Submission No 21

INQUIRY INTO ABORIGINAL CULTURAL HERITAGE (CULTURE IS IDENTITY) BILL 2022

Organisation: NTSCORP Limited

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NTSCORP Limited Submission to the Inquiry into the *Aboriginal Cultural Heritage (Culture is Identity) Bill 2022*

Yaegl Native Title Consent Determination Hearing, Yamba, 25 June 2015

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Dear Chairperson and Committee Members,

NTSCORP Limited Submission to the Inquiry into the *Aboriginal Cultural Heritage (Culture is Identity) Bill 2022*

1 We thank the Portfolio Committee No. 7 – Planning and Environment for the opportunity to provide submissions to its Inquiry into the *Aboriginal Cultural Heritage (Culture is Identity) Bill 2022* (**the Bill**).

2 These submissions are structured in the following way:

(a) Introduction;

(b) Part 1 – Best Practice Standards for Aboriginal Cultural Heritage Reform - United Nations Declaration on the Rights of Indigenous People, Dhawura Ngilan Report, the Juukan Gorge Report and Commitments under the Closing the Gap Agreement;

(c) Part 2 – NTSCORP Limited's Principles for Reform to Aboriginal Cultural Heritage Legislation in NSW;

(d) Part 3 – Native Title and the interaction with Aboriginal Cultural Heritage Legislation in NSW; and

(e) Part 4 – NTSCORP Limited's Submissions on the *Aboriginal Cultural Heritage (Culture is Identity) Bill 2022* and recommended amendments to the Bill.

Introduction

NTSCORP Limited

3 NTSCORP Limited (**NTSCORP**) has statutory obligations under the *Native Title Act 1993* (Cth) (**NTA**) to act to protect the native title rights and interests of Aboriginal Traditional Owners (**Traditional Owners**) in New South Wales (**NSW**) and the Australian Capital Territory (**ACT**).

4 NTSCORP is funded under Section 203FE of the NTA to carry out the functions of a native title representative body in NSW and the ACT. NTSCORP provides services to Aboriginal Traditional Owners who hold or may hold native title rights and interests in NSW and the ACT, specifically to assist them to exercise their rights under the NTA.

5 In summary, NTSCORP's functions and powers under sections 203B to 203BK of the NTA include:

- Facilitation and assistance, including representation in native title matters;
- Dispute resolution;
- Notification;
- Agreement-making;
- Certification; and
- Internal review.

6 This submission is based on our experience working with Traditional Owners of lands, waters and seas within NSW and the ACT, and in particular, providing assistance to native title claimants, native title holders and registered native title bodies corporate (**RNTBCs**) in relation to the recognition, exercise and protection of their native title rights and interests and specifically in relation to agreement making and litigation pertaining to Aboriginal Cultural Heritage.

The need for Reform to the Aboriginal Cultural Heritage System in NSW

7 NTSCORP strongly supports the introduction of standalone Aboriginal Cultural Heritage legislation in NSW which will operate to protect Aboriginal Cultural Heritage and recognise

and respect that Native Title Holders and, in areas which have not yet been subject to native title determinations, Aboriginal Traditional Owners, have the right to speak for and make decisions about their Cultural Heritage.

8 In NTSCORP's view, the current Aboriginal Cultural Heritage provisions contained in the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**) and related regulations establishes a system which, rather than holistically operating to protect Aboriginal Cultural Heritage, creates permissible ways to damage or destroy Aboriginal Cultural Heritage for the benefit of third parties. The NPW Act empowers the Secretary of the Department of Premier and Cabinet to make decisions in relation to the grant of Aboriginal Heritage Impact Permits (AHIPs) and the NPW Act provides that Aboriginal Cultural Heritage is owned by the State of NSW. The NPW Act does not effectively empower Native Title Holders and Aboriginal Traditional Owners to be involved in the management or protection of their Cultural Heritage or to make decisions in relation to it. This is clearly reflected in the number of AHIPs which are granted each year (and conversely the number which are declined).

9 The already insufficient Aboriginal Cultural Heritage protections contained in the NPW Act and related regulations do not apply to State Significant Infrastructure and Development. In NTSCORP's submission, this is entirely unacceptable, especially having regard to the scale and impact of infrastructure and development of that kind.

10 The application of the Aboriginal Cultural Heritage provisions contained in the NPW Act is also premised on a narrow definition of what constitutes Aboriginal Cultural Heritage and fails to take into account all facets of tangible and intangible Aboriginal Cultural Heritage and the broader landscape in which Aboriginal Cultural Heritage exists.

11 The introduction of standalone Aboriginal Cultural Heritage legislation has been advocated for by the Aboriginal People of NSW for decades and is long overdue. In the second reading speech for the *National Parks and Wildlife Amendment Bill 2010,* which contained a number of amendments pertaining to Aboriginal Cultural Heritage, then Minister for the Environment Mr Frank Sartor said:

> "*These amendments offer the first steps in the reform and modernisation of Aboriginal cultural heritage regulation in New South Wales, which have remained largely unchanged for more than 30 years. The Government has committed to a broad reform process and will consider new stand-alone legislation in New South Wales to protect Aboriginal cultural heritage. The proposal for new stand-alone*

legislation will be developed by a working party comprised of representatives from both government and community groups, within a two-year period. It is important that we move to stand-alone legislation to protect Aboriginal heritage and to remove it from what is really an Act more concerned about the protection of flora and fauna in our national parks. In the meantime, these amendments are an important first step to address enforceability issues and to bring the offences and penalties relating to Aboriginal cultural heritage in line with other environment protection legislation."

12 The Aboriginal Cultural Heritage protections contained in the NPW Act and related regulations, are also outdated as they relate to the recognition of native title in NSW and the legal rights of Native Title Holders in relation to their Cultural Heritage as determined by the Federal Court of Australia. The NPW Act and related regulations fail to effectively empower Native Title Holders to *have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.*

13 Native title is the legal recognition of the individual or communal rights and interests which Aboriginal People have in land, waters and seas, where Aboriginal People have continued to exercise their rights and interests in accordance with traditional law and custom since before the British asserted sovereignty over Australia. Native title holders are often referred to as "Traditional Owners" in recognition of the fact that they are the original owners of the lands, waters and seas. Native title rights are almost always defined to include rights in, or connected to, Aboriginal cultural heritage.

14 There have now been 16 determinations made by the Federal Court of Australia recognising that native exists in various parts of NSW and there will continue to be further determinations. Notably there are currently extensive native title claims on foot filed by the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People, Gomeroi People, South Coast People and Widjabul Wia-bal People. Annexed to this submission and marked "**Annexure A**" is a map from the National Native Title Tribunal showing the native title determinations made and native title claims on foot in NSW as at 30 June 2022.

15 Aboriginal Cultural Heritage reform in NSW must be consistent with the *United Nations Declaration on the Rights of Indigenous People* **(UNDRIP)**, the *United Nations Declaration on the Rights of Indigenous Peoples*, the *International Convention on Civil and Political Rights* and the *International Convention on Cultural Economic and Social Rights* and must follow the

recommendations and guidance contained in the "Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation" (**Dhawura Ngilan Report**), the "A Way Forward: Final Report into the destruction of Indigenous heritage sites at Juukan Gorge" (**Juukan Gorge Report**) and fulfill the obligations of the State of NSW under the National Agreement on Closing the Gap (**Closing the Gap Agreement**).

Part 1 - Best Practice Standards for Aboriginal Cultural Heritage Reform

United Nations Declaration on the Rights of Indigenous People

16 The United Nations Declaration on the Rights of Indigenous People (**UNDRIP**) was adopted on 13 September 2007, establishing a universal framework of minimum standards for the survival, dignity and well-being of Indigenous peoples across the world. A core guiding factor in the general preamble states that it is declared:

> ***Convinced*** *that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs;*[1]

17 The most relevant articles under UNDRIP in relation to the protection and preservation of Aboriginal and Torres Strait Islander cultural heritage are:

> ***Article 3***
> *Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*
>
> ***Article 11***
> *1. Indigenous peoples have the right to practice 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, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.*

[1] United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, 4.

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, practice, 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.

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.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

18 It is important to note that UNDRIP does not create new rights but recognises existing rights and that it is the goal of UNDRIP to ensure that countries work with Indigenous Peoples. As stated, these articles set minimum standards for countries and their legislative frameworks on anything that concerns Indigenous Peoples.

19 UNDRIP is referred to in both the Dhawura Ngilan Report and the Juukan Gorge Report as guiding factors for legislative reform. The relevant issues are referred to below in their respective sections.

Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation

20 The entire report, "Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation" was developed by the Chairs of Australia's national, state and territory Indigenous heritage bodies and was designed as a roadmap for improving approaches to Aboriginal and Torres Strait Islander heritage management in Australia.

21 The Dhawura Ngilan Report contains two documents: the vision and the best practice standards. In this submission they will be referred to as the Dhawura Ngilan Vision and the Dhawura Ngilan Standards.

The Dhawura Ngilan Vision

22 In the Dhawura Ngilan Vision, connection to Country is defined by Aboriginal and Torres Strait Islander Peoples' view of heritage transcending time into what can be widely be described as the Dreaming. It is the understanding that there is sacred essence in places and sacred objects. As stated in the Vision:

> *In the historic Mabo Case, evidence was given that related how the Meriam people of the Torres Strait understand their connection to Country, land and waters, both in spiritual and practical terms. Henry Kabere testified that:*
>
> > *The Malo story is part of our traditional law. This is the same law as that written in the court book. Malo law applies to the land, to land owners, to caretakers, to gardens, to fish traps, to inheritance of land and to boundaries (Keon-Cohen 2011, p. 371).*
>
> *This has been described as a 'person-land-ancestral inter-relationship' (Rumsey 2001, p. 19). It is a living connection between Aboriginal and Torres Strait Islander people today. Australia's landscape, waters, and seas, collectively referred to as 'country', are alive with a profusion of heritage places*.[2]

23 The Dhawura Ngilan Vision states that it is **this connection that gives Traditional Owners or Native Title Holders the rights, responsibilities, and duties to Country. It also gives Traditional Owners and Native Title Holders the authority to speak for Country**.[3] This is an important factor that must be included when legislation is contemplating cultural heritage.

24 The Dhawura Ngilan Vision reports that Aboriginal and Torres Strait Islander Heritage is currently inadequately served by national legislation and by various state legislation that deal with Aboriginal cultural heritage.[4]

25 The Dhawura Ngilan Vision embodies the long-held aspirations of Aboriginal and Torres Strait Islander People for their heritage and seeks to inform policy and legislative reform. The Dhawura Ngilan Vision has four key focus areas:[5]

i. Aboriginal and Torres Strait Islander people are the Custodians of their heritage. It is protected and celebrated for its intrinsic worth, cultural benefits and the wellbeing of current and future generations of Australians;
ii. Aboriginal and Torres Strait Islander heritage is acknowledged and valued as central to Australia's national heritage;

[2] Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation, March 2021, p 9.
[3] Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation, March 2021, p 9.
[4] Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation, March 2021,13
[5] Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation, March 2021, Part 1 p 7.

iii. Aboriginal and Torres Strait Islander heritage is managed consistently across jurisdictions according to community ownership in a way that unites, connects and aligns practice; and

iv. Aboriginal and Torres Strait Islander heritage is recognised for its global significance.

These key focus areas were identified in the context of guiding legislative reform in Australia. They will be briefly discussed in turn below.

Focus Area 1: Aboriginal and Torres Strait Islander people are the Custodians of their heritage.

26 Aboriginal and Torres Strait Islander heritage has been maintained over thousands and thousands of years by Aboriginal and Torres Strait Islander People, and this protection has only recently been augmented by legislation and policy across each jurisdiction. As Dhawura Ngilan Vision states, this legislation is 'inconsistent and, in some instances, outdated and inadequate'.[6] This must be alleviated through appropriate legislative reform.

27 This area of focus therefore is that legislative reform must have as the key objective that Aboriginal and Torres Strait Islander People be recognised as, and continue to be, the Custodians of their heritage.

28 To achieve this, the Vision refers to the Dhawura Ngilan Standards, which will provide guidance for this reform to ensure that any legislation that is produced is of the highest standard. To achieve this objective, it must also ensure the Free, Prior and Informed Consent (**FPIC**) of Aboriginal and Torres Strait Islander People with an interest in the heritage being protected before the approval of any project or other that would affect their Country.[7]

29 The Dhawura Ngilan Vision states that a particular focus should be the protection of intangible cultural heritage. The Dhawura Ngilan Vision refers to the contentious issues in Australia regarding intangible cultural heritage and urges Australia to ratify the UNESCO Convention for the Safeguarding the Intangible Cultural Heritage 2003. This would assist in addressing the issues found in cases such as *Milpurrurru & Others v Indofurn Pty Ltd* (1995) 30 IPR 209.

[6] Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation, March 2021, Part 1 p 14.
[7] Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation, March 2021, Part 1 p 15.

30 Another aspect to achieve this key area of focus is for heritage councils to work with Aboriginal and Torres Strait Islander people to identify and protect heritage places, with emphasis that FPIC must be obtained by the Traditional Owners or Native Title Holders.[8]

Focus Area 2: Aboriginal and Torres Strait Islander heritage is acknowledged and valued as central to Australia's national heritage

31 The significance of Aboriginal and Torres Strait Islander heritage transcends Australia's national boundaries as Aboriginal and Torres Strait Islander People are the Custodians of the oldest continuous culture on earth.

32 The Dhawura Ngilan Vision includes that legislation must ensure that this heritage is valued and appreciated as central to Australia's national heritage.

33 Key to achieving the objectives of this area of focus are the following four aspects:[9]

(a) That Australia adopts dual naming or sole naming of places, bringing the richness of Aboriginal and Torres Strait Islander languages into everyday use;
(b) That Australia embrace truth telling, acknowledging that the cultural heritage narrative is also one of dispossession, aggression, violence and cultural assault;
(c) That all jurisdictions ensure that curriculums promote Aboriginal and Torres Strait Islander heritage in their region; and
(d) That jurisdictions protect cultural and spiritual assets in order to effectively maintain Aboriginal and Torres Strait Islander culture and language.

Focus Area 3: Aboriginal and Torres Strait Islander heritage is managed consistently across jurisdictions according to community ownership in a way that unites, connects and aligns practice

34 The third key focus area of the Dhawura Ngilan Vision is to have jurisdictions across Australia all improve their processes and align their practices in the area of protecting and preserving Aboriginal and Torres Strait Islander cultural heritage to ensure consistency.

[8] Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation, March 2021, Part 1 p 16.
[9] Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation, March 2021, Part 1 p 19.

35 The Dhawura Ngilan Vision states this can be achieved by having jurisdictions working towards standardising heritage registers, for example the Aboriginal Cultural Heritage Register and Information System (**ACHRIS**) currently in use by South Australia, Queensland and Victoria. This would enable people to search across jurisdictions and to standardise data collection.[10]

36 It can also be achieved through jurisdictions working together to recognise, protect and celebrate significant sites that cross borders, the establishment of National Resting Place, and to recognise the rights of Aboriginal and Torres Strait Islander people to access and repatriate secret sacred materials held in Australia.[11]

Focus Area 4: Aboriginal and Torres Strait Islander heritage is recognised for its global significance

37 The final key focus area of the Dhawura Ngilan Vision is to ensure that a global audience hears and appreciates the stories of Aboriginal and Torres Strait Islander Peoples.

38 As the Vision states, it is imperative that all legislation drafted into the future that may have impact on or is related to Aboriginal and Torres Strait Islander cultural heritage should follow a collaborative process with the heritage Chairs in order to ensure this focus area and those set out above are followed.[12]

<u>Best Practice Standards in Indigenous Cultural Heritage Management and Legislation</u>

39 The recommendations of Dhawura Ngilan Report include a Best Practice guide, the Dhawura Ngilan Standards, that was adopted under the Darwin Statement of the Heritage Chairs and Officials of Australia and New Zealand. The objective of the Standards is to achieve the aspiration of having cultural heritage legislation that is consistent across the country and of the highest standards.

[10] Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation, March 2021, Part 1 p 23.
[11] Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation, March 2021, Part 1 p 24.
[12] Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation, March 2021, p 28.

40 These Standards were developed based on UNDRIP which is discussed above. As stated, UNDRIP provides minimum standards for survival, dignity, security and well-being of Indigenous Peoples worldwide.

41 The UNDRIP minimum standards and rights are recognised in a range of domestic Australian legislation, and must be reflected in any legislative reform pertaining to Aboriginal Cultural Heritage.

42 Specifically in relation to the principles of self-determination in the context of Indigenous Cultural Heritage (**ICH**), the principles contained in the Dhawura Ngilan Report provide that it is the affected Indigenous community itself which should be the arbiter of the management of the ICH aspects of any proposal that will affect that heritage, that the identification of a legitimate "representative organisation" capable of exercising an Indigenous community's rights and responsibilities with respect to ICH is a fundamental component in any comprehensive ICH legislation and that it is for the affected Indigenous community to decide who represents them, consistent with free, prior and informed consent.

43 The recommendations of the Dhawura Ngilan Report include that all jurisdictions adopt and work towards achieving the Best Practice Standards in Indigenous Cultural Heritage Management and Legislation.[13]

A Way Forward: Final Report into the destruction of Indigenous heritage sites at Juukan Gorge (Juukan Gorge Report)

44 The Juukan Gorge Report was released following Rio Tinto's destruction of the 46,000+ year old Juukan Gorge rock shelters on 24 May 2020. This act caused profound grief for the Puutu Kunti Kurrama and Pinikura Peoples and caused immeasurable cultural and spiritual loss.

45 The Inquiry that followed that destruction led to the Juukan Gorge Report as the Inquiry found 'serious deficiencies across Australia's Aboriginal and Torres Strait Islander cultural heritage legislative framework'.[14] These deficiencies were not just inadequacies or gaps in legislation, but in many ways the legislation designed to protect cultural heritage directly contributed to damage and destruction of cultural heritage across Australia, especially in NSW.

[13] Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation, March 2021, p 15.
[14] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, p xi.

46 The Juukan Gorge Report is critical of all states and territories legislation but was particularly critical of the current cultural heritage legislative framework in NSW. The perceptions and experiences of the NSW framework include:

> *Stakeholders presented negative assessments of NSW cultural heritage protections. Submitters claimed that the protections offered are weak and the heritage framework is inadequate and ineffective. Statistics suggest that destruction of cultural heritage is a common event in the State.*
>
> *The Law Council of Australia (LCA) submitted that the NSW cultural heritage framework is considered 'anachronistic and contains serious deficiencies'.*
>
> *One of the most fundamental problems is that Aboriginal cultural heritage is considered as flora and fauna, a fact which is seen as highly insulting by Aboriginal peoples. The National Parks and Wildlife Act 1974 provides no rights of ownership or inclusion in decision making processes for Aboriginal peoples. Aboriginal peoples are unable to determine what is considered significant cultural heritage.*[15]

47 The Juukan Gorge Report considered at length each state and territories' legislation, Commonwealth legislation and stakeholder perspectives in light of the events a Juukan Gorge. As part of the Report there are eight Recommendations. A core message of the Recommendations is that the Commonwealth must pass legislation that will either supersede all other jurisdictions or that will be an overarching legislation that sets the minimum standards for all state and territory legislation. This is because of the ongoing failures of the state and territory systems.

48 The most relevant Recommendations to the current Bill, their focus areas and ways of improvement, are set out below.

Recommendation 1: Need for overarching Commonwealth legislation

49 The Juukan Gorge Report looked at all the state and territories as well as the Commonwealth legislation that covers Aboriginal cultural heritage. From the Inquiry the Report made three main findings:

> *(1) The Australian Parliament should legislate for an overarching Commonwealth legislative framework based on the protection of cultural heritage rather than its destruction, in line*

[15] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, p 106.

with the principles set out below. State and territory legislation should also be required to meet the principles set out in this report.

(2) The Commonwealth, state and territory governments should endorse a set of standards that set best practice in the management of cultural heritage sites and objects and the development of cultural heritage management plans.

(3) *The economic benefits of protecting and celebrating cultural heritage sites should be promoted*.[16]

50 As stated above therefore, one of the key findings is therefore that there should be national legislation that will act as overarching legislation that would also set the minimum standards for state and territory legislation.

Recommendation 3: Minimum standards for legislative reform

51 Recommendation three also states that the Australian Government should legislate a new framework for cultural heritage protection at a national level, which must be developed through a process of co-design with Aboriginal and Torres Strait Islander peoples.

52 This legislation should set minimum standards for state and territory heritage protections consistent with UNDRIP and the Dhawura Ngilan Report.

53 Recommendation Three states that the legislation should include as part of those minimum standards (emphasis added):

(a) *a definition of cultural heritage recognising both tangible and intangible heritage;*
(b) *a process by which cultural heritage sites will be mapped, which includes a record of past destruction of cultural heritage sites (with adequate safeguards to protect secret information and ensure traditional owner control of their information on any database);*
(c) ***clear processes for identifying the appropriate people to speak for cultural heritage that are based on principles of self-determination and recognise native title or land rights statutory representative bodies where they exist****;*
(d) ***decision making processes that ensure traditional owners and native title holders have primary decision making power in relation to their cultural heritage****;*
(e) *a requirement that site surveys involving traditional owners are conducted on country at the beginning of any decision making process;*
(f) *an ability for traditional owners to withhold consent to the destruction of cultural heritage;*
(g) *a process for the negotiation of cultural heritage management plans which reflect the principles of free, prior and informed consent as set out in the UNDRIP;*
(h) *mechanisms for traditional owners to seek review or appeal of decisions;*

[16] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, p 186.

(i) *adequate compliance, enforcement and transparency mechanisms;*
(j) *adequate penalties for destructive activities, which include the need to provide culturally appropriate remedy to traditional owners;*
(k) *the provision of adequate buffer zones around cultural heritage sites;*
(l) *a right of timely access by Aboriginal and Torres Strait Islander peoples to protected cultural heritage sites;*
(m) *a process by which decisions can be reconsidered if significant new information about cultural heritage comes to light.*[17]

54 Key to Recommendation Three is developing a process to correctly identify the Aboriginal People to speak for Country in Cultural Heritage legislation. The Juukan Gorge Report recognises and emphasises that Traditional Owners and Native Title Holders are the correct persons to speak for Country and says that Traditional Owners and Native Title Holders should have primary decision making power in relation to their Cultural Heritage.

Who Speaks for Country

55 The Juukan Gorge Report acknowledges the different understandings of terms such as Traditional Owners and Native Title Holders and states (emphasis added):

> ***Unless specified, the term 'traditional owner' is used in the broader sense of referring to a group or groups of Aboriginal or Torres Strait Islander peoples who have a recognised connection to an area under traditional laws and customs, including the ability to speak for cultural heritage***.[18]

56 The Juukan Gorge Report reiterates this core principle at numerous points throughout the Report, emphasising in multiple different ways and in different contexts that Traditional Owners should be the only people to speak for Country. These include:

(a) At paragraph [4.133], when speaking about the deficiencies of the Western Australian legislation and the risk of the Minister having too much power under legislation the Report states:

(i) The view of Aboriginal organisations is that the relevant traditional owners should have final responsibility for deciding whether their cultural heritage should be damaged or destroyed.[19]

[17] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, p xxvii.
[18] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, p 4.
[19] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, p 99.

(b) At paragraph [5.45], in the context of discussing the Victorian legislation the Report commends the attempt to give power to Traditional Owners and states:

(i) *The Australian International Council of Monuments and Sites (Australia ICOMOS) considers that the RAP system is 'a strong attempt to put traditional owners at the centre of decision making', which makes the State's approach differ from other areas;*[20] and

(ii) *The Victorian Aboriginal Heritage Council… proposes Traditional owner groups themselves—very similar to the First Peoples' Assembly—are able to nominate and recommend who their representatives would be… the vision is very sensible and I think very sound for Victorian traditional owners to be reclaiming their rights to suggest this to government.*[21]

(c) At paragraphs [5.84]-[5.87] in the context of discussing the South Australian legislative framework the Report states:[22]

(i) *The Minister must consult with and accept the views of the relevant traditional owners in making such a determination.*

(ii) *More than other jurisdictions, South Australia affords some decision-making power to traditional owners. The AH Act (SA) establishes the Aboriginal Heritage Committee (with an all-Aboriginal membership) to act in an advisory role for the Minister, which in turn appoints Recognised Aboriginal Representative Bodies (RARBs) to advise the Minister in relation to specified sites and objects.*

(d) At paragraph [5.141]-[5.147], in the context of discussing the Northern Territory legislative framework the Report states:[23]

(i) *Key to the rights of Aboriginal and Torres Strait Islander people is that the Act requires the consent of traditional owners for work that would be done on ALRA land.*

(ii) *The CLC outlined how the ARLA and the Native Title Act supports the rights of traditional owners.*

(iii) *The Law Council had criticisms of the Northern Territory legislation relating to the NTASSA. Their concerns revolve around the role of the AAPA as opposed to land councils in identifying relevant traditional owners to be consulted when works are proposed affecting a sacred site.*

[20] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, p 113.
[21] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, p 115.
[22] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, p 125.
[23] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, pp 143-144.

(e) At paragraph [5.159] in the context of the Committee providing criticism and comments on the state and territories legislative frameworks, the Report states:[24]

(i) *Those legislative frameworks that have strong Aboriginal and Torres Strait Islander peoples' representation in decision making in standalone legislation seem to have the best acceptance by traditional owners and proponents.*

…

Those states with multiple pieces of legislation that do not actively seek to include Aboriginal and Torres Strait Islander peoples in decision-making positions perform the worse.

(f) At paragraph [6.83]-[6.89] in the context of discussing the core principle FPIC under UNDRIP the Report states:

(i) *Many Aboriginal and Torres Strait Islander groups noted that ministerial decision-making powers were in conflict with FPIC. For example, the Cape York Land Council was clear that decisions regarding cultural heritage must be made by traditional owners.*[25]

(ii) *In terms of enacting free, prior and informed consent, it must be done alongside and with the traditional owners right from the very, very beginning.*[26]

(g) At paragraph [7.32]-[7.36] in the context of discussing mapping cultural heritage sites under Recommendation Three the Report states:[27]

(i) *This cultural mapping should be undertaken by walking on country with traditional owners not by desktop survey. The control of mapping and information should be in the hands of the traditional owners.*

(ii) *Many traditional owners expressed reluctance to provide information about cultural heritage without the ability to control how the information is stored and to protect secret or sensitive information.*

(iii) *It is true that when proponents act responsibly towards traditional owners strong partnerships can be formed to map and protect cultural heritage sites.*

(h) At paragraphs [7.38]-[7.43] in the context of discussing identification of Traditional Owner groups the Report states:

(i) *Currently no heritage framework successfully grapples with how to identify the correct Aboriginal and Torres Strait Islander group/s to speak with about heritage sites. The recognition of traditional owners is complicated by a long*

[24] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, pp 148.
[25] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, pp 179.
[26] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, pp 180.
[27] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, pp 191.

history of state-sanctioned disconnection of Aboriginal and Torres Strait Islander peoples and their lands and compounded by complicated legislative frameworks at multiple levels of government.[28]

(ii) *In jurisdictions where they operate, entities such as Land Councils and Prescribed Bodies Corporate (PBCs) have specific roles and functions that allow them to speak about cultural heritage with authority. However, some heritage laws pre-date native title laws and as such, newer bodies recognised under Commonwealth law may not be recognised under state laws.*[29]

(iii) *Identifying appropriate and representative spokespeople is more problematic in areas where there is no clearly defined entity with statutory responsibility. However, many of the disputes about overlapping claims or entitlements to speak for country are a product of divisions caused by colonisation and Anglo-Australian laws.*[30]

(iv) *Therefore the process of recognising traditional owner groups will be unique to each jurisdiction, but this should not prevent the Australian Government from developing a framework to guide a process for recognising traditional owners.*[31]

(i) At paragraph [7.48] in the context of discussing FPIC under Recommendation Three, the Report states:

(i) *There is a need for a nationally consistent approach which provides Aboriginal and Torres Strait Islander Australians with a primary role in decision-making. Aboriginal and Torres Strait Islander peoples must have greater access to their areas, sites and places, and the connected knowledge and cultural expression, and the law must empower them to protect their cultural heritage. This will enable them to care for heritage sites in line with their customary obligations, and contemporary aspirations.*[32]

(j) At paragraph [7.80] which sets outs Recommendation Three of the Report it states (emphasis added):

(i) ***decision making processes that ensure traditional owners and native title holders have primary decision making power in relation to their cultural heritage***;[33] and

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[28] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, pp 192.
[29] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, pp 192.
[30] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, pp 192.
[31] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, pp 193.
[32] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, pp 193.
[33] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, pp 199.

(ii) *Traditional owners should be able to effectively enforce Commonwealth protections through civil action*.[34]

(k) On page 227 as part of the Additional Comments from Senator Lidia Thorpe the Report states:

(i) *This case study highlights the need for culturally appropriate, well-resourced and ongoing consultation processes to obtain Free, Prior and Informed Consent from Traditional Owners and Native Title holders in relation to activity proposals on Country, as well as the need for avenues available to Traditional Owners to question the apparent 'consent' provided by their PBC and the right to veto activity proposals. It also highlights the need for broader definitions and considerations, including intangible heritage, when assessing cultural heritage protection requirements.*[35]

(l) On page 232 as part of the Additional Comments from Senator Lidia Thorpe the Report states:

(i) *In their submission to the Committee, the National Native Title Council elaborates that the Commonwealth regime leaves a substantial gap between the protections afforded by the EPBC Act [...] and the ATSIHP Act that operates as legislation of last resort and has a poor record of protection. This places a heavy reliance on inconsistent and often similarly out of date State and Territory Indigenous cultural heritage protections. [...] Indigenous cultural heritage protection is and should be the responsibility of Traditional Owners and it is the expectation of the International community that national governments facilitate Traditional Owner rights to manage and protect their cultural heritage.*[36]

57 The examples above show that the Juukan Gorge Report and the Recommendations were produced with the core understanding that Traditional Owners and Native Title Holders are the appropriate people to speak for Country when it comes to Cultural Heritage.

58 The Recommendations for reform of legislation across the jurisdictions relies on this core understanding being a key factor in reform, and that there will be appropriate and effective processes to identify who are the Traditional Owners and Native Title Holders for each specified area. In NTSCORP's view Native Title Holders can be clearly identified based on the

[34] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, pp 200.
[35] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, pp 227.
[36] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, pp 232.

description of Native Title Holders contained within the Federal Court's determination of native title which described which Aboriginal persons hold native title rights and interested in a defined area in accordance with traditional law and custom. This is predominantly done by reference to descent from named apical ancestors. In regards to the legislative definition of Traditional Owners (also referred to in some legislation as "knowledge holders"), annexed to this submission and marked "**Annexure B**" is an extract of various definitions contained in cultural heritage legislation in other States and Territories for the Committee's consideration.

Commitments under the Closing the Gap Agreement

59 The NSW Government has entered the *National Agreement on Closing the Gap* (**Closing the Gap Agreement**) which contains the following Objectives and Outcomes:

> *a. Shared decision-making: Aboriginal and Torres Strait Islander people are empowered to share decision-making authority with governments to accelerate policy and place-based progress on Closing the Gap through formal partnership arrangements.*
>
> *b. Building the community-controlled sector: There is a strong and sustainable Aboriginal and Torres Strait Islander community-controlled sector delivering high quality services to meet the needs of Aboriginal and Torres Strait Islander people across the country.*
>
> *c. Improving mainstream institutions: Governments, their organisations and their institutions are accountable for Closing the Gap and are culturally safe and responsive to the needs of Aboriginal and Torres Strait Islander people, including through the services they fund.*[37]

60 The Closing the Gap Agreement contains the following commitment in relation to prioritising Aboriginal and Torres Strait Islander Cultures:

> *20. The Parties acknowledge that strong Aboriginal and Torres Strait Islander cultures are fundamental to improved life outcomes for Aboriginal and Torres Strait Islander people.*
>
> *21. The Parties agree to implement all activities under this Agreement in a way that takes full account of, promotes, and does not diminish in any way, the cultures of Aboriginal and Torres Strait Islander people. This commitment is part of the new way of working that Parties have agreed to under this Agreement. The Parties agree to demonstrate this commitment through their Implementation Plans.*
>
> *22. This Agreement supports the prioritisation of Aboriginal and Torres Strait Islander cultures through the Priority Reforms outlined in Part 6 of this Agreement.*

[37] National Agreement on Closing the Gap at [3], clause 17

23. New Closing the Gap outcome areas, targets and indicators have also been included in this Agreement that support the cultural wellbeing of Aboriginal and Torres Strait Islander people in areas of languages; cultural practices; land and waters; and access to culturally relevant communications.[38]

61 Under the Closing the Gap Agreement, the NSW Government has agreed to 17 socio-economic outcomes, including associated targets by which to measure those outcomes, including relevantly:

***Outcome 15**, '**Aboriginal and Torres Strait Islander People maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters**';*

- *Target 15a: By 2030, a 15 per cent increase in Australia's landmass subject to Aboriginal and Torres Strait Islander people's legal rights or interests.*
- *Target 15b: By 2030, a 15 per cent increase in areas covered by Aboriginal and Torres Strait Islander people's legal rights or interests in the sea.*

Outcome 16, 'Aboriginal and Torres Strait Islander cultures and languages are strong, supported and flourishing'

62 In NTSCORP's submission, any diminishment of Native Title Holder's current legal rights in relation to Aboriginal Cultural Heritage would directly contradict it's commitments under the Closing the Gap Agreement.

Part 2 – NTSCORP Limited's Principles for Reform to Aboriginal Cultural Heritage Legislation in NSW

63 NTSCORP are committed to the introduction of standalone Aboriginal Cultural Heritage legislation (**legislation**) which strengthens the protection of Aboriginal Cultural Heritage in NSW and the capacity of Native Title Holders and Traditional Owners to speak for their Country and their Cultural Heritage and to make decisions in relation to it. In NTSCORP's view embedding the principles of cultural authority and respect in any legislation enacted is paramount to the successful operation of that legislation.

[38] National Agreement on Closing the Gap at [3], clause 20-23

64 We consider that standalone legislation will provide Aboriginal Cultural Heritage protection with the singular focus and standing that it deserves. The introduction of standalone legislation will bring NSW into line with equivalent standalone Aboriginal Cultural Heritage legislation in most other States and Territories and has been a long-standing commitment of both sides of Parliament.

65 As outlined above, NTSCORP considers that any legislation enacted must:

- be consistent with Australia's International Obligations, including the *United Nations Declaration on the Rights of Indigenous Peoples*, the *International Convention on Civil and Political Rights* and the *International Convention on Cultural Economic and Social Rights*;
- follow the recommendations and guidance contained in the Dhawura Ngilan Report and the Juukan Gorge Report; and
- reflect the commitments made by the State of NSW under Closing the Gap Agreement by promoting, and not in any way diminishing, the cultures of Aboriginal People in NSW, by increasing Aboriginal People's legal rights in relation to land and water and by building and strengthening Aboriginal structures and decision making.

66 We also consider that any legislation enacted must have cultural legitimacy. It must recognise the Aboriginal People who have the cultural authority and responsibility to care for sites and Country and those who suffer the spiritual consequences for harm to sites, objects and places. Any legislation enacted must vest Aboriginal Cultural Heritage in its Traditional Owners, rather than in the State of NSW.

67 Our People and the voice of our People must be the central focus in any legislation enacted and it should seek to enshrine the respect systems which have been in operation in our communities for millennia.

Improved Protections for Aboriginal Cultural Heritage

68 NTSCORP considers that any legislation enacted must deliver improved protections for Aboriginal Cultural Heritage in NSW, including:

- providing Aboriginal People with the legislative right to veto on actions which would destroy or harm Aboriginal Cultural Heritage;
- providing Aboriginal People with Greater Aboriginal Cultural Heritage management and oversight, compliance and enforcement;

- broader recognition and definitions of Aboriginal Cultural Heritage, including intangible heritage and a broader recognition of the landscape which includes seas and waters;
- State significant infrastructure and major developments should not be exempted from any legislation enacted. Projects with this classification have perhaps the most significant impact on Aboriginal Cultural Heritage and yet they have the least protection; and
- providing opportunities for self-determination, capacity building and employment of Aboriginal People.

Aboriginal Cultural Heritage Council

69 The preferred position of NTSCORP is that a new body be established as the Aboriginal Cultural Heritage Council, funded by Government (but independent of Government) to support the functions of the Aboriginal Cultural Heritage Council and the local Aboriginal Cultural Heritage Services.

70 We consider that the new body should be Aboriginal controlled, with its own staff and have the sole function of administering the legislation. The successful operation of the Aboriginal Cultural Heritage Council, and the legislation more broadly, is dependent upon it's community acceptance as an independent, impartial and transparent body.

71 In our view, this funding should be viewed as an investment in Aboriginal Cultural Heritage protection and the successful operation of the system. The funding should also be viewed as an investment in the Aboriginal People of NSW.

72 Proponents' costs of negotiating cultural heritage management plans and accessing the Aboriginal Heritage Information Management System (**AHIMS**) could supplement Government funding.

73 To reflect the self-determination principles outlined above, NTSCORP supports reduced Ministerial functions and oversight in any legislation enacted.

Legislation enacted must not diminish Native Title Holders current or prospective legal rights in NSW

74 Currently in NSW Native Title Holders have secured a number of legal rights, which include:

- Federal Court determined native title rights under the *Native Title Act 1993 (Cth)* to maintain and to protect, from physical harm, sites and places of importance under traditional law and custom;
- Under *Part 6* of the *National Parks and Wildlife Act 1974 (NSW)* and the current Aboriginal Cultural Heritage Consultation Requirements, Native Title Holders have exclusive consultation rights in relation to Aboriginal Heritage Impact Permits; and
- Under *section 60(10)* of *National Parks and Wildlife Regulations 2019*, some Native Title Holders have secured exclusive rights in relation to Aboriginal Heritage Impact Permits and care agreements in the whole of their determination area.

Composition of Local Aboriginal Cultural Heritage Services

75 NTSCORP's position is that:

- A Registered Native Title Body Corporate (**RNTBC** or **PBC**) should be the Local Aboriginal Cultural Heritage Service for the whole of their native title determination area;
- Native Title Holders will comprise all of the members of a Local Aboriginal Cultural Heritage Service for the whole of their native title determination area;
- Where there is no native title determination, that the Local Aboriginal Cultural Heritage Service should comprise Aboriginal Traditional Owners with cultural knowledge and cultural authority to speak for their cultural heritage and for Country, including registered native title claimants; and
- There be a transition provision in any legislation enacted to provide for PBCs to assume the functions of the Local Aboriginal Cultural Heritage Service once native title has been determined.

76 In the event that any legislation enacted did not provide that native title holders were the Local Aboriginal Cultural Heritage Service where native title had been determined, some of the consequences which may flow include:

- An inconsistency with Commonwealth legislation which places the State Aboriginal Cultural Heritage Legislation at risk of a High Court challenge;
- Potential breach of s 10 of the *Racial Discrimination Act;*
- A potential compensation liability for the State of NSW to native title holders if the Aboriginal Cultural Heritage Legislation operates to affect native title rights and interests;

- Other compensation liabilities arising from decisions to destroy Aboriginal Cultural Heritage and other litigation more broadly, by native title holders in relation to the protection of Aboriginal Cultural Heritage; and
- A potential inconsistency with the cultural heritage provisions in future act agreements with proponents under the *Native Title Act 1993 (Cth).*

77 This issue is discussed in more detail in Part 3 of this Submission.

78 The 2019 decision of the Federal Court in *Kaurareg Native Title Aboriginal Corporation RNTBC v Torres Shire Council* [2019] FCA 746 demonstrates the Court's willingness to grant injunctions to PBCs to protect Aboriginal sites. A copy of the judgment in that case is annexed and marked "**Annexure C**" to this submission.

79 NTSCORP considers that this case demonstrates that any ACH legislation that the State continues or creates that does not make native title holders the decision maker on ACH will leave that process subject to intervention by the Federal Court.

Delegated Functions

80 NTSCORP considers that RNTBCs (PBCs) should be able to be delegated functions by the Aboriginal Cultural Heritage Council, including to support the operation of the Local Aboriginal Cultural Heritage Service.

81 NTSCORP is of the view that RNTBCs (PBCs) should also be directly included as one of the bodies who can be delegated functions to support the operation of Local Panels. Where there has been a determination of native title, NTSCORP consider that the RNTBC (PBC) should be the required support body for the Local Panel (in line with the composition of Local Panels in those areas).

Part 3 - Native Title and the interaction with Aboriginal Cultural Heritage Legislation in NSW

Native Title Rights and Interests

82 Native title is the legal recognition of the individual or communal rights and interests which Aboriginal People have in land and water, where Aboriginal people have continued to exercise their rights and interests in accordance with traditional law and custom since before the British asserted sovereignty over Australia. Native Title Holders are often referred to as "Traditional Owners" in recognition of the fact that they are the original owners of the lands, waters and seas. Native Title Holders' rights to "speak for Country"- including the culture and heritage connected to that Country - arise from their original ownership of an area. Any determination that native title exists includes all of the Aboriginal People who have native title rights and interests in land, waters or seas. The Native Title Holders are generally described by naming the ancestors from which each member of the group descends and each of the property rights determined by the Federal Court of Australia are individually identified.

83 In order for native title rights and interests to be formally recognised under the *Native Title Act 1993 (Cth)* (**NTA**), it must be established that:

1. The native title claim group have rights and interests that are possessed under traditional laws acknowledged and traditional customs observed;
2. The native title claim group by those laws and customs, have a connection with the land or water; and
3. That those rights and interests are capable of being recognised by Australian law.

84 This is a high bar, and one which it takes many, many years for most native title claim groups to reach. To establish to the Respondent Parties, including the State and Local Governments and an array of other interest holders, that a native title claim group holds native title it is necessary to provide extensive evidence including expert anthropological and historical reports and affidavits from native title claimants and participate in an arduous process of "credible evidence assessment" by the State of NSW, and in some circumstances, the Commonwealth of Australia.

85 The native title of a particular group will depend on the rights and interests held by the group under their traditional laws and customs. Whether those rights can be recognised through the Australian legal system depends in large part on what has happened to the land in the past and whether native title has been "extinguished" through acts such as development or the sale of land in freehold.

86 Native title rights and interests vary but commonly can include rights to:

(a) have access to, to maintain and to protect from physical harm sites and places of importance which are of significance to the native title holders under their traditional laws and customs; and

(b) engage in cultural activities including:

(1) visiting places of cultural or spiritual importance and protecting those places by carrying out activities to preserve their physical or spiritual integrity;

(2) conducting and participating in ceremonies and rituals including in relation to birth and death;

(3) holding cultural gatherings; and

(4) passing on knowledge about the physical and spiritual attributes of places of importance.

87 Native title rights are legally enforceable communal property rights recognised under Commonwealth legislation.

88 There have now been 16 determinations made by the Federal Court of Australia recognising that native exists in various parts of NSW and there will continue to be further determinations. See **Annexure A** for a map from the National Native Title Tribunal showing the native title determinations made and native title claims on foot in NSW as at 30 June 2022.

89 By way of example, in *Bandjalang People No 1 and No 2 v Attorney General of New South Wales [2013] FCA 1278* the Federal Court recognised Bandjalang People's native title rights to:

(i) conduct ceremonies;

(ii) teach the physical, cultural and spiritual attributes of places and areas of importance on or in the land and waters; and

(iii) to have access to, maintain and protect from physical harm, sites in the Consent Determination Area which are of significance to the Bandjalang People under their traditional laws and customs.

90 In *Western Bundjalung People v Attorney General of New South Wales [2017] FCA 992 [Part A]* the Federal Court recognised Western Bundjalung People's native title rights to:

(2) engage in cultural activities including:

(1) visiting places of cultural or spiritual importance and protecting those places by carrying out lawful activities to preserve their physical or spiritual integrity;

(2) conducting and participating in ceremonies and rituals including in relation to birth and death;

(3) holding cultural gatherings; and

(4) passing on knowledge about the physical and spiritual attributes of places of importance; and

91 In *Bundjalung People of Byron Bay and Attorney General of New South Wales [2019] FCA 527 the* Federal Court recognised Bundjalung People of Byron Bay's native title rights to:

(f) engage in cultural activities, to conduct ceremonies, to hold meetings, and to participate in cultural practices relating to birth and death including burials where permitted by the laws of New South Wales on the land or waters;

(g) have access to, to maintain and to protect from physical harm sites and places of importance which are of significance to the Bundjalung People of Byron Bay under their traditional laws and customs;

(h) teach the physical, cultural and spiritual attributes of places and areas of importance;

92 In *Barkandji Traditional Owners #8 v Attorney-General of New South Wales [2015] FCA 604* the Federal Court recognised Barkandji and Malyangapa People's rights to:

(f) the right to engage in cultural activities on the land, to conduct ceremonies, to hold meetings, and to participate in cultural practices relating to birth and death including burials on the land the subject of the Non-Exclusive Areas;

(g) the right to have access to, to maintain and to protect from physical harm sites and places of importance in the Non-Exclusive Areas which are of significance to the Barkandji and Malyangapa People under their traditional laws and customs;

(h) the right to teach on the Non-Exclusive Areas the physical, cultural and spiritual attributes of places and areas of importance on or in the Non-Exclusive Areas;

93 NTSCORP considers it is necessary for any Aboriginal Cultural Heritage legislation enacted to account for the existence of native title and give effect to the rights determined by the Federal Court under the NTA.

94 NTSCORP is of the view that where there is an approved determination of native title under the NTA in which the Federal Court determines that native title exists in either the whole or in part of the Determination Area, the Registered Native Title Body Corporate (PBC) should be the Local Aboriginal Cultural Heritage Service for the whole of the Determination Area.

95 It is essential that any Aboriginal Cultural Heritage legislation enacted has cultural legitimacy, it must recognise and give voice to those persons who have the cultural responsibility to care for sites and Country and suffer the spiritual consequences for harm to sites, objects and places.

Potential Conflicts of State and Commonwealth Legislation

96 The *Native Title Act 1993 (Cth)* is Commonwealth legislation. Any Aboriginal Cultural Heritage legislation introduced in NSW would be State based legislation.

Section 109 of the Constitution provides:

"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

97 Cultural Heritage legislation at a State level which is inconsistent with the Commonwealth *Native Title Act 1993 (Cth)* could be invalid and struck down by the High Court of Australia.

Legislation as a Future Act

98 The introduction of any legislation which has an affect on native title rights and interests would be a 'future act' under the *Native Title Act 1993 (Cth)* and would give rise to a compensation entitlement on the part of native title holders and conversely a compensation liability for the State of NSW.

Diminishing the existing rights of Native Title Holders

Native Title Holder's Exclusive Consultation rights for Aboriginal Heritage Impact Permits

99 In the current Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010, issued under Part 6 of the National Parks and Wildlife Act 1974 (NSW) (**NPW Act**) as part of the Aboriginal Heritage Impact Permits (AHIP) process, Clause 4.1.1 of the Requirements provides:

> "*Proponents are not required to comply with the requirements of steps 4.1.2 to 4.1.7 where there is an approved determination of native title that native title exists in relation to the proposed project area. In this circumstance, proponents need only consult with the native title holders. If a prescribed body corporate has been established to hold native title on behalf the native title holders then proponents should consult with the prescribed body corporate*."

100 Stated simply, native title holders currently have exclusive consultation rights under the Consultation Requirements for Proponents.

101 NTSCORP cannot support any proposed Aboriginal Cultural Heritage legislation which diminishes the existing legal rights of native title holders.

Section 60(10) of the National Parks and Wildlife Regulation 2019

102 *Section 60(10)* of the *National Parks and Wildlife Regulation 2019* provides as follows:

60 Aboriginal heritage impact permit—requirement for consultation process
(10) Modified or alternative Aboriginal community consultation process Despite subclause

(1), if an agreement of the following kind specifies or identifies a modified or alternative Aboriginal community consultation process for the purposes of Part 6 of the Act, the proposed applicant is to carry out an Aboriginal community consultation process in accordance with that modified or alternative consultation process—

(a) a registered Indigenous Land Use Agreement under the Native Title Act 1993 of the Commonwealth entered into between an Aboriginal community and the State,
(b) a lease entered into under Part 4A of the Act,
(c) an agreement entered into by the Chief Executive and a board of management for land reserved under Part 4A of the Act that has the consent of the Aboriginal owner board members for the land concerned,
(d) an agreement entered into between an Aboriginal community and the Department of Planning, Industry and Environment.

103 This provision was formerly *s80C(10)* of the *National Parks and Wildlife Regulation 2009*.

104 A number of PBCs in NSW have entered s60(10) agreements and as a result currently have exclusive consultation rights in relation to Aboriginal Heritage Impact Permits and Care Agreements.

105 NTSCORP considers that any Aboriginal Cultural Heritage legislation enacted must preserve any exclusive consultation arrangements for native title holders that have been established in accordance with clause 60(10) of the *National Parks and Wildlife Regulation 2019* (**NPW Regulation**). Specifically, this includes a registered Indigenous Land Use Agreement (ILUA) under the Native Title Act 1993 that has been entered into between native title holders and the State of NSW. This includes exclusive consultation rights on AHIPs and Care Agreements.

106 NTSCORP cannot support any proposed Aboriginal Cultural Heritage legislation which diminishes the existing legal rights of native title holders.

Future Act Agreements with Proponents

107 Proposed activities or developments that may affect native title are classed as 'future acts' under the NTA (Part 2, Division 3, NTA). The definition of future acts is very wide and includes Development; Exploration; Mining; Prospecting; Building public infrastructure; Tourist resorts; Water licenses; some legislative changes; and some lease renewals.

108 A native title claim group which meets the requirements of the "Registration Test" (Section 190A, B and C NTA) gains procedural rights in relation to these activities. The procedural rights vary in relation to the class of activity, but include the right to negotiate, the right to comment, the right to object and certain other procedural rights while a claim is pending.

109 If native title rights are affected by an act, such as mining or development, and the requirements of the NTA have not been satisfied, the government and/ or a miner or developer are open to the risk of litigation, payment of compensation and a finding that their project approval is invalid.

110 To ensure future acts are undertaken validly it is necessary for future act notifications to be given to NTSCORP, whether or not a native title application is currently on foot in the area affected. Typically, there is a defined period in which a native title claim group may file a native title claim in response to a notification.

111 The "right to negotiate" under the NTA applies to activities such as:

- The granting of exploration licences;
- The granting of mining leases; and
- Some compulsory acquisitions.

112 The right to negotiate is triggered when the Government issues a notice under s.29 NTA (**"a section 29 notice"**), stating that it intends to grant an interest or do a Future Act that is subject to the right to negotiate. The notice is placed in major newspapers and is sent directly to any registered native title claim groups. At this point people who assert native

title rights and interests in an area, but have not yet filed a native title claim, have 3 months from the date given on a section 29 notice to file a native title application and another month in which to get registered if they want the right to negotiate about the proposed Future Act.

113 The parties (the registered native title claimants, Government and the proponent) must then negotiate in good faith for a minimum of 6 months to try and reach an agreement about the doing of the act or the doing of the act subject to certain conditions to be complied with by any of the parties (Section 31(1)(b) NTA).

114 Section 33(2) of the NTA provides:

"*Without limiting the scope of any negotiations, the nature and extent of the following may be taken into account:*

(a) existing non-native title rights and interests in relation to the land or waters concerned;

(b) existing use of the land or waters concerned by persons other than native title parties;

(c) the practical effect of the exercise of those existing rights and interests, and that existing use, on the exercise of any native title rights and interests in relation to the land or waters concerned."

115 There needs to be consideration given as to how any Aboriginal Cultural Heritage legislation enacted will interact with the native title right to negotiate process. Negotiations between Native Title Holders or registered native title claimants and proponents under the NTA invariably include negotiations regarding cultural heritage assessment and mitigation processes, because cultural heritage is underpinned by the traditional law and custom which is the basis of native title.

116 A situation whereby there are two separate negotiations governing the same subject-matter, one being a right to negotiate process triggered by the future act provisions of the NTA and the other being development of the Aboriginal Cultural Heritage Management Plans or the grant of permits under the State based cultural heritage system, should be

avoided. Such duplication not only unnecessarily burdens proponents, but it also has the potential to cause disputes in Traditional Owner communities.

117 Enactment of legislation which fails to recognise the requirements of native title will only serve to duplicate notification, consultation and approval processes for Aboriginal People, the Government and proponents.

Effect of not ensuring State based Aboriginal Cultural Heritage Legislation recognises and respects the legal rights of Native Title Holders

118 In NTSCORP's submission there are very serious ramifications which flow from the NSW Parliament electing to enact Aboriginal Cultural Heritage legislation which fails to recognise and codify the legal rights of determined Native Title Holders in NSW.

119 The rolled up native title rights to 'protect, maintain and access sites and places of importance' are:

- rights recognised by the common law of Australia;
- are protected by Federal legislation, namely the *Native Title Act 1993* (Cth) ("Native Title Act") and the *Racial Discrimination Act 1975* (Cth) ("Racial Discrimination Act"); and
- cannot be extinguished or impaired by NSW legislation, unless in accordance with the *Native Title Act* and consistent with the *Racial Discrimination Act*.

120 Any legislation which has the effect of requiring Native Title Holders to exercise their decision functions about sites and places of importance in the company of non-native title holders will:

(a) be inconsistent with the rights of those native title holders to make decisions in exercise of those rights;

(b) not bind the Native Title Holders who will likely be able to seek relief in the Federal Court of Australia or the Supreme Court of New South Wales, for the protection of their rights and interests, and be able to make complaint to United Nations Human Rights Committee regarding breach of their rights protect culture under the *International Convention on Civil and Political Rights* and the *International Convention on Cultural Economic and Social Rights* (eg. see Torres Straits Complaint to UNHCR on climate change for failure of Australian

Government to take adequate steps to protect their cultural rights and their property);

(c) potentially create liability in the NSW Government for compensation under the *Native Title Act*, noting that the 'Never Again' report recommends Rio Tinto pay compensation to the Native Title Holders for the destruction of Juukan Gorge;

(d) potentially be in breach of s 10 of the *Racial Discrimination Act* in that the exercise of the rights in relation to sites and places may only be exercised in conjunction with other people who do not possess such rights, an imposition which is not placed on any other rights holders;

(e) will be inconsistent with the right to free, prior and informed consent as articulated in the *United Nations Declaration on the Rights of Indigenous Peoples*.

121 Any failure in the proposed legislation to ensure the integrity of Native Title Holder or First Nation decision making is likely to result in two systems of decision making, ie the statutory scheme and a separate First Nations common law decision making and protection avenue in the Courts referred to above.

122 The likely outcome is increased disputation, litigation and potential compensation liabilities arising from decisions made by non-Native Title Holders, including in relation to Cultural Heritage Management Plans and Permits.

Part 4 – NTSCORP Limited's Submissions on the *Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 and recommended amendments to the Bill*

Overview

123 Firstly NTSCORP would like to acknowledge the importance of standalone Aboriginal Cultural Heritage legislation being introduced to Parliament. It has been long advocated for by the Aboriginal People of NSW and is a key aspiration of Native Title Holders and Traditional Owners in NSW.

124 Importantly, the inclusion of State Significant Infrastructure and Development within the statutory regime contemplated in the *Aboriginal Cultural Heritage (Culture is Identity) Bill*

2022 (**the Bill**) is a significant and welcomed improvement, as are the increased decision making rights for Aboriginal People and the reduced Ministerial direction and control.

125 In many respects the Bill is a significant improvement upon the current Aboriginal Cultural Heritage regime in NSW, particularly given its similarities to the Western Australian and Victorian Aboriginal Cultural Heritage legislation. The incorporation of tangible and intangible Cultural Heritage, the "cultural landscape" and FPIC is consistent with the recommendations of the Juukan Gorge Report and the Dhawura Ngilan Standards and the incorporation of the UNDRIP principles adds additional strength to the regime.

126 It is unfortunate that NTSCORP cannot support the Bill in its current form for the reasons outlined at length in previous parts of this submission. NTSCORP cannot support the enactment of any Cultural Heritage legislation which would operate to diminish Native Title Holders' current or prospective legal rights. NTSCORP cannot support the enactment of any Cultural Heritage legislation which fails to recognise the very Aboriginal People who have the cultural authority and responsibility to care for sites, nor respect the legal rights they have as Native Title Holders in relation to the management and protection of Cultural Heritage.

127 NTSCORP has focussed the following part of this submission on the amendments to the Bill which would be necessary in order for NTSCORP to support the Bill.

Definition of Aboriginal Cultural Heritage

128 In the Bill, Aboriginal Cultural Heritage is defined in Section 6 as:

> ***Aboriginal cultural heritage***—
> *(a) means the tangible and intangible elements that are important to the Aboriginal people of the State, and are recognised through social, spiritual and historical values, as recognised by Aboriginal people, and*
> *(b) includes the following—*
> > *(i) an area (an **Aboriginal place**) in which tangible elements of Aboriginal cultural heritage are present, including a place where Aboriginal ancestral remains are buried,*
> > *(ii) an object (an **Aboriginal object**) that is a tangible element of Aboriginal cultural heritage,*
> > *(iii) a group of areas (a **cultural landscape**) interconnected through tangible or intangible elements of Aboriginal cultural heritage, including lands, plants, animals, water and sky,*

> *(iv) the bodily remains of a deceased Aboriginal person (**Aboriginal ancestral remains**), other than remains that are buried in a cemetery where non-Aboriginal persons are also buried or remains that have been dealt with or are to be dealt with under a law of the State relating to the burial of the bodies of deceased persons.*

129 The Bill proposes a new definition of Aboriginal Cultural Heritage that adopts the preferred model under the Dhawura Ngilan Standards. While NTSCORP welcomes this more comprehensive definition, NTSCORP expresses concern that the definition does not explicitly recognise "tradition" and therefore does not contemplate Native Title Holder's unique and specific understanding of what Country is. Without this inclusion, the voices of Native Title Holders and Traditional Owners are displaced (see s 7, *Aboriginal Heritage Act 2006* (Vic).

130 NTSCORP submits that Section 6 should be amended to include "tradition" in the definition of Aboriginal Cultural Heritage.

Objects of the Act and interaction with the Native Title Act

131 The Bill's Objects do not empower Native Title Holders or Traditional Owners. The Objects do not provide that Native Title Holders are the right people to speak for Country where native title is held. This is a concern for NTSCORP as the Objects of an Act often guide resolution of ambiguities because they evidence Parliament's intention.

132 NTSCORP notes Section 9 of the Bill provides:

> ***Native title rights and interests***
> *(1) This Act is not intended to affect native title rights and interests other than in accordance with the Native Title Act.*
> *(2) This Act must be interpreted in a way that does not prejudice native title rights and interests to the extent that those rights and interests are recognised and protected by the Native Title Act.*
> *(3) In this section—*
> ***affect** has the meaning given in the Native Title Act, section 227.*

133 While Section 9 acknowledges the NTA, it does so only to acknowledge that as a law of the Commonwealth it takes precedence in the event of an inconsistency. It does not recognise nor contemplate the specific and unique importance of Native Title Holders and registered native title claimants to the protection and preservation of Aboriginal Cultural Heritage.

134 Section 9 provides that "*This Act must be interpreted in a way that does not prejudice native title rights and interests*" but the Bill itself is drafted in a manner which does prejudice Native Title Holders and the legislation if enacted would operate to affect native title rights and interests.

Delegation by ACH Council

135 Section 17 of the Bill provides that the ACH Council may delegate a power or a duty of the ACH Council to one or more of the following:

> *(a) a member,*
> *(b) a member of staff of the ACH Council,*
> *(c) a committee,*
> *(d) an Aboriginal Land Council.*

136 NTSCORP considers that Registered Native Title Bodies Corporate (RNTBCs or PBCs) should also be able to be delegated functions by the Aboriginal Cultural Heritage Council.

137 NTSCORP submits that Section 17 of the Bill should be amended to include RNTBCs as one of the bodies who can be delegated functions by the ACH Council.

Designation of a Local Aboriginal Cultural Heritage Service

138 Section 23 of the Bill provides:

> ***23 Designation of local ACH service***
> *(1) The ACH Council may determine the entity to be designated as the local ACH service for an area subject to the Commonwealth law, cultural rights and legal rights*
> *of interested Aboriginal parties to Aboriginal cultural heritage on or of the land.*
>
> *(2) In this section—*
> ***Aboriginal owners** has the same meaning as in the Aboriginal Land Rights Act 1983.*
> ***interested Aboriginal parties** include the following—*
> *(a) Aboriginal owners of the land,*
> *(b) a Local Aboriginal Land Council,*
> *(c) a registered native title body corporate for the area or part of the area.*

139 NTSCORP's considers that the current drafting of section 23 lacks clarity on the composition and hierarchy of local Aboriginal Cultural Heritage services. This lack of clarity is a significant impediment for Native Title Holders and claimants and represents a diminishment of Native Title Holders' current and prospective rights.

140 The Bill currently has no preconditions for an entity being designated a local Aboriginal Cultural Heritage service, except that the ACH Council's power to designate an entity is subject to Commonwealth law and the cultural and legal rights of Aboriginal owners, Local Aboriginal Land Councils and registered native title body corporates in the area.

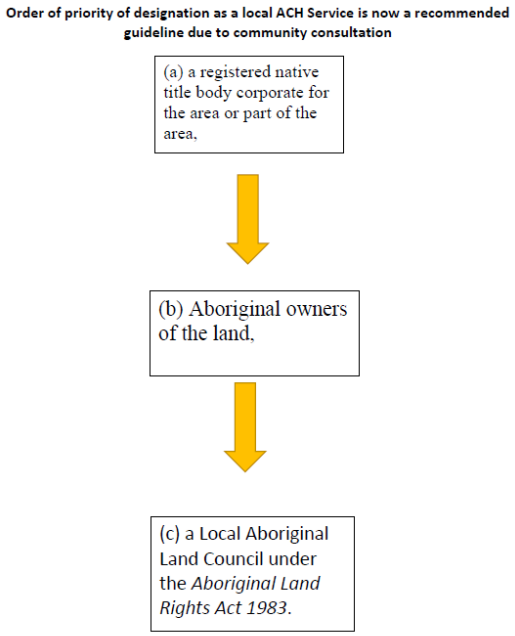
141 This section is poorly drafted and the structure is vulnerable to litigation as there is no precision as to hierarchy of interests. For example, section 23 does not even provide that a local ACH service is required to be an Aboriginal person or Aboriginal controlled body.

142 Interestingly, the Discussion Paper which accompanied the Bill and was provided to some Aboriginal persons and organisations provided the following on page 7-8:

Q5. Can you provide further clarity as to the order of priority when designation of a local service occurs?

Certainly.
The Aboriginal Cultural Heritage Council is responsible for designation of a local ACH service and can take account of the capability of community organisations who perform custodian and stewardship roles in land and water management.

After community consultation there is an updated Part in the Bill at Division 3 (Local Aboriginal cultural heritage services) – Subdivision 2 (Designation as local ACH service) – Section 23 (Designation of local ACH service) to clearly explain an order of priority in this context. By further demonstration see the graph on the following page.



143 However, the drafting of section 23 of the Bill does not seem to reflect the information circulated in the Discussion Paper.

144 The current drafting of section 23 is also not in line with recommendations of the Dhawura Ngilan Report that Aboriginal Cultural Heritage is managed consistently across jurisdictions. This drafting is inconsistent with legislation in Western Australia (**WA**), Victoria (**VIC**) and the Northern Territory (**NT**), which all require greater engagement with Native Title Holders.

145 The Dhawura Ngilan Best Practice Standards include that legislation in this area must follow the key UNDRIP principle of self-determination, therefore that 'affected Indigenous Community itself should be the ultimate arbiter of the management of the cultural heritage aspects of any proposal that will affect that heritage'.[39] As per these standards, this is managed effectively and practically by Indigenous Peoples acting through their own representative organisations.

146 As stated in the Dhawura Ngilan Best Practice Standards:[40]

> *In the context of ICH in Australia, the rigorous processes associated with the appointment of* ***Prescribed Bodies Corporate (PBCs)*** *under the Native Title Act 1993 (Cth) can ensure that* ***such organisations, where they exist, satisfy the definition of 'representative organisations' under UNDRIP.*** *In Victoria, the Aboriginal Heritage Act 2006 provides for the legal recognition of Traditional Owner corporations with*

[39] Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation, March 2021, p 35.
[40] Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation, March 2021, p 35.

responsibilities for managing and protecting the cultural heritage of the Traditional Owners they represent.

Thus, where a PBC, Aboriginal Land Council or an organisation that is representative of Traditional Owners exists, Indigenous cultural heritage legislation should vest in that organisation control of the management of the Indigenous cultural heritage aspects of any proposal that will impact upon the Indigenous cultural heritage of those Traditional Owners.

147 NTSCORP submits that an order of authority or priority as to whom may be designated a local Aboriginal Cultural Heritage service is required in section 23.

148 NTSCORP submits that Native Title Holders should be clearly prioritised in the Bill, confirming the hierarchy of interests and engagement.

149 Currently in NSW Native Title Holders have secured a number of legal rights, which include:

- Federal Court determined native title rights under the *Native Title Act 1993 (Cth)* to maintain and to protect, from physical harm, sites and places of importance under traditional law and custom;
- Under *Part 6* of the *National Parks and Wildlife Act 1974 (NSW)* and the current Aboriginal Cultural Heritage Consultation Requirements, Native Title Holders have exclusive consultation rights in relation to Aboriginal Heritage Impact Permits; and
- Under *section 60(10)* of *National Parks and Wildlife Regulations 2019*, some Native Title Holders have secured exclusive rights in relation to Aboriginal Heritage Impact Permits and care agreements in the whole of their determination area.

150 NTSCORP submits that amendments should be made to section 23 which reflect that:

- A Registered Native Title Body Corporate (**RNTBC** or **PBC**) should be the Local Aboriginal Cultural Heritage Service for the whole of their native title determination area;
- Native Title Holders will comprise all of the members of a Local Aboriginal Cultural Heritage Service for the whole of their native title determination area;
- Where there is no native title determination, that the Local Aboriginal Cultural Heritage Service should comprise Aboriginal Traditional Owners with cultural

knowledge and cultural authority to speak for their cultural heritage and for Country, including registered native title claimants; and

- There be a transition provision in any legislation enacted to provide for PBCs to assume the functions of the Local Aboriginal Cultural Heritage Service once native title has been determined.

Sections 80, 104 and 107

151 The drafting contained in sections 80, 104 and 107 similarly lacks clarity and requires a hierarchy of parties to be inserted in relation to notified persons, interested Aboriginal Parties and persons required to be consulted respectively.

152 For example, s80 preferences Local Aboriginal Land Councils and "persons who are likely to be affected by the proposed activity" before native title parties. Section 80 completely excludes Aboriginal Owners and Traditional Owners.

153 Section 104 fails to include Aboriginal Owners or Traditional Owners who have not yet had a native title claim, but includes NTSCORP.

154 Section 107 again relegates native title parties below Local Aboriginal Land Councils. NTSCORP repeats our submission above, that Native Title Holders must be prioritised within the hierarchy contained in sections 23, 80, 104 and 107 of the Bill, followed by Aboriginal Traditional Owners with cultural knowledge and cultural authority to speak for their cultural heritage and for Country, including registered native title claimants.

Ancestral Remains

155 In NTSCORP's submission the definition of "ancestral remains" and the approach to custody is comprehensive in the Bill and consistent with the Dhawura Ngilan Standards. This approach is also consistent with other jurisdictions.

156 However, NTSCORP is concerned that the definition of "custodian" does not prioritise Native Title Holders and Traditional Owners. A further concern is that as currently drafted, the local Aboriginal Cultural Heritage services do not play a role in overseeing custodianship of ancestral remains. This approach is inconsistent with that taken in other

jurisdictions, such as in section 148 of the VIC Act which provides for a local Aboriginal Cultural Heritage service to perform advisory functions in respect of ancestral remains.

157 NTSCORP submits that the Bill should be amended to include requirements similar to those found in section 55 of the *Aboriginal Cultural Heritage Act 2021* (WA), where custodians are those persons who have traditional rights, interests or responsibilities in respect of an area in which remains are found.

158 We also recommend the inclusion of an advisory function for local Aboriginal Cultural Heritage services in respect of ancestral remains, similar to provisions found in s 148 of the *Aboriginal Heritage Act 2006* (Vic).

Secret or Sacred Objects

159 Similar to our submissions above, the definition of "custodian" in the Bill as it relates to secret or sacred objects does not prioritise Native Title Holders or Traditional Owners.

160 NTSCORP submits that section 44 of the Bill should be amended to include requirements similar to those found in s 63 of the *Aboriginal Cultural Heritage Act 2021* (WA), where custodians are those persons who have traditional rights, interests or responsibilities in respect of an area in which such objects are found and similar to recommendations for ancestral remains, the inclusion of an advisory function for local Aboriginal Cultural Heritage services in respect of secret and sacred objects, similar to provisions found in s 148 of the *Aboriginal Heritage Act 2006* (Vic).

Funding

161 In NTSCORP's view the lack of guaranteed government funding outlined in the Bill prohibits adequate resourcing and operations. This is contrary to recommendations of the Juukan Gorge Report and the Dhawura Ngilan Standards and in NTSCORP's submission section 235 should be amended to ensure the new Aboriginal Cultural Heritage is set up for success.

Consultation about proposed activities

162 In NTSCORP's submission section 78 of the Bill should be amended to include the additional requirement that the proponent undertake consultations in good faith.

Aboriginal Owners Register

163 In NTSCORP's submission, having undertaken the arduous process of establishing native title, including the preparation of anthropological and historical reports, section 186 should be amended to provide that determined Native Title Holders are automatically entered onto the Register of Aboriginal Owners for the whole of the determination area.

164 Section 186(2)(a) of the Bill should be amended to include that descent includes descent by adoption or incorporation in accordance with traditional law and custom.

Aboriginal Cultural Heritage Council

165 NTSCORP submits that Schedule 1, Part 2, Section 2(1) of the Bill should be amended to include NTSCORP Limited as a body which can nominate potential members of the ACH Council.

166 Schedule 1, Part 2, Section 3 of the Bill proposes that the ACH Council include between 6 and 11 members. We note that 11 members would not allow for the equal representation contemplated by section 4. NTSCORP submits that Section 3 should be amended to provide between 8 and 12 members.

167 NTSCORP submits that Schedule 1, Part 2, Section 4 of the Bill should be amended to include a new (d) for registered native title claimants.

Application of the Bill

168 NTSCORP submits that the Bill should clarify that it applies to the State's territorial limits including Sea Country.

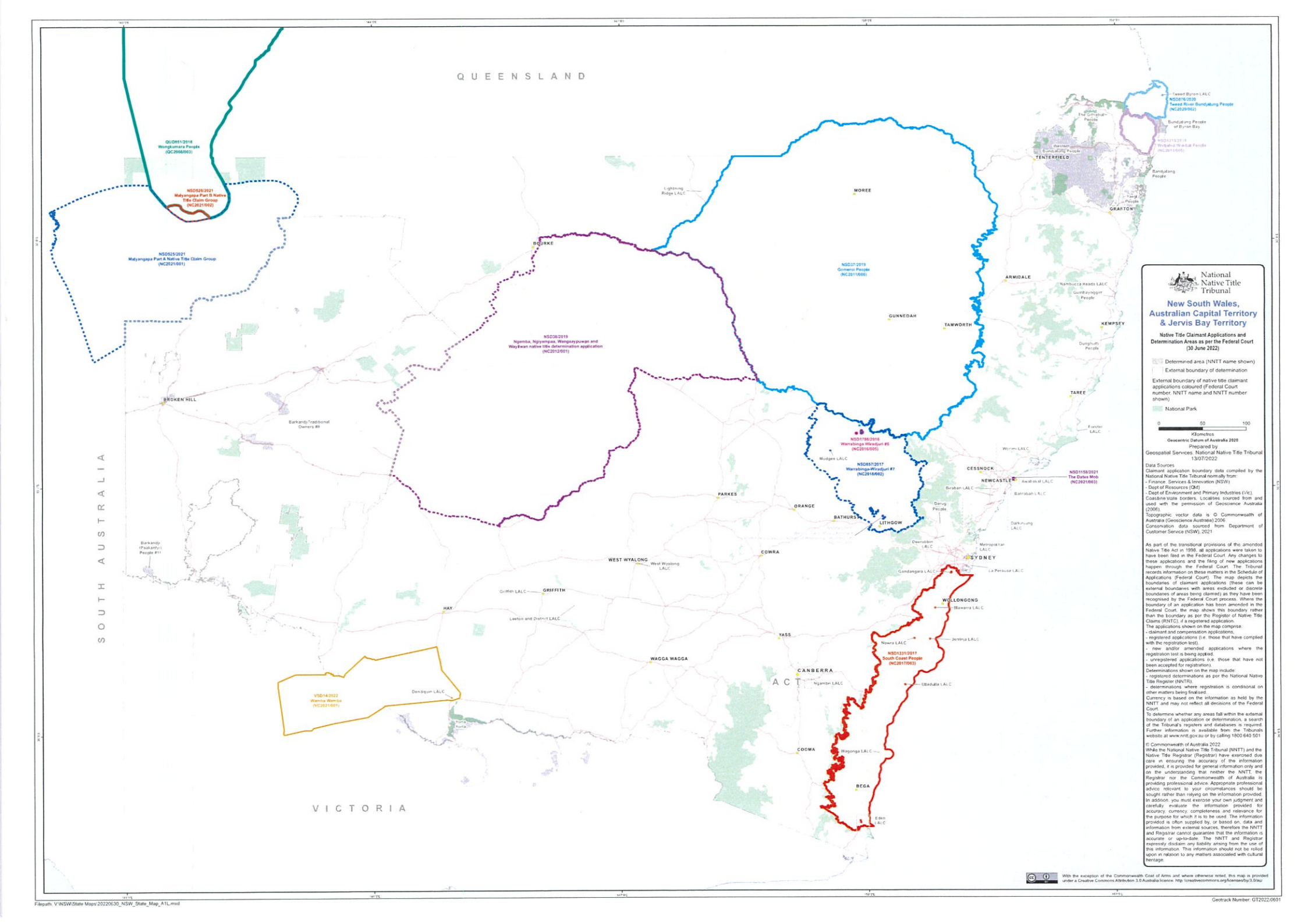
We thank you for the opportunity to provide submissions to this important Inquiry. We trust our submission will assist the Committee in considering the *Aboriginal Cultural Heritage (Culture is Identity) Bill 2022* (**the Bill**) and in informing the Committee's recommendations in that regard.

NTSCORP would be willing to give evidence before the Committee should the Committee determine it would be assisted by further information from NTSCORP.

If you require any further information in relation to this submission, please do not hesitate to contact Mishka Holt, Principal Solicitor at NTSCORP

Yours Faithfully,

Natalie Rotumah
Chief Executive Officer
NTSCORP Limited



National Native Title Tribunal

New South Wales, Australian Capital Territory & Jervis Bay Territory

Native Title Claimant Applications and Determination Areas as per the Federal Court (30 June 2022)

Determined area (NNTT name shown)

External boundary of determination

External boundary of native title claimant applications coloured (Federal Court number, NNTT name and NNTT number shown)

National Park

0 50 100
Kilometres

Geocentric Datum of Australia 2020

Prepared by:
Geospatial Services, National Native Title Tribunal
13/07/2022

Data Sources
Claimant application boundary data compiled by the National Native Title Tribunal normally from:
- Finance, Services & Innovation (NSW)
- Dept of Resources (Qld)
- Dept of Environment and Primary Industries (Vic).

Coastline/state borders, Localities sourced from and used with the permission of Geoscience Australia (2006).
Topographic vector data is © Commonwealth of Australia (Geoscience Australia) 2006
Conservation data sourced from Department of Customer Service (NSW), 2021

As part of the transitional provisions of the amended Native Title Act in 1998, all applications were taken to have been filed in the Federal Court. Any changes to these applications and the filing of new applications happen through the Federal Court. The Tribunal records information on these matters in the Schedule of Applications (Federal Court). The map depicts the boundaries of claimant applications (these can be external boundaries with areas excluded or discrete boundaries of areas being claimed) as they have been recognised by the Federal Court process. Where the boundary of an application has been amended in the Federal Court, the map shows this boundary rather than the boundary as per the Register of Native Title Claims (RNTC), if a registered application.
The applications shown on the map comprise:
- claimant and compensation applications,
- registered applications (i.e. those that have complied with the registration test),
- new and/or amended applications where the registration test is being applied,
- unregistered applications (i.e. those that have not been accepted for registration).

Determinations shown on the map include:
- registered determinations as per the National Native Title Register (NNTR),
- determinations where registration is conditional on other matters being finalised.

Currency is based on the information as held by the NNTT and may not reflect all decisions of the Federal Court.
To determine whether any areas fall within the external boundary of an application or determination, a search of the Tribunal's registers and databases is required. Further information is available from the Tribunals website at www.nntt.gov.au or by calling 1800 640 501.

Filepath: V:\NSW\State Maps\20220630_NSW_State_Map_A1L.mxd

Geotrack Number: GT2022/0601

Annexure B

Queensland - *Aboriginal Cultural Heritage Act 2003*

35 Aboriginal party for an area

(1) A native title party for an area is an Aboriginal party for the area.

(2) Subsection (3) applies to a native title party for an area who—

(a)is or was a registered native title claimant; or

(b)is the native title claim group who authorised a person who is no longer alive, but who was a registered native title claimant, to make a native title determination application.

(3) The native title party is an Aboriginal party for the whole area included within the outer boundaries of the area in relation to which the application was made under the Commonwealth Native Title Act for a determination of native title, regardless of the nature and extent of the claimant's claims in relation to any particular part of the whole area.

(4) Subsection (5) applies to a native title party for an area who is or was a registered native title holder the subject of a determination of native title under the Commonwealth Native Title Act.

(5) The native title party is an Aboriginal party for the whole area included within the outer boundaries of the area in relation to which the application for the determination was made, regardless of the extent to which native title was found to exist in relation to any particular part of the whole area.

(6) However, a native title party to whom subsection (5) applies is not an Aboriginal party for a part of the area if—

(a)native title was not found to exist in relation to the part; and

(b)there is a registered native title claimant for the part.

(7) If there is no native title party for an area, a person is an Aboriginal party for the area if—

(a)the person is an Aboriginal person with particular knowledge about traditions, observances, customs or beliefs associated with the area; and

(b)the person—

(i) has responsibility under Aboriginal tradition for some or all of the area, or for significant Aboriginal objects located or originating in the area; or

(ii) is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for some or all of the area, or for significant Aboriginal objects located or originating in the area.

Western Australia - *Aboriginal Cultural Heritage Act 2021*

Knowledge holder —

(a) in relation to an area, means an Aboriginal person who —

(i) in accordance with Aboriginal tradition, holds particular knowledge about the Aboriginal cultural heritage of the area; and

(ii) (ii) has traditional rights, interests and responsibilities in respect of Aboriginal places located in, or Aboriginal objects or Aboriginal ancestral remains located in or reasonably believed to have originated from, the area; and

(b) in relation to Aboriginal cultural heritage, means an Aboriginal person who —

(i) in accordance with Aboriginal tradition, holds particular knowledge about the Aboriginal cultural heritage; and

(ii) has traditional rights, interests and responsibilities in respect of the Aboriginal cultural heritage

39. Requirements for designation as local ACH service

The requirements for a person to be designated as the local ACH service for an area are that, in the opinion of the ACH Council, the person —

(a) has comprehensive knowledge of the local Aboriginal community in the area; and

(b) has the endorsement of any registered native title body corporate, or registered native title claimant, for the area or a part of the area; and

(c) has sufficient support of the local Aboriginal community in the area to enable it to provide local ACH service functions for the area; and

(d) for the purpose of the management of activities that may harm Aboriginal cultural heritage located in the area under Part 6 — has the necessary knowledge and skills to engage and negotiate, as is appropriate, with —

(i) proponents carrying out, or intending to carry out, activities in the area; and

(ii) native title parties and knowledge holders for the area, or a part of the area;

and

(e) has sufficient knowledge, skills and resources to provide local ACH service functions for the area; and

(f) has in place a fee structure for the fees to be charged for services provided in connection with the provision of local ACH service functions for the area that —

(i) is reasonable; and

(ii) complies with the local ACH service (fees) guidelines;

and

(g) satisfies the other requirements, if any, prescribed for the purposes of this paragraph.

40. Order of priority of designation

(1) The order of priority for designation as a local ACH service for an area is as follows —

(a) if the area is the subject of a settlement ILUA — a regional corporation in relation to the area or a part of the area;

(b) a registered native title body corporate for the area or a part of the area;

(c) a person who was a registered native title body corporate for the area or a part of the area but —

(i) under an ILUA, has surrendered their native title rights and interests in respect of the area or the part of the area; or

(ii) the person's native title rights and interests in respect of the area or the part of the area have been compulsorily acquired or otherwise been extinguished;

(d) a CATSI Act corporation or a Corporations Act corporation that —

(i) represents the local Aboriginal community in the area; or

(ii) has members that are knowledge holders for the area;

(e) a native title representative body for the area.

(2) In subsection (1)(a) —

regional corporation means —

(a) in relation to an area the subject of a settlement ILUA referred to in paragraph (a) of the definition of ***settlement ILUA*** — a Regional Corporation, as defined in the *Land Administration (South West Native Title Settlement) Act 2016* section 3, appointed in respect of that area; or

(b) in relation to the area the subject of the settlement ILUA referred to in paragraph (b) of the definition of ***settlement ILUA*** — the Regional Entity, as defined in that ILUA; or

(c) in relation to an area the subject of a settlement ILUA referred to in paragraph (c) of the definition of ***settlement ILUA*** — a prescribed corporation that has functions in respect of the area under, or for the purposes of, the settlement ILUA;

settlement ILUA means —

(a) a settlement ILUA within the meaning of the *Land Administration (South West Native Title Settlement) Act 2016* section 3; or

(b) the ILUA named the Yamatji Nation Indigenous Land Use Agreement registered on 30 July 2020; or

(c) another prescribed ILUA under which native title rights and interests have been surrendered.

(3) For the purposes of subsection (1)(d)(i), a CATSI Act corporation or a Corporations Act corporation represents the local Aboriginal community in an area in the circumstances prescribed.

Victoria - ***Aboriginal Heritage Act 2006***

Traditional owners (1) For the purposes of this Act, a person is a traditional owner of an area if—

(a) the person is an Aboriginal person with particular knowledge about traditions, observances, customs or beliefs associated with the area; and

(b) the person—

(i) has responsibility under Aboriginal tradition for significant Aboriginal places located in, or significant Aboriginal objects originating from, the area; or

(ii) is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for significant Aboriginal places located in, or significant Aboriginal objects originating from, the area.

(2) For the purposes of this Act, a person is a traditional owner of Aboriginal ancestral remains if the person is an Aboriginal person who—

(a) has responsibility under Aboriginal tradition for the remains; and

(b) is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for the remains.

(3) For the purposes of this Act, a person is a traditional owner of a secret or sacred object if the person is an Aboriginal person who—

(a) has responsibility under Aboriginal tradition for the object; and

(b) is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for the object.

South Australia - ***Aboriginal Heritage Act 1988***

Traditional owner of an Aboriginal site or object - means an Aboriginal person who, in accordance with Aboriginal tradition, has social, economic or spiritual affiliations with, and responsibilities for, the site or object;

Northern Territory - ***Aboriginal Sacred Sites Act 1989***

Custodian in relation to a sacred site, means an Aboriginal who, by Aboriginal tradition, has responsibility for that site and, in Part II, includes a custodian of any sacred site

FEDERAL COURT OF AUSTRALIA

Kaurareg Native Title Aboriginal Corporation RNTBC v Torres Shire Council [2019] FCA 746

File number:	QUD 315 of 2019
Judge:	**LOGAN J**
Date of judgment:	17 May 2019
Catchwords:	**PRACTICE AND PROCEDURE** – interlocutory injunctions – where applicants are native title holders and has outstanding native title claims – where respondent seeks to undertake public works on areas possibly subject to native title – invalid future acts – where applicants submit that the public works would be an invalid future act – where no usual undertaking as to damages has been offered – where any harm is not reparable by damages – where respondent would incur costs in delaying public works – interim injunction granted. **NATIVE TITLE** – invalid future acts – where applicants submit the respondent will undertake public works which will constitute an invalid future act – where any harm is not reparable by damages – whether a usual undertaking as to damages is a necessary condition for the grant of an injunction – interim injunction granted.
Legislation:	*Native Title Act 1993* (Cth)
Cases cited:	*Ross v State Rail Authority of New South Wales* (1987) 70 LGRA 91
Date of hearing:	17 May 2019
Registry:	Queensland
Division:	General Division
National Practice Area:	Native Title
Category:	Catchwords
Number of paragraphs:	23
Counsel for the Applicants:	Mr G Carter

Solicitor for the Applicants:	Holman Webb Lawyers
Counsel for the Respondents:	Mr M Jonsson QC
Solicitor for the Respondent:	Preston Law

ORDERS

QUD 315 of 2019

BETWEEN:	**KAURAREG NATIVE TITLE ABORIGINAL CORPORATION RNTBC** First Applicant
	MILTON SAVAGE Second Applicant
	ENID TOM Third Applicant
AND:	**TORRES SHIRE COUNCIL** Respondent
JUDGE:	**LOGAN J**
DATE OF ORDER:	**17 MAY 2019**

PENAL NOTICE

TO: The Torres Shire Council, its officers, servants, agents, engaged contractors or other persons concerned in the undertaking of the works referred to in paragraph 1 of this Order:

IF YOU (BEING THE PERSON BOUND BY THIS ORDER):

(A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR

(B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU NOT TO DO,

YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.

THE COURT ORDERS THAT:

1. Until close of business on 3 June 2019 or further earlier order, the Respondent by its officers, servants, agents, engaged contractors or otherwise howsoever be restrained from undertaking public works within the area identified in yellow in the first page of

annexure SBR 7 to the affidavit of Mr Roberts filed 17 May 2019 (Mr Roberts' affidavit).

2. The Respondent is to furnish forthwith to the Applicants particulars as to the areas of land in respect of which it proposed to conduct public works and the nature of those public works which are the subject of the public noticed dated May 2019 referred to in paragraph 72 of Mr Roberts' affidavit.

3. The parties attend a mediation to be conducted by the Hon Stanley Jones AO or such other person as the court may appoint after consultation with the parties, on such date the court appoints.

4. The case be adjourned until 3 June 2019 at 10.15 am for case management and the determination of whether or not and in what terms the restraint in Order 1 should be continued. Assuming, that the video link is available and workable, an appearance via video link will be permitted.

5. Costs reserved.

6. Liberty apply.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

LOGAN J:

1 Late this afternoon, the Kaurareg Native Title Aboriginal Corporation RNTBC, a Mr Milton Savage and a Ms Enid Tom, filed an originating application under the *Native Title Act 1993* (Cth) (**Native Title Act**), to which the Torres Shire Council is respondent. It has been possible for the Council to be heard in response to an interim injunction application, which was made by the applicants in conjunction with the filing of the originating application.

2 The applicant corporation is a registered native title body corporate. The applicants, both individual and corporate, have brought the application on behalf of the Kaurareg people, who are the determined native title holders for Apparrlu-Waubinin Mabauzi Lag above the high-water mark, the subject of the Kaurareg Muralag determination in proceeding QCD2001/002 in this Court, and the native title claimants for Apparrlu-Waubinin Malu below the high-water mark in matter QUD267/2008 in this Court, known as the Kaurareg #2 Native Title Claim.

3 The land concerned, which is the subject of the determination just mentioned, is on Prince of Wales Island, also known as Muralag. The land the subject of the claim is areas of the sea and seabed below the high-water mark off that particular island. Prince of Wales Island is located in the Torres Straits, to the north of Cape York Peninsula.

4 In addition, there are subsisting Indigenous Land Use Agreements in respect of the land the subject of the Court's determination. Relevant here is the one between the Kaurareg people and the present local government respondent. The local government wishes to undertake public works, being both roadworks and harbour works, on land on Prince of Wales Island.

5 Suffice it to say, the applicants allege that the undertaking of such works would constitute an invalid future act, having regard to native title either determined or, as the case may be, claimed.

6 The occasion for the urgency of the interim injunction application is that the local government proposes to commence undertaking landward aspects of the proposed public works this coming Monday, 20 May 2019. The proposed public works are more particularly described in an affidavit of the applicants' solicitor, Mr Roberts, which was filed today.

7 At paragraph 12, Mr Roberts deposes to a particular area within annexure SBR7, on page 1 of which there is an area, the metes and bounds of which are given geospatial precision and which is described by a yellow bordered area in the vertical photograph found there. An enlargement thereof on the second page shows particular areas hashed in red, in respect of which it is proposed to undertake roadworks, at least in terms of the evidence to hand.

8 Ordinarily, in terms of the granting of interim or interlocutory injunctive relief, the position is that an applicant must give to the Court what is known as the usual undertaking as to damages. The precise form of that undertaking is set out in the Court's *Usual Undertaking as to Damages Practice Note (GPN-UNDR)*. The present applicants, upon inquiry, are not disposed, at least at the present, to give that undertaking. That, of course, is, as was correctly submitted on behalf of the local government, a relevant consideration in terms of whether or not to exercise the discretion to grant interlocutory injunctive relief. Its absence is not, though, determinative of the fate of the application.

9 Also relevant - and this is deposed to in Mr Roberts' affidavit on information and belief - are the very particular associations as between the Kaurareg people and land on Prince of Wales Island, the subject of this Court's determination.

10 Those associations are not to be diminished in terms of their importance by a submission which was made on behalf of the local government that damages may be an adequate remedy. In relation to the bundle of rights represented by native title, and the particular associations and emotional and spiritual ties which underpin that bundle of rights, money may never be an adequate compensation for what may be an invalid future act - in other words, for something that will be destructive of one or more of the bundle of rights that comprise native title. In this particular case, one of that bundle of rights is an obligation to protect sacred site areas.

11 As was submitted, correctly again, in this instance on behalf of the applicants, sometimes, the strength of a *prima facie* case mitigates against the usual requirement for an undertaking as to damages: see *Ross v State Rail Authority of New South Wales* (1987) 70 LGRA 91, especially at 100. It is not possible, in the time available this evening, to form a settled view as to the strength of the applicants' substantive claim. That said, there is a subsisting native title determination in respect of Prince of Wales Island, which rather suggests to me that the application for interim injunctive relief is far from frivolous, but, rather, one in respect of which there is some prospect of success in relation to the applicants' claim substantively for declaratory relief.

12 Of course, it may be, on a more detailed examination, that areas in respect of which the local government proposes to conduct public works are areas where, by virtue of earlier acts of State, native title was extinguished. But, in the urgency of today's interim application, and given the quite disastrous consequences that would follow from a destruction of determined native title rights, it seems to me that this is a case where, *at least at an interim stage*, the absence of the usual undertaking as to damages should not tell against the granting of interim injunctive relief.

13 Another factor quite understandably raised on behalf of the local government was that there has been much notice of the proposed works. Mr Roberts' affidavit, quite properly, is fulsome as to the exchanges which have occurred before today as between the local government and those representing the applicants or the applicants directly.

14 It is, to say the least, unfortunate that a mechanism apparently found in the Indigenous Land Use Agreement for mediation has not been able to be engaged. It was so obviously one of the intents of the Indigenous Land Use Agreement, that matters would not have to come to the stage of litigation in order to resolve differences as between, relevantly, the native title holders and the local government.

15 It was also put on behalf of the local government that there had been delay such as would tell against the granting of even interim relief. Delay is, of course, relevant. But, looking at the flow of exchanges, it seems to me there are two ways of viewing those exchanges, not ways which are entirely in favour of the local government. By that, I mean it seems to me as if the applicants and those representing them have tried their very best not to have to come to court, and have been left, really, with no other choice. Equally, it appears to me, from my perusal of the exchanges, that it was a very large and fraught step indeed, in the absence of either exact precision as to the absence of native title by extinguishment, or by agreement, for the local government to incur costs in the positioning of equipment for the undertaking of the works proposed.

16 I was informed without objection that the local government will incur costs of some $14,500 per day. I was likewise so informed that there are particular considerations arising from the time of year and tidal flows in the Torres Strait which make the present a particularly useful time in which to undertake public works. Of course I take that into account, but again, an answer to that is: that it was fraught always, in the absence of closure as to native title, to go ahead. In that sense, it may well be that the losses lie where they fall.

17 It is, though, obvious that there is not just one public interest at large, even in respect of whether to grant interim injunctive relief. The importance of native title and not interfering with it is highly relevant. Also relevant - and I take this into account in terms of public interest - is the undertaking of public works, which the local government concerned has determined are necessary works. That said, in respect of an island the subject of a native title determination, it is just necessary, in today's age, to take into account not just the native title determination but also the native title claim. I am far from persuaded that that need has fully resonated in the local government.

18 Of course, the more reflective consideration offered, upon the return of the orders I propose to make, may yield a different perspective; but, for the present, there is, in my view, an overwhelming need, having regard to the balance of convenience, to grant interim injunctive relief for a short period.

19 The order that I propose to make will restrain the undertaking of public works in the area identified in yellow on the first page of annexure SBR7 to the affidavit of Mr Roberts, filed today, until 3 June 2019 or further earlier order. "Public works" means what it says. It does not prevent a person from walking over the land in question. It would not, as I see it, prevent a surveyor from engaging in surveying works of a kind which would not interfere with the land or the native title rights asserted. What it most emphatically would prevent - and I not intending in any way to be exhaustive - are roadworks, grading, steamrolling or earthworks of any kind.

20 The other necessity related to a need for precision as to an alleged intersection between the site of public works and native title, determined or claimed, is for the local government to provide forthwith particulars as to the area and the works. It may be that that is readily done just by reference to what is already annexed in SBR7, but there should be no doubt about the subject of the works or their precise location(s). That, in turn, will enable meaningful mediation, in my view, to occur. That, too, is something which needs to be undertaken as soon as possible.

21 As to a mediator, it is within my experience that the Honourable Stanley Jones, AO, a retired judge of the Supreme Court of Queensland, has much experience in the mediation of native title cases and is also well respected in Far North Queensland. I therefore propose also to make an order requiring that the parties attend a mediation to be conducted by the Hon Stanley Jones or such other person as the Court may appoint after consultation with the

parties, on such date as the Court appoints. It is necessary to have a degree of flexibility built in at the moment, as I have indicated, in the mediation requirement, because it is not precisely known as to when Mr Jones will be available. There is also a question in relation to the costs of mediation, but that is a question which, in my view, is best addressed when this case next comes back before the Court, so as to enable parties to take instructions in a measured way on that subject, and to discuss the subject as between themselves in a way the Court expects of responsible legal practitioners.

22 Apart from the injunctive relief identified and the preliminary discovery and mediation, it is also necessary for the case to come back for consideration as to whether to extend the interim relief granted and for case management. The matter will, therefore, be adjourned for that purpose to 3 June 2019 at 10.15 am. Assuming the link is available and workable, an appearance by video link from Far North Queensland will be permitted on that date.

23 I shall, for the moment, reserve costs, if only out of an abundance of caution, being aware that there are particular provisions in the Native Title Act which may be relevant on the subject of costs in any event. The orders should be passed and entered forthwith.

I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan.

Associate:

Dated: 23 May 2019