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Submission to An inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia by The Joint Standing Committee on Northern Australia Parliament of Australia

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Submission to
An inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia
by The Joint Standing Committee on Northern Australia
Parliament of Australia

This submission addresses the terms of reference of the Inquiry in particular in relation to:

(d) the loss or damage to the Traditional Owners, Puutu, Kunti Kurrama and Pinikura people, from the destruction of the site;
(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;
(j) any other related matters.

Summary:

(a) State and Commonwealth laws concerning Indigenous cultural heritage and native title require reform and alignment to afford substantive rights to First Nations peoples to own and protect significant sites. The first step is to implement the recommendations of the Australian Law Reform Commission concerning native title over cultural knowledge and extend this to cultural heritage.
(b) The law requires amendment to compensate Traditional Owners for damage to or destruction of culturally significant sites.
(c) Australia needs a constitutionally enshrined Voice to Parliament to ensure that Parliament and government are appraised of the experiences and views of First Nations peoples, when enacting laws and policies.

1. I am a non-Indigenous lawyer and legal academic whose research interests include property law, native title law, and the law affecting First Nations peoples. I do not purport to speak for the Traditional Owners of the land, nor for First Nations peoples. I speak rather concerning the capacity of the law to deliver justice.

2. **State and Commonwealth laws: Interaction, Efficacy, Improvement**
   2.1. While the interoperability of state and Commonwealth Indigenous heritage laws warrants scrutiny, I address here the lacuna between state Indigenous heritage laws and native title (Commonwealth law).
   2.2. In Australia, Indigenous cultural heritage is regulated under both State and Commonwealth statutes.[1] There is a range of approaches to regulation including the nature of the 'heritage' that is protected, the role of Aboriginal and Torres Strait Islander people in the legislated processes for determining and managing cultural heritage, the objection processes, and the purpose of the protection. Although the jurisprudence of cultural heritage is relatively new and is therefore still taking shape,[2] it is generally conceived as a

[1] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth); *Heritage Act 2004* (ACT); *National Parks and Wildlife Act 1974* (NSW); *Northern Territory Aboriginal Sacred Sites Act 1989* (NT); *Aboriginal Cultural Heritage Act 2003* (Qld); *Torres Strait Islander Cultural Heritage Act 2003* (Qld); *Aboriginal Heritage Act 1988* (SA); *Aboriginal Relics Act 1975* (Tas); *Aboriginal Heritage Act 2006* (Vic); *Aboriginal Heritage Act 1972* (WA).
[2] Kathy Bowrey and Nicole Graham, 'The Placelessness of Property, Intellectual Property and Cultural Heritage Law in the Australian Legal Landscape: Engaging Cultural Landscapes' in Christoph Antons

regulatory function of the State rather than a private right. In her review of the (then) Commonwealth legislation, Elizabeth Evatt observed that '[p]rotecting Aboriginal heritage is a significant national responsibility'.[3] However, it is not a responsibility overtly undertaken for the benefit of Aboriginal and Torres Strait Islander people themselves.

2.3. In addition to cultural heritage laws, sites—land and sea, landscapes, and places of significance—fall within native title law.[4] Traditional Owners may, through processes prescribed in the *Native Title Act 1993* (Cth), have rights to land recognised by the state. Despite the intrinsic connection—as both a non-technical and a legal concept—between Traditional Owners and their lands, native title does not comprehend cultural heritage rights. Native title might include rights of access to sacred sites and ceremonies conducted there, but the rights afforded under s223(1) of the *Native Title Act* have been interpreted to exclude rights to protect cultural knowledge.[5] Thus, so far as native title land encompasses a site comprising cultural heritage, that aspect of the land's characterisation (under the Anglo-Australian legal system) does not fall within the native title framework. In its 2015 Report, the Australian Law Reform Commission recommended further examination of the potential for cultural knowledge to be considered a native title right,[6] however the Report has not yet been acted on.

2.4. Where a native title claim has been lodged, or a determination made, Traditional Owners may have a right to negotiate with other users (or potential users) of the land. Importantly, this is not a right of veto. It is merely the right to come to agreement on the use of land held under native title. The resulting Indigenous Land Use Agreement (ILUA) is registered in the National Native Title Tribunal, but its terms are confidential to the parties—and sometimes subject also to a confidentiality requirement prohibiting public discussion of land-related matters.

2.5. The potential for Traditional Owners to protect significant sites is thus undermined through:

  2.5.1. the orientation of Indigenous cultural heritage as a right vested in the state; and

  2.5.2. the deliberate construction of native title as:

    a) excluding substantive rights to cultural heritage; and

    b) privatising agreement-making in circumstances that position Traditional Owners as the weaker party.

2.6. So long as the system of Indigenous cultural heritage laws and native title continue in this vein, the framework for protection of Indigenous cultural heritage will remain both ineffective and inadequate to physically protect significant sites, and to protect their ongoing cultural importance to First Nations peoples.

2.7. Recommendation:

  2.7.1. To follow through with the implementation of the Australian Law Reform Commission recommendation to consider recognising cultural

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and William Logan (eds), *Intellectual Property, Cultural Property and Intangible Cultural Heritage (Key Issues in Cultural Heritage)* (Routledge, 2018) 137.

[3] Elizabeth Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (AGPS, 1996), [3.2].

[4] To the extent that rights are recognised pursuant to the *Native Title Act 1994* (Cth).

[5] *Western Australia v Ward* (2002) 213 CLR 1, 209.

[6] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (Report No 126, April 2015) 270.

knowledge as a native title right,[7] as well as aligning the *Native Title Act* with cultural heritage itself.

2.7.2. In consultation with First Nations peoples, to reorient Indigenous cultural heritage laws to offer substantive rights to First Nations peoples themselves, over significant sites, whether native title exists over those sites or not.

3. Loss or Damage from Destruction of Juukan Gorge Site

3.1. As Indigenous cultural heritage is conceived of as the patrimony of the state (and thus the broader community) rather than a private right vesting in Traditional Owners,[8] the framework of cultural heritage does not provide for damages for the loss suffered by Traditional Owners. Yet the fact that the question of loss or damage to Traditional Owners is included in the terms of reference speaks to the intuitive connection between Traditional Owners and significant sites (in cultural heritage terms). This should logically be provided for by law.

3.2. On the other hand, the *Native Title Act* provides for compensation for the loss of native title, although the compensation provisions have rarely been used. The *Timber Creek* decision in 2019[9] offers guidance as to how the common law might calculate damages payable to Traditional Owners for the loss of their lands—and landscapes. Not only did the *Timber Creek* decision calculate loss arising from dispossession and loss of native title rights (property), but it also awarded damages for cultural loss. For example, the trial judge accepted that 'loss of, and damage to, country caused emotional, gut-wrenching pain and deep or primary emotions accompanied by anxiety for the Claim Group.'[10]

3.3. An earlier decision by Henry J of the Supreme Court of Queensland had also recognised the loss of culture in compensation awarded to the family of an Aboriginal man killed in the 2005 Lockhart River plane crash.[11] The award was calculated in part based on the family's loss of the cultural skills of the deceased.[12]

3.4. It is clear that loss of culture is capable of compensation under the law—yet the loss of cultural heritage such as in the case of the destruction of the Juukan Gorge caves is not provided for.

3.5. Such a framework would also need to comprehend circumstances where native title has not been determined, given that the significance of cultural sites for First Nations peoples continues to exist independently of a native title determination. This is evidenced by the very existence of Indigenous cultural heritage, defined with reference to its importance to Indigenous peoples.

3.6. *Recommendation*:

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[7] Ibid.
[8] See, eg, *WA v Bropho* (1991) 5 WAR 75, 86.
[9] *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 (13 March 2019).
[10] Ibid [194].
[11] *Emily Kepa, for and on behalf of the estate and dependants of Frank Billy, deceased v Lessbrook Pty Ltd (In Liquidation)* [2012] QSC 311 (12 October 2012).
[12] Kate Galloway, 'Lockhart River crash compensation a big win for Indigenous justice' *The Conversation* (6 November 2012) <https://theconversation.com/lockhart-river-crash-compensation-a-big-win-for-indigenous-justice-10257>.

3.6.1. Reorientation of Indigenous cultural heritage laws to recognise substantive rights in First Nations peoples to significant sites.
3.6.2. Provision for compensation for loss where significant sites are damaged or destroyed.

4. Other Matters—Voice to Parliament

4.1. It is well and good for a non-Indigenous lawyer and legal scholar to opine on law reform to Indigenous cultural heritage laws. But the essence of the problem underlying this submission is the absence of First Nations voices from Australian law-making processes.
4.2. Australian law builds silos around cultural heritage and native title because non-Indigenous interests and traditions are privileged in the law-making process. Without effective processes to engage with, listen to, and learn from, the views and experiences of First Nations peoples themselves our lawmaking will continue to make the same mistakes. These mistakes not only affect Traditional Owners. As the loss of the Juukan Gorge caves has shown, these losses diminish us all.
4.3. *Recommendation*: That Parliament adopt the recommendations of the Uluru Statement from the Heart,[13] moving forward with a Voice to Parliament as recommended by the Referendum Council in its 2017 Report.

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29 July 2020
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[13] Referendum Council, *Final Report of the Referendum Council* (Commonwealth of Australia, 2017); *Uluru Statement from the Heart* (2017) <https://www.referendumcouncil.org.au/resource>.