# 5 Heritage protection

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| Key points |
| * While all forms of heritage (historical, natural and Indigenous) can be impacted by exploration, Indigenous heritage policy challenges are the most pronounced. * All states and territories have dedicated legislation to protect Indigenous heritage. However, there is variation in how Indigenous heritage is defined, how it is protected from resource exploration and who makes decisions on heritage matters. * Participants raised a number of concerns, at times conflicting, including: * inadequate protection of Indigenous heritage * overlap between Commonwealth and state/territory legislation * inadequate heritage registers and associated information problems * costs of conducting cultural heritage surveys, particularly when the area has been surveyed previously * delays in identifying, consulting and negotiating with Indigenous parties. * Recent reforms by various jurisdictions include increased consultation and involvement of Indigenous representatives in heritage decision making, alignment of heritage legislation with native title and increased fines for unintentional damage. * Overlap between the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and state/territory legislation needs to be addressed. Accreditation of state and territory regimes can resolve the issue. * Building better Indigenous heritage registers is necessary for greater expediency in heritage decisions and for avoiding unnecessary cost. * Indigenous heritage protection should be based on risk management processes. * Where risk of harming heritage is low, a streamlined ‘duty of care’ or ‘due diligence’ process will prevent an unnecessary regulatory burden for explorers. * Where Indigenous heritage is of high significance, expediency in approvals and agreements is not the primary goal. Rather, the objective is to protect Indigenous heritage while facilitating exploration to the extent possible. * Negotiated agreements between explorers and Indigenous parties (or third parties) are likely to produce better outcomes for heritage protection than systems which rely on ministerial or departmental authorisation for exploration. * When harm to heritage cannot be avoided and/or management plans cannot be agreed upon, ministerial (or departmental) decisions to allow exploration to go ahead should be based on clear decision making criteria, transparency and consultation with all parties that have a direct-interest. |
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This chapter commences with a summary of the types of heritage and their regulatory framework. The main focus of the chapter is on Indigenous heritage issues that relate to exploration. The chapter also discusses historic heritage issues. Natural heritage issues are discussed in chapter 4 (exploration in national parks) and chapter 6 (in relation to the *Environment Protection and Biodiversity Conservation Act 1999*).

## 5.1 The broad regulatory framework

### What is heritage?

Heritage includes artefacts, tools, historical sites, myths surrounding natural features, stories, traditions, languages, events and experiences inherited from the past. It comprises both natural and cultural places with tangible and intangible values. Resource exploration has the potential to damage, destroy or lead to the relocation of some features of heritage or cause indirect pressures, such as loss of access to a heritage place.

The Australian heritage system identifies three types — Indigenous, historical and natural heritage (State of the Environment 2011 Committee 2011, p. 700).

* Indigenous Aboriginal and Torres Strait Islander heritage extends over tens of thousands of years. As well as being historically important, Indigenous heritage is of continuing cultural significance. It has both tangible and intangible dimensions:
* tangible Indigenous heritage includes material manifestations of life including burial sites, rock art, carved trees, middens and scatters of stone tools
* intangible Indigenous heritage relates to places where there may be no physical evidence of past cultural activities. It includes places of spiritual and ceremonial significance, landscapes, important waters and trade and travel routes. Significant sites are often associated with stories of the dreamtime or with initiation, mortuary and other ceremonies. Generally, information about such places is passed down orally from one generation to the next.
* Historical places relate particularly to the occupation and use of the Australian continent since the arrival of European and other migrants. It includes remnants of early convict history, pastoral properties and small remote settlements, as well as large urban areas, engineering and mining works, factories and defence facilities.
* Natural heritage refers to land and environmental heritage. It includes areas of land which have aesthetic, historical, scientific or social significance, or other special values for the present and future community. Such places may include national parks, reserves, botanic gardens and private conservancies, as well as significant fauna and flora habitats or geological sites.

### Laws and regulations protecting heritage

Australia has a complex set of laws governing heritage protection. As well as Commonwealth heritage statutes there are heritage Acts in each state and territory. There are also state environmental and development laws and local government by‑laws that allow for the protection of heritage places and objects. While all forms of heritage — Indigenous, historical and natural — can be impacted by exploration activities, policy challenges are most pronounced for Indigenous heritage — the primary focus of this chapter.

Heritage protection is primarily the responsibility of the states and territories. Most jurisdictions have both historical and Indigenous heritage Acts while regulation relating to natural heritage is often embodied in environmental protection Acts.

New South Wales and the ACT are the only two jurisdictions that do not have a specific act dedicated to Indigenous heritage. In New South Wales, the *Heritage Act 1977* allows for Indigenous places to be nominated to the New South Wales Heritage Register. Indigenous heritage is also incorporated into sections dealing with archaeological materials in the *National Parks and Wildlife Act 1974.* In the ACT, Indigenous heritage is incorporated into the ACT *Heritage Act 2004* (table 5.1).

Table 5.1 Principal state and territory heritage legislation

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| Jurisdiction | Principal legislation | Administered by |
| New South Wales | *National Parks and Wildlife Amendment (Aboriginal Ownership) Act 1996*  *National Parks and Wildlife Act 1974*  *Heritage Act 1977* | Office of Environment and Heritage |
| Victoria | *Aboriginal Heritage Act 2006*  *Heritage Act 1995* | Department of Planning and Community Development |
| Queensland | *Aboriginal Cultural Heritage Act 2003*  *Torres Strait Islander Cultural Heritage Act 2003*  *Queensland Heritage Act 1992* | Department of Environment and Heritage Protection |
| Western Australia | *Heritage of Western Australia Act 1990*  *Maritime Archaeology Act 1973*  *Aboriginal Heritage Act 1972* | State Heritage Office  Western Australian Museum  Department of Indigenous Affairs |
| South Australia | *Heritage Act 1993*  *Historic Shipwrecks Act 1981*  *National Parks and Wildlife Act 1972*  *Aboriginal Heritage Act 1988* | Department for Environment and Heritage  Department of the Premier and Cabinet, Aboriginal Affairs and Reconciliation Division |
| Tasmania | *Tasmanian Historic Cultural Heritage Act 1995*  *Aboriginal Relics Act 1975* | Department of Primary Industries, Parks, Water and Environment |
| Northern Territory | *The Heritage Act 2012*  *Aboriginal Sacred Sites Act 1989* | Department of Lands, Planning and Environment  Aboriginal Areas Protection Authority |
| ACT | *Heritage Act 2004* | ACT Heritage |

The Australian Government’s role predominantly relates to listing and protecting places with world and national heritage significance. Principal Commonwealth heritage legislation of relevance to resource exploration is summarised in box 5.1.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) enables the Australian Government to act as a ‘protector of last resort’ for Indigenous heritage by responding to requests to preserve important Indigenous areas and objects where it is perceived that state or territory laws have not provided effective protection.

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| Box 5.1 Principal Commonwealth heritage legislation |
| *The* ***Aboriginal and Torres Strait Islander Heritage Protection Act 1984*** allows the responsible Commonwealth Minister to make a declaration to preserve or protect an area from injury or desecration if satisfied that ‘the area is a significant Aboriginal area’ and there is a ‘serious and immediate threat’. The Act allows for intervention if state and territory laws do not provide effective protection.  The Minister cannot make a declaration unless an Indigenous person or representative has made an application. In making a decision, consideration is given to all relevant information presented by the applicant, affected parties and the relevant state or territory government. The Minister can take into account the financial impact on affected parties if a declaration is made and what is in the national interest. The Minister has discretion and is not required to make a declaration, even if a significant area or object is under threat of injury or desecration.  Any party whose interests might be adversely affected by a declaration (including explorers) must have a reasonable opportunity to comment. If this opportunity is not provided, a person who is adversely affected may seek a judicial review of the Minister’s decision in the Federal Court.  In 2004 heritage provisions were introduced in the ***Environment Protection and Biodiversity Conservation Act 1999*** (EPBC Act), replacing the *Australian Heritage Commission Act 1975.* The legislation is administered by the Department of Sustainability, Environment, Water, Population and Communities.  The EPBC Act allows natural, historic and Indigenous places of significance to be recognised under the National and Commonwealth Heritage Lists. The Australian Heritage Council — an independent body of heritage experts advising the Minister on heritage matters — is constituted under the EPBC Act.  The Minister for Sustainability, Environment, Water, Population and Communities decides whether to include a place on the list by following the consultation process set out in the Act. The Minister can also make an emergency listing if an unlisted place which is capable of meeting the criteria for National Heritage listing is under threat.  Once a site is listed, a referral to the Minister must be made under the EPBC Act for actions that are likely to have a significant impact on a declared world, national or Commonwealth heritage site.  The ***Historic Shipwrecks Act 1976***, protects historic shipwrecks and associated relics that are more than 75 years old and in Commonwealth waters. Each of the states and the Northern Territory has complementary legislation which protects historic shipwrecks in state waters, such as bays, harbours and rivers. The Minister can also make a declaration to protect any historically significant shipwrecks or articles and relics that are less than 75 years old.  Source: SEWPaC (2012a). |
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Heritage legislation at all levels of government provides for a listing process — the process of identifying and recording significant heritage sites. The overwhelming majority of listings occur at the state level, often in response to perceived threats. The main implication of a site being placed on a heritage list is that restrictions apply as to what works can be carried out on the site (section 5.4). In addition to statutory listings, some unofficial lists are recorded by non-government organisations (box 5.2).

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| Box 5.2 Lists of significant heritage sites |
| The **World Heritage List** (maintained by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) includes places of cultural and natural heritage which UNESCO’s World Heritage Committee considers to have ‘outstanding universal value’.  The **National Heritage list** established under the EPBC Act includes Indigenous, historic and natural places that are of national heritage value to Australia.  The **Commonwealth Heritage List** also established under the EPBC Act, includes Indigenous, historic and natural heritage places that are within a Commonwealth area, or are owned or leased by the Australian Government.  The **Register of the National Estate** lists significant natural, Indigenous and historic heritage places in Australia (originally established under the *Australian Heritage Commission Act 1975).* In February 2012, superseded by the National Heritage List and the Commonwealth Heritage list, the register ceased operating as a statutory register but remains as a publicly available archive.  The **Australian Shipwrecks Database** commenced in 2009 and includes all known shipwrecks in Australian waters.  **State heritage registers** vary between jurisdictions. All states and territories have national parks and reserves. Each state and territory has a statutory list of historic places but the criteria and thresholds for listing vary. In addition, all jurisdictions have registers of Indigenous sites which generally include information about objects and places that have been declared as significant to Indigenous culture and information from heritage surveys such as reports, photographs and maps.  **Local heritage** identification is highly variable. There are many managed local reserves that identified because they have natural heritage significance. Some buildings are protected and some Indigenous places are managed by local governments. Generally, Indigenous heritage is not protected at the local government level.  **Non-statutory heritage lists** are recorded by non-government organisations including the National Trust of Australia, the Institution of Engineers and the Royal Australian Institute of Architects. Despite having no statutory basis, they can be used in decision-making processes. |
| *Source*: State of the Environment 2011 Committee (2011, pp. 697–699). |
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Indigenous Australians can also obtain protection for heritage through registered Indigenous land use agreements under the *Native Title Act 1993* and under land rights legislation in each state and territory. The processes under native title and Indigenous land rights Acts, however, are outside the terms of reference for this inquiry.

## 5.2 Indigenous heritage requirements and processes

While all states and territories have enacted legislation to protect Indigenous heritage sites and objects, there is substantial variation in how Indigenous heritage is defined, how it is protected and who decides whether an activity can go ahead if harm to an Indigenous heritage site cannot otherwise be avoided.

There are penalties for unauthorised damage or destruction of Indigenous heritage. In order to avoid prosecution, explorers need to identify whether the area for the proposed activity has heritage significance and, if so, what the appropriate management options are in the relevant jurisdiction. Table 5.2 provides a snapshot of Indigenous heritage requirements for exploration in each state and territory.

### What is protected?

The definition of protected Indigenous heritage varies between jurisdictions (table 5.2). For example, in South Australia protected Aboriginal heritage is broadly defined and includes all Aboriginal sites, objects and remains in South Australia that are of significance to Indigenous prehistory and tradition, archaeology and anthropology (SA DPC 2007).

In New South Wales, protected Indigenous heritage is defined as all Aboriginal objects and declared Aboriginal places. More specifically, Aboriginal objects are defined as physical evidence of the use of an area by Aboriginal people including:

* physical objects, such as stone tools, Aboriginal-built fences and stockyards, scarred trees and the remains of fringe camps
* material deposited on the land, such as middens
* the ancestral remains of Aboriginal people.

Table 5.2 A snapshot of Indigenous heritage approval systems for exploration

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| Jurisdiction | What is protected | Heritage management process for exploration | Consultation with Aboriginal parties | Decision making |
| New South Wales | Aboriginal objects and  declared ‘Aboriginal places’. | Due diligence code of practice with penalties for non-compliance. Permits can be issued where harm to an Aboriginal object or place cannot be avoided. | Consultation with traditional owners, custodians and people with ties to a site. | Permit decisions rest with the Director General of the NSW Office of Environment and Heritage. Appeals can be taken to the Land and Environment Court. |
| Victoria | All Aboriginal places, Aboriginal objects and Aboriginal human remains. | Cultural Heritage Management Plans required for ‘high impact’ exploration activities. Cultural Heritage Permits required for ‘low impact’ activities. When a heritage plan or permit is not required a voluntary Cultural Heritage Agreement between the explorer and Aboriginal party(ies) can be created. | Traditional owners or people with historical attachment to an area may be recognised as Registered Aboriginal Parties. | Permits & plans must be approved by the relevant Registered Aboriginal Party (RAP). Where no RAP exists, the Secretary of the Department of Planning and Community Development, or the Aboriginal Heritage Council, may approve the permit or plan. Decisions may be appealed at the Victorian Civil and Administrative Tribunal. |
| Queensland | Blanket protection for areas and objects of traditional, customary and archaeological significance. | Mandatory for major developments which have an Environmental Impact Statement (EIS) to carry out heritage assessments and Cultural Heritage Management Plans (CHMP). When an EIS is not required explorers can:   * comply with gazetted duty of care guidelines * negotiate a voluntary CHMP (statutory process) with relevant Indigenous group * negotiate other cultural heritage agreement with relevant Indigenous party * proceed in compliance with native title protection conditions. | Aboriginal parties are identified via the native title system — Registered Native Title Holders, then Claimants, then ‘failed claimants’ are identified and notified of proposed activities. If there is no native title party, Aboriginal people with a ‘particular knowledge’ can be identified. | Agreement-making with Indigenous groups is a key approach to meeting duty of care.  When agreement cannot be reached a proposed CHMP can be referred to the Land Court. The tribunal will make a recommendation to the responsible Minister who makes the decision. |
| Western Australia | Automatic protection for all places and objects that are important to Aboriginal people because of connections to their culture. | Due diligence guidelines (not statutory) may be used to identify activities which may impact on heritage and to assist in compliance with legislation. Consent from the Minister for Aboriginal Affairs is required to harm any ‘Aboriginal site’. An application for consent requires an Aboriginal Heritage Survey report. | No definitive list for consultation. The Aboriginal Cultural Material Committee suggests: determined native title holders; registered native title claimants; informants recorded on the Register; and other Aboriginal persons who demonstrate relevant knowledge. | Decisions on the protection, disturbance or destruction of Aboriginal sites rest with the Minister for Indigenous Affairs after considering recommendations from the Aboriginal Cultural Material Committee. |

Table 5.2 Continued

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| Jurisdiction | What is protected? | Heritage management process for exploration | Consultation with Aboriginal parties | Decision making |
| South Australia | Blanket protection of Aboriginal sites, objects and remains that are significant to Aboriginal tradition, archaeology, anthropology and/or history. | A determination decision from the responsible Minister (whether a site is an Aboriginal site as defined by legislation) is required before undertaking exploration. The Minister generally bases the decision on a cultural heritage survey and/or anthropological opinion.  Following a determination a proponent can seek authorisation from the Minister to damage, destroy or interfere with an Aboriginal site or object. This process is separate from the determination process. | These groups must be consulted by the Minister before making a determination or authorisation.   * The Aboriginal Heritage Committee. * Any Aboriginal organisation with a particular interest in the matter. * Any traditional owners and other Aboriginal persons who in the Minister’s opinion, have a particular interest in the matter. | Decisions to damage or disturb an Aboriginal site, object or remains rest with the responsible Minister.  Decisions can only be appealed through the Supreme Court of South Australia. |
| Tasmania | Blanket protection of Aboriginal relics prior to European arrival in 1876 for ‘protected sites’ and ‘protected objects’. | Aboriginal heritage assessments are undertaken for exploration activities to determine whether a site has Aboriginal heritage significance.  Permits are required prior to any interference with sites of Aboriginal heritage significance. | The interim Aboriginal Heritage Council was established in 2012 to provide a view to the Minister on new permit applications, development proposals and policies, as well as provide advice and recommendations on the protection and management of Aboriginal heritage. | All recommendations and considerations are presented to the Director of National Parks and Wildlife who then makes a recommendation to the Minister for Heritage. Decisions can only be appealed through the Supreme Court of Tasmania. |
| Northern Territory | Blanket protection for sites that are sacred or significant according to Aboriginal tradition. | On non-sacred sites a permit is required to harm Aboriginal heritage.  An Authority Certificate must be obtained to undertake work on a sacred site. | The heritage branch requires that Traditional Owners are notified of proposed survey work, where possible involved in fieldwork, consulted and acknowledged for their contribution. On sacred sites, the Aboriginal Areas Protection Authority (AAPA) consults and works directly with custodians. | Permit decisions on non-sacred sites rest with the Minister.  The AAPA issues Authority Certificates on sacred sites. A Minister’s Certificate can override non-certification by the AAPA. |
| ACT | All Aboriginal places and objects. | If development is likely to impact upon heritage a cultural heritage specialist is employed to consult with each Representative Aboriginal Organisation (RAO). Voluntary heritage agreements are encouraged. | The ACT Heritage Council is required to consult with RAOs. | The Heritage Council advises the Minister for Heritage on heritage places and objects. |

*Sources*: NSW OEH (2011, 2012a, b); Vic DPCD (2013); Qld DATSIMA (2012); WA DAA (2011, 2012a, b); WA DIA/DPC (2013); SA DPC (2007); Transport SA (1999); Aboriginal Heritage Tasmania 2012, Aboriginal Heritage Council 2013; NT DLPE (2012a) and AAPA (2013); ACT ESDD (2011).

In New South Wales, the Minister can also declare an area to be an ‘Aboriginal place’ if the Minister believes that the place is or was of ‘special significance’ to Aboriginal culture. An area can have spiritual, natural resource usage, historical, social, educational or another type of significance (NSW OEH 2012b).

In all states and territories, the significance of Indigenous heritage is generally determined through heritage surveys and/or consultation with Indigenous parties on a case-by-case basis.

### Indigenous heritage surveys

In most jurisdictions, heritage surveys and assessments are a significant factor in Indigenous heritage decision making. Generally, to identify and understand the heritage significance of an area, an explorer will contact the relevant government department or authority which maintains the heritage register for the proposed area.

When a tenement has not previously been surveyed, only been partially surveyed or there are no accessible records of previous surveys, explorers may be required to conduct heritage surveys or assessments. This may involve, to varying degrees, engagement with government departments, Indigenous representatives for ‘country’, third parties such as Aboriginal Land Councils, and heritage professionals such as archaeologists and anthropologists. For example, Western Australia requires both archaeological and ethnographic research to identify the significance of Indigenous heritage on a proposed exploration site.

* Archaeological research involves determining whether a site contains physical evidence of past occupation by Indigenous groups through inspection of the ground surface of a site.
* Ethnographic research is about identifying and recording significant Indigenous heritage sites through interviews and site inspections with Indigenous groups.

Box 5.3 lists guidelines developed by the Western Australian Department of Indigenous Affairs on preparing an Indigenous heritage survey in Western Australia. Explorers are responsible for meeting the cost of survey work, which may include the fees of archaeologists, anthropologists and other professionals, expenses for survey teams and transport (4WDs, helicopters etc.), daily rates for Indigenous parties involved in consultation and survey work and fees for Aboriginal Land Councils.

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| Box 5.3 Aboriginal heritage survey guidelines, Western Australia |
| The Western Australian Department of Indigenous Affairs has designed a set of guidelines for land owners and users including explorers, consultants and researchers to follow when undertaking heritage surveys. These guidelines include:   * copyright: licensing the department to use the report for specified purposes * spatial accuracy statement * acknowledgements and list of survey participants * purpose of the heritage survey report, including proposed development * desktop study: previously reported Aboriginal sites, identification and review of previous heritage survey reports, identification of Aboriginal people and organisations affected by the proposed use of the land and a summary of the main findings of the heritage survey * methodology: type of survey, field methodology and consultation (including how Aboriginal advisors were selected) * survey area with supporting maps and diagrams * field survey: location, survey dates, persons involved, archaeological and ethnographic surveys, evaluation of significance for each Aboriginal site * potential effects: strategies to avoid or minimise the effect of the proposed land use on any Aboriginal site and, where a proposed land use will affect an Aboriginal site, identification of any site affected, why the site cannot be avoided and the type and degree of effect on the site * discussion and conclusions * recommendations: including the mitigation of any potential effects on Aboriginal sites, a statement as to whether an opportunity has been provided to the Aboriginal people involved in the survey to comment on the contents of the report and whether further consultation with Aboriginal people is required or more information about the proposed use of the land and its effects is needed. |
| *Source*: WA DIA (2010). |
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In contrast, in Queensland the focus of heritage decision making is on consultation and agreement making between explorers and Indigenous parties prior to exploration. Heritage surveys based on archaeological and anthropological research are generally not conducted.

### Indigenous heritage management processes for exploration

When Indigenous heritage of significance is discovered, there are requirements on explorers to manage the site, depending on the nature of the activity and the legislation in the relevant jurisdiction. Table 5.2 provides a snapshot of the heritage management requirements in each jurisdiction.

Some jurisdictions, including New South Wales, Victoria and Queensland, provide exemptions for activities considered ‘low impact’. In some cases, heritage obligations may be met by avoiding sensitive areas on the exploration site. Sensitive areas may include sand dunes, rock outcrops and stone arrangements, scatters of stone artefacts, middens, scarred trees and the edges of lakes, rivers and claypans.

In most instances, Indigenous heritage is managed during exploration through duty of care processes, agreed cultural management plans or land use agreements and authorisation systems. In brief:

* ‘duty of care’ (Queensland) or ‘due diligence’ (New South Wales) processes require explorers to take all reasonable and practicable measures to prevent harm to Indigenous cultural heritage
* in some instances cultural heritage management agreements are made between Indigenous parties and explorers to allow exploration to take place in heritage areas. The content of an agreement is generally not prescriptive and may include the protection or maintenance of a heritage site or object, right to access the site by Indigenous people and the rehabilitation of Indigenous places or objects
* in most jurisdictions (except Queensland) explorers can apply for a permit or consent (from a Minister or department) to proceed with exploration when it is likely to destroy Indigenous heritage.

### Consultation with Indigenous parties

When Indigenous heritage is discovered on an exploration site, it is considered best practice in heritage management for explorers to consult with Indigenous parties that have been identified as having authority to speak for country (box 5.4).

NTSCORP commented that effective consultation first requires the identification of the correct Traditional Owners for the proposed area.

Effective consultation with Traditional Owners requires proponents to do more than simply establish a dialogue with local Aboriginal organisations. Effective consultation can only be achieved by identifying the correct Traditional Owners of the project area, and ensuring that these are the people speaking for their traditional country. (sub. 31, p. 5)

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| Box 5.4 Consultation with Indigenous people is best practice |
| In 2002 the Australian Heritage Commission’s *Ask First* publication identified consultation with Indigenous people as best practice in Indigenous heritage management. This guide, designed for use by heritage professionals and land users such as exploration companies, identifies Indigenous people as the ‘primary source of information on the value of their heritage and how it is best conserved’ and states that Indigenous people must have:   * an active role in any Indigenous heritage planning process * input into primary decision‐making in relation to Indigenous heritage so they can continue to fulfil their obligations towards this heritage …   In identifying and managing this heritage the guide also states:   * uncertainty about Indigenous heritage values at a place should not be used to justify activities that might damage or desecrate this heritage * all parties having relevant interests should be consulted on Indigenous heritage matters. |
| *Source*: Australian Heritage Commission (2002, p. 6). |
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The Chamber of Minerals and Energy of Western Australia (CMEWA 2012, p. 1) notes that the process of identifying and consulting with Indigenous parties for Indigenous heritage matters in Western Australia is not a native title process. Heritage, although somewhat related to native title, is a separate issue. Native title and Indigenous heritage parties are likely to have common members but are not always the same people. The Chamber also notes that the native title claimant group is usually larger than the group of Indigenous people that is consulted on heritage matters.

The process of identifying the appropriate Indigenous parties for consultation on heritage matters varies between jurisdictions. For example:

* Queensland legislation provides a chain of preferences as to who should be the Indigenous party consulted for an area, drawing heavily on the native title process.
* In New South Wales, at sites not covered by the native title process, explorers are required to attempt to contact Indigenous people who may have knowledge of heritage within the area of a planned activity. Generally this requirement is satisfied by the placement of a public notice about the activity, to which Indigenous people may respond.
* In Western Australia, the heritage Act predates the Commonwealth *Native Title Act 1993* and there is no definitive list of which Indigenous people should be consulted in Western Australian legislation (table 5.2).

### Who makes heritage decisions?

In Western Australia, South Australia and Tasmania, heritage decisions rest with the relevant Minister. In New South Wales, decisions rest with the head of the department which administers heritage. In the Northern Territory, the independent authority — the Aboriginal Areas Protection Authority (AAPA) — issues Authority Certificates for access and activity near sacred sites. However, a Minister’s Certificate can override non-certification by the authority (table 5.2).

In contrast to Ministerial and departmental approval processes, in Victoria, heritage plans and permits for exploration must be approved by the relevant Registered Aboriginal Party (RAP). Traditional Owners must apply to the Victorian Aboriginal Heritage Council to be appointed as a RAP. When a proposed exploration area does not have a RAP, the Secretary of the Department of Planning and Community Development, or in some instances the Aboriginal Heritage Council, may approve the permit or plan.

The duty of care and agreement making model in Queensland minimises government involvement in decision making. However, when cultural heritage agreements cannot be negotiated, a proposed cultural heritage management plan can be referred to the Land Court. The court will make a recommendation to the Minister (for the Department of Environment and Resource Management) who makes the decision.

Appeals systems also vary by jurisdiction. For example, in Victoria, an administrative review of a decision is available through the Victorian Civil and Administrative Tribunal. In Queensland, the Land Court is responsible for reviewing decisions, while in South Australia and Tasmania, recourse to the relevant Supreme Court is the only avenue for review (table 5.2).

### The enforcement of Indigenous heritage regulation

Enforcement mechanisms are a key aspect of any regulatory system. As noted above, Indigenous heritage legislation in all states and territories includes penalties to provide a deterrent against harming protected places and relics. For example, in New South Wales the maximum penalty for harm to an Aboriginal object or Aboriginal place is $550 000 and/or two years imprisonment for an individual or $1.1 million for a corporation (NSW OEH 2010).

The monitoring of compliance with permit conditions and agreements is also a feature of heritage Acts and enforcement systems in some jurisdictions. In particular:

* Victorian inspectors have extensive powers of entry, search and seizure and are responsible for overseeing Cultural Heritage Audits (these are ordered by the Minister when it is suspected that a Cultural Heritage Management Plan or Permit has been breached) and have the power to issue Stop Orders in emergency situations (Vic DPCD 2013).
* Similarly, in South Australia, inspectors appointed by the Minister have powers of entry, search and seizure.
* In Western Australia, officers of the department responsible for heritage and honorary wardens (appointed by the Minister) have powers to enter and inspect Aboriginal sites.
* In Queensland, heritage Acts provide for ‘authorised officers’ to investigate and monitor compliance with the Acts. However their powers are not as extensive as in Victoria and South Australia and an officer can only gain access to land with a warrant or the consent of the land owner.

There have been very few prosecutions for unauthorised harm under Indigenous heritage legislation.

Information available indicates there have been a very small number of prosecutions for unlawful [destruction of] Indigenous heritage, including one prosecution in Victoria since the operation of the *Aboriginal Heritage Act 2006* (Vic) and four stop work orders, an average of one investigation per year in Tasmania over the reporting period and none in the Northern Territory. (Schnierer et al. 2011, p. 60)

### Many reviews are underway

In recent years Indigenous heritage legislation in all jurisdictions has been under review although, in most jurisdictions, the reviews remain inconclusive or proposed reforms have yet to be implemented (box 5.5).

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| Box 5.5 State and territory reform of Indigenous heritage |
| **New South Wales:** In 2010 an Aboriginal Cultural and Heritage Working Party was formed to advise the NSW Government on options for the protection and management of Aboriginal culture and heritage in NSW. A discussion paper was released to identify key issues and seek ideas on the way forward.  **Victoria:** The review of the *Aboriginal Heritage Act 2006* was completed in 2012. The Victorian Government is due to respond in 2013.  **Queensland:** The Department of Environment and Resource Management (DERM) has finalised the review of the Aboriginal Cultural Heritage Act 2003 and Torres Strait Islander Cultural Heritage Act 2003. Amendments were introduced into the Queensland Parliamenton 29 November 2011 by the Minister for Finance, Natural Resources and the Arts.  **Western Australia:** In 2011 the Government announced its intention to amend the *Aboriginal Heritage Act 1972*. In April 2012 a discussion paper was released, containing seven proposals to regulate and amend the Act for improved clarity, compliance, effectiveness and certainty. Submissions to the review closed in June 2012. To date no legislative changes have been made following the review.  **South Australia:** In 2008 the Minister for Aboriginal Affairs and Reconciliation announced a review of the *Aboriginal Heritage Act 1988*. In September 2010, a consultation report, *It’s Not Just About Sacred Sites*, was released. To date, no legislative changes have been made following the review.  **Tasmania:** In the 2012‑13 State Budget the Government committed additional funding to continue the development of contemporary Aboriginal heritage legislation. Consultation with the Aboriginal community and other key stakeholders occurred from July 2011 to September 2011. A draft of the Aboriginal Heritage Protection Bill 2012 has been released with public consultation closing in December 2012. It is expected that a new Bill will be introduced in Parliament in 2013.  **Northern Territory:** *The Heritage Act 2012* commenced on 1 October 2012, replacing the old *Heritage Conservation Act 1991*. |
| *Sources*: NSW OEH (2012b); Vic DPCD (2012); Qld DATSIMA (2012); WA DAA (2012); Tas DPIW (2013); NT DLPE (2012b). |
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While there is no uniformity to the changes or recommended changes in each state and territory, a number of trends are apparent.

* Changes appear to be entrenching a consultation model with, in some instances, some measure of Indigenous decision-making power and recognition of custodianship of Indigenous heritage.
* There is increasing recognition of the primacy of Traditional Owners and alignment of heritage legislation with Native Title in terms of determining who may speak for country.
* The fines in some jurisdictions have increased and there are more enforcement mechanisms for damage to heritage, including unintentional damage (Schnierer et al. 2011, p. 27).

The Commonwealth’s ATSIHP Act has also been under review since 2009 when the Australian Government released a discussion paper on proposed reforms. At that time, it was stated that the reforms would aim to improve the opportunities for Indigenous Australians to protect their heritage and decrease duplication and red tape in Indigenous heritage processes (DEWHA 2009b, p. 3).

In addition, in 2011, the Australian Government Department of Sustainability, Environment, Water, Population and Communities (SEWPaC) began the process of developing an Australian heritage strategy (SEWPaC 2013).

However, there has been concern that reform is taking too long. For example, the *Australia State of the Environment* *2011* report discussed the consequences of delay in reforming the ATSIHP Act.

In 2009, the Australian Government released a discussion paper on proposed reforms to the ATSIHP Act. The reforms aim to improve the protection of the traditional heritage of Indigenous Australians in all jurisdictions through accreditation of state and territory laws that meet a set of rigorous standards. This would enable the Australian Government to take a more active and coordinated approach in the protection of sacred sites and objects. However, the delay in reforming the Act is prolonging uncertainty, especially for the states and territories, most of which are reviewing their Indigenous heritage legislation. (State of the Environment 2011 Committee, p. 750)

## 5.3 What are the key Indigenous heritage issues?

This section addresses options for reforming heritage legislation and processes (such as consultation, regulation and administration) so as to achieve an appropriate balance between heritage protection and resource exploration, efficiently and cost effectively.

### The protection of heritage

The fundamental question of balance comes to the fore in deciding on applications from explorers which seek permission to harm or destroy Indigenous heritage. Understandably, it is a highly contentious matter and in many jurisdictions it is an ongoing source of conflict between explorers, Indigenous communities, archaeologists and government agencies.

The *Australia State of the Environment 2011* report explained the issue in the following terms:

One of the main threats to Indigenous heritage places is conscious destruction through government-approved development — that is, development for which decision-makers are aware of (or obliged to be informed about) Indigenous heritage impacts, yet choose to authorise the destruction of Indigenous heritage. This widespread process, combined with a general lack of understanding of physical Indigenous heritage, means that individual decisions on assessment and development result in progressive, cumulative destruction of the Indigenous cultural resource. (State of the Environment 2011 Committee 2011, p. 721)

Several submissions argued that current regimes do not adequately protect Indigenous heritage. NTSCORP expressed concern that economic values are given a higher value than Indigenous cultural values in making decisions about heritage:

There is a perception that Aboriginal cultural values are consistently overridden by economic considerations and decisions are frequently made in favour of development at the expense of intangibly valuable Aboriginal culture and heritage sites, objects and places. (sub. 31, p. 4)

Some archaeologists have also expressed concern about the inadequate protection of heritage. For example, Melissa Hetherington, based on her experience undertaking archaeological research in Western Australia, commented:

Heritage legislation needs be restructured in a way that facilitates effective, quality archaeological research. However, this doesn’t seem to be happening in an effective manner. In fact, current cultural heritage management practices seem to be facilitating the destruction of archaeological sites, even sites which have been classified and registered as highly significant and which have the potential to contribute valuable information to research goals. (sub. 16, p. 3)

In a number of jurisdictions, inquiry participants commented that there is a lack of confidence in the ability of state legislation to adequately protect Indigenous heritage. For example, in Western Australia, Indigenous heritage legislation has persisted largely unchanged since its introduction in the 1970s, despite the introduction of native title. Yamatji Marlpa Aboriginal Corporation (YMAC) commented:

A major challenge for YMAC and our clients is that the *Aboriginal Heritage Act 1972* (WA) has not been amended to recognise the introduction of the *Native Title Act* and therefore offers no direction on how the two pieces of legislation should properly interact. (sub. 34, p. 3)

YMAC also reported:

The Native Title Tribunal has acknowledged that the ‘protective regime’ of the *Aboriginal Heritage Act* [Western Australia] is sometimes insufficient to protect Aboriginal heritage … The Auditor General of Western Australia has also criticised the heritage regime, noting the State Government ‘has not actively monitored if operators are meeting … [heritage] conditions… Aboriginal heritage sites could have been lost or destroyed without the State knowing or taking action. (sub. 34, p. 4)

Similarly, in New South Wales, the NSW Aboriginal Land Council stated:

… Aboriginal culture and heritage laws, at least in New South Wales, are failing to provide the appropriate protections for Aboriginal culture and heritage. (sub. 10, p. 1)

And NTSCORP argued for stand-alone heritage legislation:

The current framework for culture and heritage NSW consists of a plethora of overlapping regulations and guidelines …

There is concern and confusion amongst Traditional Owners regarding their rights and obligations, and the rights and obligations of exploration proponents… We believe consolidating these regulations and guidelines would result in a clearer, more streamlined and more accessible process for both Aboriginal stakeholders and exploration proponents. (sub. 31, p. 3)

The NSW Aboriginal Land Council’s submission contained recommendations for a process that seeks to achieve a balance between often competing interests:

Aboriginal people in New South Wales must have their inherent right to control and manage Aboriginal culture and heritage recognised.

Any legislative system must effect a practical balance between:

1. the recognised need to preserve and enhance Aboriginal cultural traditions
2. the need to deliver social justice to Aboriginal peoples in New South Wales to redress the significant cultural, economic and social dispossession they have suffered
3. the need for the economic, social and cultural advancement of other non-Aboriginal interests in New South Wales. (sub. 10, p. 3)

The Commission is mindful of the current reviews and reforms being undertaken in Indigenous heritage protection and also that the focus of this inquiry is on exploration, not heritage. This inquiry cannot offer a comprehensive analysis of the effectiveness of all jurisdictional heritage legislation and processes. For example, to answer the question, ‘Is the level of protection of Indigenous heritage adequate?’ a more extensive inquiry into Indigenous heritage would be required.

In terms of exploration issues, however, the Commission has considered options to achieve a balance which minimises costs and delays for explorers within the framework of efficient and effective Indigenous heritage legislation.

### Overlap in Commonwealth legislation

Many participants in the above-mentioned review of the ATSIHP Act observed that the Act overlapped with state and territory Indigenous heritage legislation, creating an unnecessary burden through duplication in processes and delays for explorers. Concern was also expressed that the Act has been ineffective.

The ATSIHP Act has not been effective in meeting its purpose, which was to provide a direct and immediate means for the Commonwealth to protect traditional areas and objects when there are gaps in state and territory legislation. Instead it has created uncertainty about decisions made under other laws, provoked disputes and led to duplication of decisions, with increased costs for all parties involved. (DEWHA 2009, p. 4)

Moreover, only five per cent of the 394 valid applications received since the Act commenced in 1984 have resulted in emergency protection declarations (Schnierer et al. 2011, p. 48).

The primary concern for explorers is that the ATSIHP Act provides an opportunity for Indigenous ‘forum shopping’. In this regard, the Minerals Council of Australia (MCA) commented:

Dual and parallel layers of Commonwealth and State heritage legislation encourage ‘forum shopping’ – where a group dissatisfied with the outcomes of a state based cultural heritage approval process may then move to utilise the Aboriginal and Torres Strait Islander Heritage Protection Act to overturn the State decision. (sub. 27, p. 30)

The MCA suggested that this problem could be overcome by merging the ATSIHP Act into the EPBC Act.

At the Commonwealth level, the MCA considers there is significant value in rolling the Aboriginal and Torres Strait Islander Heritage Protection Act into the Environment Protection Biodiversity Conservation Act (EPBC Act). Following this, and in line with the broader EPBC reforms, state processes could then be accredited by the Commonwealth as they meet pre-determined national standards. This amendment would streamline the legislative requirements around cultural heritage and would prevent the current practice of “forum shopping” between state and federal processes on this matter. (sub. 27, p. 30)

However, the Commission supports the view that Indigenous heritage and environmental protection are separate issues. Given that the ATSIHP Act was designed as a short-term measure two decades ago, to operate where Indigenous heritage protection by state or territory jurisdictions fail, a preferred interim solution would be to introduce state and territory accreditation into the ATSIHP Act. This was a proposal in SEWPaC’s discussion paper on Indigenous heritage law reform:

The ATSIHP Act was intended to fill gaps in protection when state and territory laws were inadequate or not applied. Accreditation can promote high standards of protection across all states and territories and minimise overlaps in responsibilities. To make this idea work, the reformed legislation could set standards for state and territory laws … and enable the Minister to accredit laws that meet the standards. The opportunity to gain accreditation could be an incentive for each state and territory to make sure its laws are effective, provided it is clear that by gaining accreditation a state or territory could stop the Australian Government from overriding its decisions. (DEWHA 2009b, p. 15)

As noted above, all states and territories have now enacted some form of Indigenous heritage legislation but some Acts are outdated and some reviews have not been concluded. Accreditation of complying legislative regimes would be a positive first step for the avoidance of unnecessary overlap. This should then be followed by the repeal of the ATSIHP Act when all state and territory regimes comply, so as to eliminate duplication and increase certainty in state and territory decision making.

Draft Recommendation 5.1

Until concerns with state and territory legislation have been fully addressed, the Commonwealth should retain the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIHP Act) and amend it to allow state and territory regimes to be accredited if Commonwealth standards are met. Once all jurisdictional regimes are operating satisfactorily to Commonwealth standards, the Commonwealth should repeal the ATSIHP Act.

### Multiple heritage surveys of the same tenement

In practice, while all jurisdictions maintain records of Aboriginal sites and objects, the listing of Indigenous heritage is widely viewed as inadequate.

In jurisdictions such as Western Australia, where explorers may be required to undertake heritage surveys, inquiry participants reported that the inconsistent and inadequate listing of heritage surveys is leading to repeat surveys of the same site. The Australasian Institute of Mining and Metallurgy (AusIMM) commented:

Conducting Indigenous heritage surveys or reviews and negotiating native title are important issues for minerals exploration. All Australian States and Territories have different enquiry and notification systems that an explorer must navigate if they require information about whether a known Aboriginal heritage site or parcel of land subject to native title is situated on an area of interest. These systems are not comprehensive and not all jurisdictions keep a register of heritage surveys, meaning surveys can be unnecessarily repeated where an area is explored by a different company. (sub. 12, p. 6)

Registers with up-to-date information about all known Indigenous heritage sites and previously completed surveys could avoid multiple surveys of the same land by explorers. In 2008 AusIMM recommended to the Ministerial Council on Mineral and Petroleum Resources, that:

Jurisdictions maintain a heritage survey database containing all the surveys conducted and which is accessible by relevant interested parties (those holding rights to the tenement). (sub. 12, p. 7)

One issue preventing the establishment of heritage survey registers (or the inclusion of heritage survey information in existing Indigenous heritage registers) is that the copyright of heritage surveys commissioned by the explorer is usually owned by the consultant that undertook the survey. A notable exception is the Northern Territory where mining and exploration companies are required to lodge all heritage and archaeological surveys with the Northern Territory Department of Lands, Planning and the Environment for inclusion in the heritage library. Sites are then entered into the Northern Territory Archaeological Sites Database.

In Queensland and Victoria, listing of heritage surveys is also not an issue.

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 [and exploration] commences. (New South Wales Aboriginal Land Council, 2010, p. 40)

That said, in all jurisdictions, Indigenous registers which list up-to-date information — about all known Indigenous heritage sites, areas that have been the subject of cultural heritage management plans, who has been identified as responsible for country, and previously completed surveys and assessments — can be efficient and timely sources of information for explorers about their tenements.

Incomplete information on registers may be attributed to the unwillingness of Indigenous Australians to divulge sensitive information.

Inappropriate release of information about sites can … cause serious damage to Aboriginal people. Information may be released by mining companies or by government regulatory authorities that have become aware of it through their interaction with Aboriginal custodians. Alternatively, Aboriginal people may release information themselves because they are required to do so in order to seek protection under relevant legislation or agreement provisions, or more generally because they believe that only by highlighting the importance of a site have they any chance of protecting it. In this regard Aboriginal custodians face serious dilemmas. The public release of information that is supposed to be secret causes great anguish, and thus people are reluctant to release it unless a site is in imminent danger. (O'Faircheallaigh, 2008, p. 8)

In principle, it should be possible to develop registers containing maps of heritage significance and related information (such as who has been identified as having authority to speak for country) that are regularly updated with new details of Indigenous heritage, in much the same way as occurs for pre-competitive geoscientific information.

There should be a risk management approach to the maintenance of the registers. Agreed protocols could be developed such that sensitive information is only released to approved persons, and only at a level of that is necessary for the conduct of the approved purpose. Under the protocols, information could be made available to explorers on a tenement-by-tenement basis.

The protocols would need to recognise that the registers relate to living cultures and that there may be a need, at times, to remove or redact sensitive cultural material from the maps and documentation.

Draft Recommendation 5.2

Governments should ensure that their heritage authorities:

* require that resource explorers or other parties lodge all heritage surveys with that authority
* maintain registers which map and list all known Indigenous heritage
* adopt measures to ensure that sensitive information collected by a survey is only provided to approved parties (and only as necessary for the purposes of their activities), on the basis of agreed protocols.

### Establishing who has authority to speak for country

Consulting and negotiating with Indigenous groups who have responsibility and authority to speak for country is a fundamental aspect of heritage management. However, where it is not easy to identify the individuals and groups who have authority to speak for country, consultation can be costly and time consuming.

In the Northern Territory, the AAPA advised that:

AAPA and various Land Councils regularly cooperate to ensure that AAPA Authority Certificates are in place but it raises a number of hurdles involving increased timeliness and costs. (sub. 23, p. 1)

The Western Australian Government drew attention to circumstances where several Indigenous groups have responsibility for country.

Additional barriers can arise when there are multiple Traditional Owner groups that cover a single area. This increases the costs and time to consult with all groups and coordinate representatives from all groups to participate in surveys. (Western Australian Government, sub. 29, p. 13)

Several inquiry participants noted that determining who has culturally appropriate responsibilities for country and the authority to speak for country could be more complex in non-native title areas. The Australian Petroleum Production and Exploration Association stated:

Companies have a record of working collaboratively with Indigenous groups, however difficulties can arise in the context of unrealistic expectations, the role played by ‘third parties’ and in determining the appropriate representative body or bodies. (sub. 22, p. 18)

The Commission supports the general intention underlying the view of NTSCORP (which was directed specifically at New South Wales), that:

A mechanism to identify the correct Traditional Owners and RAPs with authority to speak for country should be developed and applied to all exploration and assessment processes... (sub. 31, p. 6)

### Promoting good working relationships with Indigenous communities

The value of constructive consultation and negotiation between explorers and Indigenous parties is well recognised and is central to effective outcomes in Indigenous heritage.

With more than 60 per cent of Australian minerals operations neighbouring Indigenous communities, the development and maintenance of strong and positive relationships with Indigenous communities is critical to securing and maintaining the industry’s social licence to operate …

Cultural heritage places are integral to Indigenous Australians’ connection with their traditional lands. Therefore any successful relationship between a mining company and an Indigenous community will include recognition and respect for the community’s cultural heritage. (Department of Industry Tourism and Resources 2007, p. 3, 44)

Similarly, the MCA commented:

… the minerals industry has long recognised that engagement with Indigenous peoples needs to be founded in mutual respect and in the recognition of Indigenous Australians’ rights in law, interests and special connections to land and waters. This has been reflected in the multitude of arrangements made between the minerals industry and Indigenous peoples, including traditional owners, around industry contribution to the management of cultural heritage. (sub. 27, p. 30)

The Commission found that in practice there were marked differences of view about the negotiating behaviour of exploration companies, Indigenous parties and third party representatives.

On the one hand, some Indigenous groups claimed that consultation with Indigenous parties on heritage matters can be insufficient or ‘tokenistic’. NTSCORP asserted:

Proponents should be required to demonstrate a concerted effort to ensure that engagement with Traditional Owners and RAPs for culture and heritage management assessment processes is genuine and inclusive, rather than tokenistic. (sub. 31, p. 7)

On the other hand, the Australian Petroleum Production and Exploration Association claimed:

The experience of the industry to date suggests that the behaviour of some negotiating representatives or groups is very ‘tactical’ in nature, with a view to place considerable commercial pressure on explorers or developers. Such an approach is inconsistent with the policy intent of the negotiation process and leads to outcomes that impose sub-optimal outcomes for all parties. (sub. 22, p. 18)

While governments cannot tailor solutions to address the actions of negotiating parties, constructive behaviour can be facilitated through the dissemination of guidance and leading practices. Several such practices have been developed and published. These include:

* work with Indigenous parties as early as possible when exploration is being planned, to identify potential impacts and to try to agree on how to avoid damage to traditional areas and objects. (DEWHA 2009b, p. 1)
* agree on the timing and the level of consultation required for the activity (Australian Heritage Commission 2002, p. 10).
* engage with Indigenous communities (or a third party) to build a social licence to operate (Department of Industry Tourism and Resources 2007, p. 3).
* investigate whether the interests of Indigenous people from surrounding areas may also be affected by an activity (Australian Heritage Commission 2002, p. 8)
* involve Indigenous people in decision-making processes, not just consultation processes (NTSCORP, sub. 31, p. 2).

### Efficient and effective Indigenous heritage protection

State governments have adopted different models for protecting Indigenous heritage. At one end of the spectrum, Western Australia relies on ministerial decisions based on archaeological and anthropological heritage surveys. At the other end, the Queensland Government has adopted a streamlined ‘duty of care’ process for most cases.

Many explorers have expressed concern about costs and delays associated with the Western Australian approach. For example, the Association of Mining and Exploration Companies (AMEC) said:

AMEC members have consistently expressed deep concern with the time delays and increasing costs in undertaking a heritage survey, and in progressing Section 18 consents. Some progress has been made in respect of the latter through the administrative processes of the ACMC [Aboriginal Cultural Materials Committee] however, the high costs that are incurred by industry in obtaining a heritage survey continue unabated. (sub. 24, p. 14)

AMEC reported that costs have increased significantly since 2010 and that its members have no ability to control the cost of heritage surveys.

Based on member feedback the average cost of a heritage survey has increased from $11,000 per day in 2010 to the current approximate cost of $15,000 per day. There have also been examples where the daily cost of undertaking the survey has exceeded $20,000. There is limited opportunity for exploration companies to negotiate these costs. (sub. 24, p. 14)

Similarly, the Western Australian Government stated that ‘escalating costs of Aboriginal heritage surveys is a significant disincentive for exploration in Western Australia’ (sub. 29, p. 12). The Government provided a case study of a company undertaking exploration in midwest Western Australia. The study reported that:

* the onus is on the company to negotiate with Traditional Owners or Representative Bodies to reach an agreement which can include a fee just to meet to begin negotiations. Once an agreement has been reached to conduct a survey the company may be required to pay the following costs related to the process. The quantum of these costs depends on the size of the survey, location of the site and cooperation between all parties …
* costs for an anthropological and ethnographic survey by an expert consultant including Aboriginal consultants… can be $25,000 for a 2 day survey
* the quality of the survey and the methodology employed can vary considerably between consultants
* … the company has had to wait 10 months between submitting a notice of intent to explore and receiving the final survey report. The cost of delays in the process can be $10,000 – $20,000 due to equipment on hire standing idle. The greater opportunity cost and internal costs to manage the process are not easily quantified. (sub. 29, p. 13)

Some participants claimed that the market for heritage surveys has become ‘big business’ in Western Australia. For example, AMEC, commenting on the *Aboriginal Heritage Act 1972* (Western Australia) said:

A heritage survey industry has grown from this requirement for company due diligence and is now a significant ‘industry’ in its own right. Issues of supply and demand of qualified persons plus unrealistic expectations on the exploration industry’s capacity to pay have meant the industry sustains a large number of anthropologists, archaeologists and native title representatives. In combination they are costing the industry $100 millions of dollars annually – money not being spent on the ground exploring. (sub. 24, p.14)

In a similar vein, Melissa Hetherington, who undertook archaeological research in the same jurisdiction, commented:

One notable impact of these current heritage legislation and cultural heritage management practices is that archaeology in north Western Australia has become big business over the past 20 years. (sub. 16, p. 2)

In responding to the submission from the Western Australian Government, YMAC asserted:

The WA Government’s submission refers at length to the contemporaneous growth in expenditure and decline in minerals exploration activity and seeks to link this directly to heritage and native title related consultation and negotiations. However, the submission fails to provide strong evidence to support any direct correlation and does not sufficiently acknowledge the overall increase in the cost of doing business in remote areas of WA during a mining boom. (sub. 34, pp. 1-2)

The Queensland heritage protection system, which is based on cultural heritage agreements, is less vulnerable to these risks. The Queensland Resources Council (QRC 2012) reported:

QRC members generally regard it [Queensland Indigenous heritage legislation] as the best Indigenous cultural heritage legislation in Australia and that both the certainty and flexibility it provides are crucial, as is its focus on the development of direct relationships between proponents and the owners and managers of Indigenous cultural heritage being the Indigenous people themselves.

The Queensland Government described the merits of its legislation in the following terms.

The compliance framework established by the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* provides a streamlined and balanced process for managing cultural heritage arising from resource exploration activities. This is achieved by:

* minimising direct government involvement in the negotiation of cultural heritage agreements
* eliminating the need for government approval of cultural heritage agreements (with the exception of activities that trigger Environmental Impact Statements)
* empowering Aboriginal and Torres Strait Islander people to determine the significance of cultural heritage
* enabling land users to liaise directly with the statutory Aboriginal or Torres Strait Islander party for an area to tailor specific agreements for their projects
* utilising provisions of the Commonwealth *Native Title Act 1993* where appropriate to eliminate duplication
* reducing mandatory reporting requirements to government
* encouraging flexible and non-prescriptive approaches to the management of cultural heritage. (sub. 25, p. 20)

Other reports also support negotiated agreements between explorers and Indigenous parties as being likely to produce sound outcomes for heritage protection and the authorisation of exploration. The basis for such views is that:

* agreements place the onus on the immediately affected parties — explorers and traditional owners — rather than a government agency, to decide how to best protect heritage values from being damaged or destroyed.
* negotiated agreements allow parties to negotiate flexible, pragmatic agreements to suit their particular circumstances.

For example, the Department of Industry, Tourism and Resources in its *Working with Indigenous Communities* handbook, concluded:

Agreements between mining companies and Indigenous people with rights and interests in land and waters are the most practical approach to finding ways to accommodate each other’s interests … Agreements provide mining companies with secure land access, which they need if they are to invest large sums in high-risk, long-term mining ventures. They also recognise the interests of Indigenous people who have maintained strong connections to the land and waters where, as a matter of law, their native title no longer exists, or only survives in a limited way. (2007, p. 32)

Similarly, in a research paper on Indigenous and mining company agreements, O'Faircheallaigh stated:

In principle, such agreements could offer important advantages over legislation or direct political action as a means of protecting cultural heritage. They create, for the first time, an opportunity *for Aboriginal people themselves* to devise measures to protect their cultural heritage, and to negotiate acceptance of those measures by mining companies. Agreements could protect Aboriginal cultural knowledge, and could facilitate a proactive approach, allowing traditional owners to put systems in place designed to avoid damage. In addition, agreements could provide the resources required to support ongoing management and protection of sites over extended periods of time. (2008, pp. 14–15)

The preferred method for Indigenous heritage protection presented in SEWPaC’s 2009 discussion paper on Indigenous heritage law reform was also centred on agreement making (figure 5.1)*.*

Figure 5.1 Reaching decisions about protecting Indigenous heritage

Preferred method from the *Indigenous Heritage Law Reform Discussion Paper*

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| Figure 5.1 Reaching decisions about protecting Indigenous heritage. This figure is a flowchart which shows the preferred method of reaching an agreement. |

*Source*: DEWHA (2009b, p. 6).

Efficient and effective Indigenous heritage protection should be based on sound risk management processes. Indigenous heritage regimes need to provide strong protection for areas that are considered to have high levels of heritage significance. Conversely, where there is no heritage significance or there is only a low risk of harming heritage, a streamlined ‘duty of care’ or ‘due diligence’ process can be more appropriate and reduce unnecessary costs and delays for explorers.

The Commission considers that — when there is a high level of heritage significance and the exploration activity is likely to impact on the heritage values of a site — systems that rely on ministerial or departmental approval are less likely to produce sound outcomes than agreement making. Further, the latter is likely to be more effective when explorers consult and negotiate directly with Indigenous groups. However, when either party lacks the necessary financial resources or expertise to negotiate agreements, processes can be delayed and outcomes may be unsatisfactory. A third party (such as a government agency or land council) may be able to improve outcomes. Third party involvement may also have the additional benefit that Indigenous Australians may be more willing to divulge sensitive information to them (when they have established a trusted working relationship) than to an explorer.

If negotiations fail and agreement cannot be reached, it is then the government’s role to make informed decisions about whether or not Indigenous sites, artefacts, remains and objects are to be preserved, conserved and protected or are allowed to be damaged, destroyed or relocated. This involves clear decision-making criteria (including consideration of the economic and social benefits of the land and the impact that exploration is likely to have on the heritage value of the site), transparency, and consultation with all parties that have a direct interest.

Draft Recommendation 5.3

State and territory governments should manage Indigenous heritage on a risk assessment basis.

* Where there is a low likelihood of heritage significance in a tenement and the exploration activity is low risk, a streamlined ‘duty of care’ or ‘due diligence’ process should be adopted.
* Where there is a high likelihood of heritage significance and the exploration activity is higher risk, models of agreement making should be adopted rather than a government authorisation system.
* When negotiated agreements cannot be reached, governments should make decisions about heritage protection based on clear criteria, transparency and consultation with all parties that have a direct interest.

### Native title and Indigenous land rights regimes

Chapter 4 noted participants’ concerns with the costs and delays with native title regimes and with the interaction of native title and Indigenous land rights regimes with heritage processes. Box 5.6 provides background on the *Native Title Act 1993* and Indigenous heritage protection.

NTSCORP commented:

We note that while consideration of the *Native Title Act* is explicitly excluded from the Terms of Reference of the study, native title and culture and heritage are fundamentally interconnected concepts and processes. We believe that better integration of native title and culture and heritage processes in the mineral exploration realm would lead to a substantial amount of regulatory duplication being avoided. (sub. 31, p. 7)

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| Box 5.6 Native title and Indigenous heritage |
| The *Native Title Act 1993* (NTA) commenced on 1 January 1994 and has since been substantially reviewed and amended. Native title is a set of rights that are possessed under the traditional laws and customs of Indigenous people that can provide them with exclusive possession of, or limited access to, their traditional lands for a wide range of purposes that could include hunting, fishing, medicine, accommodation, religion and culture.  The NTA provides a systematic legal framework to balance the common law native title rights and interests of Aboriginal and Torres Strait Islanders against the requirements of other land users (miners, pastoralists, tourist operators and others) who need land access and certainty of title while also ensuring that governments can continue to improve infrastructure and manage natural resources. More specifically, the objectives of the NTA are to:   * recognise and protect native tile as defined under the common law * confer legal validity on ‘past acts’ (that is, legislative and administrative actions by governments and persons generally before 1 January 1994) that may otherwise have been invalid because of the existence of native title * provide a framework for ‘future acts’ (that is, actions by governments and persons which affect native title and which are not past acts) and establish conditions, including a ‘right to negotiate’, by which future acts can proceed * establish a mechanism by which native title and compensation can be determined.   The NTA was a significant development for the management of Indigenous heritage. Native title establishes processes of mediation and negotiation between native title parties, governments and proponents (including exploration and mining companies), providing some Indigenous people the ability to negotiate the identification and care of their own heritage on more equitable terms (Edelman et al 2010, p. 6). |
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Similarly, the Northern Territory Department of Mines and Energy asserted that ‘the *Aboriginal Land Rights Act 1976* is considered to be the foremost non-financial barrier to exploration in the Northern Territory’(sub. 2, p. 1).

Further, participants noted that heritage legislation may be confused with processes under native title and Indigenous land rights acts. The AAPA noted:

… our Authority Certificate process for the protection of sacred sites is often confused with Land Councils' charter in forming agreements on land use. While sacred sites are taken into consideration during Land Council consultations, an AAPA certificate is the only document under the *Northern Territory Sacred Sites Act* legislation that provides indemnity against prosecution if damage to a sacred site occurs. (sub. 23, p. 1)

Despite the close interaction between Indigenous heritage, native title and Indigenous land rights Acts, the examination of processes under the Commonwealth’s *Native Title Act 1993*, the *Aboriginal Land Rights (Northern Territory) Act 1976* and state Indigenous land rights regimes are outside the terms of reference for this inquiry.

**5.4 Historic heritage**

Australia’s historical heritage consists of places that are important to Australia’s national identity and warrant protection from damage or modification. Historic heritage applies to a diverse range of sites — including shipwrecks, buildings, bridges, mines, farms, gardens and graves — that have been endorsed by an authorised body as having cultural value to Australia and/or the wider world.

*Onshore historic heritage*

All three levels of governments contribute to the protection of Australia’s onshore historic heritage. Whether on a national, state or territory level, the basic regulatory framework is broadly similar. Each jurisdiction maintains a list or register of identified historic heritage places administered by a jurisdiction-specific Heritage Council. Depending on the jurisdiction, the decision as to what sites should be placed on these lists is either made by these Councils, or by the Minister (usually on the basis of advice from the Council).

Local governments also identify places of local heritage value and regulate these through their planning schemes. All states, with the exception of Tasmania, have provisions or requirements for local governments to establish a register of locally significant places (PC 2006)[[1]](#footnote-1). In 2006, the Commission identified that there were over 147 000 listed local government heritage places in Australia.

The main implication of a site being placed on a heritage list is that restrictions apply as to what works can be carried out on the site — generally, anything beyond minor maintenance and upkeep requires prior approval from the appropriate government agency. Although exploratory activity may be restricted in and around listed sites, relative to other forms of heritage, the burdens caused by historical heritage are small. This is because:

* most historic heritage is concentrated in small pockets and often in locations where exploration is unlikely (for example, in residential or commercial districts of cities and towns)
* the maintenance of up-to-date heritage lists allows explorers to gauge the degree to which their planned exploration activities will impact on historic heritage sites prior to commencing their operations.

That said, the MCA noted that the need for companies to consult multiple lists is problematic:

… MCA considers that significant opportunity exists to reduce the complexity of the Heritage processes through the consolidation of heritage listings in a National Heritage Register. A single Register would reduce the existing challenges of understanding the heritage values within a region by having to consult multiple registers. (sub. 27, p. 30)

The establishment of a national heritage register which consolidates local, state and national heritage lists is likely to expedite searches by explorers (and others) as part of their approval processes, but the level of additional benefit is uncertain. Online, searchable databases of listed heritage places already exist for listings by the Australian Government and each State and Territory government. Some local governments publish their heritage lists online, while those that do not typically provide access through a public facility, such as a library (PC 2006). Further, developing a national list would also involve costs in establishing the list and maintaining its currency across all jurisdictions as heritage places are listed or delisted. On balance, it is unlikely the benefits of a national list would outweigh these costs.

An alternative way to reduce the burden of having multiple heritage lists would be for state governments to encourage those remaining local governments that do not yet publish databases of their historic heritage online, to do so. Explorers would be able to expediently search for local heritage places around their areas of operation, reducing their costs of identifying heritage listed areas and possibly raising their level of compliance with regulatory requirements.

Additionally, the MCA suggested that there is a lack of opportunity for stakeholders to comment on proposed heritage listings:

Property owners and those with interests in an area should be entitled to make submissions on listing proposals that fundamentally affect the value of, and use that can be made of, their assets. (sub. 27, p. 30)

The Commission heard similar suggestions in its 2006 inquiry on the conservation of Australia’s historic heritage. Recommendation 10.1 (p. 264) from that inquiry was directed at State and Territory governments and proposed, among other things, that they should:

* require that listing authorities directly notify owners of any intention to add their place to the statutory list
* require that listing authorities make available a preliminary statement of significance to the owner and the public, prior to public consultation
* require that listing authorities follow timely consultation procedures following a decision to consider a place for statutory listing.

In its response to this recommendation, the Australian Government agreed that these points ‘encourage best practice in the management of privately-owned historic heritage places by state and local governments’ (Australian Government 2007, p. 6). The response by Chairs of the State and Territory Heritage Councils also noted:

Statements of significance, and consultation with owners and the public, are already an integral part of the listing process in most jurisdictions.

And:

The *Cooperative National Heritage Agenda for Australia* includes improved policy guidance on managing changes to heritage places. All jurisdictions are working to improve the level of information available to owners of heritage places. (Chairs of State and Territory Heritage Councils of Australia 2006, p. 12)

The Commission encourages the continued implementation of this recommendation. By allowing sufficient time for public comment prior to listing a nominated site on a heritage register, regulators have greater scope to gauge the views of affected parties and will have more information to weigh the costs and benefits of the listing.

The MCA also presented concerns that heritage decisions can be made without due consideration to wider social and economic factors and, as such, listings can be made without fully assessing the impacts on the local community or region.

There are costs associated with heritage listing a site. One of these costs is an opportunity cost because once a place is listed on a historic heritage register, it is difficult to convert the site to an alternate use. In its 2006 inquiry into historic heritage, the Commission found:

Current methods of identifying historic heritage places for statutory listing focus on the benefits expected to accrue to the community. Typically, there is little, if any, consideration to the costs imposed either on the owner or the community more generally. (p. 149)

Within the specific domain of resource exploration, listing can result in forgone opportunities to explore for resources on a heritage listed site. However, as discussed above, the burdens imposed on the industry by complying with historic heritage are small and furthermore, changes to the criteria used by each jurisdiction to nominate and assess historic heritage places have policy implications far beyond the exploration industry alone. As such, the Commission will not be examining this issue further in this inquiry.

*Offshore historic heritage*

Australia’s offshore historic heritage consists predominately of shipwrecks and the relics in and around them. These shipwrecks are protected under the *Historic Shipwrecks Act 1976,* although state and territory legislation has a role for wrecks not found in Commonwealth waters. The *Act* mandates that a historic shipwreck must not be damaged, destroyed or interfered with without a permit. The Act automatically protects shipwrecks that are 75 or more years old regardless of whether their location is known. Shipwrecks less than 75 years old can also be protected under the Act by declaration of the Minster[[2]](#footnote-2) (SEWPaC 2009).

In 2009, the Australian Government announced that the *Historic Shipwrecks Act* would be reviewed. In the ensuing discussion paper, the ambiguity around the extent that shipwrecks could be disturbed for development purposes — including for oil and gas exploration — was noted:

Since 1976 many shipwreck sites have been located in Australian waters. Some of the shipwrecks are currently being exploited for development, such as coastal developments, aquaculture or oil and gas exploration. While the Act clearly states that historic shipwrecks should not be damaged or interfered with, it is unclear how development proponents can ascertain what shipwrecks might be in their development area and how they should manage the sites if historic shipwrecks are located.

The Act contains no clear procedures that a developer should follow to assess the impact the development would have on historic shipwreck sites, to undertake mitigation activities, or to obtain approval for works prior to any actions that may damage historic shipwreck sites. (Australian Government 2009, p. 14)

The 2011‑12 Annual Report of SEWPaC stated that the review of the Act is ‘ongoing’ (SEWPaC 2012d p. 212).

During this inquiry, the Commission has not heard of any instances where the current regulations around historic shipwrecks have represented barriers for oil and gas exploration companies. However, further clarification on the processes and procedures explorers must meet when working around historic shipwrecks — as flagged in the review of the *Historic Shipwrecks Act* — is likely to be of benefit to the industry.

1. Historic heritage protection in the Northern Territory and the ACT is solely the responsibility of Territory governments. [↑](#footnote-ref-1)
2. The Minister currently responsible for this declaration is the Minister for Sustainability, Environment, Water, Population and Communities. [↑](#footnote-ref-2)