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

Dear Committee Secretary,

We would like to thank you for the opportunity to contribute to the Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia.

AIATSIS is Australia's national Institute dedicated to Aboriginal and Torres Strait Islander peoples' knowledge, societies and cultures. We are both the custodian of Australia's national collection of Aboriginal and Torres Strait Islander heritage materials and one of Australia's publicly funded research agencies.

Rooted in our knowledge of Indigenous culture and heritage, including native title, land and water management and Indigenous governance, our submission aims to:

- highlight the narrow role that Aboriginal people have in heritage protection
- enhance the quantity and quality of Indigenous consultation during decision making regarding culture and heritage
- raise the standard of what is acceptable regarding culture and heritage protection
- elevate the cultural value placed upon heritage by the Indigenous community to the value placed upon commercial and archaeological interests, and
- decouple cultural value from archaeological value.

We maintain that legislative and decision making processes are distant from effective cultural processes that could enrich outcomes. Further, we recommend a modernisation of these processes that aligns with best practice heritage management and the *Native Title Act 1993* (Cth).

Yours sincerely,

Dr Lisa Strelein

Executive Director, Research and Education Group
31 July 2020
Enc AIATSIS submission





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AIATSIS Submission

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

Lisa Strelein, Peter Bligh, Tran Tran and Stephanie Bloxsome



Understanding Indigenous heritage and value

The destruction of the Juukan Gorge demonstrates how Indigenous culture and heritage is undervalued by law and policy in Australian society. In particular, Commonwealth and Western Australian heritage laws prescribe a very narrow role for Indigenous peoples in large scale developments on their Country. This narrow role is inconsistent with global best practice principles for development, the recognised rights of Indigenous peoples and obligations of the state under international law.

An operational disconnect

In order to understand what led to the destruction of the Juukan Gorge, it needs to be acknowledged, from the outset, that there can be operational differences between formal developmental approval systems that are enshrined in legislation and Indigenous cultural systems. With respect to the latter, elders and knowledge holders can possess a potentially deep and complex understanding of cultural value; value that is both tangible and intangible. Moreover, that knowledge or value is not always appropriate to share widely.

Legislation and culture operating on these two different planes, with a narrow intersection point (most likely at the beginning of a development or legislative process), can confuse and distort the definition and protection of Indigenous culture and heritage.¹ Therefore, in order to limit this confusion and distortion, heritage legislation has a critical standard-setting role and must include frequent and broad consultation of culturally appropriate members of the relevant Indigenous community.² Tools such as cultural statistics, inventories and cultural mapping must support Indigenous community-driven processes for informing the protection of Indigenous culture and heritage.

Recognition of culture and heritage in Australia

Impoverished understandings of Indigenous culture and heritage are reflected in limited opportunities for the full and accurate representation of appropriate Indigenous perspective to inform laws, policies and processes – including persistent

¹ Tran, Tran and Barcham, Clare. "(Re)defining Indigenous Intangible Cultural Heritage" *AIATSIS Research Publications* 37 (2018), p.5.

² Tran, Tran and Barcham, Clare. "(Re)defining Indigenous Intangible Cultural Heritage" *AIATSIS Research Publications* 37 (2018), p.5 and The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance, 2013 <<https://australia.icomos.org/wp-content/uploads/The-Burra-Charter-2013-Adopted-31.10.2013.pdf>>.

inconsistencies and the operational redundancy of Commonwealth and state based heritage legislation.³

Australian states and territories have primary responsibility for the protection of Indigenous heritage.⁴ However, at the international and national level, heritage recognition and protection is understood as being central to development policy and constitutes a critical pre-condition to successful development for the whole of Australia.⁵ Despite being an accepted part of Australia's public law and funding framework, Indigenous intangible and tangible cultural heritage is poorly recognised in state based policy and legal frameworks that purportedly aim to balance heritage recognition and development activity.⁶ We argue that this balance is better achieved through improved recognition and valuing of Indigenous culture and heritage, and a shift toward shared decision making processes underpinned by legislation.

Broadly, the circumstances that allow for the lawful, but undesired, destruction of Aboriginal sites under s 18 of the *Aboriginal Heritage Act 1972* (WA) (AHA) should be unacceptable.⁷ This destruction highlights severe inadequacies in current heritage legislation.⁸ These inadequacies directly relate to how heritage is recognised, valued and protected and how its desecration or destruction is compensated for. The major challenge in Australia is to integrate appropriate Indigenous cultural processes and values into all public policies, decision-making mechanisms and developmental practices. This challenge is most acute in land development and land use planning, particularly mining, where economic benefits can be deemed to be more important than heritage values.⁹

³ *Review of the Aboriginal Heritage Act 1972: Proposals for new legislation to recognise, protect and celebrate Western Australia's Aboriginal Heritage*, Discussion paper, March 2019 <<https://www.dplh.wa.gov.au/getmedia/ab8c0b4a-7941-4b31-aa89-658b74c976ad/AH-Review-AHA-discussion>>; *Independent review of the EPBC Act: Interim Report* June 2020 <https://epbcactreview.environment.gov.au/sites/default/files/2020-07/EPBC%20Act%20Review_Interim%20Report_June2020.pdf>

⁴ Department of Agriculture, Water and the Environment, *Indigenous Heritage Laws* <<https://www.environment.gov.au/heritage/laws/indigenous>>.

⁵ Tran, Tran and Barcham, Clare. 2018 *(Re)defining Indigenous Intangible Cultural Heritage* AIATSIS Research Publications 37.

⁶ McGrath, Pamela, ed, 2016, *The Right to Protect Sites: Indigenous heritage management in the era of native title*, AIATSIS Research Publications, Canberra, Australia.

⁷ Where land users conclude that impact to an Aboriginal site is unavoidable, the consent of the Minister must be sought under s18 of the *Aboriginal Heritage Act 1972* (WA) (AHA). Notice must be given to the Aboriginal Cultural Material Committee (ACMC) accompanied by the information as to the intended use of the land and sites on the land. There is no requirement that an Aboriginal heritage survey be included with a s 18 notice.

⁸ There are prominent instances where mining companies have had permission to remove/destroy culturally significant sites such as at Noonkanbah (1980), Karijini National Park (1992), Old Swan Brewery redevelopment (1995), Burrup Peninsula (2006), Ungani oilfields (2013).

⁹ Veronica (Dolly) Talbott, a Gomeri woman unsuccessfully sought judicial review of a decision made the Environment Minister for declining to make a declaration under s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSHP Act) over the area of the

With reference to the Juukan Gorge case specifically, it can be safely assumed that the expansion of the mine that led to the destruction of the Aboriginal culture and heritage at this site would have had some economic benefit. This is commercially logical. Further, the archaeological significance of the Juukan Gorge site is evident, even in the name of this Inquiry. The age of 46 000 years has been well publicised and holds the primary weight of significance. What is missing, and what is missing in cultural and heritage discourse more generally, is an expression of the cultural significance of the site. What the site meant, provided and connected to for the Puutu Kunti Kurrama and Pinikura peoples (PKKP), has not been shared or understood. If this meaning, provision and connection are culturally sensitive and cannot be shared, it is likely that this connection may be of immeasurable cultural significance to the PKKP and its desecration or destruction could be culturally terminal or have a traumatic negative impact across generations, independent of any economic or archaeological considerations.

Toward shared decision-making

One of the most critical elements of this Inquiry is the nature and quality of consultation and the value of its resultant information.

Generally, there can be a natural tension between the protection of Indigenous culture and heritage and the undertaking of development, particularly mining. In order to be able to preserve and protect the context of culture and heritage, as well as the tangible and intangible culture and heritage itself, Indigenous people should have the right to give or withhold consent to any project on their land. This is the principle of free, prior and informed consent (FPIC).

The physical location of heritage is part of its cultural significance. Noting the important role of Indigenous communities in safeguarding their heritage and the continual connection held by Indigenous Australians to their culture and heritage the use of places that are culturally significant should be retained kept intact or undisturbed as a matter of priority.¹⁰ This is consistent with Australia's commitments under the Burra Charter and the UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage 2003*.

FPIC enacted in Australian, and particularly Western Australian, legislation, would enshrine genuinely shared decision making. In combination with an adherence to

proposed Shenhua Mine. It was argued that s 10 (1)(d) of the ATSIHP Act did not enable the Minister to consider the social and economic impacts of the mine on the local community: *Talbott v Minister for the Environment* [2020] FCA 1042.

¹⁰ The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance, 2013 <<https://australia.icomos.org/wp-content/uploads/The-Burra-Charter-2013-Adopted-31.10.2013.pdf>>; *Convention for the Safeguarding of the Intangible Cultural Heritage 2003*, (entered into force 20 April 2006) <<https://ich.unesco.org/en/convention>>.

best practice standards, like that of the Burra Charter, FPIC would ensure that any proposed destruction of cultural heritage would occur on the terms of the relevant Indigenous peoples impacted.¹¹

Recent compensation cases under native title law recognise the immense consequences of destruction both with and without relevant cultural permissions. This includes trauma and the impact this has on communities, including future generations.¹²

Rio Tinto and PKKP People had created an Indigenous Land Use Agreement (ILUA) in 2013. ILUAs are used as a contract between Native Title holders and other parties, but are not a statutory obligation. Generally rights, including compensation are included in the terms of ILUA's as well as future acts. These agreements are kept confidential between the parties. If the PKKP people are entitled to compensation in will require evaluation.¹³ If this does go to Court then compensation will be assessed off the decision held by the court in the Timber Creek case.¹⁴

While the quantum of loss and valuation of cultural connection and practice is by no means settled, a monetary and social recognition of the lack of access to cultural sites and areas is not reflected at all in WA's heritage legislation.¹⁵ As a result, there is no 'cost' to a company or the state commensurate with the value of the site and the impact or loss imposed on the community. Limited genuine involvement of relevant Indigenous communities has, naturally, limited understanding of the impact of loss. The need for appropriate compensation highlights a heritage protection gap – leading to the equally unsurprising and shocking consequences of Juukan Gorge.

Heritage legislation preservation and protection

The AHA was created in 1972 and predates both native title and Commonwealth heritage legislation. The AHA makes no reference to native title legislation, even

¹¹ The 2003 UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage* affirms the central importance of Indigenous peoples in preservation of intangible cultural heritage.

¹² For example in the recent *Timber Creek* decision, the High Court awarded \$2.7 million to the Ngaliwurru and Nungali Peoples in the most significant compensation case in Native Title. This compensation included three components (1) economic value (2) cultural and spiritual loss and (3) loss of opportunity – an award to reflect the time between compensation being awarded. The High court awarded a further \$1.3 million for cultural loss.

¹³ Under s 125A of the *Mining Act 1978* (WA) mining companies are liable to pay compensation.

¹⁴ The three pronged approach to compensation was cultural and spiritual harm, freehold value of the land and accumulative harm over time, which resulted in could be in the millions if they are found successful: *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7. The compensation awarded to the Ngaliwurru and Nungali Peoples was in accordance to Part 2 of the NTA for loss, diminution, impairment or other effect of certain acts on the Claim Group's native title rights and interests over their lands.

¹⁵ Under the AHA, penalties are capped at \$100,000 for individual offences: s 57(b)(ii) and damage to a registered site is \$1,000,000: s 129 (1)(b): *Heritage Act 2018* (WA).

though it is common for native title determinations to include a right to protect sites. This approach aligns more closely with best practice.¹⁶ Native title recognition creates important processes and exemptions for Indigenous groups to protect their cultural heritage and cultural practice.¹⁷ This protection however is not achieved directly through legal processes but via the assertion of cultural connections through heritage protection agreements or ILUAs and maintenance of Country via recognised programs such as the Indigenous Protected Areas program.¹⁸

Currently, in jurisdictions such as Queensland native title holders are recognised as heritage bodies.¹⁹ As noted above, sustained and consistent relationships between Indigenous groups, state governments, and development activity ensures that heritage is appropriately managed. In Western Australia, the lack of alignment of the AHA to native title is evident in the specific technical focus on academic ‘experts’ rather than relevant cultural knowledge holders or the perspective of the relevant Indigenous community and knowledge holders.²⁰ For a large number of developments that are considered under the AHA, archaeological significance is emphasised rather than Indigenous cultural significance.²¹ This emphasis creates a potential for a perverted outcome as the likelihood of an imbalance between the quantity and quality of values held by traditional owners and those put forth for consideration by the Aboriginal Cultural Material Committee (ACMC) results in an

¹⁶ The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance, 2013 <<https://australia.icomos.org/wp-content/uploads/The-Burra-Charter-2013-Adopted-31.10.2013.pdf>>, Art 12.

¹⁷ For example the *South Australian Aboriginal Heritage Act 1988* (SA) enables statutory protection and preservation of Aboriginal Heritage separate to and consistent with native title. Aboriginal Heritage rights applies to all lands and waters within South Australia, not just Crown lands.

¹⁸ The NTA ensures existing mining interests will prevail and has a ‘right to negotiate’ not a right to veto a project. If a native title claim group or holders wanted to object to a project (or future act) they must do so within 4 months. Further, in *Western Desert Lands Aboriginal Corporation v Western Australia* the court held that even though the Martu people had exclusive possession under Native Title, they still couldn’t prevent a mining development from proceeding.

¹⁹ Note that in 2018, there have been a number of legal applications relating to the administration of the Queensland *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003*. The current legislation establishes a clear hierarchy to identify relevant native title parties for heritage consultation. The decision of *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships* [2017] QSC 321 threw open the question of how registered native title claimants are recognised as ‘native title parties’ under section 34 of the acts, especially where there are multiple or amended RNTBCs in operation. The existing Duty of Care Guidelines remain in place as a means of complying with the cultural heritage duty of care established by the legislation and will continue to operate until such time as revised Guidelines are formulated for gazettal.

²⁰ Under s 28 of the AHA, the Aboriginal Cultural Material Committee is appointed by the Minister and s28 (4) outlines that members are chosen, ‘whether or not they are of Aboriginal descent’, based on specific knowledge and experience in evaluation of cultural significance sites, thus privileging technical rather than cultural expertise. A new Aboriginal Heritage Council (AHC) has been proposed to enforce standards of research for the reporting and registration of Aboriginal heritage.

²¹ The need for modernisation of WA’s current heritage laws has been long recognised: AHA Consultation Paper 2018.

incomplete fact pattern on which decisions are based.²² This undermines the Burra Charter, the primary standard of practice for providing advice, making decisions about, or undertaking works to places of cultural significance.

The Western Australian Government sought feedback on the AHA in 2018.²³ Similar issues and concerns came out of consultations. Priorities for reform included prioritising regionalisation of the AHA, increasing penalties and ensuring Aboriginal people have the right to review s 18 decisions.

To date, existing gaps under WA heritage legislation have been filled through the use of heritage protection agreements. These agreements articulate processes for heritage assessment to ensure that Aboriginal heritage sites are identified early on. These agreements require initial surveys involving traditional owners and anthropologists to identify a significant site. In the absence of a heritage protection agreement or a clear separation of archaeological and cultural heritage significance, current processes under the AHA continue to privilege development interests.²⁴

The AHA fails to recognise that Aboriginal people have a special interest in sites on their Country and then empower them in the decision making regarding their culture and heritage. The AHA uses language that suggests that the conservation of a heritage site is for the public, not specifically for the Aboriginal community.²⁵ Further, in 2013 there was significant deregistering of sites – after a shift in focus from community significance to state significance.²⁶

To date, 463 applications have been lodged by mining companies to legally destroy sites of significant heritage under s 18. None has been rejected. In the instance of Juukan Gorge, there was evidence of significant archaeology on the site in 2011, but the application made under s 18 of the AHA was ultimately approved. The Juukan Gorge case highlights a systemic issue of Indigenous disempowerment and the undervaluing of Indigenous culture and heritage despite information that would indicate significance requiring protection.

Noting this operational redundancy, the AHA has been the subject of reforms in the past 15 years with proposed changes seeking to give Aboriginal people greater

²² In contrast, the *Northern Territory, the Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) places greater emphasis on Land Councils in decision making processes and contains the right of veto.

²³ The communities that were consulted are Albany, Broome, Bunbury, Esperance, Kalgoorlie, Karratha, Kununurra, Narrogin and Port Hedland.

²⁴ For example, an objection to the declaration of an Aboriginal site as a protected area can be made in writing to the Minister. Therefore mining and other development bodies can appeal, even though Aboriginal people do not have a right to appeal under the Act: s 21, AHA.

²⁵ This position was later upheld in *Traditional Owners - Nyiyaparli People and Minister for Health, Indigenous Affairs* [2009] WASAT 71].

²⁶ This deregistration was based on internal policies in the application of s 5A and s 5D of the AHA.

control in the management of their own cultural heritage. However, these reforms are contextualised within, and determined by, shifts in the relationships between Aboriginal people and the Western Australian government. While the AHA has developed mechanisms for consulting or involving Aboriginal people in processes, this involvement continues to place a greater emphasis upon the archaeological or economic significance instead of, as best practice would dictate, the significance to the people to whom the culture and heritage are directly relevant.²⁷

Commonwealth legislation

It has been reiterated that the overall effectiveness of Aboriginal heritage protections remains affected by gaps in legislation, for example, by the recent interim report from the Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and by the 2013 *Mineral and Energy Resource Exploration Report* by the Productivity Commission.

Federal legislation is focused on areas of national significance under the EPBC Act.²⁸ The Review of the EPBC Act has noted that the legislation is not fulfilling its objectives as they relate to the role of Indigenous peoples in protecting and conserving biodiversity, working in partnership with and promoting the respectful use of their knowledge. The review identifies a policy culture of tokenism and symbolism that doesn't fully value Indigenous culture and heritage in decision making, a lack of operational harmony between development processes and cultural processes, and a lack of authority given to Indigenous perspectives or lack of shared decision making.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) can be used by any Indigenous person, once thresholds of threat and particular significance are met, to request that the Environment Minister use their discretion to protect any area or object where it is under threat of injury or desecration and where state or territory law does not provide for effective protection. The ATSIHP Act, like the AHA doesn't align with the NTA or the EPBC Act.

The Department of Agriculture, Water and the Environment (formerly the Department of Environment) developed an Australian Heritage Strategy in 2015 in an attempt to unify governments and the community in managing natural, historical and Indigenous places in response to inconsistencies in heritage laws and practice.

²⁷ *Independent review of the EPBC Act: Interim Report June 2020*
<https://epbcactreview.environment.gov.au/sites/default/files/2020-07/EPBC%20Act%20Review%20Interim%20Report%20June2020.pdf>; The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance, 2013 <<https://australia.icomos.org/wp-content/uploads/The-Burra-Charter-2013-Adopted-31.10.2013.pdf>>.

²⁸ Indigenous Heritage Laws, Department of the Environment and Energy, (viewed 16 July 2020) archived at <https://perma.cc/Q9N7-L7HF>.

These Commonwealth legislation and policies are clearly misaligned, operating independently and are not easy to understand or navigate. This does not bode well for Indigenous engagement or protection of culture and heritage matters at a national scale. Further, this legislation does not empower Indigenous people in decision making or promote their perspective and appropriately value their culture and heritage. These shortcomings bode a word of caution in the coming months in the implementation of the National Cabinet agreement to move to single-touch environmental approvals through bilateral approval agreements (while simultaneously developing formal national standards) with the aim of creating more employment.²⁹ The most significant impact of this announcement is the fact that these projects will occur or are likely to occur on Indigenous lands – with Aboriginal communities bearing a significant and high risk burden of COVID19 ‘recovery’.³⁰

Summary

The destruction of the Indigenous culture and heritage at Juukan Gorge, without the free, prior and informed consent of the traditional owners, should not have happened. It was enabled by flawed state heritage law that sidelines the universal and particularly significant value of culture and heritage to traditional owners. This is reinforced by misaligned Commonwealth legislation that disempowers Indigenous knowledge and compounds disingenuous Indigenous involvement in decisions.

Simultaneous reviews of the AHA and the EPBC Act represent a renewed opportunity to address the inequities and ineffectiveness of heritage protection laws. The review of the EPBC act provides a renewed opportunity to pursue compensation and comprehensive agreement making opportunities that will also streamline heritage assessment approvals – premised on the priorities and decision making protocols of Indigenous communities that are impacted. In line with the interim report from the review of the EPBC Act, there is a clear need for genuine decision making and involvement of Indigenous processes, perspectives and values within national heritage legislation. Some of the obvious and most notable changes required are based upon principles of best practice, which would enable an appropriate valuing of Indigenous culture and heritage (decoupled from archaeological perspectives), promote the appropriate involvement of relevant Indigenous peoples in legislative processes, support compensation measures and bring to an end the non-consensual desecration and destruction of Indigenous heritage and culture.

²⁹ Prime Minister of Australia *Media Statement* 24 July 2020.

³⁰ For example the expansion of the BHP Olympic Dam mine has been listed as well as iron ore projects in Western Australia.