

Joint Standing Committee on Northern Australia
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CANBERRA
Canberra ACT 2600

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**New South Wales
Aboriginal Land Council**
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Dear Committee Members,

Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia

Thank you for the opportunity to provide a submission to this inquiry.

Our cultural heritage and landscapes are being destroyed at alarmingly high rates and are under increasing threats. Many Australians have expressed outrage at the actions of proponents and the severely deficient legislative regimes that destroy Aboriginal cultural heritage across the Country every day, including at Juukan Gorge.

All governments must partner with Aboriginal and Torres Strait Islander peak bodies and communities to design and deliver comprehensive reforms to replace Australia's archaic Aboriginal heritage laws.

New laws must be based on self-determination, and free, prior and informed consent.

The NSW Aboriginal Land Council (**NSWALC**) provides these comments as the peak body representing Aboriginal peoples across the lands and waters now known as New South Wales (NSW). NSWALC is a self-funded statutory body under the *Aboriginal Land Rights Act 1983* (NSW) (**ALRA**), with legislated objectives to improve, protect and foster the best interests of all Aboriginal peoples in NSW. With over 23,000 members, NSWALC is the largest Aboriginal member-based organisation in Australia.

The ALRA recognises that '*Land is of spiritual, social, cultural, and economic importance to Aboriginal Peoples*' and establishes 120 autonomous Local Aboriginal Land Councils (**LALCs**) that NSWALC supports. LALCs have similar objectives to NSWALC which include land management, protection and promotion of Aboriginal cultures and heritages, and supporting Aboriginal communities. It is a core imperative for NSWALC and the Land Rights Network to ensure the protection of the many diverse Aboriginal cultures and heritages across NSW.

The state of our heritage grows objectively worse. The State of the Environment Report 2011¹ highlighted that:

¹ Australia State of the Environment Report 2011, State of the Environment 2011 Committee, Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities, Canberra, page 721 <http://155.187.2.69/soe/2011/report/heritage/pubs/soe2011-report-heritage.pdf>

ALWAYS WAS ALWAYS WILL BE ABORIGINAL LAND

Head office	Western Zone	Northern Zone	Northern Zone (Tamworth)	Eastern Zone	Southern Zone	Far Western Zone
Level 5, 33 Argyle Street Parramatta NSW 2150	2/36 Darling Street Dubbo NSW 2830	Suite 5, Level 1 66-90 Harbour Drive Coffs Harbour NSW 2450	2/158 Marius Street Tamworth NSW 2340	Suite 23, 207 Albany Street North Gosford NSW 2250	Unit 22, 2 Yallourn Street Fyshwick ACT 2609	Ground Floor Suite 49 Oxide Street Broken Hill NSW 2880
PO Box 1125 Parramatta NSW 2124	PO Box 1196 Dubbo NSW 2830	PO Box 1912 Coffs Harbour NSW 2450	PO Box 890 Tamworth NSW 2340	PO Box 670 Gosford NSW 2250	PO Box 619 Queanbeyan NSW 2620	Ph: 08 8087 7909 Fax: 08 8087 3851
Ph: 02 9689 4444 Fax: 02 9687 1234	Ph: 02 6885 7000 Fax: 02 6881 6268	Ph: 02 6659 1200 Fax: 02 6650 0420	Ph: 02 6766 4468 Fax: 02 6766 4469	Ph: 02 4337 4700 Fax: 02 4337 4710	Ph: 02 6124 3555 Fax: 02 6280 5650	

“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.

The State of the Environment Report 2016² re-iterates the scale of the problem, highlighting that “incremental destruction” is a key risk to our cultural heritage³. The Report notes that:

“The economic imperatives of development and infrastructure delivery can place great pressure on sensitive Indigenous heritage places and overemphasise the individual ‘site’, rather than understanding that Indigenous heritage exists at a landscape scale, covering both tangible and intangible manifestations.” The cumulative impacts on Aboriginal heritage, along with the high rates of destruction both illegal and legally authorised must be urgently addressed.

There is mounting evidence that recognising and protecting culture of Aboriginal people is vital to Aboriginal people’s health and well-being.⁴ The impacts on Aboriginal people of site destruction extends beyond loss of our heritage, to closing the gap in life outcomes.

The Prime Minister has spoken of the need for a new approach to Closing the Gap that is built on partnership, giving back responsibility, listening to and empowering Aboriginal people. We urge Governments to adopt the same approach to protecting Aboriginal cultural heritage.

In recognition that more must be done, NSWALC, along with other large Aboriginal Land Councils and Native Title bodies have called for a moratorium on the destruction of cultural heritage sites and for reforms to be designed in partnerships with us.⁵

With regards to the Terms of Reference:

(a) the operation of the *Aboriginal Heritage Act 1972 (WA)* and approvals provided under the Act;

Both State sanctioned and illegal destruction of sites significant to Aboriginal people is a regular occurrence in WA, as it is in NSW. Like the outdated and inadequate laws in NSW, there is a need for a moratorium and broader reforms that embed

- Self-determination,

² Australia State of the Environment Report 2016, Heritage Chapter, page 27
<https://soe.environment.gov.au/sites/g/files/net806/f/soe2016-heritage-launch-v27march17.pdf?v=1488844294>

⁴ See [https://www.lowitja.org.au/content/Document/CtG2020_FINAL4_WEB%20\(1\).pdf](https://www.lowitja.org.au/content/Document/CtG2020_FINAL4_WEB%20(1).pdf) – page 7 & https://aiatsis.gov.au/sites/default/files/products/report_research_outputs/benefits-cfc_0.pdf

⁵ <https://alc.org.au/newsroom/media-releases/aboriginal-leaders-call-for-action-to-protect-first-nations-cultural-heritage/>

- The right for Aboriginal people to say no, and
- Strengthen protection mechanisms.

In relation to State sanctioned destruction, the current legislation in both WA and NSW allows proponents to appeal decisions they are dissatisfied with. There is no such right for Aboriginal people or the broader community. There is a fundamental imbalance of power inherent in the existing legislation

We understand the WA Government has recognized that reform is needed but its processes have been slow. Any reform process must prioritize the needs of Aboriginal people and be developed in partnership with Aboriginal people.

We also note that the Federal Government has significant responsibilities with respect to protecting the heritage of Aboriginal people. It must intervene urgently to develop new national legislation that will provide the best possible protection of the heritage of Aboriginal people.

(b) the consultation that Rio Tinto engaged in prior to the destruction of the caves with Indigenous peoples;

In relation to consultation more broadly, we seek new Commonwealth and jurisdictional legislation that mandates that Aboriginal people will make decisions in relation to Aboriginal cultural heritage. Consultation is not an appropriate substitute for consent by Aboriginal people.

(c) the sequence of events and decision-making process undertaken by Rio Tinto that led to the destruction;

Based on the information that has come to light to date, we suggest that further investigation is needed regarding whether laws, however inadequate, have been broken.

(d) the loss or damage to the Traditional Owners, Puutu, Kunti Kurrama and Pinikura people, from the destruction of the site; and

(e) the heritage and preservation work that has been conducted at the site;

The views of local Aboriginal peoples must be prioritised in these matters.

In response to the devastation that has occurred at Juukan Gorge by Rio Tinto, our organization has withdrawn investments from Rio Tinto and call on other investment holders to do the same. We are putting other companies on notice that we intend to act. We are socially and morally responsible for what we invest in - when companies conduct themselves with disregard for the impact on Aboriginal people, we will take action.

(f) the interaction, of state Indigenous heritage regulations with Commonwealth laws;

In our experience, interaction in State and Commonwealth laws rarely occurs because governments have not taken their role seriously, and often fail to respond to requests to protect sites. If there any complexity in the interactions between State and Commonwealth laws, reducing safeguards and avenues for Aboriginal communities to seek protections is not the answer.

We are concerned that rhetoric of ‘complex interaction’ and ‘reducing red / green tape’ has been misguided and has resulted in weak laws, no or minimal avenues for Aboriginal people to make decisions about Aboriginal heritage, and significant destruction.

It is essential that important safeguards and protections are improved and that avenues for Aboriginal people to protect Aboriginal cultural heritage and manage Country are expanded, not reduced.

We note that the Federal Minister has the power to issue emergency declarations under the *Aboriginal and Torres Strait Islander Heritage Protection Act*, however this is rarely ever done. Most obviously, it didn’t happen in respect to Juukan Gorge.

NSWALC draws attention to Articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**)⁶ which recognises rights of Indigenous people to self-determination, as well as rights to control and use traditional lands and territories. The Articles also stipulate that States must cooperate in good faith with Indigenous peoples through representative institutions in order to obtain the ‘free, prior and informed consent,’ of Indigenous peoples. NSWALC encourages the Committee to consider the human rights context in which States laws and policies are administered. NSWALC encourages the Committee to recognise the importance of, and honour commitments enshrined in the UNDRIP and work proactively to incorporate Declaration aims into domestic policy and legislation.

(g) the effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions;

The laws at the Commonwealth and State level in NSW are obviously ineffective and inadequate, and are in need of urgent reform.⁷ However we caution against rushed responses that are not designed in partnership with Aboriginal and Torres Strait Islander peak organisations and communities.

NSWALC has extensively highlighted deficiencies in both Commonwealth (including the *Aboriginal and Torres Strait Islander Heritage Protection Act*⁸, and *Environment Protection & Biodiversity Conversation Act*⁹) and NSW laws¹⁰, and has called for significant reforms since our inception more than 40 years ago.

To highlight just some of the inadequacies in NSW, the NSW Government continues to approve the destruction of our heritage at alarmingly high rates. For the first half of the 2020 calendar year, approximately four Aboriginal Heritage Impact Permits (**AHIPs**) – or permits to destroy Aboriginal heritage - were being issued every week by the NSW Government¹¹.

⁶ https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

⁷ Hunt, J. (2020), Cultural vandalism: Regulated destruction of Aboriginal cultural heritage in New South Wales. Topical Issue No. 3/2020, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra. <https://doi.org/10.25911/5ef088fdc313f>

⁸ See for example <https://alc.org.au/wp-content/uploads/2019/12/Federal-Review-Submission.pdf>

⁹ See for example <https://epbcactreview.environment.gov.au/sites/default/files/2020-06/ANON-K57V-XQ28-Z-%20NSW%20Aboriginal%20Land%20Council.pdf>

¹⁰ See for example <https://alc.org.au/wp-content/uploads/2019/12/180420-final-nswalc-ach-submission.pdf>

¹¹ <https://www.heritage.nsw.gov.au/permits-and-assessments/aboriginal-heritage-impact-permits/>

There is also much less transparency around major projects, which are exempt from the AHIP requirement. However, concerns are regularly raised that a significant amount of our heritage is being destroyed via NSW Government approvals for major projects.

Furthermore, despite the hundreds of thousands of Aboriginal sites across NSW, only about 100 Aboriginal Places are formally protected under the current *National Parks and Wildlife Act 1974 (NPW Act)*. Additionally, current approaches under the NPW Act are outdated (i.e. prioritising physical evidence of previous occupation as opposed to viewing Country holistically and recognising current and previous cultural values embedded within and across Country).

The high rates of destruction of Aboriginal sites, both 'approved' and illegal, continues to cause deep distress within our communities. The destruction of Aboriginal sites impacts on the ability of our peoples to maintain living cultures and create wellbeing and healthy communities. Our sites tell important stories and must be protected so Aboriginal peoples can strengthen and maintain our cultures now and in the future.

Current Aboriginal heritage provisions are primarily contained in sections 83-91 of the NPW Act. These sections are not well integrated with the development process in NSW. This results in a reactive system that often does not consider Aboriginal heritage until after the development assessment process or when Aboriginal heritage is under threat of destruction. It is also very apparent that the NSW planning laws also provide inadequate consideration and protection of Aboriginal cultures and heritages.

(h) how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites;

In NSW, we note that have been numerous reviews and inquiries into the reform of Aboriginal culture and heritage laws since in 1978. All of the reviews¹² have supported:

- Aboriginal ownership and the right of Aboriginal peoples to control their culture and heritage recognised in separate stand-alone legislation, and
- Independent Aboriginal controlled bodies to make decisions, with decentralised control of Aboriginal culture and heritage with the day-to-day management responsibilities are invested in local Aboriginal people, and Aboriginal understandings and definitions of what is culture and heritage.

We recommend that the following key principles are adopted to guide reforms to improve the protection of Aboriginal cultural heritage. Reforms must be:

1. Be positive and beneficial, and further the rights, interests and aspirations of Aboriginal & Torres Strait Islander peoples;
2. Empower Aboriginal and Torres Strait Islander peoples, and support self-determination;
3. Embed free, prior, and informed consent, and the right for First Nations people to say no;
4. Have no detrimental impacts to existing beneficial land rights or Cultural Heritage regimes;

¹² See: <https://alc.org.au/wp-content/uploads/2019/12/110215-our-sites-our-rights-final.pdf>

5. Build on existing structures Aboriginal community-controlled structures of land rights and native title;
6. Be led, supported by, and meet the needs of Aboriginal and Torres Strait Islander peoples;
7. Based on best practice international standards, including United Nations Declaration on the Rights of Indigenous People

In NSW, we seek to ensure that new laws include the following:

1. Decision making, administration, compliance, enforcement by Aboriginal people, including:
 - a. Independent Aboriginal cultural heritage State body to establish and administer the regulatory system
 - b. Local Aboriginal people making decision on local ACH matters
2. Whole of government approaches – not limited to a regime that regulates site destruction
3. Improved protections and promotion of Aboriginal culture and heritage, including conservation mechanisms, better regulatory and land use planning, protections for misuse of intangible heritage, protection and promotion of knowledges and languages, protection and support for cultural practice, access and use, appropriate repatriation mechanisms, mechanisms to support Aboriginal land rights and water rights etc;
4. Requirements for approvals by Aboriginal people about Aboriginal cultural heritage matters before planning / land use decisions are made - Aboriginal people must be able to refuse an activity or development where there will be unacceptable impacts to Aboriginal heritage, in line with the United Nations *Declaration on the Rights of Indigenous peoples*,
5. Definition of Aboriginal Cultural Heritage that reflects Aboriginal peoples understandings, recognises living culture, and ensures blanket protections
6. Strong investigation powers and enforcement and compliance provisions
7. Increased penalties
8. No or minimal roles for Ministers
9. Limited defences available to harm offences
10. Removal of merits appeals for proponents or provision of equitable merits appeals for Aboriginal people
11. Recognition that Aboriginal heritage belongs to Aboriginal people - not the Crown;
12. Resourced properly by governments.

Furthermore, we suggest that the laws should be enabling and provide a framework that supports self-determination, instead of seeking to legislate for Aboriginal community and cultural elements. The laws should ensure strong regulatory frameworks, but not seek to disempower Aboriginal people through inappropriate attempts to legislate for culture.

New laws should also ensure a strong national framework, with recourse for Aboriginal peoples where State / Territory laws have failed.

It is only through the above practices that Aboriginal cultures and heritages can be improved to guarantee the protection of culturally and historically significant sites.

NSWALC encourages Committee members to broaden understandings of ‘significance’ from one based solely on archaeological timelines and testing to an understanding that recognises holistic Aboriginal understandings of Country. It is fundamental that the richness and diversity within and between our peoples, cultures, and languages (both contemporary and historical) are recognised for their significance as determined by our peoples. By only referring to the past, there is a very real risk of ignoring the current vibrant, contemporary cultures within and between Aboriginal communities and peoples.

(i) opportunities to improve indigenous heritage protection through the *Environment Protection and Biodiversity Conservation Act 1999*; and

Australia’s key piece of national environmental law – the *Environment Protection & Biodiversity Conservation Act 1999 (EPBC Act)* – is not up to the task of providing that strong framework to protect Aboriginal heritage. It does not adequately protect Country, or our cultural heritage, and does not appropriately recognise and provide for the rights and interests of Aboriginal people.

The current EPBC Act review provides a key opportunity for the Commonwealth Government to implement enhanced mechanisms to both protect the environment, ensure self-determination, and provide Aboriginal communities with meaningful opportunities to protect and manage Country. This is in line with existing government commitments to Closing the Gap and will, in turn, benefit all Australians.

The operation of the EPBC Act needs to be improved to better support the rights and interests of Aboriginal people. Aboriginal people should be involved in decision making, including as approval authorities. Greater emphasis should be placed on Aboriginal self-determination and rights (including free prior informed consent requirements), and land management and biodiversity stewardship.

Specifically, NSWALC recommends Australia’s environmental laws be strengthened to recognise and provide for the rights and interest of Aboriginal people, including to:

- Better recognise and promote Aboriginal people’s environmental management, stewardship, and consensual knowledge sharing, and
- Facilitate Aboriginal people’s decision making including in regulatory water and land management bodies, in line with requirements for free prior informed consent informed by the United Nations Declaration on the Rights of Indigenous Peoples (to which Australia is a signatory).
- Recognise the unique status of Aboriginal peoples in Australia in all aspects of environment, biodiversity, land, heritage and natural resource management, including through effective decision-making and partnership arrangements,

We note that interim report¹³ on the EPBC Act review recognises that current environmental laws, including in relation to Aboriginal cultural heritage and engagement with Aboriginal people are failing and need reform.

¹³ <https://epbcactreview.environment.gov.au/resources/interim-report>

While some are some potential improvements flagged in the interim report, these are only a very small step in the right direction, and alone will not adequately address the scale of the issues.

Furthermore, the Commonwealth government response to date, indicates a very rushed approach to setting 'standards' that have not been developed in partnership with peak Aboriginal bodies. We are concerned that a 'national standards' model, which devolves responsibility to the States/Territories, is not capable of achieving effective mechanisms for strong environmental or Aboriginal cultural heritage protections. This approach risks remove important safeguards and recourse, and setting a course for weak 'minimum' rather than best practice standards.

(j) any other related matters.

The management of Aboriginal culture and heritage is inextricably linked with land and sea Country. It would be remiss not to acknowledge this relationship and also fail to recognise the need for broader reform regarding land and water management. We also note the work Ms. Terri Janke has highlighted the deficiencies of the laws relating to Aboriginal knowledge.¹⁴

We recommend that the Committee recognise the broader issues and opportunities related to supporting, protecting and promoting Aboriginal cultural heritage. We also recommend that the principles of Indigenous data sovereignty guide and inform the future work of the Joint Standing Committee.¹⁵

In closing, we are determined to work together to develop a reforms and solutions to this serious problem. We seek commitments from all governments to develop and implement reforms led by Aboriginal and Torres Strait Islander communities. Governments must partner with us to develop and implement broader reforms that uphold our rights to self-determination. It is only through genuine, meaningful partnership that travesties like that of Juukan Gorge destruction can be avoided in the future. We ask that the Committee listen to and prioritise Aboriginal and Torres Strait Islander people's voices in this inquiry.

Thank you for the opportunity to provide these comments. We would be happy to provide further information and appear at any public hearings. Please contact us on 9689 4444 or policy@alc.org.au.

Sincerely

James Christian
CEO
NSW Aboriginal Land Council
Date: 31 July 2020

¹⁴ Terri Janke and Maiko Sentina, *Indigenous Knowledge: Issues for Protection and Management*, IP Australia, Commonwealth of Australia, 2018

¹⁵ Walter, M. Lovett R., Bodkin Andrews, G. & Lee, V. (2018) *Indigenous Data Sovereignty Briefing Paper 1*. Miam nayri Wingara Data Sovereignty Group and the Australian Indigenous Governance Institute and Miam Nayri Wingara. (n.d.). KEY PRINCIPLES. [online] Available at: <https://www.miamnayriwingara.org/key-principles/> [Accessed 31 Jan. 2019]