

# Not Plants or Animals: the Protection of Indigenous Cultural Heritage in Australia<sup>1</sup>

*...the protection afforded to Indigenous cultural heritage at the international, national and state level is piecemeal, overly bureaucratized, unnecessarily vague, lacking in effective sanctions, and subject to the current Australian Federal Government's refusal to effectively acknowledge the unique place that Indigenous people, their traditional knowledge, and cultural heritage hold within Australian society.<sup>2</sup>*

## INTRODUCTION

1. The Aboriginal peoples of Australia maintain one of the oldest continuous living cultures in the world. The protection of cultural and spiritual landscapes and materials, including sacred sites and artefacts, both past and present, is vital to maintaining this culture. But to date, the protection afforded to Indigenous cultural heritage has been piecemeal and often ineffective.
2. This paper will explore the historical and modern concept of Aboriginal cultural heritage and critically evaluate the efficacy of the Commonwealth, State and Territory legislative schemes in protecting this heritage. The paper will then consider in more detail the present legislative position in New South Wales ("NSW"), where protection of Indigenous cultural heritage is presently only afforded under legislation whose principal object is the conservation of parks and wildlife. Finally, the paper will then proceed to evaluate the NSW Government's recently released proposals for reform and suggest, as a minimum, what changes need to be enacted in that State in order to preserve and protect this heritage.

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<sup>2</sup> T Chapman, "Corroborree Shield: A Comparative Historical Analysis of (The Lack of) International, National and State Level Indigenous Cultural Heritage Protection" (2008) 5(1) *Macquarie Journal of International and Comparative Environmental Law* 81.

## THE CONCEPT OF ABORIGINAL CULTURAL HERITAGE – A CHANGING DEFINITION

### Early Approaches: ‘Relics’ Relevant Only to Archaeologists

3. Approaches to the concept of Indigenous cultural heritage are, as with everything, reflected in the language we use to describe it. Early attempts to protect Indigenous cultural heritage in the 1960s and early 1970s conceived the process as one emphasising the conservation of relics. The use of this word reflects a range of attitudes that are naturally problematic today. Specifically, that the Aboriginal people are a dying race and that any purpose of preserving their sacred sites is merely archaeological. The term ‘relic’ and the use of the past tense in reference to Aboriginal occupation in Australia, perpetuated the myth that Indigenous cultural heritage was not relevant to Indigenous groups in the present day.<sup>3</sup> It also allowed for continuing public ignorance of the complexity and profundity of Aboriginal peoples’ spiritual connection to country and to the Dreamtime or Creation stories that inform and fashion that connection.

### The 1970s and 1980s: Changes in Attitudes

4. In the late 1970s and 1980s, this predominantly archaeological focus remained, but consultation with relevant Aboriginal groups began to be increasingly accepted as an appropriate method of undertaking heritage studies and conservation programs.<sup>4</sup> This was a crucial turning point. The heritage industry began to conceive Indigenous cultural heritage as a means of advancing the political and social status of Indigenous people. For example, by assisting to legitimise customary land tenure claims, as well as being a means of educating the general public about the unique and complex nature of this ancient culture.<sup>5</sup> Thus emerged a nascent contemporary concept of Indigenous cultural heritage.

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<sup>3</sup> D Ritchie, “Australian heritage protection laws: an overview”, in J Finlayson and A Jackson-Nagano (eds) *Heritage and Native Title: anthropological and legal perspectives* (Canberra, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1996) 29.

<sup>4</sup> National Native Title Tribunal, *Indigenous Cultural Heritage Schemes in Victoria, Queensland and the Northern Territory: an overview* (May 2009) 4.

<sup>5</sup> *Ibid.*

5. As a consequence in the mid 1980s, some jurisdictions amended their legislation to provide limited categories in which sites of non-archaeological significance could be heritage listed. The Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* ("ATIHP Act") was one such statute. But that legislation is largely impotent because the potential for proactive protection is very limited.<sup>6</sup>

### **The 1990s: "Ask First" and the *Native Title Act 1993* (Cth)**

6. It was in the next decade that processes and policies in the heritage industry began to make provision for extensive consultation with Aboriginal people. This manifested itself in the former Australian Heritage Commission's "Ask First" policy, which was a guide for developers that allowed Aboriginal people with the requisite knowledge of the region to determine what were places of high cultural significance. The introduction of the *Native Title Act 1993* (Cth) in the early 1990s was a further turning point that necessarily changed attitudes to Indigenous cultural heritage, providing, as it did, a bundle of land rights as a result of a proven and ongoing connection to the land in question.<sup>7</sup>

### **Contemporary Concepts of Aboriginal Cultural Heritage**

7. More recently there has been a growing public awareness of the present and continuing relevance of sacred sites and objects for Aboriginal groups.
8. The significance of the Dreaming (or Creation) to Aboriginal people has secured its place in the national consciousness. Creation is a "richly complex and integrated body of sacred knowledge";<sup>8</sup> the means by which stories of ancestors have been passed on from generation to generation, over millennia.<sup>9</sup>

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<sup>6</sup> Ibid, 6.

<sup>7</sup> Ibid, 7.

<sup>8</sup> Ibid, 2.

<sup>9</sup> M Geissler, "The landscape thinks itself in me and I am its consciousness': Understanding Contemporary Aboriginal Painting", paper presented at the Land and Environment Court Annual Conference, 2013, 1 (emphasis added).

There is no aspect of traditional life that is not permeated by the Dreaming. It is integral to the operation of ancient tribal law and it acknowledges the sacredness of a living 'Mother Earth' and the interdependence of all living and non-living things. Within the complex of meanings inherent within the Dreaming narratives are explanations for the past and all of creation. Importantly, it is regarded as a system that *operates powerfully in the present*.

9. What is certain about the Dreaming is its present, profound and unwavering connection to the landscape, and the sites, objects, and memories that populate that landscape. It reflects Indigenous peoples' spiritual relationship with the holistic concept of 'country'. A relationship that is deeply personal. As a consequence, the destruction of cultural heritage has a profound emotional and intellectual effect on Aboriginal people.<sup>10</sup> To quote one elder:

When our sites are destroyed or desecrated, the physical and spiritual connection we have with our country is destroyed... The mental anguish we go through because of the lack of respect and dignity shown to us and our ancestors' ancient sites and burial grounds, is unbearable.

10. Today Aboriginal cultural heritage is taken to mean all things tangible and intangible that give a place its significance in the lore of the local Aboriginal group. This includes objects like spearheads, rock engravings,<sup>11</sup> burial grounds and bark paintings; sites of ancient or recent history, including post-colonial massacre sites; and importantly more intangible elements such as specific cultural associations<sup>12</sup> that tell a story about the area and the people that existed there.<sup>13</sup> This includes birthing sites, traditional routes, songlines which connect sacred places "like railway lines",<sup>14</sup> and particular associations with specific plants and animals.<sup>15</sup>

11. Persistent efforts by traditional owners, NGOs and academics, have led to a greater public understanding about the nature and content of Aboriginal cultural

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<sup>10</sup> Q Agius, Chairperson, Adjahdura/Narungga Heritage Group, "Heritage Plea," *Koori Mail* (Lismore, 5 November 2008) 26.

<sup>11</sup> *Chief Executive, Office of Environment and Heritage v Ausgrid* [2013] NSWLEC 51.

<sup>12</sup> *Ashton Coal Operations Pty Limited v Director-General, Department of Environment, Climate Change and Water (No 3)* [2011] NSWLEC 1249.

<sup>13</sup> L Turner, Acting Chief Executive Officer of the NSW Aboriginal Land Council, in *Chief Executive, Office of Environment and Heritage v Ausgrid* [2013] NSWLEC 51 at [53].

<sup>14</sup> G Smith, traditional owner, in A Aikman, "OM Manganese fined \$150k for desecrating Aboriginal sacred site" *The Australian* (online) 2 August 2013.

<sup>15</sup> *Ashton Coal Operations Pty Limited v Director-General, Department of Environment, Climate Change and Water (No 3)* [2011] NSWLEC 1249 at [81].

heritage,<sup>16</sup> and as a result, legislative recognition of Indigenous cultural heritage as comprising more than just archaeological relics has occurred.

12. For example, the New South Wales *Heritage Act 1977* (“the Heritage Act”) specifically provides that the word “relic” cannot be used to describe objects from Aboriginal settlements.<sup>17</sup> The relevant Commonwealth statute, the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (“EPBC Act”) (and several other State Acts), goes further insofar as it gives Aboriginal people ownership of the definition of their cultural heritage. That is, a place with “indigenous cultural value” is defined as a place Indigenous people themselves believe to be of cultural heritage value.<sup>18</sup>

13. Nevertheless, while there are encouraging changes in attitudes towards the *concept* of Indigenous cultural heritage, the protection of this heritage in Australia still tends to focus on tangible objects and sites. There remains a lamentable lack of legal protection of intangible cultural heritage.

## **HOW THE CURRENT COMMONWEALTH AND STATE LEGISLATIVE SCHEMES PROTECT INDIGENOUS CULTURAL HERITAGE**

### **The Commonwealth**

14. The Commonwealth Indigenous cultural heritage regime is designed to provide a safety net of protection where State and Territory legislation fails to protect the relevant heritage items. The scheme largely exists in two Acts, between which there is substantial overlap.

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<sup>16</sup> See also, Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 (Cth), whose aim is to “articulate the Parliament’s recognition of Aboriginal and Torres Strait Islanders as the original inhabitants of Australia, and also their ongoing connection with their traditional land and waters, cultures, languages and heritage”.

<sup>17</sup> *Heritage Act 1977* (NSW) s 4.

<sup>18</sup> *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 528; *Aboriginal Cultural Heritage Act 2003* (Qld) ss 9, 10; *Aboriginal Heritage Act 2006* (Vic) s 4(1); *Heritage Act 2004* (ACT) s 9.

15. The ATSIHP Act allows the Commonwealth Minister for the Environment to declare an area “of particular significance” to Aboriginal people<sup>19</sup> to be preserved under the Act in order to protect the items from serious and immediate threats of injury or desecration.<sup>20</sup> The declaration can only be made in response to a request from an Indigenous person,<sup>21</sup> where there is no State or Territory law to protect that site or object.<sup>22</sup> But declarations can only stop activities; they cannot compel conservation or repairs to damaged areas.<sup>23</sup>

16. Applications for a declaration can be made at any stage in the process of the development. A merits assessment process follows the application, regardless of whether the site or object has previously been assessed under the EPBC Act.<sup>24</sup> The result is duplication of assessment processes.<sup>25</sup>

17. A Commonwealth review of the ATSIHP Act in 2009 by the then Department of the Environment, Water, Heritage and the Arts, found that:<sup>26</sup>

the ATSIHP Act has not proven to be an effective means of protecting traditional areas and objects. Few declarations have been made: 93 per cent of approximately 320 valid applications received since the Act commenced in 1984 have not resulted in declarations.

18. The very low number of declarations suggests the Act is not acting as the safety net that it was designed to be.

19. The second major limb of the Commonwealth Indigenous cultural heritage protection scheme is the EPBC Act, which provides protection to those places or objects that are listed on the National Heritage List and the Commonwealth

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<sup>19</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ss 3, 9(1)(b)(i).

<sup>20</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ss 9, 10.

<sup>21</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 9(1)(a).

<sup>22</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ss 7, 13(2), (5).

<sup>23</sup> Commonwealth Department of Sustainability, Environment, Water, Population and Communities, Heritage Division, *Introduction to the Aboriginal and Torres Strait Islander Heritage Protection Act* (2010), available at <<http://laptop.deh.gov.au/heritage/laws/pubs/introduction-atsihpa.pdf>>, accessed 10/02/2014.

<sup>24</sup> A Hawke, Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2009) 294.

<sup>25</sup> *Ibid.*

<sup>26</sup> Commonwealth Department of the Environment, Water, Heritage and the Arts, *Indigenous Heritage Law Reform: for discussion* (2009) 4.

Heritage List, and are therefore deemed to be of “national environmental significance”.<sup>27</sup>

20. The Commonwealth Minister for the Environment can include an object or place on the National Heritage List if he or she is satisfied that it has national heritage value,<sup>28</sup> and that it is at a likely and imminent risk of destruction.<sup>29</sup> “National heritage” value equates to “outstanding heritage value to the nation” because of, *inter alia*, the place’s importance in Australia’s history, or because of its unique aesthetic characteristics valued by a particular cultural group. Any action which would have “significant impact” within or outside National Heritage places requires approval under the EPBC Act.<sup>30</sup>
21. To gain a place on the Commonwealth Heritage List, the item must have “Commonwealth heritage values,” which equates to “significant heritage value” for a variety of different reasons,<sup>31</sup> and must be within a Commonwealth area or, if outside Australian jurisdiction, owned or leased by the Commonwealth.<sup>32</sup>

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<sup>27</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(a).

<sup>28</sup> That is, it meets one of the criteria in the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth): *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 324D(1); see also *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) 10.01A.

<sup>29</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 324JL.

<sup>30</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 15B.

<sup>31</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 341D; *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) r 10.03A.

<sup>32</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 341C.

22. Criticisms of the operation of the EPBC Act are many. First, the threshold for falling under the National or Commonwealth heritage criteria is very high. It is therefore hard to gain protection under the Act, which is exacerbated by an overly complex nomination and listings process.<sup>33</sup> This has naturally led to questions as to whether EPBC listing provides any more substantive protection than what is already provided under State and Territory legislation.<sup>34</sup>
23. Second, critics have pointed to the uncertainty surrounding the overall strategic importance and purpose of the National Heritage List, noting the plethora of other Commonwealth heritage lists, both statutory and non-statutory, which appear to serve the same purpose but to little effect.<sup>35</sup>
24. Third, complaint has been made of the fact that Indigenous heritage is dealt with under an Act with such a broad scope, whose primary focus is the protection of the environment. This does not allow for the level of active engagement with Indigenous communities that is needed, thereby removing Indigenous Australians' ability to protect and manage their cultural heritage.<sup>36</sup>
25. When the EPBC Act was reviewed in 2008 pursuant to s 522A of the Act, the resulting report recommended that the provisions of the ATSIHP Act be incorporated into the EPBC Act in order to avoid overlaps in heritage assessment and authorisation processes.<sup>37</sup> The Government agreed to "consider" this

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<sup>33</sup> S Shearing, "Reforming Australia's National Heritage Law Framework" (2012) 8(1) *Macquarie Journal of International and Comparative Environmental Law* 71, 82.

<sup>34</sup> Australian Council of National Trusts Review, Submission to the Department of Environment, Heritage and the Arts, *Independent Review of the EPBC Act 1999*, December 2008, 19, available at <<http://www.environment.gov.au/system/files/pages/dacbaf4-0bca-46ee-9271-2fa95ce1b6dc/files/039-aust-council-national-trust.pdf>>, accessed 11/02/2014; and ICOMOS Australia, Submission to the Department of Environment, Heritage and the Arts, *Independent Review of the EPBC Act 1999*, December 2008, 5, available at <<http://www.environment.gov.au/system/files/pages/dacbaf4-0bca-46ee-9271-2fa95ce1b6dc/files/117-australia-icomos.pdf>>, accessed 11/02/2014.

<sup>35</sup> Including the Commonwealth Heritage List, National Heritage List, List of Overseas Places of Historic Significance to Australia, the Register of the National Estate, as well as many Commonwealth agency heritage registers: National Trusts Review submission, above n 35, 19.

<sup>36</sup> Indigenous Advisory, Submission to the Department of Environment, Heritage and the Arts, *Independent Review of the EPBC Act 1999*, May 2009, 3, in Shearing, above n 34, 81.

<sup>37</sup> Hawke, above n 24, 293.



recommendation in its response to the review in 2011, but no further action has resulted.<sup>38</sup>

26. To date, therefore, the Commonwealth Government's response to the reform recommendations involving Indigenous cultural heritage may generally be characterised as committing to streamlining heritage assessment and approvals, absent any commitment to substantive reform.<sup>39</sup>

### **Australian Capital Territory**

27. In the Australian Capital Territory ("ACT"), Indigenous cultural heritage is governed by the *Heritage Act 2004* (ACT) ("the ACT Act"). The ACT Act is administered by the Minister for the Environment and Sustainable Development and the ACT Heritage Council,<sup>40</sup> an independent statutory body who maintains the Heritage Register.<sup>41</sup> The Register lists Aboriginal places or objects which are of "particular significance" to Aboriginal people because of their history or tradition.<sup>42</sup>

28. The ACT Heritage Council conducts consultation with the public, not just Indigenous groups, in relation to the possible registration of a particular Aboriginal place or object.<sup>43</sup> It is responsible for registering the item, after reporting to and consulting with the Minister.<sup>44</sup> Registration entitles the place or object to funding from the Heritage Grant Program, support from the Heritage Advisory Service, and legal protection under the ACT Act.<sup>45</sup>

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<sup>38</sup> Department of Sustainability, Environment, Water, Population and Communities, *Australian Government response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, 2011, 105, available at <<http://www.environment.gov.au/system/files/resources/605a54df-7b33-4426-a5a8-51de24b29c71/files/epbc-review-govt-response.pdf>>, accessed 25/02/2014.

<sup>39</sup> Shearing, above n 34, 71. For example, it has agreed to simplify the cumbersome nomination and listing process for the National and Commonwealth Heritage Lists: above n 39, 59.

<sup>40</sup> *Heritage Act 2004* (ACT) s 16.

<sup>41</sup> *Heritage Act 2004* (ACT) s 20.

<sup>42</sup> *Heritage Act 2004* (ACT) s 9.

<sup>43</sup> *Heritage Act 2004* (ACT) s 37.

<sup>44</sup> *Heritage Act 2004* (ACT) ss 38-40.

<sup>45</sup> ACT Government, *ACT Heritage Register*, available at <[http://www.environment.act.gov.au/heritage/heritage\\_register](http://www.environment.act.gov.au/heritage/heritage_register)>, accessed 27/02/2014.

29. Provisional protection will apply to the site or object while the process of registration is being carried out.<sup>46</sup> Information on the Register is publicly available<sup>47</sup> unless the Heritage Council has declared it to be restricted,<sup>48</sup> which provides privacy to Aboriginal people who would wish certain details to remain secret. Not reporting the discovery of an Aboriginal place or object is a strict liability offence under the ACT Act.<sup>49</sup> As is the case with all of the legislation discussed in this paper, damaging a registered Aboriginal place or object is a criminal offence.<sup>50</sup>
30. The ACT Act is relatively unique in granting determinative powers to the Heritage Council, which is made up of both departmental and community members. Such an arrangement is only replicated in the Northern Territory, and only in relation to sacred sites. However, unlike the NT scheme, the ACT Heritage Council is only required to have one Aboriginal member.<sup>51</sup>
31. There is currently a heritage amendment Bill in existence in the ACT whose aim, among other things, is to lower the definitional threshold of Indigenous cultural heritage and therefore strengthen its protection. The proposed reforms include changing the definitions of “Aboriginal object” and “Aboriginal place” to include anything that is “associated with Aboriginal people”.<sup>52</sup> Further, in order to fall within these definitions, the heritage items no longer have to be “of particular significance” or registered. The reforms also propose that heritage guidelines may be made about any Aboriginal object, not just those that are registered.<sup>53</sup>
32. In addition, the amendments seek to expand consultation with Aboriginal people in relation to heritage decision-making. The ACT Government is investigating

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<sup>46</sup> *Heritage Act 2004* (ACT) s 28.

<sup>47</sup> *Heritage Act 2004* (ACT) s 21.

<sup>48</sup> *Heritage Act 2004* (ACT) s 22.

<sup>49</sup> *Heritage Act 2004* (ACT) s 51.

<sup>50</sup> *Heritage Act 2004* (ACT) s 75.

<sup>51</sup> *Heritage Act 2004* (ACT) s 17(3)(b).

<sup>52</sup> Heritage Legislation Amendment Bill 2013 (ACT) s 9.

<sup>53</sup> ACT Government Environment and Sustainable Development Directorate, *Heritage Legislation Amendment Bill 2013: Summary Statements*, available at <[http://www.environment.act.gov.au/heritage/review\\_of\\_the\\_heritage\\_act\\_2004/heritage\\_legislation\\_amendment\\_bill\\_2013\\_summary\\_statement](http://www.environment.act.gov.au/heritage/review_of_the_heritage_act_2004/heritage_legislation_amendment_bill_2013_summary_statement)>, accessed 18/02/2014.

criteria for Representative Aboriginal Organisations in order to ensure Aboriginal groups are adequately and effectively represented.<sup>54</sup>

## Northern Territory

33. Indigenous cultural heritage in the Northern Territory (“NT”) is protected by two separate Acts. First, the *Northern Territory Sacred Sites Act 1978* (NT) (“the Sacred Sites Act”) provides robust protection to sites deemed to be sacred by an Aboriginal-only body, the Aboriginal Areas Protection Authority (“the AAPA”). Second, the *Heritage Act 2012* (NT) (“the NT Heritage Act”) provides protection to cultural heritage according to its archaeological value<sup>55</sup> and is administered by the Minister for Lands, Planning and the Environment and the Northern Territory Heritage Council.

34. Under the Sacred Sites Act, the AAPA is able to register a certain area as a sacred site for the purposes of the Act.<sup>56</sup> The Authority has control over registration of sacred sites subject to specific criteria to which it must refer when making a determination.<sup>57</sup> Anyone wanting to conduct work on a registered area must obtain an authority certificate from the AAPA.<sup>58</sup> Criminal offences apply to unauthorised entry onto a sacred site,<sup>59</sup> conducting work on a sacred site,<sup>60</sup> contravening an authority certificate issued by the AAPA,<sup>61</sup> and desecration of that site.<sup>62</sup>

35. Thus the AAPA successfully charged a mining company with desecration of a sacred site in *Aboriginal Areas Protection Authority v OM (Manganese) Ltd.*<sup>63</sup> In that case the defendant’s mining development led to the collapse and destruction of the rocky outcrop in the sacred site known as ‘Two Women Sitting Down’.

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<sup>54</sup> Ibid.

<sup>55</sup> *Heritage Act 2012* (NT) ss 6, 8.

<sup>56</sup> *Northern Territory Aboriginal Sacred Sites Act 1978* (NT) s 10(d).

<sup>57</sup> *Northern Territory Aboriginal Sacred Sites Act 1978* (NT) ss 27(2), 29.

<sup>58</sup> *Northern Territory Aboriginal Sacred Sites Act 1978* (NT) s 19B.

<sup>59</sup> *Northern Territory Aboriginal Sacred Sites Act 1978* (NT) s 33.

<sup>60</sup> *Northern Territory Aboriginal Sacred Sites Act 1978* (NT) s 34.

<sup>61</sup> *Northern Territory Aboriginal Sacred Sites Act 1978* (NT) s 37.

<sup>62</sup> *Northern Territory Aboriginal Sacred Sites Act 1978* (NT) s 35.

<sup>63</sup> [2013] NTMC 19.

36. The defendant had obtained an authority certificate from the AAPA on the condition that the sacred area not be entered or disturbed. The defendant purported to consult with local Aboriginal custodians to obtain consent to mine at a steeper angle of the pit wall, closer to the sacred site, even though the custodians did not themselves have individual authority to approve a mining plan that posed a risk to the state of the sacred site.<sup>64</sup> Magistrate Sue Oliver declared this as “either a cynical or a naïve exercise on the part of the Defendant”.<sup>65</sup> Her Honour held that the defendant had desecrated the site.
37. Legislation as robust as the Sacred Sites Act can militate against box-ticking ‘consultation’ and ‘consent’ without meaningful explanation and engagement with Aboriginal communities. The fact that the Act is administered by a dedicated Aboriginal body provides an element of ownership and control to Aboriginal groups that is lacking in other States and Territory legislation. The Sacred Sites Act also creates potential for protection of intangible cultural heritage. In the *OM* case, the Court noted that the definition of desecration included “not so much the physical integrity of the site but...whether what has occurred in relation to it has violated the sacred symbols or beliefs that it represents.”<sup>66</sup>
38. The NT Heritage Act operates much like the ACT Act by providing protection to Aboriginal objects and places through registration on the NT Heritage Register. One main difference is that heritage-listing is only available to sites and objects by virtue of their archaeological value, rather than their value to contemporary Aboriginal groups.<sup>67</sup> Also, unlike the ACT Heritage Council, the NT Heritage Council’s job is purely advisory; it has no determinative powers itself.<sup>68</sup>

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<sup>64</sup> *Aboriginal Areas Protection Authority v OM (Manganese) Ltd* [2013] NTMC 19 at [22].

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid* at [32].

<sup>67</sup> *Heritage Act 2012* (NT) ss 6, 8.

<sup>68</sup> *Heritage Act 2012* (NT) s 125.

## Queensland

39. The focus of the Queensland *Aboriginal Cultural Heritage Act 2003* (Qld) (“the Queensland Act”) is, importantly, on prevention of harm, described in the Act as a cultural heritage “duty of care”. That is, any party seeking to undertake an activity in Queensland must establish that they have taken all reasonable and practicable measures to prevent harm to Aboriginal heritage.<sup>69</sup>
40. This can be demonstrated by compliance with the Queensland Act’s duty of care guidelines,<sup>70</sup> by acting under the authority of a cultural heritage management agreement or a native title agreement, with a Registered Aboriginal Party (“RAP”), or a cultural heritage management plan.<sup>71</sup> The onus is on the proponent to draw up an action plan to prevent cultural heritage damage. Breach of the duty of care, along with destroying, moving or possessing items of Aboriginal cultural heritage, is a criminal offence.<sup>72</sup>
41. In the Queensland Act, critically, the relevant Aboriginal parties themselves define what is, and what is not, cultural heritage in their region.<sup>73</sup> The Queensland legislation thus emphasises the need for consensus with Indigenous groups in order to satisfy the duty of care.<sup>74</sup>
42. There is much to commend this approach. First, the duty of care concept empowers Aboriginal communities. Second, breach of the duty of care is relatively simple to prosecute. Third, the measures required to fulfil the duty are not overly burdensome.<sup>75</sup>
43. Furthermore, the Queensland regime is efficient insofar as it identifies one specific Aboriginal group or party with whom consultations are to be conducted,

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<sup>69</sup> *Aboriginal Cultural Heritage Act 2003* (Qld) s 23.

<sup>70</sup> *Aboriginal Cultural Heritage Act 2003 Duty of Care Guidelines* (Qld).

<sup>71</sup> *Aboriginal Cultural Heritage Act 2003* (Qld) ss 3(a)(ii), (iii).

<sup>72</sup> *Aboriginal Cultural Heritage Act 2003* (Qld) ss 23-26.

<sup>73</sup> *Aboriginal Cultural Heritage Act 2003* (Qld) ss 9, 10.

<sup>74</sup> *Aboriginal Cultural Heritage Act 2003* (Qld) s 23(2).

<sup>75</sup> A Seiver, “Defining the offence of unlawfully destroying Aboriginal heritage” (2005) 6(9) *Indigenous Law Bulletin* 8, 10.

rather than engaging in the broader and more time-consuming consultation with several interested parties that is required in most other States, for example, NSW.<sup>76</sup> Having said this, Indigenous groups in Queensland have expressed the view that the practical result has often been insufficient consultation with traditional owners.<sup>77</sup>

## South Australia

44. In South Australia far-reaching powers are granted to the Minister<sup>78</sup> to determine the management of Aboriginal cultural heritage. Aboriginal cultural heritage receives protection after registration under the South Australian *Aboriginal Heritage Act 1988* (SA) (“the SA Act”), but the Minister is vested with the power to authorise damage, disturbance, excavation or removal of Aboriginal cultural heritage, including Aboriginal remains.<sup>79</sup>

45. The Minister is obliged to take “reasonable steps” to consult with the State Aboriginal Heritage Committee (“the SA Committee”) on protection matters, but he or she has no duty to take into account its advice in making a determination under the SA Act.<sup>80</sup> The Minister also decides upon the membership of the SA Committee<sup>81</sup> and Aboriginal groups have no right to appeal the merits of a Minister’s decision to allow for damage of Aboriginal cultural heritage.<sup>82</sup>

46. The one concrete power granted to Aboriginal groups in South Australia is with respect to the determination of what constitutes significant cultural heritage. While the Minister decides whether an object or site is “Aboriginal” for the

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<sup>76</sup> C Gregory, L Davis and J Ford, “Comparison of NSW and Queensland Aboriginal cultural heritage regimes” (2013) 28(2) *Australian Environment Review* 466, 468.

<sup>77</sup> New South Wales Aboriginal Land Council, *Caring for Culture: Perspectives on the effectiveness of Aboriginal cultural heritage legislation in Victoria, Queensland and South Australia* (2010) 11.

<sup>78</sup> Minister for Aboriginal Affairs and Reconciliation.

<sup>79</sup> *Aboriginal Heritage Act 1988* (SA) ss 21, 22, 23.

<sup>80</sup> *Aboriginal Heritage Act 1988* (SA) s 13(1).

<sup>81</sup> *Aboriginal Heritage Act 1988* (SA) s 7.

<sup>82</sup> A Collett, *Discussion Paper Relating to the Aboriginal Heritage Act 1998 (SA)*(Antakirinja Matu-Yankunytjatjara Native Title Claim Group, November 2008) 26, in N Caon, “Does the Aboriginal Heritage Act adequately recognise Aboriginal custodianship of culture and heritage? Part 2” (2011) 32(8) *Law Society of South Australia Bulletin* 24. The right to apply to the Supreme Court for judicial review remains.

purposes of the Act,<sup>83</sup> he or she must accept the views of traditional owners in relation to the definition of that land or object.<sup>84</sup>

47. In submissions to a review of the SA Act, Aboriginal owners understandably expressed concern about the vesting of overarching powers in an individual with little knowledge of individual Indigenous cultural heritage issues.<sup>85</sup> There was also a perception amongst traditional owners that the SA Committee is not sufficiently proactive in promoting Indigenous cultural heritage awareness in the community.<sup>86</sup> The SA Act has been under review since 2008 but the State Government has not yet released any reform proposals.<sup>87</sup>

## Tasmania

48. Tasmania is the only jurisdiction that still presently uses the term “relics” to refer to Aboriginal cultural heritage. Under the *Aboriginal Relics Act 1975* (Tas) (“the Tasmanian Act”), “relics” are archaeological items made or created by the original inhabitants of Australia; Aboriginal remains; or objects that bear the signs of Aboriginal occupation, providing they were created before 1876.<sup>88</sup>

49. The Tasmanian Act vests broad decision-making power in the Minister.<sup>89</sup> The Tasmanian Aboriginal Relics Advisory Council can provide advice and recommendations to the Minister regarding cultural heritage but there is no obligation on the Minister to follow the Council’s recommendations.<sup>90</sup> Only one member of the Council must represent “persons of Aboriginal descent”.<sup>91</sup>

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<sup>83</sup> *Aboriginal Heritage Act 1988* (SA) s 12.

<sup>84</sup> *Aboriginal Heritage Act 1988* (SA) s 13(2).

<sup>85</sup> See, for example: Agius, above n 10, 26.

<sup>86</sup> NSWALC, above n 79, 11.

<sup>87</sup> S Roughan, Rural Solutions SA, “*It’s not just about sacred sites*”: *A quantitative analysis of the community consultation process of the 2009 Review of the Aboriginal Heritage Act, 1988*, 9, 16.

<sup>88</sup> *Aboriginal Relics Act 1975* (Tas) s 2(3)-(4).

<sup>89</sup> Minister of Primary Industries, Parks, Water and Environment.

<sup>90</sup> *Aboriginal Relics Act 1975* (Tas) s 3.

<sup>91</sup> One member, nominated by the Minister, must be “selected from a list submitted by a body which, in the opinion of the Minister, represents persons of Aboriginal descent”: *Aboriginal Relics Act 1975* (Tas) s 4(2)(b).

50. Under the Act, it is an offence to interfere with a relic or protected site unless you were unaware it was a relic. In short, ignorance is a defence.
51. However, two reform Bills<sup>92</sup> have been tabled in Parliament in recognition of the outdated nature of the existing Act.<sup>93</sup> The reforms proposed are far reaching. Amongst other things the Bills will, if enacted, create new offences; create new definitions of what constitutes Indigenous cultural heritage to include both tangible and intangible cultural heritage and that will remove the arbitrary 1876 cut-off date;<sup>94</sup> and create an Aboriginal Heritage Council, comprising Aboriginal members, which will have limited decision-making powers. The Bills are currently being considered by a Committee of the Legislative Council.

## Victoria

52. Of all of the State Indigenous protective cultural heritage schemes, Victoria's is the most comprehensive, most well-resourced, and arguably, the most representative of Aboriginal interests. The Victorian *Aboriginal Heritage Act 2006* ("the Victorian Act") is largely administered by the Victorian Aboriginal Heritage Council ("the Victorian Council"), an independent statutory body with advisory functions. Membership of the Council is decided upon by the Minister.<sup>95</sup> Each member must be an Aboriginal person and resident in Victoria with traditional or familial links to an area within the State, and with relevant experience or knowledge of local Aboriginal cultural heritage.<sup>96</sup>
53. The Victorian Council receives administrative support from a Secretariat in the Aboriginal Affairs Heritage Services Branch in the Victorian Department of Planning. In 2010, the Heritage Services Branch had approximately

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<sup>92</sup> The Aboriginal Heritage Protection Bill 2013 and the Aboriginal Heritage Protection (Consequential Amendments) Bill 2013.

<sup>93</sup> Tasmanian Government, *Proposed Aboriginal heritage protection legislation Fact Sheet 1: Overview* (2013) 1.

<sup>94</sup> Tasmanian Government, *Proposed Aboriginal heritage protection legislation Fact Sheet 2: Key Definitions* (2013) 1.

<sup>95</sup> Minister of Aboriginal Affairs.

<sup>96</sup> *Aboriginal Heritage Act 2006* (Vic) s 131(3).



40 employees, of which half were located in regional Victoria supporting Registered Aboriginal Parties (“RAPs”).

54. The Victorian Act is unique in its inclusion of the promotion of public awareness and understanding of Aboriginal cultural heritage as one of its statutory objectives.<sup>97</sup> The Victorian Council achieves this objective through a variety of mechanisms. It provides advice to the Department of Premier and Cabinet regarding RAPs, cultural heritage management plans and permits. It advises departments on the return of Aboriginal remains and provides support to traditional owners regarding management of country. The Council also produces submissions to reviews of different legislation that affect Indigenous cultural heritage.<sup>98</sup>

55. Cultural heritage permits may be issued for disturbance or excavation of Aboriginal cultural heritage that would otherwise be illegal.<sup>99</sup> If an RAP objects to the granting of a permit, the Secretary must refuse the permit's issue.<sup>100</sup> If a proposed activity will have a high impact in an area of cultural heritage sensitivity, a cultural heritage management permit must be prepared. RAPs also have the power to veto the issue of these management plans.<sup>101</sup> The Victorian Civil and Administrative Tribunal (“VCAT”) deals with disputes regarding appeals relating to cultural heritage permits.<sup>102</sup>

56. While the Victorian Act affords significant control to RAPs and the Council, it is worth observing that the overarching body for non-indigenous heritage, the Victorian Heritage Council, is vested with significantly greater powers over the heritage it administers than the Victorian Aboriginal Heritage Council.<sup>103</sup> Concern has also been expressed about appeals being heard by VCAT, a body with

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<sup>97</sup> *Aboriginal Heritage Act 2006* (Vic) s 3(e).

<sup>98</sup> Victorian Department of Premier and Cabinet, *The Victorian Aboriginal Heritage Council's Advisory Functions* (2014) available at <<http://www.dpc.vic.gov.au/index.php/aboriginal-affairs/victorian-aboriginal-heritage-council/the-victorian-aboriginal-heritage-councils-advisory-functions>>, accessed 27/02/2014.

<sup>99</sup> *Aboriginal Heritage Act 2006* (Vic) ss 27, 29. Note that cultural heritage permits cannot be issued for excavations of human remains or sacred objects: *Aboriginal Heritage Act 2006* (Vic) s 37.

<sup>100</sup> *Aboriginal Heritage Act 2006* (Vic) s 40(3).

<sup>101</sup> *Aboriginal Heritage Act 2006* (Vic) s 63.

<sup>102</sup> *Aboriginal Heritage Act 2006* (Vic) ss 113, 116.

<sup>103</sup> NSWALC, above n 79, 11.

limited experience of Aboriginal cultural heritage.<sup>104</sup> Moreover, the continuing focus on physical archaeological excavation has drawn rebuke for perpetuating an out-of-date conception of Indigenous cultural heritage. And, along with almost all other legislative schemes, the Victorian Act fails to adequately make provision for intangible cultural heritage.

## Western Australia

57. In Western Australia under the *Aboriginal Heritage Act 1972* (WA) (“the WA Act”), sites or objects that are of sacred, ritual or ceremonial significance to Aboriginal people are not automatically protected. Rather, they are recorded and their significance is evaluated by the Minister of Indigenous Affairs.<sup>105</sup> The Aboriginal Cultural Material Committee (“the WA Committee”), which may or may not have Aboriginal members,<sup>106</sup> then advises the Minister as to the significance of particular places or objects.<sup>107</sup> As in South Australia, Tasmania and the NT, the Minister is not bound to accept these recommendations.

58. The Minister can declare an area to be registered on relatively complex and specific grounds. Protection will be declared where the WA Committee has advised that the site is of “outstanding importance”, and “it appears to the Minister that it is in the general interest of the community to do so”, taking into account any grievances submitted to the Department regarding the possible declaration of the site as protected, usually from the relevant landowner.<sup>108</sup>

59. In a reflection of Queensland’s ‘duty of care’ system, the WA Act’s due diligence guidelines provide direction to land users as to how they can prevent harm to areas that have been declared to be “Aboriginal sites”.<sup>109</sup>

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<sup>104</sup> L Kelleher, “Story Telling: Silence and Voice-Hope, Trust, Knowledge-Reflections on Aboriginal Heritage Legislation” (Paper delivered to the Annual Conference of the Australian Sociological Association, University of Melbourne, December 2008) 14, available at <<http://www.tasa.org.au/uploads/2011/05/LeonieKelleherPaper.pdf>>, accessed 28/02/2014.

<sup>105</sup> *Aboriginal Heritage Act 1972* (WA) s 10.

<sup>106</sup> *Aboriginal Heritage Act 1972* (WA) s 28.

<sup>107</sup> *Aboriginal Heritage Act 1972* (WA) s 39.

<sup>108</sup> *Aboriginal Heritage Act 1972* (WA) s 19.

<sup>109</sup> *Aboriginal Heritage Due Diligence Guidelines 2013* (WA).

60. A review of the WA Act commenced in 2012 with a view to recommending reforms that would improve certainty, compliance and efficiency, in light of new demands placed on the Act by mining, rapid State development and native title.<sup>110</sup> One proposal involves granting discretion to the Department of Indigenous Affairs to bypass the normal assessment and consent process in relation to harm to certain disturbances to Aboriginal heritage. Reactions to the discussion paper from the Aboriginal community have been largely negative, with one group describing the proposal as granting a “rubber stamp to miners and developers”.<sup>111</sup>

## **New South Wales**

61. The current NSW regulatory scheme governing Indigenous cultural heritage is governed principally by the *Heritage Act 1977* (NSW) (“the Heritage Act”) and the *National Parks and Wildlife Act 1974* (NSW) (“the NPW Act”). Plainly protection is also afforded by the *Aboriginal Land Rights Act 1983* (NSW), but along with the Commonwealth’s *Native Title Act*, the focus of this legislation is that of securing property rights rather than safeguarding against the destruction of or damage to cultural heritage on land or property over which Indigenous groups hold no title or proprietary interest.

62. The *Heritage Act* makes no specific reference to Aboriginal cultural heritage. Instead, sites or objects deemed to be of “State heritage significance” are listed on the State Heritage Register (“heritage items”).<sup>112</sup> This is a lengthy and complex process because of the need for those nominating the area for heritage listing to compile an evidentiary nomination document. The Heritage Council of NSW has changed its processes in order to accommodate a lack of resources in

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<sup>110</sup> Department of Indigenous Affairs, *Discussion Paper: Seven proposals to regulate and amend the Aboriginal Heritage Act 1972 for improved clarity, compliance, effectiveness, efficiency and certainty*, 2012, i.

<sup>111</sup> Swan River People, Submission to the Heritage and Culture Branch, Government of Western Australia, *Review of the Aboriginal Heritage Act 1972 (WA)*, 31 May 2012, 1, available at <<http://www.daa.wa.gov.au/PageFiles/1842/AHADiscussionpaper31may2012.pdf>>, accessed 28/02/2014.

<sup>112</sup> *Heritage Act 1977* (NSW) s 32(1).

Aboriginal communities wanting to make a heritage listing, but the process remains laborious.<sup>113</sup>

63. The result has been that to date only 26 items of Aboriginal cultural heritage have been listed on the Register, compared with 1500 listings for non-Indigenous cultural heritage.<sup>114</sup>
64. The Act explicitly allows for the harm and destruction of heritage items if an excavation permit has been issued.<sup>115</sup> These permits are routinely granted upon application and without any need for consultation with Aboriginal groups.<sup>116</sup>
65. The discovery of “relics” is required by the Act to be notified to the Heritage Council within a certain time period, but there is no sanction if this does not occur and it is uncertain if Indigenous “relics” are in any event covered by the Act.<sup>117</sup>
66. Furthermore, the registration process in NSW gives rise to privacy concerns. Registering heritage items can require Indigenous people to disclose material information about the item without any ability to keep the information confidential.<sup>118</sup> Disclosure of the location or nature of cultural sites may be contrary to the customary manner of passing on cultural knowledge and problematic to those Aboriginal groups for whom the area is significant.<sup>119</sup>
67. Part 6 of the NPW Act creates the offence of knowingly permitting the destruction, excavation of, or damage to an Aboriginal object without first obtaining an Aboriginal heritage impact permit (“AHIP”) from the Director-General of the Office of Environment and Heritage (“OEH”).<sup>120</sup>

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<sup>113</sup> T Koeneman, “‘These stories need to be told and these places must be remembered’: identifying and protecting a continuing Aboriginal heritage in NSW” (Paper presented at the Land and Environment Court Annual Conference, 2013) 3.

<sup>114</sup> *Ibid*, 2.

<sup>115</sup> *Heritage Act 1977* (NSW) s 139.

<sup>116</sup> *Heritage Act 1977* (NSW) s 141.

<sup>117</sup> *Heritage Act 1977* (NSW) s 146.

<sup>118</sup> Chapman, above n 1, 93.

<sup>119</sup> *Ibid*.

<sup>120</sup> *National Parks and Wildlife Act 1974* (NSW) ss 86, 87.

68. Factors that must be considered in determining the issue of an AHIP include actual or likely harm to Aboriginal objects; practical measures that can be taken to reduce the harm; the significance of the Aboriginal object; and the social and economic consequences of making the decision.<sup>121</sup>
69. The Act also establishes the Aboriginal Heritage Information Management System (“AHIMS”), which maps and records items of Aboriginal cultural heritage.<sup>122</sup> Although there are currently 60,000 heritage items recorded on the AHIMS, this represents a very small percentage of the Indigenous heritage present in the State.<sup>123</sup>

### **Flaws Inherent in the NSW Scheme**

70. The current NSW legislative regime that applies to Indigenous cultural heritage is flawed in the following ways, which are discussed in further detail below:
- (a) first, it fails to adequately acknowledge the importance of cultural heritage in the lives of contemporary Indigenous people;
  - (b) second, the consultation requirements are insufficient insofar as they do not require agreement or consent from Indigenous parties before cultural heritage may be impacted upon by development;
  - (c) third, inadequate resources and the high cost of litigation are impediments to the effective and timely protection of Indigenous cultural heritage;
  - (d) fourth, the penalties for the destruction of or damage to Indigenous cultural heritage are not high enough to reflect the objective seriousness of such activity;

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<sup>121</sup> *National Parks and Wildlife Act 1974* (NSW) s 90K.

<sup>122</sup> *National Parks and Wildlife Act 1974* (NSW) s 90Q.

<sup>123</sup> E Schnierer, S Ellsmore and S Schnierer, *State of Indigenous Cultural Heritage 2011: Supplementary Report to the Australian State of the Environment Report 2011*, Australian Government, 17, available at <<http://www.environment.gov.au/system/files/pages/3f0dc683-4f21-4611-95f8-f6604297c916/files/soe2011-supplementary-heritage-state-indigenous-cultural-heritage.pdf>>, accessed 20/02/2014.

- (e) fifth, it contains limited provision for proactive measures to be taken in order to prevent damage to or destruction of Indigenous cultural heritage; and
- (f) sixth, it fails to protect or promote intangible cultural heritage.

### **Failure to Acknowledge Importance of Indigenous Cultural Heritage**

71. There is presently no dedicated statute governing Indigenous cultural heritage in NSW. It is the only Australian state not to have enacted one.<sup>124</sup> The fact that Indigenous cultural heritage in NSW is governed by legislation dealing with the environment, that is to say, flora and fauna, or plants and animals, is on any view offensive.<sup>125</sup> As one commentator put it, such classification is a “distasteful remnant from a time when Aboriginal people were considered as merely part of the environment”.<sup>126</sup>
72. In addition, the definition of Indigenous cultural heritage contained in the NPW Act is antiquated. Aboriginal objects are defined by reference to their capacity to demonstrate historical Aboriginal habitation in the area.<sup>127</sup> Aboriginal places are only recognised as such if a declaration to this effect is made by the Minister of OEH.<sup>128</sup> These measures have the effect of removing ownership of cultural heritage from the Aboriginal people for whom it is significant.
73. The definition also does not take into account the significance of surrounding areas and contexts. For example, the Keepara or Diamond Tree is a very significant site for local Aboriginal men near Nambucca Heads. Only certain men are allowed to see or approach the site. The tree itself was declared protected

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<sup>124</sup> *Aboriginal Cultural Heritage Act 2003* (Qld); *Aboriginal Heritage Act 1988* (SA); *Aboriginal Relics Act 1975* (Tas); *Aboriginal Heritage Act 2006* (Vic); *Aboriginal Heritage Act 1972* (WA).

<sup>125</sup> J Kennedy, “Operative Protection or Regulation of Destruction? The validity of permits to destroy Indigenous Cultural Heritage Sites” (2005) 6(14) *Indigenous Law Bulletin* 20.

<sup>126</sup> New South Wales Aboriginal Land Council and NTSCORP Ltd, “Our culture in our hands,” Submission in response to the Reform of Aboriginal Culture and Heritage in New South Wales, December 2011, in J Brightling, “Protecting 40,000 years of Aboriginal culture and heritage in New South Wales” (2013) 28(2) *Australian Environment Review* 470. See also P Daley, “We need a national keeping place for our ‘lost’ Indigenous remains”, *the Guardian* (online) 24 October 2013.

<sup>127</sup> *National Parks and Wildlife Act 1974* (NSW) s 5.

<sup>128</sup> *National Parks and Wildlife Act 1974* (NSW) s 84.

under the NPW Act, but the area surrounding it was not and was subsequently cleared in order to construct a playing field, thereby rendering the tree visible and thus any physical protection of the site futile.<sup>129</sup>

### **Insufficient Consultation Requirements**

74. There is no legal right for Indigenous parties to be consulted on the heritage status of particular sites. The 2010 amendments to the NPW Act and accompanying Regulations<sup>130</sup> have nevertheless created non-binding requirements to consult with local Aboriginal groups before an AHIP is issued or varied.<sup>131</sup> The proponent of any development must then prepare a cultural heritage assessment report premised upon consultation with specific Registered Aboriginal Parties (“RAPs”).<sup>132</sup>

75. But the emphasis of the legislative regime under the NPWA and Regulations is on consultation, not consent. There is no requirement that traditional owners give their consent to the granting of an AHIP or endorse the findings in any consultation heritage assessment report.<sup>133</sup> Instead, the final decision as to whether to issue an AHIP rests with the Minister.

### **Lack of Resources for Litigation**

76. The number of prosecutions that have been undertaken for offences in relation to damage to Aboriginal cultural heritage have been significantly outnumbered by the amount of impact permits that have been issued by the same department.<sup>134</sup>

77. From 2005 to 2011, only four prosecutions of offences against Aboriginal cultural heritage occurred in NSW, compared with the 157 applications for AHIPs in the

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<sup>129</sup> Environmental Defender’s Office, Submission to the Aboriginal Culture and Heritage Reform Working Party on Aboriginal Culture and Heritage Legislative Review and Reform, 19 December 2011, 11.

<sup>130</sup> *National Parks and Wildlife Regulations 2009* (NSW).

<sup>131</sup> *National Parks and Wildlife Regulations 2009* (NSW) s 80C.

<sup>132</sup> *National Parks and Wildlife Regulations 2009* (NSW) s 80D.

<sup>133</sup> NSW Aboriginal Land Council, *Factsheet: Using the law to protect Aboriginal culture and heritage: Consultation* (September 2010) 2.

<sup>134</sup> EDO, above n 136, 7-8.

year of 2007 alone, 92% of which were granted.<sup>135</sup> Between 2004 and 2009, an average of five AHIPs were issued per week.<sup>136</sup>

78. Further, enforcement by Aboriginal peoples of statutory measures to protect cultural heritage is expensive. Judicial review is stultified by the threat of adverse costs orders if the court does not find the litigation to be in the public interest.<sup>137</sup> Legal aid is not available for cases relating to the protection of Indigenous cultural heritage and recent funding constraints imposed on community legal centres and the Environmental Defender's Office, further limit the availability of Aboriginal groups to enforce the existing law.<sup>138</sup>

### **Inadequate Penalties**

79. The maximum penalties for the damage or destruction of Aboriginal cultural heritage are manifestly too low. And more particularly, as was noted in the decision of *Chief Executive, Office of Environment and Heritage v Ausgrid*,<sup>139</sup> the maximum penalties for these offences are considerably lower than comparable offences that fall under other environmental and planning statutes,<sup>140</sup> such as the *Environmental Planning and Assessment Act 1979* (NSW) or the *Protection of the Environment Operations Act 1997* (NSW)<sup>141</sup>.

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<sup>135</sup> Ibid, 7.

<sup>136</sup> Schnierer, Ellsmore and Schnierer, above n 126, 57.

<sup>137</sup> See, for example, *Anderson v Director-General of the Department of Environment and Climate Change* [2008] NSWLEC 299. In that case, the Land and Environment Court found that there was insufficient basis to depart from the normal costs rule because, although the proceedings could be described as "in the public interest", there was disagreement among the Aboriginal litigants as to whether or not a permit should be issued and the case had not been a particularly strong one: at [14].

<sup>138</sup> The Hon Greg Smith SC MP, "Greater access to justice for disadvantaged" (Press Release, 20 December 2012)

<[http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll\\_corporate.nsf/vwFiles/201212\\_MR\\_Access\\_to\\_justice\\_disadvantaged.pdf/\\$file/201212\\_MR\\_Access\\_to\\_justice\\_disadvantaged.pdf](http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/201212_MR_Access_to_justice_disadvantaged.pdf/$file/201212_MR_Access_to_justice_disadvantaged.pdf)>.

<sup>139</sup> [2013] NSWLEC 51.

<sup>140</sup> *Chief Executive, Office of Environment and Heritage v Ausgrid* [2013] NSWLEC 51 at [46].

<sup>141</sup> Offences by individuals against the *Environmental Planning and Assessment Act 1979* (NSW) (EPAA) attract a maximum penalty of 10,000 penalty units or \$1,100,000, and possibly a further daily penalty of 110 penalty units or \$110,000: EPAA s 126. Tier 1 offences by individuals against the *Protection of the Environment Operations Act 1979* (NSW) (POEOA) attract a maximum penalty of \$1,000,000 or 7 years' imprisonment: POEOA s 119(b). Tier 1 offences by corporations against the POEOA attract a maximum penalty of \$5,000,000 for wilful actions and \$2,000,000 for negligent actions: POEOA s 119(a).



80. Prior to the 2010 amendments to the NPW Act, maximum penalties in NSW were even lower. Hence in *Plath v O'Neill* defendants found guilty of deliberate destruction of middens and possible Aboriginal ancestral remains were fined \$800.<sup>142</sup> And in *Garrett v Williams* [2007] 151 LGERA 92 where the defendant was fined \$1,350 for knowingly damaging an Aboriginal object and damaging an Aboriginal place. Since 2010, the maximum penalties have been increased, but they are still insufficient. Thus in *Ausgrid*, for example, the albeit accidental destruction of an Aboriginal rock carving resulted in a fine of \$4690, much to the distress of the local Aboriginal community and various commentators<sup>143</sup>. The maximum penalty under the Act was only \$220,000 for a corporation.

81. And of course, in the case of damage to Indigenous cultural heritage by corporations, the inadequacy of the penalties arguably sets up a paradigm whereby the destruction of Aboriginal heritage can become a mere “purchasable commodity which can be discounted as an additional licensing fee”.<sup>144</sup> This has the tendency to undermine the fulfilment of the fundamental sentencing objective of deterrence.<sup>145</sup>

### **Lack of Proactive Harm Prevention**

82. The need for departmental consent to destruction is, as stated above, a disempowering process for Indigenous parties. In addition, processing applications for impact permits takes up departmental resources that could be better spent on harm prevention and enforcement.<sup>146</sup>

83. There are also problems with data collection. The AHIMS has only a fraction of potential Aboriginal cultural heritage on its database, meaning that there may be unrecorded Aboriginal heritage items on the land which are not available on the

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<sup>142</sup> *Plath v O'Neill* [2007] NSWLEC 533; (2007) 174 A Crim R 336.

<sup>143</sup> A Packham, “Between a rock and a hard place: Legislative shortcomings hindering Aboriginal cultural heritage protection” (2014) 31 *Environment Planning Law Journal* 75.

<sup>144</sup> Z Lipman and L Roots, “Protecting the Environment through Criminal Sanctions: The Environmental Offences and Penalties Act 1989 (NSW)” (1995) 12(1) *Environmental Planning Law Journal* 16, 31.

<sup>145</sup> *R v Rushby* [1977] 1 NSWLR 594 at 597; *Director-General, Department of Environment and Climate Change v Rae* [2009] NSWLEC 137; (2009) 168 LGERA 121 at [89].

<sup>146</sup> Seiver, above n 77, 9.

website. The incompleteness of the public record means that developers may not be aware of Indigenous cultural heritage in the area they begin work on and may inadvertently harm Indigenous cultural heritage.<sup>147</sup>

### **Lack of Recognition of Intangible Cultural Heritage**

84. The NPW Act makes little or no provision for the protection of intangible heritage notwithstanding that reference to intangible cultural heritage is contained with the 2010 Consultation Guidelines that accompany the Act:<sup>148</sup>

Aboriginal cultural heritage has social/cultural, historic, aesthetic and scientific (archaeological) significance. All aspects should be given the same weight and assessed equally by the proponent in the Aboriginal cultural heritage assessment report.

85. Thus in *Ashton Coal Operations Pty Limited v Director-General, Department of Environment, Climate Change and Water (No 3)*,<sup>149</sup> which concerned the fulfilment of the requirements for the issue of an AHIP under s 90K of the NPW Act, the Land and Environment Court found that, while the archaeological significance of objects had been investigated, much less attention had been paid to the intangible heritage that related to the area.<sup>150</sup> An investigation of intangible heritage would have enriched and deepened the cultural heritage assessment and the Commissioners' true understanding of the significance of the area.<sup>151</sup> Intangible cultural heritage in the region included "specific cultural associations such as traditional routes, songlines associated with initiation ceremonies, birthing sites, and special traditional associations such as with the kingfisher and with bush medicine plants".<sup>152</sup> No oral history was taken, no genealogies or ethnographic information relating to traditional use patterns compiled. All cultural heritage assessment was limited to an investigation of objects.<sup>153</sup>

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<sup>147</sup> Chapman, above n 1, 94.

<sup>148</sup> NSW Department of Environment, Climate Change and Water, *Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010* (NSW), r 3.1.

<sup>149</sup> [2011] NSWLEC 1249.

<sup>150</sup> *Ashton Coal Operations Pty Limited v Director-General, Department of Environment, Climate Change and Water (No 3)* [2011] NSWLEC 1249 at [83].

<sup>151</sup> *Ibid* at [83] and [97].

<sup>152</sup> *Ibid* at [81].

<sup>153</sup> *Ibid* at [84].

86. Despite the importance of intangible cultural heritage to the relevant Aboriginal groups,<sup>154</sup> because the focus of s 90K(1) was on objects alone this meant that there was sufficient evidence to permit the AHIP to be issued.<sup>155</sup>

## **IN WHAT SPECIFIC WAYS CAN THE NSW LEGISLATIVE SCHEME BE REFORMED TO BETTER PROTECT INDIGENOUS CULTURAL HERITAGE?**

### **Commonwealth Initiatives**

87. The various legislative regimes that govern the protection of Indigenous cultural heritage vary significantly not only from Commonwealth to State and Territories but also as between the States and Territories, thereby preventing the protection of Indigenous cultural heritage in a robust and consistent way. Ideally, therefore, the enactment of uniform legislation across Australian States and Territories to protect Indigenous cultural heritage would be preferable.

88. Alternatively, the Commonwealth could ratify the *2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage*, which provides a framework for the identification and preservation of intangible heritage, including social practices, spiritual practices, knowledge concerning nature and the universe and traditional craftsmanship.<sup>156</sup>

89. But in the current political climate, neither are likely.

### **Stand-Alone NSW Legislation**

90. In NSW, at least, for the reasons given above, legislative reform is necessary. The Government must enact dedicated legislation dealing exclusively with Indigenous cultural heritage to remove any association with parks and wildlife in order to appropriately recognise the importance of cultural heritage to Indigenous persons.

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<sup>154</sup> Ibid at [136].

<sup>155</sup> Ibid at [88].

<sup>156</sup> *UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage* 2003, Article 2.

91. Fortunately, the need for such legislation has been recognised by the NSW Government. According to a very recent OEH report entitled *Reforming the Aboriginal Cultural Heritage System in NSW: a NSW Government model in response to the ACH Reform Working Party's recommendations and public consultation*, the State Government proposes to enact stand-alone Aboriginal cultural heritage legislation,<sup>157</sup> thereby fulfilling an election promise made in 2011 by the then Liberal opposition.

92. A detailed survey of the proposed reforms is beyond the scope of this paper, but its principal features are described as follows:

The new approach to ACH protection draws on four important principles:

- respect for Aboriginal culture, to recognise Aboriginal people's responsibility and authority over their own cultural heritage and their right to expect protection for significant cultural values;
- legislative balance, to recognise the different needs and interests of groups within the whole community and to deliver social, economic and environmental outcomes in the best interests of all people in NSW;
- Government efficiency, to reduce red tape, duplication and unnecessary state intervention in local issues; and
- best practice in heritage protection, to establish benchmarks for performance and deliver a diverse range of benefits.

93. The proposed legislation is premised on four key elements:

- (a) first, stand-alone legislation enacted for "pragmatic and symbolic reasons" that will include "more contemporary definitions" for Aboriginal cultural heritage designed to cover more than objects and places and will include both tangible and intangible cultural values;
- (b) second, the Act is to ensure that Aboriginal people have both responsibility for and authority in cultural protection. At a local level, committees are to be established for all consultation and decision-

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<sup>157</sup> NSW Office of Environment and Heritage, *Reforming the Aboriginal Cultural Heritage System in NSW: a NSW Government model in response to the ACH Reform Working Party's recommendations and public consultation* (2013) 2, available at <<http://www.environment.nsw.gov.au/resources/cultureheritage/20130760achrefgov.pdf>>, accessed 28/02/2014.

making. These committees are to be responsible for mapping local cultural heritage within agreed boundaries, to develop publicly available Plans of Management and to act as a “one stop-shop” for consultation (similar to the Victorian RAPs). At a State level, an Aboriginal Cultural Heritage Advisory Committee will advise the Government and “take on a new strategic role”. Its members will be Aboriginal people with relevant skills, knowledge of planning and legislation and experience in Aboriginal cultural heritage matters;

(c) third, the Act envisages a greater integration between elements of the protection to be afforded to Indigenous cultural heritage and the planning regime. In this regard, AHIPs are to be replaced with flexible Project Agreements negotiated at the local level. These agreements are intended to be legally binding once entered upon an Aboriginal Cultural Heritage Register. Furthermore, the new regulatory approach is to enable “streamlined assessment and consultation processes”. Low or no impact projects or projects occurring in an area mapped as having low or no cultural heritage value will be able to proceed, whereas activities in areas of high value will require consultation with a local committee; and

(d) fourth, the new Act will be administered by the Minister for Heritage. To implement the Act the Government will establish a dedicated Heritage Division, which will be responsible for monitoring compliance with the new Act and enforcement of its provisions.

94. Each element is examined in turn.

### **Authority Over Definition of Cultural Heritage**

95. At the risk of repetition, it is important that Aboriginal people be given control over the definition of their cultural heritage. The NSW Government proposes to reform the definition of Aboriginal cultural heritage to mean “practices, representations, expressions, knowledge and skills – as well as associated

objects and artefacts – that Aboriginal people recognise as part of their cultural heritage, insofar as these values are reflected in the landscape”.<sup>158</sup> This definition would represent an important step forward because it would afford Aboriginal self-determination over their own heritage, and would also acknowledge the existence and relevance of intangible cultural heritage.

### **Establishment of Independent Aboriginal Cultural Heritage Agencies to Administer the Act**

96. Rather than the Act being administered by the Minister for Heritage, it would be preferable if a separate and independent agency was established to administer the new Act, along the lines of the Aboriginal Areas Protection Authority in the Northern Territory or Victorian schemes. The body should be made up of relevant Indigenous people and heritage experts with particular understanding of Indigenous cultural heritage in NSW. Such a reform would be consistent with recommendations made in previous reviews of NSW heritage laws<sup>159</sup> and with the *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”), adopted by Australia in 2009. Failing the establishment of a specific body, consultation with the relevant Aboriginal groups must be compulsory in any new NSW legislation.

### **Higher Penalties and Increased Resources**

97. As discussed above, penalties awarded for damage to or destruction of Aboriginal cultural heritage have been too low. It is disappointing to note that in the proposed reforms the NSW Government has expressed an intention to maintain the current penalty regime.<sup>160</sup>
98. It is also clear that in order to properly implement the new Act, including the establishment of local and State advisory committees, adequate resources will have to be provided by the Government.

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<sup>158</sup> NSW Government reform proposal, above n 160, 13.

<sup>159</sup> NSWALC, above n 79, 2.

<sup>160</sup> NSW Government reform proposal, above n 160, 37.

## **Cultural Heritage Mapping and Plans of Management**

99. In relation to the creation of cultural heritage mapping and Plans of Management, care must be taken to avoid inappropriate disclosure of culturally sensitive information.<sup>161</sup> Provision should be made for the protection of privacy in relation to sacred sites and objects, as exists in the ACT.

## **Incorporation into the Planning Regime**

100. The integration of Aboriginal cultural heritage issues into the planning and development process is laudable. This could, for example, involve mandated consideration of cultural heritage mapping and Plans of Management in any planning approval assessment.

101. Having said this, in striving to remove so-called 'red' or 'green tape' and streamline assessment processes, care must be taken to ensure that proper cultural heritage assessment nevertheless takes place. Speed must not trump substance.

102. In this context, it is noted with some dismay that one mooted reform proposal is to remove any need for an AHIP equivalent for State significant development, infrastructure, or public priority infrastructure.<sup>162</sup>

## **CONCLUSION**

103. In NSW, at least, the current legislative arrangements are insufficient to provide an adequate framework within which to protect Indigenous cultural heritage, both tangible and intangible. The consequence has been, over time, its attendant damage and destruction. Whether intentional or accidental, this destruction affects the ability of Aboriginal persons to participate in cultural activities and undermines the concept and practice of intergenerational equity. Moreover, it "has the tendency to perpetuate the 'national legacy of unutterable shame'

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<sup>161</sup> *Hunter Environment Lobby v Minister for Planning and Ashton Coal Operations Limited*. Unreported decision by Registrar Walton.

<sup>162</sup> Planning Bill 2013 (NSW), 6.2.

caused by the dispossession of Aboriginal persons from lands as a consequence of colonisation”.<sup>163</sup>

104. The NSW reforms, if enacted as proposed, will significantly strengthen protection for Aboriginal cultural heritage. However, as the discussion above demonstrates, there is still considerably more that can, and should, be achieved across Australia to preserve this invaluable legacy for the benefit of past, present and future Indigenous (and non-Indigenous) persons alike.

**5 March 2014**

**The Hon Justice Rachel Pepper  
Land and Environment Court of New South Wales**

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<sup>163</sup> *Chief Executive, Office of Environment and Heritage v Ausgrid* [2013] NSWLEC 51 at [43] quoting *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 at 104 per Deane and Gaudron JJ.