ATTACHMENT A

Victorian Aboriginal Heritage Council
Submission to the Joint Standing Committee on Northern Australia's Inquiry into the destruction of Juukan Gorge and Associated Matters

HERITAGE CHAIRS AND OFFICIALS OF AUSTRALIA AND NEW ZEALAND

Indigenous Chairs and Officials Paper

Best Practice Standards in Indigenous Cultural Heritage Management and Legislation

DRAFT ONLY (Revision #7 July 2020 – For Presentation to HCOANZ 29 July Officials Meeting)

Outline

1. Background

In Australia legislative responsibility for the protection, promotion and management of Indigenous Cultural Heritage is divided between the states and territories and the Commonwealth. This division has long been the foundation of aspirations to ensure consistency

across jurisdictions while also ensuring that the level of protection of Indigenous Cultural Heritage (ICH) and the level of control over our cultural heritage enjoyed by Australia's First Peoples, is of the highest standard.

In May 2018 the Heritage Chairs and Officials of Australia and New Zealand adopted the "Darwin Statement". Under the Darwin Statement the members of the HCOANZ agreed to implement best practice cultural heritage principles including the inclusion and engagement of Aboriginal and Torres Strait Islander peoples. As part of the HCOANZ commitment to implementing the principles of the Darwin Statement, over 2019 and 2020 both in Australia and Aotearoa/New Zealand, HCOANZ engaged particularly with Indigenous Heritage Chairs and Officials and with many Indigenous organisations and leaders.

As a result of this engagement, the HCOANZ Indigenous Chairs group developed these *Best Practice Standards for Indigenous Cultural Heritage Legislation* (Standards). These Standards have been drafted by the Indigenous Chairs and officials who form part of the broader HCOANZ and brought forward by the Indigenous Chairs to HCOANZ. The objective of the Standards is to achieve the aspirations identified above; that is *to facilitate ICH Legislation and policy across the country that is consistently of the highest standards*.

2. Basic Principles

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UN General Assembly on 13 September 2007. The Commonwealth Government announced its support for the declaration in 2009. The UNDRIP does not impose new international legal obligations on states. Rather, it restates existing international legal obligations but framed in the specific context of Indigenous Peoples. The UNDRIP is widely understood by the world's Indigenous Peoples as articulating the minimum standards for the survival, dignity, security and well-being of Indigenous Peoples worldwide. Acceptance of the UNDRIP obligations is increasingly a requirement of the processes of many multi-national agencies and organisations. The International Finance Corporation, the Equator Principles, the International Council of Mines and Metals and the UN Guiding Principles on Business and Human Rights are merely some examples of this general acceptance.

A number of the provisions of UNDRIP directly address issues associated with the enjoyment, management and protection of ICH. Articles 11, 12, 13, 18, and 31 are examples of this. A number of other provisions of UNDRIP indirectly impact upon ICH. Provisions of UNDRIP that recognise the obligation to ensure the Free Prior and Informed Consent of affected Indigenous Peoples before the approval of any project that affects Indigenous Peoples' lands or the resources therein (particularly Article 32) are an example of this as is Article 40 dealing with dispute resolution. The relevant provisions of UNDRIP are attached as an annexure to this statement.

As a foundational principle, Australia's Indigenous Peoples are entitled to expect that Indigenous Cultural Heritage legislation will uphold the international legal norms contained in the UNDRIP.

The rights set out in UNDRIP are also recognised in a range of domestic legislation such as the *Human Rights Act 2019* (Qld) and the *Charter of Human Rights and Responsibilities 2006* (Vic.).

While the UNDRIP provides the foundational principles that all ICH legislation should uphold, the Declaration is not a comprehensive code or model legislation that addresses all matters that need to be included in ICH legislation. Therefore, the following Standards have been developed by the HCOANZ to identify some of these additional matters under the following headings: Definitions; Basic Structures; Indigenous Self-Determination; Process; Resourcing; Indigenous Ancestral Remains; Secret and Sacred ICH; Frontier Conflict Sites; and, National Intangible ICH Legislation.

3. Best Practice Standard – Basic Structures

There are two basic models utilised in ICH legislation. The first prohibits harm to ICH only when there is a particular declaration in force in the place where the ICH is located. The second prohibits any interference to ICH that satisfies the statutory definition *unless* there is a statutory authorisation in place. The second model is by far the most effective and most ICH legislation operates on this basis, but this is not universally the case. There are examples, at both a state and Commonwealth level, of legislation that operates on the basis that ICH is only protected subsequent to some form of Ministerial declaration. ICH legislation structured only in this fashion cannot be seen as adequate. However, for the 'prohibition of harm unless authorised' model to be effective there must be a comprehensive definition of ICH. This matter is considered in the following section of these Standards. Many of the following sections consider the appropriate structures and processes around the authorisation to interfere with ICH so defined.

4. Best Practice Standard – Definitions

ICH is at the heart of all Australian Heritage and should be celebrated by all Australians as the foundation of Australia's unique cultural heritage. However more than anything else ICH is the living phenomenon connecting Traditional Owners' culture today with the lives of our ancestors. In legislation, this connection is described in the definitions of key terms such as "Aboriginal or Torres Strait Islander cultural heritage" or "Aboriginal and Torres Strait Islander

place". These definitions should recognise that an essential role of ICH is to recognise and support the *living* connection between Indigenous Peoples today, our ancestors and our lands. It is crucial that definitions of ICH within legislation should recognise the role of "tradition" as it is understood *today* in the definition of what is ICH.

In similar fashion, ICH legislation must comprehend that, while physical artefacts provide an important ongoing physical representation of Indigenous Peoples' connection to their country over time, definitions of the manifestations of ICH must also comprehend the importance of the *intangible* aspects of physical places. It is in this way that a physical landscape can be properly understood as a living place inhabited by our ancestors and creators. Likewise, intangible ICH not necessarily immediately connected to physical places must also be recognised in legislation.

The definitions in several pieces of existing legislation are a useful illustration of these concepts. For example, the *Aboriginal Heritage Act 2006* (Vic.) (AHA) has the following definitions:

> ***(AHA s 4) Aboriginal cultural heritage*** *means Aboriginal places, Aboriginal objects and Aboriginal ancestral remains;*
>
> ***(AHA s 5) What is an Aboriginal place?***
>
> *(1) For the purposes of this Act, an Aboriginal place is an area in Victoria or the coastal waters of Victoria that is of cultural heritage significance to Aboriginal people generally or of a particular community or group of Aboriginal people in Victoria.*
>
> *(2) For the purposes of subsection (1),* ***area*** *includes any one or more of the following—*
>
> *(a) an area of land;*
>
> *(b) an expanse of water;*
>
> *(c) a natural feature, formation or landscape;*
>
> *(d) an archaeological site, feature or deposit;*
>
> *(e) the area immediately surrounding anything referred to in paragraphs (c) and (d), to the extent that it cannot be separated from the thing without diminishing or destroying the cultural heritage significance attached to the thing by Aboriginal people;*
>
> *(f) land set aside for the purpose of enabling Aboriginal ancestral remains to be re-interred or otherwise deposited on a permanent basis;*
>
> *(g) a building or structure.*

Aboriginal tradition *means—*

(a) the body of traditions, knowledge, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people; and

(b) any such traditions, knowledge, observances, customs or beliefs relating to particular persons, areas, objects or relationships;

The *Northern Territory Aboriginal Sacred Sites Act 1989* utilises the following definitions of "Aboriginal Tradition" and "Sacred Site"[32]

> ***Aboriginal tradition*** *means the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.*
>
> ***sacred site*** *means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.*

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSHIPA) adopts a similar definition of "Aboriginal tradition:"[33]

> …the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.

The term "area" is defined to include a "site" and a "significant Aboriginal area" is relevantly defined to mean "an area of particular significance to Aboriginals in accordance with Aboriginal tradition". The term "significant aboriginal object" is defined in similar terms.

ATSHIPA subsections 3(2) and 3(3) provide the definitions of "injury" or "desecration" which also acknowledge that these acts should be determined by how Aboriginal or Torres Strait Islander people *today* perceive them. They are in the following terms:

[32] These definitions are contained in s 4 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
[33] Noting that Aboriginal is defined to include Torres Strait Islander – ATSIHPA s 3(1).

(2) For the purposes of this Act, an area or object shall be taken to be injured or desecrated if:

(a) in the case of an area:

(i) it is used or treated in a manner inconsistent with Aboriginal tradition;

(ii) by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or

(iii) passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition; or

(b) in the case of an object—it is used or treated in a manner inconsistent with Aboriginal tradition;

and references in this Act to injury or desecration shall be construed accordingly.

At times case law may have given an over emphasis to the historical components of tradition.[34] However, the essential aspect of the definitions provided, all of which were developed in consultation with Traditional Owners, is that the central lynchpin is how Traditional Owners *today* perceive their cultural heritage which is the crucial issue.

A similar issue arises in the context of intangible ICH. The only example of a legislative definition of intangible ICH in Australia is in s 5 of the Victorian AHA which (relevantly) provides:

*(1) …**Aboriginal intangible heritage** means any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public.*

(2) Aboriginal intangible heritage also includes any intellectual creation or innovation based on or derived from anything referred to in subsection.

This definition then also adopts the key definition of "tradition" with its reliance on a contemporary Traditional Owner understanding of its content.

5. Best Practice Standard – Incorporation of Principles of Self Determination

The key to UNDRIP is the principle of self-determination. In the context of ICH, this principle requires that the affected Indigenous Community *itself* should be the ultimate arbiter of the management of the ICH aspects any proposal that will affect that heritage.

[34] *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106.

Application of the UNDRIP is, in a practical sense, dependent upon the ability of the affected Indigenous Peoples to act collectively and independently. Thus, in the crucial UNDRIP Article 32, reference is made to Indigenous Peoples acting through "their own representative organisations". Identification of the legitimate representative organisation of a particular Indigenous People can, at times, be challenging. Despite this the identification of a legitimate "representative organisation" capable of exercising an Indigenous community's rights and responsibilities with respect to their ICH is a fundamental component in any comprehensive ICH legislation

In the context of ICH in Australia, the rigorous processes associated with the appointment of Prescribed Bodies Corporate (PBCs) under the *Native Title Act 1993* (Cth) can ensure that such organisations, where they exist, satisfy the definition of "representative organisations" under UNDRIP. Thus, where a PBC exists, it would be expected that ICH legislation would vest in that PBC control of the management of the ICH aspects of any proposal that will impact upon the ICH of the PBC's native title holders.

Greater difficulty arises where a PBC does not yet exist. ICH legislation should include mechanisms for the identification and appointment of an organisation that can genuinely be accepted as the "representative organisation" of the affected Indigenous community to undertake this role.

6. Best Practice Standard – Process

The role of ICH in the process of consideration of development proposals in a jurisdiction is important. So, to is the process of consideration of the management of ICH in the context of a specific proposal. A central component of the principle of Free, Prior and Informed Consent under UNDRIP is that the affected Indigenous community has adequate information and adequate time to consider that information in making any decision that may affect their ICH. This fact impacts upon two aspects of a jurisdiction's development proposal consideration process. First, decisions regarding ICH management cannot be left to be the last consecutive approval required in the assessment of a development proposal. Rather, ICH consideration must be integrated as early as possible into development proposal assessment time frames. This ensures both adequate time to consider a proposal and that ICH considerations are not perceived as the "last impediment" to development proposal approval. This principle is already incorporated into many existing government policies. The Commonwealth Governments "*Engage Early - Guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)*" is an example of such a policy.

This temporal integration of process should also strive to ensure that consideration of ICH is included as a component in other development proposal approval regimes such as town planning, environmental assessment and National Heritage considerations.

The second component is that, consistent with the principles of UNDRIP, the ultimate decision regarding whether an interference with ICH is acceptable or not, must rest with the affected Indigenous community. However, a jurisdiction's ICH regime can maximise the likelihood of consent to a development proposal being granted if the management regime within ICH legislation identifies interference with ICH, as a last resort in regime that requires identification, recognition, conservation and protection as preferable approaches to the management of ICH.

7. Best Practice Standard – Resourcing; participation and enforcement

A third component of the process around an effective ICH regime is of such importance as to warrant separate attention. This is the matter of resourcing. There are two aspects of this component.

First, there must be acceptance that the Indigenous representative organisation undertaking the engagement with a proponent and the assessment of their proposal is performing a statutory function under the relevant jurisdiction's project assessment and approval regime and must be adequately resourced to perform this function. An Indigenous representative organisation undertaking these functions should not be forced to subsidise these statutory obligations from their own resources. Desirably the undertaking of these statutory obligations should facilitate opportunities for the Indigenous representative organisation involved to develop its independent economic activities.

The second but existential aspect of the processes attached to ICH legislation is the regime around compliance and enforcement. In turn there are three issues in relation to this aspect. First, wherever possible, affected Indigenous communities should be adequately empowered and resourced to undertake necessary compliance and enforcement functions. Second though, whatever agency is undertaking compliance and enforcement functions, the ICH legislative regime must take account of the fact that without a robust regime around compliance and enforcement, no legislative regime can be effective. Third there is a need to ensure there is national consistency in both the structure and penalty regime of ICH offence provisions.

8. Best Practice Standard – Indigenous Ancestral Remains

The presence of Indigenous Ancestral Remains (IAR) in country is the clearest and most poignant illustration of an Indigenous People's ongoing association with their traditional lands.

As such IAR are an aspect of ICH of such importance as to warrant particular attention in these best practice standards. The issue of IAR are specifically addressed in UNDRIP Article 12.

The fundamental principle applicable to this area is that, *wherever possible*, IAR identified in country should be left in country and these resting places protected as "Aboriginal or Torres Strait Islander places" (howsoever described) in the legislation. Processes and protocols with agencies involved with the management of IAR must be built around this principle and adequate resources must be allocated to accommodate the effective implementation of these processes and protocols. Implementation of these measures may require review and amendment of other legislation (for example coronial) and processes.

The second fundamental principle in regard to IAR is that their management is the right and duty of the Indigenous community of origin of the ancestor in question. Again, processes, protocols and resources must be incorporated within an IAR regime to accommodate this principle. So to must the principle of self-determination; such that where there is no possible alternative to the relocation of IAR, this relocation takes places in accordance with the wishes of the affected community. Attention also needs to be paid to the care of IAR where no Indigenous community of origin can be immediately identified.

A further issue that arises with regard to IAR is the definitional one. Existing legislation in various jurisdictions provides various examples of definitions of IAR. The Victorian AHA provides one of the most comprehensive and yet workable definition. The relevant provision (in s 4) is as follows:

> ***Aboriginal ancestral remains*** *means the whole or part of the bodily remains of an Aboriginal person but does not include—*
>
> > *(a) a body, or the remains of a body, buried in a public cemetery that is still used for the interment of human remains; or*
> >
> > *(b) an object made from human hair or from any other bodily material that is not readily recognisable as being bodily material; or*
> >
> > *(c) any human tissue—*
> >
> > > *(i)dealt with or to be dealt with in accordance with the* ***Human Tissue Act 1982*** *or any other law of a State, a Territory or the Commonwealth relating to medical treatment or the use of human tissue; or*
> > >
> > > *(ii)otherwise lawfully removed from an Aboriginal person;*

The Victorian definition was adapted from the very similar definition in ATSHIPA. (Although note in ATSHIPA Aboriginal ancestral remains are managed within the regime applicable to Aboriginal objects).

Finally, the IAR regime included within ICH legislation must provide an effective regime for the expeditious return to the affected communities of IAR held in institutional and other "collections". Wherever possible such provisions should have extra-jurisdictional application.

9. Best Practice Standard - Secret and Sacred Objects

Some movable ICH (objects) will be considered secret or sacred by the Indigenous community of origin. It is inconceivable that ICH that is secret or sacred could ever have legitimately entered the realm of commercial transactions. It is for this reason that in addition to the relevant provisions of UNDRIP a body of internal law has developed around this topic. The 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import Export and Transfer of Ownership of Cultural Property* as to is the 1995 *UNIDROIT Convention on the Return of Stolen or Illegally Exported Cultural Objects.*[35]

As such, ICH legislative regimes must acknowledge that property in secret and sacred objects can only legitimately vest in the community of origin of the object and deploy mechanisms to achieve the repatriation of these objects. The ICH regime must acknowledge the role of Indigenous tradition as understood today in the definition of secret or sacred for these purposes. The Victorian AHA (s 4) provides a further example that incorporates the earlier definition of Aboriginal tradition:

> ***sacred*** *means sacred according to Aboriginal tradition;*
>
> ***secret*** *means secret according to Aboriginal tradition;*

The (practically) similar definition of significant Aboriginal object in ATSHIPA has been noted above.

Further, ICH legislative regimes regarding regulation of the trade in movable ICH must incorporate mechanisms to prohibit trade in secret or sacred objects and to allow a potentially affected community to determine the status of an object proposed to be traded. To be effective these mechanisms must be nationally uniform or supported by Commonwealth legislation or both.

10. Management of Frontier Conflict Sites

Frontier Conflict Sites represent a complex juxtaposition of Indigenous and Non-Indigenous heritage and history. On the one hand they represent an opportunity to present and analyse the full history of the dispossession of Australia's Indigenous peoples by the forces of colonial

[35] Opened for signature 24 June 1995, 34 ILM 1322 (1995) (entered into force 1 July 1998).

(and post-colonial) authorities. They can also represent an opportunity to reflect on the bravery, tenacity and tragedy of the Indigenous resistance to that dispossession. On the other hand, Frontier Conflict Sites are the places where murder and massacre took place and care must be taken that these sites are never glorified.

In considering the treatment of Frontier Conflict Sites the fundamental principle is that the wishes of the affected Indigenous community are paramount. Beyond this, jurisdictions may wish to consider whether the issue of Frontier Conflict Sites require particular attention in ICH legislation, cultural heritage legislation of broader application or both, and, alternatively whether the management of this issue is best undertaken through the adoption of particular protocols without need for specific legislative references. Subject to the incorporation of the fundamental principle of the paramountcy of the wishes of the affected Indigenous community jurisdictions should develop appropriate methods to address the issue of Frontier Conflict Sites with the active participation of relevant Indigenous representatives.

11. National Legislation and Intangible Indigenous Cultural Heritage

Intangible ICH can exist independently of the association of this ICH with particular lands. The management, protection and promotion of this form of cultural heritage can provide particular challenges in a legislative context. This noted, the importance of this manifestation of ICH is indicated by the number of international instruments, in addition to UNDRIP,[36] that address this topic. The *2003 UNESCO Convention for the Safeguarding of the Intangible Heritage*[37], the *Convention of Biological Diversity*,[38] and (to some extent) the 1996 *WIPO Performances and Phonograms Treaty*[39] are examples of this international attention.

The Indigenous Chairs recommend that HCOANZ state its belief that it is desirable that this form of ICH be recognised and protected by Indigenous communities for their benefit and that of the broader community, and that HCOANZ congratulate those jurisdictions that have established regimes for the recognition and protection of intangible ICH. However, the Indigenous Chairs also acknowledge that, given the constitutional arrangements in Australia, it is desirable that measures in this respect are supported by the Commonwealth legislation, and recommend that the HCOANZ states of its support for the development of national legislation in regard to the recognition and protection of intangible ICH.

[36] See Articles 11,12,13,14 and 31.
[37] *2003 UNESCO Convention for the Safeguarding of the Intangible Heritage* Opened for signature 17 October 2003, 2368 UNTS 3 (entered into force on 20 April 2006).
[38] *Convention on Biological Diversity* of 5 June 1992 (*1760 U.N.T.S. 69*).
[39] Signed 20 December 1996, TRT/WPPT/001 (entered into force 20 May 2002) Articles 5–10.

Cultural Heritage Relevant Provisions of UNDRIP

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

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

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including 14 those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language

Article 31

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

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

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.