

Reforming NSW Laws for the Protection of Aboriginal Cultural Heritage

Discussion Paper



About the Environmental Defender's Office NSW

The EDO is a community legal centre that specialises in environmental law. We are a non-profit organisation and we are independent from government. We have two offices, one in Sydney and a Northern Rivers branch office in Lismore. The Lismore office services the Northern Rivers region which covers the area from just south of Port Macquarie north to the Queensland border and west to Armidale. The Sydney office covers the rest of the State.

In 2006 the EDO established an Indigenous Engagement program with initial funding from the Law and Justice Foundation and then funding from the Aboriginal Legal Access Program. This discussion paper has been prepared by the EDO's Aboriginal Solicitor as part of that program.

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Cover artwork – 'Unity' by Alison Buchanan

Junnoy Wurriwan (English name – Alison Buchanan) kindly donated the cover artwork to the EDO. Alison was born in the Nambucca Valley on the NSW mid-north coast where she was lucky enough to maintain a strong connection with the life and culture of the Gumbaynggirr people.

Alison's artworks reveal a love and respect for nature, reflecting the coastal colours and surroundings that she grew up with.

Alison has established an Aboriginal art print company, Indigetec Pty Ltd, where she sells her prints. We encourage you to look at her work by visiting www.indigetec.com.au. You can also contact Alison at Alison@indigetec.com.au

Discussion Paper: Reforming New South Wales' Laws for the Protection of Aboriginal Cultural Heritage

1. Introduction

1.1. Protecting Aboriginal Cultural Heritage in NSW

The protection of Aboriginal cultural heritage, which includes both physical objects and spiritual tradition and customs associated with land and places, is of critical importance to Indigenous peoples for whom 'cultural heritage is a direct physical and spiritual link with their historical and traditional association to the land'.¹

For a number of years, the EDO has assisted Aboriginal people and groups across NSW to protect their cultural heritage, through community education and client consultation in litigation and advisory roles. Through these avenues, a number of problems with the legislation in NSW that is intended to protect Aboriginal cultural heritage have been highlighted. Complaints about the system established by the National Parks and Wildlife Act (*NPW Act*) and the manner in which it is implemented and enforced by the Department of Environment and Climate Change² (*DECC*) from Aboriginal people and communities are frequently heard, particularly in relation to the issue of consents to permit the destruction of Aboriginal objects in the context of development, and the consultation process with Aboriginal communities relating to such matters.

Aboriginal elders have been forced to resort to litigation to stop the destruction of Aboriginal objects and the development of places of cultural significance, which has only had limited success. Indeed, the fact that Indigenous communities are forced so frequently to resort to litigation is testament to the fact that the system for protecting Aboriginal cultural heritage is not achieving good outcomes for Indigenous people in NSW. Moreover, with the recent Anderson decisions³ in which the Land and Environment Court made costs orders against the Aboriginal plaintiffs, a further disincentive now exists, given how expensive litigation frequently is.

¹ O'Dwyer B, 'Aboriginal Heritage Under Threat in NSW', Chain Reaction magazine #99, March 2007, available at:

<http://www.foe.org.au/resources/chain-reaction/editions/99/cr-99-essays-regular-sections/aboriginal-heritage-under-threat-in-nsw?>

² Formerly, the National Parks and Wildlife Service (NPWS). The NPWS is still commonly referred to and remains the 'public face' of the branch of DECC that administers the NPW Act.

³ See Appendix for summaries of some relevant Anderson decisions. See also Ruddock K, 'Bankruptcy - the price for seeking to protect indigenous rights?' (2009, unpublished).

1.2. Purpose of Discussion Paper

In this context, this Discussion Paper seeks to initiate a dialogue to promote the reform of NSW's system for protecting Aboriginal cultural heritage in the context of proposed amendment of the *National Parks and Wildlife Act 1974*, the revised NSW draft Consultation Guidelines, and the Omnibus Bill.

The purpose of this discussion paper is to provide a basis for a discussion about the existing problems with the legislation, and proposed legislation, and seek feedback on these problems, and to canvass some options for reforming the system to ensure that there is improved protection, management and conservation of Aboriginal cultural heritage.

1.3. Scope of Discussion Paper

This Paper sets out the current system in NSW for protecting Aboriginal cultural heritage. It then identifies and outlines some commonly raised issues and concerns with this system that have been raised by various people including Aboriginal traditional owners and custodians, Aboriginal elders, lawyers, and other commentators.

To enable a comparative evaluation, the Discussion Paper provides a review of legislation to protect Aboriginal cultural heritage in the other States and Territories of Australia, and the Commonwealth, and also sets out Australia's international obligations in this area. These overviews provide a basis for a discussion of alternative options for protecting Aboriginal cultural heritage in NSW. Throughout the paper we have included questions to facilitate reflection on and discussion of issues arising for the reform of NSW's Aboriginal cultural heritage laws and policy.

A number of case studies of NSW litigation that has sought to protect Aboriginal cultural heritage are set out in the Appendix. These cover some of the more recent cases in the NSW Land and Environment Court and Court of Appeal relating to Aboriginal cultural heritage provisions in the NPW Act between 2002 to 2008.

2. NSW Legislative Framework

2.1. National Parks and Wildlife Act 1974 (NPW Act)

The NPW Act is the primary legislation in NSW that addresses Aboriginal cultural heritage. The NSW Department of Environment and Climate Change (DECC) administers the NPW Act, and therefore has the responsibility for protecting Aboriginal cultural heritage in NSW.

2.1.1. Objects

Relevant objects of the NPW Act in relation to protecting Aboriginal cultural heritage include:⁴

(1) (b) the conservation of objects, places or features (including biological diversity) of cultural value within the landscape, including, but not limited to:

(i) places, objects and features of significance to Aboriginal people

2.1.2. Definitions: Aboriginal Objects and Aboriginal Places

Under the NPW Act, ‘Aboriginal objects’ are deposits, objects or material evidence relating to Aboriginal habitation of New South Wales,⁵ and include Aboriginal remains.

Aboriginal objects are, legally, the property of the Crown (the Government).⁶

An ‘Aboriginal place’ is a place which is or was of special significance to Aboriginal culture, and is considered to be so, in the opinion of the Minister.⁷

2.1.3. Methods of Protection

The Director-General has statutory responsibility for the proper care, preservation and protection of Aboriginal objects and Aboriginal places in NSW, and for the proper restoration of any land that has been disturbed or excavated for the purpose of discovering an Aboriginal object.⁸ There are five main ways that the NPW Act protects Aboriginal cultural heritage, as follows:

- Aboriginal areas

Land may be dedicated as an ‘Aboriginal area’ to preserve, protect and prevent damage to, Aboriginal objects or Aboriginal places on that land.⁹ Crown land, or land that has been acquired by the Minister, either voluntarily or by compulsory acquisition, can be reserved as an Aboriginal area.¹⁰

- Stop work orders

The Director-General of DECC may issue a stop work order for up to 40 days if an action that is being, or is about to be carried out is likely to significantly affect an

⁴ *National Parks and Wildlife Act 1974 (NSW) s2A*

⁵ *National Parks and Wildlife Act 1974 (NSW) s5*

⁶ *National Parks and Wildlife Act 1974 (NSW) s83*. There are policies that encourage repatriation of Aboriginal ancestral remains back to Aboriginal communities when they can be identified either by documentation or other scientific means.

⁷ *National Parks and Wildlife Act 1974 (NSW) s84*

⁸ *National Parks and Wildlife Act 1974 (NSW) s85*

⁹ *National Parks and Wildlife Act 1977 (NSW) ss 30K and 62*

¹⁰ *National Parks and Wildlife Act 1974 (NSW) s145*

Aboriginal object or Aboriginal place.¹¹ The order can be extended for further periods of 40 days.¹² This does not apply if the action is authorised by another Act.¹³

- Interim Protection Orders

The Minister can make an interim protection order to preserve land with Aboriginal places or objects on it.¹⁴ Interim protection orders are valid for the period that is specified in the order but no longer than 2 years.¹⁵

- Conservation agreements

The Minister may make conservation agreements with landowners to protect areas which contain objects or Aboriginal places of special significance.¹⁶ A conservation agreement may restrict the use of the area and may require the preservation of the area.

- Criminal offences

There are a number of criminal offences under the NPW Act that relate to cultural heritage.¹⁷ These offences can deter people from destroying or damaging items or places of heritage value, and include: intentionally damaging an Aboriginal object, excavating land for the purpose of discovering an Aboriginal object, and removing an Aboriginal object from a national park or Aboriginal area.¹⁸

2.1.4. Duty to Notify

A person who is or becomes aware of the location of an Aboriginal object must notify the Director-General within a reasonable period of time. It is an offence to fail to notify the Director-General unless the person believes on reasonable grounds that the Director-General is aware of the location of that Aboriginal object.¹⁹

2.1.5. Permits and Consents to Destroy, Deface or Damage

It is not an offence to destroy Aboriginal cultural heritage if approval has been obtained from DECC in accordance with Part 6 of the NPW Act.

The Director-General of DECC can give consent for a person to destroy, deface or damage an Aboriginal object or Aboriginal place (*s90 Consent*).²⁰ The Director-General can also issue permits to move and disturb objects and places of cultural

¹¹ *National Parks and Wildlife Act 1974* (NSW) s91AA

¹² *National Parks and Wildlife Act 1974* (NSW) s91DD

¹³ *National Parks and Wildlife Act 1974* (NSW) s91DD(3), (4) and (5)

¹⁴ *National Parks and Wildlife Act 1974* (NSW) s91A

¹⁵ *National Parks and Wildlife Act 1974* (NSW) s91D(1)

¹⁶ *National Parks and Wildlife Act 1974* (NSW) s69C(1)(d)

¹⁷ *National Parks and Wildlife Act 1974* (NSW) s86

¹⁸ *National Parks and Wildlife Act 1974* (NSW) ss 86 and 90

¹⁹ *National Parks and Wildlife Act 1974* (NSW) s91

²⁰ *National Parks and Wildlife Act 1974* (NSW) s90

heritage value (*s87 Permit*).²¹ In essence, these permits make it legal to do any of the things that would otherwise be offences under the NPW Act.

The s90 Consents and s87 Permits are now collectively referred to as ‘Aboriginal Heritage Impact Permits’ (*AHIP*).

2.1.6. Aboriginal Cultural Heritage Advisory Committee

The NPW Act establishes an Aboriginal Cultural Heritage Advisory Committee (*ACHAC*), whose role is to advise the Minister and Director-General of DECC on any matter relating to the identification, assessment and management of Aboriginal cultural heritage. This includes providing strategic advice on the *AHIP* process, whether or not the matter has been referred to the Committee by the Minister or the Director-General.²²

The *ACHAC* is to consist of one member nominated by the NSW Aboriginal Land Council, and 10 other members appointed as nominees of Aboriginal elders groups, registered native title claimants, and Aboriginal owners registered under the *Aboriginal Land Rights Act* 1983. The members of the *ACHAC* are to be persons who are involved in cultural heritage matters in their local communities, and have an understanding of cultural heritage management issues.²³

2.1.7. Interim Consultation Guidelines

DECC released ‘Interim Community Consultation Requirements for Applicants’ (*Guidelines*) in December 2004, as an attempt to ‘clarify and reaffirm the intent of its policies regarding the requirements for consultation by proponents with members and representatives of Aboriginal communities’.²⁴ The purpose of the *Guidelines* is to establish the requirements on the part of proponents, when seeking permission from DECC for an *AHIP*, for consultation with members and representatives of Aboriginal communities. These *Guidelines* are not required to be developed by the NPW Act, and are therefore not binding. However, they do signify the policy position taken by DECC in relation to how consultation should proceed when anyone applies for an *AHIP*. They clearly state that DECC, not the Aboriginal community, is the decision maker in the *AHIP* process.²⁵

The *Guidelines* were under review in 2008 and a final version released in May 2009.

AHIMS Register

Although not required by the NPW Act, in practice DECC keeps a register of all recorded Aboriginal objects and Aboriginal places in a particular location, known

²¹ *National Parks and Wildlife Act 1974* (NSW) ss 86-87

²² *National Parks and Wildlife Act 1974* (NSW) s28

²³ *National Parks and Wildlife Act 1974* (NSW) schedule 9

²⁴ See <http://www.environment.nsw.gov.au/resources/parks/interimConsultationGuidelines.pdf> at page 1.

²⁵ *Ibid* at page 3.

as the Aboriginal Heritage Information Management System (*AHIMS*). The information recorded in AHIMS can be made available on request.²⁶ However, the information contained in AHIMS is not comprehensive: there are likely to be many undiscovered or unrecorded Aboriginal objects and places in NSW.

2.2. Other NSW Legislation that Protects Aboriginal Cultural Heritage

2.2.1. State Heritage Register

Natural and cultural heritage can be protected via the State Heritage Register.²⁷ This list may include cultural heritage items or places²⁸, but it does not include 'Aboriginal relics'.

The Minister for Planning decides what gets listed, but the Heritage Council can recommend listings. Things that are listed on the State Heritage Register are protected and cannot be demolished, redeveloped or otherwise altered without an approval from the Heritage Council.

2.2.2. Protection under the *Environmental Planning and Assessment Act 1979*

Under NSW planning laws, all development and planning happens in accordance with state, regional and local environment plans (known as environmental planning instruments²⁹) that set out what types of development can happen where and what areas are protected.

As part of the NSW Government Planning Reforms, all Local Governments (*Councils*) must redraft their local environment plans (*LEPs*) so that they conform with the new standard LEP template designed by the State Government. When Councils are redrafting LEPs, Council must provide for the conservation and management of Aboriginal heritage.³⁰ Aboriginal bodies such as Land Councils can tell Council about items and places of heritage significance, which will mean that Council's LEP must facilitate the conservation of those items or places.

Before a new LEP can come into force, it must be publicly exhibited and the public is allowed to comment on the provisions of the LEP. This is an opportunity for local Aboriginal people to have a say in the level of protection their Council gives

²⁶ For more information, view DECC's website on AHIMS at:

<http://www.environment.nsw.gov.au/licences/AboriginalHeritageInformationManagementSystem.htm>

²⁷ *Heritage Act 1977* (NSW) Part 3A.

²⁸ *Heritage Act 1977* (NSW) s4. Under the Act, 'item' means a place, building, work, relic, moveable object or precinct, and 'place' means an area of land, with or without improvements. The definition of relic excludes Aboriginal relics.

²⁹ Most environmental planning instruments- Local Environmental Plans, Regional Environmental Plans and State Environmental Planning Policies, are available online at www.legislation.nsw.gov.au under 'Browse In Force'.

³⁰ Direction 9 under the powers conferred by s 117 of the *Environmental Planning and Assessment Act 1979*. See http://www.planning.nsw.gov.au/planning_reforms/p/s117s_30sept05.pdf

to cultural heritage in their area, by making a written submission during the exhibition period.³¹

The Minister for Planning decides whether to approve an LEP. Once the Minister has approved the LEP, any development that is consistent with the LEP can be approved by the Council. It is therefore important to look carefully at the LEP and raise any objections during the exhibition period, otherwise it may not be possible to challenge a development later on.

The standard LEP template (which all Councils must implement) also stipulates that a consent authority, before granting consent for development in a place of Aboriginal heritage significance, must consider the effect of the proposed development on the heritage significance of the place and any Aboriginal object known or reasonably likely to be located at the place. The consent authority must also notify the local Aboriginal communities (in such way as it thinks appropriate) about the application and take into consideration any response received within 28 days after the notice is sent.³²

1. Do you think the NPW Act achieves its stated objective of the conservation of ‘places, objects and features of significance to Aboriginal people’? Is this objective suitable?
2. Do you think that the NPW Act, together with other applicable legislation set out in Part 2 above, establishes a suitable framework for protection Aboriginal cultural heritage in NSW? If not, what are some of the major issues?
3. What aspects of the NPW Act do you think are working well?
4. What aspects of the NPW Act do you think can be improved?
5. What do you think are the major roles for relevant stakeholders in a legal regime for protecting Aboriginal cultural heritage in NSW (Indigenous people; local councils; State Government; developers; land owners)?

3. What are some criticisms of the current system in NSW?

For some years, criticism has been made of the existing system in NSW by Aboriginal people, non-governmental organisations, as well as lawyers and other commentators.

It has been noted that as at March 2007, DECC has issued over 1200 s90 Consents (and has not refused any) since 2000, and there has only been one successful prosecution of the illegal destruction of any Aboriginal objects since the legislation

³¹ The exhibition period is usually 28 days.

³² Clause 5.10 (8), *Standard Instrument—Principal Local Environmental Plan*

was enacted in 1974.³³ Since then, it has been reported that in 2007, DECC received 157 applications for s90 Consents, of which 92% were approved. For the time up to October in 2008, 69 applications had been made of which 100% were approved.³⁴

These statistics alone raise concerns about the effective and adequate protection of Aboriginal cultural heritage under the NPW Act, and whether the legislation is achieving good outcomes.

In addition, a number of Indigenous people have had to resort to litigation to try to protect their heritage, by challenging the grant of AHIPs, as well as challenging development consents to prevent development on sites of Aboriginal significance.³⁵

A summary of these cases is contained in the appendix. While there have been some successes, including a recognition of the legitimate expectation for Aboriginal people to be consulted in the consideration of AHIPs, for the for the most part these legal challenges have not resulted in preventing development from going ahead (and thus the interference with, and destruction of, Aboriginal sites and objects). The fact that the only option to protect the cultural heritage of these Indigenous people has been litigation is troubling.

In this context, set out below are some criticisms that have been raised about the adequacy and appropriateness of the NPW Act to protect Aboriginal cultural heritage.

3.1. The contradictory nature of the NPW Act's provisions

The stated role of the Director-General of DECC under the NPW Act is to protect Aboriginal cultural heritage. However the chief operative provisions of the NPW Act centre on the power of the Director-General to grant permits for the destruction of Aboriginal cultural heritage. Thus, the system effectively regulates the destruction of Aboriginal objects and places, rather than protecting it.³⁶

The fact that ownership of Aboriginal cultural heritage is also by default vested in the Crown, which therefore (through the Director General and Minister) retains absolute discretion over its protection and destruction, is flawed given that it is the Aboriginal traditional owners who have the customary obligations towards, and interests in, protecting spiritual and sacred sites, places and objects.³⁷

³³As cited by Binnie O'Dwyer in 'Aboriginal Heritage Under Threat in NSW', Chain Reaction magazine #99, March 2007, above n1.

³⁴ Cohen I, MLC, 'Question on notice to Minister for Environment and Climate Change in NSW Parliament, Response from Minister' (28 October 2008), cited in Ruddock K, 'Bankruptcy - the price for seeking to protect indigenous rights?' (2009, unpublished).

³⁵ Of particular note are the multiple challenges made in each case by Mr Alan Carriage and Mr Roy Kennedy in relation to land at Sandon Point, Mr Neville Williams in relation to the Lake Cowal Gold Mine, and Doug and Susan Anderson, in relation to a site at Angels Beach, Ballina.

³⁶ Kennedy, J 'Operative Protection or Regulation of Destruction? The validity of permits to destroy Indigenous Cultural Heritage Sites,' [2005] *Indigenous Law Bulletin* 57; see also Ridge K and Seiver A, 'Carriage- An Elder's Journey through the Courts' [2005] *Indigenous Law Bulletin* 10.

³⁷ O'Dwyer, above n1.

3.2. Protection offered by the NPW Act is reactive, not proactive

Under the current NPW Act, protection of Aboriginal objects and places in practice relies upon Aboriginal people objecting to an application for an AHIP. DECC itself effectively has a reactive role in managing sites upon the receipt of AHIP applications, rather than actively working with Aboriginal people and communities to seek out cultural heritage in order to protect it.³⁸ Landowners or developers may not be aware of sites with Aboriginal cultural heritage, nor be willing to jeopardise their plans by informing DECC of any discovery of such heritage.³⁹ The goodwill of property developers can therefore be a necessity, so that they notify DECC upon the discovery of an object or place in circumstances where the object or place has not been declared or was previously unknown. While there are other protective mechanisms in the NPW Act (set out in section 2.1.3 above), these rely heavily on the discretion of the Minister or Director-General determining to utilise those powers.

3.3. Outdated and inappropriate framework and terminology

NSW is the only remaining State or Territory in Australia without independent legislation protecting Aboriginal cultural heritage. The inclusion of provisions for protecting Aboriginal cultural heritage within the NPW Act, which at its core is legislation that regulates flora and fauna, is inappropriate and paternalistic.⁴⁰ In addition, the NPW Act approaches the protection of cultural heritage predominantly from an archaeological perspective, rather than focusing on the cultural significance of objects and places for traditional owners themselves. Cases have depicted the difficulty communities have had in protecting land and sites that have cultural significance because of events that have taken place, or their spiritual meaning, rather than the location of particular objects and archaeological evidence.⁴¹ The NPW Act also fails to make provision for, and regulate, access to sacred sites for Aboriginal people.

3.4. Inadequate participation and consultation requirements for indigenous stakeholders

There is no requirement in the NPW Act for the direct participation of Aboriginal people in the protection of their cultural heritage, nor consultation in relation to decisions made under the Act. While case law has to some extent established a legitimate expectation on the part of Aboriginal persons to be consulted by DECC, given its policy of doing so,⁴² this is not an adequate guarantee for participation and consultation.

³⁸ Kennedy, above n36.

³⁹ Ibid.

⁴⁰ Ibid

⁴¹ See Appendix.

⁴² See for example, the case of *Carriage v Stockland* in the Appendix.

DECC's Interim Consultation Guidelines do establish that there should be notification of Indigenous stakeholders and print media advertising when applying for an AHIP, yet this in practice may require Aboriginal people to 'scour' newspapers to register interest in a particular application within 10 days.⁴³ Criticism of the very open provision of who should be consulted has also been made, because this has resulted in those with no actual geographical affiliation with the land registering interest.⁴⁴ Disputes can arise between different individuals and groups within the Indigenous community in this context. For example, a client of the EDO reported that over 30 groups registered for consultation in relation to one mine in the Upper Hunter Valley upon the publication of the Guidelines, which created considerable conflict within the community.

3.5. No merits appeal rights for Indigenous stakeholders

Indigenous stakeholders have no recourse for review on the merits of a decision, once an AHIP has been granted. This is particularly problematic given the uncertainty surrounding consultation requirements and the broad discretion of the Director-General under the NPW Act. Judicial review proceedings, which rely on there being a procedural error in the decision-making process, are not an adequate recourse.

3.6. Enforcement by DECC has been unsatisfactory, forcing litigation

DECC is either under-funded or unwilling to actively ensure protection of Aboriginal cultural heritage. DECC resources are directed to processing AHIP applications, rather than working with indigenous communities to identify and define Aboriginal cultural heritage across NSW, and prosecute breaches.⁴⁵ Prosecutions under the NPW Act by DECC have been limited. This, together with the lack of merit appeal rights, has forced Aboriginal people to litigate by themselves by judicial review challenges, noted above, which are expensive, time-consuming and a formal and frequently stressful process, particularly where the subject matter is an issue as sensitive as cultural and spiritual traditions. While some success has been achieved through litigation, unsuccessful cases have also resulted in costs orders as the Courts have failed to recognise the public interest nature of Aboriginal litigants seeking to protect their cultural heritage by litigation - which acts as a further deterrent.⁴⁶

⁴³ Ridge and Seiver, above n36.

⁴⁴ Other problems with the Interim Consultation Guidelines have been identified in 'Discussion Paper - Reviewing the Interim Community Consultation Requirements for Applicants for Aboriginal Heritage Impact Permits' published by DECC, see:

<http://www.environment.nsw.gov.au/resources/parks/ReviewInterimRequirementsForAHIP.pdf>

⁴⁵ Seiver A, 'Defining the offence of unlawfully destroying Aboriginal heritage' [2005] *Indigenous Law Bulletin* 11, 2.

⁴⁶ Ruddock K, above n34.

3.7. Criminal law is inappropriate to address harm to cultural heritage

Offences under the NPW Act can be difficult to prove (especially the requirement of ‘knowingly’), and penalties (fines and imprisonment) under the NPW Act are relatively inconsequential, ineffective, and inappropriate as they fail to recognise harm to the community.⁴⁷ The penalties are significantly increased in the proposed Omnibus Bill. Interestingly though, in a recent prosecution the Land and Environment Court required the defendant to participate in a ‘restorative justice’ conference with affected members of the local Aboriginal community in conjunction with a small penalty⁴⁸, which may be a more effective remedy.

There is also difficulty associated with the enforcement of the offence provisions under the NPW Act, because for destruction of Aboriginal cultural heritage to be considered a crime, there needs to be prior recognition of the site as an ‘Aboriginal area’ or an ‘Aboriginal object’. Further, the provisions do not provide Aboriginal people with adequate authority to enforce them.⁴⁹

3.8. Relationship with planning and land use regulation

As noted in section 3.2 above, the NPW Act provisions are highly reactive. This is compounded by the detachment of the Aboriginal cultural heritage protective provisions in the NPW Act from the planning and development assessment system. Impact assessment is often more of an afterthought, and there is no requirement for potential impacts on cultural heritage to be comprehensively addressed prior to the grant of development consent. Impact assessment requirements for development proposals also fail to include impact on living cultural tradition, as opposed to the physical environment and heritage sites viewed simply as relics.⁵⁰

Even in circumstances where Aboriginal cultural heritage has been protected from development, this is often not effective in practice to adequately protect a sacred site. For example, the system has failed to enable the provision of buffer zones around significant or sacred sites which can impact on the cultural heritage values of a site.⁵¹ However, it should be noted that this may improve with recent planning reforms that require local councils to identify and Aboriginal cultural heritage in their area, and consider the impact of development applications on this heritage (see section 2.2.2 above).

⁴⁷ *National Parks and Wildlife Act 1974*, s 175 provides that the maximum penalty is 100 penalty units for individuals and 200 for corporations (which corresponds to \$11,000 and \$22,000 currently). For a breach of s90 specifically, maximum penalties are 50 penalty units (\$5,500) or imprisonment for 6 months, and 200 (\$22,000) penalty units for a corporation.

⁴⁸ See *Garrett v Williams, Craig Walter* [2007] NSWLEC 96, summarised in the Appendix.

⁴⁹ Seiver A, ‘Defining the offence of unlawfully destroying Aboriginal heritage’ (2005) *Indigenous Law Bulletin* 6(9) at 8

⁵⁰ Collings N, ‘Protecting Indigenous Cultural Identity’ [2006] *Indigenous Law Bulletin* 36

⁵¹ Environmental Defender’s Office NSW (2008) ‘Part C; Protecting Aboriginal Cultural Heritage’ in *Caring for Country: a Guide to Environmental Law for Aboriginal Communities* (2nd ed.) at pp 20-21.

1. What aspects of the NPW Act do you think are working well?
2. What do you think are the most problematic aspects of the NPW Act? How could these be changed to ensure better outcomes for Indigenous people?
3. Have you experienced or identified other practical problems with the NPW Act that have not been mentioned here?

4. Legislation in the other Australian States and Territories protecting Aboriginal cultural heritage

NSW is the only state in Australia that does not have legislation directed specifically towards the protection of Aboriginal cultural heritage. This part of the Discussion Paper summarises the primary legislation aimed towards protecting Aboriginal cultural heritage in each State and Territory.

Each piece of legislation varies, often considerably, in the way it establishes a framework to protect Aboriginal cultural heritage. However, there are naturally common themes and features that are apparent in the legislation, although the extent to which each Act may focus on a particular theme can vary (and in some cases, is omitted). For the most part, the legislation will include provisions on how Aboriginal cultural heritage is defined, who owns it, and what is protected, the main methods of protection, what actions constitute offences, consultation requirements with Indigenous people, the establishment and operation of advisory bodies and information registers, and appeal rights and enforcement.

Some legislation is also set out in a great more detail and is more prescriptive (generally speaking, the more recent legislation) and this is reflected in the level detail set out in the summaries below. The most recently enacted legislation is discussed first.

4.1. Victoria - Aboriginal Heritage Act 2006

The *Aboriginal Heritage Act 2006* (Vic) was enacted on 9 May 2006 and commenced in May 2007. It repealed earlier provisions under the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic). Some of the important features of the *Aboriginal Heritage Act* include the establishment of a state-wide body to advise the Minister for Aboriginal Affairs on the management of cultural heritage, provisions for a permit system to manage activities that may harm Aboriginal cultural heritage and strengthening of the enforcement provisions. It also establishes an Aboriginal Heritage Register.⁵²

⁵² *Aboriginal Heritage Act 2006* (Vic) s144

4.1.1. Objectives

The Act contains a comprehensive set of objectives, set out below for consideration.

The objectives of this Act are—

- (a) to recognise, protect and conserve Aboriginal cultural heritage in Victoria in ways that are based on respect for Aboriginal knowledge and cultural and traditional practices;*
- (b) to recognise Aboriginal people as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage;*
- (c) to accord appropriate status to Aboriginal people with traditional or familial links with Aboriginal cultural heritage in protecting that heritage;*
- (d) to promote the management of Aboriginal cultural heritage as an integral part of land and natural resource management;*
- (e) to promote public awareness and understanding of Aboriginal cultural heritage in Victoria;*
- (f) to establish an Aboriginal cultural heritage register to record Aboriginal cultural heritage;*
- (g) to establish processes for the timely and efficient assessment of activities that have the potential to harm Aboriginal cultural heritage;*
- (h) to promote the use of agreements that provide for the management and protection of Aboriginal cultural heritage;*
- (i) to establish mechanisms that enable the resolution of disputes relating to the protection of Aboriginal cultural heritage;*
- (j) to provide appropriate sanctions and penalties to prevent harm to Aboriginal cultural heritage.⁵³*

4.1.2. Definitions

‘Aboriginal cultural heritage’ is defined to mean Aboriginal places, Aboriginal objects and Aboriginal human remains.

An ‘Aboriginal place’ is defined as ‘an area in Victoria or the coastal waters of Victoria that is of cultural heritage significance to the Aboriginal people of Victoria’.⁵⁴ This includes:

- (a) an area of land;
- (b) an expanse of water;
- (c) a natural feature, formation or landscape;
- (d) an archaeological site, feature or deposit;
- (e) the area immediately surrounding any thing referred to in paragraphs (c) and (d), to the extent that it cannot be separated from the thing without diminishing or destroying the cultural heritage significance attached to the thing by Aboriginal people;

⁵³ *Aboriginal Heritage Act 2006 (Vic) s3*

⁵⁴ *Aboriginal Heritage Act 2006 (Vic) s5(1)*

- (f) land set aside for the purpose of enabling Aboriginal human remains to be re-interred or otherwise deposited on a permanent basis;
- (g) a building or structure.⁵⁵

This definition broadens Aboriginal heritage beyond individual artefacts or sites to include the surrounds or the context.

An 'Aboriginal object' is defined as an object that relates to the Aboriginal occupation of any part of Australia, whether or not the object existed prior to the occupation of that part by people of non-Aboriginal descent, and is of cultural significance to the Aboriginal people of Victoria. Alternatively, an 'Aboriginal object' can be an object that is removed or excavated from an Aboriginal place, and is of cultural heritage significance to the Aboriginal people of Victoria.

The definition therefore places the emphasis on whether the object is of cultural heritage significance to Aboriginal people, rather than simply being evidence of Aboriginal habitation of an area (which has an archaeological or scientific focus).

4.1.3. Aboriginal Heritage Council

The Act establishes an Aboriginal Heritage Council. Its role is to advise the Minister in relation to the protection of Aboriginal cultural heritage in Victoria, including on the significance of Aboriginal human remains, places or objects, measures for effective protection and management, and for promoting the role of Aboriginal people in the protection and management of Aboriginal cultural heritage. The Minister can also request advice in relation to various powers under the Act, such as protection declarations, cultural heritage management plan proposals, cultural heritage audits and the compulsory acquisition of land.⁵⁶

4.1.4. Registered Aboriginal Parties

Aboriginal parties can apply to the Aboriginal Heritage Council to be 'Registered Aboriginal Parties,' with the role of being the primary source of advice and knowledge in relation to cultural heritage for a particular area. Registered Parties may consider and advise on applications for cultural heritage permits, evaluate and approve or refuse cultural heritage management plans, enter into cultural heritage agreements, and apply for protection declarations.⁵⁷ To become a Registered Party, details of the relationship or links to the area, and historical or contemporary interest in Aboriginal cultural heritage relating to the area must be provided by the body corporate applying.⁵⁸ There may be more than one Registered Aboriginal Party for a particular area.⁵⁹

⁵⁵ *Aboriginal Heritage Act 2006* (Vic) s5(2)

⁵⁶ *Aboriginal Heritage Act 2006* (Vic) s132

⁵⁷ *Aboriginal Heritage Act 2006* (Vic) s148

⁵⁸ *Aboriginal Heritage Act 2006* (Vic) s150

⁵⁹ *Aboriginal Heritage Act 2006* (Vic) s153

4.1.5. Protection of Places and Objects

The Act contains some protection for Aboriginal places and objects, including a duty to report, the requirement for permits, and the creation of offences.

- Duty to Report

The Act prescribes a duty to report the discovery of an Aboriginal place or object, where there is knowledge that the discovery is an Aboriginal place or object.⁶⁰ Owners or occupiers of land where such a discovery is made are entitled to continue use of the land, although must comply with provisions of the Act preventing harm to ACH.

- Cultural heritage permits

Cultural heritage permits are required to do one or more of the following:⁶¹

- (a) conduct disturb or excavate any land for the purpose of uncovering or discovering Aboriginal cultural heritage;
- (b) carry out scientific research on an Aboriginal place (including the removal of Aboriginal objects from that place for the purpose of that research);
- (c) carry out an activity that will, or is likely to, harm Aboriginal cultural heritage;
- (d) buy or sell an Aboriginal object;
- (e) remove an Aboriginal object from Victoria.

A cultural heritage permit may not be granted in respect of Aboriginal human remains or secret or sacred Aboriginal objects, or for an activity for which a cultural heritage management plan (discussed below) is required.⁶²

- Offences

It is an offence under the Act to knowingly harm Aboriginal cultural heritage, or to harm Aboriginal cultural heritage in a manner that is reckless or negligent as to whether the thing being harmed was Aboriginal cultural heritage.⁶³ Further, it is an offence to something that is likely to cause harm to Aboriginal cultural heritage.⁶⁴

If someone is guilty of an offence, a court can make an order to pay money for the cost of repair or restoration of the Aboriginal cultural heritage or something associated with it that also needs to be repaired or damaged as a result of the offence.⁶⁵

⁶⁰ *Aboriginal Heritage Act 2006* (Vic) s24

⁶¹ *Aboriginal Heritage Act 2006* (Vic) s36

⁶² *Aboriginal Heritage Act 2006* (Vic) s37

⁶³ *Aboriginal Heritage Act 2006* (Vic) s27

⁶⁴ *Aboriginal Heritage Act 2006* (Vic) s28

⁶⁵ *Aboriginal Heritage Act 2006* (Vic) s30

4.1.6. Participation and Consultation

Cultural heritage permit applications must be referred to registered Aboriginal parties.⁶⁶ There are a number of actions that a Registered Aboriginal party⁶⁷ may take, including objecting to the grant of the permit, not objecting to the grant of the permit, or agree to the grant of the permit with certain specified conditions.⁶⁸

If a registered Aboriginal party objects to the grant of a permit within the specified timeframe, the Secretary (of the Department) must refuse to grant the permit.⁶⁹

The power to specify conditions is important because the 'reasonable conditions' of a registered Aboriginal party *must* be imposed on a cultural heritage permit.⁷⁰ Moreover, conditions that conflict with the reasonable conditions of a Registered Aboriginal Party are prohibited.⁷¹

The nature of the conditions that can be made by a Registered Aboriginal Party is not expressly limited except for the one qualification: a condition cannot specify that the 'applicant pay or give money or money's worth to the Registered Aboriginal Party'.⁷² Aboriginal supervision over the fulfilment of these conditions as a registered Aboriginal party 'may include a condition that something be done to the satisfaction of the Registered Aboriginal Party'.⁷³

4.1.7. Cultural Heritage Management Plans

The Act introduced a new regime aimed at better integrating planning and development approval processes with the protection of Aboriginal cultural heritage, a major feature of which are cultural heritage management plans (*CHMP*). A CHMP is required for activities which require an Environment Effects Statement⁷⁴, or are designated as 'high impact' or within an area of 'cultural heritage sensitivity'.⁷⁵

A CHMP is required to involve an assessment of the area to determine the nature of any Aboriginal cultural heritage present in the area, and a written report setting out the results of the assessment and recommendations for measures to be taken before, during and after an activity, to manage and protect the identified Aboriginal cultural heritage.⁷⁶

⁶⁶ *Aboriginal Heritage Act* 2006 (Vic) s38

⁶⁷ For a full list of the functions of a registered Aboriginal group, see section 148 of the *Aboriginal Heritage Act* 2006.

⁶⁸ *Aboriginal Heritage Act* 2006 (Vic) s39

⁶⁹ *Aboriginal Heritage Act* 2006 (Vic) s40

⁷⁰ *Aboriginal Heritage Act* 2006 (Vic) s41(1)(a)

⁷¹ *Aboriginal Heritage Act* 2006 (Vic) s41(1)(b)

⁷² *Aboriginal Heritage Act* 2006 (Vic) s39(2)(b)

⁷³ *Aboriginal Heritage Act* 2006 (Vic) s39(2)(a)

⁷⁴ *Aboriginal Heritage Act* 2006 (Vic) s 49

⁷⁵ *Aboriginal Heritage Regulations* 2007 (Vic) cl 6

⁷⁶ *Aboriginal Heritage Act* 2006 (Vic) s42

Assessment for the purposes of a CHMP may include: research into information regarding aboriginal cultural heritage; a ground survey to detect the presence of aboriginal cultural heritage; and the disturbance of land to uncover or discover aboriginal cultural heritage.⁷⁷

A Registered Aboriginal Party can sponsor a plan,⁷⁸ and voluntary plans are permitted⁷⁹ where a plan is not required under the Act.⁸⁰ This can afford registered Aboriginal parties a means of providing input where they feel it is valuable to do so. Registered Aboriginal Parties must be kept aware of plans, and are given the opportunity to be involved in the development of a plan and to evaluate a final plan, for a fee. If a plan is sponsored by another, each relevant Registered Aboriginal Party must have notice of intention to prepare the plan before the plan is commenced.⁸¹

A sponsor must make all reasonable efforts to consult with Registered Aboriginal Parties before and during preparation of the plan.⁸² Registered Aboriginal Parties are also given an important advisory role if they have indicated their intention to be involved in the evaluation of a CHMP. This includes consulting with the sponsor in relation to the assessment of the area, consulting with the sponsor in relation to recommendations included in the CHMP, and participating in the conduct of the assessment⁸³.

CHMPs can be significant because the Act prohibits decision makers providing statutory authorisation for activities 'inconsistent with the approved cultural heritage management plan'.⁸⁴ Registered Aboriginal Parties who have elected to evaluate the CHMP may refuse to approve it, in circumstances where the party is not satisfied that it adequately addresses matters required to be addressed, including whether the activity will be conducted in such way as to avoid 'harm to Aboriginal cultural heritage' or minimises that harm, and management options.⁸⁵

4.1.8. Dispute Resolution

Appeals to the Victorian Civil and Administrative Tribunal can be made under the Act in the following circumstances⁸⁶:

- A Registered Aboriginal Party refuses to approve a CHMP;

⁷⁷ *Aboriginal Heritage Act 2006* (Vic) s43

⁷⁸ *Aboriginal Heritage Act 2006* (Vic) ss 44(1), (2)

⁷⁹ *Aboriginal Heritage Act 2006* (Vic) s 45

⁸⁰ The situations in which a plan is mandatory are set out in sections 46 to 49 of the *Aboriginal Heritage Act 2006* (Vic). These situations include situations in which an Environmental Effects Statement is required (section 49).

⁸¹ *Aboriginal Heritage Act 2006* (Vic) s 54

⁸² *Aboriginal Heritage Act 2006* (Vic) s 59(2)

⁸³ *Aboriginal Heritage Act 2006* (Vic) s 60

⁸⁴ *Aboriginal Heritage Act 2006* (Vic) s 52(3)

⁸⁵ *Aboriginal Heritage Act 2006* (Vic) s 61

⁸⁶ *Aboriginal Heritage Act 2006* (Vic) Part 8

- By an applicant for a cultural heritage permit that has been refused or had conditions applied (a relevant Registered Aboriginal Party will be a party to the proceedings);
- By a person affected by a decision regarding protection declarations.

The Act also establishes mechanisms for alternative dispute resolution for disputes between two or more Registered Aboriginal Parties regarding the evaluation of a CHMP.

1. What do you think are the best and worst features of Victoria's Aboriginal Heritage Act?
2. Do you think the concept of a CHMP is appropriate, and the procedures established by the Act are suitable?
3. Do you think the mechanisms for establishing 'Registered Aboriginal Parties' is appropriate?
4. Are the consultation and participation requirements adequate?

4.2. Australian Capital Territory - Heritage Act 2004

The *Heritage Act 2004* (ACT), which came into effect in March 2005, is the principle legislation relating to the protection of all heritage places and objects in the ACT. It incorporates specific provisions that address the protection of Aboriginal places and objects. The major features of the Act include the establishment of a Heritage Register for Aboriginal places and objects, and a Heritage Council for conserving Aboriginal places and objects. The Act was the culmination of a five year consultation process with the community and key stakeholders, and recognised the need to integrate protection of Aboriginal cultural heritage with the planning and development system.

4.2.1. Objects

Relevantly, the objects of the Act include to establish a 'system for the recognition, registration and conservation of natural and cultural heritage places and objects, including Aboriginal places and objects,' to encourage the development of heritage agreements to improve conservation of heritage places and objects, and to provide a system integrated with land planning and development.⁸⁷

4.2.2. Definitions and Important Concepts

The Act defines Aboriginal places and objects to mean those with particular significance to Aboriginal people because of either (or both) Aboriginal tradition, and the history (including contemporary history) of Aboriginal people.⁸⁸

⁸⁷ *Heritage Act 2004* (ACT) s3

⁸⁸ *Heritage Act 2004* (ACT) s9

A place or object can demonstrate ‘heritage significance’ on a number of grounds. The most specific criterion for Aboriginal heritage significance is where a place or object is significant to the ACT because of its importance as part of local Aboriginal tradition.⁸⁹

Aboriginal tradition is defined to include tradition, observance, custom or belief, including those that have evolved or developed since European colonization of Australia.⁹⁰

4.2.3. Heritage Council

The Act establishes a Heritage Council, whose role includes to identify, assess, conserve and promote places and objects of cultural significance, to work with the land planning and development system to achieve appropriate conservation of Aboriginal objects and places, to advise the Minister on matters affecting heritage, to encourage heritage management, and to encourage the public interest in and public education about heritage places and objects.

The Council is to contain at least one representative from the Aboriginal community who, in the Minister’s opinion, adequately represents the group, and six expert members who can be experts in the fields of Aboriginal history, Aboriginal culture and archaeology, amongst others.⁹¹ However, there is no requirement that one of the experts must be from one of these disciplines.

4.2.4. Heritage Register

The Council is required to keep a Register of heritage places and heritage objects, which includes Aboriginal places and objects. The Register must be made available to the public, although it is possible for some information on the Register to be restricted, and therefore not disclosed to the public.⁹²

Any person may make a nomination for provisional registration of an Aboriginal place or object, and the Council must consult, and consider the views of, each Representative Aboriginal Organization about the provisional registration.⁹³ Provisional registration lasts for five months. Final registration may be made by the Council (contingent upon any direction of the Minister) after the Council has conducted community consultation.⁹⁴

⁸⁹ *Heritage Act 2004* (ACT) s10

⁹⁰ *Heritage Act 2004* (ACT) s4 (Dictionary)

⁹¹ *Heritage Act 2004* (ACT) s17

⁹² *Heritage Act 2004* (ACT) ss21-22, see also Part 9 regarding restricted information.

⁹³ *Heritage Act 2004* (ACT) ss28,31

⁹⁴ *Heritage Act 2004* (ACT) Part 6, Division 6.2

In relation to Court proceedings, the fact that an Aboriginal object or place is on an approved internet site containing the Register means that no further evidence is required to demonstrate the object or place is registered.⁹⁵

4.2.5. Heritage Guidelines

The Council is also able to make 'Heritage Guidelines' in relation to the conservation of Aboriginal objects and places, after public consultation.⁹⁶ 'Aboriginal representative organisations' (see below) must be notified of the proposed Guidelines. Any functions exercised under the Act must be in accordance with any applicable Guidelines, such as when the Council provides advice to the planning and land authority about the potential impact of a development on the heritage significance of a place or object.⁹⁷

4.2.6. Representative Aboriginal Organisations

The Act requires that the Council must consult on decisions affecting Aboriginal places and objects with 'Representative Aboriginal Organisations' (RAO). The Minister is authorised to declare an entity a RAO, and must consult with the Council and Aboriginal people who have a traditional affiliation with the land on the criteria for selecting these entities.⁹⁸

Decisions that require consultation with RAOs include: where there are proposed Guidelines relating to Aboriginal places and objects,⁹⁹ decisions on whether to provisionally register an Aboriginal object or place,¹⁰⁰ decisions on whether to cancel the registration of an Aboriginal object or place,¹⁰¹ and when making decisions regarding whether information about an Aboriginal place or object is to be restricted.¹⁰²

4.2.7. Protection of Aboriginal Objects and Places

There are a number of mechanisms the Act establishes to protect Aboriginal objects and places, including a duty to report, obligations in respect of development applications, the ability to make orders and directions, and the creation of offences.

- Duty to report

If a person discovers an Aboriginal object or place, and has reasonable grounds to believe it is an Aboriginal object or place, the person must report the discovery to the Council within five days. Failure to do so has a maximum penalty of \$500 for

⁹⁵ *Heritage Act 2004* (ACT) s23

⁹⁶ *Heritage Act 2004* (ACT) ss25-26

⁹⁷ *Heritage Act 2004* (ACT) s27

⁹⁸ *Heritage Act 2004* (ACT) s14

⁹⁹ *Heritage Act 2004* (ACT) s26

¹⁰⁰ *Heritage Act 2004* (ACT) s31

¹⁰¹ *Heritage Act 2004* (ACT) s45

¹⁰² *Heritage Act 2004* (ACT) s54

an individual and \$2500 for a corporation. This duty does not apply to objects and places already registered, or to a person who has a traditional Aboriginal affiliation with the land where the place or object was discovered. After an object or place is reported, the Council must arrange consultation with each RAO and decide whether or not to provisionally register the place or object.¹⁰³

- Restricted Information¹⁰⁴

It is an offence to knowingly publish information that is declared to be restricted under the Act, without approval. The maximum penalty is \$5000. An exemption applies when the publication is made by a person with a traditional affiliation with the place or object, and it is made to another Aboriginal person, is for the purpose of education about Aboriginal tradition or is necessary and reasonable to avoid an imminent risk of damage to or destruction of an Aboriginal place or object.

- Land Development Applications¹⁰⁵

The Council may give advice to the planning and land authority about a development, if it is satisfied on reasonable grounds that the development would affect the heritage significance of a registered place or object, or a place or object nominated for provisional registration. This advice must include a summary of the effect of the development on the heritage significance, as well as advice on ways to avoid or minimize any impact and can set out proposed conditions of consent for any approval. In certain circumstances, the planning and land authority may be required to give the Council a copy of a development application for advice, which must be considered by the planning and land authority. Where the Council has made representations about a development application, it can apply to the relevant tribunal for a review of any decision to approve that development.

- Heritage Directions¹⁰⁶

Where the Minister is satisfied that there is a serious and imminent threat to the heritage significance of a place or object, and imminent protection is necessary, he or she may give an owner or occupier of a place or object a written direction to do or not do something, to conserve its heritage significance. The Council must also be satisfied, on reasonable grounds that the direction is in accordance with any applicable Guidelines, and must make a recommendation to the Minister to make the direction¹⁰⁷. The intentional contravention of a Direction has a maximum penalty of \$10 000.

- Heritage Orders¹⁰⁸

The Supreme Court may make an order if satisfied that a person is contravening, or is likely to contravene, an offence provision. An application for an order may be made by the Council; or any other person when the Council has failed to act in a reasonable time upon request and the Court determines that it is in the public

¹⁰³ *Heritage Act 2004* (ACT) ss51-53

¹⁰⁴ *Heritage Act 2004* (ACT) Part 9

¹⁰⁵ *Heritage Act 2004* (ACT) See part 10

¹⁰⁶ *Heritage Act 2004* (ACT) See part 11

¹⁰⁷ *Heritage Act 2004* (ACT) s62

¹⁰⁸ *Heritage Act 2004* (ACT) See part 12

interest. The order can restrain the person from contravening the offence provision, or anything else that the Court considers appropriate. However, while the Court must consider the public interest in any application made for legal costs, it is also able to require an applicant to provide security for costs or an undertaking, and can also order compensation for any loss or damage suffered, in cases where the respondent is found to not have committed the offence.

- **Other Offences**

It is an offence under the Act to engage in conduct that diminishes the heritage significance of a place or object. Specifically for Aboriginal places and objects, it is also an offence to engage in conduct causing damage to Aboriginal places or object. In both cases, higher penalties apply for recklessness or negligence.

Exceptions apply for conduct that is carried out in accordance with Guidelines, a Direction, a Heritage Agreement, a conservation management plan approved by the Council, or a development approval.

4.2.8. Heritage Agreements¹⁰⁹

The Minister may enter into a Heritage Agreement regarding the conservation of the heritage significance of a place or object, in accordance with the advice of the Council, and only with the owner (or any other person if the owner consents). A Heritage Agreement can include provisions regarding the conservation of the heritage, the provision of financial, technical or other professional advice for its conservation, the establishment of restrictions on work that may be carried out, or requirements to carry out work. An Agreement attaches to the land where the place or object is located, and binds the owner.

4.2.9. Public Authorities¹¹⁰

Public authorities are given responsible for identifying Aboriginal objects and places for which they are responsible. They must nominate for provisional registration any places or objects that are newly identified. The Council can also direct a public authority to prepare a conservation management plan for a heritage place or object for which the authority is responsible.

4.2.10. Appeals

A number of decisions-making powers under the Act are subject to review in the Administrative Appeals Tribunal,¹¹¹ upon application by an 'interested person'.¹¹² This includes a RAO, or a person who reported the discovery of an Aboriginal place or object. Decisions which can be appealed include a decision to register, or refuse to register, a place or object; a decision to cancel registration; a decision by

¹⁰⁹ *Heritage Act 2004* (ACT) ss99-100

¹¹⁰ *Heritage Act 2004* (ACT) Part 16

¹¹¹ *Heritage Act 2004* (ACT) s114

¹¹² *Heritage Act 2004* (ACT) s111

the Minister to make or not make a Heritage Direction; and a decision by the Council to approve, or not approve, the publication of restricted information.¹¹³ The relevant decision maker must use ‘best endeavours’ to give written notice of the relevant decision, and what appeal rights apply, to all ‘interested persons’.¹¹⁴

1. What do you think are the best and worst features of the ACT’s Heritage Act?
2. Do you think the concept of ‘Registered Aboriginal Parties’ is a good way to ensure adequate participation and consultation for Indigenous people?
3. Do you think the Act establishes a good balance, with a variety of mechanisms for protecting and conserving cultural heritage?

4.3. Queensland – Aboriginal Cultural Heritage Act 2003 and Torres Strait Islander Cultural Heritage Act 2003

The *Aboriginal Cultural Heritage Act 2003 (Qld)* and *Torres Strait Islander Cultural Heritage Act 2003 (Qld)* govern the recognition, protection and conservation of indigenous cultural heritage in Queensland. They recognise that Aboriginal and Torres Strait Island people are the primary authority on their cultural heritage. Both Acts are for practical purposes identical in their provisions, but refer separately to Aboriginal people and Torres Strait Islanders. For ease of reference, this review will refer to the *Aboriginal Cultural Heritage Act*. The *Torres Strait Islander Cultural Heritage Act* interchanges references to ‘Aboriginal’ with ‘Torres Strait Islander’. The Acts are currently under review by the Department of Natural Resources and Water to ascertain whether the legislation has achieved what it set out to do, which aspects are working well and which can be improved.

4.3.1. Purpose of the Act

The purpose of the Act is to provide effective recognition, protection, and conservation of Aboriginal cultural heritage. Principles behind this purpose include the acknowledgement that Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage and that the recognition, protection and conservation of this heritage should be based on respect for Aboriginal knowledge, culture and traditional practices.¹¹⁵

To achieve this main purpose, the Act recognises the Aboriginal ownership of Aboriginal cultural heritage, establishes a duty of care, contains various powers of protection, and ensures that Aboriginal people are involved in managing cultural heritage, amongst other things.¹¹⁶

¹¹³ *Heritage Act 2004 (ACT)* s112

¹¹⁴ *Heritage Act 2004 (ACT)* s113

¹¹⁵ *Aboriginal Cultural Heritage Act 2003 (Qld)* s4-5

¹¹⁶ *Aboriginal Cultural Heritage Act 2003 (Qld)* s6

4.3.2. Definitions and Interpretation

The Act defines Aboriginal cultural heritage as anything that is a significant Aboriginal area in Queensland, a significant Aboriginal object, or evidence (of archaeological or historic significance) of Aboriginal occupation of an area of Queensland.¹¹⁷

A significant Aboriginal area or object is an area or object of particular significance to Aboriginal people because of Aboriginal tradition, and/or the history (including contemporary history) of any Aboriginal party for the area.¹¹⁸

The Act defines ‘Aboriginal tradition’ as meaning ‘the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships’.¹¹⁹

The Act recognises that for an area to be a significant Aboriginal area, physical evidence such as markings is not necessary. Also, if significant Aboriginal objects exist in an area and the significance of the objects is intrinsically linked with their location in the area, the existence of the objects in the area is enough on its own to make the area a significant Aboriginal area.¹²⁰

Finally, the Act provides that it is not to be interpreted in a way that prejudices the right of ownership of a traditional Aboriginal group in cultural heritage held and used for traditional purposes, or a person’s enjoyment of or access to cultural heritage, if the person usually lives according to Aboriginal tradition and the access, use or enjoyment is sanctioned by tradition or native title interests.¹²¹

4.3.3. Ownership, Custodianship and Possession

The Act aims to protect cultural heritage, and as far as practicable, ensure that it is protected and owned by Aboriginal people with traditional or familial links to that cultural heritage, in relation to human remains, secret or sacred objects, or Aboriginal cultural heritage lawfully taken away from an area.

The Act restores ownership of Aboriginal human remains to those with a traditional or familial link. There is an obligation to report knowledge of the existence and location of any Aboriginal human remains, and failure to do so is an offence.¹²² It also restores ownership of secret or sacred objects (an example of which is ceremonial items) to Aboriginal people with traditional or familial links, where the object is in the custody of the State.

¹¹⁷ *Aboriginal Cultural Heritage Act 2003* (Qld) s8

¹¹⁸ *Aboriginal Cultural Heritage Act 2003* (Qld) ss9-10

¹¹⁹ *Aboriginal Cultural Heritage Act 2003* (Qld) s9

¹²⁰ *Aboriginal Cultural Heritage Act 2003* (Qld) ss 11-12

¹²¹ *Aboriginal Cultural Heritage Act 2003* (Qld) s13

¹²² *Aboriginal Cultural Heritage Act 2003* (Qld) ss15-18

However, ownership of Aboriginal cultural heritage that is not confirmed in accordance with the Act is by default owned by the State.¹²³

Owners or occupiers of land on which Aboriginal cultural heritage is located remain entitled to the use and enjoyment of the land, provided that the use does not unlawfully harm the cultural heritage.¹²⁴

4.3.4. Protection

- Duty of Care¹²⁵

The cultural heritage duty of care, one of the key provisions of the Act, provides that a person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage. Maximum penalties for a breach are 1000 penalty units for an individual and 10 000 penalty units for a corporation.¹²⁶

The Court may consider a number of factors to determine if the duty of care has been complied with, including:

- the nature of the activity and the likelihood of its causing harm to Aboriginal cultural heritage;
- the nature of the Aboriginal cultural heritage likely to be harmed by the activity;
- the extent to which the person consulted with Aboriginal parties about carrying out the activity and the results of the consultation;
- whether the person carried out a study or survey of the area affected by the activity to find out the location and extent of Aboriginal cultural heritage, and the extent of the study or survey;
- whether the person searched the database and register for information about the area affected by the activity;
- the extent to which the person has complied with cultural heritage duty of care guidelines; and
- the nature and extent of past uses in the area affected by the activity.

Compliance with the duty of care is assumed where the person is acting under an approved cultural heritage management plan, an authority under the Act, in compliance with cultural heritage duty of care guidelines, or under a native title agreement, amongst other things, or the person owns the cultural heritage (or has the owner's agreement), or the activity in question is necessary because of an emergency (such as a natural disaster).

¹²³ *Aboriginal Cultural Heritage Act 2003* (Qld) s20

¹²⁴ *Aboriginal Cultural Heritage Act 2003* (Qld) s21

¹²⁵ *Aboriginal Cultural Heritage Act 2003* (Qld) s23

¹²⁶ In November 2008 the government announced that the value of a penalty unit would be raised from \$75 to \$100, contained in:

<http://www.legislation.qld.gov.au/Bills/52PDF/2008/PenSenOAA08.pdf>

Guidelines may be prepared to identify reasonable and practicable measures for ensuring activities are managed to avoid or minimise harm to Aboriginal cultural heritage.¹²⁷ The Department of Natural Resources and Water has published such guidelines, which further expand upon the factors that a Court may consider in relation to the duty of care.¹²⁸

- Offences¹²⁹

The Act establishes the following offences:

- to harm Aboriginal cultural heritage if the person knows or ought reasonably to know it is Aboriginal cultural heritage;
- to excavate, relocate or take away Aboriginal cultural heritage if the person knows or ought reasonably to know that it is Aboriginal cultural heritage;
- to have possession of an object that is Aboriginal cultural heritage if the person knows or ought reasonably to know that it is Aboriginal cultural heritage

Maximum penalties are 1000 penalty units or 2 years in prison for individuals, or 10 000 penalty units for corporations. An offence is not committed in circumstances where the person is acting in accordance with an authority under the Act, or other circumstances (as with the duty of care, above). The Court is able to make orders relating to the costs of rehabilitation or restoration needed.

The Act also protects secret or sacred information or knowledge, by making it an offence for a person who includes such information in a report or other document to the Minister or chief executive under the Act. Maximum penalties are 100 penalty units for an individual or 1000 for a corporation.

- Stop orders¹³⁰

The Minister can make a 'stop order' to a person who is carrying out an activity if the person is or will be harming Aboriginal cultural heritage, and/or the activity is having or will have a significant adverse impact on the cultural heritage value of Aboriginal cultural heritage. The maximum penalty for knowingly contravening an order is 17 000 penalty units.

- Other protective measures¹³¹

The Minister may also acquire by purchase or gift, Aboriginal cultural heritage for the purpose of its preservation, and cause structures to be erected and other steps taken, as are necessary or desirable to preserve the cultural heritage.

¹²⁷ *Aboriginal Cultural Heritage Act 2003* (Qld) s28

¹²⁸ A copy of the Guidelines can be viewed at:

http://www.nrw.qld.gov.au/cultural_heritage/pdf/duty_of_care_guidelines.pdf (accessed 14/1/09)

¹²⁹ *Aboriginal Cultural Heritage Act 2003* (Qld) ss 24- 27

¹³⁰ *Aboriginal Cultural Heritage Act 2003* (Qld) s32

¹³¹ *Aboriginal Cultural Heritage Act 2003* (Qld) s33

4.3.5. Aboriginal parties and bodies

The Act gives precedence for native title claimants and holders to be an ‘Aboriginal party’ for a particular area. This is particularly relevant in relation to cultural heritage management plans (see below). If there is no native title party for an area, a person is an ‘Aboriginal party’ if they are an Aboriginal person with particular knowledge about traditions, observances, customs or beliefs associated with the area, and the person has responsibility under Aboriginal tradition for some or all of the area, or for significant Aboriginal objects in the area, or is a member of a family or clan group with the same knowledge.¹³²

The Act also provides for the registration of Aboriginal corporations as ‘Aboriginal Cultural Heritage Bodies’¹³³ for a particular area. There can only be one body registered for a particular area, except when a body applies for registration for the duration of a particular project only and the existing body agrees.

The Minister can register a particular corporation as an Aboriginal Cultural Heritage Body if satisfied that it is an appropriate body to identify Aboriginal parties for the area and has the capacity to do so, and the Aboriginal parties (which are consulted in accordance with the hierarchy above) for the area agrees that the corporation should be registered.

These Bodies are assigned the role of identifying Aboriginal parties for an area.¹³⁴ In addition to their registration, the Act also requires the Minister to provide financial or other assistance to these groups to enable them to perform their role.¹³⁵

4.3.6. Collection and Management of Information

The Act provides for the establishment of both an Aboriginal Cultural Heritage Database¹³⁶ and an Aboriginal Cultural Heritage Register.¹³⁷

The Database is established to hold information relating to Aboriginal cultural heritage, as a research and planning tool to help various parties in the consideration of Aboriginal cultural heritage values of particular areas. Access is not available to the public generally, but may be made available to an Aboriginal party for an area, a person carrying out an activity who wants to seek information in relation to their cultural heritage duty of care, or a researcher.

The Register is to hold information contained in any cultural heritage studies, whether areas are subject to cultural heritage management plans, information regarding Aboriginal cultural heritage bodies, and other relevant information to assist consideration of Aboriginal cultural heritage. It is intended for use as a

¹³² *Aboriginal Cultural Heritage Act 2003* (Qld) ss34-35

¹³³ *Aboriginal Cultural Heritage Act 2003* (Qld), s 36

¹³⁴ *Aboriginal Cultural Heritage Act 2003* (Qld), s 37

¹³⁵ *Aboriginal Cultural Heritage Act 2003* (Qld), s 37(2)

¹³⁶ *Aboriginal Cultural Heritage Act 2003* (Qld) ss 38-45

¹³⁷ *Cultural Heritage Acts 2003* (Qld) ss46-51

depository of information for land use and land use planning, and as a research and planning tool to help people in their consideration of Aboriginal cultural heritage values of particular objects and areas. The Register is accessible to the general public.

4.3.7. Cultural Heritage Studies

The Act permits any person (including the Minister) to be the sponsor of a cultural heritage study, the information from which may be included in the Register by the chief executive.¹³⁸

Aboriginal parties are responsible for assessing the level of significance of an area and objects in the study. The sponsor is required to give written notice to relevant stakeholders. In relation to the Aboriginal parties, the notice must advise the steps required if they want to take part in the study.¹³⁹ Those who respond become responsible for assessing the level of significance of areas and objects in the study area and consulting with the sponsor about the study and providing help and advice. Cultural heritage assessors may also be engaged to assist.¹⁴⁰

Consultation is required between each Aboriginal party and sponsor about carrying out the study.¹⁴¹ Appeals may be made to the Land Court in relation to the decision to either record or not record the study's findings in the Register.¹⁴²

4.3.8. Cultural Heritage Management Plans

Another major aspect of the Act is the requirement for a Cultural Heritage Management Plan (*CHMP*) in circumstances where an Environmental Impact Statement is needed for any other permit, authority or consent under another law (or if prescribed by Regulations). The relevant consent authority is unable to provide that approval unless a CHMP has been developed and approved in accordance with the Act (or is required by conditions of the consent). Alternatively, in relation to development applications where the chief executive is a concurrence agency, a CHMP can also be required in those circumstances.¹⁴³

There are considerable consultation requirements in relation to CHMPs. The sponsor of a CHMP (who can be anyone, including the Minister) must notify owners and occupiers, any Aboriginal Cultural Heritage Body, or if there is not one, a native title party, or if there is not one, any entity that is a representative body in the area. The sponsor must advise any Aboriginal parties that they can take part in developing the plan, and the steps to acknowledge that they want to do so and then be 'endorsed' to do so.¹⁴⁴

¹³⁸ *Cultural Heritage Acts 2003* (Qld) ss71-73

¹³⁹ *Cultural Heritage Acts 2003* (Qld) ss53-59

¹⁴⁰ *Cultural Heritage Acts 2003* (Qld) ss 66-69

¹⁴¹ *Cultural Heritage Acts 2003* (Qld) s70

¹⁴² *Cultural Heritage Acts 2003* (Qld) ss75-79

¹⁴³ *Cultural Heritage Acts 2003* (Qld) ss82-89

¹⁴⁴ *Cultural Heritage Acts 2003* (Qld) s91

The role of an ‘endorsed party’ is to seek agreement with the sponsor regarding how the project is to be managed, to ensure harm to Aboriginal cultural heritage is avoided or minimised, to consult and negotiate with the sponsor and other parties regarding the issues to be addressed and the final content of the plan, and to generally help and advise the sponsor to ensure that the plan’s suitability is maximised, for effective protection and conservation.¹⁴⁵ The sponsor’s role is to seek agreement with the endorsed parties, to ensure harm to Aboriginal cultural heritage is avoided or minimised, and to develop the plan in consultation with those parties, to ensure it is suitable to protect and conserve Aboriginal cultural heritage.

There is an obligation on both sponsor and endorsed party to negotiate and make every reasonable effort to reach agreement about provisions of the plan.¹⁴⁶ The chief executive is to approve or refuse to approve the plan, but must approve in circumstances where there is at least one endorsed party, and all parties agree that the plan should be approved.¹⁴⁷ However, if this fails either party can ask the Land Court to mediate.¹⁴⁸ The sponsor can also refer the matter to the Land Court either if mediation is unsuccessful, or if there is a failure to agree on the plan. In this case, the Court makes a recommendation to the Minister to either approve (with or without amendments) or refuse the plan, which the Minister must then consider and make a determination.¹⁴⁹

1. What do you think are the best and worst features of Queensland’s *Aboriginal Cultural Heritage Act* and *Torres Strait Islander Cultural Heritage Act*?
2. Do you think that the Acts’ approach to ownership of cultural heritage is suitable?
3. Do you think the concept of a ‘cultural heritage duty of care’ in the legislation is a good approach? Do you think it is appropriate to remove permit provisions, replacing instead with the duty of care, CHMPs, and other agreement based mechanisms?
4. Do you think the mechanisms for participation and consultation through ‘Aboriginal parties’ and ‘Aboriginal Cultural Heritage Bodies’ are likely to be effective?

4.4. South Australia – *Aboriginal Heritage Act 1988*

The primary piece of legislation that regulates the protection of Aboriginal Heritage in South Australia is the *Aboriginal Heritage Act 1988*. The long title of

¹⁴⁵ *Aboriginal Cultural Heritage Act 2003* (Qld) s102

¹⁴⁶ *Aboriginal Heritage Act 1988* (SA) s105

¹⁴⁷ *Aboriginal Heritage Act 1988* (SA) s107

¹⁴⁸ *Aboriginal Heritage Act 1988* (SA) s106

¹⁴⁹ *Aboriginal Heritage Act 1988* (SA) ss110 -120

the Act states that it is to provide for the protection and preservation of sites and items of sacred, ceremonial, mythological or historic significance to the Aboriginal people. The Minister is charged with the responsibility for the protection and preservation of Aboriginal heritage in accordance with the Act, including taking such measures as practicable for the protection and preservation of Aboriginal sites, objects and remains, to conduct, direct or assist research into Aboriginal heritage, and to conduct, direct or assist searches for the purpose of discovering Aboriginal sites or objects.¹⁵⁰

4.4.1. Definitions¹⁵¹

According to the Act, an Aboriginal ‘object’ and ‘site’ are defined as an object or site ‘of significance according to Aboriginal tradition or of significance to Aboriginal archaeology, anthropology or history’. ‘Aboriginal remains’ include the whole or part of skeletal remains of an Aboriginal person, not including those buried in accordance with the law.

The Act also defines ‘Aboriginal tradition’ for the purposes of the Act, as meaning ‘traditions, observances, customs or beliefs of the people who inhabited Australia before European colonisation and includes traditions, observances, customs and beliefs that have evolved or developed from that tradition since European colonisation’.

4.4.2. Aboriginal Heritage Committee

The Act provides for the establishment¹⁵² of the Aboriginal Heritage Committee (AHC), the functions of which include advising the Minister on Aboriginal Heritage Agreements (see further below) and the measures that should be taken for the protection or preservation of Aboriginal sites, objects and remains.¹⁵³ The AHC is able to advise the Minister at its own initiative or upon request. The importance of these Committees should not be underestimated, as the legislation provides that before making any determinations, giving any authorisations, or before a site or object is declared by regulation to be an Aboriginal site or object, the Minister must consult with this Committee.¹⁵⁴

The Act dictates that the membership of the AHC is to be comprised of, as far as practicable, ‘Aboriginal persons... from all parts of the State’¹⁵⁵ with ‘equal numbers of men and women’.¹⁵⁶

¹⁵⁰ *Aboriginal Heritage Act 1988* (SA) s5

¹⁵¹ *Aboriginal Heritage Act 1988* (SA) s3

¹⁵² *Aboriginal Heritage Act 1988* (SA) s7(1)

¹⁵³ *Aboriginal Heritage Act 1988* (SA) s8(1)(a)(iv)

¹⁵⁴ *Aboriginal Heritage Act 1988* (SA) s13(1)(a-c)

¹⁵⁵ *Aboriginal Heritage Act 1988* (SA) s7(2)

¹⁵⁶ *Aboriginal Heritage Act 1988* (SA) s7(3)

4.4.3. Archives

The Minister is required to maintain archives that contain a Register of Aboriginal Sites and Objects, detailing those objects and sites determined by the Minister to be Aboriginal sites and objects.¹⁵⁷ In legal proceedings, the fact that a site or object is on the Register means that the site or object is conclusively presumed to be an Aboriginal site or object.¹⁵⁸

4.4.4. Protection and Preservation

The Act establishes a number of ways to protect and preserve Aboriginal heritage, set up as follows:

- Discovery of and Search for Aboriginal Sites, Objects and Remains

The Act imposes a duty to report to the Minister the discovery of sites, objects or remains as soon as practicable. A failure to do so constitutes an offence under the Act.¹⁵⁹ Excavating sites for the purpose of uncovering any site, object or remains also constitutes an offence, unless authorised by the Minister.¹⁶⁰

- Protection of Objects, Sites and Remains.

The Act establishes that it is an offence to damage, disturb or interfere with any site, damage any object, or disturb or remove any discovered objects or remains, without authorisation from the Minister.¹⁶¹ The Minister is permitted to give directions prohibiting or restricting access to a site (or area surrounding a site), objects or remains, or activities in relation to a site, objects or remains, if satisfied that the directions are necessary for the protection or preservation of the site, objects or remains. The Minister must take reasonable steps to give no less than 8 weeks notice to the owner or occupier of the site, the Committee, and any Aboriginal organisation, traditional owners, and other Aboriginal persons who have a particular interest in the matter.¹⁶²

The Act also establishes that it is an offence to fail to take reasonable measures to protect an Aboriginal object in the ownership or possession of a public or private collection.¹⁶³

- Sale and Disposal of Aboriginal Objects

The Act creates an offence of selling or disposing of an Aboriginal object (or removing an Aboriginal object from the State) without the authority of the Minister.¹⁶⁴

¹⁵⁷ *Aboriginal Heritage Act 1988* (SA) s9

¹⁵⁸ *Aboriginal Heritage Act 1988* (SA) s11

¹⁵⁹ *Aboriginal Heritage Act 1988* (SA) s20

¹⁶⁰ *Aboriginal Heritage Act 1988* (SA) ss21-22

¹⁶¹ *Aboriginal Heritage Act 1988* (SA) s23

¹⁶² *Aboriginal Heritage Act 1988* (SA) s24

¹⁶³ *Aboriginal Heritage Act 1988* (SA) s28

¹⁶⁴ *Aboriginal Heritage Act 1988* (SA) s29

- Acquisition and Custody of Aboriginal Sites, Objects and Records

The Minister is able to acquire land for the purposes of protecting or preserving Aboriginal sites, objects or remains, and may also purchase or compulsorily acquire Aboriginal objects or records.¹⁶⁵ The surrender of objects or records (or objects believed to be so) for determining if it is an Aboriginal object or record, or for examination, and consideration of acquisition. Forfeiture can also be required where a person is guilty of an offence in relation to an Aboriginal object. When the Minister has acquired, or come into possession of, land or an Aboriginal object, these can be placed into the custody of an Aboriginal person or organisation.¹⁶⁶

- Protection of Traditions

The Act creates an offence for divulging information contrary to Aboriginal tradition, in relation to Aboriginal objects, sites and remains, or Aboriginal tradition, without the authority of the Minister.¹⁶⁷ The Minister may also authorise Aboriginal persons to enter any land for the purpose of gaining access to an Aboriginal site, object or remains, according to Aboriginal tradition.¹⁶⁸ It also clarifies that nothing in the Act is to prevent Aboriginal people from doing anything in relation to sites, objects or remains in accordance with tradition.¹⁶⁹

- Aboriginal Heritage Agreements

The Minister can enter into 'Aboriginal Heritage Agreements' (AHA) with the owner of land that contains any Aboriginal objects, sites or remains. An AHA attaches to the land, and so binds subsequent owners. Before entering into an AHA, the Minister must take 'all reasonable steps' to give any traditional owners of a site or object on the land the opportunity to become parties to the AHA, and must also consult with the AHC, any Aboriginal organisation, Traditional Owners, or other Aboriginal persons who, in the opinion of the Minister, have a particular interest in the matter.¹⁷⁰ The potential content of an AHA is given broad scope, and may contain 'any provision' for the protection or preservation of Aboriginal sites, objects or remains, for example, restricting the use of the land or the nature of work that may be carried out on the land, or provide for the management of the land in accordance with a management plan.¹⁷¹ Any party can commence proceedings in the District Court for a failure to comply with an AHA, and the Court has discretion to make any orders necessary to secure compliance with the AHA or remedy the default, or any incidental matters.¹⁷²

4.4.5. Consultation and Participation

Although the AHC is the major consultation body for the Minister under the Act, it is important to note that consultation is not strictly limited to be individuals on

¹⁶⁵ *Aboriginal Heritage Act 1988* (SA) s30

¹⁶⁶ *Aboriginal Heritage Act 1988* (SA) ss31-34

¹⁶⁷ *Aboriginal Heritage Act 1988* (SA) s35

¹⁶⁸ *Aboriginal Heritage Act 1988* (SA) s36

¹⁶⁹ *Aboriginal Heritage Act 1988* (SA) s37

¹⁷⁰ *Aboriginal Heritage Act 1988* (SA) s37A

¹⁷¹ *Aboriginal Heritage Act 1988* (SA) s37B

¹⁷² *Aboriginal Heritage Act 1988* (SA) s37D

the AHC. Before making a determination or giving an authorisation under the Act, or before declaring a site or object to be an Aboriginal site or object, the Minister is required to ‘take all reasonable steps’ to consult with the AHC, any Aboriginal organisation, Traditional Owners, or other Aboriginal person who in the opinion of the Minister have a particular interest in the matter.¹⁷³

When consulting with one of these two parties or the AHC as to whether an area of land is an Aboriginal site or an object is an Aboriginal object, the Minister *must accept* the views of the Traditional Owners of the land or object on the question of whether the land or object is of significance to Aboriginal tradition.¹⁷⁴

Importantly, only Traditional Owners are able call into question the validity of an act or determination of the Minister on the basis that a decision was made without their sufficient consultation, or the Minister failed to obtain their approval or their stipulation of conditions.¹⁷⁵

4.4.6. Offences and Penalties

Penalties under the Act for an offence relating to the protection or preservation of Aboriginal heritage are \$50,000 for a company and \$10,000 or six months imprisonment for a person.

1. What do you think are the best and worst features of South Australia’s Aboriginal Heritage Act?
2. Do you think the ‘protection of traditions’ provisions are effective and should be replicated in NSW?
3. Are the consultation and participation requirements adequate?

4.5. Tasmania – Aboriginal Relics Act 1975

The *Aboriginal Relics Act 1975* (Tas) is the existing legislation that is designed to protect Aboriginal ‘relics’ created prior to 1876. The legislation has been criticised on a number of grounds, including a failure to protect recent and continuing Aboriginal heritage. As a result, an extensive review and consultation process is currently underway, which commenced in 2005 and is anticipated to present a new draft bill for public consultation by 2009.¹⁷⁶ As such, the review of this legislation will be brief.

4.5.1. Definitions

The Act defines a relic as:

¹⁷³ *Aboriginal Heritage Act 1988* (SA) s13(1)

¹⁷⁴ *Aboriginal Heritage Act 1988* (SA) s13(2)

¹⁷⁵ *Aboriginal Heritage Act 1988* (SA) s42

¹⁷⁶ See <http://www.tahl.tas.gov.au/index.html> for further information on the review process.

- any artefact, painting, carving, engraving, arrangement of stones, midden, or other object made or created by any of the original inhabitants of Australia or the descendants of any such inhabitants;
- any object, site, or place that bears signs of the activities of any such original inhabitants or their descendants; or
- the remains of the body of such an original inhabitant or of a descendant of such an inhabitant who died before the year 1876 that are not interred in a cemetery or burial ground pursuant to the law, or a marked grave in any other land.

However, only objects made or created before 1876 are to be treated as relics in accordance with the Act.¹⁷⁷

4.5.2. Aboriginal Relics Advisory Council

The Act establishes an Aboriginal Relics Advisory Council, whose role is to advise and make recommendations to the Minister and Director. The Council is to be constituted by five members, only one of which must be nominated from a list submitted by a body which, in the opinion of the Minister, represents persons of Aboriginal descent.¹⁷⁸

4.5.3. Protected Sites¹⁷⁹

The Minister has the power, on the recommendation of the Director, to declare any land containing a relic to be a protected site, if the owner or occupier of the site consents. The Director is then charged with the management and maintenance of the protected site, including causing work to be undertaken to protect or preserve a protected object on such a site, providing and maintaining access to the site, and restoring or repairing relics on the site.

4.5.4. Relics¹⁸⁰

Any person who owns a relic, or has a relic in their custody or control, or has knowledge of a relic, must inform the Director. When a person finds a relic, they must notify the Director as soon as practicable. It is an offence to fail to do so.

Relics that are discovered on Crown land are the property of the Crown. The Minister can also determine to acquire a relic. However, a person of Aboriginal descent can apply to a Magistrate to cancel a notice to acquire a relic that is given by the Minister, if he or his ancestors have had the relic in their possession for a period exceeding 50 years.

The Act creates offences for taking certain actions in relation to relics, in the absence of a permit. These include destroying and damaging a relic, removing a

¹⁷⁷ *Aboriginal Relics Act 1975 (Tas)* s2

¹⁷⁸ *Aboriginal Relics Act 1975 (Tas)* Part II

¹⁷⁹ *Aboriginal Relics Act 1975 (Tas)* Part III

¹⁸⁰ *Aboriginal Relics Act 1975 (Tas)* Part IV

relic from its location, selling relics, removing from the State, and excavating Crown land for the purpose of searching for a relic.

1. What do you think are the best and worst features of Tasmania's Aboriginal Relics Act?

4.6. Western Australia – Aboriginal Heritage Act 1972

The *Aboriginal Heritage Act 1972* (WA) governs the protection of Aboriginal heritage in Western Australia. The long title of the Act indicates that its purpose is to 'make provision for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants' and for related purposes.

4.6.1. Scope of Application and Definitions

The Act applies to places:

- Of importance and significance, where persons of Aboriginal descent have (or appear to have) left any object used or made for any purpose relating to the traditional cultural life of Aboriginal people, past or present;
- That are sacred, ritual or ceremonial sites of importance and special significance to persons of Aboriginal descent;
- Which are, or were, associated with Aboriginal people and are of historical, anthropological, archaeological or ethnographical interest, and should be preserved because of the significance to the cultural heritage of WA (in the opinion of the Committee);
- Any place where Aboriginal objects (to which the Act applies) are traditionally stored, or have been taken or removed.¹⁸¹

The Act applies to all objects (whether natural or artificial) which are, or have been, of sacred, ritual or ceremonial significance to persons of Aboriginal descent, or which were used or made for any purpose connected with traditional cultural life of Aboriginal people, past or present. This includes any objects that 'so nearly' resemble an object of sacred significance, such that they are likely to deceive or be capable of being mistaken for such an object.¹⁸²

4.6.2. Traditional Custodians and Use

If the Committee is satisfied that a representative body of persons of Aboriginal descent has an interest in a place or object that is of traditional and current importance to it, the Minister can authorise a person or persons nominated by that body, to exercise the Minister's powers, as determined by the Minister.¹⁸³ The

¹⁸¹ *Aboriginal Heritage Act 1972* (WA) s5

¹⁸² *Aboriginal Heritage Act 1972* (WA) s6

¹⁸³ *Aboriginal Heritage Act 1972* (WA) s9

Minister is also able to make a place or object available for use as and whenever required for purposes sanctioned by the relevant Aboriginal tradition.¹⁸⁴

4.6.3. Protection of Aboriginal Sites

- Duty to report

There is a duty to report any knowledge the existence of Aboriginal objects, paintings or engravings, burial grounds, carved trees, amongst other things.¹⁸⁵

- Offences

It is an offence to excavate, damage, or destroy an Aboriginal site, or damage, remove or deal with in a manner not sanctioned by relevant custom, any object on or under an Aboriginal site, without an authorisation to do so.¹⁸⁶ Where a land owner plans to use land for a purpose which is likely to result in the commission of one of these offences, they can seek consent from the Minister to use the land for a notified purpose. The Committee is involved in advising the Minister on these matters.¹⁸⁷

- Declaration as Protected Area

An Aboriginal site can be declared a protected area if the Committee makes a recommendation to the Minister that the site is of ‘outstanding importance’ and should be declared as protected. The Minister must firstly consult with the relevant landowner, and any other person that might be ‘specially affected’. Once declared a protected area, the exclusive right to occupy and use the area vests in the Minister on behalf of the Crown. After considering any representations and the Committee’s view, the Minister can recommend to the Governor to make a declaration.¹⁸⁸ Any person that did hold an interest in the land is then entitled to reasonable compensation.¹⁸⁹ The Governor makes regulations on matters including access to a protected area, work on the land and livestock.¹⁹⁰

- Covenants

A person with an interest in land upon which an Aboriginal site is located may covenant with the Minister which prohibits or imposes conditions on development or use of the land that would have a deleterious effect on the preservation of the site.¹⁹¹

4.6.4. Aboriginal Cultural Material Committee

The Act establishes an Aboriginal Cultural Material Committee to act as an advisory body to make recommendations and advise the Minister on relevant

¹⁸⁴ *Aboriginal Heritage Act 1972 (WA)* s8

¹⁸⁵ *Aboriginal Heritage Act 1972 (WA)* s15

¹⁸⁶ *Aboriginal Heritage Act 1972 (WA)* s17

¹⁸⁷ *Aboriginal Heritage Act 1972 (WA)* s18

¹⁸⁸ *Aboriginal Heritage Act 1972 (WA)* s19

¹⁸⁹ *Aboriginal Heritage Act 1972 (WA)* s22

¹⁹⁰ *Aboriginal Heritage Act 1972 (WA)* s26

¹⁹¹ *Aboriginal Heritage Act 1972 (WA)* s27

matters, to evaluate on behalf of the community the importance of places and objects alleged to be associated with Aboriginal persons and to record and preserve the traditional Aboriginal lore related to such places and objects.¹⁹² It must maintain a register of protected areas, Aboriginal cultural material and other places and objects to which the Act applies.¹⁹³ The Act stipulates that associated sacred beliefs, and ritual or ceremonial usage, in so far as such matters can be ascertained, shall be regarded as the primary considerations to be taken into account in the evaluation of any place or object'.¹⁹⁴

The Act does not require that members of the Committee are necessarily of Aboriginal descent, but must have special knowledge, experience or responsibility which in the opinion of the Minister will assist the Committee in relation to the recognition and evaluation of the cultural significance of matters.¹⁹⁵

Most of the decision-making powers of the Minister under the Act must be exercised on the advice of, or in consultation with, the Committee. For example, the Minister can only exercise functions regarding the protection of Aboriginal objects (below) in consultation with the Committee.

4.6.5. Protection for Aboriginal Objects

- Declaration as Aboriginal Cultural Material

Upon recommendation of the Committee, the Governor of WA can declare that an object or class of objects is 'Aboriginal cultural material' if they are of sacred, ritual or ceremonial importance, of anthropological, archaeological, ethnographical or other special interest or of outstanding aesthetic value. Any person in the custody of Aboriginal cultural material must notify the Minister. The Minister may require the object(s) to be produced and may retain such objects, by agreement or acquisition.¹⁹⁶

The Act also provides that it is an offence to sell, remove from the State, or wilfully damage, destroy, or conceal, objects classified as Aboriginal cultural material, unless the person is of Aboriginal descent and is acting in a way that is sanctioned by a relevant Aboriginal custom, has been authorised by the Minister, or has been offered for sale to the Minister who has declined to purchase it.¹⁹⁷

- Compulsory Acquisition

The Minister can also acquire any object when he or she is of the opinion that it would be in the general interest of the community to do so.¹⁹⁸

¹⁹² *Aboriginal Heritage Act 1972 (WA)* s39

¹⁹³ *Aboriginal Heritage Act 1972 (WA)* s38

¹⁹⁴ *Aboriginal Heritage Act 1972 (WA)* s39

¹⁹⁵ *Aboriginal Heritage Act 1972 (WA)* s28

¹⁹⁶ *Aboriginal Heritage Act 1972 (WA)* ss40-42

¹⁹⁷ *Aboriginal Heritage Act 1972 (WA)* s43

¹⁹⁸ *Aboriginal Heritage Act 1972 (WA)* s47

- Restrictions on Use

The Act contains restrictions on the exhibition of objects in a manner not sanctioned by relevant Aboriginal custom.¹⁹⁹ The Governor may also restrict the publication of an object classified as Aboriginal cultural material.²⁰⁰

4.6.6. Offences

For offences under the Act, penalties range from \$20,000 or 9 months in prison for individuals and \$50,000 fines for corporations for first offences. The fines double for second offences.²⁰¹ The Act creates a ‘special defence’ for circumstances where the person charged proves that ‘he did not know and could not reasonably be expected to have known, that the place or object to which the charge relates’ was covered by the Act.²⁰²

1. What do you think are the best and worst features of Western Australia’s Aboriginal Heritage Act?
2. Do you think the scope of the Act is sufficient to adequately protect Aboriginal cultural heritage in WA?

4.7. *Northern Territory – Northern Territory Aboriginal Sacred Sites Act (1989)*

The *Northern Territory Aboriginal Sacred Sites Act* governs the protection of sacred sites in the Northern Territory. The long title to the Act states that it is aimed to ‘effect a practical balance between the recognized need to preserve and enhance Aboriginal cultural tradition in relation to certain land in the Territory and the aspirations of the Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement’. It establishes procedures for protecting and registering sacred sites, regulating entry onto such site, and for avoiding sacred sites in the development and use of land.

4.7.1. Definitions²⁰³

The Act defines ‘sacred site’ as ‘a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition’.

In relation to a sacred site, a ‘custodian’ means an Aboriginal who, by Aboriginal tradition, has responsibility for that site.

¹⁹⁹ *Aboriginal Heritage Act 1972 (WA)* s48

²⁰⁰ *Aboriginal Heritage Act 1972 (WA)* s49

²⁰¹ *Aboriginal Heritage Act 1972 (WA)* s57

²⁰² *Aboriginal Heritage Act 1972 (WA)* s62

²⁰³ *Northern Territory Aboriginal Sacred Sites Act* s3

4.7.2. Aboriginal Areas Protection Authority

The Act establishes an Aboriginal Areas Protection Authority that is to be constituted of ten members who are custodians of sacred sites.

The Authority is charged with a number of functions, including facilitating discussions between custodians of sacred sites and persons performing, or proposing, work on or the use of land on or in the vicinity of a sacred site, to establish and maintain a register of sites, to examine and evaluate applications in relation to the use of land where sacred sites are located, and to make recommendations to the Minister, amongst other things.²⁰⁴

4.7.3. Protection and Preservation of Sacred Sites

The Act establishes a procedure for ‘Authority Certificates,’ in circumstances where a person proposes to use or carry out work on land. Upon receipt of an application, as soon as practicable, the Authority must consult with custodians of sacred sites on or in the vicinity of the land, if the land is likely to be affected by the proposed use or work. It also provides that the applicant may request a conference with the affected custodians.²⁰⁵

The Authority may grant an Authority Certificate where it is satisfied that the works or use of the land could proceed without there being a ‘substantial risk of damage to or interference with a sacred site on or in the vicinity of the land, or in the circumstances where an agreement has been reached between the custodians and the applicant.’²⁰⁶

In addition, the Administrator of the NT is also given powers to take steps to protect sacred sites, including acquiring land or reserving land as Crown land.²⁰⁷

4.7.4. Registration of Sacred Sites

A custodian of a sacred site may apply to the Authority for a site to be registered. Consultation with the applicant and any other custodians is required to be undertaken by the Authority, to ascertain various details and the site and the story of the site according to Aboriginal tradition.²⁰⁸ The owner(s) of the land is to be given notice, and the opportunity to make representations about the application for registration. Where the Authority is satisfied that the site is a sacred site, it is to place the information on the register.

²⁰⁴ *Northern Territory Aboriginal Sacred Sites Act* s10

²⁰⁵ *Northern Territory Aboriginal Sacred Sites Act* Part III, Divisions 1A and 1

²⁰⁶ *Northern Territory Aboriginal Sacred Sites Act* s22

²⁰⁷ *Northern Territory Aboriginal Sacred Sites Act* s41

²⁰⁸ *Northern Territory Aboriginal Sacred Sites Act* s27

4.7.5. Access to Sacred Sites

A person may enter and remain on a sacred site, with approval of the custodians or the Authority, provided the person does so in accordance with the conditions of any Certificate.²⁰⁹ The Act explicitly preserves the right of Aboriginals to have access to sacred sites in accordance with Aboriginal tradition, and entry to sites pursuant to such access will not be an offence under the Act.²¹⁰ The Minister or Authority may also approve a person, with the express approval of a custodian, cross private land to access a sacred site, after giving reasonable notice to the owner of the land. It is an offence to obstruct such access.²¹¹

4.7.6. Review Rights and Consultation with Custodians

If a person who applied for an Authority Certificate is aggrieved by a decision of the Authority, they can apply to the Minister for a review of that decision. The Authority must review the decision upon referral by the Minister, and in doing so give notice to the custodians of the affected sacred site(s) where appropriate, or other affected persons, inviting representations. Due consideration is required of all representations made,²¹² and the Authority reports back to the Minister.

When making his or her decision on the review, the Minister may discuss the report or recommendations of the Authority with the custodians or other persons who in the Minister's opinion has a legitimate interest in the outcome.²¹³

The Authority and Minister, before exercising a power under the Act regarding a sacred site, must take into account the 'wishes of Aboriginals relating to the extent to which the sacred site should be protected'.²¹⁴

4.7.7. Offences

The Act creates the following offences in relation to sacred sites:

- To enter or remain on a sacred site, except in accordance with the Act;²¹⁵
- To carry out work on or use a sacred site, in the absence of an Authority Certificate;²¹⁶
- To desecrate a sacred site;²¹⁷
- To contravene conditions of an Authority Certificate relating to work or use of land, which causes damage to a sacred site or distress to a custodian of a sacred site;²¹⁸

²⁰⁹ Northern Territory Aboriginal Sacred Sites Act s43

²¹⁰ Northern Territory Aboriginal Sacred Sites Act s46

²¹¹ Northern Territory Aboriginal Sacred Sites Act s47

²¹² Northern Territory Aboriginal Sacred Sites Act s30

²¹³ Northern Territory Aboriginal Sacred Sites Act s31

²¹⁴ Northern Territory Aboriginal Sacred Sites Act s42

²¹⁵ Northern Territory Aboriginal Sacred Sites Act s33

²¹⁶ Northern Territory Aboriginal Sacred Sites Act s34

²¹⁷ Northern Territory Aboriginal Sacred Sites Act s35

²¹⁸ Northern Territory Aboriginal Sacred Sites Act s37

- To record or communicate information of a secret nature according to Aboriginal tradition acquired because of involvement under the Act, or produce to a person a document produced for the purpose of the Act.²¹⁹

A prosecution for an offence may only be brought by the Authority.²²⁰ For the first three offences set out above, it is a defence if the defendant had no reasonable grounds for suspecting that the sacred site was a sacred site. This is not available, though, unless the presence of the person on the sacred site was lawful in the absence of it being a sacred site, and the defendant had taken reasonable steps to ascertain the location and extent of sacred sites on any part of that Aboriginal land likely to be visited by the defendant.²²¹

Penalties range between \$22000 and \$44000 for individuals (or 12 months to 2 years in prison), and between \$110,000 and \$220,000 for corporations.

1. What do you think are the best and worst features of the Northern Territory Aboriginal Sacred Sites Act?
2. Do you think the scope of the Act is sufficient to adequately protect Aboriginal cultural heritage in the NT?
3. Are the provisions regarding access to sacred sites suitable for replication in NSW?

4.8. Commonwealth

There are a number of pieces of Commonwealth legislation that are relevant to the protection of Aboriginal cultural heritage. These should be considered in terms of the additional protection they may offer to that provided by State and Territory legislation, and in the particular context of potential reforms of NSW's legislation.

Aboriginal cultural heritage can be protected by Commonwealth legislation in the following ways:

4.8.1. Protection as a World Heritage Area

World Heritage Areas are areas of outstanding universal value.²²² Any cultural heritage that falls within a World Heritage Area is protected as part of that area. Federal Government approval is needed before anyone can do anything that will have a significant effect on a World Heritage Area or the values of such an area,

²¹⁹ *Northern Territory Aboriginal Sacred Sites Act* s38

²²⁰ *Northern Territory Aboriginal Sacred Sites Act* s39

²²¹ *Northern Territory Aboriginal Sacred Sites Act* s36

²²² For a list of World Heritage places in Australia go to <http://www.environment.gov.au/heritage/worldheritage>

including cultural heritage values.²²³ Willandra Lakes is the only World Heritage area listed in NSW that includes natural and cultural heritage values.

4.8.2. Protection as National Heritage

The Federal Government also protects cultural heritage areas which are on the National Heritage List.²²⁴ A place can be nominated for inclusion in the National Heritage List if it satisfies at least one of the National Heritage criteria.²²⁵

Once a place is nominated, the Heritage Council will decide whether the place meets the National Heritage criteria. The Heritage Council must consult owners, occupiers and Indigenous people with rights or interests in the nominated area.

The Federal Minister for Environment decides whether a place will be listed. The Minister may, but is not obliged to, invite comments on the proposal. The Minister must take into consideration the Heritage Council's assessment, and received comments.

All listed areas must have a Management Plan which is a document that identifies the values of a heritage place and outlines the policies in place to help conserve those values.

4.8.3. Protection under the Commonwealth Heritage List

The Commonwealth Heritage List comprises natural, Indigenous and historic heritage places on Commonwealth lands and waters or under Federal Government control.

The same process is followed to get something of cultural or natural significance listed as is followed for the National Heritage List.²²⁶

4.8.4. Protection under the National Estate Register

The Register is kept by the Australian Heritage Council²²⁷ and identifies places which have special value for present and future generations. There are more than 13,000 places listed on the Register, with 900 having Indigenous significance. Anyone can nominate a place for inclusion on the Register.

If the place has Indigenous heritage value the Heritage Council must consult with the owner or occupier of the place, the State or Territory and local government authority as well as each person who has Indigenous rights or interest in the place.

²²³ *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* s12

²²⁴ Under the *Environment Protection and Biodiversity Conservation Act 1999(Cth)* s15B

²²⁵ The criteria for the National Heritage List can be found at <http://whc.unesco.org/en/criteria/>

²²⁶ The criteria can be accessed from

<http://www.environment.gov.au/heritage/commonwealth/criteria.html#list>

²²⁷ <http://www.ahc.gov.au>

4.8.5. Protection under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*

The Act protects from damage areas and objects in Australia or Australian waters that are significant to Indigenous people in accordance with Aboriginal or Torres Strait Islander tradition.²²⁸ It was introduced to enable the Commonwealth to protect significant Aboriginal areas and sites when State or Territory legislation was ineffective.²²⁹

An Aboriginal or Torres Strait Islander can apply to the Minister for Indigenous Affairs for protection of a specified area or object.²³⁰ The Minister can make an emergency declaration protecting areas and objects that are at immediate risk of injury or are at risk of being used in a manner that is inconsistent with Aboriginal tradition.²³¹

4.8.6. Protection under Native Title

Native Title holders have the right to negotiate for the protection of the places over which Native Title applies.²³²

The things that are considered when the government is deciding whether certain activities should go ahead in places subject to Native Title rights include the cultural significance of the place, economic considerations and the public interest.

1. Do you think Commonwealth level of protection of Aboriginal cultural heritage is adequate? If not, how could it be improved?
2. In particular, do you think the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 is adequate to protect Aboriginal cultural heritage when State or Territory laws have proved ineffective?
3. Do you think minimum national standards or guidelines at the Commonwealth level would be of assistance, to promote and assist reform of NSW's cultural heritage laws?

²²⁸ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984(Cth)* s4

²²⁹ Evatt AC, E, 'Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984' (1997) *Australian Indigenous Law Reporter* 2(3): 433-450.

²³⁰ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* s10

²³¹ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* s 9. The emergency declaration lasts for 30 days and may be extended for a further 30 days. Officers authorised by the Minister under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* can also make emergency declarations for no more than 48 hours in relation to Indigenous heritage areas and objects.

²³² *Native Title Act 1993 (Cth)* s25

5. Australia's International Obligations

There are a number of international law principles and obligations which are applicable to the protection of Aboriginal cultural heritage, and it is appropriate that these are recognised and applied in State legislation in Australia.

The World Heritage Convention, noted in section 4.8.1 above, is one means to protect Aboriginal sites that are of 'outstanding universal value' through international law. However, in the context of the protection and preservation of objects and sites that may not meet the criteria established by the World Heritage Convention, the following international obligations are relevant.

*5.1. The International Convention on Civil and Political Rights 1966 (ICCPR)*²³³

The ICCPR contains the relevant principle that ethnic, religious or linguistic minorities should not be denied the right, in community with other members of their group, amongst other things to 'enjoy their own culture' (Article 27).

It is arguable that Australia does not currently meet its obligations under the ICCPR in this regard, in the context of the protection of Aboriginal cultural heritage. For example, the Concluding Observations of the Human Rights Committee of the UN Office of the High Commissioner for Human Rights, in its consideration of Australia's adherence to the ICCPR in relation to Aboriginal cultural heritage, stated in July 2000:

"The Committee expresses its concern that securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and **protection of sites of religious or cultural significance** for such minorities, which must be protected under article 27, **are not always a major factor in determining land use.**

...

The Committee recommends that **in the finalization of the pending bill intended to replace the Aboriginal and Torres Strait Islander Heritage Protection Act (1984), the State party should give sufficient weight to the values described above.**"²³⁴ [Emphasis added]

*5.2. International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)*²³⁵

Article 15 to the ICESCR provides that state parties must recognize the right of everyone to 'take part in cultural life'. In the context of Indigenous people in Australia, the preservation, protection and access to cultural heritage is of critical importance to ensure that Aboriginal persons can take part in their 'cultural life,'

²³³ See <http://www2.ohchr.org/english/law/ccpr.htm>

²³⁴ See [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/A.55.40,paras.498-528.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.55.40,paras.498-528.En?OpenDocument)

²³⁵ See http://www.unhchr.ch/html/menu3/b/a_ceschr.htm

given that cultural heritage is so central in the continuation of Indigenous customs and traditions.

*5.3. The Declaration on the Rights of Indigenous Peoples*²³⁶

The Declaration was adopted by the UN General Assembly on 13 September 2007. While the Australian Government declined to endorse this Declaration when it was adopted (and in fact voted against the Declaration), it is understood that the current Australian Government has indicated that it supports the Declaration and has sought the input of Indigenous individuals and organisations in determining how it ought to formally indicate their support for the Declaration. Accordingly, it is relevant that this Declaration should form part of the decision-making framework with respect to the extent of protection that should be accorded to sites and objects of significance to Indigenous persons and communities.

Relevantly, the Declaration states that:

Article 11

1. Indigenous peoples have the right to practise and revitalize 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.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual **property taken without their free, prior and informed consent** or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; **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**.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through **fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned**.

²³⁶ See <http://www.un.org/esa/socdev/unpfii/en/drip.html>

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, as well as to maintain and develop their own indigenous decision-making institutions.

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. [Emphasis added]

These provisions are critical in consideration international obligations with respect to Aboriginal cultural heritage legislation in Australia. Participation in decision-making, free, prior and informed consent, and the rights to access, use, control and maintain manifestations of their culture, are all overarching principles which should guide State legislation.

5.4. Relevant Conventions to which Australia is not a Party

Other international conventions to which Australia is not a party but which would be relevant in the circumstances include the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003, and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005.²³⁷ However, it is understood that ratification of these Conventions is under consideration by the Federal Government (particularly, the latter Convention in relation to which the Government has sought submissions), and so may become applicable in the future.²³⁸

5.5. Other Principles

Finally, another relevant consideration is that the protection of Aboriginal cultural heritage requires consideration of the nationally and internationally recognised principle of Intergenerational Equity, one of the cornerstones of the concept of 'ecologically sustainable development'. The principle of intergenerational equity is that 'the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.'²³⁹ The basis of intergenerational equity includes the 'conservation of access' principle under which each generation should give its members equitable

²³⁷ Details on these Conventions can be obtained from the UNESCO website:

http://portal.unesco.org/culture/en/ev.php-URL_ID=34603&URL_DO=DO_TOPIC&URL_SECTION=201.html

²³⁸ See the Australian Human Rights Commission's submission on the ratification of this Convention at http://www.hreoc.gov.au/legal/submissions/2008/20081105_UNESCO.html (accessed 15/1/09)

²³⁹ See, in the Australia context, the Intergovernmental Agreement on the Environment.

rights of access to the legacy of past generations and should conserve this access for future generations.²⁴⁰

It can be seen that the issue of intergenerational equity is an important one in the context of protecting and preserving Aboriginal cultural heritage. Indeed, it has been the subject of some case law in NSW which sought to protect cultural heritage from destruction.²⁴¹ While it is acknowledged that the NPW Act's objects are required to be achieved by applying the principles of ecologically sustainable development, and hence, intergenerational equity, the detailed provisions of the legislation could also be more focussed towards the protection of cultural heritage, to ensure access to and enjoyment of that heritage for future generations.

1. How do you think legislation in NSW currently meets Australia's international obligations in relation to Indigenous cultural heritage?
2. If not, what do you think would be required in legislation to effectively do so?

6. *Concluding Remarks: Considering Reform for NSW*

Given the current problems associated with NSW's laws protecting Aboriginal cultural heritage, in particular the noted inadequacies of the NPW Act provisions, it is clear that the need for reform has become critical.

Reflecting upon the various legislative schemes in Australia for protecting Aboriginal cultural heritage reviewed in this Discussion Paper, it is useful to consider which of these frameworks stand out as offering the most comprehensive and suitable protection and conservation of Aboriginal cultural heritage, or alternatively, which particular elements within these frameworks stand out. Additional considerations will include the additional protection offered by Commonwealth laws, and how international obligations can frame proposed law reform.

To assist, it may be constructive to consider the following aspects which commonly occur in Aboriginal cultural heritage legislation, and consider which State or Territory legislation best addresses each aspect:

- Definitions of important concepts and the coverage or scope of the legislation, including issues such as control over who determines 'significance,' and ownership;
- Methods of protection afforded to cultural heritage, such as duties, permits, emergency orders or declarations, management plans, offences (and their penalties);
- Advisory bodies and how they are constituted and operate;

²⁴⁰ See *Ecologically Sustainable Development in the Courts in Australia and Asia*, the Hon Justice Brian J Preston, 28 August 2006, p.24, available on the NSW Land and Environment Court's website at http://www.lawlink.nsw.gov.au/lawlink/lec/ll lec.nsf/pages/LEC_speeches_and_papers#preston

²⁴¹ See summary of *Anderson v Director General of Department of Environment and Climate Change* [2008] NSWLEC 182 in the Appendix.

- Information management, including restrictions on sensitive material;
- Participation and consultation with Indigenous people and groups, and other stakeholders;
- Interaction with planning and land use legislation;
- Dispute resolution (including between various Indigenous persons or groups) and appeal rights (to ensure accountability of decision-makers);
- Other issues, such as access to sites; the education of both Indigenous and non-Indigenous persons about cultural heritage.

1. Reflecting upon the various systems established and the common elements of Aboriginal cultural heritage legislation, the problems highlighted by NSW case law and practical difficulties that you may have come across, what do you see are the most critical focus areas for reform of the NSW legislation?
2. What do you think are the best legal mechanisms to ensure that legislation aimed to protect Aboriginal cultural heritage can achieve its intended effects, and achieve better outcomes? For example, the creation of offences; a duty of care; integration in the planning and land use development systems by cultural heritage management plans, etc.
3. What do you think are the appropriate roles for the various stakeholders involved in this debate: Indigenous persons and communities, government (state and local), landowners and developers (and any other relevant stakeholders)?
4. Do you think there are any other matters that are omitted from all Australian legislation relating to Aboriginal cultural heritage and that should be included in future legislation in NSW?

APPENDIX - CASE LAW IN NSW

Case law to date has not comprehensively addressed the development of provisions for 'protection of Indigenous heritage'. Set out below are a number of case studies relating to the protection of Aboriginal cultural heritage. While many are challenges to permits issued under s87 and s90 of the NPW Act, other attempts to protect cultural heritage have included challenges to development consent, etc. While not a conclusive summary of every case addressing Aboriginal cultural heritage issues, they do canvass the main avenues by which litigation has been used to try to protect Aboriginal cultural heritage.

Kennedy on behalf of the Sandon Point Tent Embassy v Director General of NPWS & Anor
[2002] NSWLEC 67

Background

This case arose within the context of proposed development of land at Sandon Point near Wollongong. In December 2000, an Aboriginal Tent Embassy was established to protect an Aboriginal burial site in Sandon Point near Wollongong, as well as to raise awareness within the broader community regarding the sacred significance of the Sandon Point area generally. Development consent for subdivision of the land was granted to Stockland Constructions in late 2001, and Stockland then engaged heritage consultants to carry out sub-surface testing of the site, and to prepare a summary report for provision to the Aboriginal organisations associated with the site. This information was provided to representatives of the interested Aboriginal communities, together with notification that Stockland intended to apply for s90 Consents. These were ultimately issued by the Director-General of the NPWS.

Mr Kennedy, the Ambassador of the Kuradji Aboriginal Tent Embassy at Sandon Point, challenged the issuing of these s90 Consents. His case was that there was a failure to accord him procedural fairness in relation to viewing the artifacts collected during the sub-surface testing of the sites, and during the consultation process with the Aboriginal community with respect to Aboriginal heritage issues.

Outcome

The LEC was of the view that procedural fairness had been awarded to Mr Kennedy and dismissed the appeal.

The Court held that Mr Kennedy had been given ample opportunity to provide the views of the Sandon Point Aboriginal Tent Embassy in relation to the applications for s90 Consents, but had failed to do so. This was because Mr Kennedy had self-imposed two deadlines for providing his response to the report prepared by heritage consultants, but had not met these deadlines.

Mr Kennedy responded by indicating that he had underestimated the time necessary to get traditional knowledge holders to divulge important information and stories that relate to the

cultural significance of the Sandon Point area. Mr Kennedy had expressed an interest in viewing the artifacts prior to making his comments to the NPWS, but had not followed up to arrange such a meeting, expecting that this would be arranged by the NPWS. However, the Court concluded that he had failed to let his views be known, and had missed opportunities to relay information about the significance of the area, on several occasions. There had been no representations that the s90 Consents would not be issued prior to Mr Kennedy inspecting the artifacts, and in the circumstances of the case, there was no legitimate expectation that there would be such a delay in the decision-making process. As a result, there was no denial of procedural fairness.

Roy Kennedy v Director-General of the Department of Environment and Conservation and Another [2006] NSWLEC 456

Background

This case was another in the context of the complex controversy that had arisen regarding development at Sandon Point in Wollongong. In these particular proceedings, Mr Kennedy, the deputy chairman of the Wadi Wadi Coomaditchie Aboriginal Corporation, and the spokesperson for the Sandon Point Aboriginal Tent Embassy, challenged the grant of a s90 Consent to destroy located artefacts on the site at Sandon Point. The consent was one of a number that had been granted in relation to the site. He claimed that the particular s90 Consent was invalid or that, if valid, the Director-General had failed to comply with special conditions of the consent.

The grounds of challenge were:

1. The consent was uncertain because it was a blanket authority allowing destruction of all Aboriginal objects on the land to which it applied, rather than providing details of the authorized work;
2. The consent was granted in breach of the requirements of procedural fairness, because there was a failure to comply with the Director-General's policy and the delegates did not consult with Mr Kennedy, despite him having a legitimate expectation that he would be consulted;
3. The Director-General failed to take into account relevant considerations which included the absence of archaeological assessments, ethnographical and/or anthropological studies by qualified persons into the cultural significance of the area, the significance of the site, and various reports prepared by consultants;
4. The Director-General took into account an irrelevant consideration, by discounting a particular report as being of limited value;
5. The Director-General failed in her statutory duty pursuant to s2A(1)(b)(i) of the NPW Act, by granting the consent without any ameliorating conditions to monitor, salvage and curate Aboriginal Objects impacted by proposed work.
6. If the consent was valid, Stockland had failed to comply with special conditions by not having operative within 12 months of the issuing of consent an Aboriginal Keeping Place for any Aboriginal objects collected or salvaged from the area.

Outcome

On the circumstances of the case, the LEC rejected Mr Kennedy's challenge to the validity of the consent, dismissing all grounds of appeal.

However, while the Court was not satisfied that Stockland knowingly destroyed Aboriginal object(s) without first having obtained the Director-General's consent, it was satisfied that there was a threatened breach of s 90 of the NPW Act by Stockland based upon its interpretation of the s90 consent and its particular conditions. The Court therefore exercised its discretion and proposed orders it considered appropriate to remedy this threatened breach, ordering Stockland to provide a place available for the interim storage of the Aboriginal objects collected or salvaged from the area of Sandon Point.

Williams v Director-General of National Parks and Wildlife Service and Ors [2003] NSWLEC 121

Background

Mr Neville Williams, an elder of the Wiradjuri people and a traditional owner of land at Lake Cowal, resorted to litigation on a number of occasions in a campaign to protect Aboriginal objects from destruction as a result of the Lake Cowal Gold Mine Project. Initially, Mr Williams brought proceedings alleging that exploration works under the relevant exploration license were in breach of the NPW Act¹. He also challenged the granting of a permit and consent under ss87 and 90 of the NPW Act to the mining company by the then NPWS. Additionally, he later brought challenges in respect of the construction of an electricity transmission line for the project².

In these particular proceedings, Mr Williams challenged the validity of a permit and consent issued respectively under s87 and s90 of the NPW Act in respect of Aboriginal objects on lands comprising a mining lease at Lake Cowal. A number of grounds for why the permit and consent should be invalidated were presented by Mr Williams, including a denial of procedural fairness, bias, failure to take into account relevant considerations, and that there was a lack of evidence to support an opinion that the area was not socially or culturally significant to the Wiradjuri people.

Outcome

The LEC dismissed the appeal, rejecting each ground of challenge to the validity of the permit and consent.

¹See *Williams v Barrick Australia Limited & Ors* [2003] NSWLEC 218

²See *Williams v The Director General of the Department of Environment and Conservation (formerly National Parks and Wildlife Service) v (2) Ors* [2004] NSWLEC 613 and *Country Energy v Williams; Williams v Director-General National Parks and Wildlife* [2005] NSWCA 318. The Applicant succeeded in the LEC but was overturned on appeal to the Court of Appeal.

However, the judgement made some comments regarding what matters were required to be considered by the Director-General in the decision-making process for granting a s87 permit or section 90 consent to destroy. In particular, the Court held that the duty imposed by s2A(3)(a) of the NPW Act to give effect to the objects of the Act applies, with the result that the functions are to be carried out in line with the purposes of protection and conservation expressed in the Act under section 2A(1)(b)(i). The Court recognised that the granting of a s90 consent may seem contradictory to such a duty, but that the powers of the Director-General under s90 could not be nullified by the introduction of s2A

The LEC also noted that because the Director-General had made both oral and written representations to Mr Williams, this gave rise to a legitimate expectation on the part of Mr Williams that the matters he had raised in opposition to the consent would be considered.

Carriage v Stockland Development Pty Ltd (No. 6) [2004] NSWLEC 541

Background

Mr Alan Carriage, an elder of the Wadi Wadi nation, undertook a number of challenges in relation to the proposed development of land at Sandon Point, Wollongong, by Stockland. This particular decision challenged the validity of a permit issued under s90(2) of the NPW Act, amongst other things, in the context of earthworks that had been carried out. Mr Carriage, as chairman of the Wadi Wadi Coomaditchie Aboriginal Corporation (WWCAC), argued that he had a legitimate expectation that the Director General would not determine the s90 consent application without first consulting him and the WWCAC, and that he was not given a reasonable opportunity to present his case.

Outcome

Mr Carriage was unsuccessful. The Court noted that the Director-General's policy of consulting with all relevant aboriginal groups in relation to s90 applications could give rise to a legitimate expectation to be consulted, and that a failure to consult could be a denial of procedural fairness. However, on the facts of the case the Court considered that Mr Carriage had the opportunity to do so. The Court explained that the Director-General was not obliged to delay its decision until such time as Mr Carriage could make a submission, but that the duty was limited to providing such affected persons notice that an application has been made, and giving them a reasonable opportunity to make representations in relation to that application.

Anderson v Ballina Shire Council [2006] NSWLEC 76

Background

Mr Douglas Anderson, an Elder of the Bundjalung nation, the Aboriginal group from the Ballina area. Douglas and Susan Anderson together sought to protect certain land at Angels Beach, in the

context of Council's plans to build a cycleway through land that was traditionally owned by the Bundjalung nation. The case involved a challenge to the development consent granted by Council to itself for the construction of the cycleway. The Andersons argued that because the land was the site of a massacre of Aboriginal people in 1845 and as such was of great contemporary significance to local Aboriginal people. The challenge to the development consent was on a number of grounds including a denial of procedural fairness and the failure to consider relevant considerations.

Outcome

The Andersons were successful in their appeal, on the ground that the Council did not have sufficient material before it relating to the significance of the Aboriginal cultural heritage in the area. The consultant report failed to include the massacre in the assessment of the cultural heritage of the site. More than mere mention of the issue of cultural heritage was required: an evaluation of the significance of cultural heritage in the area was required, and did not take place. As a result, the Council did not have before it material that it was required to consider.

Garrett v Williams, Craig Walter [2007] NSWLEC 96

Background

This case was a prosecution for an offence under s90. The defendant Mr Williams was the director of a mining company that was undertaking exploration works adjacent to the Pinnacles, an area declared an Aboriginal place under the NPW Act. A trench was excavated across the boundary, despite knowledge that the area was an Aboriginal place. A number of Aboriginal objects were also destroyed during construction of a rail siding, despite knowledge that there were deposits of Aboriginal objects at the site. No consent under s90 had been applied for.

Outcome

Mr Williams pleaded guilty to both offences. With the consent of Mr Williams and Ms Maureen O'Donnell, an Aboriginal elder and traditional owner of land in the Broken Hill area, a 'restorative justice' conference was held, a process where people affected by a crime participate in resolving matters arising from that crime. The conference enabled a constructive dialogue between representatives of the Broken Hill Aboriginal Land Council (who shared the significance of the objects and place to the Aboriginal people of the area) and the mining company (which was able to share information about its operations and the business issues confronting it), and could form the basis of ongoing collaboration.

In considering sentencing options subsequent to this conference, the Court explained the purpose and importance of the provisions within the NPW Act in protecting and conserving cultural heritage:

67 *The conservation of places, objects or features of cultural value within the landscape, including places, objects or features of significance to Aboriginal people, is an express object of the National Parks and Wildlife Act: s 2A(1)(b)(i). Informed and responsible members of the public view the protection and preservation of cultural heritage seriously. The scheme provided for under Part 6 of the National Parks and Wildlife Act plays a critical role in achieving that objective. In particular, when a person wishes to cause destruction or damage to Aboriginal objects or places to which the provisions of Part 6 apply, that person is obliged to observe due process by making an application for a consent to destroy or damage which, if refused, is subject to review on appeal by the Minister: s 90(3)-(5).*

68 *Causing destruction or damage to Aboriginal objects or places without first obtaining consent undermines the integrity of the system for the preservation of cultural heritage under Part 6 of the National Parks and Wildlife Act.*

The emphasis appears to be on maintaining the integrity of the Act, and that the failure to comply with the due process laid out in the Act is the true offence, rather than destroying the objects themselves.

Despite these remarks, the Court declined to describe the harm caused as ‘substantial’ in respect of sentencing, noting that the ‘*damage was not at the heart of the Aboriginal place in the physical sense but very much at its periphery*’.

In the context of a number of factors, including his participation in the restorative justice conference, his agreement to pay costs of the Applicants, his plea of guilty and his remorse, Mr Williams was fined a total of \$1400.

Plath v O'Neill [2007] NSWLEC 553

Background

In this case, Lisa and Timothy O'Neill pleaded guilty to four breaches of the NPW Act (section s86 and 90), for knowingly causing damage to an Aboriginal shell midden without consent, and for aiding and abetting the disturbance on land of an Aboriginal object that is the property of the Crown. The offences took place on property at Woombah on the NSW North Coast. The O'Neill's had undertaken earthworks on the site in the absence of knowledge about the midden. Upon discovery, and despite many conversations with staff at DECC about the need to further investigate the midden site that had been recently discovered and the requirement for a permit to disturb the site, the O'Neill's again moved the midden site through earthworks, that is, they moved the material back to its original location.

Outcome

The Court acknowledged that as a result of moving the midden, it had been significantly disturbed and damaged and this had diminished the potential for it to contribute to the benefits gained from archaeological study of the midden.

The O'Neills were fined \$1600 in total. In mitigation was the fact that they were to pay prosecutor's costs of approximately \$40,000 and had lost a substantial amount on the sale of their house as a result of their discovery, and that the actions taken occurred in a severe state of financial stress; the good character of the defendants, and because the midden was already significantly disturbed by the previous works (which were not the subject of the complaint).

Broad Henry v Director-General of the Department of Environment and Conservation and Australand Corporation (NSW) Pty Limited [2007] NSWLEC 722

Background

Mr Broad Henry commenced a case challenged the validity of a s87 permit and s90 consent granted by the Director-General for the Shell Cove Boatharbour Marina Project. The case argued by Mr Broad Henry was that the permit and consent were not valid in the context of his dissatisfaction with the consultation process. In particular, he had written to the proponent and requested that the proponents undertake a number of studies and surveys regarding the site, including burials at the site, which were not undertaken. He argued that the Director-General failed to consider relevant matters, considered irrelevant matters, was biased, and denied Mr Broad Henry procedural fairness.

Outcome

The Court dismissed all claims. In its analysis, the Court made some remarks in relation to the matters the Director-General must consider. It stated that for a massacre site to be a relevant matter for consideration in terms of s87 and s90 permits and consents, the site must have some relationship to the Aboriginal objects on or in the land, and that 'an historical narrative cannot be an Aboriginal object'. Thus, absent some physical evidence of a massacre, which is required to meet the definition of Aboriginal object in the NPW Act, the 'bare historical fact that a massacre occurred on the land' is not a relevant matter. However, if burials and human remains were located, consideration of this would be relevant. Therefore, a relationship is required between an Aboriginal object and the land on which it is located, for the significance of the land to be considered as a relevant matter (because of the impact of disturbing or moving those objects). Significance of land independent of or unrelated to objects is not a matter required to be considered.

The case also stated that the Director-General was under no obligation to seek out further information or make inquiries. The NPW Act neither expressly nor by implication gives rise to any requirement to undertake any further studies or work, and in the

circumstances of the case there was no public statement or practice which could give rise to a finding that there was a legitimate expectation on the part of Mr Broad Henry that further studies would be undertaken.

The case also confirms that no person, indigenous or non-indigenous, has a statutory right to be consulted in the consideration of an application under section 90. No such right is expressed or implied in the NPW Act.

Anderson & Anor v Director-General of the Department of Environment and Climate Change & Anor [2008] NSWLEC 182

Background

This case was an application for judicial review of a permit and consent issued by the Director General under ss87 and 90 of the NPW Act in relation to land at Angels Beach, Ballina which was the subject of a proposed residential subdivision. The applicants, Douglas and Susan Anderson, Aboriginal elders of the Nunbahjing Clan within the Bundjalung Nation, had previously sought to protect the area in relation to a cycleway proposed by Council. The Andersons had also taken various proceedings challenging earlier development consents and s87 and s90 permits and consents, some of which had been successful, in their campaign to protect the Angels Beach site.³

This case challenged the validity of the permit and consent, on the basis that the Director-General failed to give proper, genuine and realistic consideration to the cultural significance of the land and Aboriginal objects, to intergenerational equity and to the opinions of the Andersons, that the Director-General's decision was manifestly unreasonable, and was affected by bias.

Outcome

The Court rejected the application for review on all grounds. It was emphasised that the Court was not called upon to decide whether it would have granted the application for consent - the fact that the Andersons were not happy with the merits of the decision did not permit the Court to inquire into those merits. The Court considered that on the facts of the case, all relevant matters were adequately taken into consideration, and dismissed that the Director-General's decision was manifestly unreasonable or affected by bias.

³ For example, see *Anderson & Anor v The Director-General of the Department of Environment and Conservation & Ors* [2006] NSWLEC 12; *Anderson v Minister for Infrastructure Planning & Natural Resources* [2006] NSWLEC 725; *Anderson & Anor on behalf of Numbahjing Clan within the Bundjalung Nation v NSW Minister for Planning and Ors* [2008] NSWLEC 120

Anderson v Director General of the Department of Environment and Climate Change & Anor [2008] NSWCA 337

Background

This was an appeal from the above decision in the Land and Environment Court.

In the Court of Appeal, the Andersons focused on the argument that in making the decision to grant the s90 consent, the Director General had failed to adequately take inter-generational equity into account. Specifically, the Director General failed to consider the significance to the traditional custodians of the land (including future generations) for the Aboriginal objects to remain undisturbed on the site, in the context of the traditions, customs and observances of those custodians. The Andersons submitted that this was a relevant consideration in applying the principles of ecologically sustainable development to the s90 consent application.

Outcome

In rejecting the Andersons' argument, the Court of Appeal determined that the particular facts of the case could not support this conclusion, because the Director General had considered matters of inter-generational equity to the required degree.

Anderson on behalf of Numbabjing Clan within the Bundjalung Nation v Director-General of the Department of Environment and Climate Change & Anor [2008] NSWLEC 299

Background

This case was the Court's decision regarding an order for costs sought by DECC for the proceedings challenging a consent issued under s90 in relation to the Angels Beach site at Ballina⁴. As noted above, the Andersons were unsuccessful in their challenge.

In response to DECC's claim for costs, the Andersons sought to rely on a rule of the LEC that permits the Court to depart from the ordinary 'loser pays' costs order, when proceedings are brought in the public interest.

Outcome

The Court refused to exercise the available discretion in relation to costs, and made an order that the Andersons were to pay the costs of DECC. While accepting that the proceedings were brought in the public interest, the Court stated that there was required to be some 'special circumstances' beyond the public interest, which could justify departing from the usual costs order. In this case, countervailing considerations to the public interest were the fact that there was

⁴ *Anderson & Anor v Director-General of the Department of Environment and Climate Change & Anor* [2008] NSWLEC 182

disagreement within the local Aboriginal community, as there was some indication that not all members (in particular, the Local Aboriginal Land Council) were against the granting of the s90 consent, the fact that despite raising the question of intergenerational equity, the case did not involve any real or substantial consideration of legal questions of general significance, and that the case was not a particularly strong one- as the decision-maker had gone to such lengths 'to ensure that every conceivable consideration was taken into account including affording the Andersons themselves the fullest opportunity of making submissions and having them taken into account before any determination was made'.