



CENTRAL LAND COUNCIL

Submission to the Joint Standing Committee on Northern Australia – Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia

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Terms of Reference

1. On the 18 June 2020 the Joint Standing Committee on Northern Australia commenced an inquiry into the destruction of Indigenous heritage sites at Juukan Gorge in Western Australia (**the Inquiry**). The Inquiry will examine how the destruction of the caves came about; the processes that failed to protect the site; the impacts on Traditional Owners; and the legislative changes required to prevent such incidents from recurring.
2. The Central Land Council confines its submission to the following terms of reference, as they relate to the protection of sacred sites in the Northern Territory:
 - f) the interaction of state indigenous heritage regulations with Commonwealth laws;
 - 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;
 - h) how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites;
 - i) opportunities to improve indigenous heritage protection through the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Executive Summary

3. There are a number of Commonwealth and Northern Territory Acts that can provide protection to sacred sites in the Northern Territory; primarily the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), the *Aboriginal and Torres Strait Islander Heritage Protection Act 1994* (Cth), the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) and the *Northern Territory Aboriginal Sacred Sites Act 1984* (NT). Rather than viewing this multiplicity of legislation as being confusing and overly complicated, the CLC is of the view that with improvements to some Acts and coordination between the bodies administering and working under them, the various Acts can form an effective regime to protect sacred sites throughout the Northern Territory.
4. The CLC is of the view that the ALRA plays the preeminent role in the Northern Territory in protecting sacred sites, particularly on Aboriginal land. Under the ALRA traditional owners are empowered with free, prior and informed consent and can take effective measures to ensure protection of their sacred sites. The ALRA provides that it is an offence to enter on a sacred site in the Northern Territory without appropriate authorisation.¹
5. The CLC recognises that there is need for other legislation to give traditional owners protection on land where free, prior and informed consent to development is not afforded, including on land subject to native title where there are less rights than those under ALRA. The CLC recommends improvements to the ATSIHP Act so that it can be an effective measure of last resort for Indigenous people throughout Australia, and can set minimum standards for State and Territory legislation.

¹ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 69.

6. It is appropriate to have State and Territory legislation that meets these minimum standards, so each jurisdiction can tailor its legislation to take into account jurisdictional specific issues. In the Northern Territory the legislation needs to take into account the provisions of the ALRA. Improvements are required to the NTSSA so that it meets standards related to self-determination and free, prior and informed consent that are critical to effective site protection. These improvements would also address issues of duplication that arise between the ALRA and the NTSSA, to create a more effective site protection regime in the Northern Territory.
7. The CLC also recognises that proper resourcing of the Northern Territory's Aboriginal Areas Protection Authority is required, so that this body is better able to promote sacred site protection and prosecute when sacred sites are damaged. The CLC proposes other important functions for AAPA to improve site protection in the Northern Territory.

Recommendations

Recommendation 1

- Any legislative reform to guarantee the protection of culturally and historically significant sites must be consistent with the United Nations Declaration on the Rights of Indigenous Peoples.
- All State and Territory governments, and the Commonwealth Government, not make any decisions that will damage Aboriginal and Torres Strait Islander heritage sites until legislative reform occurs that offers adequate protection to sites.
- Legislation for the protection of indigenous cultural heritage must be based on the principles of empowerment of Aboriginal and Torres Strait Islander people to make decisions on their own cultural heritage, and be based on the principle of free, prior and informed consent.

Recommendation 2

- The Inquiry give full consideration to recommendations of the Evatt Review.
- Responsibility for the ATSIHP Act return to the Minister for Indigenous Australians.

Recommendation 3

- That the ALRA provisions relating to sacred site protection remain robust and relevant, namely sections 69, 23(1)(ba) and 73(1)(a), and that no amendments to the ALRA should be recommended by the Inquiry.

Recommendation 4

- The Northern Territory Government amend its position and advice provided to all developers and government departments that they can choose to apply for a CLC SSCC or an AAPA Authority Certificate. This advice should also state that if the proposed work is on Aboriginal Land, or where the government department or developer has commitments under an ILUA or Joint Management Agreement, they must apply directly to the relevant Land Council.

Recommendation 5

The NTSSA be amended as follows:

- Section 36 should be amended to clarify that a SSCC issued by Land Councils provide a defence to prosecution under the NTSSA;
- Section 34(2) be amended to read 'It is a defence to a prosecution for an offence under subsection (1) if it is proved that the defendant carried out the work on or used the sacred site with, and in accordance with the conditions of, an Authority Certificate or a Land Council Sacred Site Clearance Certificate permitting the defendant to do so';
- Section 37 be amended to read 'A person who contravenes or fails to comply with a condition of an Authority Certificate or a Land Council Sacred Site Clearance Certificate relating to work which may be done on or use that may be made of land and by doing so causes damage to a sacred site or distress to a custodian of a sacred site, is guilty of an offence';
- Section 3: Definitions: the following is added: Sacred Site Clearance Certificate means a certificate issued by a Northern Territory Land Council, which stipulates site protection conditions relevant to the proposed works; and
- Section 36 be amended to limit the defences in relation to breaches of section 34(1) and 35 of the NTSSA for individuals. Proponent body corporates should only be provided with a defence to prosecution if it can establish that it exercised all due diligence and risk assessment to determine if it should apply for an Authority Certificate or Land Council SSCC.

Recommendation 6

The NTSSA be amended as follows:

- Section 22(1)(b) be amended to set out the minimum standards for issuing an Authority Certificate where an agreement has been reached between the custodians and the applicant; and
- Section 22(1)(b) be amended to specify that agreements concerning sacred site protection entered into by Land Councils are agreements for the purpose of that section and can be accepted as meeting the minimum standards.

Recommendation 7

The NTSSA be amended as follows:

- That section 32(1)(b) providing for the relevant Minister to override AAPA decisions subject to review be amended to specify that the Minister cannot make a decision that gives rise to the desecration of a sacred site.

Recommendation 8

The NTSSA be amended as follows:

- Section 30 be amended to accommodate a review process for a custodian or traditional owner who is aggrieved by an AAPA decision; and
- Section 32(4) be amended to allow for the Minister's decision under section 32(1)(b) to be reversed or amended if more information were to become available, on the application of an aggrieved custodian or traditional owner.

Recommendation 9

- That 'legacy' Authority Certificates issued more than 10 years ago be declared void and the holders of such certificates be required to reapply.

Recommendation 10

- That the NTSSA be amended to specify that the AAPA can retract and re-issue Authority Certificates where new information has become available which is material to the Authority Certificate. This new provision should be accompanied by guidelines that outline the criteria and circumstances when the AAPA will revoke a certificate, including if the AAPA believes there is a substantial risk of damage.

Recommendation 11

- The NTSSA should be amended to make certificates compulsory once certain development thresholds are reached, except when there is an agreement with the relevant Land Council.

Recommendation 12

The NTSSA be amended as follows:

- To include compulsory reporting in relation to damage and/or desecration of a sacred site, with associated penalties for failing to report;
- To allow for stop work orders to be implemented if a site has been damaged and/or desecrated or is seen to be under threat of continuing damage and/or desecration;
- To include provisions that allow for orders to be made for a proponent to repair or restore a sacred site where damage has occurred due to the proponent's activity;
- Where an offence has occurred against section 33, 34(1) or 35 of the NTSSA, the alleged offender and the Land Council (on behalf of traditional owners) can agree on the payment of compensation as an alternative to taking the case for prosecution to court; and
- Where no agreement can be reached, the Land Council (on behalf of traditional owners) should be empowered to bring civil action for the recovery of compensation.

Abbreviations and Acronyms

Aboriginal Land	Land granted as Aboriginal Land under the ALRA
ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1979 (Cth)</i>
AAPA	Aboriginal Areas Protection Authority, established under Part II of the NTSSA
ATSIHP Act	<i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)</i>
Authority Certificate	Issued by the AAPA in accordance with Part III Division 1A of the NTSSA
CLC	Central Land Council (ABN: 71 679 619 393)
EPBC Act	<i>Environmental Protection and Biodiversity Conservation Act 1999 (Cth)</i>
EPBC Regulations	<i>Environmental Protection and Biodiversity Conservation Regulations 2000 (Cth)</i>
Northern Territory Heritage Act	<i>Heritage Act 2011 (NT)</i>

ILUA	Indigenous Land Use Agreement
NTA	<i>Native Title Act 1993</i> (Cth)
Native Title Land	Land either subject to a registered native title claim or a determination that native title exists under the NTA
NTSSA	<i>Northern Territory Aboriginal Sacred Sites Act 1984</i> (NT)
PBC	Prescribed Body Corporate (or registered native title body corporate) that holds native title in trust or as agent for the common law holders once a determination has been achieved under the NTA
SSC	Sacred Site Clearance in accordance with Central Land Council procedures. Also known as a work area clearance
SSCC	A Sacred Site Clearance Certificate issued by the CLC
UNDRIP	United National Declaration on the Rights of Indigenous Peoples

Introduction

8. The CLC welcomes this opportunity to provide a submission to the Joint Standing Committee on Northern Australia's Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia.
9. The CLC is a corporate entity established under the ALRA. Amongst other functions, it has statutory responsibilities for Aboriginal land acquisition and land management in the southern half of the Northern Territory. Under section 23(1)(a) of ALRA the CLC has the function of ascertaining and expressing the wishes and the opinion of Aboriginal people living in its region as to appropriate legislation concerning their land. The CLC is also a Native Title Representative Body established under the NTA.
10. Pursuant to the ALRA more than 50% of the Northern Territory is now held by Aboriginal Land Trusts on behalf of traditional owners. The CLC region covers approximately 780,000 km² of land, and 417,318 km² is Aboriginal land under ALRA. In addition, rights have been asserted and won under the NTA, and traditional owners unable to claim land under the ALRA have succeeded in obtaining rights to small areas known as Community Living Areas, under Northern Territory legislation.
11. Through its elected representative Council of 90 Aboriginal community delegates the CLC continues to represent the aspirations and interests of approximately 17,500 traditional Aboriginal landowners and other Aboriginal people resident in its region, on a wide range of land-based and socio-political issues. Sacred sites are places of deep spiritual significance and are an integral part of Aboriginal culture. Their protection is vital for the continuation of religious and cultural traditions, for the maintenance of

environmental balance and as a source of identity for Aboriginal people. The CLC has duties under the ALRA and the NTA to assist traditional owners to protect sacred sites.

Guiding principles when reviewing Indigenous heritage legislation

12. The CLC submits that any legislative reform for the protection and preservation of Indigenous cultural sites be guided by the principles contained in the UNDRIP. In particular, this includes the following Articles:
- a) Article 11.1: Indigenous peoples have the right to practise and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
 - b) Article 12.1: Indigenous peoples have the right to... maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
 - c) Article 13.1: Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
 - d) Article 13.2: States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.
 - e) Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures.
 - f) Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
 - g) Article 31.1: Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.
 - h) Article 31.2: In conjunction with indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights.
 - i) Article 32.2: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

13. On 17 June 2020 Aboriginal leaders from across Australia representing Aboriginal Land Councils, Native Title Representative Bodies (including the CLC) and Aboriginal and Torres Strait Islander Community Controlled Organisations held an emergency meeting following the destruction at Juukan Gorge. At this meeting the First Nations Heritage Protection Alliance was formed (**the Alliance**). The Alliance requested all State and Territory governments, and the Commonwealth Government, not to make any decisions that will damage Aboriginal and Torres Strait Islander heritage sites until legislative reform occurs that offers adequate protection to sites, so that an incident like Juukan Gorge never happens again. The CLC supports the call by the Alliance for legislation to be based on the principles of empowerment of Aboriginal and Torres Strait Islander people to make decisions on their own cultural heritage, and be based on the principle of free, prior and informed consent.

Recommendation 1:

- Any legislative reform to guarantee the protection of culturally and historically significant sites must be consistent with the UNDRIP.
- All State and Territory governments, and the Commonwealth Government, not make any decisions that will damage Aboriginal and Torres Strait Islander heritage sites until legislative reform occurs that offers adequate protection to sites.
- Legislation for the protection of indigenous cultural heritage must be based on the principles of empowerment of Aboriginal and Torres Strait Islander people to make decisions on their own cultural heritage, and be based on the principle of free, prior and informed consent.

Term of reference (f): The interaction of state indigenous heritage regulations with Commonwealth laws

14. The Commonwealth legislation that protects indigenous cultural heritage in the Northern Territory is the ALRA, which applies in the Northern Territory only; and the ATSIHP Act and the EPBC Act, which apply nationally. Northern Territory legislation that protects indigenous heritage is the NTSSA and the Northern Territory Heritage Act.

15. Details of the sacred site protection provided for in the ALRA and the role of the CLC in site protection pursuant to the provisions of the ALRA and the NTA are set out in the discussion of term of reference (g). Term of reference (h) focuses on recommendations to improve the NTSSA. Term of reference (i) is about the EPBC Act. Discussion on term of reference (f) focuses on the interaction between the ATSIHP and the NTSSA.

Interaction of Aboriginal and Torres Strait Islander Heritage Protection Act (Cth) with the Northern Territory Sacred Sites Act

16. At present the State and Territory governments have the primary responsibility for laws to protect areas and objects. The declaration provisions of the ATSIHP Act were designed as an emergency procedure applying throughout Australia to be triggered as a last resort if state or territory legislation was demonstrated to not be working. A

declaration by the Minister under the ATSIHP Act can override an approval for an activity granted under State or Territory law. A declaration can also override an ILUA entered into under the NTA. The provisions do not apply to all Indigenous heritage, but only areas and objects of particular significance to Indigenous Australians. Unlike the EPBC Act, the ATSIHP Act is not limited to protecting areas or objects that have national significance. If the Minister does not make a declaration under the ATSHIP Act, then the NTSSA regime will apply.

The ATSIHP Act

17. Under the ATSIHP Act the Commonwealth Minister for the Environment can make three kinds of declarations for the protection of significant areas and objects:

- Section 9 emergency declarations for up to 60 days in relation to the protection of areas;
- Section 10 long term or indefinite declarations in relation to the protection of areas; and
- Section 12 declarations in relation to the protection of objects.

18. Section 18 further allows an authorised officer to make emergency declarations in relation to the protection of areas or objects.

19. Declarations under the ATSIHP Act can only be made when sites or objects are under threat of injury or desecration. They are designed to be used when the threat is imminent and as a last resort. Accordingly the ATSIHP Act has been little utilised. The 2016 State of the Environment Report found that:

The ATSIHP Act has done little to fulfil its intended purpose of protecting significant Aboriginal areas or objects. Between 2011 and 2016, 32 applications were received for emergency protection under s. 9 of the Act, 22 applications were received for long-term protection under s. 10 of the Act, and 7 applications were received for protection for objects under s. 12 of the Act. During the past 6 years, no declarations under ss. 9, 10 or 12 of the Act were made.²

20. The recent Federal Court decision of *Talbott v Minister for the Environment* [2020] FCA 1042 (**Shenhua Mine case**) demonstrates the enduring inadequacy of the ATSIHP Act to protect Aboriginal cultural heritage. The Commonwealth Minister for Environment exercised her discretion to not make a declaration under section 10 of the ATSIHP Act, which would have protected and preserved from injury and desecration 8 interconnected areas and 3 trees of significance to the Gomeri Traditional Custodians from the impacts of the Shenhua Watermark Coal Mine.³ The Minister 'considered that the expected social and economic benefits of the Shenhua Watermark Coal Mine to the local community outweighed the impacts of the mine on the [Gomeri Traditional Custodians group] as a result of the likely destruction of parts of their Indigenous cultural heritage'.⁴ The Minister was entitled to take this consideration into account in exercising her discretion as under section 10(1)(d) of the ATSIHP Act the Minister may

² Professor Richard Mackay, Department of the Environment and Energy, *Australia State of the Environment 2016*, available online <https://soe.environment.gov.au/download/reports>, 84.

³ *Talbott v Minister for Environment* [2020] FCA 1042, [10].

⁴ *Ibid* [15].

consider ‘such other matters as... she thinks relevant’. The Court found that the ATSIHP Act should be construed such that ‘the report and representations by interested persons [under section 10(1)(c)] which must be considered by the Minister may include countervailing considerations’ to the interests of the Gomeri Traditional Custodians.⁵

21. This case demonstrates that the broad Ministerial discretion conferred under the ATSIHP Act does not offer adequate protection of Aboriginal cultural heritage, even if the Minister is satisfied that the area is a significant Aboriginal area under threat of injury.⁶ The ATSIHP Act acting as a ‘last resort’, and the provisions of the ATSIHP Act requiring the Minister to balance the wider public interest against the interest to preserve and protect areas of significance to Aboriginal people from injury and desecration, results in the Ministerial exercise of discretion being ‘of a political character’.⁷ As demonstrated in the Shenhua mine case, this balancing exercise results in Aboriginal cultural heritage being destroyed due to political considerations.
22. In 1996 the Hon Elizabeth Evatt AC conducted a comprehensive Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (**the Evatt Review**). She found that ideally, State and Territory laws should provide an effective process for the protection of areas and objects significant to Aboriginal people when they are threatened by development. This process should include ‘early consideration of heritage issues and effective consultation with Aboriginal people in genuine mediation or other processes whose purpose is to avoid injury to or desecration of sites’.⁸
23. The CLC made a submission to the Evatt Review, and many of its recommendations continue to be relevant today. The CLC recommends that the Inquiry give full consideration to the Evatt Review, and in particular the following recommendations:
 - When amending the ATSIHP Act the legislature should have the following goals:
 - To respect and support the living culture, traditions and beliefs of Aboriginal people and to recognise their role and interest in the protection and control of their heritage;
 - To retain the basic principles of the Act, as an Act of last resort;
 - To ensure that the Act can fulfil its role as a measure of last resort by encouraging States and Territories to adopt minimum standards for the protection of Aboriginal cultural heritage as part of their primary protection regimes;
 - To avoid duplication and overlap with State and Territory jurisdictions by recognition and accreditation of their process;
 - To provide access to an effective process for the protection of areas and objects significant to Aboriginal people;

⁵ Ibid [12].

⁶ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 10(1)(b).

⁷ *Talbott v Minister for Environment* [2020] FCA 1042, [28]; *Tickner v Bropho* [1993] FCA 208; 1993 40 FCR 183, [224] per French J. See also Hon. Elizabeth Evatt AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Commonwealth of Australia (2016) 62, [5.12].

⁸ Hon. Elizabeth Evatt AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Commonwealth of Australia (2016) 18, [12.43].

- To provide a process which operates in a consistent manner, according to clear procedures, in order to avoid unnecessary duplication, delays and costs.
- To ensure that Aboriginal people participate in decisions about the protection of their significant sites and that their wishes are taken fully into account.
- To ensure that heritage protection laws benefit all Aboriginal people, whether or not they live in traditional lifestyle, whether they are urban, rural or remote. The objective should be to protect living culture/tradition as Aboriginal people see it now.
- The Commonwealth Government should support and encourage the process of developing agreed minimum standards as the basis for uniform or model laws on Aboriginal cultural heritage protection for adoption by States and Territories and by the Commonwealth, where relevant. The process must be in consultation with Aboriginal representative bodies such as the Land Councils, State and Territory Governments, and other interested parties. The Australian Government has previously recommended a system of accreditation of State and Territory heritage protection laws that meet certain standards, to enable the Commonwealth Government to take a more active leadership role in the protection of sacred sites and objects.⁹ The system should include minimum standards for rights of access to sites, confidentiality of restricted information, recognition of customary law, a consistent definition of Aboriginal cultural heritage that is appropriately broad, blanket protection to areas and sites falling within the definition, and effective criminal sanctions.
- The process for issuing declarations should provide for a specific mediation procedure, and significant areas should be protected from continuing injury or desecration while mediation takes place.
- The Act should require the Minister to consult interested persons before exercising any power to vary or revoke a declaration.

24. The CLC notes that since the Evatt Review the responsible Minister for the ATSIHP Act is now the Minister for the Environment, whereas it was originally the Minister for Aboriginal Affairs. The CLC is of the firm view that the legislation should be the responsibility of the Minister for Indigenous Australians. The protection of sacred sites is not just another aspect of protecting the environment, it is a fundamental right of Indigenous Australians under international law. The issues that arise in protection of sites are specific to the custodians involved.

25. The CLC does not consider the fact that there is more than one piece of legislation potentially available to protect indigenous cultural heritage means having one Commonwealth Minister responsible for the various Acts is desirable or makes for more effective protection of sacred sites. The critical importance of sacred sites to Indigenous Australians makes it all the more important that there is a Minister able to give this issue the preeminent attention it deserves, and this should be the Minister for Indigenous Australians. The CLC recommends that responsibility for the ATSIHP Act return to the Minister for Indigenous Australians.

⁹ Australian Government, *Our north, our future: white paper on developing Northern Australia* (2015), 79.

Recommendation 2:

- The Inquiry give full consideration to recommendations of the Evatt Review.
- Responsibility for the ATSIHP Act return to the Minister for Indigenous Australians.

Term of reference (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

26. The CLC continues to support the statutory protection afforded to sacred sites in the Northern Territory under the ALRA and the NTSSA. Current CLC processes mean that Aboriginal people are able to enter into agreements supporting development proposals on Aboriginal and native title land, on the condition that their sacred sites will be protected in the face of such developments. Further, the CLC considers that strong sacred site protection promotes economic development. Aboriginal people are more likely to consent to third party development proposals if they are satisfied that their sacred sites will be well protected.

Aboriginal Land Rights (Northern Territory) Act 1976

27. It must be recognised that the ALRA underpins the sacred sites protection regime in the Northern Territory. The following provisions of ALRA underpin this regime:

- Section 69 makes it an offence for a person to enter or remain on land in the Northern Territory that is a sacred site;
- Section 23(1)(ba) provides that a function of a Land Council is to assist Aboriginal people in the protection of sacred sites on land (whether or not Aboriginal land) in the area of the Land Council;
- Section 23(2)(a) states that a Land Council may, with the approval of the Minister, perform any functions that may be conferred on it by a law of the Northern Territory, including, without limiting the foregoing, functions in relation to the protection of sacred sites;
- Section 24(b) provides that a Land Council may compile in relation to each group of traditional Aboriginal owners, a map or other references showing the sites belonging to them; and
- Section 73(1)(a) allows the Northern Territory to make laws providing for the protection of, and the prevention of the desecration of, sacred sites in the Northern Territory, including sacred sites on Aboriginal land, and, in particular, laws regulating or authorizing the entry of persons on those sites.

28. These provisions act as a safeguard to ensure the integrity of the Northern Territory's sacred site protection regime. The ALRA ensures that Aboriginal representative organisations, the Land Councils, have a key responsibility to protect sites, whose processes are underpinned by the requirement that development on Aboriginal land

only occurs with the free, prior and informed consent of Aboriginal traditional landowners. The provisions of the ALRA remain robust and relevant and the Inquiry should not recommend any amendments be made to the ALRA.

Native Title Act 1993 (Cth)

29. Under section 203BB of the NTA the CLC's functions are to assist registered native title bodies corporate, native title holders and persons who may hold native title in consultations, mediations, negotiations and proceedings relating to native title applications, future acts, ILUAs and other agreements, rights of access conferred under the Act, and any other matters relating to native title or the operation of the Act.
30. The future act regime of the NTA provides an avenue for Aboriginal people to protect their sacred sites on native title land by the inclusion of site protection measures in ILUAs and other agreements with developers. The CLC always negotiates with developers on the basis that protection of sacred sites is a key requirement of any agreement. Unfortunately not all developments that may impact on sacred sites are subject to the Right to Negotiate process under the NTA. In the Northern Territory, mineral exploration licences are routinely issued through the expedited procedures processes of the NTA, so native title holders are not assured of engagement with explorers about protection of their sacred sites.

Recommendation 3:

- That the ALRA provisions relating to sacred site protection remain robust and relevant, namely sections 69, 23(1)(ba) and 73(1)(a), and that no amendments to the ALRA should be recommended by the Inquiry.

CLC's sacred site protection process

31. The CLC has over many years taken a proactive role to assist traditional owners to protect their sacred sites and has developed a robust process for sacred site clearances. Consistent with section 23(1)(ba) of ALRA, the CLC assists Aboriginal people to protect their sacred sites by ensuring that every development proposal that comes before the CLC (including exploration and mining, infrastructure and road works) is subject to a SSC on Aboriginal land and on native title land when the CLC has negotiated an agreement on behalf of native title holders with the proponent.
32. An SSC must be completed prior to the commencement of the work. Through the clearance process, traditional owners gain a sound understanding of the proposed work and its impact on their land, enabling them to make an informed decision. Negotiating comprehensive agreements that provide for sacred site protection as well as a range of other conditions of relevance to proponents and traditional owners is an efficient mechanism for facilitating development on Aboriginal and native title land.
33. The SSC process is as follows:

- a) The traditional owners of the land in question are identified as part of CLC's statutory function to consult with traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Land Council with respect to any proposal relating to the use of that land.¹⁰
- b) For development proposals on non-Aboriginal land, pursuant to the NTA the CLC identifies native title holders and on their behalf negotiates agreements with proponents. This includes ILUAs.
- c) CLC staff (and the project proponents, or their representatives) discuss the land use proposal with the identified traditional owners to ensure they are fully informed of, and understand the nature and scope of, the request. If traditional owners are in favour, in principle, of the work proceeding, CLC staff will travel across the country covered by the proposal. Through this clearance activity traditional owners are able to exclude any culturally sensitive areas and place other conditions on the works to ensure proper protection of sacred sites. The CLC prepares a SSCC which is given to the proponents, who are contractually bound to comply with the conditions of the SSCC.
- d) An SSCC serves the following purposes:
 - i. A SSCC aims to prevent damage to, and interference with, Aboriginal sacred sites. The SSCC achieves this by setting out conditions in relation to entering and working on the subject land. An applicant, when applying for a SSCC, agrees to be bound by the conditions of the SSCC.
 - ii. A SSCC serves to protect the applicant against prosecution for entering, damaging or interfering with sacred sites under the NTSSA and ALRA. It achieves this by providing the applicant with documentary evidence that the custodians and traditional Aboriginal owners of the subject land have been consulted and consent to the applicant's proposed works. The CLC logs all applications in a register and all certificates are signed, numbered and their details recorded. A SSCC as a defence to prosecution is discussed further below.
 - iii. Where a proposed activity is not subject to a formal legal agreement or lease that provides consent to the activity, the SSCC provides surety that the traditional owners of the land have been consulted about the activity and consent to it.

Northern Territory Aboriginal Sacred Sites Act 1989

34. The Northern Territory Government enacted the NTSSA under the auspices of section 73(1) of the ALRA, which provides as follows:

73 Reciprocal legislation of the Northern Territory

- (1) The power of the Legislative Assembly of the Northern Territory under the *Northern Territory (Self-Government) Act 1978* in relation to the making of laws extends to the making of:
 - a) Laws providing for the protection of, and the prevention of the desecration of, sacred sites in the Northern Territory, including sacred sites on Aboriginal Land, and, in particular, laws regulating or authorizing the entry of persons on those sites, but

¹⁰ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 23(c).

so that any such laws shall provide for the right of Aboriginals to have access to those sites in accordance with Aboriginal tradition and shall take into account the wishes of Aboriginals relating to the extent to which those sites should be protected.

35. The NTSSA predates the recognition of native title and has not been amended to reflect the considerable economic, political and social changes in the Northern Territory since 1989. The NTSSA establishes the AAPA with functions, amongst other things, to prosecute for offences against the NTSSA and to issue Authority Certificates.
36. It is an offence against section 34 of the NTSSA to carry out work on or use a sacred site, and it is an offence against section 35 to desecrate a sacred site. Applications can be made to AAPA for an Authority Certificate that authorises a person to carry out work or use land according to conditions that AAPA thinks accord with the custodians' wishes. There is no mandatory requirement for developers to obtain an Authority Certificate but section 34(2) provides that it is a defence to a section 34(1) offence if the work is carried out in accordance with an Authority Certificate. It is also a defence against sections 33, 34(1) and 35 of the NTSSA if it is proved that the defendant had no reasonable grounds for suspecting that the sacred site was a sacred site.¹¹
37. Any reform to the NTSSA should incorporate the following standards:
- That State and Territory legislation should incorporate principles of self-determination. In the context of Indigenous cultural heritage, this means that the affected traditional owners should be the ultimate arbiter of the management of the cultural heritage aspects of the proposal.
 - That processes of Aboriginal cultural heritage management ensure that the affected traditional owners have adequate information and adequate time to consider that information in making any decision that may affect their cultural heritage. This standard is consistent with the principle of free, prior and informed consent recognised under UNDRIP, which includes the principle that redress should be provided when cultural, intellectual, religious and spiritual property is taken without free, prior and informed consent.
38. The current provisions of the NTSSA falls short of these standards of self-determination and free, prior and informed consent:
- Section 22(1)(b) which allows AAPA to issue an Authority Certificate where an agreement has been reached between the custodians and the applicant. There are no minimum standards for an agreement under section 22(1)(b) that require the applicant to obtain the free, prior and informed consent of the custodians.
 - The ministerial override provisions under section 32(1)(b) which allows the Minister to override AAPA advice and issue an Authority Certificate. The ministerial override provisions are contrary to principles of self-determination that custodians should be the ultimate arbiter of the management of sacred sites.

¹¹ *Northern Territory Aboriginal Sacred Sites Act 1984* (NT), s 36(1).

- The review procedure of Authority Certificates under section 30 does not allow custodians to apply for review of a decision or action of AAPA, contrary to principles of self-determination.
- Section 32(4) which allows an applicant to seek Ministerial review of a decision if more information is made available does not apply to custodians, contrary to principles of self-determination.
- The lack of provisions that require proponents to repair or restore sacred sites where damage has occurred conflicts with principles of self-determination that custodians should have a primary role in managing sacred sites, and is contrary to the principle that custodians should be provided with redress where damage to a sacred site has occurred without free, prior and informed consent.

39. Recognition of Land Council SSCCs, as recommended below, would enhance principles of self-determination and free, prior and informed consent under the NTSSA. When issuing SSCCs, the Land Council has regard to the interests of, and shall consult with, the traditional Aboriginal owners of the land and any other Aboriginals interested in the land.¹² The SSCCs reflect the instructions for site protection given by the traditional owners. The Land Council must not take any action unless it is satisfied that the traditional owners understand the nature and purpose of the proposed action and as a group consent to it, and that the affected Aboriginal community or group have been consulted and have an opportunity to express their views.¹³ These Land Council functions directly correspond with principles of self-determination and free, prior and informed consent.

40. The CLC also considers that it is vital to ensure the AAPA is independent and provided with sufficient resources to perform its functions, including site registration and prosecutions. The CLC also proposes reforms to clarify the roles of the CLC and the AAPA.

Interaction of CLC and AAPA

41. Only the Land Councils have statutory duties to consult the traditional owners and seek their consent for proposed works. AAPA does not have this statutory function and cannot provide consent for works on any tenure of land. Consent from traditional owners to development on Aboriginal land is required regardless of the possession of an Authority Certificate. Many projects on native title land also require an agreement with the native title holders, and as the representative body for its region, the CLC usually assists native title holders and PBCs to negotiate these agreements. It is CLC's experience that traditional owners and native title holders are adamant that sacred site procedures need to be included in agreements for both Aboriginal land and native title land. It is difficult to separate issues of site protection from consent to the project, as the impact on land and sites are so interrelated. The SSC process outlined above is a key component of the CLC fulfilling its function of ensuring that traditional owners are providing free, prior and informed consent to developments.

¹² *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 23(3).

¹³ *Ibid* ss 23(3)(a)-(b).

42. Given the crucial statutory duty of the CLC to obtain the consent of the landowners for use of their land, it is the CLC's view that changes are required to Northern Territory government regulation as well as clarifying CLC's role under the NTSSA, in order to improve the sacred site protection regime in the Northern Territory.
43. Various NT government agencies have policies that require an Authority Certificate as part of their approval process. The Environment (Petroleum) Regulations 2000 require an Authority Certificate for Environmental Management Plans to be approved. These policies and regulations can lead to an unnecessary duplication of sacred site clearances where SSCs are already required as part of the consent process under ALRA or NTA agreement process.

Term of reference (h): How Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites

[Duplication of CLC and AAPA functions](#)

44. The duplication of AAPA and CLC functions causes frustration and confusion: companies are faced with paying AAPA for an Authority Certificate when they have already received an SSCC from the CLC; traditional owners are confused if AAPA sends anthropologists to consult with them after they have already done a clearance with the CLC. It is the CLC's position that such duplication is unnecessary and inefficient.
45. There have been discussions between the CLC and AAPA about ways to avoid duplication by the CLC entering an agreement on behalf of custodians with the developer and then providing this agreement and a report to the AAPA to issue an Authority Certificate. The CLC has found this process to be administratively cumbersome and uncertain, as the requirements of an agreement under section 22(1)(b) of the NTSSA are not sufficiently set out in this legislation. This uncertainty creates an inefficient use of the resources of both organisations, as well as causing delay to companies in receiving the Authority Certificate. The CLC is also concerned about indications from AAPA staff that they may not be able to issue Authority Certificates with the same protective measures that are included in the CLC's SSC.
46. The CLC submits that a way to prevent this duplication is to amend the NTSSA to specify that a clearance by a Land Council is a defence against offences under the Act. It is the CLC's firm legal opinion that a SSCC issued by the CLC would provide the applicant with a defence against prosecution under section 36 of the NTSSA. However, there have been no prosecutions by AAPA for any works done in accordance with an SSCC, so this position has never been tested in court.
47. Such an amendment would be consistent with section 23(2)(a) of the ALRA which provides that a Land Council may, with the approval of the Minister, perform any functions that may be conferred on it by a law of the Northern Territory, including functions in relation to the protection of sacred sites. The CLC recommends the following additional amendments to the NTSSA:

- Section 34(2) be amended to read 'It is a defence to a prosecution for an offence under subsection (1) if it is proved that the defendant carried out the work on or used the sacred site with, and in accordance with the conditions of, an Authority Certificate or a Land Council Sacred Site Clearance Certificate permitting the defendant to do so'.
- Section 37 be amended to read 'A person who contravenes or fails to comply with a condition of an Authority Certificate or a Land Council Sacred Site Clearance Certificate relating to work which may be done on or use that may be made of land and by doing so causes damage to a sacred site or distress to a custodian of a sacred site, is guilty of an offence'.
- Section 3 Definitions: the following is added: Sacred Site Clearance Certificate means a certificate issued by a Northern Territory Land Council, which stipulates site protection conditions relevant to the proposed works.

48. Northern Territory Government policy and regulations should be amended and advice provided to all developers and government departments that they can choose to apply for a CLC or an AAPA certificate, depending on the circumstances, but that it is not necessary to apply to both organisations. Developers and government departments should also be advised that they must apply directly to the CLC for site clearances in relation to proposed works on Aboriginal land. In addition, where developers or government departments have commitments under ILUAs or Joint Management agreements to apply for Land Council SSCs, they should apply directly to the relevant Land Council. These recommendations are intended to improve site protection and reduce delays for processing applications.

49. In 2015 PricewaterhouseCoopers Indigenous Consulting were appointed by the Northern Territory Department of Chief Minister to provide advice on the NTSSA. In 2016 PIC released a report titled *Sacred Sites Processes and Outcomes Review (the 2016 Review)*. The 2016 Review recommended that the AAPA consider sub-contracting Land Councils to undertake work on its behalf for preparation of documentation for the registration of sacred sites and consultations with custodians for the purpose of an Authority Certificate. This recommendation suggests that the Land Councils should not have a determinative role under the NTSSA. The CLC does not support this recommendation as it does not resolve the current problems regarding confusion over AAPA and CLC's separate roles. Further, it conflicts with the CLC's statutory functions under ALRA to consult with and take action in accordance with the instructions of traditional owners. CLC can only take action that has been consented to by traditional owners. AAPA must consult with traditional owners, but arguably is not compelled to follow their instructions under the NTSSA. Under the NTSSA, applicants for Authority Certificates may apply to the Minister to seek a review of AAPA's decision, and the Minister may override the wishes of the custodians. The CLC would not contract to be

bound to a process where the wishes of traditional owners are not paramount, as it is contrary to CLC's statutory functions.

Recommendation 4:

- The Northern Territory Government amend its position and advice provided to all developers and government departments that they can choose to apply for a CLC SSCC or an AAPA Authority Certificate. This advice should also state that if the proposed work is on Aboriginal Land, or where the government department or developer has commitments under an ILUA or Joint Management Agreement, they must apply directly to the relevant Land Council.

Defence of ignorance

50. The defence of ignorance in the event of site damage or desecration may prevent AAPA from taking action once a site is damaged or desecrated. The use of the words 'no reasonable grounds' presents a low threshold to successfully argue a defence. The CLC submits that an average reasonable person can have little or no knowledge of Aboriginal tradition and therefore has little to no understanding of what may constitute a site under Aboriginal tradition. It is therefore highly unlikely that a person would have reasonable grounds to expect that a site may be a sacred site. In this context it is insufficient for a person to claim they did not seek advice, therefore they are ignorant of the site and can successfully invoke the defence under section 36 of the NTSSA.
51. The CLC submits that section 36 should be amended to limit the defences in relation to breaches of section 34(1) and 35 of the NTSSA for individuals so that body corporates, including large development corporations, cannot use ignorance as a defence for desecration or damage to a sacred site and have a positive requirement to take measures to ensure protection of sacred sites.

Recommendation 5:

The NTSSA be amended as follows:

- Section 36 should be amended to clarify that a SSCC issued by Land Councils provide a defence to prosecution under the NTSSA.
- Section 34(2) be amended to read 'It is a defence to a prosecution for an offence under subsection (1) if it is proved that the defendant carried out the work on or used the sacred site with, and in accordance with the conditions of, an Authority Certificate or a Land Council Sacred Site Clearance Certificate permitting the defendant to do so'.
- Section 37 be amended to read 'A person who contravenes or fails to comply with a condition of an Authority Certificate or a Land Council Sacred Site Clearance Certificate relating to work which may be done on or use that may be made of land and by doing so causes damage to a sacred site or distress to a custodian of a sacred site, is guilty of an offence'.
- Section 3: Definitions: the following is added: Sacred Site Clearance Certificate means a certificate issued by a Northern Territory Land Council, which stipulates site protection conditions relevant to the proposed works.
- Section 36 be amended to limit the defences in relation to breaches of section 34(1) and 35 of the NTSSA for individuals. Proponent body corporates should only be provided with a defence to prosecution if it can establish that it exercised all due diligence and risk assessment to determine if it should apply for an Authority Certificate or Land Council SSCC and to ensure it complied with the NTSSA.

Requirements for issuing an Authority Certificate under section 22(1)(b)

52. Section 22(1)(b) of the NTSSA states that AAPA may issue an Authority Certificate where an agreement has been reached between the custodians and the applicant. Section 22(1)(b) does not specify criteria or standards that AAPA must be satisfied of before they will issue an Authority Certificate. The CLC submits that the absence of any guidance about the nature or principles of an agreement between custodians and the applicant for an Authority Certificate may risk agreements being entered into that do not require the appropriate traditional owners or custodians to be identified and subsequently consulted in regards to the protection of sacred sites. The CLC recommends that section 22(1)(b) of the NTSSA be amended to set out the minimum standards for issuing an Authority Certificate where an agreement has been reached between the custodians and the applicant. Such minimum standards should include the following requirements of the applicant:

- The custodians for the sacred sites in the proposed development area have been identified;
- That custodians understand the nature of the proposed development and its effect on sacred sites;
- That the custodians have been consulted about the development proposal and how the development will affect sacred sites, and have consented to the agreement.

53. As outlined above, Land Councils are representative Aboriginal bodies with the function under ALRA to assist traditional owners to take measures to protect sites. The CLC can only take action with respect to Aboriginal land with the consent of the traditional owners, after they have been consulted and fully informed of the proposal.¹⁴ These and other functions of the Land Councils under ALRA have given CLC the expertise to appropriately consult with traditional owners to identify sacred sites and ensure their protection. The CLC submits that to better align the NTSSA with ALRA, section 22(1)(b) of the NTSSA should be amended to specify that agreements concerning sacred site protection entered into by Land Councils are agreements for the purpose of that section, and can be accepted as meeting the minimum standards.

Recommendation 6:

The NTSSA be amended as follows:

- Section 22(1)(b) be amended to set out the minimum standards for issuing an Authority Certificate where an agreement has been reached between the custodians and the applicant; and
- Section 22(1)(b) be amended to specify that agreements concerning sacred site protection entered into by Land Councils are agreements for the purpose of that section and can be accepted as meeting the minimum standards.

Removing the ability of the Minister to override the wishes of traditional owners

54. Under section 30(1) of the NTSSA a person who applies for an Authority Certificate and is aggrieved by a decision, action or failure of AAPA, including the issuing of certificates under section 22, may apply to the Minister for a review of the decision, action or failure. Section 32(1) of the NTSSA provides the Minister with the discretion to either uphold the decision or action of AAPA, or issue to the applicant an Authority Certificate which sets out conditions, if any, on which work may be carried out on or use made of the land as the Minister thinks fit. The effect of section 32(1)(b) is that the Minister is given the discretion to override AAPA advice and issue an Authority Certificate that authorises the desecration or destruction of a sacred site.

55. The CLC submits that ministerial override to authorise the desecration or destruction of a sacred site is ultra vires and conflicts with the power under ALRA for the Northern Territory to 'protect sites'. As noted above, the head of power for the NTSSA specifically derives from section 73(1)(a) of the ALRA.

56. Section 73(1)(a) does not extend the legislative ability of the Northern Territory to provide a Minister with power to authorise works on a site or enable the destruction or desecration of a site. It would be beyond the power extended by section 73(1)(a) for a Minister to issue a Minister's certificate which would have the effect of authorising damage to those sites.

¹⁴ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 23(3).

57. Section 32(1)(b) should be amended to specify that the Minister cannot make a decision that gives rise to the desecration of a sacred site. However, this would still allow the Minister to override the decisions of custodians by issuing a certificate which changes boundaries of a restricted work area or conditions.

Recommendation 7:

The NTSSA be amended as follows:

- That section 32(1)(b) providing for the relevant Minister to override AAPA decisions subject to review be amended to specify that the Minister cannot make a decision that gives rise to the desecration of a sacred site.

[Review procedure of Authority Certificates](#)

58. The current position in the NTSSA is that only the applicants may apply for a review of a decision by AAPA. The CLC submits that section 30 be amended to accommodate a review process for a custodian or traditional owner who is aggrieved by an AAPA decision. This is necessary to ensure that the NTSSA provides the key requirement of allowing traditional owners to effectively protect their sacred sites. Authority Certificates are sometimes issued with conditions that do not adequately protect sites.

59. The CLC recommends that section 32(4) of the NTSSA be amended to allow for the Minister's decision under section 32(1)(b) to be reversed or amended if more information were to become available, on the application of a custodian or traditional owner.

60. In relation to Juukan Gorge, the Minister gave consent to authorise the destruction of the site in 2013. In 2014, an archaeological dig unearthed a range of artefacts that shed new light of the significance of the site. Despite this new information, the Minister could not reverse his decision under Western Australian laws. Amending section 32(4) of the NTSSA to allow the Minister to review his own decision when further information is made available could prevent a similar incident as Juukan Gorge occurring in the Northern Territory.

Recommendation 8:

The NTSSA be amended as follows:

- Section 30 be amended to accommodate a review process for a custodian or traditional owner who is aggrieved by an AAPA decision; and
- Section 32(4) be amended to allow for the Minister's decision under section 32(1)(b) to be reversed or amended if more information were to become available, on the application of an aggrieved custodian or traditional owner.

Legacy Certificates

61. The CLC is aware of Authority Certificates issued prior to 2000 that are purportedly still valid and continue to be used for works by Northern Territory Government departments. Certificates that are more than 10 years old may create a number of problems. The sacred site protections and activities dealt with in old certificates may not be known by current senior custodians and traditional owners and they may become concerned about works occurring that they have not been informed about. Certificates issued more than 10 years ago were usually issued with a much lower level of accuracy in the recording of locations of sacred sites and related restricted work areas. Current mapping and GPS technology is far superior to methods previously employed. For these reasons the use of certificates that are over 10 years old may also be contrary to the principle of free, prior and informed consent. The CLC submits that current certificates older than 10 years should be made void and the holder of such a Certificate should need to reapply.

Recommendation 9:

- That 'legacy' Authority Certificates issued more than 10 years ago be declared void and the holders of such certificates be required to reapply.

AAPA capacity to retract and re-issue certificates

62. The current NTSSA does not specifically allow AAPA to retract Authority Certificates in reasonable circumstances without a fear of litigation. The capacity for AAPA to retract and re-issue Authority Certificates needs to be transparent as new information may arise regarding the significance of a particular site or area or it may become apparent that AAPA has not sufficiently described the conditions in an Authority Certificate. A development may proceed in ways not expected under the original Authority Certificate that custodians may consider would put sacred sites at a higher level of risk. Clarifying that the AAPA can retract certificates where new information has become available would offer an added layer of protection for sacred sites. This new provision should be accompanied by guidelines that outline the criteria and circumstances when the AAPA will revoke a certificate, including if the AAPA believes there is a substantial risk of damage.

Recommendation 10:

- That the NTSSA be amended to specify that the AAPA can retract and re-issue Authority Certificates where new information has become available which is material to the Authority Certificate. This new provision should be accompanied by guidelines that outline the criteria and circumstances when the AAPA will revoke a certificate, including if the AAPA believes there is a substantial risk of damage.

Compulsory certificates once development thresholds are reached

63. The CLC submits that the NTSSA should be amended to make certificates compulsory once certain development thresholds are reached, except when there is an agreement with the relevant Land Council. Making certificates compulsory for works above a certain threshold would both ensure a greater level of protection for sites, and enable the Authority to intervene in cases where sites are potentially at risk from development where an Authority Certificate has not been sought. This amendment would improve protections for sacred sites by ensuring that all development proponents are aware of their need to protect sites, and that a defence of ignorance under section 36 of the NTSSA could not be invoked. The CLC further submits that this would also be beneficial to developers as they would be required to apply for a certificate in the early stages of the project, instead of later in the process when it may delay the project at a crucial moment.

Recommendation 11:

- The NTSSA should be amended to make certificates compulsory once certain development thresholds are reached, except when there is an agreement with the relevant Land Council.

Site damage – responsibilities and compensation

Stop work orders

64. A stop work order would be an effective preventative measure to protect sacred sites. The Northern Territory Heritage Act contains provisions that allow for the heritage office to issue a stop work order if they are satisfied of a range of factors, including that the work constitutes a serious and imminent threat to the heritage significance of a heritage place or object.¹⁵ The *Aboriginal Heritage Act 2006* (Vic) (**the Victorian Heritage Act**), the regime for protection of Aboriginal heritage in Victoria, includes provisions for stop orders to be issued by the Minister or inspector engaged in the conducting of a cultural heritage audit.¹⁶

65. Consistent with the recommendations of the 2016 Review, the CLC recommends that Part IV of the NTSSA be amended to include a power for AAPA to issue stop work orders, whether or not the proponent holds an Authority Certificate. Stop work provisions should include an appeals provision allowing an aggrieved party the opportunity to appeal AAPA's decision if they believe it is unjust.

Responsibilities to report damage to a sacred site

66. Consistent with recommendations of the 2016 Review, the CLC submits that Part IV of the NTSSA be amended to include an offence provision for the compulsory reporting of damage or desecration to sacred sites, including when there is an Authority Certificate. The new provision should include appropriate penalties for failing to report damage or desecration.

¹⁵ *Heritage Act 2011* (NT), s 79.

¹⁶ *Aboriginal Heritage Act 2006* (Vic), Part 6 Division 2.

Responsibilities to repair or restore a sacred site

67. The Victorian Heritage Act allows the court to order an offender to pay an amount of money towards the cost of any repair or restoration of Aboriginal cultural heritage that needs to be carried out. The court may also order the person to take any reasonable steps that the court thinks appropriate for any restoration of land that needs to be done because of the offence.¹⁷

68. The Northern Territory Heritage Act includes a process of repair orders on a heritage place or object, that includes the issuing of an order, offences to contravene orders and that the Territory may carry out work if an owner contravenes an order.¹⁸ Penalties for failing to comply with orders are included.¹⁹

69. The CLC submits that the NTSSA should be amended to include provisions for a proponent to repair or restore a sacred site where damage has occurred due to the proponent's activity, in accordance with the wishes of the custodian.

Compensation

70. The CLC supports a scheme for providing compensation to the custodians of a site where damage to a sacred site has caused distress. Under the current legislative regime for protection of sacred sites, there is no avenue for traditional owners or custodians to be compensated where a sacred site is damaged. The CLC submits that the NTSSA should be amended so that traditional owners and custodians can be compensated promptly and simply where damage or desecration to a sacred site has occurred, in order to expediently resolve the matter and without the potential of further grievance to an already distressed group of people that a prosecution can cause. The CLC recommends the NTSSA should be amended as follows:

- Where an offence has occurred against section 33, 34(1) or 35, the alleged offender and the Land Council (on behalf of traditional owners) can agree on the payment of compensation as an alternative to taking the case for prosecution to court.
- Where no agreement can be reached, the Land Council (on behalf of traditional owners) should be empowered to bring civil action for the recovery of compensation.

¹⁷ *Aboriginal Heritage Act 2006* (Vic), s 30.

¹⁸ *Heritage Act 2011* (NT), s 85-88.

¹⁹ *Ibid* s 84.

Recommendation 12:

The NTSSA be amended as follows:

- To include compulsory reporting in relation to damage and/or desecration of a sacred sites, with associated penalties for failing to report.
- To allow for stop work orders to be implemented if a site has been damaged and/or desecrated or is seen to be under threat of continuing damage and/or desecration.
- To include provisions that allow for orders to be made for a proponent to repair or restore a sacred site where damage has occurred due to the proponent's activity.
- Where an offence has occurred against section 33, 34(1) or 35 of the NTSSA, the alleged offender and the Land Council (on behalf of traditional owners) can agree on the payment of compensation as an alternative to taking the case for prosecution to court.
- Where no agreement can be reached, the Land Council (on behalf of traditional owners) should be empowered to bring civil action for the recovery of compensation.

Term of reference (i): Opportunities to improve indigenous heritage protection through the Environment Protection and Biodiversity Conservation Act 1999

71. The *2020 Independent Review of the EPBC Act - Interim Report (Interim Report)* notes that there are a number of Commonwealth Acts that play a role in the protection of indigenous cultural heritage, including the EPBC Act and the ATSIHP Act, as well as State and Territory legislation. The Interim Report finds that the current legislation is not providing adequate protection to indigenous cultural heritage: the ATSIHP Act offers last minute protection when a sacred site is under threat, and is not coordinated with the development assessment and approval processes of the EPBC Act. These processes do not require specific consideration of indigenous cultural heritage matters.²⁰ The Interim Report posits that the EPBC Act can play a more expansive role in indigenous heritage protection at a national level and proposes comprehensive review of national Indigenous cultural heritage protection. This review would consider the interaction between site protection and the development and approval processes of the EPBC Act.²¹

72. The CLC supports the proposition that current Commonwealth legislation does not provide adequate protection to sacred sites and supports the proposal of the Interim Report for a review of the national indigenous cultural heritage regime.

73. The CLC does not support the proposition that the EPBC Act should be the only, or primary Commonwealth legislation for the protection of indigenous cultural heritage. The EPBC Act only applies to developments that meet certain criteria, for indigenous cultural heritage the development must impact on heritage listed on the National

²⁰ Professor Graeme Samuel AC, *Independent Review of the EPBC Act - Interim Report* (June 2020), 33.

²¹ *Ibid*, 30.

Heritage List. It is the CLC's experience that traditional owners are reluctant to expose their sacred knowledge to the public and they often do not want to have their sacred sites listed on a publically available list. They often only bring the existence of sacred sites to the attention of others when those sites are in danger of damage or desecration. The ATSIHP Act should continue to offer protection as a measure of last resort, and importantly should set minimum standards for State and Territory legislation.

74. However the CLC does support changes to the EPBC Act to improve its processes. In its submission to the EPBC review, the CLC noted the need for earlier engagement of approval processes with traditional owners about cultural heritage protection. The EPBC Act processes should also recognise engagement with traditional owners that already occurs under other processes, such as clearances by Land Councils. Without this coordination the danger is that there will be the same duplication detailed above under term of reference (h), 'Duplication of CLC and AAPA functions'.

75. A copy of the CLC's submission to the EPBC Act review is attached at Annexure A.

Conclusion

76. The terrible destruction of the Juukan Gorge has highlighted the need for more effective protection of Indigenous cultural heritage in Western Australia, and deficiencies at the federal level. However there is also a need for legislative reform in the Northern Territory. The current NTSSA gives the Minister the power to authorise a developer, such as a mining company, to desecrate or destroy a sacred site. Amendments are required to explicitly remove the Ministerial power to authorise desecration or destruction of a sacred site. Despite the power to enact the NTSSA coming from ALRA, the NTSSA does not acknowledge the role that the Land Councils play under ALRA to protect sacred sites. The workability of the NTSSA would improve if this role was expressly acknowledged. The national and international attention on the need for reform of Indigenous cultural heritage protection should give the Northern Territory government the impetus to make long overdue reforms to the NTSSA.

77. This Inquiry can map out a path for a comprehensive review of indigenous cultural heritage laws throughout Australia. The aim of such a review would not be to simplify these laws so that only one possible avenue of protection is available, but to better coordinate the available processes so that they provide effective protection of Indigenous cultural heritage. The importance of such protection to Indigenous communities in Australia cannot be underestimated.