



***BACKGROUND PAPER:
Cultural Heritage Protection***

May 2021

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Background

What is First Nations cultural heritage?

Defining what exactly cultural heritage means for Australia's First Nations Peoples is no simple task. This is due to the variety of unique Indigenous cultures that have existed in Australia for millennia. A broadly encompassing definition of *Indigenous Cultural and Intellectual Property* (relating to the rights of Indigenous people to their culture) has been formulated by Terri Janke, a Wuthathi/Meriam woman and a prominent legal authority, to mean "intangible and tangible aspects of the whole body of cultural practices, resources and knowledge systems developed, nurtured and refined by Indigenous people and passed on by them as part of expressing their cultural identity".¹

This definition follows an international standard developed in a 1997 global study by Professor Erica-Irene Daes whilst she was Chairperson and Special Rapporteur of the United Nations Working Group on Indigenous Populations². Janke also formulated a non-exhaustive list of cultural heritage items noting, however, that as First Nations heritage is living it has the potential for further elements of cultural heritage to be created in the future. Any definition of cultural heritage must also be flexible enough to encompass the differences between different Indigenous groups and the possibility of changes over time.³

Heritage includes:

- Literary, performing and artistic works (including music, dance, song, ceremonies, symbols and designs, narratives and poetry).
- Languages.
- Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and sustainable use of flora and fauna).
- Spiritual knowledge.
- All items of moveable cultural property including burial artefacts.
- Indigenous ancestral remains.
- Indigenous human genetic material (including DNA and tissues).
- Cultural environment resources (including minerals and species).
- Immovable cultural property (including sites of significance, and burials).
- Documentation of Indigenous people's heritage in all forms of media (including scientific, ethnographic research reports, papers and books, films, sound recordings).⁴

¹ Terri Janke, *Our Culture, Our Future* (Report, 1999) XVII.

- See html <https://www.terrijanke.com.au/our-culture-our-future>

² Terri Janke, 'Managing Indigenous Knowledge and Indigenous Cultural and Intellectual Property' (2005) *Australian Academic and Research Libraries*, 96.

- See html <https://www.tandfonline.com/doi/pdf/10.1080/00048623.2005.10721251>

³ Janke (n 1) XVIII.

⁴ Janke (n 1) XVII.

Why is protecting First Nations cultural heritage important?

In September 2020, the Heritage Chairs of Australia and New Zealand released *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander Heritage in Australia*. This document, developed by the Aboriginal and Torres Strait Islander Chairs and made in consultation with First Nations stakeholders and relevant peak advisory bodies, aims to provide a comprehensive framework for the protection and celebration of Indigenous cultural heritage with its particular purpose being to “inform policy, underpin legislative change and inspire action”.⁵ It refers to the importance of the person-land-ancestral inter-relationship which makes the maintenance of heritage crucial in both spiritual and practical terms for First Nations People:

*‘Australia’s landscape, waters, and seas, collectively referred to as ‘country’, are alive with a profusion of heritage places. Imbued with the essence of ancestral beings that created them, it is through these places that family descent and kinship connections flow. It is this connection that gives owners’ rights, responsibilities and duties to country. This is often described as being a Traditional Owner or Native Title Holder. In this document we use the term Custodians. Often it is the senior Custodians who have the authority to speak for country in their role as repositories of knowledge about places.’*⁶

The document also stresses that whilst there may not be a shared ancestral connection in regards to certain places of heritage, it is the unity of lived experience which is significant. Having survived through colonisation, heritage is important for all First Nations People to be able to continue to affirm their identity.⁷ This desire to control and protect cultural heritage is an aspiration of First Nations People which has been affirmed historically through numerous statements such as the Yirrkala bark petitions in 1963, the Burunga Statement in 1988 and the Darwin Statement in 2018.⁸ It is one aspiration amongst other broader aspirations for the rights and welfare of First Nations People.

Value for all Australians

A part of the vision of *Dhawura Ngilan* is that First Nations cultural heritage is rightfully recognised as central to Australia’s national heritage. By recognising its intrinsic value as a nation, we can foster a greater consciousness and appreciation of both our past and present as well as setting the stage for a more positive future by creating a pathway for recognition and healing:

⁵ Heritage Chairs of Australia, *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander Heritage in Australia* (Vision Statement, 16th September 2020) 1.

- See html <https://www.environment.gov.au/heritage/publications/dhawura-ngilan-vision-atsi-heritage>

⁶ Ibid 3.

⁷ Ibid.

⁸ See NITV 2018, ‘The Yirrkala Bark Petitions,’ SBS, last updated 14th August 2018, accessed 20th May 2021 at: <https://www.sbs.com.au/nitv/explainer/yirrkala-bark-petitions>; AIATSIS 2021, ‘The Burunga Statement,’ accessed 20th May 2021 at: <https://aiatsis.gov.au/explore/articles/barunga-statement>; and Australian Heritage Council 2018, ‘Darwin Statement,’ accessed 20th May 2021 at: <https://www.environment.gov.au/heritage/organisations/australian-heritage-council/publications/darwin-statement-hcoanz>

*'Australia's heritage narrative is one of survival and cultural achievement across thousands of years in a sometimes harsh and changing environment. It is also one of dispossession, aggression, violence and cultural assault. More recently Australia's narrative has been one of humanitarian but paternalistic policies giving way to heroic politics and national awakening as descendants of the nation's first peoples have used Australia's democratic institutions to claim recognition and rights. It is now time for Australia to adopt a process of Truth Telling and ensure the truth is told about this past.'*⁹

How are sites currently protected?

The overturning of the legal principle of terra nullius via the Mabo decision of 1992, and the subsequent Wik decision in 1996 which established the ability of native title to co-exist with pastoral leases, was a significant development for the process of creating an effective legal framework for First Nations cultural heritage protection.¹⁰ This is because it helped allow for a shift in policy considerations away from the idea of protecting remnants of a 'historical' civilisation towards that of protecting an alive culture, the formulation of which is ongoing. It also became a matter of legal right rather than Government benevolence.¹¹ Despite this, current legislation still tends to entrench a power imbalance that restricts the ability of First Nations peoples to adequately control and protect their heritage with the power of free and informed consent. The goal to achieve this is identified as one of the core principles of the United Nations' *Declaration on the Rights of Indigenous Peoples* which Australia claims to support¹². Examples of circumstances where current legislation produces significant failings will be considered subsequently under the section titled 'How common is the destruction of cultural heritage sites?'

Commonwealth v State Law

In order to comprehend current protections, it is first necessary to understand that by virtue of Australia's federal system the states of Australia (QLD, NSW, WA, SA, VIC) have complete power to legislate in most areas (save a few areas such as external affairs).

This law is 'overridden' by Commonwealth legislation in the event of inconsistency, for example where Commonwealth Law prohibits a certain action (e.g. a certain crime) and law within one of the states permits it. Therefore, in relation to protections for First Nations cultural heritage the features of Australian state law act in unison to the Commonwealth law when under the jurisdiction of the given state except in circumstances of conflicting laws.

⁹ Ibid 12.

¹⁰ See Maureen Tehan 1998, 'Customary Title, Heritage Protection and Property Rights in Australia: emerging patterns of land use in the post-Mabo era,' *Pacific Rim Law and Policy Journal*, vol. 7, no. 3, pp. 767-79.

¹¹ Australian Human Rights Commission, *Native Title Report 2000* (Report, 2000) Chapter 4.

- see html

<https://humanrights.gov.au/our-work/native-title-report-2000-chapter-4-indigenous-heritage>

¹² ANTaR, *UN Declaration on the Rights of Indigenous Peoples* <<https://antar.org.au/campaigns/un-declaration-rights-indigenous-peoples>>.

Section 122 of the Constitution also gives the Federal Parliament the power to make any laws for the government of territories, however power has also been devolved in the case of the Australian Capital Territory and the Northern Territory and therefore any applicable laws may also be considered separately in addition to the states for those particular territories.

Applicable Laws (Commonwealth/State/Territory)

The following statutes govern the protection of First Nations cultural heritage in Australia:

- **Commonwealth**
 - *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*
 - *Environment Protection and Biodiversity Conservation Act 1999*
 - *Protection of Movable Cultural Heritage Act 1986*

- **New South Wales**
 - *National Parks and Wildlife Act 1974*
 - *Heritage Act 1977*
 - *Environmental Planning and Assessment Act 1979*

- **Queensland**
 - *Aboriginal Cultural Heritage Act 2003*
 - *Torres Strait Islander Cultural Heritage Act 2003*

- **Australian Capital Territory**
 - *Heritage Act 2004*

- **Victoria**
 - *Aboriginal Heritage Act 2006*

- **Tasmania**
 - *Aboriginal Relics Act 1975*

- **South Australia**
 - *Aboriginal Heritage Act 1988*

- **Western Australia**
 - *Aboriginal Heritage Act 1972*

- **Northern Territory**
 - *Heritage Conservation Act 1991*
 - *Aboriginal Sacred Sites Act, 1989; 2006*

Who administers the statutes?

In most states and territories, legislation relating to Indigenous cultural heritage is administered through Government agencies. For example, 'In NSW the agency responsible for administering the *National Parks and Wildlife Act 1974* is the Office of Environment and Heritage; in Victoria, Aboriginal Affairs Victoria administers the *Aboriginal Heritage Act 2006*; and in the ACT, ACT Heritage administers the *Heritage Act 2004*. In the Northern Territory, however, the Aboriginal Areas Protection Authority is an independent statutory organisation established to administer the *Aboriginal Sacred Sites Act 2006*. This body operates independently from government.'¹³ That being said, under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* in circumstances where state laws do not provide protection and 'at the request of an Aboriginal or Torres Strait islander person, the Commonwealth can intervene in any state or territory to protect places and objects that are of traditional significance to Aboriginal people'. Such a decision is dependent on whether or not the Commonwealth decides that the relevant state laws have actually been ineffective in providing protection. It is intended as a last resort decision and does not provide protection indefinitely.¹⁴

Who makes decisions?

Decision making is mostly the responsibility of relevant ministers and heads of government agencies, however in some cases may be made by other parties. For example, Aboriginal bodies are responsible for appointing traditional owner groups under Victorian legislation, the entering into management plan agreements in Queensland, or the issuing of permits for access and work near sacred sites in the Northern Territory.¹⁵

Who owns First Nations cultural heritage?

In most of Australia, Aboriginal and Torres Strait Islander cultural heritage is either 'owned by the state, or by private owners of land where sites such as rock art and scarred trees occur.'¹⁶ There are, however, some exceptions. Victorian legislation for example, recognises ownership of Aboriginal human remains and secret or sacred objects by Aboriginal people who have a traditional and familial link to the items of heritage in question. Queensland also recognises Aboriginal ownership of Aboriginal human remains and of secret or sacred objects held in state collections.¹⁷

For 250 years, First Nations cultural heritage has also been removed overseas and placed in museums, universities and private collections. Some 6,000 looted heritage items are currently housed in the British Museum, which is the largest overseas collector of Aboriginal and Torres Strait

¹³ Office of Environment and Heritage New South Wales, *Comparing the NSW Aboriginal Heritage System with other Aboriginal Systems* (Publication, May 2012).

- see html <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Aboriginal-cultural-heritage/comparing-nsw-aboriginal-heritage-system-with-other-australian-systems-120402.pdf>

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

Islander artefacts and remains.¹⁸ Other items are housed in the Cambridge Museum of Archaeology and Anthropology, Victoria and Albert Museum and Royal Anthropological Institute, among 43 institutions currently housing Aboriginal and Torres Strait Islander heritage and remains within Britain. Artefacts and remains are also held in the US and other parts of Europe.¹⁹

Currently, the Australian government is funding the Return of Cultural Heritage initiative, which aims to facilitate the repatriation of Aboriginal and Torres Strait Islander cultural heritage from overseas. The program, currently run by Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS), was established in 2018 and will be funded until 2024.²⁰ Aboriginal activists have also been engaged in grassroots efforts to repatriate their stolen heritage. For example, Gweagal activist, Rodney Kelly, has been undertaking a crowdfunded tour of institutions in Britain and the UK to repatriate the Gweagal shield and spears taken from his ancestor, the Gweagal warrior Cooman, at contact 250 years ago.²¹

How common is the destruction of First Nations cultural heritage sites?

Hundreds of cultural heritage items are impacted or destroyed each year. By consulting the NSW Government's Aboriginal Heritage Impact Register, it is shown that as at December 2020, 194 permits have been registered as issued between 1 August 2019 and 2 November 2020 which allow for harm to Aboriginal objects and places under certain conditions in NSW alone. By navigating the Heritage NSW website, you can download the public register as an excel spreadsheet which the NSW Government states is updated on a regular basis.²²

Recent Cases/Examples

Whilst non-exhaustive, there are a number of recent examples of the destruction or planned destruction of First Nations Cultural Heritage which serve to provide a clear reflection on the state of current laws and their often highly egregious lack of protection.

The Juukan Gorge

On 23 May 2020, a sacred rock shelter in the Pilbara region of Western Australia was blasted by the mining company Rio Tinto. The shelter contained evidence of 46,000 years of continuous human occupation, including the hair of direct ancestors of the Puutu Kunti Kurrama and Pinikura Peoples.

¹⁸ Paul Daley, 'The Gweagal shield and the fight to change the British Museum's attitude to seized artefacts,' *The Guardian* (Publication, 25 Sep 2016).

¹⁹ John Halliday, 'Manchester Museum returns stolen sacred artefacts to Indigenous Australians,' *The Guardian* (Publication, 21 Nov 2019).

²⁰ AIATSIS, 'Return of Cultural Heritage,' *Australian Institute for Aboriginal and Torres Strait Islander Studies*, <https://aiatsis.gov.au/about/what-we-do/return-cultural-heritage>

²¹ Daley, Op. Cit.

²² Heritage NSW, *Aboriginal Heritage Impact Permit Public Register* <<https://www.heritage.nsw.gov.au/protecting-our-heritage/aboriginal-heritage-impact-permit-public-register/>>.

Archaeologist Michael Slack, who compiled a report on the site, which was presented to Rio Tinto, commented that it was of the “highest archaeological significance in Australia” containing a “cultural sequence spanning over 40,000 years, with a high frequency of flaked stone artefacts, rare abundance of faunal remains, unique stone tools, preserved human hair and with sediment containing a pollen record charting thousands of years of environmental changes”.²³

The site was given permission to be blasted due to an exception under section 18 of the *Aboriginal Heritage Act 1972 (WA)* which allows for ministerial approval of the destruction of places of First Nations cultural significance with or without conditions (s 18(3)(a)). The act does not allow for the revocation of ministerial consent; this is despite the emergence of new archaeological information regarding the extent of the site’s cultural significance one year prior to the blasting which could have had significant bearing on the decision made in 2013. Nor does it provide First Nations People power to object to any destruction.

The backlash from the events at Juukan Gorge helped cause considerable focus into the ways in which approvals for the destruction of First Nations cultural sites are being granted, and the shortcomings of present-day legislation across the country. In response, a coalition of Aboriginal land councils, Aboriginal corporations and other related organisations formed the *First Nations Heritage Protection Alliance* vowing to “pursue national reforms to prevent this from ever happening again”.²⁴

A Federal inquiry into the causes of the destruction published an interim report finding that Rio Tinto’s role in the tragedy was ‘inexcusable’ and that ‘Rio knew the value of what they were destroying but blew it up anyway.’ The report, compiled by the Joint Standing Committee, also found that the *Aboriginal Heritage Act 1972 (WA)* both legalised and made inevitable the destruction of Aboriginal heritage. It made a number of recommendations, crucially among them was the removal of gag clauses in agreements between mining companies and traditional owners that prevent traditional owners from publicly critiquing companies’ destruction of their cultural heritage.

It also recommended that a moratorium be placed on the consideration and approval of new Section 18 applications until the new legislation is passed.²⁵ A bill seeking to amend the *Aboriginal Heritage Act 1972 (WA)* has now closed phase three public consultation.²⁶

²³ ABC, *Report reveals Rio Tinto knew the significance of 46,000-year-old rock caves six years before it blasted them* <<https://www.abc.net.au/news/2020-06-05/rio-tinto-knew-6-years-ago-about-46000yo-rock-caves-it-blasted/12319334>>.

²⁴ First Nations Cultural Heritage Protection Alliance, *Aboriginal Leaders call for action to protect First Nations Cultural Heritage* <<https://www.nts.org.au/wp-content/uploads/2020/06/National-Crisis-Meeting-Communique-Final-2406201.pdf>>.

²⁵ Joint Standing Committee 2020, ‘Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia - Interim Report,’ p. vi, p. 7.

²⁶ Department of Planning Lands and Heritage, *Phase three - final consultation of the Aboriginal Heritage Act review* <<https://www.dplh.wa.gov.au/policy-and-legislation/review-of-the-aboriginal-heritage-act-1972/phase-three-final-consultation-of-the-aboriginal-h>>.

Shenhua Coal Mine

On 28 of January 2015, the Planning Assessment Commission of NSW conditionally approved Shenhua's 'Watermark Coal Project', a proposed open-cut coal mine in the Liverpool Plains.²⁷ In April of that year, the Gomeroi people made an application under sections 9 and 10 of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) 'ATSIHP' seeking ministerial declarations that would protect sites of cultural significance in the area (by virtue of the Act's offences and penalties regime [part III]). Included in this application were sacred grinding grooves believed to be used by warriors preparing for battle by 'sharpening their spears, as well as burial grounds and male ceremonial areas' in addition to other tangible and intangible heritage.²⁸ The application to make an emergency declaration under section 9 was declined in May 2016 by the former Federal Minister for the Environment Greg Hunt, despite being satisfied that the areas specified were of significance and that there was adequate information to support this claim.²⁹

The mine had already received conditional ministerial approval by that same Minister in July 2015.³⁰ Despite being satisfied of the risk of injury or desecration under section 10(1)(b)(ii) of the ATSIHP Act, the current Minister for the Environment Sussan Ley decided not to issue a declaration under section 10, due to the 'social and economic benefits of the mine'.³¹

In May 2020, Gomeroi custodian Veronica "Dolly" Talbott sued Sussan Ley in the Federal Court alleging that Ley made an error of law in deciding not to make a declaration to protect Aboriginal heritage on the basis of these reasons. In July 2020, this legal bid failed with Judge Wendy Abraham dismissing the application, stating the applicant had failed to establish that the social and economic impacts are irrelevant under the ATSIHP Act. A new application to the Environment Minister has since been made, providing new information in the hopes that this application will be successful.³²

The ongoing struggle of the Gomeroi people to protect their sacred sites further reveals the impact of legislation which favors broad ministerial discretion and grants essentially no power for First Nations people themselves to protect their own cultural heritage. Just as legislation in Western Australia failed to protect the sacred rock shelters of the Juukan Gorge, this particular case highlights the shortcomings of Commonwealth legislation as well. As Dolly Talbott stated "[The national

²⁷ Planning Assessment Commission of NSW, *Development Consent* <<https://majorprojects.accelo.com/public/120fa1f2c289661c1f10670978e3cc2c/Watermark%20Coal%20Project%20-%20Conditions%20of%20Consent.pdf>>.

- Note approved under the *Environmental Planning and Assessment Act 1979*.

²⁸ ABC, *Renewed scrutiny over decision not to protect Aboriginal sacred sites in NSW* <<https://www.abc.net.au/news/2020-06-11/renewed-scrutiny-over-decision-not-to-protect-sacred-sites-nsw/12344422>>.

²⁹ Sussan Ley, *Statement of reasons for a decision under section 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* <<https://www.environment.gov.au/system/files/200603.pdf>>.

³⁰ Department of the Environment (Ministerial Approval), *Approval Decision* <<https://majorprojects.accelo.com/public/97d9334fb065e32612ef7c52db09c71d/Watermark%20Coal%20Project%20-%20DoE%20Approval%20Decision.pdf>>.

- Note approved under the *Environment Protection and Biodiversity Conservation Act 1999*.

³¹ Ley (n 22).

³² SMH, *Indigenous owners lose bid to protect land earmarked for Shenhua mine* <<https://www.smh.com.au/national/indigenous-owners-lose-bid-to-protect-land-earmarked-for-shenhua-mine-20200722-p55eip.html>>.

Indigenous heritage laws] are supposed to be there for the protection of Aboriginal culture and it doesn't seem to be working."³³

Western Victoria Highway Duplication

In 2008, planning of the Western Victoria Highway Duplication began. It was recognised early on that the work would likely impact cultural heritage and following a number of cultural heritage impact assessments, VicRoads accepted it was plausible that they would encounter previously unrecorded Aboriginal cultural heritage sites.³⁴ Nevertheless, the work on the highway was deemed able to proceed provided there were targeted archaeological excavations and the preparation of a Cultural Heritage Management Plan for the project as required under part 4 of the *Aboriginal Heritage Act 2006* (Vic) '*Aboriginal Heritage Act*'.³⁵

In 2017, Aboriginal Victoria (who are responsible for administering the above legislation) notified VicRoads that it had received preliminary reports from a member of the public regarding a number of previously unidentified trees in the vicinity of Langi Ghiri State Park. These trees were at risk due to the endorsed alignment of the highway duplication in 2013, including two which bore strong indicators that they may be highly culturally significant birthing trees used by ancestors of the Djab Wurrung people (who have occupied parts of Djab Wurrung Country for more than 12,500 years).

Aboriginal Victoria later wrote to VicRoads that inspections with senior female Djab Wurrung representatives of Martang Pty Ltd ('Martang') and Eastern Maar Aboriginal Corporation ('Eastern Maar') had not substantiated the claims made about the area and VicRoads was authorised to proceed with the Cultural Heritage Management Plan previously approved by Martang under section 63 of the *Aboriginal Heritage Act* in 2013 (which was at the time the Registered Aboriginal Party).³⁶ Whilst there appears to have been apparent disagreement over items of cultural heritage within the Djab Wurrung community, the *Aboriginal Heritage Act* in Victoria gives primacy to the knowledge, advice and agreement of a Registered Aboriginal Party. In June 2018, the 'Djab Wurrung Heritage Protection Embassy' camp was established to prevent the scheduled removal of trees near the Langi Ghiri State Park, occupied by some Djab Wurrung traditional custodians as well as other individuals.

In addition to the establishment of the camp, members of the Djab Wurrung Heritage Protection Embassy such as multi-clan elder Aunty Sandra Onus, made an application under Federal legislation to protect the trees. This application operated under the same legal framework as the decision in

³³ ABC (n 21).

³⁴ Victorian Ombudsman, *Investigation into the Planning and Delivery of the Western Highway Duplication Project* (Report, July 2020).

- see html

https://www.parliament.vic.gov.au/file_uploads/Investigation_into_the_planning_and_delivery_of_the_Western_Highway_duplication_project_8HCbf0p0.pdf

³⁵ Ibid.

³⁶ Ibid.

regard to the Shenhua open-cut coal mine and was also rejected in this case by former Environment Minister Melissa Price.³⁷

That decision was quashed by the Federal Court in April 2019 due to an ‘error of law’ with a fresh decision ordered. The following decision by the current Minister Sussan Ley also resulted in a rejection of the application, however the Federal Court upheld an appeal again on the basis of a ‘legal error’ by the Minister in ‘concluding that if five trees she agreed were culturally significant were not removed, they would not be considered to have been desecrated’ by the planned works.³⁸ In December 2020 (for the third time on the basis of error) the Federal Court overturned Minister Ley’s new decision, ordering that a decision on the matter be made by a relevant party other than Minister Ley.³⁹ The outcome is not yet known. At a state level, an interlocutory injunction remains imposed by the Supreme Court of Victoria preventing work from continuing in the specific section of the highway as there is “a serious question to be tried as to whether Aboriginal cultural significance, located throughout the specified area, was or might be accorded protection under the Aboriginal Heritage Act”.⁴⁰ This was following the granting of an interim injunction in October when legal action was lodged after the destruction of the ‘Directions Tree’, a large Fiddleback which some traditional custodians say was culturally significant, and the arrest of 50 protestors.⁴¹ A trial on the matter is scheduled for February.⁴²

Highlighting a potential issue with Victorian legislation, the late identification of the possible birthing trees has been considered by some to be a result of inadequate consultation with a broad enough spectrum of First Nations parties with an interest in the outcome of the project.⁴³ A cultural heritage consultation plan was not required under the *Aboriginal Heritage Act* and was not pursued, though recommended under *VicRoads’ Cultural Heritage Guidelines*.⁴⁴ In addition, the Victorian Ombudsman investigation into the matter stated that the consultation that did occur ‘tended to rely upon discussions between VicRoads, Aboriginal Victoria and the Registered Aboriginal Parties for the area.’⁴⁵

³⁷ ABC, *Victoria's Western Highway upgrade stalls again after Federal Court upholds appeal over sacred Indigenous trees* <<https://www.abc.net.au/news/2019-12-06/highway-upgrade-stalls-again-court-upholds-appeal-sacred-trees/11773142>>.

³⁸ Ibid.

³⁹ ABC, *Federal Court upholds Djab Wurrung's Western Highway appeal, overturns Sussan Ley's decision on sacred trees* <<https://www.abc.net.au/news/2020-12-17/federal-court-overturns-sussan-leys-decision-on-sacred-trees/12970540>>.

⁴⁰ ABC, *Supreme Court grants Djab Wurrung sacred tree injunction on Western Highway project* <<https://www.abc.net.au/news/2020-12-03/supreme-court-orders-djab-wurrung-injunction-until-trial/12899028>>

⁴¹ ABC, *50 arrests as controversy rages over felling of Djab Wurrung tree at Western Highway upgrade site* <<https://www.abc.net.au/news/2020-10-27/djab-wurrung-tree-protesters-arrested-on-western-highway/12816628>>.

⁴² ABC (n 33).

⁴³ Vic Ombudsman (n 27).

⁴⁴ Ibid.

⁴⁵ Ibid.

Looking to The Future - Current Enquiries

Community Expectations

One of the primary issues that has presented itself regarding the failure of First Nations cultural heritage protection legislation, is the clear fact that the expectations of Australia's First Nations communities (amongst other groups) are not being met. So, what are these expectations?

Broadly speaking, they can be referred to as a number of rights in respect of Indigenous Cultural and Intellectual Property (ICIP), defined by Wuthathi/Meriam woman and legal scholar, Terri Janke, as:⁴⁶

1. The right to own ICIP
2. The right to define what constitutes ICIP
3. The right to ensure that any means of protecting ICIP is premised on the principle of Self-Determination
4. The right to be recognised as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future
5. The right to apply for protection for ICIP right, including where collectively owned by a particular community
6. The right to authorise or refuse to authorise the commercial use of ICIP in accordance with Indigenous customary law
7. The right to prior informed consent for access to, use and application of ICIP, including cultural knowledge and cultural environmental resources
8. The right to maintain secrecy of Indigenous knowledges and other cultural practices
9. The right to benefit commercially from the authorised use of ICIP, including the right to negotiate such terms
10. The right to full and proper attribution
11. The right to protect Indigenous sites
12. The right to own and control management of land and sea, conserved in whole or in part, because of their Indigenous cultural values
13. The right to prevent derogatory, culturally offensive and unauthorised use of ICIP in all media
14. The right to prevent distortions and mutilations of ICIP
15. The right to preserve and care, protect, manage and control Indigenous cultural objects, Indigenous ancestral remains, Indigenous cultural resources such as food and material sources, and Indigenous cultural expressions such as dances, stories and designs.
16. The right to control the disclosure, dissemination, reproduction and recording of Indigenous knowledge, ideas and innovations concerning medicinal plants, biodiversity and environment management

⁴⁶ Terri Janke 2005, 'Managing Indigenous Knowledge and Indigenous Cultural and Intellectual Property,' *Australian Academic and Research Libraries*, vol. 36, no. 2, p. 100.

17. The right to control the recording of cultural customs and expressions, the particular language which may be intrinsic to cultural identity, knowledge, the skill and teaching of culture.⁴⁷

Many of these rights are incorporated into the United Nations' *Declaration on the Rights of Indigenous Peoples* under articles 11, 13, 25, 26, 31 and 32. Despite initially voting against the declaration, the Federal Government announced their support for it in 2009.⁴⁸

Heritage Chair Standards

Central to the vision of *Dhawura Ngilan* (as mentioned previously under the section 'Why is protecting Indigenous cultural heritage important?') is the development of the 'Best Practice Standards' which aims to provide a practical reference point for legislators in their consideration of changes to the current nature of First Nations cultural heritage protections.⁴⁹

In particular, they seek to uphold the legal norms which have been established by the United Nations' *Declaration on the Rights of Indigenous Peoples*. The standards have been supported by the *National Native Title Council 'NNTC'*, a peak body for the native title sector made up of 'regional Native Title Representative Bodies (NTRBs), Native Title Service Providers (NTSPs), local Prescribed Body Corporates (PBCs) and Traditional Owner Corporations (TOCs).'⁵⁰

The NNTC calls upon the Commonwealth Government to adopt the standards, thereby developing a national system based on core principles of self-determination and free, prior and informed consent.⁵¹

Why are Government enquiries important?

Inquiries are of immense importance when conducted correctly. Not only do they often operate as a springboard for legislative change, they also offer the opportunity to help facilitate the truth-telling process as discussed under the section 'Value for all Australians'.

⁴⁷Terri Janke 1998, 'Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights,' report prepared for *Australian Institute of Aboriginal and Torres Strait Islander Studies* and the *Aboriginal and Torres Strait Islander Commission*, Michael Frankel & Company: Sydney, NSW, p. xx-xi, accessed 20th May 2021 at: https://4b0a135d-0afc-4211-ad92-391c5def66bb.filesusr.com/ugd/7bf9b4_2740d8cff7d24320b70f8a34015f9a53.pdf

⁴⁸ ANTaR (n 10).

⁴⁹ Dhawura Ngilan Vision for Aboriginal and Torres Strait Islander Heritage in Australia (2020) - <https://www.environment.gov.au/system/files/resources/8582db94-6daa-4097-b77e-079a797ef67d/files/dhawura-ngilan-vision-atsi-heritage.pdf>

⁵⁰ National Native Title Council, *Home* <<https://nntc.com.au>>.

⁵¹ National Native Title Council, *Cultural Heritage* <<https://nntc.com.au/our-agenda/cultural-heritage/>>.

1. 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.

In June 2020, following the blasting of the sacred Juukan Gorge rock shelters, the Senate referred the above inquiry to the Joint Standing Committee on Northern Australia to investigate the causes of the destruction and more broadly to take suggestions regarding change needed to First Nations cultural heritage protection legislation around the country (see the inquiry's 'Terms of Reference').⁵² Through its submissions process, it provides a valuable opportunity for community-based organisations to have a say on proposals for the direction of cultural heritage protection law. The Kimberley Law and Cultural Centre is one such contributor. Amongst their many ideas for the development of better legislative protections, one key one is the desire that the authority and leadership of Old People (First Nations elders) be recognised:

*'They are the living libraries and custodians of law, knowledge, stories and ceremony. Their authority shapes Aboriginal identity and the cultural standards by which Aboriginal people live.'*⁵³

This means removing any legislative scenarios where sufficient consultation with Old People, as per the expectations of First Nations communities, is not required. We have seen recently how the issue of inadequate consultation can create crucial issues, such as in regard to the Western Victorian Highway Duplication under the section 'How common is the destruction of cultural heritage sites?'. The National Native Title Council has also made a submission, whose comments relating to 'Proposed Legislative Structure' ANTaR have supported.⁵⁴ This proposed structure can be summarised as the following:

1. Accreditation of State and Territory regimes which adopt the 'Best Practice Standards' as developed by the Chairs of Australia's national, state and territory First Nations heritage bodies, and address all other relevant criteria such as "Definitions; Indigenous Self-Determination; Process; First Nations Ancestral Remains; Secret and Sacred First Nations cultural heritage; and Intangible First Nations cultural heritage."⁵⁵
2. In relation to any proposals which may impact upon First Nations cultural heritage, vest control of the management of local heritage in Traditional Owner corporations or Traditional Owners where there is no accredited regime and no 'Prescribed Bodies Corporate' under the *Native Title Act 1993* or other representative organisation.
3. Create an effective structure to ensure that in this scenario all relevant Traditional Owners are properly identified and that they have real control either of their own accord or through the providing of advice to a minister.

⁵² Parliament of Australia, 'Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia,' https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/CavesatJuukanGorge

⁵³ Parliament of Australia, *Submissions received by the committee* <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/CavesatJuukanGorge/Submissions?main_0_content_1_RadGrid1ChangePage=2_20>. - KALACC sub.

⁵⁴ Ibid - ANTAR sub.

⁵⁵ Ibid - NNTC sub.

It will be of immense interest to observe the outcome of the enquiry and whether or not it has a substantive and positive impact upon the policy directions of the various states and territories as well as the Federal Government. In order for this to be the case however, governments must listen to the concerns of our First Nations communities and seek to ensure that the rights which have been mentioned under the previous section 'Community Expectations' are genuinely protected.

2. Aboriginal Heritage Act Review (Western Australia)

Released for public consultation on the 2nd of September 2020, the *Aboriginal Cultural Heritage Bill 2020* seeks to provide Western Australia with a replacement for its currently outdated and highly problematic legislation. It was the current iteration of the *Aboriginal Cultural Heritage Act* which allowed for the destruction of the sacred rock shelters at the Juukan Gorge, a site of immeasurable cultural value to the Puutu Kunti Kurrama and Pinikura Peoples and one of the best archaeological records of human civilisation in the world.

Key to the proposed reform is a number of significant changes. Some of the most significant are the expansion of the definition of First Nations cultural heritage and the proposed removal of section 18 of the Act which has allowed for the irreversible and independent Ministerial approval of activities that would harm cultural heritage. Instead, for medium to high impact activities parties are required to enter into an Aboriginal Cultural Heritage Management Plan with relevant Aboriginal parties which is then approved either by a proposed Aboriginal Cultural Heritage Council or by the Minister for Aboriginal Affairs.⁵⁶

The draft bill has however drawn criticism in a number of submissions to the public consultation process, including from the Kimberley Land Council. In particular, they suggest that the proposed bill fails to meet the Heritage Chair 'Best Practice Standards' as discussed prior, due to issues such as the continuing ability for the Minister to make decisions on behalf of Aboriginal people. This involves an intolerable amount of trust, trust which has been broken consistently over the last 48 years as evidenced by the failure of Ministers to act in the best interests of Aboriginal people and the protection of their culture stating:

*'The high likelihood that proponents will obtain the necessary approvals even if they don't reach agreement with and obtain the consent of Aboriginal parties means that the playing field for agreement-making or heritage management is never level.'*⁵⁷

The National Native Title Council has also weighed in, stating:

'It is the NNTC's view that the WA Bill falls significantly short in many respects of the Standards and UNDRIP, particularly with regard to the principle of self-determination, the

⁵⁶ Minter Ellison, *Proposed reforms to Aboriginal Cultural Heritage legislation* <<https://www.minterellison.com/articles/proposed-reforms-to-aboriginal-cultural-heritage-legislation>>.

⁵⁷ Government of Western Australia, *Aboriginal Cultural Heritage Bill 2020* https://consultation.dph.wa.gov.au/aboriginal-heritage/aboriginal-heritage-bill-2020/consultation/view_respondent?_b_index=60&uuld=115496371 - Kimberley Land Council sub.

*requirement of free prior and informed consent, the failure to ensure affected Traditional Owners are the ultimate decision makers in relation to the management of their cultural heritage and a failure to adequately resource Traditional Owner representative organisations to engage with proponents let alone perform their most basic statutory functions.*⁵⁸

These are damning critiques, and thus whilst the bill proposes a number of changes that would result in significant progress from the current state of the law it is clear that it still falls substantially short of the expectations of our First Nations communities. This is particularly in its inability to reflect the 'Best Practice Standards' as developed by the heritage chairs.

Dr Anne Poelina, Nyikina woman and chair of Fitzroy Martuwarra council in Western Australia, told the Inquiry into the destruction of Juukan Gorge that the destruction of Aboriginal heritage is widespread and happening across the country. She argued that the WA's draft new heritage laws were unlikely to offer greater protections and that there was an urgent need for a national statutory authority to regulate the Aboriginal heritage system.⁵⁹

New Labor Minister for Aboriginal Affairs, Stephen Dawson, has nevertheless vowed to lock down WA's new Cultural Heritage Bill.⁶⁰

Cultural Heritage and Environment

Aboriginal and Torres Strait Islander people are likely to be disproportionately impacted by the effects of climate change not only because of existing social and economic disadvantage in their communities,⁶¹ but also because of the close relationship they perceive between their cultural heritage, identity and wellbeing.⁶² For Aboriginal and Torres Strait Islander people, cultural heritage encompasses the management of living culture and cultural landscapes through ongoing care for country, rather than the preservation of a 'relic' from the past.⁶³ Here, country describes the interdependent relationship between First Nations people and their land and seas that is sustained by Aboriginal and Torres Strait Islander knowledge.⁶⁴

⁵⁸ Ibid - NNTC sub. - see html https://consultation.dplh.wa.gov.au/aboriginal-heritage/aboriginal-heritage-bill-2020/consultation/view_respondent?_b_index=120&uuld=41794163

⁵⁹ Lorrena Allam 2021, 'Every day it's happening': Juukan Gorge inquiry told Aboriginal heritage is commonly destroyed,' *The Guardian*, (Published 20 Feb 2021), <https://www.theguardian.com/australia-news/2021/feb/20/every-day-its-happening-juukan-gorge-inquiry-told-aboriginal-heritage-is-commonly-destroyed>

⁶⁰ Hanah Cross 2021, 'Vow to get the job done,' *NITV*, (Published 24 March 2021), <https://nit.com.au/vow-to-get-the-job-done/>

⁶¹ Donna Green, 'Culture and Climate Change: Impacts for Indigenous Australians,' *Just Policy*, p.18.

⁶² Torres Strait Islander Regional Authority (2008), 'Climate Change and the Human Rights of Torres Strait Islanders,' *Supplementary Submission to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts: Inquiry into Climate Change and environmental impacts on coastal communities*, p.242.

⁶³ Blaze Kwaymullina, Ambelin Kwaymullina and Sally Morgan (2012), 'Reform and Resistance: An Indigenous Perspective on Proposed Changes to the *Aboriginal Heritage Act*,' *Indigenous Law Bulletin*, vol. 8, no. 1, p.8.

⁶⁴ 'Connection to Country,' *Common Ground*, <https://www.commonground.org.au/learn/connection-to-country> (accessed 18th May, 2021)

Significantly, Aboriginal and Torres Strait Islander people's ability to care for country has historically supported the foundation for the environmental sustainability of the Australian landscape.⁶⁵ In the Anthropocene, loss of both biological and cultural diversity has reduced the capacity for First Nations ecological knowledge to be passed onto future generations.⁶⁶ Nevertheless, there is growing recognition of the importance of this knowledge for tackling climate change, as well as the need to link the protection of Aboriginal and Torres Strait Islander cultural heritage to issues of wellbeing.

Public health researchers have found that First Nations people involved in the management of their land are more likely to be physically active, have better diets and reduced rates of obesity, diabetes, renal disease, cardiovascular disease and psychological distress. Meanwhile, traditional land management practices have proven to dramatically reduce CO2 emissions from bushfires and provide economic opportunities for local Aboriginal and Torres Strait Islander people.⁶⁷

Despite recognition of the relationship between Aboriginal and Torres Strait Islander cultural heritage and wellbeing, legal protection for First Nations cultural heritage has been ineffective due to the distinction between 'environment' and 'First Nations cultural heritage.' Pieces of heritage become compartmentalised from the concept of country, in line with Eurocentric understandings that equate heritage with a specific component of the landscape such as a piece of rock art or an individual site.⁶⁸ Improving the way the legal system operates in Australia with regards to Aboriginal and Torres Strait Islander cultural heritage will require further consultation and engagement of First Nations communities, as well as acknowledgement that the *whole of country* must be recognised by the law.⁶⁹

The Torres Strait Islands

Beach erosion, inundation and storm surges due to climate change are already major hazards threatening Torres Strait Island communities and their cultural heritage sites.⁷⁰ More recently, Torres Strait Islander residents have complained of a visible rise in sea levels and an increase in extreme weather events, observations which are substantiated by scientific research. Evidence

⁶⁵ Jonathan 'Yotti' Kingsley, Mardie Townsend, Rebecca Phillips and David Aldous (2009), "'If the land is healthy it makes the people healthy": The relationship between caring for Country and health for the Yorta Yorta Nation, Boonwurrung and Bangerang Tribes,' *Health and Place*, vol. 15, p. 291.

⁶⁶ Leanne Cullen Unsworth and Kirsten Maclean (2015), 'The role of Indigenous knowledge for the management of cultural landscapes in a changing climate: A case study of the Kuku Nyungkal people from the Queensland Wet Tropics, Australia', in David Harvey and Jim Perry (eds.), *The Future of Heritage as Climate Change: Loss, Advantage, and Creativity*, London: Routledge, p.96.

⁶⁷ Donna Green and Liz Minchin (2014), 'Living on Climate-Changed Country: Indigenous Health, Well-Being and Climate Change in Remote Australian Communities,' *EcoHealth*, vol. 11, p. 263.

⁶⁸ Justice Rachel Pepper and Lauren Butterly (2018), 'Are courts colour blind to country? Indigenous cultural heritage, environmental law and the Australian judicial system,' in *Courts and the Environment*, edited by Christina Voigt and Zen Makuch, Northampton, MA: Edward Elgar Publishing, p. 211-212.

⁶⁹ Ibid.

⁷⁰ Donna Green (2006), 'How Might Climate Change Affect Island Culture in the Torres Strait?' Climate Change Impacts and Risk: CSIRO Marine and Atmospheric Research Paper 011.

suggests that if climate change continues to accelerate, up to 2,000 Torres Strait Islanders will be displaced to the mainland by the end of the century due to rising sea levels.⁷¹

Concerns about how displacement would threaten Torres Strait Islander culture were raised at the United Nations' Permanent Forum on Indigenous Issues. Ailan Kastom (Island culture) combines traditional Islander beliefs and practices with Christianity and is officially recognised through the *Torres Strait Islander Land Act 1991 (Qld)*. It governs the management of land and natural resources, and plays an important role in linking land, sea and environment to Torres Strait Islander culture.

Traditional hunting techniques using spear or harpoon are an important expression of Islander culture, as is the preparation and sharing of dugong and turtle meat

Ailan Kastom is already being impacted by climate change in many ways. Dugongs and turtles, totemic animals for many Torres Strait Islanders, play a significant role in Ailan Kastom. However, their numbers are declining as a result of habitat loss due to climate change. Cultural heritage sites, including graveyards, monuments and sacred sites, are particularly susceptible to storm surges. Torres Strait Islander peoples also traditionally rely on seafood for their protein, including shellfish, fish, turtle and dugong. However, habitat loss from the impacts of climate change, coupled with illegal and commercial overfishing, have led to dramatic declines in the populations of these animals. This has implications for Torres Strait Islanders' capacity to express their culture through traditional hunting techniques using spear or harpoon and the preparation and sharing of dugong and turtle meat.⁷²

In May 2019, a group of Torres Strait Islanders, called the Torres Strait 8, lodged a landmark human rights complaint against the Australian Government with the United Nations. The complaint accused the Commonwealth of breaching their fundamental rights to culture and life by failing to act on climate change. This case will be worth keeping track of for new developments in the upcoming months.⁷³

⁷¹ Cordes-Holland (2008), 'The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights Protected by the ICCPR,' *Melbourne Journal of International Law*, 9.2.

⁷² Green (2006), *op.cit.*, p.5.

⁷³ Marian Faa (2020), 'Torres Strait 8 could set 'global precedent' with United Nations human rights fight linked to climate change,' ABC NEWS, published 30th September 2020, accessed 20th May 2021 at: <https://www.abc.net.au/news/2020-09-30/torres-strait-islanders-fight-government-over-climate-change/12714644>

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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.