Submission to the Joint Standing Committee on Northern Australia inquiring into the destruction of 46,000 year old caves at Juukan Gorge.

Bill Gray AM

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Thank you for providing an opportunity to make a submission regarding the destruction of an Aboriginal site that was not only of major significance to identifiable living Aboriginal people in the Pilbara but of national and world significance to the rest of humanity.

I make this submission as a retired Commonwealth public servant who, in 1983/84, as a First Assistant Secretary, had responsibility for the preparation and administration of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the ATSIHP Act). I retained that responsibility in my subsequent role as Secretary of the Department of Aboriginal Affairs and as the founding CEO of ATSIC.

It has puzzled me, from the first public reporting of the destruction of the site at Juukan, that no mention has been made of the Commonwealth ATSIHP Act in the context of providing emergency or longer term protection for the site. Neither the Commonwealth Minister for the Environment, who has responsibility for the ATSIHP legislation, nor the Minister for Indigenous Australians has made mention of the Act which, in my judgement, could and should have been used to protect the site. Such action would have allowed further discussion to take place between the Traditional Owners (TOs) and other major stake holders as to the future of the site.

The ATSIHP Act was designed to enable the relevant Commonwealth Minister to place a pause on proposed action which, if not stopped, would result in the immediate threat of injury or desecration to a specified area significant to Aboriginal people. It is legislation of last resort which enables the Minister to exercise his or her discretion to intervene in circumstances where state or territory legislation does not provide adequate or appropriate protection. It is legislation that can be used to over-ride state legislation or other agreements, to

provide emergency declarations to protect significant Aboriginal sites that are in imminent danger of being destroyed. The Act also provides opportunity to set in place a process of mediation.

The ATSIHP Act has been in existence for some 35 years and has been used to prevent action that would have otherwise seen the destruction of sites which were significant to Indigenous people. It has also been used to initiate mediation between Indigenous groups and parties engaged in development and mining operations. I understand that the ATSIHP Act was used by the Minister for Environment as recently as September 2019 in relation to an area in NSW.

I do not propose to recite the provisions of the ATSIHP Act in this submission as I anticipate that they will be made known to the Committee by those with current responsibility for its administration. I would, however, draw attention to the fact that nearly all the matters which are canvassed in the Committee's Terms of Reference (f) through to (i) have been comprehensively examined over the past twenty years and are the subject of a very significant number of considered recommendations. Apart from a failed attempt to amend the ATSIHP Act in 1998, none of the many recommendations made during the past two decades have been enacted by successive governments.

The most thorough and, to my mind, most pertinent review of the ATSIHP Act was conducted by the eminent jurist, the Hon Elizabeth Evatt AC in 1995/96. Again, I will not go through all the matters raised and examined in her report, as the Committee would have access to it. I will note, however, that every aspect of how the legislation operated, including the definition of a significant area, the effectiveness of emergency declarations, procedural issues, Ministerial responsibilities, avoidance of duplication, uniformity of standards of protection and the relationship of the Act to other Commonwealth and State/Territory legislation, were all comprehensively examined and reported upon. While it is a sad fact that none of the recommendations contained in the Evatt report have been enacted, I would assert that the report remains relevant to the present Committee's inquiry and should be considered in some detail.

The ATSIHP Act was originally administered by the Commonwealth Department/Agency responsible for Indigenous Affairs from 1984 through to December 1998, when it was transferred to the Department responsible for the

Environment. I think it is important to note this change to administrative arrangements, as it placed the administration of the Act in the hands of personnel who were and remain removed from the day to day contact and activities of Indigenous communities, groups and organisations. It places the administration of the Act a further step away from the people the legislation is designed to protect and support. The issue of timing and the need for early decision making is fundamental to the operation and effectiveness of the ATSIHP Act. The current administrative arrangements may have played a part in slowing the process in the present case. The fact that the representatives of the TOs made their representations to the Minister for Indigenous Australians rather than the Minister for the Environment would suggest that there was some confusion as to which Minister had responsibility for providing protection for the Juukan site or the administration of the ATSIHP Act, and time may have been lost as a consequence. Whether this did play a part in the timing of action taken by the Commonwealth is something the Committee might consider.

While I appreciate that much has changed within the political and administrative environment in which the ATSIHP Act now operates, I remain perplexed that there appears to have been no decisive action taken by the Commonwealth to use the legislation to protect the Juukan site.

I note that the third Term of Reference requires the Committee to 'examine and report on the sequence of events and decision making process undertaken by Rio Tinto that led to the destruction of the site'. I would suggest that it is equally important to inquire into the sequence of events and decision making process undertaken by the Commonwealth Ministers and relevant officials, to protect the Juukan site from being destroyed, following the representations by the TOs and their representatives to the Minister for Indigenous Australians. Such an examination would fall within the scope of Term of Reference (j).

Reports and press statements issued by the Minister for Indigenous Australians would indicate that representations were made by, or on behalf of, the TOs to his office seeking advice on how to protect the Juukan site, as the site was in imminent danger of being destroyed and that urgent action was needed. These are the very circumstances that the ATSIHP Act was designed to address. When those representations were made to the Commonwealth Ministers, an application

under the ATSIHP Act could have been made, triggering the emergency provisions of the legislation to protect the site from destruction.

The ATSIHP Act provides that an application can be made either in writing or made orally. It can be made by, or on behalf of, the TOs. There are also provisions in the Act which enable an Authorised Officer to make an emergency declaration for a period of up to 48 hours without the approval of the Minister, and provisions which allow the Minister to make an emergency declaration preventing the destruction of a site for a period of 30 days and if necessary, an additional 30 days. The Act also provides for penalties of up to 5 years imprisonment for a breach of a declaration. Why none of these provisions were employed to protect the Juukan site must go to the heart of the Committee's inquiry.

Based on my previous experience with the administration of the Act, and in the circumstances where representations were made to the Minister for Indigenous Australians, I would have expected that either he or his office, or his officials, would have immediately taken steps to alert the Commonwealth Minister for the Environment to the representations made to protect the Juukan site. How, or if, this was done should be considered along with the timing of such action.

I would also have expected that either the Minister for Indigenous Australians or the Minister for Environment would have contacted the WA Minister for Aboriginal Affairs as a matter of some urgency to seek clarification as to the current status of the site and the protection that was on offer under the WA legislation. I note from public statements made by the WA Minister, following the destruction of the Juukan site, that he claimed to know nothing about the impending destruction of the site or the planned actions of Rio Tinto. This might suggest that there was no contact between the Commonwealth and State Ministers until after the event. It is a matter which I suggest the Committee should clarify.

It would also have been prudent for at least one of the Ministers at the Commonwealth level to have contacted the Chairman or CEO of Rio Tinto to seek a pause to any action that would have damaged the site, pending further consideration of the matters raised by the TOs. Such action would have removed what the CEO of Rio Tinto subsequently claimed to have been a misunderstanding on the part of the company as to the importance of the site to the TOs. Whether

such contact did take place between either of the Ministers and the Chairman or CEO of the company should be clarified by the Committee.

It is important that the Committee also examines the role of those who represented the TOs in seeking the protection of the site. It is unclear to me, from the distance of an interested observer, whether the representatives were aware of the provisions of the ATSIHP Act. If they were, it begs the question as to whether they took steps to lodge an application on behalf of the TOs to protect the site and if so, what were the details of that application? If they did not make an application, were they unaware of the provisions of the Act, or was there some other reason for not using the Act to provide the requisite protection? Again, this is a point that the Committee should investigate.

I have attached a series of questions to my submission, which I would respectfully suggest the Committee needs to have answered. Unless these questions are answered, it will remain unclear as to how, in 2020 Australia, a site of such traditional and world significance could be the subject of such a catastrophic act of destruction by one of the largest mining companies in the world which, until now, had promoted itself as having exemplary and respectful relationships with the local TOs in the Pilbra.

In short, Commonwealth legislation exists which could have protected the Juukan Gorge site. Why did it fail on this occasion?

I have always tried to be optimistic about the potential for incidents such as Juukan to generate a more positive and empathetic approach being adopted by governments and industry to the needs and rights of the First Australians. However, the history of reform in the protection of Indigenous culture and heritage over the past 20 years has been characterised by a depressing lack of action on the part of successive governments. There remains an urgent need on the part of the Commonwealth government in particular, to take the necessary legislative steps to move from mouthing positive rhetoric in support of promoting and protecting indigenous culture and heritage, to taking real action that is seen to be effective by the Indigenous peoples whose lives are most directly impacted by the never ending pursuit on the part of the broader society, of economic development and profit.

I conclude my submission by noting the statement of the Prime Minister made in his address to the National Press Club on 26 May 2020, just one day before the public reporting of the destruction of the Juukan Gorge site.

He said:

"Secondly, is the principle of caring for country, a principle that Indigenous Australians have practiced for tens of thousands of years.

It means responsible management and stewardship of what has been left to us, to sustainably manage that inheritance for current and future generations.

We must not borrow from generations in the future, from what we cannot return.

This is as true for our environmental, cultural and natural resources as it is for our economic and financial ones.

Governments therefore must live within their means, so we don't impose impossible debt burdens on future generations that violates that important caring for country principle."

The Juukan disaster makes clear that the principle of 'caring for country', as posited by the Prime Minister, will require reforms of a kind that only governments can initiate. And reform will take more than just words.