

Extracts of material relevant to *Aboriginal Heritage Act 1972 (WA)*

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Apologies and intentions to improve (extracts from industry and government)

WA Government

Explanation of impact of Marandoo Bill

[\[media release, 6 February 1992\]](#)

6 February 1992

Aboriginal heritage clearance for the Marandoo iron ore project will be enshrined in law under legislation introduced into Parliament today.

Aboriginal Affairs Minister Judyth Watson said the Bill would ensure that legal claims against the finality of the Section 18 consent did not interfere unnecessarily with the progress of the project.

"The Act enshrines the consent given by me on Monday as a result of recommendations from the Aboriginal Cultural Material Committee on the Marandoo project," Dr Watson said.

"That consent was subject to four conditions that acknowledge the need to protect a number of significant Aboriginal sites in the area and salvage archaeological materials which would benefit future generations of both Aboriginal and non-Aboriginal people."

Dr Watson said the Bill should not be confused with the Premier's commitment last month to introduce legislation to facilitate the project, should consent under the Aboriginal Heritage Act not be forthcoming.

"The conditional consent was given after full adherence to the proper process. This piece of legislation is a specific solution to a specific problem that acknowledges the climate of uncertainty that has developed due to problems with the Act," she said.

"The Government is not interested in solving problems experienced in project timetables on a piecemeal basis. **The Aboriginal Heritage Act will be amended in the coming session of Parliament to ensure that legitimate Aboriginal heritage concerns are met, and that past problems do not recur.**"

Dr Watson said the Bill would also remove much of the Marandoo mine and corridor area that was the subject of the Section 18 application from the Aboriginal Heritage Act.

She said once the legislation was passed the way would be clear for the company to proceed with its test drilling program.

The release of the Environmental Review Management Program is expected in late February.

[Submission of Department of Planning, Lands and Heritage](#) to Commonwealth Parliamentary Inquiry into Juukan Gorge

One of the Act's greatest weaknesses is that it does not expressly provide for consultation with Aboriginal people in the identification, management and protection of their heritage.

...

The Act is also not supported by a strong enforcement or compliance regime.

...

Importantly, the Act currently does not provide for any right of appeal by Aboriginal people in relation to decisions about their cultural heritage. **There is also a lack of transparency required by the Act about decisions made.**

...

In order to achieve protection, conservation and management of Aboriginal cultural heritage in Western Australia, and to provide a clear framework that enables land users to manage Aboriginal heritage, **a fundamental shift away from the current Act is required.**

...

The Western Australian Government recognises the need for change. In March 2018 the Minister for Aboriginal Affairs, the Hon Ben Wyatt MLA, announced the launch of the review of the Act. ... The Aboriginal Cultural Heritage Bill 2020 (Bill) will be the culmination of the review, and extensive consultation with Aboriginal people across Western Australia, as well as industry and other stakeholders.

...

The Bill will represent a fundamental shift in the approach to, and protection of, Aboriginal heritage in Western Australia. It will be a modern piece of legislation with three key focus areas: Aboriginal voices, improved protection, and better decisions.

Rio Tinto

[Submission of 31 July 2020](#) Commonwealth Parliamentary Inquiry into Juukan Gorge

Rio Tinto has unreservedly apologised to the Puutu Kunti Kurrama and Pinikura people (PKKP), and we reaffirm that apology now.

...

We are determined to learn the lessons from what happened at Juukan Gorge, to restore a relationship of trust with the PKKP people and to re-build Rio Tinto's reputation for cultural heritage management.

Woodside Energy

[Submission of 3 August 2020](#) to Commonwealth Parliamentary Inquiry into Juukan Gorge

Woodside acknowledges that **our approach to managing and protecting cultural heritage has improved** over time. **Cultural heritage impacts** were managed differently **in the 1980s**, and those practices **did not meet the standards that we now set ourselves and that the community expects today**. Importantly, at that time, the **Traditional Custodians were excluded from heritage processes during the design and construction of the Karratha**

Gas Plant (KGP). Instead, the Western Australian (WA) Government, through the WA Museum, managed the heritage assessment and site clearances on behalf of the North West Shelf Project.

Minerals Council of Australia

[Submission of 19 August 2020](#) to Commonwealth Parliamentary Inquiry into Juukan Gorge

The Minerals Council of Australia recognises the distress caused to the Puutu Kunti Kurrama and Pinikura People (PKKP) by the destruction of the Juukan Gorge caves and the effect on Aboriginal and Torres Strait Islander people and the broader Australian community. The MCA is deeply sorry.

For more than two decades, Australia's minerals industry has worked to build strong and enduring relationships with the Traditional Owners on the lands on which it operates. The industry remains committed to these relationships.

While matters under inquiry are specific to the caves at Juukan Gorge, the industry is committed to learning from the committee's findings. Drawing on advice from Traditional Owners, Aboriginal and Torres Strait Islander organisations and the committee's findings, **the MCA will lead a national work program to capture, share and embed lessons across the sector.**

Holcim Australia

[News report from ABC website, 9 February 2010.](#)

Rock art accused 'sorry'

9 February 2010

A concrete supplier that damaged indigenous rock art in Western Australia's Pilbara region has avoided prosecution by agreeing to pay compensation and develop a cultural management program. Holcim Australia, formerly know as Cemex, carried out rock blasting and bulldozing at a culturally significant site on the Burrup Peninsula.

The work damaged rock engravings in the heritage-protected area. Holcim was facing prosecution but today reached a settlement with the Federal Department of Environment, Water, Heritage and Arts.

Holcim must spend \$280,000 to develop a cultural awareness program, employ an Indigenous relations officer, improve staff training and conduct archaeological surveys of its quarry area. Holcim has also been told to develop cultural heritage agreements with local Aboriginal groups.

The company says it deeply regrets the incident and has pledged to work closely with traditional owners.

References to s18 process under the *Aboriginal Heritage Act 1972 (WA)* as ‘approval’ or ‘clearance’

Minister for Indigenous Affairs -v- Catanach [\[2001\] WASC 268](#)

- 12 Mr Cerini says that he had a discussion with **Mr Hayden Lowe, the Chief Executive Officer of the Aboriginal Affairs Department**. Mr Lowe informed Mr Cerini that he was going to meet with the Minister, Dr Kim Hames, shortly and that a s 18 consent was to be issued. Mr Cerini said that he was told by Mr Lowe that he would "not need to go back to the Minister for any further consent for any further development on the site". He essentially told Mr Cerini that his inquiries indicated that the site had no Aboriginal heritage significance. He said that he was unable to find any evidence that would support the withholding of consent.
- 13 In fact, the matter had gone before the Aboriginal Cultural Material Committee ("ACMC"), as contemplated by the Act, which resolved to recommend to the Minister that, provided written evidence was submitted to the Registrar that Mr Cerini had consulted with certain named persons, consent would be granted to him to use a portion of Aboriginal site No 12793 for "site clearing and construction for various structures including a shed, retaining wall, driveway, fence and sewer/water lines".
- 14 This recommendation was considered by Mr Lowe, who passed it on to the Minister with a briefing note which stated: "Contrary to the recommendation of the ACMC I am of the view that you should grant unconditional consent to Mr Cerini for the proposed use outlined in his s 18 application." He gave reasons for that recommendation, but it is not necessary for me to set them out.
- 15 The Minister then wrote a letter [to Cerini] dated 22 August 2000, which read: "I refer to your notice under s 18 of the Aboriginal Heritage Act 1972 (AHA) dated 4th April 2000. In accordance with my powers under s 18(3) of the AHA, I hereby grant you consent to use the land on Lot 74 (sic), Dampier Terrace, Broome (being a portion of the area of site 12793) for the purpose detailed in your s 18 notice dated 4th April 2000."
- 16 Following receipt of the s 18 consent, Mr Cerini says that he contacted Mr Lowe again as he noted that the s 18 consent did not in terms state that no further s 18 consent would be required for the subsequent development of Lot 73. Mr Lowe **said that he would prepare another letter which clarified that the site had been given a full clearance** and that Mr Cerini would not have to go back for an application in relation to any further development. Mr Lowe then signed the letter on behalf of the Aboriginal Affairs Department dated 24 August 2000, which read: "To clarify your inquiry if you need to make changes to your project plans, please note that you do not need to make another s 18 application. Your current s 18 approval from the Minister will cover these."
- 29 The dispute has developed because **the present Minister's departmental head held the view that once consent had been given to carry out work on the land, this amounted to a general clearance in relation to all and any work which might thereafter be carried out**. The defendants agree with this view. The present Minister does not agree. He contends that the consent only relates to the "Shed" development.
- 30 **Not only did the Chief Executive Officer hold the view that consent once given permitted different work to be carried out, but** he also wrote his letter of 24 August 2000 to Mr Cerini expressing this view and **later, when he was no longer in the department when this dispute was brewing, he expressed the view that there was a "blanket clearance"** on the site and confirmed that this was his view of the matter in an e-mail dated 27 September 2001 directed to Mr Sutton.

Point Grey Development -v- Shire of Murray [\[2019\] WASAT 106](#)

62. **Mr Timothy Trefry provided expert planning evidence** for the applicant. ...
73. **Mr Trefry noted that a portion of the works will encroach into a registered Aboriginal Site and will be subject to that granting of an approval under s 18 of the Aboriginal Heritage Act 1972 (WA) (AH Act) prior to any works commencing. ...'**

Robert Tickner -v- Bropho [\[1993\] FCA 208](#); 40 FCR 183, 189 per Black CJ

20. The Western Australian **Minister's s. 18 approval** was issued on 22 October. Construction work recommenced on about 12 November 1992.

Robert Tickner -v- Bropho [\[1993\] FCA 208](#); 40 FCR 183, 206 per Lockhart J

24. The **Minister's approval under s. 18** was given on 22 October 1992. Construction work recommenced about 12 November 1992.

Traditional Owners (Niyiyaparli People) -v- Indigenous Affairs Minister [\[2009\] WASAT 71](#), per Chaney P

- 7 It is apparent that the notice was given because of the impact of the proposed works on a number of Aboriginal heritage sites. It would have been an offence under the AH Act to carry out the works without the consent of the Minister. **In accordance with the requirements of the AH Act**, the ACMC provided a recommendation to the Minister, and by letter dated 29 December 2008, **the Minister granted approval for the works under s 18(3) of the AH Act.**

Total Communications -v- City of South Perth [\[2006\] WASAT 272](#), [16] per Member Connor

- 16 As the subject land is incorporated within an area designated on the Department of Indigenous Affairs Register of Aboriginal Sites, consent of the Minister for Indigenous Affairs is required for works within the Aboriginal site. Any planning consent of the proposed facility under the planning legislation would not obviate the **obligations of the applicant to obtain the necessary approvals under the Aboriginal Heritage Act 1972 (WA).**

Statistics regarding the *Aboriginal Heritage Act 1972 (WA)*

Summary

Process	Prevalence	Notes and source (extracted below)
Section 18 applications for consent	more than 3300	‘3340 applications have been received under s18 of the AHA since it was enacted in 1972 [but earlier] section 18 applications were managed manually so this figure may not be accurate’: 2018, information from DPLH
Section 18 ‘consents’ issued by Minister, allowing legal damage of Aboriginal sites	more than 914	<p>From May 2013 – Sep 2018, 212 consents had been issued by the Minister: 2018, information from DPLH</p> <p>Many s18 applications are ‘determined as not having Aboriginal heritage sites...and therefore consent for the purpose was not necessary’. In 2013 to 2015, this was the determination made for 65% of s18 applications considered (63 of the 96 applications determined): 2018, information from DPLH</p> <p>At March 2003, 702 applications under s18 had been recommended be approved (by the ACMC): Hansard, 4 March 2003</p>
Prosecutions, under s17, for damage to Aboriginal sites	6	<p>‘our compliance unit has advised there have been 6 prosecutions under the Aboriginal Heritage Act 1972. The fines issued were:</p> <ul style="list-style-type: none"> • 1986 - Accused pleaded guilty and was fined \$200 • 1989 - Our compliance unit could not locate the file for this case so I cannot provide you with the amount fined • 1999 - Accused pleaded guilty and was fined \$1,500 • 2005 - Accused pleaded guilty and was fined \$1,250 • 2007 - Accused pleaded guilty and was fined \$10,000 • 2010 - Accused pleaded guilty and was fined \$3,500 <p>The compliance unit also advised that all prosecutions under the Act to date have resulted in convictions.’: 2018, information from DPLH</p>
Authorisations, under s9, for traditional custodian to exercise Minister’s powers	0	‘according to our records and advice from the Registrar of Aboriginal Sites it appears that no authorisations under section 9 have been issued by the Minister. We also have no records of any applications being made to the Minister’: 2018, information from DPLH

Sources:

2020, Hansard

Extract from [Hansard \[COUNCIL — Thursday, 14 May 2020\]](#) p2703b-2703b

Hon Robin Chapple; Hon Stephen Dawson

ABORIGINAL CULTURAL MATERIAL COMMITTEE — SECTION 18 NOTICES

2878. Hon Robin Chapple to the minister representing the Minister for Aboriginal Affairs:

I refer to the procedures and approvals of works under section 18 of the Aboriginal Heritage Act 1972, by the Aboriginal Cultural Material Committee (ACMC), and I ask:

- (a) can the Minister confirm how many section 18 notices for land that is described as a mining lease, were bought before the ACMC, since 1 July 2010; and
- (b) of the section 18 notices pertaining to mining leases, how many have been declined in the same period (as of 1 July 2010), by the Minister?

Hon Stephen Dawson replied:

- (a) 463
- (b) Nil. This confirms what I have consistently highlighted, the obligations under the Aboriginal Heritage Act 1972 are not an impediment to the effective operations of the mining industry, particularly where mining companies enter into positive consultations with traditional owners.

2018, information from Department for Planning, Lands & Heritage (DPLH)

From: ... <...@dplh.wa.gov.au>
 Sent: Wednesday, September 5, 2018 12:28 PM
 To: John Southalan <john@southalan.net>
 Subject: RE: inquiry regarding AH Act applications and decisions

Good afternoon John,

Tanya Butler, Registrar of Aboriginal Sites has reviewed the stats and has asked me to forward her response to you. I apologise for the delay in responding.

- 1
 - (a) There are currently 80 Protected Areas in Western Australia.
 - (b) Our records indicate a total of 171 areas (including the 80 protected areas) have been identified as possible protected areas under the AHA. Of these, 47 proposals were not progressed and 44 were not approved. Most of these would have been nominated before the 1980s. Unfortunately, due to the lack of available records we are unable to advise why they were not progressed or not approved.

- 2
 - (a) According to the department's internal Aboriginal Heritage Electronic Lodgement Program (launched in May 2013), the Minister has issued 212 consents under section 18 of the AHA since May 2013.
 - (b) Approximately 35% of the consents issued since May 2013 relate to exploration/mining/prospecting activities.
 - (c) A total of 3340 applications* have been received under s18 of the AHA since it was enacted in 1972.

*Please note prior to AHELP section 18 applications were managed manually so this figure may not be accurate. Section 18 applications received prior to May 2013 were entered into AHELP, however the outcomes of these applications were not recorded so we won't be able to provide this information.

Regards,

...

| Executive
Bairds Building
491 Wellington Street, PERTH WA 6000
(08) 6551 8029
www.dplh.wa.gov.au

From: John Southalan [mailto:john@southalan.net]
Sent: Thursday, 21 June 2018 3:05 PM
To: ...@daa.wa.gov.au>
Subject: RE: inquiry regarding Aboriginal Heritage Act

Dear ...

Thank you very much for that information, and I apologise for my delayed response as I have been in the field with limited email access.

I am most grateful for the information you provided, and completely understand the difficulties of collating answers to some of the matters I asked. I do not wish to create additional work, as I appreciate the significant obligations your department has and the limited resources for that. So I do not expect, nor ask, that significant additional work be conducted where the information is not readily available.

I have two further areas I'd to know data on, if possible.

- 1 How many "protected areas" have been declared by the Minister under section 19 (or any earlier equivalent)? And, if possible, how many applications have ever been received for such declarations?
- 2 How many "consents" has the Minister issued under section 18 (or any earlier equivalent)? And, if possible, how many of those have been for mining/petroleum operations or related work (I assume this is not easily identified, and so do not expect that information can be easily made available)?. Also, if possible, would you be able to indicate how many applications have ever been received for consents under s18?

For this information, the range over which I enquire is from the enactment of this legislation - or the relevant provisions - until current date.

I'll be grateful for any assistance you can provide, or if I should direct my enquiries elsewhere, please let me know where.

Kind regards

John

From: ...@dplh.wa.gov.au>
Sent: Thursday, 7 June 2018 3:59 PM
To: John Southalan <john@southalan.net>
Subject: RE: inquiry regarding Aboriginal Heritage Act

Good afternoon John

I apologise for the delay in getting back to you.

For your first question, our compliance unit has advised there have been 6 prosecutions under the Aboriginal Heritage Act 1972. The fines issued were:

- 1986 - Accused pleaded guilty and was fined \$200
- 1989 - Our compliance unit could not locate the file for this case so I cannot provide you with the amount fined
- 1999 - Accused pleaded guilty and was fined \$1,500
- 2005 - Accused pleaded guilty and was fined \$1,250
- 2007 - Accused pleaded guilty and was fined \$10,000
- 2010 - Accused pleaded guilty and was fined \$3,500

The compliance unit also advised that all prosecutions under the Act to date have resulted in convictions. So the answer to part c would be six also.

In regards to your second question, according to our records and advice from the Registrar of Aboriginal Sites it appears that no authorisations under section 9 have been issued by the Minister. We also have no records of any applications being made to the Minister.

I hope this information helps.

Regards,

...

| Executive
Bairds Building
491 Wellington Street, PERTH WA 6000
(08) 6551 8029
www.dplh.wa.gov.au

From: John Southalan
Sent: Monday, 28 May 2018 5:29 PM
To: ...@dplh.wa.gov.au
Subject: inquiry regarding Aboriginal Heritage Act

Dear ...

I am an adjunct academic at UWA, and have two questions for some current writing I'm doing about mining law which involves the Aboriginal Heritage Act 1972.

I contacted the Department a couple of weeks back, but have heard no response. A colleague of ours, ... , suggested you may be able to assist or direct me to the relevant place for inquiry.

I extract, below, the text of the letter I previously sent the Department. I would be grateful for any suggestions or direction you can provide in relation to the two questions I'm asking.

Kind regards

John Southalan

The Chief Executive Officer
Department of Planning, Lands and Heritage
Postal Address:
Locked Bag 2506

Perth WA 6001

Email info@dplh.wa.gov.au

Dear Sir / Madam

Inquiry regarding use of Aboriginal Heritage Act 1972

I am an adjunct academic, researching and writing on areas of resources regulation, and I have two questions for some current writing I am doing which involves the Aboriginal Heritage Act 1972.

- 1) In relation to offences under s17:
 - a) How many parties have ever been determined, by a court, of having breached this section (either after a contested hearing or having pleaded guilty);
 - b) what fines or sentences were issued in relation to each conviction; and
 - c) how many prosecutions has the Government ever commenced (whether they resulted in convictions or not)?
- 2) In relation to authorisations under s9:
 - a) How many times has the Minister authorised an Aboriginal party to exercise the Minister's powers or duties;
 - b) what powers or duties were authorised on each of these occasions; and
 - c) how many applications have ever been made to the Minister, by Aboriginal parties, under this section.

The range over which I enquire is from the enactment of this legislation - or the relevant provisions - until current date.

I realise this could potentially be onerous to search the relevant data, and that the Freedom of Information Act and procedures are available for these types of inquiries. However I also expect that, with the current review of the Aboriginal Heritage Act, this type of information may already be known with the Department. Accordingly, I would be grateful if this information could be made available to assist better academic understanding and engagement with the area.

If you have any questions regarding this matter, please contact me through the following details (as I am only occasionally on campus):

Email: john@southalan.net

Mobile: 0450 507 332

Yours sincerely
JL Southalan
Adjunct Associate Professor

2015, Hansard

Extract from [Hansard \[ASSEMBLY — Tuesday, 11 August 2015\]](#)

p5092b-5092b

Mr Ben Wyatt; Dr Kim Hames

ABORIGINAL AFFAIRS — ABORIGINAL HERITAGE ACT

4121. Mr B.S. Wyatt to the Minister representing the Minister for Aboriginal Affairs:

I refer to section 18 of the Aboriginal Heritage Act 1972 and I ask:

- (a) since 14 June 2013 how many applications were made pursuant to section 18 of the Aboriginal Heritage Act 1972;
- (b) of the applications pursuant to section 18, on how many occasions was consent not provided by the Minister; and
- (c) in respect of recommendations received from the Aboriginal Cultural Material Committee (ACMC) regarding applications pursuant to section 18 of the Aboriginal Heritage Act 1972, how many times did the Minister not accept the recommendation of the ACMC?

Dr K.D. Hames replied:

- (a) 142 Section 18 Notices were received.
- (b) To date the Aboriginal Cultural Material Committee has considered 96 of the 142 section 18 notices.

It should be noted that 63 of the 96 notices considered to date were determined by the Aboriginal Cultural Material Committee as not having Aboriginal heritage sites to which section 5 of the Aboriginal Heritage Act 1972 applied on the land and therefore consent for the purpose was not necessary. For the remaining 33 notices, there were no occasions on which consent was not provided.

- (c) The Minister has accepted all of the Aboriginal Cultural Material Committee's recommendations.

2013, Parliamentary intern report

Barnsby, M, 2013. Parliamentary Internship Report for the Hon Robin Chapple MLC, *The Effectiveness of the Aboriginal Heritage Act 1972*, [Tabled Paper 1255](#), Legislative Council 26 Feb 2014, December 2013. Perth (AUS): WA Parliament.

'For example, as of 2002, the Aboriginal Cultural Materials Committee had processed 957 applications since the Aboriginal Heritage Act came into force. Of these 957, 702 were recommended for approval (Hansard, 2002 Parliamentary Questions). Between the period of 1 January 2008 - 14 June 2013, a further 646 Section 18 applications were made. Of these 646, only one was refused by the Minister.' (p13)

2003, Hansard, 4 March

Extract from [Hansard \[COUNCIL - Tuesday, 4 March 2003\]](#)

p4945c-4945c

Hon Robin Chapple; Hon Graham Giffard

ABORIGINAL CULTURAL MATERIALS COMMITTEE, SECTION 18 APPLICATIONS

369. Hon Robin Chapple to the Parliamentary Secretary representing the Minister for Indigenous Affairs

- (1) How many Section 18 applications (re the Aboriginal Heritage Act 1972 [the Act] has the Aboriginal Cultural Materials Committee (ACMC)) processed since the Act came into force?
- (2) How many Section 18 applications have the ACMC recommended be approved?
- (3) How many have the ACMC recommended be refused?
- (4) How many Section 18 applications (re the Act) has the Minister approved since he came to office?
- (5) How many Section 18 applications has the Minister refused since he came to office?
- (6) How many times has the ACMC recommended a Section 18 application be refused and the Minister overridden this recommendation and approved this application?
- (7) Since the inception of the Act, how many prosecutions under the Act have been laid?

Hon GRAHAM GIFFARD replied:

- (1) 957
- (2) 702
- (3) 32
- (4) 114
- (5) 0
- (6) 1
- (7) 3

Court views on efficacy of protection in *Aboriginal Heritage Act 1972 (WA)*

These arise in two frequent contexts. First, cases concerning the Commonwealth Indigenous heritage Act, which applies where a State law does not provide effective protection. Second, in procedures under the Native Title Act which involved determining whether impacts are not 'significantly likely'. In both these areas, courts have had to determine whether WA's Aboriginal Heritage Act 'provides effective protection' or ensures that impacts are not 'significantly likely'. The courts have observed the Act does not ensure those outcomes.

Re Robert Bropho -v- Tickner [1993] FCA 25; 40 FCR 165, per Wilcox J

(note this decision was appealed in *Tickner -v- Bropho* [1993] FCA 208; 40 FCR 183; but the following statement was not disturbed; see Black CJ at 196-197, and Lockhart J at 211)

41. ... The adjective "effective" requires that **the protection offered by the State or Territory legislation** be more than nominal or theoretical; it **must be such as to ensure that the area will be protected under State or Territory law**. This is consonant both with the usual meaning of the word "effective" and the scheme of the Act that, in such a case, a declaration is not to be made under the Commonwealth Act (s.13(2)) or, if made, revoked (s.13(5)). It is not to be supposed that Parliament intended that the protection of the Commonwealth Act should be denied by a statutory mirage. If, in the present case, Mr Tickner concluded that the Western Australian Act offered "effective protection of the area" he erred in law.

State of Western Australia -v- Commonwealth Aboriginal Affairs [1995] FCA 1052; 37 ALD 633 per Carr J

96. The matter of protection of an area under State law is referred to, in slightly different terms, three times in the relevant Division of the Commonwealth Act. The direction in s.13(2) to the Commonwealth Minister to consult with the appropriate State Minister is "... as to whether there is, under a law of that State or Territory, effective protection of the area ...". Section 13(5) provides that the Commonwealth Minister shall revoke a declaration where he is satisfied that the State law "... makes effective provision for the protection of an area". Among the matters which must be dealt with by a report under s.10 are "... the extent to which the area is or may be protected by or under a law of a State or Territory, and the effectiveness of any remedies available under any such law." It is possible that the draftsman was seeking to distinguish, for slightly different purposes, between a State having effective legislation on its statute books and the extent to which that legislation might not, in particular circumstances, be availed of or applied to bring about effective protection.
97. However, there does not seem to be a rational basis for drawing such a distinction which might have the result that in some circumstances it might be regarded as enough that there be effective provision for protection of an area and in other circumstances that there had also to be effective protection under the law of a State or Territory for that area. In my view, **as a matter of construction, the test is the more stringent one of effective protection. By that I mean effective protection of (in this case) the specific area** not of areas generally, because that is what the above provisions speak of, namely "the area" (s.10(1)(b)(i)), "the area, object or objects" (s.13(2) and (5)). **That may not require absolute protection for an area**, as might be demonstrated by reference to the present matter. In my opinion, it would have been open to the Commonwealth Minister to have found that the law of Western Australia had provided effective protection of the area by excisions which meant that the Initiates' Track could be used on all but four or five occasions each year. However, **I do not think it could be said that it was manifestly**

unreasonable or perverse for the Commonwealth Minister to come to a different opinion. Nor, in my view, did he err in law in doing so.

98. As French J noted, **both the Commonwealth Act and the State Act provide discretionary protection.** I respectfully agree with his Honour's observation that the intent of the Commonwealth Act is to allow the Commonwealth Minister to intervene to protect a site in a case in which he or she takes a view of the relevant public and private interests different from that taken by the State Minister., found that the Cth Act is about effective protection in particular circumstances, not whether there is some law addressing it on the statute books. Also, **it is reasonable for the Cth Minister to consider the WA AHA does not ensure effective protection, because it is effectively 'discretionary protection'.**

Parker -v- WA [\[2008\] FCAFC 23](#); 167 FCR 340 per Branson J

- 35 As the primary judge correctly noted, the reasons for determination of the Tribunal make clear that it appreciated that it was bound to take into account whether there was a real risk of interference with the Barimunya site otherwise than by conduct in breach of s 17 of the Aboriginal Heritage Act. At [34] of the Tribunal's reasons for determination, the Tribunal referred to an observation concerning **the protective effect of the provisions of the Aboriginal Heritage Act** made by Nicholson J in *Little v Western Australia* [2001] FCA 1706. The Tribunal went on at [35] to state: "The Tribunal **has always given significant weight (as it must)** to this finding **but does not** interpret it as **meaning that in all cases the protective regime will be adequate to make the s 237(b) interference unlikely** (see *Banjo Wurrumurra and Others on behalf of Bunuba Native Title Claimants*; *Butcher Cherel and Others on behalf of the Gooniyandi Native Title Claimants/Western Australia/Bernfried Gunter Wasse, James Ian Stewart, Paul Winston Askins, NNTT WO04/136 and WO04/137*, [2005] NNTTA 90 (2 December 2005), Hon C J Sumner and cases cited therein at [35] for a recent example). Each case must be considered on its particular facts. What is clear is that the Tribunal is entitled to have regard and give considerable weight to the Government party's site protection regime."
- 36 As his Honour also noted, the Tribunal also appreciated the significance of s 18 of the Aboriginal Heritage Act to the determination it was required to make. At [47] of its reasons for determination the Tribunal said: "As already explained, the possibility that a s 18 application may be made is not, since the amendment to the Act in 1998, decisive (as it was prior to 1998) in leading to a conclusion that there will be interference with sites of particular significance. This possibility has always been a part of the Government party's regulatory regime which has been considered by the Tribunal and Federal Court in *Little v Western Australia* [2001] FCA 1706. Its importance in deciding whether there is a real risk of interference with sites of particular significance will depend under the predictive assessment approach on all the circumstances. If the evidence were to be that exploration could not be carried out without avoiding sites or that a s 18 application was virtually inevitable then these circumstances would need to be given greater weight. It would still, however, need to be considered in the context of the number of sites, the consultative mechanism in place with the native title party through a heritage survey or otherwise and the attitude of the grantee party to site protection."
- 37 No party challenged the legal accuracy of the above passages from the reasons for determination of the Tribunal. That is, there is no dispute between the parties as to the

answer to this question of law. Nor can it be demonstrated that the Tribunal relevantly misunderstood the law.

38 As the native title party's written submissions reveal, their real complaint with respect to the Tribunal's consideration of s 17 and s 18 of the Aboriginal Heritage Act is that the Tribunal gave too much weight to the protective provisions of that Act and insufficient weight to the risk of the grantee party obtaining a s 18 exemption in respect of the Barimunya site. The weight to be given to these matters for the purpose of making a finding of fact is not a question of law. It was for the Tribunal to determine the weight to be given to these and other relevant matters in making necessary findings of fact.

Parker -v- WA [\[2008\] FCAFC 23](#); 167 FCR 340 per Tamberlin J

67 The Tribunal's reasons refer to the decision of Nicholson J in *Little v Western Australia* (2001) 6(4) AILR 67 and to the Tribunal's application of his Honour's reasoning in its decision in *Champion v Western Australia* [2005] NNTTA 1; (2005) 190 FLR 362. While the Tribunal's reasons note that it was bound by the decision of Nicholson J, the Tribunal expressly accepts that **the existence of the protective regime provided under ss 16, 17 and 18 of the Aboriginal Heritage Act 1972 (WA) was, of itself, not sufficient to establish there is unlikely to be interference in this case.** This is apparent from the Tribunal's reasons at [35], where it states that significant weight must be given to the reasoning of Nicholson J in *Champion* [2005] NNTTA 1; 190 FLR 362, but emphasises that resolving questions raised by s 237 of the NTA requires consideration of the detailed circumstances of each case. It is evident on a fair reading of its reasons that the Tribunal concluded that, while weight would be given to the existence of the protective statutory regime, its mandate was to determine whether interference is likely to occur within the meaning of s 237(b).

72 The second point under this first issue is the submission that the finding of the Tribunal was so unreasonable as to amount to an error of law. In my view, this proposition is untenable. As discussed above, the reasons of the Tribunal correctly framed the issues before it, surveyed all the evidence pertaining to those questions and took into account all the relevant considerations, including such matters as the existence of the protective regime under the Aboriginal Heritage Act 1972 (WA), the existence of a substantial buffer zone around the Barimunya site and the relevant commitments and undertakings of the parties. Accordingly, I consider that the determination reached by the Tribunal was clearly open to it, and cannot be said to be so unreasonable as to indicate a failure by the Tribunal to perform its function and thereby render its decision invalid.

McKenzie -v- Lands Minister [\[2011\] WASC 335](#); 45 WAR 1, per Martin CJ

109 Counsel for the Minister next asserted that the objectors' difficulty was more theoretical than real because development of the land could only take place in accordance with the provisions of the Aboriginal Heritage Act 1972 (WA) (the AH Act). It is certainly true that **the AH Act provides a measure of protection to places and sites of Aboriginal heritage value. It is also true that the Minister responsible for that Act has a discretion to permit actions which include the development and desecration of sites of Aboriginal heritage value. The question of whether or not native title rights including the right to continue use and enjoyment of such a site had been extinguished would be relevant to the exercise of that discretion. It is unreasonable to suggest that in this case, the objectors had no interest in whether the land to be taken would include**

sites of particular significance because **they could be confident that such sites would be protected from development under the AH Act.**