

CARING FOR CULTURE



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Perspectives on the effectiveness of Aboriginal cultural heritage legislation in
Victoria, Queensland and South Australia

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Cover image: June 25, 2008: Sydney, NSW. Uncle Max Eulo cleanses the crowd and the area with smoke during the smoking ceremony at the Guringai Festival at crows nest. Pic. John Appleyard Published: North Shore Times (Friday) - May 22, 2009 Page: 41 Edition: © Newspix / News Ltd / 3rd Party Managed Reproduction & Supply Rights

Foreword

The Aboriginal peoples of Australia maintain the oldest continuous living cultures in the world. We keep our cultures alive through the practice and handing down of knowledge, tradition, language, arts and rituals. The protection of our cultural and spiritual landscapes and materials, including sacred and significant sites, and objects is vital to maintaining our cultures. Unfortunately however, in NSW these are not given adequate legal protections.

Since the Aboriginal Land Rights Movement of the 1970's Aboriginal Land Councils in NSW, have been at the forefront of the push to protect Aboriginal culture and heritage in this state. As a result of the Land Rights Movement, the Aboriginal Land Rights Act 1983 was passed. This legislation, recognised the NSW Aboriginal Land Council, established the state-wide network of Local Aboriginal Land Councils and gave all Aboriginal Land Councils a function to take action to protect and promote Aboriginal culture and heritage but no real power to do so.

However, the promises of successive Governments to establish an Aboriginal Heritage Commission have never been realised.

As a result the Aboriginal people of NSW have had Land Councils to protect Aboriginal culture and heritage, but no legislative authority to provide the needed protection. Aboriginal Land Councils have been pushing to change this situation ever since.

With proper protections still not in place and with another Government process offering 'broad reform', the NSW Aboriginal Land Council has commissioned this and the following two research papers, to stimulate discussion and debate:

1. 'Commonwealth, State and Territory Heritage Regimes: summary of provisions for Aboriginal consultation'; and
2. 'Our Sites, Our Rights - Returning control of Aboriginal sites to Aboriginal communities: A summary of key recommendations of past Aboriginal heritage reviews in NSW';

The original research in this particular paper looks at the Aboriginal culture and heritage regimes of Victoria, Queensland and South Australia, and asks Aboriginal community members and Government what's working? in Aboriginal culture and heritage management in their States.

While the paper offers insights to help inform the reform process in NSW, sadly it also highlights, that the wanton destruction of Aboriginal culture and heritage is not unique to this state.

On behalf of my fellow Councillors, I encourage Local Aboriginal Land Councils, Aboriginal communities and the broader community to engage in the reform process, and to debate the important issues outlined in this paper, to ensure comprehensive measures are finally put in place to allow Aboriginal people's across NSW to continue to practice culture.



Bev Manton
Chairperson
NSW Aboriginal Land Council

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I would also like to express my thanks and appreciation to Sylvie Ellsmore from the Policy and Research Unit of the New South Wales Aboriginal Land Council for her helpful and supportive management of this research project.

Eloise Schnierer

Watego Legal and Consulting

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Executive summary

INTRODUCTION

The New South Wales Aboriginal Land Council is the peak Aboriginal representative body in New South Wales. The responsibilities of the NSW Aboriginal Land Council and Local Aboriginal Land Councils under the *Aboriginal Land Rights Act 1983* (NSW) include the protection and promotion of Aboriginal culture and heritage.

In February 2010, the NSW Government announced it would establish a Working Group to consider options for independent Aboriginal heritage legislation for NSW. At the time of completion of this report, the Terms of Reference and members of the proposed Working Group were yet to be announced, although a two year timeframe for the Working Group has been set.

To inform debate about possible reform in NSW, the NSW Aboriginal Land Council has commissioned independent research into the way in which Aboriginal cultural heritage matters are dealt with in other jurisdictions. In particular, the NSW Aboriginal Land Council was interested in whether the NSW Government should look to any other State's heritage model as best practice.

This report considers the Aboriginal heritage systems in **Victoria, Queensland and South Australia**.

Research and interviews were undertaken with Aboriginal organisations and Government representatives working within these systems. As outlined in the following sections, and the main body of this report, this research identified key lessons about the practical operation of the various heritage systems on the ground, particularly which aspects of the systems Aboriginal groups felt were providing successful protection of tangible Aboriginal cultural heritage (sites, objects and areas) and meaningful control of Aboriginal cultural heritage by Aboriginal people.

IMPORTANT NOTE: The views and opinions in this report are those of the author. The NSW Aboriginal Land Council holds no responsibility for any errors contained in this report.

A note on the use of the terms 'cultural heritage' or 'culture' and 'heritage'

In general, usage of the term 'heritage' refers to physical places or objects, and the history attached to those places, whilst 'culture' refers to practices such as language, dance and song. In respect to Aboriginal culture and heritage such a clear distinction may not be as easy to make.

While different perspectives may exist on this and on the use of 'culture and heritage' versus 'cultural heritage', it is beyond the scope of this report to make comment upon this issue. Therefore with all due respect the author has used 'cultural heritage' throughout this report without favour.

Additionally, where such distinctions are necessary, the terms 'sites' and 'objects' have been used.

BACKGROUND TO THIS REPORT

The establishment of legislation to recognise Aboriginal ownership, control and rights over Aboriginal culture and heritage has been a key policy of the NSW Aboriginal Land Council since its formation.

In the early 1980's, Aboriginal peoples' campaigns for recognition of Aboriginal land rights led to the establishment of a comprehensive Land Council system under the *Aboriginal Land Rights Act 1983* (NSW). The return of control over Aboriginal sites and objects were key demands of the land rights movement and the NSW Aboriginal Land Council, and there was broad support among Aboriginal people for the establishment of an independent statutory authority to ensure that Aboriginal people had responsibility for management and protection of Aboriginal heritage in New South Wales – an Aboriginal Heritage Commission.

As outlined in the *'First Report from the NSW Select Committee of the Legislative Assembly Upon Aborigines'* in 1980 (the First Keane Report)¹ the New South Wales Government at the time recognised the importance of returning control of Aboriginal sites to Aboriginal people and the establishment of an Aboriginal Heritage Commission. However, despite bi-partisan support and several high level Government funded reviews held between 1980 and 1996 no Commission has ever been established.

For more information about past Aboriginal heritage reviews in NSW, and the involvement of Aboriginal groups in those reviews, see the reports and information published on the NSW Aboriginal Land Council website at www.alc.org.au or contact the NSW Aboriginal Land Council Parramatta Office on (02) 9689 4444.

Also available from the NSW Aboriginal Land Council are submissions and reports outlining the Land Council's view on the current management of Aboriginal heritage in NSW, including the *'More than Flora and Fauna'* report (2009).

SCOPE OF THIS REPORT AND LIMITATIONS

The scope of this report was to collect feedback from Aboriginal people and other stakeholders in Victoria, Queensland and South Australia regarding the effectiveness of the laws in their State. Given that the NSW Aboriginal Land Council represents the interests of Aboriginal people in NSW, the focus of the research was the views and perspectives of Aboriginal people and organisations on whether the laws in their state provide successful protection of tangible Aboriginal cultural heritage (sites, objects and areas) and facilitate meaningful control of Aboriginal heritage by Aboriginal people.

The author recognises that there are a wide range of perspectives on the merits of the cultural heritage regimes in different jurisdictions. This report is by no means comprehensive and does not presume to have captured the views of the entire Aboriginal community nor all stakeholders in those jurisdictions. Much of the feedback is anecdotal and some was provided confidentially.

However, the interviews conducted did highlight perceptions of the successes and failures of the heritage regimes in Victoria, Queensland and South Australia which may be relevant to Aboriginal communities and policy makers in other states, as outlined below.

As this report is limited to consideration of the schemes in Victoria, Queensland and South Australia, for additional information about the Aboriginal heritage systems in other Australian jurisdictions, including the Northern Territory and Western Australia, see the separate information paper commissioned by the NSW Aboriginal Land Council and published by the Research Section of the National Native Title Tribunal entitled *'Commonwealth, State and Territory Heritage Regimes: a summary of provisions for Aboriginal consultation'* (December 2010). A copy of this report can be found on the NSW Aboriginal Land Council website at www.alc.org.au or by contacting the NSW Aboriginal Land Council Parramatta Office on (02) 9689 4444.

It is also noted that at the time of completing this report some changes were proposed to heritage laws in both South Australia and Queensland.² The information in this paper is current as of **August 2010**.

ORGANISATIONS INTERVIEWED FOR THIS REPORT

The author conducted detailed interviews with employees, board members and other contacts during 2010, as well as desktop research including the review of both public and internal reports by various organisations.

Interviews were conducted confidentially on an individual basis. The views in this report are the **views of individuals** and **do not represent the formal position of the organisations** in most cases. For advice about the formal position of organisations interviewed for this report please contact the organisations directly.

OVERVIEW OF VICTORIA, SOUTH AUSTRALIA AND QUEENSLAND ABORIGINAL HERITAGE SYSTEMS

Aboriginal heritage management in Australia has historically been a state issue, with states and territories holding responsibility for protecting significant Aboriginal places (or ‘sites’).³

In **New South Wales**, the primary law for the protection of Aboriginal heritage is the *National Parks and Wildlife Act 1974* (NSW). This Act, in theory, applies blanket protection to Aboriginal ‘places’ and ‘objects’. The NSW Act deems the Crown to be responsible for Aboriginal heritage, and recognises few formal rights for Aboriginal people in the process.

In Queensland and Victoria, the primary laws for the protection of Aboriginal heritage have been established relatively recently. They are:

- the *Aboriginal Heritage Act 2006* (Vic); and
- the *Aboriginal Cultural Heritage Act 2003* (Qld), which is mirrored by the *Torres Strait Islander Cultural Heritage Act 2003* (Qld).

The Victorian and Queensland laws recognise that Aboriginal and Torres Strait Islander people are the primary authority on their cultural heritage, and have established systems to recognise Aboriginal decision makers (to various degrees).

Although this report highlights some critical feedback in **Victoria**, the author wishes to emphasise that the Victorian Act was generally viewed in positive terms by all those interviewed. **Queensland** is currently reviewing its laws. While it was agreed that the Queensland Act needs to be strengthened, it was still generally considered a strong piece of legislation that, importantly, “recognises that Aboriginal people were here prior to contact”.

In **South Australia**, the current law is the *Aboriginal Heritage Act 1988* (SA). The law recognises that the Minister is responsible for the protection of Aboriginal heritage, but includes provisions for the Minister to delegate some powers to a state wide Aboriginal Heritage Committee. The South Australian Act has been under review since 2008. There was a perception by those interviewed for this report that the regimes in Victoria and New South Wales provide better protection of cultural heritage.

SECTIONS OF THE MAIN BODY OF THIS REPORT

Section two of the main body of this report provides some background information on the history of cultural heritage protection, as well as a brief overview of land rights and Aboriginal representation in each state.

Sections three to eight of the main body of this report outlines perspectives on the practical effectiveness of the specific mechanisms set up under each State’s Act to protect Aboriginal cultural heritage. In particular, how cultural heritage is defined (section three), administrative structures (section four), who may speak for Country (section five), methods of protection and conservation (section seven) and review and appeal processes (section eight).

Section six includes general feedback on the level of Aboriginal consultation, control, management and decision-making under Aboriginal heritage laws.

Section nine outlines efforts to build the capacity of Aboriginal groups or organisations to fulfill their roles and/or obligations under the Act (including training that has been made available) and the general level of resources and funding allocated to the protection of Aboriginal cultural heritage.

Section ten is concerned with the level of compliance with the legislation and covers monitoring, enforcement, penalties and public awareness. It also outlines ideas to improve compliance.

Section eleven details brief commentary on the level of public awareness about Aboriginal cultural heritage and the requirements of the Acts protecting it, as well as education activities.

The final section of the main body of the report includes an overview of the key recommendations and lessons from the research about what is, and isn’t working, in the Victoria, Queensland and South Australian schemes.

I. WHAT IS PROTECTED? DEFINITIONS OF CULTURE AND HERITAGE

As outlined in more detail in **section three** of the main body of this report, all three jurisdictions focused on protecting what was defined by the legislation as Aboriginal ‘cultural heritage’ including Aboriginal ‘areas,’ ‘places’ or ‘objects’.

While each State had a wide definition of Aboriginal ‘cultural heritage significance’, with some recognition of Aboriginal people’s role in determining the significance of that heritage, Aboriginal groups in all jurisdictions reported that the legislative definitions did not adequately recognise the Aboriginal communities’ more holistic definition of Aboriginal culture and heritage, which extends beyond physical places and extends to include intangible cultural heritage connected with places including knowledge, stories, song and dance.

During interviews conducted for this report Aboriginal groups also complained that the definitions of Aboriginal heritage in some cases did not adequately recognise that Aboriginal heritage is a living culture, with too much emphasis placed on “stones and bones”. It was reported that the Acts also do not generally address issues of access to and use of sites by Aboriginal groups.

II. ADMINISTRATIVE STRUCTURES

The administrative structures in each state are quite different. **Victoria’s** system is based around a state-wide Victorian Aboriginal Heritage Council which is appointed by the Minister for Planning and Community Development, and the appointment of one Aboriginal organisation to represent Traditional Owners for each area (a ‘Registered Aboriginal Party’).

The Victorian Aboriginal Heritage Council is an independent statutory authority with an advisory and decision making function. It is supported administratively by a Secretariat in Aboriginal

Affairs Victoria’s Heritage Services Branch, which sits within the Victorian Department of Planning and Community Development. The Heritage Services Branch employs approximately 40 staff, of which just over half are based in regional offices supporting Registered Aboriginal Parties. The annual budget for the Heritage Services Branch of Aboriginal Affairs Victoria is consistently around \$4-5 million.

On the other hand, Queensland and South Australia have very minimalist systems in place. While **South Australia** has a state-wide Aboriginal Heritage Committee, the Committee serves in an advisory capacity only and was not viewed as very pro-active in the community. The Aboriginal Heritage Committee is administered by the Aboriginal Heritage Branch of the South Australian Department of Premier and Cabinet. At the time of publication the author did not have information about staffing levels.

In **Queensland** there is no state-wide Aboriginal Heritage Body. The only administrative structures are Aboriginal organisations which have applied for and been recognised as Aboriginal Cultural Heritage Bodies by the State Government, whose only function is to assist in identifying the relevant Traditional Owners that should be consulted under the Queensland Act. The Cultural Heritage Coordination Unit in the Department of Environment and Resource Management administers the Queensland Act and is staffed by approximately eight to ten employees.

Neither the Queensland nor South Australian systems create any type of administrative structure to represent the interests of Traditional Owners at the local level that is comparable to the Registered Aboriginal Parties in Victoria.

For more information see **section four** of the main body of this report.

III. WHO MAY SPEAK FOR COUNTRY?

Each jurisdiction focuses on identifying Traditional Owners as those who are the Aboriginal authorities for culture and heritage issues, that is, those who can speak for Country. Victoria and Queensland also have processes in place to prioritise native title groups as the recognised Traditional Owners for defined areas.

There was a mixed response from participants interviewed for this report about native title being the primary way that Traditional Owners were recognised, with some supporting and others questioning the *Native Title Act 1993* (Cth) as an appropriate process.

The **Victorian** and **Queensland** processes of recognising or working through established Aboriginal groups was generally reported as positive but, as outlined in **section five** of the main body of this report, there were several examples identified where the processes in place to nominate particular Aboriginal groups encouraged division in the Aboriginal community. In **South Australia**, concerns were expressed about the Ministers’ role in determining which Aboriginal groups are recognised to speak for Country.

IV. ABORIGINAL CONTROL, MANAGEMENT AND DECISION-MAKING

As outlined in **section six** of the main body of this report, the **Victorian** system affords Traditional Owners a significant degree of control over decisions impacting on cultural heritage. Registered Aboriginal Parties are empowered to refuse or approve Permits and Cultural Heritage Management Plans. However, the Registered Aboriginal Parties and the Victorian Aboriginal Heritage Council that appoints them, are significantly less autonomous and empowered than the Victorian Heritage Council that is charged with responsibility for (Australian) heritage in Victoria.

In principle, the **Queensland** Act affords a reasonable degree of Aboriginal input into decisions about cultural heritage. Consultation and negotiation with Traditional Owners are a key component of satisfying a proponents’ cultural heritage ‘duty of care’. However in practice, community feedback suggests that there is “not nearly enough consultation with Traditional Owners”.

In **South Australia**, all key decisions concerning cultural heritage are made by the Minister and minimal community consultation obligations are imposed. With no weight given to the views of Traditional Owners, a common complaint received from interviewees for this report was that the consultation process is seen as being “not genuine. It’s just ticking a box”.

V. METHODS OF PROTECTION

The Victorian and South Australian systems establish offences for harming Aboriginal Cultural Heritage. In South Australia there is a blanket ‘strict liability’ offence for harm to Aboriginal heritage, which is not subject to any ‘carve-outs’ or ‘exceptions’, whilst for Victoria, either knowledge of the harm, or negligence, or recklessness is required. By contrast, the Queensland system establishes a duty of care to prevent damage to Aboriginal cultural heritage (‘cultural heritage duty of care’).

Both the Victorian and South Australian systems authorise harm to Aboriginal culture and heritage under a permits system. In **Victoria**, areas characterised as ‘sensitive’ under the regulations, that is in areas where there is likely to be Aboriginal heritage, a more comprehensive Cultural Heritage Management Plan is required. Since the Victorian Act came into operation in 2007 there have been over 800 Cultural Heritage Management Plans prepared.⁵ Community engagement in these processes in Victoria is significant, with Registered Aboriginal Parties authorised to refuse to approve of a permit or a management plan. While on the other hand, in South Australia and Queensland, the only obligation is community ‘consultation’.

The Victorian system also allows for the establishment of Cultural Heritage Agreements. Whilst the content of these agreements is not prescribed, they may cover: protection, rehabilitation, maintenance and access to places and objects, and are viewed quite positively by the community. Several Cultural Heritage Agreements have been entered into by Registered Aboriginal Parties and various State Government Departments in the past three years.

In **Queensland**, agreement making is viewed as an attractive way to satisfy the cultural heritage duty of care by developers, however it appears to be undermining the intended use of Cultural Heritage Studies and Cultural Heritage Management Plans. The popularity of the agreement making provision is likely due to its flexibility and lack of prescriptive minimum standards. Despite this, the Queensland system was widely perceived as “not so bad.”

For more information see **section seven** of the main body of this report.

VI. REVIEW AND APPEAL PROCESSES

Appeal rights vary significantly across the states. In **Victoria**, the sponsor or proponent has the right to seek judicial review of a Registered Aboriginal Party’s decision to refuse to approve a permit or cultural heritage management plan. Threats of such action, and the limited support and resources provided to Registered Aboriginal Parties for dealing with such reviews appears to be undermining the ability of Traditional Owners to safeguard their cultural heritage. Not surprisingly, Traditional Owners strongly asserted their desire for an “unqualified right” to reject permits or management plans.

In **Queensland**, if consultations required by the system break down, both Aboriginal parties and proponents may seek resolution of disputes by the Land Court of Queensland. It seems that most requests of this nature are made by proponents, and are settled by mediation without judgement. Even so, the process was criticised for being too legalistic.

In **South Australia** there are no statutory appeal rights related to the operation of the South Australian Act. Aboriginal parties wishing to seek judicial review of a decision to issue a permit must do so before the Supreme Court at significant cost.

For more information see **section eight** of the main body of this report.

VII. FUNDING, TRAINING AND CAPACITY BUILDING

It was reported that **Victoria** has spent considerable resources on capacity building and training for Registered Aboriginal Parties and the Victorian Aboriginal Heritage Council, although it was still considered inadequate by most people interviewed. **Queensland** and **South Australia** on the other hand, appear to have little or no initiatives in place to train, fund or build the capacity of Traditional Owners.

For more information see **section nine** of the main body of this report.

VIII. COMPLIANCE AND ENFORCEMENT

While Registered Aboriginal Parties in **Victoria** have been involved in a significant number of management plans since 2007, a consistent complaint from community is that sites are regularly being illegally destroyed without prosecution. This lack of prosecutions appears to be repeated in **South Australia**.

In **Queensland**, while there have been successful prosecutions, the consensus view of interviewees was that destruction or harm continues unlawfully, particularly on freehold land. Other views were that the Queensland penalty regime provides insufficient disincentive to developers, and that the granting of access to land to Traditional Owners would greatly strengthen the compliance regime.

For more information see **section ten** of the main body of this report.

IX. EDUCATION AND PUBLIC AWARENESS

Reports from all three states suggested that cultural heritage continues to be harmed and that it is often the limited public awareness of issues and obligations relating to Aboriginal cultural heritage that is to blame. Local Councils were singled out for particular criticism in Victoria for failing to inform developers of their obligations. It is however, anticipated that the Victorian Aboriginal Heritage Council will begin to promote public awareness of cultural heritage, when it no longer needs to focus on the establishment of the network of Registered Aboriginal Parties.

For more information see **section eleven** of the main body of this report.

1. Introduction

This report has been commissioned by the NSW Aboriginal Land Council (**NSWALC**) to inform debate about the possible reform of the management of Aboriginal heritage laws in NSW.

NSWALC is the peak Aboriginal representative body in New South Wales. The responsibilities of NSWALC and Local Aboriginal Land Councils (**LALCs**) under the *Aboriginal Land Rights Act 1983* (NSW) include the protection and promotion of Aboriginal culture and heritage.

NSWALC's position is that the current regime for the protection of Aboriginal cultural heritage in NSW under the *National Parks and Wildlife Act 1974* (NSW) has failed to protect Aboriginal cultural heritage. In particular, there is widespread destruction of Aboriginal cultural heritage and no provision for direct Aboriginal participation in decisions regarding the significance of cultural heritage or what happens to Aboriginal places or objects.

In February 2010, the New South Wales Government announced it would establish a Working Group to consider options for independent Aboriginal heritage legislation for New South Wales.

To inform debate about possible reform in New South Wales, NSWALC commissioned independent research into the way in which Aboriginal cultural heritage matters are dealt with in Victoria, Queensland and South Australia. In particular, NSWALC was interested in whether the New South Wales Government should look to any of these State's models as best practice.

As summarised in the Executive Summary and outlined in more detail in the following sections, this report outlines the findings of qualitative research into the effectiveness of the Aboriginal cultural heritage protection models in **Victoria, Queensland and South Australia**.

A separate comparative summary of cultural heritage laws nationally is provided in a report commissioned by NSWALC and completed by the National Native Title Tribunal's Research Unit titled, *Commonwealth, State and Territory Heritage Regimes: summary of provisions for Aboriginal consultation* (2010).

Both reports are available on the NSWALC website at www.alc.org.au or by request from the NSWALC Resource Centre on 02 9689 4444.

The scope of this report was to collect feedback from Aboriginal people and other stakeholders in Victoria, Queensland and South Australia regarding the effectiveness of the laws in their State.

Given that NSWALC represents the interests of Aboriginal people in NSW, the focus of the research was the views and perspectives of Aboriginal people and organisations on whether the laws in their state provide successful protection of tangible Aboriginal cultural heritage (sites, objects and areas) and facilitate meaningful control of Aboriginal heritage by Aboriginal people.

The author recognises that there are a wide range of perspectives on the merits of the cultural heritage regimes in different jurisdictions. This report is by no means comprehensive and does not presume to have captured the views of the entire Aboriginal community nor all stakeholders in those jurisdictions. Much of the feedback is anecdotal and some was provided confidentially.

However, the interviews conducted did highlight perceptions of the successes and failures of the heritage regimes in Victoria, Queensland and South Australia which may be relevant to Aboriginal communities and policy makers in other states, as outlined below.

It is noted that at the time of completing this report some changes were proposed to both Queensland and South Australian heritage laws. The information in this paper is current as of **August 2010**.

IMPORTANT NOTE: The views and opinions in this report are those of the author. The NSW Aboriginal Land Council holds no responsibility for any errors contained in this report.

2. Background

The purpose of this section is to provide some brief background information on the objectives of Aboriginal heritage legislation in Victoria, Queensland and South Australia, as well as the legislative history of Aboriginal cultural heritage protection in those states. Some brief information on land rights and Aboriginal representation has been included to contextualise the legislative history.

2.1 VICTORIA

Aboriginal culture and heritage in Victoria is currently protected by the *Aboriginal Heritage Act 2006* (Vic) (**Victorian Act**), enacted on 9 May 2006 which commenced in May 2007. Its broad objectives are:

- (a) To recognise, protect and conserve Aboriginal cultural heritage in Victoria in ways that are based on respect for Aboriginal knowledge and cultural and traditional practices;
- (b) To recognise Aboriginal people as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage;
- (c) To accord appropriate status to Aboriginal people with traditional or familial links with Aboriginal cultural heritage in protecting that heritage;
- (d) To promote the management of Aboriginal cultural heritage as an integral part of land and natural resource management;
- (e) To promote public awareness and understanding of Aboriginal cultural heritage in Victoria;
- (f) To establish an Aboriginal cultural heritage register to record Aboriginal cultural heritage;
- (g) To establish processes for the timely and efficient assessment of activities that have the potential to harm Aboriginal cultural heritage;
- (h) To promote the use of agreements that provide for the management and protection of Aboriginal cultural heritage;
- (i) To establish mechanisms that enable the resolution of disputes relating to the protection of Aboriginal cultural heritage; and
- (j) To provide appropriate sanctions and penalties to prevent harm to Aboriginal cultural heritage.⁶

The Victorian Act is administered by Aboriginal Affairs Victoria, a division of the Department of Planning and Community Development.

2.1.1 Legislative history

The *Archaeological and Aboriginal Relics Preservation Act 1972* was the predecessor to the current *Aboriginal Heritage Act 2006* (Vic). This Act was administered by Aboriginal Affairs Victoria, but ultimate decision-making power was vested in the Minister for Aboriginal Affairs. Over time the Act was subject to criticism on the basis that it did not adequately represent Aboriginal interests in decision-making; processes under the Act were unclear and inconsistent; and there was an overall emphasis on destruction rather than conservation of heritage.⁷

During the 1980's the Victorian Government attempted to amend the legislation, but was prevented from doing so by the Opposition.⁸ The Government turned to the Commonwealth Government, which wrote special clauses into Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) to provide specific protection for objects and places of significance to Aboriginal people in Victoria, in accordance with their traditions. These provisions enabled Victorian Aboriginal communities to request emergency, temporary or other declarations if they regarded their heritage as under threat.⁹

This complexity and uncertainty of this dual State / Commonwealth system, coupled with the need for better integration of cultural heritage with local planning laws, were factors that drove the development of the *Aboriginal Heritage Act 2006* (Vic).¹⁰ Victorian Traditional Owners also felt disenfranchised by the system, which recognised certain local Aboriginal community groups that were not controlled by Traditional Owners, as responsible for cultural heritage within specified boundaries.¹¹ In developing new legislation for Victoria, the Victorian Traditional Owners Land Justice Group urged the Victorian Government to “respect and recognise the exclusive rights and primacy of Victorian Traditional Owner groups in the management of Aboriginal cultural heritage”.¹²

2.1.2 Land rights, Native Title and Aboriginal representation in Victoria

Limited land rights and Native Title outcomes in Victoria, as well as the lack of representative mechanisms through which Aboriginal people in Victoria can have a say in the decisions that affect them arguably influenced the development of the Victorian Act – particularly the administrative structures (Victorian Aboriginal Heritage Council and Registered Aboriginal Parties), which are described in more detail in section four.

Presently, less than one per cent of land in Victoria is Indigenous held,¹³ the majority of which has been purchased with the assistance of either the Victorian Government, the former Aboriginal and Torres Strait Islander Commission (ATSIC) or the Indigenous Land Corporation.¹⁴ Although Native Title brought a renewed emphasis on Traditional Ownership, it has to date delivered little in terms of land justice for Victorian Traditional Owners.¹⁵ Since the introduction of the *Native Title Act 1993* (Cth), only 1725 square kilometres, or 0.75 per cent of the state, has been declared native title.¹⁶ As with other parts of the east coast of Australia, Victoria's history of early and rapid colonisation, combined with widespread dispossession of Aboriginal people from traditional lands and a relatively small proportion of available Crown land, have been primary obstacles in the way of land justice for Aboriginal people in Victoria.¹⁷

As at September 2009, there have been several determinations of native title by consent in Victoria (Wimmera claims, Gunditjmara) and one litigated determination (Yorta Yorta).¹⁸ The two Gunditjmara matters were determined in part in March 2007.¹⁹ There are presently 17 active native title applications in Victoria, 11 of which have been referred to the National Native Title Tribunal for mediation.²⁰

In June 2009, the Victorian Government announced the adoption of a Victorian Native Title Settlement Framework. The Settlement Framework provides an alternative to the Native Title system in which Traditional Owners can negotiate directly with the Victorian Government to reach an out-of-court settlement on native title and other land justice issues.²¹

Unlike New South Wales, Victoria does not have a representative system of local Aboriginal land councils represented by a peak state body. Although there are numerous organisations representing the interests of Aboriginal people in Victoria, including Traditional Owner groups, until recently there has been no formal representative system to facilitate dialogue between Aboriginal people in Victoria and all levels of Government since the abolition of ATSIC in 2005. In 2010, the Victorian Government introduced new Indigenous representative arrangements based on Local Indigenous Networks and Regional Indigenous Councils.²² The author acknowledges that these arrangements are very new and their effectiveness remains to be seen.

2.2 QUEENSLAND

Aboriginal and Torres Strait Islander cultural heritage in Queensland is protected by the *Aboriginal Cultural Heritage Act 2003* (Qld) (and the complimentary *Torres Strait Islander Cultural Heritage Act 2003* (Qld)) (**Queensland Act**). Its main purpose is to “provide effective recognition, protection and conservation of Aboriginal cultural heritage”.²³ The principles underlying the Queensland Act’s main purpose are:

- (a) the recognition, protection and conservation of Aboriginal cultural heritage should be based on respect for Aboriginal knowledge, culture and traditional practices;
- (b) Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage;
- (c) it is important to respect, preserve and maintain knowledge, innovations and practices of Aboriginal communities and to promote understanding of Aboriginal cultural heritage;
- (d) activities involved in recognition, protection and conservation of Aboriginal cultural heritage are important because they allow Aboriginal people to reaffirm their obligations to ‘law and Country’; and
- (e) there is a need to establish timely and efficient processes for the management of activities that may harm Aboriginal cultural heritage.²⁴

The Department of Environment and Resource Management has responsibility for administering the Queensland Act.

2.2.1 Legislative history

The *Aboriginal Cultural Heritage Act 2003* and complementary *Torres Strait Islander Cultural Heritage Act 2003* (collectively referred to as the *Aboriginal Cultural Heritage Act 2003* (Qld) or **Queensland Act**), were the first dedicated state laws for the protection of Indigenous cultural heritage in the native title era.²⁵ Prior to the *Aboriginal Cultural Heritage Act 2003* (Qld), Queensland’s Indigenous cultural heritage was protected under a series of ‘relics’ Acts, starting with the *Aboriginal Relics Preservation Act 1967*, which was replaced by the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987*.²⁶

The Department of Environment and Resource Management is currently undertaking a review of the Queensland Act. The Review has highlighted some significant gaps between the intent of the Act and its practical application. One Aboriginal interviewee described the focus of the Queensland Act in the following terms:

“[The Queensland Act is] based on Traditional Owners having to respond to development proposals (if they are aware of them) and demonstrating that cultural heritage places or objects exist – which often requires funding and/or resources that they don’t have”.

It was suggested that the Queensland Act should be amended so that proponents²⁷ are required to engage with Traditional Owners at an early stage of the process:

- (a) so that Traditional Owners can assist the developer with determining exactly whose Country is involved and with whom they should speak;
- (b) to seek the permission of the relevant Traditional Owners to come onto Country; and
- (c) to identify what steps are necessary to ensure that all cultural heritage issues are taken into account.

A set of 27 recommendations were made by the Review comprising legislative and administrative actions of which 12 are being implemented in an exposure draft of the *Indigenous Cultural Heritage Acts Amendment Bill 2011* (Qld) recently released by the Department of Environment and Resource Management for public comment. Some of these proposed amendments are discussed in this report.

2.2.2 Land rights, Native Title and Aboriginal representation in Queensland

The Native Title landscape in Queensland is considerably different to that in New South Wales and Victoria. Roughly 75% of land in the state of Queensland is Crown land or leasehold land owned by the Crown.²⁸ Much of the State is covered by Native Title claims – especially in mining regions. Of the 45 native title determinations in Queensland (to September 2009), 42 have resulted from mediated agreement between the parties.²⁹ Most native title applications in Queensland are resolved by agreement rather than in court. Traditional Owners in Queensland have also negotiated most of Australia’s total of Indigenous Land Use Agreements, which the National Native Title Tribunal described as “another sign of the strong agreement making focus of native title in Queensland”.³⁰

Indigenous people in Queensland have experienced comparatively less extinguishment of Native Title rights and interests, although it was noted by Queensland South Native Title Services that there have been no determinations of Native Title south of Townsville. The feedback from the Native Title Representative Bodies interviewed for this project was that the majority of cultural heritage work is being undertaken in areas of mining activity, as these areas are more likely to be covered by a Native Title claim.

There is no state-wide land council system in Queensland. In the north, there are three large regional land councils – the North Queensland Land Council, Carpentaria Land Council and Cape York Land Council – while in central and south-eastern Queensland there are some smaller land councils, including the Gurang Land Council. The Land Councils are incorporated under the *Corporations (Aboriginal and Torres Strait Islanders) Act 2006* (Cth). Both the Cape York Land Council and North Queensland Land Council are Native Title Representative Bodies under the *Native Title Act 1993* (Cth). Queensland South Native Title Services is the Native Title Representative Body for other areas of the State.

Some criticism of the Queensland Land Councils was noted during the interviews, particularly in relation to representation and the size of the Land Council’s membership base. There was also a perception, it is unclear how wide-spread, that Aboriginal people view the Land Council’s as ‘government bodies’, and not representative bodies, because they are funded under arrangements with the Federal Government.

Among the aims of the Cape York and Carpentaria Land Councils is the object of “assisting Aboriginal persons to protect sacred sites and sites of significance”.³¹ Similarly, the mandate of the North Queensland Land Council includes “assisting Aboriginal people in their endeavours to access, care for and maintain according to traditional law and custom, all their sites of significance”.³² However, the Land Councils do not have a mandate or function under the *Aboriginal Cultural Heritage Act 2003* (Qld) and, as such, receive no cultural heritage funding from the Queensland Government. Yet all the Land Council’s and Native Title Representative Bodies reported some level of interaction with the Queensland Act. The Cape York Land Council observed that Queensland South Native Title Services and the North Queensland Land Council both do more work on cultural heritage because these organisations are located in regions that have experienced greater difficulty establishing Native Title.

Another interesting development in Queensland is the drive, in some areas of the State, for more land and sea management groups that represent the interests of local Traditional Owners. Some of these organisations are engaging in significant cultural heritage mapping projects, using a combination of Federal / State government funding and philanthropic funding.

2.3 SOUTH AUSTRALIA

Aboriginal cultural heritage in South Australia is protected by the *Aboriginal Heritage Act 1988 (SA)* (**South Australian Act**). The South Australian Act does not have an objects clause. It is administered by the Aboriginal Affairs and Reconciliation Division of the Department of Premier and Cabinet.

2.3.1 Legislative history

South Australia was the first State to enact Aboriginal heritage protection legislation with the *Aboriginal and Historic Relics Preservation Act 1965 (SA)*. The current system is based around the *Aboriginal Heritage Act 1988 (SA)*.

The Aboriginal Affairs and Reconciliation Division of the Department of Premier and Cabinet are currently conducting a review of the South Australian Act to bring the legislation in line with Native Title, changing perceptions of heritage and the aspiration of Aboriginal people in South Australia to have more participation in decision making about heritage.³³ The review process is underpinned by the following principles:

- recognising Aboriginal custodianship of cultural heritage;
- creating a strong framework for long term protection and management of Aboriginal heritage;
- enabling Aboriginal negotiation of agreements about heritage;
- embedding Aboriginal heritage considerations into the development and land management process;
- creating timely and efficient processes;
- creating certainty for all parties; and
- complementing the *Native Title Act 1993 (Cth)*.³⁴

As part of the review, the Aboriginal Affairs and Reconciliation Division have held 25 community meetings attended by approximately 400 community members.³⁵ At the time of publication of this report, a qualitative analysis of the consultations (which also sets out preliminary findings and community feedback) had been recently released by the Aboriginal Affairs and Reconciliation Division.³⁶ The author notes that time and resources have not permitted inclusion of feedback from the South Australian consultations in this report.

2.3.2 Land rights, Native Title and Aboriginal representation in South Australia

Aboriginal people in South Australia have generally acquired tenure to land in several ways: through the South Australian Aboriginal Lands Trust; through direct negotiation and legislation; direct purchase using Commonwealth funding; and Native Title.

The Aboriginal Lands Trust was established to hold land under the *Aboriginal Lands Trust Act 1966 (SA)* to ensure that title to existing Aboriginal Reserves was held in trust for the economic and cultural benefit of all Aboriginal people in South Australia.³⁷ The South Australian Government may also transfer other Crown lands to be held by the Trust.³⁸ The Trust is empowered to issue leases over lands held by it to an incorporated community body.³⁹ When the *Aboriginal Lands Trust Act 1966 (SA)* came into force in 1966, titles to nine missions and reserves still operating in the state were vested in the Trust and the lands leased back to the local Aboriginal community for a period of 99 years with repeated rights of renewal.⁴⁰ A further thirty-two small areas of land described under various forms of individual or family title as land for Aboriginal use were also vested in the Trust.⁴¹

There have also been two direct legislative moves to provide Aboriginal people with title to land

– the *Anangu Pitjantjatjara Yankunytjajara Land Rights Act 1981 (SA)* and the *Maralinga-Tjarutja Land Rights Act 1984 (SA)*. Land held by Aboriginal people under these Acts cannot be sold, subdivided or resumed.⁴² Entry to the lands is restricted and visitors require a permit.⁴³ Developers, such as mining companies, must negotiate over access and the conditions of development.⁴⁴ If an agreement cannot be reached, the Aboriginal owners have the right to deny access.⁴⁵

There have been seven successful Native Title determinations and no unsuccessful Native Title claims in South Australia.⁴⁶ Most of the successful Native Title claims have been in the region north of Port Augusta and towards the west of the State as, according to South Australian Native Title Services, in these areas it has proved easier to establish connection and continuity. The land is also pastoral land and, as such, is claimable under the *Native Title Act 1993 (Cth)*.

Following the abolition of the Aboriginal and Torres Strait Islander Commission, the South Australian Government established the South Australian Aboriginal Advisory Council. The Council is an interim body whose function is to advise the South Australian and Federal Governments on a future (permanent) Aboriginal advisory structure.⁴⁷

3. What is protected? Definitions of culture and heritage

All three jurisdictions focus on protecting what is defined by the legislation as Aboriginal ‘cultural heritage’, including Aboriginal ‘areas,’ ‘places’ or ‘objects’. Each State has a wide definition of Aboriginal ‘cultural heritage significance’, with some recognition of Aboriginal people’s role in determining the significance of that heritage.

3.1 VICTORIA

Aboriginal cultural heritage includes ‘Aboriginal places’, ‘Aboriginal objects’ and ‘Aboriginal human remains’.⁴⁸ An Aboriginal object may be either:

- (a) an object in Victoria or the coastal waters of Victoria that relates to the Aboriginal occupation of any part of Australia, whether or not the object existed prior to the occupation of that part of Australia by people of non-Aboriginal descent and is of *cultural heritage significance* to the Aboriginal people of Victoria; or
- (b) an object, material or thing in Victoria or the coastal waters of Victoria that is removed or excavated from an Aboriginal place; and is of *cultural heritage significance* to the Aboriginal people of Victoria.⁴⁹ (emphasis added)

An ‘Aboriginal place’ is an *area* that is of *cultural heritage significance* to the Aboriginal people of Victoria.⁵⁰ An *area* includes – an area of land; an expanse of water; a natural feature, formation or landscape; an archeological site, feature or deposit; the area immediately surrounding any of these things; land set aside for the purpose of enabling Aboriginal human remains to be re-interred; and a building or structure.⁵¹

‘Cultural heritage significance’ includes archeological, anthropological, contemporary, historical, scientific, social or spiritual significance; and significance in accordance with Aboriginal tradition.⁵²

There was a perception among Traditional Owners and others interviewed for this report that the focus of the Victorian Act is on ‘stones and bones’, with little recognition that sites may be significant because of Aboriginal tradition (e.g. story). It is unclear whether this is a function of the definition of cultural heritage itself, or the application of the legislation by Aboriginal Affairs Victoria, who one interviewee observed is staffed more by people with archeological, not anthropological, training.

One Registered Aboriginal Party observed that the pro forma application used to register a new site on the state register of Aboriginal sites and objects, lists only objects of archeological significance (such as scar trees) and does not include an option for significance according to Aboriginal tradition. Another Registered Aboriginal Party observed that in the process of completing a cultural heritage management plan, cultural heritage advisors tend to find other ways to classify a significant site, such as linking the site to a neighbouring scar tree, rather than categorising the site as significant because of Aboriginal tradition. One Traditional Owner was also critical that the Victorian Act does not specify that Aboriginal heritage encompasses “whole culture” – which includes intangible aspects of culture.

3.2 QUEENSLAND

The Queensland definition of Aboriginal cultural heritage is less complex than that used in Victoria. ‘Aboriginal cultural heritage’ is anything that is a significant Aboriginal area in Queensland; a significant Aboriginal object; or evidence of archeological or historic significance, of Aboriginal occupation of an area of Queensland.⁵³ ‘Significance’ is defined in terms of either or both Aboriginal tradition and/or the history, including contemporary history, of any ‘Aboriginal Party’ for the area.⁵⁴

One Traditional Owner from North Queensland urged that cultural heritage be viewed as part of a bigger picture – as part of “Aboriginal values, social issues and knowledge transfer to younger people” – stating that Aboriginal people want the ability to safeguard all these things. While interviewees reported no issues with the acceptance of significance because of culture or story, one Traditional Owner felt the Queensland Act does not recognise that cultural heritage is a living aspect of culture. Cultural heritage is not just comprised of physical objects, but is intrinsically linked with cultural practice.

Several interviewees complained of the lack of protection for the intangible cultural heritage of Aboriginal people – knowledge, stories, song, dance etc. The gap between Aboriginal and non-Aboriginal notions of ‘cultural heritage’ was highlighted, as Aboriginal culture makes no distinction between the tangible and intangible.

This gap between Aboriginal and non-Aboriginal cultural values as to what constitutes ‘cultural heritage’ was again highlighted in relation to the struggle of Traditional Owners to have the Daintree rainforest recognised on the National Heritage Register for its ‘cultural values’ in addition to its already well recognised ‘natural values’. A comparison was drawn with the Melbourne Cup Race track, which is listed on the National Heritage Register for its ‘cultural value’. Traditional Owners feel it is “insulting” that the Elders have to demonstrate heritage, connection to Country and cultural value “to these young people in Canberra”.

3.3 SOUTH AUSTRALIA

An Aboriginal object or Aboriginal site is an object or site that is of significance according to Aboriginal tradition; or of significance to Aboriginal archeology, anthropology or history.⁵⁵ ‘Aboriginal tradition’ includes traditional observances, customs and beliefs prior to colonisation and those which have developed since colonisation.⁵⁶ However, the Minister may include or exclude Aboriginal objects and sites from this definition by regulation. Under section 12, the Minister may also determine whether a site or object should be entered into the Register of Aboriginal Sites and Objects. In making a determination under section 12, section 13 obliges the Minister to consult with Traditional Owners and other Aboriginal organisations and people with an interest in the matter and to “accept the views of Traditional Owners of the land or object on the question of whether the land or object is of significance according to Aboriginal tradition”.

A senior South Australian lawyer observed that there is a “good broad definition of Aboriginal heritage” in South Australia. Unlike Victoria, sites will generally be accepted as significant because of the importance to Aboriginal tradition (e.g. story) and not just archeological value. For example, the Tjilbruki Trail runs from Adelaide to Camp Jervis across Kurna country covering urban and rural areas. The Traditional Owners say the story of the Trail has been recognised since the 1960s and many local governments respect and acknowledge the story of the trail and its significance.

Recent community consultations in relation to the review of the South Australian Act have, however, highlighted some gaps in the definition of Aboriginal cultural heritage. In her report outlining a qualitative analysis of the community consultation process in relation to the review, Roughan observed:

“Heritage is currently being discussed by the Aboriginal community as encompassing a far broader scope, with concepts such as hunting grounds, campsites, intellectual property, stories, songlines and dreaming trails, waterholes, landscapes and skylines all being considered part of Aboriginal heritage.”⁵⁷

4. Administrative structures

The administrative structures in each state are quite different. Victoria’s system is based around a state-wide Aboriginal Heritage Council (with advisory and decision-making functions) which is appointed by the Minister for Planning and Community Development, and the appointment of one Aboriginal organisation to represent Traditional Owners for each area (a ‘Registered Aboriginal Party’, or RAP).

On the other hand, Queensland and South Australia have minimalist systems in place. In Queensland there is no state-wide Aboriginal heritage body. While South Australia does have an Aboriginal Heritage Committee, the Committee serves in an advisory capacity only. Neither the Queensland nor South Australian systems create any administrative structure to represent the interests of Traditional Owners at the local level that is comparable to the Registered Aboriginal Party system in Victoria.

4.1 VICTORIA

The *Aboriginal Heritage Act 2006* (Vic) is administered by Aboriginal Affairs Victoria, which sits within the Department of Planning and Community Development. There is a cultural heritage unit based at the head office, which includes a Secretariat that supports the Victorian Aboriginal Heritage Council. There are also five regional offices staffed by four to five employees whose primary role is to assist Registered Aboriginal Parties.

4.1.1 Registered Aboriginal Parties

A ‘Registered Aboriginal Party’ (or RAP) is a body corporate comprised of Traditional Owners. The Registered Aboriginal Party is the only entity that may be consulted about cultural heritage matters for each area under the Victorian Act. Traditional Owners must apply to the Victorian Aboriginal Heritage Council to be appointed as a Registered Aboriginal Party. Appointments are made on the basis of requirements discussed in detail in section five of this report. Where no Registered Aboriginal Party is appointed for an area, its functions may be exercised by the Secretary of the Department of Planning and Community Development or, in certain circumstances, the Victorian Aboriginal Heritage Council.

The Registered Aboriginal Party’s main purpose is to consider and advise on Cultural Heritage Permits and to evaluate and approve or refuse Cultural Heritage Management Plans.⁵⁸ Secondary functions include: pursuing cultural heritage agreements; advising the Minister on cultural heritage within their boundaries; negotiating repatriation and return of remains and objects held by institutions; and obtaining interim and ongoing protection orders.⁵⁹

One Traditional Owner felt that a significant advantage of the structure and process under the Victorian Act is that it takes less time to formally recognise Traditional Owners compared to the *Native Title Act 1993* (Cth). On the other hand, the Registered Aboriginal Parties were criticised by one senior Victorian Environment and Planning lawyer, as being yet another layer of bureaucracy that Aboriginal people have to engage with.

4.1.2 Victorian Aboriginal Heritage Council

The Victorian Act establishes the Victorian Aboriginal Heritage Council, whose primary function in its first few years of operation has been to appoint Registered Aboriginal Parties.⁶⁰ The Council is also tasked with providing advice to the Minister on various cultural heritage issues and to promote public awareness and understanding of Aboriginal cultural heritage in Victoria.⁶¹

(i) Structure and membership

The Council is established as a body corporate under the Victorian Act.⁶² The Council is comprised

of at least eleven members appointed by the Minister.⁶³ Each member of the Council must be an Aboriginal person who:

- (i) can demonstrate traditional or familial links to an area in Victoria;
- (ii) is resident in Victoria; and
- (iii) in the opinion of the Minister, has relevant experience or knowledge of Aboriginal cultural heritage in Victoria.⁶⁴

One Registered Aboriginal Party observed that “Victoria always lacked a statewide voice for Aboriginal people” and that “having a statewide council of Traditional Owners is good”. The Council is supported by a Secretariat and meets for approximately two days every six weeks.

While the Council originally attracted criticism for being based on Ministerial appointment rather than representation, the people the author spoke to did not raise this as a significant concern at this point in time. Interestingly, Aboriginal Affairs Victoria indicated that members may not always be appointed by the Minister but that “experienced people” were needed during the Council’s initial years.

(ii) Functions

The Council’s *Strategic Plan 2008-2011* states that the mission of the Council is “working with Traditional Owners, government and all Victorians for an exemplary system to protect, preserve and enjoy Aboriginal heritage”. The Council’s vision is said to be “a community that respects Aboriginal cultural heritage and recognises Traditional Owners as the primary custodians of this heritage.” The Strategic Plan also identifies four priorities:

(a) Appointing and supporting the work of Registered Aboriginal Parties

The Council is required to conduct a comprehensive assessment before appointing a Registered Aboriginal Party by following the guidelines set out in the Victorian Act and other principles adopted by the Council. It also relies on:

- (a) the Council’s own knowledge as a group of Traditional Owners;
- (b) information from the Registered Aboriginal Party applicant and neighbouring Aboriginal groups; and
- (c) research material – historical, anthropological and genealogical material, including research commissioned by the Council.⁶⁵

The Registered Aboriginal Parties the author spoke to generally provided positive feedback about the Council in relation to the application process. The author acknowledges, however, that no Aboriginal organisations whose application was rejected were consulted for this report.

(b) Providing influential advice to the Minister and Government

The Council provides advice to the Minister, both voluntarily and on request, on the protection and management of cultural heritage in Victoria, such as:

- (a) significance of any Aboriginal human remains, place or object;
- (b) protection and management of culturally sensitive places and information;
- (c) promoting the participation of Aboriginal people in the protection and management of Aboriginal cultural heritage;

- (d) standards of knowledge, expertise, conduct and practice required of persons engaged in research into Aboriginal cultural heritage;
- (e) training and appointment of inspectors who enforce the Victorian Act; and
- (f) other matters referred to the Council by the Minister.⁶⁶

The Minister can also request advice and/or recommendations from the Council on the exercise of his or her powers under the Victorian Act including: applications for interim or ongoing protection declarations; preparation of cultural heritage management plans; appropriateness of a cultural heritage audit; appropriateness of compulsory acquisition of land in a particular case; and other matters relating to the exercise of the Minister's powers under the Victorian Act.⁶⁷

The Council also provides advice to the Secretary of the Department of Planning and Community Development on:

- (a) establishing standards and fee guidelines for sponsors to pay Registered Aboriginal Parties for their consultation when preparing cultural heritage management plans and assessments; and
- (b) the exercise of his or her (the Secretary's) powers in relation to cultural heritage permits, cultural heritage management plans and cultural heritage agreements.⁶⁸
- (c) Actively promoting awareness and understanding of Aboriginal cultural heritage

A key function of the Council is to play an active role in educating Victorians about the "importance of Aboriginal cultural heritage and how it can be preserved and protected to ensure it remains an intrinsic part of Victoria's identity for future generations".⁶⁹

During the first few years of the Victorian Act, the Council's time has been primarily taken up with the appointment of Registered Aboriginal Parties. In terms of future priorities, the Council has stated that over time it will "increase its focus on providing government with strategic advice and developing an effective education and information strategy to promote public awareness and understanding of Aboriginal culture in Victoria."⁷⁰

(d) Building a strong Victorian Aboriginal Heritage Council

The Council's aim is to become a respected and authoritative source of advice on Aboriginal cultural heritage in Victoria and the requirements of the Victorian Act.

(iii) Feedback on the Victorian Aboriginal Heritage Council

Those Registered Aboriginal Parties interviewed by the author were generally happy with the Council's role in the RAP registration process, including mediation provided by the Council. It was acknowledged that the appointment of Registered Aboriginal Parties is challenging and that Council members were "somewhat preoccupied looking out for each other as people are trying to have a go at them because they are determining boundaries".

However, the fact that the Council has been so preoccupied with appointing Registered Aboriginal Parties was also a criticism. One interviewee felt the Council was "generally viewed as absent". The perception is that the Council is so busy trying to do business they have not had much opportunity to build a profile. Registered Aboriginal Parties were generally unhappy at the lack of public awareness of cultural heritage and were looking for the Council to show more leadership in the education of local government on the importance of bringing Aboriginal cultural heritage to the attention of developers at an early stage. However, most interviewees acknowledged that the Council does not have the resources to dedicate to more strategic activities until the RAPs have been appointed. Every interviewee agreed that time and resources are major challenges to the Council's effectiveness in these other areas.

4.2 QUEENSLAND

The *Aboriginal Cultural Heritage Act 2003* (Qld) is administered by the Cultural Heritage Coordination Unit, which sits within the Department of Environment and Resource Management. The only administrative structures established by the Queensland Act are Aboriginal Cultural Heritage Bodies.

4.2.1 Aboriginal Cultural Heritage Bodies

The function of an Aboriginal Cultural Heritage Body is simply to act as a contact point for developers who want to consult the Aboriginal parties for an area and to identify those parties.⁷¹

The Minister may appoint a corporation as the Aboriginal Cultural Heritage Body for an area provided it is an appropriate body, and has the capacity to identify Aboriginal parties for an area.⁷² It is not necessary for the corporation to represent Traditional Owners or for the boundaries of the organisation to reflect Traditional Owner boundaries. There are presently 28 registered Aboriginal Cultural Heritage Bodies listed on the Department of Environment and Resource Management’s website. The Department advised that there have been no instances where the Minister has refused to register a corporation applying to be an Aboriginal Cultural Heritage Body. The Aboriginal Cultural Heritage Bodies receive a one-off ten thousand dollar grant from Department of Environment and Resource Management, but otherwise must perform their statutory function without any government funding.

Some Aboriginal Cultural Heritage Bodies were criticised for not being representative of Traditional Owners. One interviewee also reported conflict where an Aboriginal Cultural Heritage Body was appointed for a large area that extended beyond traditional boundaries. Otherwise there was little feedback regarding Aboriginal Cultural Heritage Bodies, which is perhaps not surprising given their limited function and the limited funding available to them.

4.2.2 Role of Native Title Representative Bodies

Perhaps as a consequence of the lack of formal administrative structures under the Queensland Act, there are a range of other organisations that have taken on functions associated with protecting cultural heritage, including Native Title Representative Bodies (which in Queensland may also be Land Councils).

The North Queensland Land Council Native Title Representative Body (North Queensland Land Council) observed that while it has no specific mandate under the Queensland Act in relation to cultural heritage, it has assisted with the preparation of cultural heritage agreements in the course of negotiating Indigenous Land Use Agreements on behalf of Native Title claimants, particularly when dealing with local governments, energy providers and mining companies. These organisations will sometimes request the Native Title Party also enter into a cultural heritage agreement. Where the cultural heritage agreement is directly related to the native title claim the Land Council may receive some funding from the Federal Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). However, where the cultural heritage agreement is not necessary for the purpose of the native title claim the North Queensland Land Council stated that it will ensure the proponents pays the costs of its preparation.

The Cape York Land Council Native Title Representative Body (Cape York Land Council) observed it has considered undertaking an Indigenous Land Use Agreement and cultural heritage agreement together, but that it would be too difficult due to the complexity of Native Title claims, the level of pressure and limits on funding and resources. The Cape York Land Council also observed that sometimes there is no practical opportunity to get a cultural heritage agreement in place, as it may take a long time for the native title corporation to be established.

4.3 SOUTH AUSTRALIA

The *Aboriginal Heritage Act 1988 (SA)* (**South Australian Act**) is administered by the Aboriginal Heritage Branch of the South Australian Department of Premier and Cabinet. The only administrative structure established by the South Australian Act is the South Australian Aboriginal Heritage Committee.

4.3.1 South Australian Aboriginal Heritage Committee

The Committee consists of Aboriginal persons appointed by the Minister to represent the interests of Aboriginal people from all regions across the State in the protection and preservation of Aboriginal heritage.⁷³ The functions of the Committee are to advise the Minister, on its own initiative or at the request of the Minister, in relation to:

- (a) the making of entries (ie culture and heritage) in the central archives and the removal of any such entry;
- (b) measures that should, in the Committee’s opinion, be taken for the protection or preservation of Aboriginal sites, objects or remains;
- (c) the appointment of suitable persons as inspectors; and
- (d) Aboriginal heritage agreements.⁷⁴

The powers of the Committee are very limited and one strong view by interviewees was that the Committee should have more decision-making power rather than the Minister.

Another significant concern was that the Minister appoints members of the Committee. One Traditional Owner described the Committee as “comprised of long-time public servants who say ‘yes’ to the government” and suggested “if you ask most Aboriginal people they would say the committee is a joke. It is not proactive in any way.” However this same interviewee agreed it is “better to have the Committee than to not have it”.

It was also noted that membership is not restricted to South Australian Traditional Owners, and that while the government attempts to appoint people from all regions across the State, those members are not appointed to represent their region. Representation of all communities was viewed as essential, given the Minister uses the Committee as a reference point. One interviewee described tension in the Committee between native title groups and local heritage committees since the *Native Title Act 1993* (Cth). The author notes some feedback that the government has begun to emphasise the appointment of people from the Native Title side.

Despite this criticism of the Committee, South Australian Native Title Services observed that there is no consistent direction expressed from the community as to how the Committee should be constituted, in particular, whether the Committee should be representative or whether membership should be based on expertise. In a joint submission to the review of the South Australian Act, the Joint Aboriginal Heritage Committee (comprised of representatives of the State Aboriginal Heritage Committee and the Heritage Sub-Committee of the Aboriginal Congress of South Australia Inc.) suggested an independent statutory authority comprised of Aboriginal representatives from across the State (similar to the Northern Territory Aboriginal Areas Protection Authority) as a good model.⁷⁵ Some Aboriginal people see value in appointing representatives from other stakeholder groups (such as mining or pastoral groups) to an independent authority (such as the Northern Territory model), while other Aboriginal people strongly maintain that the entity should be Aboriginal controlled.

4.3.2 South Australian Aboriginal Heritage Fund

The South Australian Act establishes the South Australian Aboriginal Heritage Fund, which is held in a separate account at treasury.⁷⁶ The Minister may apply to the Fund:

- (i) in acquiring land or Aboriginal objects or records under the South Australian Act;
- (ii) in making grants or loans to persons or bodies undertaking research into, or in relation to Aboriginal heritage;
- (iii) in making payments under an Aboriginal heritage agreement entered into by the Minister under the South Australian Act;
- (iv) in the administration of the South Australian Act; or
- (v) for any other purpose related to the protection and preservation of Aboriginal heritage.⁷⁷

The author attempted to obtain information on the present value of the Aboriginal Heritage Fund and the types of activities which have been funded, however at the time of publication no information was available from the South Australian Government.

5. Who may speak for Country?

Each jurisdiction focuses on identifying Traditional Owners as those who are the Aboriginal authorities for culture and heritage issues, that is, those who can speak for Country. Victoria and Queensland also have processes in place to prioritise native title groups as the recognised Traditional Owners for defined areas.

5.1 VICTORIA

The Registered Aboriginal Party (RAP) for an area is the only entity authorised to speak for Aboriginal cultural heritage in that area. The Victorian Aboriginal Heritage Council determines which organisations may become the Registered Aboriginal Party and the boundaries of the Registered Aboriginal Party. If an organisation is a registered native title holder for an area in respect of which a native title determination has been made, the Council must register the applicant as the Registered Aboriginal Party and no other applicant can be registered in respect of that area.⁷⁸ Otherwise, factors that the Council must take into account when assessing an application include:

- (i) whether the applicant is a Native Title Party for the area;
- (ii) the terms of any native title agreement that the parties of that agreement make available to the Council;
- (iii) whether the applicant is a body representing Aboriginal people with traditional or familial links to the area; and
- (iv) whether the applicant is a body representing Aboriginal people that has a historical or contemporary interest in Aboriginal cultural heritage relating to the area and demonstrated expertise in managing and protecting Aboriginal cultural heritage in that area.⁷⁹

Although the factors are broad enough to include organisations that do not represent Traditional Owners, the Council has adopted several practices in relation to the appointment of Registered Aboriginal Parties that effectively preclude it from doing so:

- (i) the Council will give priority consideration to applications made by groups who represent Traditional Owners;
- (ii) where appropriate, the Council will move quickly to register the core of applicants representing Traditional Owners who have sufficient capacity to become a Registered Aboriginal Party;
- (iii) the Council will also give priority consideration to uncontested applications by other groups that meet the Victorian Act's requirements where supported by the Traditional Owners of the Country affected by the application;
- (iv) the Council may invite certain applicants to participate in regional meetings and mediations to resolve competing applications and overlapping boundaries; and
- (v) the Council encourages smaller groups to create sustainable Registered Aboriginal Party structures by working together to create a single Registered Aboriginal Party or to develop cooperative arrangements with other Aboriginal organisations.⁸⁰

Where there is no Native Title holder, the Council has the power to appoint more than one Registered Aboriginal Party for an area, although it is yet to exercise this power.⁸¹

5.1.1 Conflict between Traditional Owners and other Aboriginal heritage groups

According to interviewees, the previous cultural heritage legislation in Victoria left a legacy of Aboriginal organisations, not necessarily representative of Traditional Owners, working in cultural heritage management (particularly Aboriginal cooperatives). These organisations have been effectively shut out of cultural heritage work now as the Aboriginal Heritage Council pursues the policy of ‘right people for right Country’. As a consequence there has reportedly been some disquiet and at times conflict within the Aboriginal community. Registered Aboriginal Parties who were already organised and recognised as representing Traditional Owners reported little conflict with Aboriginal Cooperatives at the time they applied for registration. However, other Traditional Owners who formed organisations for the purpose of obtaining Registered Aboriginal Party status, reported community conflict associated with Aboriginal Cooperatives.

There was a general perception that conflict in the broader Victorian Aboriginal community over which organisation should be appointed as the Registered Aboriginal Party will clear up once all the Registered Aboriginal Parties have been appointed by the Council. At the date of publication, nine Registered Aboriginal Parties have been appointed covering approximately fifty per cent of the State.

5.1.2 Conflict amongst competing groups of Traditional Owners

Despite having the power to register more than one Registered Aboriginal Party for an area,⁸² the Council has adopted the practice of only registering a single Registered Aboriginal Party that is inclusive of the majority of Traditional Owners in an area. The Council has expressed the view that “appointing a single inclusive organisation as a Registered Aboriginal Party, rather than two non-inclusive organisations, would give best effect to the Council’s principle of aligning with native title arrangements”.⁸³ The importance of this practice is that it effectively prevents the kind of ‘forum shopping’ that was complained about by interviewees in Queensland and South Australia.

It appears that some Registered Aboriginal Parties have been able to effectively adopt internal inclusiveness practices – ensuring that all family groups have a say in how the Registered Aboriginal Party is managed, and maintaining an even workload among the family groups. However, the case studies in sections 5.1.3 and 5.1.4 (below) concern Registered Aboriginal Party applications from rival Traditional Owner groups including where an application was rejected by the Aboriginal Heritage Council on the basis that neither organisation was inclusive of all Traditional Owners.

5.1.3 Case Study: Wathaurung Aboriginal Corporation Registered Aboriginal Party

The Dja Dja Wurrung people established an entirely new organisation (the ‘Wathaurung Aboriginal Corporation’) in order to apply to be the Registered Aboriginal Party for their area. The path to being appointed as a Registered Aboriginal Party took the Dja Dja Wurrung two years because their application was one of three competing applications over the same area.

According to the Wathaurung Aboriginal Corporation, it represents approximately ninety-eight per cent of Traditional Owners. The other applicants were both Aboriginal Cooperatives that reportedly included few or no Traditional Owners in their membership bases. In an attempt to resolve the dispute, the Aboriginal Heritage Council paid for mediation and an open forum for the community. However, it was only after the other organisations withdrew their application that the Wathaurung Aboriginal Corporation was appointed but the appointment was not without controversy.

5.1.4 Case Study: Bunurong Land Council Aboriginal Corporation and Boon Wurrung Foundation

The Bunurong Land Council Aboriginal Corporation and Boon Wurrung Foundation both applied

to become the Registered Aboriginal Party for areas including the south-east of Melbourne, the Mornington Peninsula, Westernport Bay and Wilsons Promontory. In declining both applications the Aboriginal Heritage Council took into account the following:

- (i) members of both Boon Wurrung Foundation and Bunurong Land Council Aboriginal Corporation are Traditional Owners of Boon Wurrung (Bunurong) country;
- (ii) there is a long running dispute between Bunurong Land Council Aboriginal Corporation and Boon Wurrung Foundation and neither organisation accepts the other's claim to be Traditional Owners of Boon Wurrung (Bunurong) country;
- (iii) if Bunurong Land Council Aboriginal Corporation was appointed the sole Registered Aboriginal Party, the Council was not satisfied that Bunurong Land Council Aboriginal Corporation would be able to accommodate within their membership members of Boon Wurrung Foundation who have traditional links to Country. In particular, the Council was concerned by correspondence from Bunurong Land Council Aboriginal Corporation that indicated that it did not accept the traditional or familial links of Boon Wurrung Foundation members; and
- (iv) appointing both organisations as Registered Aboriginal Parties would not be appropriate and was unlikely to resolve the conflict within the Traditional Owner group.⁸⁴

5.1.5 Boundaries

The boundaries of Registered Aboriginal Parties are often in dispute. The Council operates on the principle of “right people for right Country” and prefers to appoint only one Registered Aboriginal Party for the area, in line with Native Title. The Registered Aboriginal Parties interviewed for this research reported being generally happy with their boundaries.

The Dja Dja Wurrung Registered Aboriginal Party observed that each Registered Aboriginal Party must, by necessity, work with its neighbours. For example, Dja Dja Wurrung country neighbours the Gundititj Mirring. The Gundititj Mirring originally claimed a parcel of land in their Registered Aboriginal Party application that was subject to a Native Title claim by the Dja Dja Wurrung. The Gundititj Mirring removed this parcel of land from their RAP application. If they had not removed the disputed parcel of land, the Council would have refused to appoint them as a Registered Aboriginal Party. The Dja Dja Wurrung said that the Gundititj Mirring have “decided to wait until the outcome of the Native Title claim is decided”.

The Dja Dja Wurrung Registered Aboriginal Party also reported that is has adopted the policy of consulting with its neighbours regarding any cultural heritage located within ten kilometres of the boundary.

5.1.6 Views on Registered Aboriginal Parties

The Aboriginal people interviewed for this research supported the Registered Aboriginal Party process as an appropriate mechanism for recognising who may speak for Country, although it must be cautioned that those Aboriginal people were all representatives of Registered Aboriginal Parties or the Aboriginal Heritage Council.

One Registered Aboriginal Party said the “best thing” about the Registered Aboriginal Party structure was that it “got the Traditional Owners back and gave them a voice, which they didn’t have”. However, the same Registered Aboriginal Party also felt that the Victorian Act should recognise Registered Aboriginal Parties as the primary contact point for other aspects of culture including ceremony and language. It observed that some Local Councils in its region are not interacting with the Traditional Owners, other than for cultural heritage, through the Registered Aboriginal Party. Traditional Owners said they want “to be actively known in other areas rather than just the people who dig up the rocks”.

However, a senior environment and planning lawyer suggested that Registered Aboriginal Parties are not the way go and questioned whether the all traditional knowledge holders are consulted in the process, including those who are not actively involved in the Registered Aboriginal Party. While Registered Aboriginal Parties provide certainty for developers concerning who to consult, the emphasis on the Registered Aboriginal Party structure assumes that all relevant knowledge holders become a Registered Aboriginal Party or have the time to be involved in Registered Aboriginal Party activities. An additional concern was the lack of a right of appeal for traditional knowledge holders who disagree with the decision of a Registered Aboriginal Party. The Registered Aboriginal Parties were described by the same lawyer as “just another layer of governance in an over-governanced field. There is no need for additional entities, Aboriginal people already know who the Traditional Owners are”.

5.2 QUEENSLAND

There are numerous ways to avoid breaches of the Queensland Act, (i.e. to satisfy the ‘cultural heritage duty of care’, see section 7.2 below), most of which include some degree of consultation with the ‘Aboriginal Party’ for the area.

An Aboriginal Party for an area may be a ‘Native Title Party for the area’ or an Aboriginal person with knowledge of local customs who has traditional responsibility for all or part of the area or is a member of a family group recognised as having traditional responsibility for all or part of the area.⁸⁵

An Aboriginal Party may be a ‘Native Title Party’ for an area⁸⁶ or, where no Native Title Party exists:

- (i) an Aboriginal person with responsibility under Aboriginal tradition for some or all of the area, or for significant Aboriginal objects located or originating from the area; or
- (ii) an Aboriginal person who 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.⁸⁷

A ‘Native Title Party’ is defined quite broadly to include:

- (a) a registered native title claimant for the area;
- (b) a person who, at any time after the commencement of this section, was a registered native title claimant for the area, but only if--
 - (i) the person’s claim has failed and--
 - (A) the person’s claim was the last claim registered under the Register of Native Title Claims for the area; and
 - (B) there is no other registered native title claimant for the area; and
 - (C) there is not, and never has been, a native title holder for the area; or
 - (ii) the person has surrendered the person’s native title under an indigenous land use agreement registered on the Register of Indigenous Land Use Agreements; or
 - (iii) the person’s native title has been compulsorily acquired or has otherwise been extinguished;
- (c) a registered native title holder for the area;
- (d) a person who was a registered native title holder for the area, but only if--

- (i) the person has surrendered the person’s native title under an indigenous land use agreement registered on the Register of Indigenous Land Use Agreements; or
- (ii) the person’s native title has been compulsorily acquired or has otherwise been extinguished.⁸⁸

Interviewees expressed significant concerns with the definition of, and process for identifying, the Aboriginal Party who may be consulted about cultural heritage on Country, as set out below. It is highly likely that the definition of an Aboriginal Party will be amended as part of the review of the legislation that is presently underway.

5.2.1 Aboriginal Parties and the Native Title process

It is interesting to note that while the Victorian Act is also tied to Native Title (using identical language), the effect of the Victorian Act is different compared to the Queensland Act. In Victoria, the Native Title process is used to guide the decision of the Aboriginal Heritage Council as to who should be the single recognised organisation to speak on behalf of Traditional Owners. In Queensland, however, the process is set up so that developers must consult with an Aboriginal Party which, where there is no current Native Title claim, may be an Aboriginal person who formed part of a failed Native Title claim (ie. the last registered Native Title claim). There is no requirement to investigate why the claim failed or whether the people being consulted are in fact the right people to speak for Country.

One interviewee said mining companies “love the Queensland Act” because coupling it with the Native Title process means they can “piggyback off the Native Title claim to get the contacts for the Aboriginal Party”. Many interviewees said that the definition of an Aboriginal Party should be decoupled from the Native Title process, and made the following comments:

- Reliance on Native Title processes produces “perceived unfair outcomes” in the identification of the correct people for Country, with the potential for formal recognition of the wrong persons as keepers of Aboriginal cultural heritage. Some native title claims may be struck out in close succession, or be withdrawn, reorganised and resubmitted, making it a problematic basis for identifying the correct Traditional Owners. The principal should be “right people for right Country”. There can be much conflict within Traditional Owner groups during the native title process. Some Traditional Owners may be included in the native title applications, others may be left out or removed. Whether a person has been left out or removed from a Native Title application should be irrelevant as to the question of ownership of cultural heritage.
- There is too much emphasis on Native Title claimants as the ‘Aboriginal Party’. The Aboriginal cultural heritage Act should be decoupled from Native Title. A native title determination is a high level test of who is a Traditional Owner. It is a highly technical process and more than you need to just identify who the Traditional Owners are for an area. Native Title is also no guarantee that the particular cultural heritage will be owned by that group. Aboriginal groups intermingle and overlap. The question is, who is responsible for that heritage?
- the downside of the Queensland Act is the way it is tied to the Native Title process. If a Native Title claim was properly made, then there is nothing to worry about. The grey areas are old claims and claims that have been thrown out. There is “lot’s of injustice in this area”, as groups are not fairly and reasonably represented. For example, near Brisbane there was a Native Title claim that had been struck out. The claim was made in 1999 for 7 people, whereas there were 20-30 families in that area with Native Title rights. The claim was struck out on that basis and no new claim was registered. In this situation, one of the original applicants was the only recognised person to speak for the area and everyone else was excluded.

- There may be good reasons why other people have not yet lodged a Native Title claim. A proper Native Title claim should be well researched, with a good idea of the boundaries and families. In Queensland some good claims are being struck out because the groups have not followed directions. In this case you would want the failed claim to be recognised. However there are failed claims that have failed with good reason, where they were not well formulated or incorrect.
 - The link between the Native Title process and cultural heritage laws is not appropriate, particularly the fact that notifications can be sent to “the last man standing” or to old claims.
 - One interviewee suggested that the Queensland Act be amended and the definition of an ‘Aboriginal Party’ replaced with the following definition of a ‘Traditional Owner’:

Traditional Owners means the lineal descendants of Aboriginal persons who were prior to sovereignty entitled to use and occupy the lands and waters upon which the Aboriginal cultural heritage was originally located. ⁸⁹

5.2.2 Difficulty identifying the Aboriginal Party

It was acknowledged by several interviewees that it can be quite complex finding the Aboriginal Party where there is no Native Title claim. Queensland South Native Title Services said it receives many phone calls from people trying to work out who the relevant Aboriginal Party is and how to contact them. Generally Queensland South Native Title Services is able to provide an appropriate referral, however, it often refers inquiries to the Department of Environment and Resource Management’s listed cultural heritage bodies.

The North Queensland Land Council felt the problem with identifying the Aboriginal Party is “leading to a real lack of consultation in the State”. A common situation in Queensland was said to be the proponent who argues, in defence of their failure to consult with the Traditional Owners, that they tried to contact the Traditional Owners by placing a notice in the local newspaper and had given the Traditional Owners thirty days to respond. According to the North Queensland Land Council, the reality is that lots of Traditional Owners never see the public notice in the newspaper and are not consulted. The North Queensland Land Council reportedly receives many complaints about this practice and would prefer that instead of public notices in newspapers, proponents go through the Land Council as first point of contact. The North Queensland Land Council also felt Land Councils are in a better position to advise proponents where there are conflicting Traditional Owner groups or conflict among Traditional Owners – two situations non-Indigenous proponents may not have the expertise to deal with.

5.2.3 Scope for developers to ‘forum shop’

The lack of a single organisation to represent and speak for Traditional Owners in Queensland also lends the system to ‘forum shopping’. Several interviewees observed that the point of the Queensland Act is said to be ‘consultation’ however sponsors are known to go to different groups to “get the opinion they want to hear”. The process has proved very divisive in some instances and one non-Aboriginal cultural heritage expert felt that there needs to be more mediation and inclusiveness among Traditional Owners.

Several interviewees urged the Department of Environment and Resource Management to “toughen up” this aspect of the legislation. The Gold Coast was said to be a site of significant conflict as there is no Native Title in the area and several overlapping claims. One cultural heritage consultant stated that on the Gold Coast, cultural heritage practitioners frequently just pick up one Aboriginal person and consult with them.

5.2.4 Case Study: Djarrungan

The author was referred by the North Queensland Land Council and one senior cultural heritage

advisor to a dispute between various Traditional Owners over who should speak for a mountain known as Djarrungun (which means “scrub hen egg”) located next to Walsh’s Pyramid in North Queensland. Djarrungun is a significant part of the dreaming stories for at least five Traditional Owner groups in the area. A proposal was put forward to start mining operations on Djarrungun. The miner consulted with one of the Traditional Owner groups in the area that did not have Djarrungun in their dreaming stories. However, this group were not the Traditional Owners entitled to speak for the mountain. As the issue became more high profile the miner reportedly refused to consult with the relevant Aboriginal Party.

The heritage consultant representing the Local Council (who were responsible for deciding whether the mining application should be approved) went to the North Queensland Land Council seeking help to identify the correct Aboriginal Party with authority to speak for Djarrungun. The North Queensland Land Council put the council in touch with several families from different Traditional Owner groups in the area, none of whom had been consulted by the miner. After consulting each group separately it became clear that there were several stories about the mountain from different Traditional Owner groups, including the group with authority to speak for Djarrungun. There were also different layers and levels of connection to the mountain among the groups – some groups had the right to visit Djarrungun, but not speak for the mountain – yet one group had been elevated, by the Queensland Act, to the status of decision maker and the rest had been left out.

The matter ended up in the Queensland Land Court and was ultimately finalised in favour of the Traditional Owners. However, the legislation was heavily criticised for failing to prevent this situation, other than by way of the appeals system.

5.2.5 Internal consultation by Traditional Owner groups

The Queensland Act does not require the Aboriginal Party consulted about cultural heritage to report back to the wider group, that is, there is no requirement of internal consultation. In relation to this gap, a senior cultural heritage advisor said “there is little recognition [under the Act] of what happens in the community and of cultural ways”.

5.2.6 Aboriginal Cultural Heritage Bodies and Traditional Owners

The Queensland Act provides that existing Aboriginal organisations may be registered as an ‘Aboriginal Cultural Heritage Body’ for an area. Its only role is to act as a contact point or ‘post box’ for developers to contact Traditional Owners. The cultural heritage body is not necessarily representative of Traditional Owners and is charged with identifying the correct Traditional Owners to consult with.

In spite of the limited role of the cultural heritage body, including the fact that it has no power whatsoever to speak for Country, the North Queensland Land Council felt the Minister should consult with the Native Title Service before registering an Aboriginal Cultural Heritage Body. Another interviewee gave the example of one Traditional Owner group that applied to be a cultural heritage body over an area that went beyond their traditional boundaries, which was reportedly a source of conflict in the region.

5.3 SOUTH AUSTRALIA

Under section 13 of the South Australian Act, before making any authorisation or determination under the Act (such as authorising damage to Aboriginal cultural heritage) the Minister must take all reasonable steps to consult with the Aboriginal Heritage Committee and any Aboriginal organisation, Aboriginal person or Traditional Owner who, in the opinion of the Minister, has a particular interest in the matter.

The ‘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.⁹⁰ ‘Aboriginal tradition’ means traditions, observances, customs or beliefs of the people who inhabited Australia before European colonisation and includes traditions, observances, customs and beliefs that have evolved or developed from that tradition since European colonisation.⁹¹

The South Australian Act is currently under review and one of the likely changes will be to bring the definition of who speaks for Country in line with Native Title. Another potential change will be the introduction of a site clearance model such as that used in Victoria and Queensland. Under a site clearance model, the developer is required to consult directly with the relevant Aboriginal people, rather than the Minister, to ascertain the location and significance of Aboriginal cultural heritage on a proposed work site prior to work commencing. In this context, the people interviewed for this report said it was very important to have certainty regarding who speaks for Country, particularly from the perspective of developers who do not want to be in the situation where they must consult with more than one group.

5.3.1 Addressing Native Title

As mentioned above, the South Australian Act predates the *Native Title Act 1993* (Cth) and, as such, is not connected with the Native Title process. Several interviewees stated that the South Australian Act requires amending so that it “privileges those with Native Title determinations, Native Title agreements or Native Title claims”.

Presently there may be several organisations in a region that is covered by a single Native Title claim that purport to speak for Aboriginal cultural heritage. This situation is a consequence of the previous *Aboriginal and Historic Relics Preservation Act 1965* (SA), under which local Aboriginal heritage committees were established. Two interviewees observed that there has been some tension between who speaks for Native Title and who speaks for cultural heritage. One interviewee described the conflict as “bad” in the Adelaide region, while in other regions things are “clearer and Native Title groups are more recognised”.

The position of South Australian Native Title Services was that Native Title groups should be responsible for heritage, but they could delegate that responsibility to another heritage group. They cited the Ngarrendjeri nation as a successful example, as they have a Memorandum of Understanding in place between the Native Title group and the Heritage Committee.

5.3.2 Which Traditional Owners to consult with?

As discussed previously, the Minister must consult with Traditional Owners before making any determination or authorisation under the Act (importantly, before determining whether a site is an Aboriginal site or authorising damage to an Aboriginal site). However, there are no parameters defining which Traditional Owners the Minister must listen to. This gap in the legislation was exploited during the notorious Hindmarsh Island Bridge dispute. In that dispute some Traditional Owners agreed that Hindmarsh Island was a sacred site for Aboriginal women, while others said the site was not significant at all. The South Australian Government was able to drive a wedge between the Traditional Owners to enable development to proceed. One interviewee cautioned Aboriginal people in New South Wales to “be wary of a process of supposed heritage legislation that allows for racist attacks on people”. The same interviewee described the Hindmarsh Island Bridge Dispute as “sexist, racist, uncomfortable and unpalatable”.

6. Aboriginal control, management and decision-making

Each jurisdiction offers a different level of Aboriginal control, management and decision-making. Victoria is arguably the high water mark, although the Registered Aboriginal Parties and the Victorian Heritage Council which appoints them are significantly less empowered and autonomous when compared with the Victorian Heritage Council that is charged with responsibility for ‘Australian’ heritage in Victoria.

In principle, the Queensland Act affords a reasonable degree of Aboriginal input into decisions about cultural heritage – with consultation and negotiation with Traditional Owners a key component of satisfying a developer or other person’s cultural heritage ‘duty of care’. In practice, however, community feedback suggests that there is not enough consultation taking place. In South Australia, all key decisions concerning cultural heritage are made by the Minister and minimal community consultation obligations are imposed. With no weight given to the views of Traditional Owners, a common complaint received from interviewees for this report was that the consultation process is seen as being not genuine.

6.1 VICTORIA

The Victorian Act affords Victorian Traditional Owners a significant degree of control over decisions that impact on cultural heritage. Importantly, the power to approve or refuse a cultural heritage permit or cultural heritage management plan is vested in Traditional Owners, not the Minister. The effectiveness of Aboriginal control is undermined, however, by the fact that a Registered Aboriginal Party’s (or RAP’s) decision is reviewable and may be overturned by the Victorian Civil and Administrative Tribunal.

Aboriginal control of decision-making is also dependant on a Registered Aboriginal Party being appointed for an area. If there is no Registered Aboriginal Party, the power to approve a cultural heritage management plan or permit sits with the secretary of the Department of Planning and Community Development.⁹² The Secretary may consult Traditional Owners and the Victorian Aboriginal Heritage Council, but is not obliged to accept their views.⁹³ This will be an ongoing issue for Aboriginal people in Victorian until all the Registered Aboriginal Parties have been appointed. At present approximately fifty per cent of the State is covered by Registered Aboriginal Parties.⁹⁴

The Victorian Aboriginal Heritage Council is also afforded total control over the appointment of Registered Aboriginal Parties. The Victorian Government is reportedly keen to avoid being involved in the process of deciding who speaks for Country. It was suggested the Council should have the power to issue notices to applicants for further information and dismiss vexatious Registered Aboriginal Party applications. It should be noted that while the Council has significant powers, Aboriginal people have no control over the appointment of members to the Council.

One interviewee drew an interesting comparison between the Victorian Aboriginal Heritage Council and the Victorian Heritage Council (the organisation responsible for ‘Australian’ heritage). The Victorian Heritage Council has significant power and autonomy – it can grant permits and registrations and also hear cases. It was questioned why the Victorian Aboriginal Heritage Council is not afforded the same degree of control and autonomy. In particular, it was suggested that where oversight of a process or decision is required, the Victorian Aboriginal Heritage Council should be used. For example, instead of a right of appeal to Victorian Civil and Administrative Tribunal, the Victorian Aboriginal Heritage Council could hear appeals relating to the decisions of Registered Aboriginal Parties.

There was also some criticism of Aboriginal Affairs Victoria’s role in protecting cultural heritage and its relationship with Registered Aboriginal Parties. Some Registered Aboriginal Parties felt that Aboriginal Affairs Victoria is undermining their authority in the field by questioning their ability to identify cultural heritage that is of archeological significance. Another Registered

Aboriginal Party felt that there is a general misconception in Victoria that the Act is centered on Traditional Owners, when “the cultural heritage protection processes under the Act are actually clearly jointly controlled by Aboriginal Affairs Victoria and Registered Aboriginal Parties”.

6.2 QUEENSLAND

In principal, the Queensland Act affords a reasonable degree of Aboriginal control of decisions about cultural heritage. Consultation and negotiation with Traditional Owners is supposed to be the primary way to ensure compliance with cultural heritage ‘duty of care’, particularly through the cultural heritage study and cultural heritage management plan processes. There is, however, no blanket requirement for developers to consult with Traditional Owners. In practice, the feedback was that there is “not nearly enough consultation with Traditional Owners happening in Queensland”.

It can be difficult for developers to identify the relevant Traditional Owners to consult with, particularly where there is no native title claim. In some cases developers may satisfy the requirement to notify Traditional Owners of proposed development by placing an advertisement in a newspaper and simply waiting thirty days. If there is no response from Traditional Owners then no consultation takes place. Even where there is a Native Title claim, developers need only send a written notice to the Native Title Party and wait 30 days. No further inquiries are necessary if no response is received. There is no appeal right for any Traditional Owners if the Aboriginal Party contacted by the developer does not respond within the thirty day notice period.

While also subject to strong criticism, one interviewee felt that section 23(3)(a)(iii) of the Queensland Act (the agreement making provision) was empowering for Aboriginal communities. The flexibility of the provision means that developers are more likely to pursue an agreement with Traditional Owners rather than risk breaching the cultural heritage ‘duty of care’. By all accounts a large number of these agreements are being entered into.

6.3 SOUTH AUSTRALIA

The South Australian Act provides a very low level of Aboriginal control of important decisions about cultural heritage protection. As has been set out previously, the Minister has control of two key decisions regarding cultural heritage:

- (i) determining whether a site or object is an Aboriginal site or object; and
- (ii) deciding whether to authorise destruction of cultural heritage.

While the Minister is required to accept the view of Traditional Owners as to whether a site or object is ‘of significance to Aboriginal tradition’, the South Australian Act allows the Minister to selectively choose which Traditional Owners to listen to. This may be problematic where there is conflict among Traditional Owners and/or different views or levels of knowledge of Aboriginal tradition.

Where the Minister is asked to authorise destruction of cultural heritage under section 23, Traditional Owners must be consulted, but the Minister is not obliged to follow their views. One Traditional Owner described the section 23 consultation provision in the following terms:

“Consultation is sometimes just a process, not genuine. It’s just ticking a box”.

The general feedback was that Traditional Owners, not the Minister, should have the right to control and make decisions about cultural heritage. South Australian Native Title Services said that most Traditional Owners support a system based on “local decision making, consultation and negotiation”, with the Minister used as “a last resort”.

Reform of the Aboriginal Heritage Committee was also suggested. Some Traditional Owners would prefer to see a more representative organisation, with members elected to the Committee by the Aboriginal community rather than being appointed by the Minister. There was also a desire to see the Committee exercise direct control over decisions about Aboriginal cultural heritage, rather than just serving in an advisory capacity. Some have suggested South Australia adopt the Northern Territory Aboriginal Areas Protection Authority model. This model comprises an independent statutory authority made up of Aboriginal representatives from across the Territory who are put forward by their community.

7. Methods of protection

There are some notable similarities and differences between the methods of protecting cultural heritage in each state. The Victorian and South Australian systems establish offences for harming Aboriginal cultural heritage. In South Australia there is a blanket ‘strict liability’ offence for harm to Aboriginal heritage, which is not subject to any ‘carve-outs’ or exceptions – damage is only permitted with authority from the Minister. While in Victoria, either knowledge of the harm, or negligence, or recklessness is required. By contrast, the Queensland system establishes a duty of care to prevent damage to Aboriginal cultural heritage (‘cultural heritage duty of care’).

Commonly, each state maintains a central register of Aboriginal sites and objects. While the site registers are important, they appear to be less significant in Queensland and Victoria where the primary objective is consultation with Traditional Owners before development commences. Both Queensland and Victoria have provisions for cultural heritage management plans, although management plans are infrequently used in Queensland with developers favouring other more flexible agreement making provisions.

Both the Victorian and South Australian systems authorise harm under permits. In Victoria, in areas characterised as ‘sensitive’ under the regulations (that is in areas where there is likely to be Aboriginal heritage) a more comprehensive Cultural Heritage Management Plan is required. Community engagement in these processes in Victoria is significant, with Registered Aboriginal Parties authorised to refuse to approve a permit or a management plan. While on the other hand, in South Australia and Queensland, the only obligation is community ‘consultation’.

7.1 VICTORIA

In Victoria it is an offence to knowingly, recklessly or negligently harm Aboriginal cultural heritage,⁹⁵ or to knowingly do an act likely to harm Aboriginal cultural heritage.⁹⁶ Harm is permitted in certain limited circumstances, importantly where a person is acting in accordance with a cultural heritage permit (**Permit**) or approved cultural heritage management plan.⁹⁷ These two items are the primary mechanism for protecting cultural heritage. Other measures to protect cultural heritage include the Victorian Aboriginal Heritage Register (see section 7.1.4), Cultural Heritage Agreements (see section 7.1.2), stop work orders and protection declarations.

7.1.1 Cultural Heritage Management Plans

Cultural heritage management plans are the primary mechanism for protecting Aboriginal cultural heritage in Victoria. The cultural heritage management plan involves an assessment of an area to determine the nature of any Aboriginal cultural heritage present and a written report setting out the results of the assessment and recommendations for measures to be taken before, during and after an activity to manage and protect the Aboriginal cultural heritage identified in the assessment.⁹⁸ The cultural heritage management plan must be prepared in accordance with prescribed standards and in compliance with the *Aboriginal Heritage Regulations 2007* (Vic) (**Victorian Regulations**).⁹⁹

Registered Aboriginal Parties expressed support for the cultural heritage management plan process. One observed that previously a desktop study, site walk through and site supervision were considered an appropriate level of research, whereas now a “full investigation” must be completed and the sponsor must have a contingency plan in place prior to work starting.

(i) *When is a cultural heritage management plan is required?*

A cultural heritage management plan may be undertaken voluntarily,¹⁰⁰ may be required by the Victorian Act, or may be required by the Victorian Regulations. Under the Victorian Regulations, a cultural heritage management plan is required where any or all of a proposed activity is listed as a high impact activity, resulting in significant ground disturbance, and any or all of the area is an area of cultural heritage ‘sensitivity’, which has not been subject to previous ground disturbance.

‘High impact’ activities are specified in the Regulations (Part 2, Division 5) and include: the construction of three or more dwellings; subdivision of three or more lots; building or works in alpine resorts; the extraction or removal of sand or sandstone; searching for stone; timber production; and dams.

Areas of ‘sensitivity’ are also specified in the Victorian Regulations (Part 2, Division 3). They include registered cultural heritage places, waterways, ancient lakes, coastal land, parks, high plains, greenstone outcrops, stony rises, caves, dunes and land within specified distances of areas of cultural sensitivity (for example, all land within 200 meters of a waterway is deemed sensitive).¹⁰¹ The areas of sensitivity were criticised by several Registered Aboriginal Parties, who felt that all Country is sensitive and development proponents should always be obliged to consider the impact of their development on Aboriginal cultural heritage and to consult with Traditional Owners.

(ii) Integration of cultural heritage management plans with local planning processes

The cultural heritage management plan process is supposed to be integrated with the local government planning process, however there was notable criticism of the actual level of integration of these two processes.

When the Victorian Act was introduced, consequential amendments were made to the *Victoria Planning Provisions*¹⁰² to better integrate cultural heritage management plans with local planning processes. The aim was to ensure that cultural heritage management plans are carried out prior to development activity taking place. Local Councils must check whether a cultural heritage management plan is required prior to determination of a planning permit application. Where a cultural heritage management plan is required, the council cannot issue a planning permit until it has received a copy of the approved plan. The author notes that Aboriginal Affairs Victoria has developed an online assessment tool to assist applicants to determine if a cultural heritage management plan is required.

The integration of the Victorian Act with local planning laws was both praised and criticised by the Registered Aboriginal Parties interviewed. On the one hand, one Registered Aboriginal Party observed that under the previous laws cultural heritage assessments were frequently not completed before development commenced. On the other hand, some Registered Aboriginal Parties expressed concern that Local Councils are not aware of, or chose to ignore, their obligation to consider whether a cultural heritage management plan is required. One Registered Aboriginal Party reported that within its boundaries several Local Councils “don’t care and won’t push cultural heritage management plans”.

It was suggested that this is not an issue with the legislation itself, but is more a question of Local Councils being better informed of their obligations and proactively educating the community about cultural heritage. One interviewee felt that it would be beneficial to set out the integrated planning and cultural heritage management plan process in the Victorian Act, including clearly stating that it is the Local Council’s responsibility to notify people of the Victorian Act.

(iii) Preparation and approval of cultural heritage management plans

The Victorian Act sets out a highly prescriptive process for the preparation and approval of cultural heritage management plans. A sponsor must notify the relevant Registered Aboriginal Party, Secretary of the Department of Planning and Community Development and all relevant landowners to which the plan relates, of his or her intention to carry out a cultural heritage management plan.¹⁰³ The Registered Aboriginal Party has fourteen days from receipt of the notice to notify the sponsor of whether it intends to evaluate the plan or not.¹⁰⁴ One Registered Aboriginal Party commented that some sponsors erroneously believe that the fourteen day period starts from when the notice is sent and suggested the Victorian Act be amended to clear up this ambiguity.

The sponsor must engage a cultural heritage advisor to prepare the cultural heritage management plan.¹⁰⁵ The author notes that Aboriginal Affairs Victoria have prepared guidelines on the qualifications for cultural heritage advisors in an attempt to raise standards, although one Registered Aboriginal Party did comment that there are still some cultural heritage advisors “who make a living off being dodgy”. The sponsor must also consult with the Registered Aboriginal Party before beginning the assessment and during the preparation of the plan and the Registered Aboriginal Party may participate in conducting the assessment.¹⁰⁶

The sponsor is required to contact all relevant land owners to inform them when a site assessment will be taking place. Several Registered Aboriginal Parties, however, stated that sponsors frequently fail to do this. Often the landowner does not know that the Registered Aboriginal Party site assessors are coming and there has been unnecessary confrontation. This has led some Registered Aboriginal Parties to call for the Victorian Act to be amended to make the sponsor’s obligation to notify the landowner clearer.

Once completed, the cultural heritage management plan must be submitted to the Registered Aboriginal Party for approval.¹⁰⁷ A Registered Aboriginal Party may refuse to approve a cultural heritage management plan if it has not been prepared in accordance with the prescribed standards or where the cultural heritage management plan does not adequately address the factors set out in section 61 of the Victorian Act, which include:

- (a) whether the activity will be conducted in a way that avoids harm to Aboriginal cultural heritage;
- (b) if harm cannot be avoided, whether the activity will be conducted in a way that minimises harm to Aboriginal cultural heritage;
- (c) any specific measures required for the management of Aboriginal cultural heritage likely to be affected by the activity, both during and after the activity;
- (d) any contingency plans required in relation to disputes, delays and other obstacles that may affect the conduct of the activity; and
- (e) requirements relating to the custody and management of Aboriginal cultural heritage during the course of the activity.

The Registered Aboriginal Party has thirty days in which to approve or refuse to approve the cultural heritage management plan once it has been submitted for evaluation. One Registered Aboriginal Party expressed frustration that many sponsors expect the cultural heritage management plan to be approved within a week, in spite of the fact that the Victorian Act clearly allows the Registered Aboriginal Party thirty days. Additionally, there is some confusion over when the thirty day period starts. The cultural heritage management plan must be submitted to the Registered Aboriginal Party accompanied by the prescribed fee.¹⁰⁸ Registered Aboriginal Parties start the thirty day period from the day the funds clear into their bank account and not the date the application was received.

The approval of a cultural heritage management plan is supposed to be final, however the Registered Aboriginal Parties all commented that Aboriginal Affairs Victoria has, in practice, been rejecting approved cultural heritage management plans. The author was told that Aboriginal Affairs Victoria sometimes fails to notify the Registered Aboriginal Party that it has rejected the cultural heritage management plan – the first the Registered Aboriginal Party hears of the problem is when the sponsor questions them about the delay. The author was told of one cultural heritage management plan that had been approved by the Registered Aboriginal Party but was rejected by Aboriginal Affairs Victoria because it did not contain page numbers (as required by the prescribed standards) and of another that was rejected because Aboriginal Affairs Victoria were not satisfied with the map provided.

According to one Registered Aboriginal Party the author spoke to, all the Registered Aboriginal Parties have questioned why Aboriginal Affairs Victoria retains this power when, throughout the process of developing the Victorian Act, Traditional Owners consistently maintained that Aboriginal Affairs Victoria must consult with Traditional Owners about all decisions relating to their Country. This power was also viewed as undermining the authority of Registered Aboriginal Parties with the sponsors of cultural heritage management plans:

“All the way through the process we are saying to farmers ‘we are the Traditional Owners, you need to talk to us about stuff on our Country’ but then Aboriginal Affairs Victoria can come in and still reject the cultural heritage management plan”.

(iv) Right to appeal the decision of a Registered Aboriginal Party to reject a cultural heritage management plan

All the Registered Aboriginal Parties the author spoke to said they want the unqualified right to reject a cultural heritage management plan and that the sponsor’s right to appeal their decision to the Victorian Civil and Administrative Tribunal should be removed from the Victorian Act.¹⁰⁹

7.1.2 Cultural Heritage Agreements

A cultural heritage agreement is an agreement between two or more persons (at least one of whom must be a Registered Aboriginal Party)¹¹⁰ relating to the management or protection of Aboriginal cultural heritage.¹¹¹ The content of a cultural heritage agreement is not prescriptive and it may include:

- (a) the protection, maintenance or use of land containing an Aboriginal place;
- (b) the protection, maintenance or use of Aboriginal objects;
- (c) rights of access to, or use of Aboriginal places or objects by Aboriginal people; and
- (d) the rehabilitation of Aboriginal places or objects.¹¹²

Cultural heritage agreements must be in an approved form and must be lodged with the Secretary of the Department of Planning and Community Development.¹¹³

Several Registered Aboriginal Parties were surveyed regarding the use of cultural heritage agreements as a method of protecting cultural heritage. It appears that most cultural heritage agreements have been actively pursued by Registered Aboriginal Parties, not other parties. Based on the feedback the author received, most, if not all, agreements to date have been signed with local, state or federal government agencies. Some of the agreements have provided Registered Aboriginal Parties with funding (e.g. to employ rangers). Other agreements have set out agreed processes for the preparation of cultural heritage management plans, where the sponsor is regularly involved in high impact developments (e.g. construction of roads). The benefit of the latter type of agreement was said to be greater efficiency – if the processes are set out in the agreement there is no need “to rehash the same information in the cultural heritage management plan each time”.

7.1.3 Cultural Heritage Permits

A cultural heritage permit is required where a person wants to: excavate for the purpose of uncovering Aboriginal cultural heritage; carry out scientific research on an Aboriginal place; carry out an activity that will, or is likely to, harm cultural heritage; buy or sell an Aboriginal object; or remove an Aboriginal object from Victoria.¹¹⁴

An application for a cultural heritage permit must be referred by the Secretary of the Department of Planning and Community Development to the relevant Registered Aboriginal Party (if one has been appointed).¹¹⁵ The Registered Aboriginal Party has thirty days in which to approve, approve

with amendments, or reject the permit application. If the Registered Aboriginal Party rejects the permit application within this timeframe, the Secretary must refuse to grant the permit.¹¹⁶

The author received little feedback regarding cultural heritage permits during the course of this research. Some Registered Aboriginal Parties reported having never dealt with cultural heritage permits. One Registered Aboriginal Party said it has dealt with two applications for permits between June 2001 and May 2010, both for research projects.

7.1.4 Victorian Aboriginal Heritage Register

Aboriginal Affairs Victoria maintains the Victorian Aboriginal Heritage Register which contains information concerning cultural heritage sites and objects in Victoria.¹¹⁷ Anyone may submit a preliminary recording for the Register using a form found on the Aboriginal Affairs Victoria website, however the recording must be confirmed by Aboriginal Affairs Victoria before the Secretary will enter the record on the Register.

(i) Access to the Register

Access to the Register is limited to Registered Aboriginal Parties, Victorian Aboriginal Heritage Council members, Aboriginal Affairs Victoria personnel, cultural heritage advisors, landowners and local government planning employees.¹¹⁸ Other persons may only access the Register with the approval of a Registered Aboriginal Party or the Victorian Aboriginal Heritage Council.¹¹⁹ While some Registered Aboriginal Parties acknowledged the need for one central Register, they were concerned that it be “culturally safe for people to access the records”.

One Registered Aboriginal Party expressed the desire for more information to be made freely available to Traditional Owners. Presently, all Registered Aboriginal Parties have access to the online database – which contains maps highlighting areas of sensitivity – however they do not have ready access to records of the actual sites on the Register. Without access to that information, a Traditional Owner who has not actually visited the site may not know what the site is. It was suggested that the online database provide access to all the background information that relates to a site, for Traditional Owners only.

The author also notes that in 2008, the Victorian Government announced the allocation of \$4.4 million over four years for the development of an expansive online Register.

(ii) Currency of information and delays recording sites

Some questions were raised about the currency of information in the Register. One Registered Aboriginal Party indicated that it periodically checks records on the Register because information is “sometimes out of date”. In addition to some information being out of date, there are also significant delays in recording sites on the Register. All preliminary recordings must be checked by Aboriginal Affairs Victoria. Several interviewees described lengthy delays in the processing of sites of by Aboriginal Affairs Victoria. The impact of this delay is significant. The author was told of one case where an unregistered scatter site was disturbed despite a preliminary recording having been submitted to Aboriginal Affairs Victoria eighteen months earlier.

(iii) Conflict between Registered Aboriginal Parties and Aboriginal Affairs Victoria over recording sites

There have been occasions where a Registered Aboriginal Party made a preliminary recording for an Aboriginal object, such as a scar tree, which has been challenged by Aboriginal Affairs Victoria. If Aboriginal Affairs Victoria do not agree that it is a scar tree, then the site is not registered. The approach taken by Aboriginal Affairs Victoria was described in the following terms: “it’s not a scar tree, you don’t know, you’re not an archaeologist”. In spite of this approach, the Registered Aboriginal Party in question reported that it continues to notify sponsors of the existence of the site during the cultural heritage management plan process.

7.1.5 Repatriation and return

The Victorian Act provides for the repatriation of human remains held by State entities,¹²⁰ and for the return of secret or sacred objects held by State entities.¹²¹ There were few concerns with remains or objects held by Victorian State entities. Traditional Owners were more concerned with repatriation of remains and return of objects held by overseas institutions. Funding to pursue repatriation and return was raised as an issue.

7.2 QUEENSLAND

The Queensland Act imposes a ‘cultural heritage duty of care’ on people who are carrying out activities to take all reasonable and practicable measures to ensure the activity does not damage Aboriginal cultural heritage,¹²² and imposes penalties for breaches of the cultural heritage duty of care.

The Queensland Act sets out a range of factors that may be taken into account when determining whether a person has complied with the duty of care. The inherent uncertainty of these factors has, in practice, forced many developers to consult with Aboriginal parties and enter into cultural heritage agreements to ensure compliance. For example, a person is taken to have satisfied the cultural heritage duty of care, importantly where the person is acting:

- (a) under an approved cultural heritage management plan;
- (b) under a native title agreement or another agreement with an Aboriginal Party; or
- (c) in compliance with the cultural heritage duty of care guidelines.¹²³

Several parts of the Queensland Act were repeatedly highlighted by interviewees as great concepts for protecting cultural heritage – in particular the cultural heritage duty of care – but as undermined by a range of limitations and a lack of resources in practice. Other aspects of the Queensland Act were strongly criticised – particularly the duty of care guidelines, which were viewed as undermining the duty of care itself. The Cape York Land Council was particularly critical, saying “the Act provides a process that allows third parties and business to go about their business with a minimal regime in place”.

While not an absolute way to prevent destruction of cultural heritage, the protection offered by the Queensland Act was widely perceived as “not so bad”. Interestingly, Queensland South Native Title Services said many of its clients believe the Queensland Act is more powerful than the Native Title Act. The perception is that it is a “real” law that protects their cultural heritage. Although Queensland South Native Title Services maintains that the Act needs to be strengthened, it says Traditional Owners still consider the Queensland Act a “strong” piece of legislation that, importantly, “recognises that Aboriginal people were here prior to contact”.

7.2.1 Cultural heritage duty of care

A person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage (the ‘cultural heritage duty of care’).¹²⁴ The factors that may be considered in determining whether a person has complied with the cultural heritage duty of care include:

- (a) the nature of the activity, and the likelihood of its causing harm to Aboriginal cultural heritage;
- (b) the nature of the Aboriginal cultural heritage likely to be harmed by the activity;
- (c) the extent to which the person consulted with Aboriginal Parties about the carrying out of the activity, and the results of the consultation;
- (d) whether the person carried out a study or survey, of any type, of the area affected by

the activity to find out the location and extent of Aboriginal cultural heritage, and the extent of the study or survey;

- (e) whether the person searched the database and register for information about the area affected by the activity;
- (f) the extent to which the person has complied with cultural heritage duty of care guidelines; and
- (g) the nature and extent of past uses in the area affected by the activity.¹²⁵

A person is taken to have complied with the duty of care if the person:

- (a) is acting under an approved cultural heritage management plan;
- (b) is acting under a native title agreement or another agreement with an Aboriginal Party, unless the Aboriginal cultural heritage is expressly excluded from being subject to the Agreement;
- (c) is acting in compliance with the duty of care guidelines;
- (d) is acting in compliance with native title protection conditions, but only if cultural heritage is expressly or impliedly the subject of the conditions;
- (e) owns the cultural heritage or is acting with the owner’s agreement; or
- (f) the activity is necessary because of an emergency.¹²⁶

There were a range of views about the cultural heritage duty of care provisions. The majority of interviewees felt it is a great concept, but its effectiveness in stopping damage to cultural heritage is limited in practice. The benefits of the duty of care were said to be:

- A ‘duty of care’ is a well understood legal concept and also fits well with Aboriginal perspectives of having a responsibility or duty towards culture.
- The duty of care concept is “an easy tool for people to understand”.
- The duty of care “is a vast improvement on previous laws”. At least now proponents are obliged to stop and consider cultural heritage.
- The duty of care has forced many companies to implement processes and policies

that incorporate cultural heritage compliance. Many companies now believe they must be able to establish that they are thinking about cultural heritage and they have processes to acknowledge the duty of care, as opposed to having a policy of not acknowledging cultural heritage, no process in place and pleading ignorance when they do destroy cultural heritage.

Despite the benefits, all interviewees were convinced that cultural heritage continues to be destroyed on a regular basis. Interviewees identified clear and common limitations on the effectiveness of the duty of care which are outlined below:

(i) Lack of public awareness of the duty of care

Some people felt the Government was not doing enough to educate the public about the existence of the duty of care. One person suggested that public awareness could be increased by noting cultural heritage on the title to a property so that when the property is sold and a title search is conducted, the buyer is aware of the cultural heritage. Another suggested that when people do the wrong thing, there should be more media coverage and the Department of Environment and Resource Management should leverage more publicity.

(ii) The duty of care guidelines

It is possible to satisfy the cultural heritage duty of care provided you comply with the cultural heritage duty of care guidelines. The guidelines define different areas of sensitivity and categories of activities that are deemed unlikely to impact on Aboriginal cultural heritage. For example, category two activities causing ‘no additional surface disturbance’ (such as cultivation of an area already subject to cultivation) are deemed to comply with the duty of care guidelines.¹²⁷

Interviewees were strongly of the view that Traditional Owners should always be the first point of contact, not the duty of care guidelines. People were very concerned that it is possible to satisfy the duty of care without ever speaking to Traditional Owners by following the guidelines. For example, where it is proposed to change the use of an area of pastoral land that has been cleared for over 100 years (i.e. the land has been disturbed), the proponent may rely on the guideline which prescribes that the land has been disturbed, therefore the activity is unlikely to harm cultural heritage and no consultation is necessary.

A senior cultural heritage advisor the author spoke to described instances where developers have threatened Aboriginal people that if they do not sign an agreement, the developer will simply use the duty of care guidelines to satisfy the duty of care.

(iii) Lack of access to land for Traditional Owners

Every interviewee felt that granting Traditional Owners the right to access traditional lands would improve compliance with the duty of care guidelines and increase protection for cultural heritage. Often Traditional Owners are notified of issues on freehold land but, without access, it is difficult to find out whether the duty of care has been complied with. All interviewees reported that Traditional Owners have experienced problems accessing all types of land, other than native title land, including freehold and National Parks lands.

7.2.2 Cultural Heritage Studies

The Queensland Act sets up a process for undertaking a cultural heritage study, which may lead into the development of a cultural heritage management plan or other agreement with the Aboriginal Party for the area. Cultural heritage studies are not mandatory, but may be voluntarily undertaken and the results recorded on the cultural heritage register maintained by the Department of Environment and Resource Management.

The study should be undertaken in consultation with the Aboriginal Party for the area, whose responsibility is to assess the level of significance of areas and objects in the study area that appear to be significant Aboriginal areas or objects.¹²⁸ However, it is possible for a cultural heritage study to proceed without any Aboriginal involvement where the Aboriginal Party for the area fails to respond, within the thirty day period, to the sponsor’s written notice of intention to carry out a cultural heritage study.

The Queensland Act sets out prescriptive requirements for carrying out a cultural heritage study (under Part 6). Aboriginal parties are responsible for assessing the level of significance of areas and objects included in the study area that are or appear to be significant Aboriginal areas and objects.¹²⁹ However, as previously noted, if the Aboriginal Parties do not respond to the proponent’s notice of intent to carry out a cultural heritage study within the thirty day timeframe, the proponent may proceed without their involvement. Even if the Aboriginal Party expresses interest outside the thirty day period, the proponent is not obliged to endorse the Aboriginal Party’s participation in the study.¹³⁰

The results of a cultural heritage study may be recorded on the cultural heritage register (Part 6, Division 4). The fact that a proponent has carried out a cultural heritage study is a factor that may be taken into account in determining whether the proponent has complied with the cultural heritage duty of care, but it does not guarantee total compliance. As such cultural heritage studies have, in practice, tended to be used as the preliminary step to a cultural heritage management plan.

One organisation which represents Traditional Owners was critical of the fact that cultural heritage studies do not include a social impact statement that assesses the impact of destroying cultural heritage or restricting access to sites or land on Traditional Owners. For example, if a main road is being built and it will restrict access to a significant waterhole, the study should consider the impact that restriction will have on a Traditional Owner who can no longer visit the site, take the kids and tell the stories that relate to the waterhole.

7.2.3 Cultural Heritage Management Plans

Cultural heritage management plans are required in certain situations, but may also be undertaken voluntarily. A cultural heritage management plan is required where an environmental impact statement is needed or another form of environmental assessment is required (e.g. an Environmental Management Plan submission).¹³¹ The Act sets out detailed administrative procedures for carrying out a cultural heritage management plan which, in part, may explain why some interviewees said developers rarely utilise cultural heritage management plans. Sponsors are more likely to pursue a s 23(3)(a)(iii) agreement because the cultural heritage management plan process is “more formulaic”.

There are provisions for consultation with the Aboriginal Party for the area in development of the plan. However it is possible for a cultural heritage management plan to proceed without any consultation with an Aboriginal Party. Where the Aboriginal Party has been consulted, but agreement cannot be reached, the sponsor may refer the cultural heritage management plan to the Land Court and request the Land Court recommend the Minister approve the plan.¹³²

The notice requirements and timeframes were again highlighted as a concern. When it is not clear who the Aboriginal Party is, the sponsor must place an advertisement in a newspaper and consult with every person who responds to the advertisement.

If there is a Native Title claim in relation to an area, then the developer need only send a written notice to the Native Title party and no further inquiries are necessary. There is no appeal right if that party does not respond within the thirty day notice period.¹³³

Where an Aboriginal Party is endorsed to participate in the development of a cultural heritage management plan, its role is to:

- (a) seek agreement with the sponsor of the plan about how the project is to be managed to avoid harm to Aboriginal cultural heritage and, to the extent that harm cannot be avoided, to minimise harm;
- (b) consulting and negotiating with the sponsor about issues needing to be addressed in the development of the plan; and
- (c) generally giving help and advice directed at maximising the suitability of the plan for the effective protection and conservation of Aboriginal cultural heritage.¹³⁴

Traditional Owners were critical of the fact that the cultural heritage management plan only addresses how to avoid damaging the cultural heritage during development and does not address the ongoing management and preservation of any cultural heritage on the site.

The parties must all agree on the cultural heritage management plan, otherwise the matter will be referred to the Land Court for mediation or for the Court to make recommendations to the Minister. Ultimate power to decide whether a cultural heritage management plan should be authorised rests with the Minister.¹³⁵

7.2.4 Agreements

Provided cultural heritage is not expressly excluded, it is possible to satisfy the cultural heritage

duty of care under a ‘Native Title agreement’ or ‘another agreement with an Aboriginal Party for an area’. While the Queensland Act sets out very detailed administrative procedures for undertaking a cultural heritage study and/or cultural heritage management plan, it sets out no procedures in relation to the ‘Native Title agreements’ or other ‘agreements with an Aboriginal Party’.

It seems this form of agreement was never intended to be a major part of the Queensland Act, but it has reportedly become common place because there are no prescribed minimum standards for the agreement and the agreements are not subject to outside scrutiny. While sponsors like the flexibility (particularly the fact that the content of the agreement is not prescribed and it may be very short), many interviewees agreed that the Department of Environment and Resource Management needs to set some minimum standards.

On the other hand, the fact that Aboriginal parties can enter into legally binding agreements in relation to cultural heritage was said to “keep the companies more honest” and the process was described as “empowering”. It was said that a number of communities have used the agreements to pursue breaches committed by companies.

7.2.5 Cultural Heritage Database and Register

The Department of Environment and Resource Management maintains a cultural heritage database and register of information about cultural heritage. One Traditional Owner group described the Department’s database and register as “gamin”. Much of the information was said to be old, antiquated and not very detailed, although it was acknowledged that the Cultural Heritage Coordination Unit are now very strict about the quality of information entered into either system.

Several interviewees noted that Traditional Owners have real concerns about putting cultural heritage information on the register, which is controlled by the State government and bureaucrats. The author was told that many Traditional Owners are starting to map cultural heritage at a local level and maintain local cultural heritage databases.

Another concern was that Indigenous Land Use Agreements are registered in the Indigenous Land Use Agreements database only and there is no obligation for a proponent to check that database.

7.3 SOUTH AUSTRALIA

The South Australian Act is not based on a “site clearance model”. Aboriginal cultural heritage is primarily protected under the Act through two mechanisms – the registration of sites and objects on the Register of Aboriginal Sites and Objects¹³⁶ and the need to obtain authorisation from the Minister to cause damage to sites, objects or remains.¹³⁷

The South Australian Act was praised by interviewees as “strong” and as providing “blanket protection” of Aboriginal cultural heritage. However, this so-called blanket protection was perceived as being undermined by the fact that the Minister has the final say over whether a site is registered and whether a site will be destroyed or protected. Two interviewees from the Aboriginal community felt that Aboriginal people in Victoria and New South Wales have better Aboriginal heritage acts.

The South Australian Act was generally viewed as dated, particularly in relation to Native Title and more modern “site clearance models” of heritage protection. Interviewees reported low levels of compliance (“everybody ignores the Act”) and that most protection is based on good will. On occasion, Traditional Owners have had recourse to the Federal Court under the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* to protect Aboriginal heritage, where the South Australian Act failed to provide adequate protection.

A review of the South Australian Act has been underway for several years. Some of the other

gaps that interviewees identified include that the Act does not provide for ongoing maintenance and preservation of sites and the need for early integration of Aboriginal heritage powers with planning and development processes.

An interesting feature of the South Australian Act is that it makes provision for the Minister to authorise an Aboriginal person or group of Aboriginal persons to enter any land (including private land) for the purpose of gaining access to an Aboriginal site, object or remains.¹³⁸

7.3.1 Offence to damage cultural heritage

Without prior authorisation from the Minister, it is an offence to damage, disturb or interfere with any Aboriginal site; damage any Aboriginal object; or where any Aboriginal objects or remains are found, disturb or interfere with or remove the objects or remains.¹³⁹ The protection offered by this offence was described as “blanket” because it is not subject to any carve-outs or exceptions, such as those in the Victorian Aboriginal Heritage Regulations or the Queensland Duty of Care Guidelines.

The effectiveness of protection is, however, undermined by the fact that the Minister may authorise destruction, subject only to a requirement to consult with the Aboriginal Heritage Committee, Aboriginal people or organisations with an interest in the matter and/or Traditional Owners.¹⁴⁰ These consultation provisions were viewed as weak, given the Minister is not obliged to follow the recommendations of Traditional Owners when deciding whether to authorise destruction or not. Interviewees provided numerous examples of the Minister allowing destruction of sites in spite of the objections of Traditional Owners.

7.3.2 Cultural heritage agreements

The Minister may enter into an Aboriginal cultural heritage agreement with the owner of land on which any Aboriginal site, object or remains are situated.¹⁴¹ The agreement attaches to the land and is binding on the current owner of the land regardless of whether that person was the person with whom the agreement was made.¹⁴² An Aboriginal heritage agreement may contain any provision for the protection or preservation of Aboriginal sites, objects or remains.¹⁴³ It may:

- (a) restrict the use of land to which it applies;
- (b) require specified work or work of a specified standard to be carried out in accordance with specified standards on the land;
- (c) restrict the nature of work that may be carried out on the land;
- (d) provide for management of the land or any Aboriginal site, object or remains in accordance with a particular management plan or in accordance with management plans to be agreed from time to time between the Minister and the owner;
- (e) provide for financial, technical or other professional advice or assistance to the owner of the land with respect to the maintenance or conservation of the land or the protection or preservation of any Aboriginal site, object or remains; or
- (f) provide for remission of rates or taxes in respect of the land.¹⁴⁴

The author was not made aware of any Aboriginal cultural heritage agreements having been entered into by the people interviewed for this research.

7.3.3 Register of Aboriginal Sites and Objects

The South Australian Act also provides that the Minister must maintain a Register of Aboriginal Sites and Objects.¹⁴⁵ The Minister has the power to determine whether a site or object is an Aboriginal site or object¹⁴⁶ and, as such, whether it should be entered on the Register of Aboriginal

Sites and Objects. In determining whether a site or object is an Aboriginal site or object, the Minister must consult with Aboriginal people and must accept the views of Traditional Owners as to whether the site or object is an Aboriginal site or object.¹⁴⁷ A site will be conclusively presumed to be an Aboriginal site or object once entered on the Register.¹⁴⁸

However, the feedback on the Register was that it needed to be updated more regularly and there is an extensive backlog of sites that have not been registered.

8. Review and appeal processes

Appeal rights vary significantly across the states. In Victoria, administrative review of decisions is available through the Victorian Civil and Administrative Tribunal. In Queensland the Land Court is responsible for reviewing decisions, while in South Australia recourse to the Supreme Court of South Australia is the only avenue for review.

8.1 VICTORIA

The sponsor of a cultural heritage management plan may apply to the Victorian Civil and Administrative Tribunal for review of a decision of a Registered Aboriginal Party to refuse to approve a cultural heritage management plan.¹⁴⁹ The Victorian Civil and Administrative Tribunal may approve the cultural heritage management plan, approve the cultural heritage management plan with amendments or refuse to approve the cultural heritage management plan.¹⁵⁰ This right was not available under the previous Commonwealth Act which applied in Victoria (*the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*).

The author was advised by Aboriginal Affairs Victoria that since the Victorian Act came into force in May 2007 there have been approximately seven hundred cultural heritage management plans – one of which was appealed to the Victorian Civil and Administrative Tribunal and two were negotiated out. It was noted that one of those cases was an appeal against the decision of the Secretary as there was no Registered Aboriginal Party in place.

The Victorian Traditional Owners the author spoke to strongly asserted their desire for an “unqualified right” to reject a cultural heritage management plan, which would mean removing the sponsor’s right to appeal their decisions to the Victorian Civil and Administrative Tribunal. A representative of Aboriginal Affairs Victoria also acknowledged that Registered Aboriginal Parties are “not happy that a sponsor can appeal to the Victorian Civil and Administrative Tribunal against a Registered Aboriginal Party’s decision to refuse a permit and that the Tribunal may overturn the Registered Aboriginal Party’s decision”.

One Registered Aboriginal Party observed that Traditional Owners do not want to go to court at all because “they don’t like the court system”. This Registered Aboriginal Party also reported having had difficulty with some cultural heritage advisors threatening to go to Victorian Civil and Administrative Tribunal in an attempt to force the Registered Aboriginal Party to agree to a cultural heritage management plan. Aside from the appeal right undermining the ability of Traditional Owners to safeguard their cultural heritage, Registered Aboriginal Parties were also concerned that there is no funding for legal advice or representation.

8.2 QUEENSLAND

Developers are required to consult with the Aboriginal Party for an area as part of developing a cultural heritage management plan.¹⁵¹ Where the consultation breaks down and the parties cannot agree on the cultural heritage management plan, any party to the consultation may ask the Land Court to provide mediation of the dispute.¹⁵² One interviewee said that several cases are referred to the Land Court each year. Some are appeals by Aboriginal parties but most are industry appeals, the majority of which are settled without judgment.

One senior cultural heritage advisor criticised the appeal process as “too legalistic”:

“There is no recourse for mediation. All disputes go straight to the Land Court. While the Land Court can order mediation, the process is still too legalistic”.

This interviewee provided an example of the unfairness that can arise from having such formal legal dispute resolution processes in place. In one case, a lawyer had ‘consulted’ the Aboriginal

Party by sending an email that attached the cultural heritage management plan to the consultant archaeologist for the Aboriginal Party and not the Aboriginal Party itself. When the Aboriginal Party objected to the cultural heritage management plan, the lawyer for the sponsor convinced his client to go to the Land Court. The Aboriginal Party had no resources but had to attend the Land Court. The case cost approximately thirty thousand dollars and while the Aboriginal group was awarded fifteen thousand dollars in costs, the gap in costs had to be covered by the cultural heritage firm advising the Aboriginal Party.

8.3 SOUTH AUSTRALIA

Traditional Owners have very little direct decision-making power under the South Australian Act. Primary decision-making power rests with the Minister, importantly in relation to whether a site or object is an Aboriginal site or object and whether it should be entered on the Register of Aboriginal Sites and Objects,¹⁵³ and to authorise damage to sites, objects and remains.

Before making any determination or authorisation under the Act, the Minister must consult with the Aboriginal Heritage Committee and any Aboriginal organisations, Traditional Owners or other Aboriginal persons who, in the opinion of the Minister, have a particular interest in the matter.¹⁵⁴ When determining whether an area of land is an Aboriginal site or object, the Minister must accept the views of the Traditional Owners as to whether the land or object is of significance according to Aboriginal tradition.¹⁵⁵

There are no administrative appeal rights under the South Australian Act. The only way to challenge a decision of the Minister is through common law judicial review. While the District Court and Environment, Resources and Development Court have been vested with judicial review jurisdiction under many State Acts (including the *Heritage Places Act 1993*), for judicial review of decisions under the *Aboriginal Heritage Act 1988 (SA)* remains vested in the Supreme Court of South Australia.

9. Funding, training and capacity building

The states each provide varying levels of funding, training and capacity building initiatives to Traditional Owners, with Victoria again leading the way. The total expenditure on cultural heritage by each Government department varied significantly. It was estimated that the Heritage Services Branch of Aboriginal Affairs Victoria expends \$4 to \$5 million each year, compared to the \$2.14 million expended by the Queensland Department of Environment and Resource Management on cultural heritage in the 2009/10 financial year. The author was unable to obtain budgetary information from South Australia at the time of publication of this report.

9.1 VICTORIA

Victoria has expended considerable resources on capacity building and training for Registered Aboriginal Parties and the Victorian Aboriginal Heritage Council. While the investment in this area is significantly more compared with Queensland and South Australia, it was still considered inadequate by some interviewees.

9.1.1 Funding for Registered Aboriginal Parties

Registered Aboriginal Parties reported that there was little or no funding to support the Registered Aboriginal Party application process, which was highly resource intensive for some Traditional Owners that had not previously prepared a Native Title application (the two processes require similar high level genealogical and land boundary research). Some Registered Aboriginal Parties sourced funding from other parts of their existing businesses, including Native Title income, to fund the application.

Aboriginal Affairs Victoria provide newly appointed Registered Aboriginal Parties with a start up grant of twenty thousand dollars. However, one Registered Aboriginal Party observed that Traditional Owners that did not have infrastructure and a corporate entity in place prior to their appointment would have found it difficult to start up utilising this funding alone.

Aboriginal Affairs Victoria also provides Registered Aboriginal Parties with an annual grant of between forty thousand and fifty thousand dollars. This was said to be inadequate, particularly for Registered Aboriginal Parties in low growth areas where there is limited opportunity to derive income from cultural heritage work. Registered Aboriginal Parties generally employ one to three staff members (a cultural heritage coordinator and cultural heritage officers). The number of staff depends on the volume of work and available funding, although it was generally acknowledged that at least two to three staff are necessary. The Registered Aboriginal Parties maintain a roster of casual staff for site monitoring. Several Registered Aboriginal Parties reported using other income, including Native Title income and income from various agreements with Government departments, to cover overhead costs and staff salaries related to cultural heritage work.

9.1.2 Training and capacity building

To assist Registered Aboriginal Parties with long term business planning, Aboriginal Affairs Victoria funded a business advisor to prepare business plans. Aboriginal Affairs Victoria's ultimate aim is for Registered Aboriginal Parties to be sustainable without government assistance. While this may be possible for Registered Aboriginal Parties in high growth areas, other Registered Aboriginal Parties in areas with little development were concerned about their long-term sustainability without external funding.

While Aboriginal Affairs Victoria and a Victorian higher education provider have developed a Certificate IV Cultural Heritage Studies course, Registered Aboriginal Parties complained of a lack of specific training on the detailed requirements of the legislation and how to evaluate cultural heritage management plans. Additionally, the importance of locally delivered training

was highlighted by some interviewees.

9.2 QUEENSLAND

There are significant gaps in terms of funding and administration in Queensland. There also appear to be no formal initiatives to build the capacity of organisations representing Traditional Owners in cultural heritage matters and no formal training for Traditional Owners on the requirements of the Queensland Act. Instead, Traditional Owners must rely on legal and technical advisors paid for by development sponsors, to assess and advise on cultural heritage management plans and agreements.

9.2.1 Funding

The Department of Environment and Resource Management does not provide any funding to Traditional Owner groups to carry out their functions under the Queensland Act, but does provide a one-off grant of ten thousand dollars to Aboriginal Cultural Heritage Bodies (which one interviewee felt should really be provided to Traditional Owners). Although some Land Council's reported dealing with cultural heritage when it arises in other projects, such as Native Title negotiations, there is no funding for them to undertake any work under the Queensland Act.

In practice, Traditional Owners derive their income from fees charged to developers for cultural heritage work, although difficulties were noted for Traditional Owners who do not have the infrastructure in place to support this type of work (such as computers, bank accounts and billing systems). Some Traditional Owners groups are reportedly supporting cultural heritage work using supplemental income from future acts (where the group has a Native Title determination). The importance of having a functioning organisation in place, with regular income and good cash-flow to cover administrative costs, was repeatedly highlighted.

While there is no government funding to support Traditional Owners, generally the development proponent will pay for Traditional Owners to receive professional advice in relation to a cultural heritage management plan or cultural heritage agreement, however they have no obligation to do so. One Native Title Representative Body suggested that it could be formally funded by the government to provide this type of advice. With their existing in-house expertise, including lawyers, project officers and historical data, they would be well placed to assist Traditional Owners in the cultural heritage agreement making process, although it was emphasised that they would not have the capacity to deal with the day-to-day administration.

An alternative perspective was offered by one cultural heritage advisor the author spoke to, who felt that "resourcing is not a huge issue as many large companies will pay for lawyers and technical advisors for Aboriginal groups. The sponsor of a cultural heritage management plan will always pay for lawyers. With agreements, it will depend on the size of the project".

9.2.2 Case Study: Girrigun Elders and Reference Group (Land and Sea Management Group)

Girrigun is a grassroots land and sea management group representing nine Traditional Owner groups in the rainforest region of North Queensland. Girrigun is using GIS satellite technology to map cultural heritage in the region. It maintains a database with over 6,000 entries, which is not shared with the state register.

Girrigun is funded by the Commonwealth Department of Employment and Workplace Relations and philanthropic sources, not the Queensland Department of Environment and Resource Management. It employs a CEO, archeologist and GIS database operator, as well as twelve rangers. The GIS operator is in high demand by other Traditional Owner groups who are trying to set up their own cultural heritage mapping databases.

Recently Girrigun challenged the Queensland Government’s provision of core funding for Traditional Owners and a consultant was engaged to put a dollar value on the services Girrigun provides to the Government for free. It was found that Girrigun provides Queensland Government agencies with six hundred thousand to seven hundred thousand dollars of free services each year, including services relating to the *Aboriginal Cultural Heritage Act 2003* (Qld).

9.3 SOUTH AUSTRALIA

South Australian Interviewees expressed a strong, unaddressed need for Aboriginal organisations to be resourced to carry out cultural heritage protection work and, more generally, to care for cultural heritage. The primary source of income for cultural heritage activities is from fees charged for site monitoring services.

To address this gap, one Traditional Owner group is pursuing agreements with local government that would provide for 0.5% of rates to be put aside for the protection of Aboriginal cultural heritage. Interestingly, it was noted that there is precedent for this type of scheme in South Australia. The private company which settled South Australia made provision for a percentage of land sales tax to go into a fund for Aboriginal people and for a percentage of land to be given to Aboriginal people, however these rights were lost when South Australia joined the Federation.

It is unclear whether the South Australian Government offers any specific training or capacity building support to enable Traditional Owners to protect cultural heritage. It is also unclear whether training has been made available to members of the South Australian Aboriginal Heritage Committee.

10. Compliance

Compliance with cultural heritage laws is the real test of how effective a cultural heritage protection regime is in practice. The primary issue for the Traditional Owners the author spoke to was compliance with the legal obligation to not harm Aboriginal cultural heritage. Secondary concerns included, where relevant, compliance with the requirement to carry out a cultural heritage management plan and compliance with the terms of a cultural heritage management plan.

There are a range of factors that make an assessment of the levels of compliance in each state an inherently difficult task, including the fact that Traditional Owners may themselves be unaware of the existence of the cultural heritage, particularly where it is located on private land. Ultimately, Traditional Owners felt that there is really no way for them to know how much of their cultural heritage is being destroyed on a daily basis, but there was a strong perception that the level of destruction is high.

10.1 VICTORIA

It is difficult to assess the level of compliance in Victoria. On the one hand Registered Aboriginal Parties have been engaged in a significant number of cultural heritage management plans since the Victorian Act came into operation in 2007 (over seven hundred have been completed). On the other hand, every Registered Aboriginal Party complained that sites continue to be regularly destroyed. A consistent theme was that Aboriginal Affairs Victoria will investigate complaints promptly, but will never prosecute. One Registered Aboriginal Party felt that each time Aboriginal Affairs Victoria was “looking for a bigger, better example for a prosecution”.

In one case, a contractor who was clearing weeds in a park on behalf of a state government department disturbed a well known, but unregistered, scatter site. There is a dispute about who is responsible for the damage. According to the Registered Aboriginal Party, the government department claims it did not inform the contractor of the scatter site because the contractor had said he would not put his skid steer down to pick up the piles of weeds. While Aboriginal Affairs Victoria investigated the Registered Aboriginal Party’s complaint, and reportedly acknowledged that the site was well known, they chose not to prosecute.

Several Aboriginal interviewees observed that under the previous legislation, local communities had a cultural heritage advisor who had the powers of an inspector. The inspector’s powers included the power to issue on-the-spot stop work orders. Under the new Victorian Act, inspectors must be government employees. One Registered Aboriginal Party commented that without the power to immediately stop work, all they can do is complain to Aboriginal Affairs Victoria and hope that the inspector can visit the site before the damage has been done.

10.2 QUEENSLAND

There were mixed views on compliance in Queensland. Although several interviewees noted successful prosecutions under the Queensland Act, every interviewee felt that there is still a lot of destruction occurring on freehold land. There was a perception that the economic gain sometimes outweighs the penalty that must be paid for destroying a site. One Traditional Owner felt the system had been set up so that developers can simply pay money to destroy cultural heritage, describing the penalties as “dirty money, blood money and the Government should be ashamed”.

There was criticism that the penalty is paid to the government and not the community. Interviewees commented that, in addition to the existing criminal penalty, there should be a right of action for a Traditional Owner to seek damages against persons who unlawfully harm or possess Aboriginal cultural heritage or breach the duty of care provided in the Queensland Act, by way of having a right to institute civil proceedings against the person who damaged the cultural heritage or by way of entitlement to benefit from a civil penalty.

Traditional Owners strongly believe their ability to protect heritage on freehold land is very limited. It was said that giving Traditional Owners access to land would not only get them more involved in protecting cultural heritage, but would bring about greater compliance. In order to increase compliance, one Traditional Owner said “Don’t increase fines, give the Traditional Owners access”.

10.3 SOUTH AUSTRALIA

The people the author interviewed were unaware of any prosecutions and as of the date of publication the South Australian government has not provided any comment on whether there have been prosecutions.

11. Education and public awareness

Most people interviewed for this report considered education and public awareness vital to the protection of cultural heritage, yet reported generally low levels of public awareness of the existence of the laws to protect Aboriginal cultural heritage and public understanding of the value of Aboriginal cultural heritage.

11.1 VICTORIA

Traditional Owners felt there is a low level of public awareness of Aboriginal cultural heritage and the Victorian Act, and reported that cultural heritage is regularly being destroyed. In particular, Local Councils were criticised for failing to inform developers about the requirement to consider whether a cultural heritage management plan is required.

One function of the Victorian Aboriginal Heritage Council is to increase public awareness of cultural heritage and to educate all Victorians about cultural heritage. In its first few years of operation, however, the Council has been occupied with appointment of Registered Aboriginal Parties and has undertaken limited work on public awareness – except for their website which contains many resources to assist the community and developers. These resources were viewed as a great starting point for educating Victorians about Aboriginal cultural heritage.

11.2 QUEENSLAND

Traditional Owners reported that cultural heritage is regularly being destroyed in Queensland. There were many explanations for this, among them a low level of awareness of the cultural heritage duty of care. In the recent review of the Queensland Act, the Department of Environment and Resource Management acknowledged that more work is needed to increase compliance with the cultural heritage duty of care. The draft review paper recommended additional steps to improve awareness about the duty of care to protect Aboriginal cultural heritage. The author was not made aware of any specific activities undertaken by the Department to increase public awareness. In fact, the Department was criticised for failing to leverage public awareness from one recent successful prosecution for a breach of the Queensland Act.

11.3 SOUTH AUSTRALIA

Among those people interviewed there was a general perception that public awareness of the South Australian Act is not great. The South Australian Act places the onus on developers to not harm cultural heritage, but developers were said to either not know or not care about this obligation.

12. Lessons and Recommendations

This section summarises some of the key lessons and consistent themes highlighted by Aboriginal groups through the research about aspects of the Aboriginal heritage management systems in Victoria, South Australia and Queensland.

It is recommended that any reform to the laws as proposed in NSW aim to properly recognise and address these issues.

- **Recognition that sites may be significant for reasons other than archeological value:** It is important to recognise that sites may be significant for cultural reasons, including cultural practice, tradition and story, as well as place an emphasis on anthropological clearance of sites, not just archeological.
- **Recognition that cultural heritage is living:** Cultural heritage is part of living cultural practice and protection must be tied to the ability of Traditional Owners to access and use cultural heritage to continue culture.
- **No distinction between tangible and intangible heritage:** The distinction between tangible and intangible cultural heritage is not culturally appropriate. Heritage should be defined widely to include family campsites, breeding sites, traditional uses (e.g. wood collecting), storylines, trading routes, kinship ties, spiritual connections, dreaming, specific cultural knowledge (e.g. bush medicine), grave sites, birth sites, bush tucker, hunting and gathering grounds, the ground and minerals, gender related material, plants, animals, language, dance, underground water, rock holes, swamps, native wells, Artesian bores, soaks, waterholes and creeks.
- **Greater recognition of Aboriginal concepts of cultural value:** Aboriginal perceptions of what is of ‘cultural value’ should be given greater recognition under the national regime for registering and protecting important sites of Australian heritage.
- **State-wide heritage representation for Traditional Owners:** Aboriginal people should be represented by a state-wide Aboriginal Heritage Council comprised of Traditional Owners with decision making powers as well as advisory functions. Decision-making powers should be at least comparable to any equivalent state-wide mainstream heritage council responsible for (Australian) heritage. Representation from all Traditional Owner groups is important, as is gender balance.
- **Recognition of Traditional Ownership and native title:** The definition of who speaks for Country should be based on the principal of “right people for right Country”. Any Aboriginal organisations which are created or recognised under cultural heritage legislation should be comprised of, and controlled by Traditional Owners, as the only people who are recognised to speak for Country in line with Native Title arrangements.
- **A single organisation to represent Traditional Owners:** There are significant advantages to having a single organisation representing Traditional Owners (such as Victoria’s Registered Aboriginal Parties). It may provide Traditional Owners with recognition and a voice they have previously lacked. It also provides developers with certainty regarding who they must consult with. It is important, however, that the organisation have a commitment to internal inclusiveness (i.e. includes all Traditional Owners), including an obligation to report back to the community, to share the work-load among all Traditional Owners and to ensure that all relevant knowledge holders within the community are consulted.
- **Native title a starting point for recognition:** In the absence of a Native Title determination, other native title processes (e.g. registered native title claims and failed native title claims) should only be used as a starting point for determining who speaks for Country.

- **Preventing forum shopping:** Processes need to be in place to prevent proponents “forum shopping” among Traditional Owners.
- **Control of decisions about cultural heritage:** Traditional Owners should have direct control of all decisions about their cultural heritage.
- **Consultation with Traditional Owners:** Consultation with Traditional Owners should be mandated and actively encouraged. Legislated consultation processes should be “beefed up” so that the perspectives of Traditional Owners are given primacy.
- **Unqualified right to reject proposals that would impact on cultural heritage:** Traditional Owners should have an unqualified right to refuse a cultural heritage management plan, permit or any other form of authorisation that relates to the protection or destruction of cultural heritage.
- **Alternative dispute resolution:** Alternative dispute resolution should be referred to at first instance rather than the courts. Alternative dispute resolution could be provided, at first instance, by the state Aboriginal heritage organisation.
- **Funding for legal representation:** The Government should provide funding for legal representation to Traditional Owners when disputes arise.
- **Power to immediately stop work:** Traditional Owners should be granted the power to immediately stop works where damage to cultural heritage is imminent.
- **Access to land:** Traditional Owners should be granted access to freehold land to monitor cultural heritage.
- **Penalties paid to Traditional Owners:** The penalties for damage to cultural heritage should be paid to the Traditional Owners who have suffered the damage.
- **Prosecution:** Government should implement a policy of prosecuting all breaches of the Act and maintaining a budget for prosecutions.
- **Integration with local planning laws:** Aboriginal cultural heritage legislation should be integrated with local planning processes.
- **Education of Local Councils:** Where cultural heritage protection is integrated with the local planning process, compliance education programs should be targeted at Local Councils.
- **Public education on Aboriginal heritage legislation:** Government should maintain an active public education strategy to increase awareness of the existence of the laws protecting cultural heritage so that people do not inadvertently harm cultural heritage.
- **Public education on value of Aboriginal cultural heritage:** Government should maintain an active public education strategy to increase understanding of the value of Aboriginal cultural heritage to counter the view that it is okay to simply destroy cultural heritage and pay the fine.
- **Protecting information on state heritage registers:** There must be adequate protocols in place to protect the privacy/secretcy of information on any register of Aboriginal sites and objects, while at the same time allowing easy access for Traditional Owners.
- **Updating state heritage registers:** Old information on state Aboriginal heritage registers must be updated and new sites must be promptly verified and entered on the register.

- **‘Site clearance’ model:** The ‘site clearance’ model, whereby Aboriginal people are consulted about proposed developments and allowed to assess the proposed development site, affords significant protection to Aboriginal cultural heritage. Consultation and sites surveys should be conducted before work commences and a plan (including a contingency plan) put in place to manage the site.
- **Local cultural heritage mapping:** Cultural heritage mapping empowers Traditional Owners with cultural heritage knowledge and increases their ability to protect that cultural heritage and to efficiently deal with development proposals. A new system should recognise any local databases containing cultural mapping and recognise that many Traditional Owners do not wish to share this information with the central register of Aboriginal sites and objects. There is a need for increased funding to support cultural mapping at a local level.
- **Mandated minimum standards for cultural heritage agreements and management plans:** A balance needs to be struck between prescription (which ensures consistency and quality) and flexibility (which may encourage greater engagement with Traditional Owners).
- **Benefits of the cultural heritage duty of care:** Queensland’s cultural heritage duty of care was viewed very favourably. The author notes that South Australia’s review has recommended implementation of a cultural heritage duty of care. The cultural heritage duty care is a well understood legal concept and fits well with Aboriginal notions of having a responsibility for culture. It is important that the duty of care be as broad as possible and underpinned by the requirement to consult with Traditional Owners.
- **Adequate resources, funding and training for Traditional Owners:** A significant investment must be made in building the capacity of Traditional Owners, including the organisations that represent them, to enable effective participation in cultural heritage protection. This includes funding for: local cultural heritage mapping, local education programs that ensure transmission of cultural knowledge to the next generation; organisational governance and capacity building training; and education and training of Traditional Owners in cultural heritage studies (including history, archaeology, anthropology etc).

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Native Title Act 1993 (Cth)

Torres Strait Islands Cultural Heritage Act 2003 (Qld)

End Notes

- ¹ 1980, (Sydney, Government Printer).
- ² The South Australian Aboriginal Affairs and Reconciliation Division recently published a qualitative analysis of its community consultation process regarding review of the *Aboriginal Heritage Act 1988* (SA) which highlights some interesting community feedback, titled “It’s not just about sacred sites – a qualitative analysis of the community consultation process of the 2009 review of the Aboriginal Heritage Act 1988” (September 2010) (available at <http://www.aboriginalaffairs.sa.gov.au/aha/introduction.html>). The Queensland Department of Environment and Resource Management has also completed its review of the *Aboriginal Cultural Heritage Act 2003* (Qld) and is presently seeking feedback on an exposure draft of the *Indigenous Cultural Heritage Acts Amendment Bill 2011* (available at http://www.derm.qld.gov.au/cultural_heritage/legislation/index.html).
- ³ Note that since the 1980s the Commonwealth Government also has an increasing role in Aboriginal heritage management, with powers to protect or register nationally significant Aboriginal sites (see for example the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and the Environment Protection and Biodiversity Conservation Act 1999 (Cth)). For more information see the National Native Title Tribunal report: *Commonwealth, State and Territory Heritage Regimes: summary of provisions for Aboriginal consultation* (Oct 2010).
- ⁴ Various terms are used by the State heritage legislation discussed in this report to refer to a person who is undertaking an activity impacting on Aboriginal cultural heritage. The common terms used are ‘proponent’, ‘sponsor’ or ‘developer’.
- ⁵ Figures provided by the Department of Planning and Community Development.
- ⁶ *Aboriginal Heritage Act 2006* (Vic), s 3.
- ⁷ Department for Victorian Communities (2005), *Aboriginal Heritage Bill – Exposure Draft: Summary of Proposals*, [http://www.mav.asn.au/CA256C320013CB4B/Lookup/AAVPresentation231105/\\$file/AAVPresentation231105.pdf](http://www.mav.asn.au/CA256C320013CB4B/Lookup/AAVPresentation231105/$file/AAVPresentation231105.pdf) (viewed 30 September 2010).
- ⁸ National Native Title Tribunal (2010), *Commonwealth, State and Territory Heritage Regimes: summary of provisions for Aboriginal consultation*, p 20.
- ⁹ Parliament of Australia, Department of Parliamentary Services, *Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2005*, Bills Digest, No 67, 2005-2006, p 3.
- ¹⁰ Parliament of Victoria, Department of Parliamentary Services, *Aboriginal Heritage Bill 2006*, D-Brief No. 2, 2006, p 2.
- ¹¹ Above note 7, p 9.
- ¹² Native Title Services Victoria, Submission on Aboriginal Heritage Bill 2005 (Vic), at <http://www.nts.vic.gov.au/who/index.php?t=7> (viewed 10 November 2010), pp 30.
- ¹³ Mick Dodson, “Stall tactics continue Victoria’s appalling land rights record”, *The Age*, 1 September 2010.
- ¹⁴ Native Title Services Victoria et al (2003), *Draft Strategy for Aboriginal Managed Lands in Victoria, at Draft Report*, at <http://home.vicnet.net.au/~samliiv/draft.htm> (viewed 10 November 2010), p 22.
- ¹⁵ Victorian Traditional Owners Land Justice Group, *Towards a Framework Agreement between the State of Victoria and the Victorian Traditional Owner Land Justice Group*, Discussion Paper, 26 August 2006, at <http://www.landjustice.com.au/?t=5> (viewed 10 November 2010), p 2.
- ¹⁶ Jewel Topsfield, “Native Title Reform Bid”, *The Age*, 6 January 2009.
- ¹⁷ Above note 14, p 23.
- ¹⁸ National Native Title Tribunal, Victoria and Tasmania, at <http://www.nntt.gov.au/Native-Title-In-Australia/Victoria/Pages/Victoria.aspx> (viewed 10 November 2010).
- ¹⁹ Above note 18.
- ²⁰ Native Title Services Victoria, *A summary of claims in Victoria*, at <http://www.nts.vic.gov.au/> (viewed 10 November 2010).
- ²¹ David Yarrow and Chris Marshall, *Traditional Owner Settlement Bill 2010 (Vic) – An Information Paper for Victorian Traditional Owners*, at <http://www.landjustice.com.au/?t=5> (viewed 10 November 2010).
- ²² See <http://www.dpcd.vic.gov.au/indigenous/indigenous-representative-arrangements>.
- ²³ *Aboriginal Cultural Heritage Act 2003* (Qld), s 4.
- ²⁴ *Aboriginal Cultural Heritage Act 2003* (Qld), s 5.

- 25 Above note 8, p 27.
- 26 Above note 8, p 27.
- 27 Various terms are used by the State heritage legislation discussed in this report to refer to a person who is undertaking an activity impacting on Aboriginal cultural heritage. The common terms used are ‘proponent’, ‘sponsor’ or ‘developer’.
- 28 Estimate provided by Craig Reiach (Legal Officer) Queensland South Native Title Services in telephone interview on 15 July 2010.
- 29 National Native Title Tribunal, *Queensland*, at <http://www.nntt.gov.au/Native-Title-In-Australia/Queensland/Pages/Queensland.aspx> (viewed 10 November 2010).
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- 31 Cape York Land Council Aboriginal Corporation (2010) *Rule Book*, p 3 and Carpentaria Land Council Aboriginal Corporation (2009), *Constitution*, p 7.
- 32 North Queensland Land Council Aboriginal Corporation (2009), *Rules*, p 5.
- 33 Above note 8, p 57.
- 34 Government of South Australia, Department of the Premier and cabinet, Review of the Aboriginal Heritage Act 1988 – Scoping Paper, December 2008, at http://www.aboriginalaffairs.sa.gov.au/aha/scoping_paper.html (viewed 10 November 2010), p 2.
- 35 Sylvia Roughan (2010), *It’s Not Just About Sacred Sites – A Qualitative Analysis of the Community Consultation Process of the 2009 Review of the Aboriginal Heritage Act 1988*, at <http://www.aboriginalaffairs.sa.gov.au/aha/introduction.html> (viewed 10 November 2010), p 11.
- 36 See “It’s not just about scared sites”, above note 32.
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- 42 *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA)*, s 17 and *Maralinga-Tjarutja Land Rights Act 1984 (SA)*, s 15.
- 43 *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA)*, s 19 and *Maralinga-Tjarutja Land Rights Act 1984 (SA)*, s 18.
- 44 *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA)*, s 20 and *Maralinga-Tjarutja Land Rights Act 1984 (SA)*, s 21.
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