



Australian Government

# Australian Government response to the Joint Standing Committee on Northern Australia's:

**A Way Forward:** Final report into the destruction of Indigenous heritage  
sites at Juukan Gorge

and

**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

November 2022



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#### **Acknowledgements**

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#### **Acknowledgement of Country**

We acknowledge the Traditional Custodians of Australia and their continuing connection to land and sea, waters, environment and community. We pay our respects to the Traditional Custodians of the lands we live and work on, their culture, and their Elders past and present.

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# Minister's foreword: Juukan Gorge response

As the Puutu Kunti Kurrama and Pinikura people, the Traditional Owners of the Juukan Gorge, wrote in their submission to the Parliamentary Inquiry into the destruction of their sacred site:

*'The Juukan Gorge disaster is a tragedy not only for our people. It is also a tragedy for the heritage of all Australians and indeed humanity as a whole.'*

We can feel the scale of this loss when we hear the way Traditional Owners described it in their testimony. This place was an 'an anchor of our culture'. It was a 'museum of heritage'. It was a site of 'profound', 'sacred', 'unique' and 'ancient' power.

The Juukan Gorge is one of the oldest sites of human occupation in Australia. The rock shelters contain evidence of human life going back 46,000 years. What was lost can never be replaced.

This report explains how we reached that shameful moment.

There was an agreement between Rio Tinto and the Traditional Owners that reflected gross inequalities of power. And there was federal legislation that was only ever designed as a last resort – and that was confusing, difficult to access, and ultimately ineffective.

## **What's clear from this report is that the system is not working.**

That is why the Australian Government has committed to reforming the law, with standalone First Nations cultural heritage legislation, co-designed with First Nations peoples. This report and recommendations represent the first major step in that journey.

## **The Joint Standing Committee on Northern Australia identified eight recommendations for reforming Australia's cultural heritage.**

**This report accepts seven of the recommendations.** The final recommendation is being worked through, which is whether ultimate responsibility should sit with the Minister for Indigenous Australians or the Minister for the Environment.

The Committee has produced a diligent, thorough and considerate report, and the recommendations speak to the principles and priorities that will shape our legislation.

Free, informed, and prior consent. Truth telling and open dialogue. Genuine partnership, the kind that can only be entered into by equals.

And running through it all, a new respect for First Nations culture and history, enshrined in our national law, honoured by business and civil society, and celebrated in communities right across this country.

There's never been a better moment to take this step.



*Tanya Plibersek*

The Hon Tanya Plibersek MP  
Minister for the Environment and Water

# Acknowledgements

The Australian Government thanks the individuals, organisations and industries who contributed to this inquiry. We particularly acknowledge the Puutu Kunti Kurrama and Pinikura people and all First Nations peoples who shared their stories of cultural heritage destruction and acknowledge the pain and trauma this may have caused. We thank them for their involvement in this process to inform the inquiry.

## Introduction

The Australian Government welcomes the Joint Standing Committee on Northern Australia's (the Committee's) interim and final reports into the destruction of First Nations' heritage sites at Juukan Gorge in Western Australia.

*Never Again: Inquiry into the destruction of the 46,000 year old caves at Juukan Gorge in the Pilbara region of Western Australia – Interim Report* was released in December 2020. The report includes seven recommendations of relevance to Rio Tinto, the Western Australian Government and the Australian Government.

*A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* was released in October 2021. The final report made eight recommendations of primary relevance to state, territory and the Australian governments. The recommendations encompass ratification of international agreements, legislative and policy reform, improving systems and processes, and prohibiting restrictions on Traditional Owners to seek cultural heritage protections. They also address broader matters relating to cultural heritage law and policy.

The Australian Government also notes that two dissenting reports were provided by:

- Senator Lidia Thorpe; and
- Senator Dean Smith and former MP Mr George Christensen.

Both dissenting reports have been addressed at Appendix A to this Australian Government response.

Development of this response to the two reports was supported by a First Nations Cultural Heritage Inter-Departmental Committee, including the following agencies:

- Department of Climate Change, Energy, the Environment and Water
- National Indigenous Australians Agency
- The Attorney-General's Department
- Department of the Prime Minister and Cabinet
- Office for the Arts- Department of Infrastructure, Transport, Regional Development, Communications and the Arts
- The Australian Institute of Aboriginal and Torres Strait Islander Studies
- Department of Industry, Science and Resources
- Department of Foreign Affairs and Trade

The Australian Government appreciates the urgency of improving cultural heritage protections for First Nations peoples. The government either agrees, agrees in principle, or takes note of the recommendations made in the two reports.

# Overarching approach – a co-design partnership with First Nations peoples to reform heritage protections

The Australian Government recognises that there is an ongoing story of damage and destruction to cultural heritage sites across Australia since colonisation, and the destruction of cultural heritage at Juukan Gorge is one example of many more that were exposed before, during and since this inquiry. This has been further highlighted in the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), led by Professor Graeme Samuel AC, and the 2021 State of the Environment report, which highlights that cultural heritage destruction is ongoing.

The Australian Government recognises that First Nations peoples have long been calling for urgent cultural heritage reforms, which is why we are committed to working in full and genuine partnership with First Nations peoples to reform cultural heritage protections through a standalone piece of cultural heritage legislation.

The Australian Government will do this within the framework of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), particularly the principle of self-determination, and consistent with our commitments to the *National Agreement on Closing the Gap* and the *Uluru Statement from the Heart*.

The Australian Government has committed to appointing an Ambassador for First Nations People to deliver on its commitment to implement the *Uluru Statement from the Heart* in full, and embed Indigenous perspectives, experiences and interests into our foreign policy. Appointing an Ambassador for First Nations People is an opportunity to ensure the unique perspectives of Aboriginal and Torres Strait Islander peoples are central to Australia's engagement to progress First Nations rights globally.

The *National Agreement on Closing the Gap*, signed by all levels of government, commits to undertaking policy making in full and genuine partnership with First Nations peoples, where it significantly impacts their lives. The co-design partnership aligns with priority reform 1 of the National Agreement, which commits to formal partnerships and shared decision making with First Nations peoples, and priority reform 3 which commits to transforming government organisations.

The Australian Government has entered into a partnership agreement with the First Nations Heritage Protection Alliance to reform First Nations cultural heritage protections. This co-design partnership underpins the Australian Government's approach to responding to the recommendations of the Committee's two reports. This co-design partnership is being overseen by a Joint Working Group, made up of six members, represented equally by the Australian Government and the First Nations Heritage Protection Alliance. First Nations peoples will also be broadly engaged through this co-design partnership.

The co-design partnership is currently in stage two of a national engagement process. This engagement process includes canvassing recommendations made by the Committee's two reports. Options to reform First Nations cultural heritage protections are being developed by the partnership. These options will be provided to the leadership of the First Nations Heritage Protection Alliance, and the Minister for the Environment and Water, the Hon Tanya Plibersek MP, for consideration in the term of this government.

Within the scope of issues being considered by the co-design partnership is legislative reform, policy transformation, administrative improvement and governance. Importantly, the co-design partnership includes consultation and engagement with state and territory governments, industry and the broader community, as well as First Nations peoples and organisations. The reform development process will consider the importance of cultural heritage to First Nations peoples and all Australians, and will balance this with the need for certainty in development considerations for businesses and industry.

It is vital that in strengthening protections there is a greater understanding of the importance of First Nations' cultural heritage, that First Nations peoples have a role in partnership with project proponents on project design and scope, and that there are provisions in place for the protection of cultural heritage. The government needs to balance urgent action to protect First Nations cultural heritage with the commitment to develop the reform agenda in partnership with First Nations peoples.

# A Way Forward:

**Final report into the destruction of  
Indigenous heritage sites at Juukan Gorge.**



## Recommendation 1

- 7.13 The Committee recommends that, at a matter of urgency, the Australian Parliament amend the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the *Environmental Protection and Biodiversity Conservation Act 1999* to make the Minister for Indigenous Australians responsible for all Aboriginal and Torres Strait Islander Cultural Heritage matters. As an interim measure, the Australian Government should take action to prohibit clauses in agreements that prevent traditional owners from seeking protection through Commonwealth legislation.
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- 7.14 Administrative responsibility for all Aboriginal and Torres Strait Islander heritage matters should be transferred to the relevant portfolio agencies reporting to the Minister for Indigenous Australians.
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### Noted.

The Australian Government is committed to ensuring the most appropriate Minister and portfolio has responsibility for legislation and policies for First Nations cultural heritage protection. This will be considered as part of the cultural heritage reform that the Australian Government has committed to in Recommendation 3.

## Recommendation 2

- 7.30 The Committee recommends that the Australian Government ratify the *Convention for the Safeguarding of the Intangible Cultural Heritage 2003*.
- 

### Agreed in principle.

The *Convention for the Safeguarding of the Intangible Cultural Heritage 2003* (2003 Convention), currently overseen by the Arts portfolio, requires ratifying states to implement a range of measures to recognise and ensure respect for the intangible cultural heritage of communities, groups and individuals; to raise awareness at local, national and international levels of the importance of intangible cultural heritage; to facilitate international cooperation and assistance on intangible cultural heritage matters; and to safeguard threatened intangible cultural heritage.

Given the diversity of what could be defined as intangible cultural heritage in Australia, careful consideration needs to be given to its application nationally.

Of particular importance is the application to First Nations' intangible cultural heritage. For example, Article 16 of the 2003 Convention requires the publication of a representative list of intangible cultural heritage.<sup>1</sup> This could be complex as elements of First Nations' culture are secret or sacred and the development of a representative list raises the question as to which body has the appropriate authority – both in a legal and culturally safe sense – to nominate First Nations cultural practices and expressions for inscription on the UNESCO list.

The Australian Government is currently undertaking consultations across a range of policy and legislative proposals, which will be considered to inform Australia's position on the 2003 Convention.

In particular the government will consider the Productivity Commission's final report into the inquiry on 'Aboriginal and Torres Strait Islander Visual Arts and Crafts', and IP Australia's 'Study into stand-alone legislation for Indigenous Knowledge' due at the end of 2022, which will advance the government's commitment to developing stand-alone cultural heritage legislation to reform cultural heritage protections. This work is in line with the setting of the National Cultural Policy.

Given these concurrent and overlapping processes, the matter needs to be more fully considered, including impacts that the ratification would have on the protection of intangible cultural heritage practice and implementation resources required to administer the convention.

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<sup>1</sup> The intergovernmental committee for the Convention meets annually to evaluate countries' nominations of cultural practices and expressions, to decide whether to inscribe them. There are two lists, and items can be moved from one to the other: list of intangible cultural heritage **in need of urgent safeguarding**; and a **representative list of intangible cultural heritage of humanity**. In addition, there is a register of good safeguarding practices.

The Australian Government will continue to take direct action to support the safeguarding of intangible cultural heritage, including Australia's unique First Nations' intangible cultural heritage, through a range of measures and programs.

### Recommendation 3

- 7.77 The Committee recommends that the Australian Government legislate a new framework for cultural heritage protection at the national level
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- 7.78 The legislation should be developed through a process of co-design with Aboriginal and Torres Strait Islander peoples
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- 7.79 This new legislation should set out the minimum standards for state and territory heritage protections consistent with relevant international law (including the United Nations Declaration on the Rights of Indigenous People UNDRIP) and the *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia*
- 
- 7.80 These minimum standards would be developed as part of a co-design process but consideration should be given to the inclusion of the following:
- a definition of cultural heritage recognising both tangible and intangible heritage
  - a process by which cultural heritage sites will be mapped, which includes a record of past destruction of cultural heritage sites (with adequate safeguards to protect secret information and ensure traditional owner control of their information on any database)
  - clear processes for identifying the appropriate people to speak for cultural heritage that are based on principles of self-determination and recognise native title or land rights statutory representative bodies where they exist
  - decision making processes that ensure traditional owners and native title holders have primary decision-making power in relation to their cultural heritage
  - a requirement that site surveys involving traditional owners are conducted on country at the beginning of any decision making process
  - an ability for traditional owners to withhold consent to the destruction of cultural heritage
  - a process for the negotiation of cultural heritage management plans which reflect the principles of free, prior and informed consent as set out in the UNDRIP
  - mechanisms for traditional owners to seek review or appeal of decisions
  - adequate compliance, enforcement and transparency mechanisms
  - adequate penalties for destructive activities, which include the need to provide culturally appropriate remedy to traditional owners
  - the provision of adequate buffer zones around cultural heritage sites
  - a right of timely access by Aboriginal and Torres Strait Islander peoples to protected cultural heritage sites
  - a process by which decisions can be reconsidered if significant new information about cultural heritage comes to light.
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- 7.81 The Commonwealth should retain the ability to extend protection to and/or override decisions made under inadequate state or territory protections that would destroy sites that are contrary to Aboriginal and Torres Strait Islander peoples consent
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### Agreed.

The Australian Government recognises the importance of putting First Nations peoples at the heart of decision-making for issues that affect Aboriginal and Torres Strait Islander peoples. The Australian Government commits to reform the national heritage protection framework through a co-design process with First Nations peoples. This work is well underway with a partnership agreement with the First Nations Heritage Protection Alliance who have a broad representation of First Nations members and are valued partners of the Australian Government.

The Australian Government notes the specific elements of this recommendation, which are being considered in the cultural heritage reform process, along with consideration of existing regulatory frameworks. Further information on the reform process and how this will inform the Australian Government’s commitment to new stand-alone cultural heritage legislation is included in the “Overarching approach” section.

The co-design partnership is considering recommendation 7.80, as well as other issues raised as part of the co-design partnership’s national consultation process, such as the need to protect First Nations intangible cultural heritage in a culturally appropriate way. In particular, the co-design partnership is considering minimum standards such as those presented in *Dhawura Ngilan*, as the basis for First Nations heritage protection reform. The intention behind the minimum standards recommended is also being actively considered through this process. This includes ensuring that the options considered for reform meet overarching design principles that place First Nations peoples at the centre of decision-making processes where their heritage will be affected.

The Australian Government agrees with recommendation 7.81 that the Australian Government should retain the ability to provide an avenue for protection to First Nations peoples where state or territory protections are inadequate. Currently the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act) allows the Minister for the Environment and Water (the Minister), upon application from an Aboriginal or Torres Strait Islander person or group of persons, or a person acting on their behalf, to make a declaration to protect an area, object, or class of objects from a threat of injury or desecration. The Minister is required to consult with the relevant state or territory minister as to whether the area, object, or class of objects is effectively protected under state or territory law. If the state or territory law does not provide effective protection, the Minister for the Environment and Water can make a declaration to protect the area, object, or class of objects if satisfied that the area or object/s are significant and are under threat of injury or desecration.

The ATSIHP Act continues to offer a last avenue of protection when state and territory protections are not effective. As part of the broader co-design process, consideration will be given to whether this power needs to be strengthened or improved, including considering the avenue for Commonwealth involvement where state and territory protections are inadequate. We will also ensure that the most appropriate Minister and portfolio has responsibility for legislation and policies for First Nations cultural heritage protection.

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7.82 Traditional owners should be able to effectively enforce Commonwealth protections through civil action.

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**Agreed in principle.**

The Australian Government is engaging with First Nations peoples through the co-design process outlined in the “Overarching approach” section to seek views on and consider options to improve compliance with and strengthen the enforcement of federal heritage protections.

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7.83 The legislation should prohibit the use of clauses in agreements that prevent traditional owners from seeking protection through Commonwealth legislation.

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**Agreed in principle.**

This is addressed below in the Australian Government’s response to Recommendation 4 of *A Way Forward*. The co-design process is considering ways in which agreements between two parties have contractual mechanisms that limit or prohibit First Nations peoples’ ability to pursue cultural heritage protections at the federal level.

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7.84 The Minister for Indigenous Australians should be the responsible Minister under the legislation.

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**Noted.**

This is addressed in the Australian Government’s response to Recommendation 1 of *A Way Forward*. The Australian Government has committed to putting First Nations peoples at the heart of decision making, and ensuring the most appropriate minister and portfolio has responsibility for legislation and policies for First Nations cultural heritage protection.

#### Recommendation 4

- 7.89 The Committee recommends that the Australian Government review the *Native Title Act 1993* with the aim of addressing inequalities in the negotiating position of Aboriginal and Torres Strait Islander peoples in the context of the future act regime. This review should address:
- the current operation of the future act regime and other relevant parts of the Act including s31 (right to negotiate), s66B (replacement of the applicant) and Part 6 (the operation of the NNTT)
  - developing standards for the negotiation of agreements that require proponents to adhere to the principle of Free, Prior and Informed Consent as set out in the UN Convention of the Rights of Indigenous People (UNDRIP)
  - ‘gag clauses’ and clauses restricting Aboriginal and Torres Strait Islander peoples access to Commonwealth heritage protections should be prohibited
  - making explicit the authority and responsibilities of PBCs and Representative bodies in relation to cultural heritage.
- 

#### Agreed in principle.

The Australian Government is considering the most appropriate mechanism or mechanisms to review the native title issues identified in Recommendation 4. Some aspects of Recommendation 4, particularly the latter two dot points, are dependent on the future cultural heritage protection model and may be more appropriately dealt with in cultural heritage legislation rather than the *Native Title Act 1993* (Cth). These matters are being considered through the co-design process which is currently being undertaken in partnership between the Australian Government and the First Nations Heritage Protection Alliance, as discussed in the “Overarching approach” section.

#### Recommendation 5

- 7.97 The Committee recommends that the Australian Government endorse and commit to implementing *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia*.
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#### Agreed in principle.

*Dhawura Ngilan* was written by the Heritage Chairs of Australia and New Zealand to offer a way to inform policy, underpin legislative change and inspire actions for First Nations cultural heritage. Some of its recommendations are outside of the Australian Government’s responsibilities, however, the Australian Government supports *Dhawura Ngilan* in principle and is taking its findings into account in its work to reform and strengthen heritage protections in partnership with the First Nations Heritage Protection Alliance.

Several recommendations in *Dhawura Ngilan* are consistent with recommendations in *A Way Forward*, such as truth-telling and developing national standards. The Australian Government’s response to these matters is also addressed in the response to Recommendations 1, 3 and 6.

#### Recommendation 6

- 7.109 The Committee recommends that the Australian Government develops a model for a cultural heritage truth telling process that may be followed by all Australians—individuals, governments and companies—as a part of any process to engage with Aboriginal and Torres Strait Islander peoples and their cultural heritage.
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#### Agreed.

The Australian Government is committed to truth-telling as an integral part of implementing the *Uluru Statement from the Heart* in full.

As part of that commitment, the Australian Government will establish an independent Makarrata Commission to oversee a national process for agreement-making and truth-telling in partnership with First Nations communities and other levels of government.

The Australian Government welcomes and acknowledges the many state and territory truth-telling and treaty initiatives already underway and intends for the Makarrata Commission to complement these.

Opportunities to pursue truth-telling processes and better engage with First Nations peoples will also form part of the considerations of working in partnership to design cultural heritage protection reforms outlined in the “Overarching approach” section. Truth-telling will be a key discussion point in the national engagement process towards the reform of First Nations cultural heritage protections.

### Recommendation 7

7.120 The Committee recommends that the Australian Government establish an independent fund to administer funding for prescribed body corporates (PBCs) under the Native Title Act 1999.

7.121 Revenue for this fund should come from all Australian governments and proponents negotiating with PBCs

### Agreed in principle.

The Australian Government is committed to working in partnership with native title holders, their Prescribed Bodies Corporate (PBCs), state and territory governments and other key stakeholders to consider a range of options to reform funding of PBCs and build PBC capacity.

The Australian Government recognises PBCs play an essential role in the native title system and in safeguarding native title holders’ rights and interests. PBCs are also frequently the main vehicle for native title holders land management and economic aspirations, and may also run various programs, such as ranger and cultural heritage management programs.

Cultural heritage management is undertaken on a user pays system, whereby land use proponents pay the costs of traditional owners undertaking survey and assessment activities. This intersects with a PBC sector where the user pays system for native title future acts is inadequate to meet the operational costs of many PBCs. Numerous reports from native title and industry groups over the past decade have sought further government funding to assist PBCs to undertake responsibilities that arise from both federal and jurisdictional law.

The proposed independent fund would consider how government funding could supplement the user-pays system to ensure that those PBCs requiring additional corporate and operational support receive it. The Australian Government will further consider how proponents and industry can provide additional contributions to PBCs for negotiation and agreement making on their lands. We will work with business, industry and PBCs to further explore what these options may be.

PBCs operate in areas where there have been native title determinations. It will also be important to consider arrangements where other land tenure arrangements are in place, or where there are sites of cultural importance in locations without native title recognised or statutory land rights resolved.

The Australian Government, through the National Indigenous Australians Agency (NIAA), currently provides three streams of funding for PBCs, as well as funding to Native Title Representative Bodies and Service Providers (NTRB/SPs) to assist native title claimants and native title holders post-determination.

- **PBC Basic Support** funding is provided to support PBCs to meet their compliance obligations. It is paid to NTRB/SPs. Approximately \$10.8 million was provided in 2021-22.
- **The PBC Capacity Building program**<sup>2</sup> supports PBCs to grow their organisational capacity, identify economic opportunities and engage in native title agreement making. In recognition of the critical role PBCs play in the native title system and broader role managing land and waters and protecting heritage, there is \$51 million available to PBCs over the next four years.
- **Operational funding for native title representative bodies and service providers** is provided to assist native title claimants and native title holders post-determination. These organisations have a role in facilitating and supporting native title holders and their PBCs, which often includes understanding cultural heritage protection. Approximately \$111 million was provided to 15 NTRB/SPs in the 2021-22 financial year, including the \$10.8 million in PBC Basic Support funding.

<sup>2</sup> PBCs may also apply for funding from any other IAS funding streams for which they are eligible such as the Jobs, Land and Economy stream.

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7.122 Alongside an increase in funding for PBCs, the Committee is of the view that there needs to be greater transparency and accountability in PBC proceedings within communities. Like all statutory bodies, PBCs are required corporate reporting responsibilities like conducting directors' meetings, AGMs and special general meetings. However, the Committee heard concerning reports that some PBCs are not transparent in their decision-making with respect to their local community resulting in decisions being taken to allow the destruction of cultural heritage sites, against the wishes of community members.

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7.123 Therefore, the Committee considers that PBCs should, as part of funding agreements, be required to demonstrate transparency and accountability in their decision-making processes with respect to their local community.

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### **Agreed in principle.**

The Australian Government is supportive of ensuring decisions made by PBCs on behalf of members or native title holders are transparent and accountable. Should any future reforms make changes to PBCs' cultural heritage obligations or responsibilities (see Recommendation 8), the Australian Government will review funding arrangements.

In 2021, the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (PBC Regulations) were amended to improve the accountability and transparency of decision making obligations PBCs have to native title holders.<sup>3</sup>

Should wider consultation requirements be mandated for PBCs, the Australian Government agrees to review any funding agreements and guidelines in light of these new obligations (see Recommendation 8 below).

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7.124 In the context of the issue of transparency, the Committee notes that mining companies have publicly reported on outcomes of reviews of currently-held section 18 permits, and the high-level results of reviews of agreements with traditional owners undertaken since the interim report, as well as on their engagement with traditional owners more generally. The Committee considers this to be an appropriate practice provided there is agreement between the companies and traditional owners about the release of such information

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### **Noted.**

This recommendation concerns Western Australian legislation.

The Australian Government is committed to working with states and territories to improve protections and deliver greater consistency in cultural heritage protections across jurisdictions.

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<sup>3</sup> See Native Title (Prescribed Bodies Corporate) Regulation 1999: Reg 8 and Reg 8A

## Recommendation 8

- 7.125 The Committee recommends that the Australian Government increase the transparency and accountability requirements on Prescribed Body Corporates (PBCs) and Native Title Representative Bodies under the Native Title Act 1999 to require that they demonstrate adequate consultation with, and consideration of, local community views prior to agreeing to the destruction/alteration of any cultural heritage sites.
- 

### **Agreed in principle.**

It is appropriate that most state and territory First Nations' cultural heritage laws give primacy to native title holders (and their PBCs) and/or others with recognised legal interests in the land, over the areas their rights are recognised.

The recognition of native title over an area of land is the conclusion of a significant process to determine who and whether a certain group has ongoing cultural connection and rights to an area of land. The native title claims process requires significant anthropological work to determine who can speak for country and borders of country. A determination confers rights and interests to a specific group over that area of land, which often includes a right to visit and to take care of sites of cultural significance.

It is also worth noting that a PBC will only exist for areas where native title has been determined.

Regardless, even where native title has been extinguished or not been determined, consultation with Traditional Owners and other First Nations stakeholders remains equally important.

An obligation to consult with the wider community beyond the identified group may not be restricted to PBCs, as they may only sometimes be the responsible group for cultural heritage. As such, it is appropriate to consider the need for this obligation in the context of the broader cultural heritage legislation reform process.

The Australian Government recognises that cultural heritage care and concern may extend beyond the First Nations group with legal responsibility for it under state and territory legislation, including where the responsible group is a PBC.

The Australian Government will consider this recommendation through the cultural heritage reform work that is currently being undertaken in partnership with the Alliance.

## Summary Table of recommendations

### ***A Way Forward* final report**

#### **Recommendation 1**

Noted

#### **Recommendation 2**

Agreed in principle

#### **Recommendation 3**

Agreed

#### **Recommendation 4**

Agreed in principle

#### **Recommendation 5**

Agreed in principle

#### **Recommendation 6**

Agreed

#### **Recommendation 7**

Agreed in principle

#### **Recommendation 8**

Agreed in principle



# 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.

## Recommendation 1

1.53 That Rio Tinto:

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Negotiate a restitution package for the destruction of the Juukan rock shelters with the PKKP

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Ensure a full reconstruction of the Juukan rock shelters and remediation of the site at its own expense, with guidance and oversight from the PKKP, acknowledging Rio Tinto's undertaking in this regard and the steps taken to date. The reconstruction should specifically include steps to mitigate water and other damage to the creek that flows in Juukan Gorge and protect the Sacred Snake-head Rock Pool

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Commit to a permanent moratorium on mining in the Juukan Gorge area, negotiated with the PKKP, and that this is respected by all mining and exploration companies

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Undertake an independent review of all its agreements with Traditional Owners to ensure they reflect best practice standards

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Remove any gag clauses or restrictions on Traditional Owner rights under heritage and other laws

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Commit to a stay on all actions under Rio Tinto's current Section 18 permissions until they are properly reviewed to ensure that free, prior and informed consent has been obtained from Traditional Owners and is current

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Commit to a voluntary moratorium on applying for new Section 18 permissions, pending either the passage of stronger heritage protections in Western Australia or the negotiation of a protocol with relevant Traditional Owners to establish an improved process for site surveys, cultural protection and work area clearances based on the principle of avoiding damage wherever possible

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Return all artefacts and other materials held by Rio Tinto to PKKP and after negotiation and by agreement with PKKP, fund appropriate keeping places for artefacts and other materials to be supervised and controlled by the PKKP.

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The Australian Government notes this recommendation for Rio Tinto, and will consider the issues raised in the context of the co-design partnership for cultural heritage reform.

## Recommendation 2

1.58 That the Western Australian Government:

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Replace the *Aboriginal Heritage Act 1972* with stronger heritage protections as a matter of priority, noting the progress already made in consultation on the draft Aboriginal Cultural Heritage Bill 2020. Any new legislation must as a minimum ensure Aboriginal people have meaningful involvement in and control over heritage decision making, in line with the internationally recognised principles of free, prior and informed consent, including relevant RNTBCs under the Native Title Act. Any new legislation should also include a prohibition on agreements which seek to restrict Traditional Owners from exercising their rights to seek protections under State and Commonwealth laws

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Place a moratorium on the consideration and approval of new Section 18 applications until the new legislation is passed unless it can be established and verified that there is current free, prior and informed consent obtained from Traditional Owners

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Strongly encourage mining companies with existing Section 18 permissions to not proceed with these approvals but to have them reassessed under the new legislation once it is passed unless it can be established and verified that there is current free, prior and informed consent obtained from Traditional Owners

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Urgently establish new procedures to improve the quality and transparency of decision making by the Registrar and ACMC prior to xvii any legislative change, including processes for appropriate escalation of urgent matters to the Minister

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Adequately resource the ACMC

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Institute rolling membership of the ACMC to ensure the involvement of Traditional Owners of the country that is the subject of any decision, as nominated by the relevant RNTBC

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Investigate the large number of heritage sites de-registered since 2011 and ensure that proper procedures are in place for the removal of heritage sites from the register

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Reinstate sites to the register where these were inappropriately removed

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Undertake a mapping and truth-telling project to record all sites that have been destroyed or damaged pursuant to the AHA, including visual representations of the impact to country, with a view to establishing a permanent exhibition or memorial in the Western Australian Museum.

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The Australian Government notes this recommendation for the Western Australian Government, and will consider the issues raised in the context of the co-design partnership for cultural heritage reform. The Australian Government also notes that the *Aboriginal Cultural Heritage Act 2021 (WA)* has been introduced since the Never Again Interim report was published.

### Recommendation 3

1.59 That all mining companies operating in Western Australia whether or not on Native Title Land:

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Undertake independent review of their agreements with Traditional Owners and commit to ongoing regular review to ensure consistency with best practice standards. In particular, companies should review final compensation clauses in recognition that free, prior and informed consent requires continuous review and engagement with traditional owners

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Issue public confirmation that they will not rely on gag clauses or clauses preventing Traditional Owners from exercising their rights under state and Commonwealth heritage laws and remove these clauses from their agreements with Traditional Owners

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Commit to a stay on all actions under currently held Section 18 permissions until they are properly reviewed to ensure that free, prior and informed consent has been obtained, and is current, from Traditional Owners for any damage or destruction to significant sites

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Commit to a voluntary moratorium on applying for new Section 18 permissions, pending either the passage of stronger heritage protections in Western Australia or the negotiation of a protocol with relevant Traditional Owners to establish an improved process for site surveys, cultural protection and work area clearances based on the principle of avoiding damage wherever possible

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Fund appropriate keeping places for artefacts and other materials to be agreed on with and controlled by the relevant Traditional Owners. Wherever possible, working together with other companies operating on country to jointly fund keeping places in agreement with Traditional Owners

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Facilitate the sharing of all heritage information and mapping technology used by mining companies with relevant PBCs, to correct information asymmetry and ensure Traditional Owners have access to records of their cultural heritage and are resourced to set up their own mapping initiatives

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Actively support and fund efforts by the Western Australian and Commonwealth governments to establish mapping and truth telling initiatives as recommended above

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Work with Traditional Owners to ensure better access to country.

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The Australian Government notes Recommendation 3 is directed towards mining companies operating in Western Australia, and will consider the issues raised in the context of the co-design partnership for cultural heritage reform in consultation with the Western Australia government.

Currently, more than 60 per cent of Australia's national resources projects operate on land covered by a Native Title claim or determination. This makes First Nations landholders and communities fundamental partners for the resources sector, and its social and economic contribution to Australia. The resources sector is a key contributor to the Australian economy and has created significant employment opportunities for First Nations peoples, both direct and indirect. At a national level, the mining industry, as a proportion of its workforce, employs First Nations peoples at a higher rate than all other industries. It is fundamental that agreements between First Nations peoples and the resource sector provide mechanisms for First Nations peoples to protect cultural heritage.

The Australia Government is committed to protecting First Nations' cultural heritage and is engaging with First Nations peoples as well as businesses and industry in developing the reform agenda.

#### Recommendation 4

1.62 The Committee recommends that the Australian Government:

Seek to legislate a prohibition on agreements that restrict Traditional Owners from publicly raising concerns about heritage protection or exercising their rights under heritage legislation;

#### Agreed.

This is addressed in the Australian Government's response to Recommendations 1 and 4 of *A Way Forward*. The co-design process described in the "Overarching approach" section will explore the barriers to First Nations peoples seeking cultural heritage protections. This will include consideration of the ways in which agreements between two parties have contractual mechanisms that limit or prohibit First Nations peoples' ability to pursue cultural heritage protections at the federal level.

Implement and publicly publish improved procedures within the Ministers' offices, the National Indigenous Australians Agency and the Department for responding to and recording heritage concerns raised by Traditional Owners, including protocols for communicating and escalating urgent concerns to the responsible Minister and their Department

#### Agreed.

Applications for the protection of First Nations' cultural heritage under the ATSIHP Act can be made directly to the Minister for the Environment and Water or the Department of Climate Change, Energy, the Environment and Water (DCCEEW) or via the department and its 24-hour emergency (toll free) Indigenous Heritage emergency hotline. Processes to manage applications between the Minister's office and the department have been reviewed and strengthened, with communication between the Minister's office and the department on applications and their progress occurring regularly.

The Australian Government's current protocol includes the DCCEEW notifying the National Indigenous Australians Agency (NIAA) upon receipt of an application. The DCCEEW provides details to the NIAA including the applicant, the specified area, why protection is sought and from what proposed activities (an exception is for s18 emergency applications which require a 48 hour decision, for which we would notify after a decision has been made).

The DCCEEW keeps the NIAA informed about the application as appropriate thereafter and maintains regular contact on the progress of cases. The DCCEEW also maintains contact with the NIAA regarding potential cases that may come through the 24 hour ATSIHPA emergency hotline.

This procedure is on the DCCEEW website.

The NIAA has also strengthened its internal processes to ensure any stakeholder enquiries relating to the protection of First Nations heritage sites are escalated to the appropriate authorities, including to the DCCEEW, in cases where protection under the ATSIHPA is being sought.

The NIAA's internal process aligns with the internal process implemented by the DCCEEW.

The NIAA also provides the contact details of the DCCEEW 24-hour emergency Indigenous Heritage emergency hotline and email address to stakeholders who approach the NIAA with enquiries relating to the protection of Indigenous heritage sites.

These arrangements regarding the referral and management of applications are standard practice with government departments and Ministerial Offices.

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Work with Western Australia to implement the recommendation above for a mapping and truth telling project in relation to heritage that has been damaged or destroyed, and to extend this project at the national level in collaboration with other states and territories.

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**Agreed.**

This is addressed in the Australian Government's response to Recommendations 5 and 6 of *A Way Forward*. The Australian Government notes that truth-telling, *Dhawura Ngilan* and its accompanying Best Practice Standards will be key discussion points in the national engagement process towards the reform of First Nations' cultural heritage protections.

**Recommendation 5**

- 1.64 The Committee recommends to the Australian Government that ministerial responsibility for the administration of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* revert to the Minister for Indigenous Australians Agency, and that the National Indigenous Australians Agency become the administering authority.
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**Noted.**

This is addressed in the Australian Government's response to Recommendation 1 of *A Way Forward*.

**Recommendation 6**

- 1.65 The Committee recommends to the Australian Government that the relevant Minister direct their office and department to more vigorously prosecute use of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* in Western Australia until such time as new legislation is enacted in Western Australia replacing the current *Aboriginal Heritage Act 1972* (WA).
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This recommendation is overtaken by events, noting that the *Aboriginal Cultural Heritage Bill 2021* passed both houses of the Western Australian Government on 17 November 2021.

The ATSIHP Act continues to be an avenue for Aboriginal and Torres Strait Islander people or group of persons to apply where state and territory arrangements are inadequate at protecting cultural heritage legislation.

**Recommendation 7**

- 1.66 The Committee recommends that the Australian Government urgently review the adequacy of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.
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**Agreed.**

This will be addressed in the Australian Government's response to Recommendations 1 and 3 of *A Way Forward*. The Australian Government recognises the limitations of the ATSIHP Act and is committed to developing new standalone cultural heritage legislation. In developing this legislation we will be considering the adequacy of the ATSIHP Act.

## Summary table of recommendations

### ***Never Again* interim report**

#### **Recommendation 1**

The Australian Government notes this recommendation is for Rio Tinto

#### **Recommendation 2**

The Australian Government notes this recommendation is for the Western Australian Government

#### **Recommendation 3**

The Australian Government notes Recommendation 3 is directed towards mining companies operating in Western Australia

#### **Recommendation 4**

Agreed and addressed in the Australian Government's response to Recommendation 4 of *A Way Forward*

#### **Recommendation 5**

Noted and addressed in the Australian Government's response to Recommendation 1 of *A Way Forward*

#### **Recommendation 6**

This recommendation is overtaken by events

#### **Recommendation 7**

Agreed and addressed in the Australian Government's response to Recommendations 1 and 3 of *A Way Forward*

# Appendix A - Dissenting Views

## 1. Senator Lidia Thorpe

Preface: A number of recommendations from Senator Thorpe are directed towards the Australian Government and state and territory governments. The Australian Government can only address its remit, which does not extend to the responsibilities of state and territory governments.

Dissenting view	Australian Government response
<p><b>Recommendation 1</b></p> <p>The Australian government begin the process of negotiating a Treaty or treaties with First Nations people, including a truth telling process and healing. A Treaty will create a unified national identity that celebrates what unites us, protects the rights of First Nations people and their cultures while also acknowledging the ongoing and historical injustices of colonisation.</p>	<p>Agreed</p> <p>The government is committed to the implementation of the Uluru Statement From the Heart and its three core components: Voice: a First Nations Voice in Parliament, guaranteed by the Constitution through a referendum.</p> <p>A Treaty: providing national acknowledgement of, and legal protection for, the rights and interests of First Nations peoples.</p> <p>Truth telling: a comprehensive process of truth telling about Australia’s history that acknowledges both the periods of colonial conflict and dispossession and the strength and resilience of First Nations peoples and cultures.</p> <p>The Australian Government has committed to establishing a Makarrata Commission with responsibility for treaty and truth telling, as outlined in the response to Recommendation 6 of <i>A Way Forward</i>.</p>
<p><b>Recommendation 2</b></p> <p>All legislation relating to First Nations peoples be based on the principles of the United Nations Declaration on the Rights of Indigenous Peoples and ensure any decisions are made based on the principle of Free, Prior and Informed Consent.</p>	<p>Recommendations 2-18 are Agreed in principle where the Australian Government has responsibilities at the federal level.</p> <p>The Australian Government has committed to co-designing cultural heritage reform in partnership with First Nations peoples.</p>
<p><b>Recommendation 3</b></p> <p>Giving consideration to the true meaning of Free, Prior and Informed Consent, all Commonwealth, state and territory legislation be amended to provide Traditional Owners with a right to veto any proposed activities.</p>	<p>The guiding framework for this work is within the principles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and recommends that First Nations peoples are placed at the centre of decision making processes where their heritage is affected. Issues being considered by the co-design partnership to inform their recommendations for reform include, but are not limited to, free prior and informed consent, policy and legislative reform, cultural heritage mapping, the roles of different levels of government, standards for First Nations’ heritage protection, and implementation and resourcing of First Nations’ protection measures.</p>
<p><b>Recommendation 4</b></p> <p>Australian governments on all levels, in a First Nations-led process, develop a nationally consistent approach for obtaining obtain Free, Prior and Informed Consent from Traditional Owners and Native Title holders in relation to activity proposals on Country, with specific consideration of the need to ensure that consultation is conducted inclusively with all affected communities in a culturally appropriate and well-resourced manner with full access to all relevant information and without being subjected to any form of pressure or coercion.</p>	<p>The Australian Government has committed to co-designing cultural heritage reform in partnership with First Nations peoples. The guiding framework for this work is within the principles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and recommends that First Nations peoples are placed at the centre of decision making processes where their heritage is affected. Issues being considered by the co-design partnership to inform their recommendations for reform include, but are not limited to, free prior and informed consent, policy and legislative reform, cultural heritage mapping, the roles of different levels of government, standards for First Nations’ heritage protection, and implementation and resourcing of First Nations’ protection measures.</p>

**Recommendation 5**

Australian governments on all levels ensure communities have access to essentials, including culturally appropriate housing, education and healthcare and employment opportunities, to ensure they can fully engage in Free, Prior and Informed Consent processes considering the best outcomes for their communities and Country.

**Recommendation 6**

Australian governments on all levels provide for effective mechanisms in legislation to prevent and prohibit unconscionable conduct by project proponents towards First Nations communities, such as the inappropriate use of financial and other incentives in the process to obtain consent from Traditional Owners, including the application of penalties and the non-granting of project permits for such offences.

**Recommendation 7**

The Australian federal and state and territory governments, in collaboration with all relevant stakeholders and First Nations people, develop a clear definition of cultural heritage, which encompasses intangible heritage.

**Recommendation 8**

The Australian federal, state and territory governments make ongoing public resources available for the mapping and recording of cultural heritage led by First Nations communities, and be made available in an accessible manner. Alongside the mapping and registration of existing sites, records and maps of past destruction should be made available to Traditional Owners and public cultural heritage registers.

**Recommendation 9**

Legislation on all levels relevant to the protection of First Nations cultural heritage to require consultation with all First Nations communities impacted by an activity proposition, not just registered Native Title holders or Traditional Owner corporations, to ensure true Free, Prior and Informed Consent even where multiple groups claim cultural connection to a certain area.

**Recommendation 10**

The establishment of a National and Torres Strait Islander Heritage Council as a new independent statutory body, made up exclusively of First Nations people, along the considerations outlined in chapter 7 of this report.

Importantly, this co-design process will also include engagement with industry, states and territories and the broader community.

While the Australian Government's responsibilities do not extend to state and territory legislation, opportunities to make laws relating to First Nations' cultural heritage more consistent across jurisdictions are being considered as part of the options forming through the co-design partnership with the First Nations Heritage Protection Alliance. The partnership has First Nations representatives from across the country and regularly meets to further progress the options for reform and increased protections to both tangible and intangible cultural heritage protection, with First Nations' voices being the prominent decision makers.

Additionally, the Australian Government has committed to appointing an Ambassador for First Nations People. A key role of the Ambassador will be to undertake consultation with First Nations communities, leaders and advocates to listen and engage directly on how Australia's international engagement contributes to Indigenous community and economic development and supports Indigenous rights around the world.

The Ambassador for First Nations People will lead the Government's efforts to embed First Nations' perspectives, experiences and interests across Australia's foreign policy. The Ambassador will head an Office of First Nations Engagement, and work in partnership across government agencies and departments.



**Recommendation 11**

The Australian Government provide First Nations communities with the resources to proactively identify heritage sites and areas that are worthy of protection, including those that are not linked by immediate spatial proximity, and establish a National Register of Heritage Sites for their recording and public access, and that this register be continuously expanded and updated based on the advice of Traditional Owners. The register should include provisions for sites to be listed as 'untouchable' to enjoy ongoing protection for these sites which subsequently cannot be targeted for activity by any proponents.

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Response provided on pages 19 and 20

**Recommendation 12**

The Australian government ensure any cultural heritage laws provide for appropriate review mechanisms and provide Traditional Owners with support to make use of these mechanisms.

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**Recommendation 13**

Notwithstanding the need for national standalone heritage protection legislation, the ATSHIP Act and EPBC Act be reviewed and amended to fully meet our obligations under the United Nations Declaration on the Rights of Indigenous People (UNDRIP). The best practice standards put forward by Heritage Chairs and Officials of Australia and New Zealand (HCOANZ) Dharwura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia should be enshrined in these Acts. The EPBC Act should further give full consideration to the recommendations of the Independent Review of the EPBC Act, led by Professor Graeme Samuel AC, particularly section 2.3 of the Final Report, while the review of the ATSHIP Act should give full consideration to the recommendations of the Evatt Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.

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**Recommendation 14**

Notwithstanding the need for national standalone heritage protection legislation, the Native Title Act be reviewed and amended to fully meet our obligations under the United Nations Declaration on the Rights of Indigenous People (UNDRIP), in a process led by First Nations people. The best practice standards put forward by the Heritage Chairs and Officials of Australia and New Zealand (HCOANZ) Dharwura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia should be enshrined in the Act, and particular consideration paid to avoid power imbalances and coercion in negotiations, ensuring that any agreements are based on Free, Prior and Informed Consent.

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**Recommendation 15**

The Australian government, in collaboration with all relevant stakeholders and First Nations people, develop a set of national principles/best practice standards to support and protect Indigenous cultural heritage across Australia, in consideration of the best practice standards put forward in the Heritage Chairs and Officials of Australia and New Zealand's (HCOANZ) Best Practice Standards in Indigenous Cultural Heritage Legislation.

Response provided on pages 19 and 20

**Recommendation 16**

The Australian federal, state and territory governments, in collaboration with all relevant stakeholders and First Nations people, review and increase the penalties provided by First Nations cultural heritage legislation across Australia to create a significant deterrent for land users to take unauthorised action on cultural heritage and Country, and to provide for culturally-appropriate remedy to Traditional Owners where those protections are breached, including through the methods outlined in chapter 7, as well as financial compensation to Traditional Owner communities.

**Recommendation 17**

The Australian Greens recommend that the Australian, State and Territory Governments, in collaboration with all relevant stakeholders and First Nations people, review and amend existing legislation to introduce broader human rights and cultural heritage due diligence obligations for Australian companies to take proactive steps to identify potential human rights and cultural heritage impacts of their actions.

**Recommendation 18**

First Nations heritage legislation which contains strong judicial review provisions and a provision allowing for the authorisation of activity impacting upon heritage should include a provision which enables such permission, once given, to be amended or revoked, if the impact upon the Indigenous cultural heritage, or the significance of the Indigenous cultural heritage is greater than was understood when the permission was granted.

**Recommendation 19**

The Australian Greens recommend that the federal government set up a First Nations Legal Defence Fund to provide First Nations communities with the legal and financial support to stand up for their Country and heritage, including but not limited to Native Title disputes and cultural heritage destruction. The administration of the fund is to be First Nations-led.

Noted.

Dissenting view	Australian Government response
<p><b>Recommendation 20</b></p> <p>First Nations-led innovations in governance of Country (environment and heritage) should be prioritised, supported, resourced and encouraged.</p>	<p>Noted.</p>
<p><b>Recommendation 21</b></p> <p>The new national heritage protection legislation to include strong environmental protections to ensure protection of Country as well as culture.</p>	<p>Noted.</p>
<p><b>Recommendation 22</b></p> <p>The Australian Government, in collaboration with all relevant stakeholders and First Nations people, take urgent, equitable and sustained local, national and global action to avoid climate catastrophe and its impacts on Country and cultural heritage.</p>	<p>Agreed.</p> <p>The Australian Government has also committed to delivering net zero carbon emissions by 2050, including reducing Australia’s emissions by 43% by 2030. This target has been supported in parliament by the Greens and has passed the Senate.</p>
<p><b>Recommendation 23</b></p> <p>The Western Australian Government not proceed with the draft Aboriginal Cultural Heritage Bill 2021 in its current form and provide Traditional Owners with the latest version of the Bill (also known as the Exposure Draft Bill (Green Bill)). The Western Australian Government engage in a co-design process on the draft bill (Green Bill) that enables Traditional Owners to lead decision making around cultural heritage. The Western Australian Government abolish all powers that authorise damage to cultural heritage without the consent of Common Law Holders and Traditional Owners.</p>	<p>This is a recommendation for the Western Australian Government.</p> <p>The Australian Government notes that the <i>Aboriginal Cultural Heritage Act 2021</i> was passed by the Western Australian Government on 17 November 2021.</p>

## 2. Senator Smith and former MP Mr Christensen

### Dissenting view

Actions by Rio Tinto leading to the destruction of Aboriginal heritage at Juukan Gorge were disgraceful, negligent and wilful- and the executive leadership of the company must be held to account.

More than a year has passed, yet Rio Tinto and its board have fundamentally been let off the hook for obliterating the 46,000-year-old site in WA's Pilbara region.

At the time, the Australian Financial Review reported the destruction was "an egregious story of corporate blindness". The interim report of this committee described the loss of such a significant cultural, ethnographic, and archaeological feature as "the theft of a vital part" of the living culture of the traditional owners, the Puutu Kunti Kurrama and Pinikura (PKKP) people. The PKKP characterised the event as "devastating for us".

Rio has conceded it should never have happened and breached the trust placed in it by the PKKP over almost two decades.

Despite the outrage shown in Australia and beyond, no impactful financial penalty or regulatory sanction has been imposed on Rio to date.

Chairman Simon Thompson has admitted he was ultimately accountable yet has been allowed the extraordinary privilege of determining his own exit-strategy, choosing to remain in the role for another year. Non-executive director Mr Michael L'Estrange has resigned. He led an internal review that failed to adequately explain why management responsible for cultural heritage protection was unaware of the Gorge's enormous significance. Rio Tinto's most recent annual report, however, revealed that Mr L'Estrange was paid 46 per cent on top of his annual fees for conducting the inquiry, totalling more than \$280,000. Former Chief Executive Jean-Sebastien Jacques stepped down from the role in January this year, but remained on Rio Tinto payroll until March, after receiving a 20 per cent pay rise and taking home \$12.85 million for the year. And while iron ore boss Chris Salisbury and London-based former corporate relations chief Simone Niven lost their jobs and have foregone bonuses, they will still receive eight months' wages in lieu of notice, totalling \$718,000 and £307,000 respectively.

Rio Tinto's shareholders delivered a strong message at its 2021 AGM about the poor corporate culture that Juukan Gorge exposed to the world. In one of the most significant shareholder protests in Australian corporate history, 60.8 per cent voted against the miner's remuneration report. The report estimated Jacques, Salisbury and Niven collectively left Rio Tinto, subject

### Australian Government response

The Australian Government notes the views and recommendations of Senator Smith and Mr Christensen.

The Australian Government has committed to co-designing cultural heritage reform in partnership with First Nations peoples. This process will be informed by principles such as free, prior and informed consent. Importantly, this process will also include engagement with industry, states and territories and the broader community.

The Australian Government notes the issues raised in the dissenting report regarding the corporate culture and executive accountability at Rio Tinto in the context of the destruction of Juukan Gorge, and the concerns of the Australian Shareholders Association.

The Australian Government agrees that the new standalone First Nations cultural heritage legislation should have strong compliance and enforcement provisions, to ensure there are appropriate consequences if unlawful destruction of cultural heritage does occur.

Currently, the Australian Government seeks nominations annually for new places and sites to be included on the National Heritage and Commonwealth Heritage lists. For the 2021 nomination process, the Minister for the Environment chose Indigenous Cultural Heritage as the relevant theme. The Australian Government is committed to ensuring all suitable heritage sites are included on either the National or Commonwealth Heritage Lists (or both) including places of Indigenous cultural heritage significance.

Importantly, the Australian Government provides information on the National Heritage List process to Indigenous persons who express interest in the nomination of a potential National Heritage place, or who are engaged in the assessment of a National Heritage place.

The Australian Government also recognises the significant contribution the resources sector has to our nation. Options to reform protections for First Nations cultural heritage must consider opportunities for the mining industry to engage with Traditional Owners early in the process of scoping and designing projects and facilitating ongoing engagement and dialogue throughout the assessment and

## Dissenting view

to vesting hurdles, with more than 765,000 shares worth tens of millions each. In rejecting the report, The Australian Shareholders Association said it was an “unsettling fact that the former CEO has departed with a very large remuneration package whilst being held accountable for the Juukan Gorge disaster”.

The UK-based Local Authority Pension Fund Forum (LAPFF) was also critical, stating Rio Tinto’s leaders had failed over the course of the year to take adequate accountability.

Investors did secure a new policy strengthening the power of future boards to claw back pay and bonuses, as well as increasing the emphasis on environmental, governance and social performance in awarding bonuses. But they failed to make Rio Tinto more Australian-orientated, with no clear answer why its headquarters would remain in London, rather than relocate to an Australian capital city. “Without Australia, we wouldn’t be where we are today. It’s where more than half our assets are based and for thousands of our employees, Australia is home.” – Rio Tinto, Our commitment to Australia.

Institutional investors appear to be softening, giving Rio the benefit of the doubt, with LAPFF suggesting it is now “heading in the right direction”.

Media coverage around the release of Rio Tinto’s Communities and Social Performance report last month included illuminating results from an anonymous survey of ten traditional owner groups in the Pilbara. The West Australian and The Australian, among other publications, reported on 30 September that while the groups generally approved of commitments made by the miner to enhance Indigenous engagement and protect cultural heritage, genuine action was required for change to occur.

One response noted that “the commitment is admirable ... but the proof will be in the breadth of the modernisation”. Another accused Rio Tinto of doing the “bare minimum required to recover its reputation” when it came to improving agreements.

On the Australian advisory group being established to help Rio Tinto better understand Indigenous issues, responses were mixed, with groups highlighting the need for the board to “engage directly with its traditional owner stakeholders” and adding “(it) is about establishing relationships”. The head of the Australian Council of Superannuation Investors was also quoted at the time, welcoming Rio Tinto’s initial progress but noting this was only “an early signpost on a long road ahead”.

In Rio Tinto’s defence, it has taken decisive steps to strengthen internal processes, implement new heritage protocols, empower line managers, and modernise

## Australian Government response

life of projects (if approved). It is vital that legislation, policy and governance appropriately encompass consideration of First Nations cultural heritage, such that both Traditional Owners and mining proponents can have confidence to proceed on the basis that First Nations cultural heritage has been appropriately protected and properly managed.

agreements with traditional owners. It is recognised that Rio Tinto has moved on – and been allowed to move on – with business as usual, acknowledging that these were “sensitive and contentious issues”, but noting that it had “no choice” but to allow Jacques, Salisbury and Niven to depart in good standing and with the bulk of their entitlements.

There should be a judicial inquiry into the destruction of the site, investigating if conduct preceding or following the event warrants further action – including criminal charges.

It is worthwhile noting here that a Royal Commission is not the only form of judicial inquiry. Many other methods have been established in recent years to investigate misconduct, corruption, or conduct review for the purposes of law reform, which engage retired judges or senior members of the legal profession. The success and integrity of Australia’s mining industry is central to the prosperity of states such as Western Australia and Queensland and has substantial bearing on Australia’s wealth.

An inquiry ensures Rio Tinto’s executive leadership is held to proper account, while protecting the international reputation of Australia’s mining industry and every other industry stakeholder.

**How best to protect Indigenous cultural heritage and the advancement of the resources sector.**

Rio Tinto’s failures should not reflect upon the entire resources sector. Much of the submissions and evidence presented to the committee stated outright opposition to the very existence of the resources sector, rather than improving the capacity of Indigenous people to protect their cultural heritage. We cannot ignore that the resources sector is one of largest generators of employment and economic opportunity in our country – including for Indigenous Australians. I reject the committee’s recommendations that seek to establish new, duplicate and unnecessary laws and regulations at a Federal level.

There is a great danger these proposed laws and regulations will be used as deliberate weapons against the resources sector, produce longer approval lead times, drive up project approval costs, provide further opportunity for activist activity, and ultimately undermine job opportunities and other economic benefits for Indigenous people.

As the current framework is widely accepted to provide sufficient protection, duplication of cultural heritage protection laws at a Federal level is not supported by peak industry bodies.

It also was not a recommendation following the 2013 Productivity Commission Inquiry into Mineral and Energy Resources Exploration in Australia.

However, the Commonwealth could play a unique and distinct role in setting standards and accreditation, assisting the States to develop and adopt best practice around transparency, information sharing, stakeholder engagement and regulatory improvement.

Instead of new laws and regulations, there is already an existing Federal process for the registration of significant cultural heritage sites that could be streamlined and enhanced to enable Indigenous people to list sites for protection.

The existing Federal process is the National Heritage List, which is a database of places of natural, historic and Indigenous significance to Australia.

Currently, people can nominate a place with outstanding value for inclusion on the List, then the Australian Heritage Council assesses that value against set criteria and makes recommendations to the Minister for the Environment and Water about listing. The final decision on listing is made by that Minister. This could perhaps be enhanced by involving the Minister for Indigenous Australians in decisions on listing Indigenous places of outstanding significance.

It should be noted that listed places are protected by Australian Government laws, as well as special agreements with State and Territory Governments and Indigenous and private owners. Places on the List are protected under the Commonwealth's Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act), which requires that approval be obtained before any action takes place that could have a significant impact on the national heritage values of a listed place.

If Juukan Gorge were on this List, it is unlikely that the destruction of the site would ever have occurred.

Changes should ensure that greater access to the existing National Heritage List process, and appropriate communication about the process, is provided to Indigenous people.

Importantly, overwhelming and convincing evidence has been presented that proposes the end of so-called "gag clauses" in contracts and agreements between resources companies and Indigenous people. Such clauses impede the free and timely disclosure of corporate and other behavior that may be motivated to limit the protection of cultural heritage with irreparable consequences.

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