

***Submission to the Joint Standing Committee on  
Northern Australia: Inquiry into the destruction of  
46,000 year old caves at the Juukan Gorge in the  
Pilbara region of Western Australia***

*July 2020*

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**With thanks:**

This submission was authored by Mr Paul Wright, ANTaR National Director and Ms Gemma McGreal (Researcher/Editor).

**About ANTaR**

ANTaR is a national advocacy organisation working for Justice, Rights and Respect for Australia's First Peoples. We do this primarily through campaigns, advocacy and lobbying.

Our current national campaigns include:

- Constitutional Recognition and Equality – for Constitutional change to recognise Australia's First Peoples and remove discriminatory elements from our founding document; and
- Advocating for treaty and agreement-making processes across Australia.

We also engage in national advocacy across a range of policy and social justice issues affecting Aboriginal and Torres Strait Islander communities, including native title, languages and cultures, economic and community development, remote communities' services and infrastructure, health and human rights.

ANTaR is a foundational member of the Close the Gap Campaign Steering Committee, the Change the Record Campaign Steering Committee and the Redfern Statement Alliance.

ANTaR has been working with Aboriginal and Torres Strait Islander communities, organisations and leaders on rights and reconciliation issues since 1997. ANTaR is a non-government, not-for-profit, community-based organisation.

*“More often than not, Traditional Owners are open to discussing economic development happening on their Country. But the destruction of a heritage site against their wishes is indicative of unjust laws. WA’s Aboriginal Heritage Act is currently under review and we would call on the WA government to make these reforms a matter of priority. We also call on the Commonwealth government to nationalise Aboriginal heritage protection standards. For once these heritage sites are gone, they are gone forever.”<sup>1</sup>*

Jamie Lowe, CEO  
National Native Title Council

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<sup>1</sup> NNTC Media Release (27.5.20) - [https://nntc.com.au/media\\_releases/destruction-of-aboriginal-heritage-we-need-to-focus-on-reform/](https://nntc.com.au/media_releases/destruction-of-aboriginal-heritage-we-need-to-focus-on-reform/)

## **Introduction**

Thank you for the opportunity to provide commentary for the consideration of the ***Joint Standing Committee on Northern Australia: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia***. This Joint Select Committee inquiry must be a critical examination of what has gone wrong in Western Australia at the Juukan Gorge, and also the destruction elsewhere across Australia of our Cultural Heritage sites of national importance.<sup>2</sup>

ANTaR has a long interest in the progress of First Nations Peoples in Australia and we have worked closely with organisations like the National Native Title Council ('NNTC') to advocate for the rights of Aboriginal and Torres Strait Islander peoples in relation to treaty, land rights and native title.

This submission draws upon, and commends, the work and leadership of the NNTC and our other First Nations leaders, endorsing the submissions made by the NNTC, and commends their recommendations through their submission for this inquiry.

This submission will provide views that focus ANTaR's contribution from the Inquiry's 'Terms of Reference' as follows:

- f) the interaction, of state indigenous heritage regulations with Commonwealth laws;
- 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;
- h) how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites; *and*
- j) any other related matters.

Before discussing some specifics relating to the legislative protections in the State, Territory and Federal jurisdictions, ANTaR asserts the following points:

1. Fundamental to any reform of Australia's Heritage protection regime is to have First Nations people at the decision-making table, resourced and empowered to participate in the considerations, and to inform the outcomes. As per Article 3 of the United Nations

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<sup>2</sup> Juukan Gorge Aboriginal Heritage site just one of many destroyed (ABC News) <https://www.abc.net.au/news/2020-06-11/juukan-gorge-aboriginal-heritage-site-just-one-of-many-destroyed/12337562>

Declaration on the Rights of Indigenous Peoples (UNDRIP): 'Indigenous peoples have the right to self-determination... (and) by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'<sup>3</sup>

Article 8 of UNDRIP goes further, adding that:

1. *Indigenous peoples and individuals have the right not to be subjected to forced assimilation or **destruction of their culture**.*
2. *States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of **their cultural values** or ethnic identities; (b) Any action which has the aim or effect of **dispossessing them of their lands, territories or resources**;*<sup>4</sup>

Article 11 of UNDRIP states:

*Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes **the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.***<sup>5</sup>

This right extends to Aboriginal and Torres Strait Islander peoples having agency in the determination of sites under consideration for protection. Australia is a signatory to UNDRIP and obligated to ensure the rights of First Nations peoples in Australia are respected and enjoyed. The Juukan Caves travesty highlights the significant power imbalance and legislative failures in our system, as it fails to heed, or even hear, the concerns of the Traditional Owners of the land. Although this destruction is widely considered horrifically wrong, it was technically lawful because of the weak legal protections provided by current legislation.<sup>6</sup> These ineffective 'legal protections' are not only disrespectful to Aboriginal people, past and present, but are reflective of policies across the entire country that continues to fail Australia's First Nations peoples.<sup>7</sup>

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<sup>3</sup> United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) - [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf)

<sup>4</sup> Ibid.

<sup>5</sup> Ibid. (UNDRIP)

<sup>6</sup> 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>

<sup>7</sup> NSW ALC, Statement from the NSW Aboriginal Land Council on Sacred Site Destruction in the Pilbara, <https://alc.org.au/newsroom/statement-from-the-nsw-aboriginal-land-council-on-sacred-site-destruction-in-the-pilbara/>

This power dynamic must be addressed, and the self-determined authority of Traditional Owners recognised, respected and adhered to.

A recommended approach that has been endorsed in previous reviews commissioned by the Australian Government includes the development of stand-alone Indigenous cultural heritage legislation, and for an Aboriginal controlled cultural heritage commission to be appointed. This would not only provide greater protection to cultural sites, but is also in line with the international standards embodied in the UN Declaration of the Rights of Indigenous People. More control in such matters will not only aid in supporting the right to self-determination for First Nations peoples, but the authority in discussions regarding ownership and protection of Aboriginal and Torres Strait Islander culture and heritage should be placed with First Nations peoples.<sup>8</sup>

As noted by the NNTC, Prescribed Bodies Corporate ('PBC') which are established under the *Native Title Act 1993* and have Native Title responsibilities over sites should be also resourced appropriately to rebalance the existing power imbalances discussed above.

The NNTC submission to this inquiry states (which we endorse):

*'Thus, where a PBC exists, Indigenous cultural heritage legislation should vest in that PBC control of the management of the Indigenous cultural heritage aspects of any proposal that will impact upon the Indigenous cultural heritage of the PBC's native title holders. Where a PBC does not yet exist, it may be that there are Traditional Owner organisations that can be legitimately characterised as "representative organisations". The Commonwealth Indigenous cultural heritage legislative regime should consider including mechanisms for the identification and appointment of such organisations to undertake this role.'*<sup>9</sup>

Finally, any heritage protection regime must be accompanied with the resources to ensure the ongoing maintenance and protection of designated sites of cultural and

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<sup>8</sup> 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>

<sup>9</sup> National Native Title Submission to the JSC Inquiry on Juukan Caves (July 2020)

historical significance. We note the success of the Indigenous Ranger program across Australia, which does so much to protect cultural sites as well as the environmental protection and land management work and is supported by the Federal government.<sup>10</sup> We strongly suggest that this program should be properly resourced to ensure nationwide heritage protection for cultural sites.

The protection of these sites of cultural and significance obviously have profound importance to the Traditional Owner groups that own and care for the land. The Puutu Kunti Kurrama and Pinikura people (PKKP) were the most directly impacted by the destruction of the Caves that had shown continual human interaction for over 40,000 years. However, this loss is not the PKKP peoples alone. First Nations peoples across Australia felt the loss and pain of the destruction of the Caves, as did a significant and growing number of non-Indigenous Australians. ANTaR was inundated with messages of concern and support after the news of the destruction of the Juukan Caves was made public.

The Cultural/Heritage regime in each jurisdiction must acknowledge that, beyond the direct ownership of these sites by the Traditional Owners with Native Title claim, they are (secondarily) of immense value and importance to all Australians and should be considered as such. These sites are cultural and historical inheritances for all Australians and underline the ancient, direct, specific, continuing and primary ownership of the First Nations peoples.

2. The ongoing destruction of cultural sites raises an important parallel issue of how the truth and importance of this cultural inheritance, which has been persevered over millennia by the First Nations peoples of this continent, is understood and appreciated. It is not only about protecting sacred sites, but also recognising, supporting and respecting Aboriginal and Torres Strait Islander knowledges, languages and cultural practices. The Uluru Statement from the Heart along with a First Nations 'Voice' enshrined in the Australian Constitution, and a framework of Treaty, has called for a Makarrata commission to drive a process of Truth Telling in Australia.<sup>11</sup>

There are now numerous, powerful examples internationally of how Truth Telling processes have made significant contributions to healing and understanding in

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<sup>10</sup> Indigenous Rangers: Working on Country -

<https://www.niaa.gov.au/indigenous-affairs/environment/indigenous-rangers-working-country>

<sup>11</sup> Uluru Statement from the Heart (2017) - [https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru\\_Statement\\_From\\_The\\_Heart\\_0.PDF](https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF)

conflicted, broken societies. The current focus on how Australia protects its cultural and historical inheritance is emblematic of why a Truth Telling process is so crucial and necessary. As Professor Tom Calma said at the 2018 Truth Telling Symposium put on by The Healing Foundation and Reconciliation Australia:

*“Truth Telling is about developing a shared understanding, which can serve as the basis for us all to move forward together. At its core, truth telling must be driven by the goal of recognising rights and driving reform.”<sup>12</sup>*

### **States, Territories and the Commonwealth**

3. It is evident that existing protection mechanisms are failing. The destruction of the Juukan Caves by Rio Tinto in May 2020 is simply the most recent, high profile example to take place in Australia over the last 230 years. The State and Territory-based legislative protections are not preventing the systematic loss of sites that hold immense cultural, historical and anthropological significance.

The destruction of sacred sites occurs at an alarming rate, to the point that Aboriginal Heritage Impact Permits are issued up to five times per week, granting permission to corporate bodies to damage sacred sites. This does not even encompass the illegal damage that is caused through vandalism.<sup>13</sup>

As Dr Janet Hunt has recently articulated in the context of NSW Heritage protection:

*The asserted purpose of Aboriginal cultural heritage legislation is to protect the valuable and important Aboriginal cultural heritage of this ancient land. In NSW, the law is meant to protect ‘places, objects and features of significance to Aboriginal people’ (NPWA s. 2A) itself a rather narrow definition of Aboriginal cultural heritage that excludes cultural landscapes and intangible cultural heritage. But the legislation clearly fails to do so.<sup>14</sup>*

If the current State and Territory protections are not fit for purpose, not adequately enforced or are conversely contributing to the systematic destruction of sites of National

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<sup>12</sup> Truth Telling Symposium Report (2018) - <https://www.reconciliation.org.au/wp-content/uploads/2019/02/truth-telling-symposium-report1.pdf>

<sup>13</sup> NSW ALC, Statement from the NSW Aboriginal Land Council on Sacred Site Destruction in the Pilbara, 2020

<https://alc.org.au/newsroom/statement-from-the-nsw-aboriginal-land-council-on-sacred-site-destruction-in-the-pilbara/>

<sup>14</sup> 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>

importance, then a root and branch review is required in each jurisdiction. As stated by the grouping of Aboriginal and Torres Strait Islander peak organisations and Land Councils in June 2020:

*“We find ourselves in this situation because governments, of both political persuasions and at all levels, have rarely been prepared to put the protection of Aboriginal heritage ahead of development and in the past 20 years, other than in the rarest of cases. They have let their legislation, supposedly to protect our heritage, to fall into disuse or to focus on regulating destruction, rather than protecting, enhancing and educating about our living cultures unique to this country.”<sup>15</sup>*

This is clearly not good enough. In WA alone, it was reported that ‘of the 463 applications lodged (*under the WA Heritage protection regime*) over the past decade where WA mining leases were to impact Aboriginal heritage sites, none were rejected.’<sup>16</sup>

ANTaR will not provide comment on the legislation particulars of each jurisdiction but rather we refer to and endorse the comments made by the NNTC in their Submission to this inquiry (see their ‘Proposed Legislative Structure’ section). However, we do assert that the Federal government needs to provide national leadership and support for a consistent framework for protecting these sites of local, national, and even international significance.

The two pieces of legislation that deal with Heritage protection at the Federal level being the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* (**ATSIHP Act**)<sup>17</sup> and the *Environmental Protection and Biodiversity Conservation Act 1999* (**EPBC Act**)<sup>18</sup> are failing to provide the backstop security, or last resort protection, that they should. This inquiry should encourage a much deeper root and branch review of the Federal legislation and how it operates with the state and territory legislative regimes.

3. Finally, we commend the adoption of the ‘Best Practice Standards’ as outlined by the Heritage Chairs and Officials of Australia and New Zealand (HCOANZ). We understand that the ‘Best Practise Standards’ were developed by First Nations members of the

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<sup>15</sup> NNTC Media Release (17.6.20) Aboriginal Leaders call for action to protect First Nations Cultural Heritage - [https://nntc.com.au/news\\_latest/aboriginal-leaders-call-for-action-to-protect-first-nations-cultural-heritage/](https://nntc.com.au/news_latest/aboriginal-leaders-call-for-action-to-protect-first-nations-cultural-heritage/)

<sup>16</sup> Fear another Juukan Gorge at Pilbara rock caves near FMG mine (ABC News) - <https://www.abc.net.au/news/2020-06-06/fears-another-juukan-gorge-at-pilbara-rock-caves-near-fmg-mine/12327778>

<sup>17</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* (**ATSIHP Act**) - <https://www.legislation.gov.au/Series/C2004A02943>

<sup>18</sup> *Environmental Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) - <https://www.legislation.gov.au/Series/C2004A00485>

Australian Heritage Council (AHC), and HCOANZ, in consultation with the NNTC and the Victorian Aboriginal Heritage Council.

The Best Practise Standards have been crafted on the foundational principle that Australia's First Nations peoples are entitled to expect that the cultural heritage legislation will uphold the legal norms contained in the United Nations Declaration on the Rights of Indigenous Peoples.<sup>19</sup>

## **Conclusion**

Thank you again for the opportunity to provide a submission to this important cause. We reiterate the importance of enforcing Cultural Heritage protection across all of Australia, which is of integral significance for all Australians, notwithstanding the central and primary concern for the loss experienced by First Nations peoples.

ANTaR offers our ongoing support to a process that meets the expectations of Aboriginal and Torres Strait Islander peoples, and we would also welcome the opportunity to meet with the Joint Select Committee to discuss any of the points raised in this submission.

Sincerely

**Paul Wright**

National Director, ANTaR

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<sup>19</sup> *Best Practice Standards in Indigenous Cultural Heritage Management and Legislation*, HCOANZ page 2