Aboriginal Areas
Protection Authority
protecting sacred sites across the territory

Hon Warren Entsch MP
Chair of the Joint Standing Committee on Northern Australia
Email: jscna@aph.gov.au

Dear Hon Warren Entsch

Re: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia

Thank you for the opportunity to make a submission to this Inquiry.

We, the statutory board of the Aboriginal Areas Protection Authority are heartbroken to hear about the unnecessary destruction of the Aboriginal sites at Juukan Gorge. We are senior law people from the Northern Territory and we administer the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT). We protect our sacred sites for the benefit of all Territorians in balance with the economic development of the Northern Territory. As such, we do not and cannot authorise the destruction of sacred sites in the Northern Territory. We consult always and as mandated by legislation. We respect the rights of custodians, traditional owners and native title holders. We negotiate with and guide developers. We manage risk, and provide certainty for custodians and developers alike. And we prosecute when people do the wrong thing.

Our white sacred sites law stops at the border, but our traditional law, our dreamings, know no such boundaries. We are connected with our country men and women in the Pilbara, and we write this submission to support them, and to support all the First Nations in this land. Our law is strong. We need *munanga* law to be strong too. Our places, our sites, our history deserve better, and we demand strong reforms from this Inquiry. We demand that our heritage is respected. We demand to be consulted, and we demand to be listened to. When strong reforms are enacted and our places are protected, all Australians will benefit, we have no doubt. We have a rich culture, a rich heritage. Let's celebrate it together.

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We address (f), (g) and (h) of the Inquiry's terms of reference. We uphold free prior and informed consent as a key principle in the protection of our heritage consistent with the United Nations Declaration on the Rights of Indigenous peoples (UNDRIP) to which Australia is a signatory, and the Convention on Biological Diversity and the International Labour Organization Convention 169. We assert that the Northern Territory model of sacred site protection is worthy of national adoption, and we assert the need for a strong national legislative framework for the protection of our heritage that sets guidelines and minimum standards for all state based regimes.

We need to make sure that the destruction of places like Juukan Gorge never happens again. We urge you to make strong decisions, walk with us, and do the right thing. Our country, this country depends on it.

Yours sincerely,

Bobby Nunggumajbarr, Chair

Valerie Martin, Deputy Chair

Elaine Watts

Barbara Shaw

Philip Mamarika

Neville Petrick

Walter Kerinaula Junior

Submission to the Joint Standing Committee on Northern Australia

Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia

Aboriginal Areas Protection Authority

protecting sacred sites across the territory

Aboriginal Areas Protection Authority

Darwin and Alice Springs

...

August 2020

This submission addresses (f), (g) and (h) of the Inquiry's terms of reference. It provides a brief overview of the relevant Territory and Commonwealth laws that protect Aboriginal cultural heritage. It highlights the benefit of the Northern Territory legislative regime for the protection of Aboriginal heritage and how it might be applied nationally.

Summary of Recommendations

The Aboriginal Areas Protection Authority recommends:

1. **That strong national legislation for the protection of all Aboriginal and Torres Strait Islander heritage is adopted, and that such legislation sets minimum standards for state based heritage frameworks, and provides a national last point of appeal.**

2. **That the views of Aboriginal and Torres Strait Islander people be central in the determination of matters concerning Aboriginal cultural heritage and sacred sites, and that such views and consent be sought by means of free, prior and informed consent (FPIC).**

3. **That the protection of Aboriginal and Torres Strait Islander heritage be administered by independent Aboriginal controlled bodies at the national and state level.**

4. **That the value of Aboriginal and Torres Strait Islander heritage is recognised nationally for the benefit of Aboriginal people and all Australians.**

5. **That national and state based legislation for the protection of Aboriginal and Torres Strait Islander Heritage define clear and consistent thresholds for engagement in order to provide certainty for Aboriginal people and for proponents of development alike.**

6. **That bodies tasked with the protection of Aboriginal and Torres Strait Islander cultural heritage (including sacred sites) be adequately resourced and resourced independently of undue political influence.**

7. **That state and national legislation for the protection of Aboriginal and Torres Strait Islander heritage adopt strong penalties to act as a deterrent against damage, interference or desecration of Aboriginal heritage. This should include personal liability for corporate directors and a national compensatory regime.**

8. **That state and national legislation be amended to provide custodians and traditional owners with legal standing to seek reviews in relation to decisions about their cultural heritage.**

Recommendation 1: That strong national legislation for the protection of all Aboriginal and Torres Strait Islander heritage is adopted, and that such legislation sets minimum standards for state based heritage frameworks, and provides a national last point of appeal

The Northern Territory has a deep history of sacred site destruction, interference and dispute over sacred sites. Controversially in 1983 *Ntyarlkarle Tyaneme* sacred site in Alice Springs was blown up to make way for Barrett Drive in Alice Springs; in 1953 sacred rocks were removed (and subsequently returned in 1999) from *Karlu Karlu* (Devils Marbles) to commemorate John Flynn in Alice Springs; and in 1989 major protests occurred to prevent mining activity on sacred sites at *Marla Marla/Kantiji* (Mt Samuels, Devils Pebbles), and *Guratba* (Coronation Hill) in Kakadu National Park. Most famously a plan that threatened *Werlatye Atherre*, two women's sacred sites, in the proposed construction of a recreation/flood mitigation dam in Alice Springs tested the extent to which laws in the Northern Territory protected sacred sites - with the project ultimately being halted by a 20 year moratorium imposed by the Federal Minister for Aboriginal Affairs under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (*ATSIHP Act*). We understand that this is one of only 5 times that the *ATSIHP Act* has been successfully applied in its history, and note that aside from the protection afforded to *Werlatye Atherre*, the record of the *ATSIHP Act* is nothing short of disgraceful.

The disregard for Aboriginal heritage must stop now. There is an urgent need to re-establish strong Federal laws for the protection of Aboriginal heritage and for such laws to set guidelines and minimum standards for the protection of all Aboriginal heritage, including sacred sites. This submission asserts that the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (*Sacred Sites Act*), which stems from the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (*Land Rights Act*), presents a model that should be adopted nationally and in all States and Territories. Importantly the Northern Territory framework encompasses the principles of free prior and informed consent (FPIC). It provides certainty for Aboriginal people that their significant places are protected, and certainty for proponents of development. It enshrines the protection of Aboriginal heritage, particularly sacred sites, and it is administered independently.

The *Land Rights Act* establishes both the legislative basis for the protection of sacred sites and the powers of the Northern Territory Government to establish legislation and a body to administer that protection. Since Self-Government in 1978, the Legislative Assembly of the

Northern Territory has enacted laws to protect sacred sites consistent with the powers vested by the *Land Rights Act*. The *Sacred Sites Act* is the most recent iteration of the legislative regime. While significant constraints were placed on the early operation of the Act, the legislation has stood the test of time to provide strong protection for the rights of Aboriginal Territorians in protecting their sacred sites. It is a regime that privileges the wishes of custodians of sacred sites about the protection of their cultural heritage. Through this, the importance of protecting Aboriginal sacred sites is recognised by the Northern Territory Government and the broader Territory community as an important element in the preservation of the Territory's cultural heritage for the benefit of all Territorians. Importantly, early controversies about sacred sites in the Northern Territory has highlighted that nobody benefits when Aboriginal sacred sites are destroyed or impacted in the course of development. Indeed, these disputes were important internationally in the later development of the principles of sustainable development, and associated principles of corporate social responsibility and social licence to operate, principles which remain relevant today.

As companion legislation to the *Land Rights Act,* the *Sacred Sites Act* extends the rights of custodians of sacred sites to protect their sacred sites across all tenure in the Northern Territory. The *Sacred Sites Act* establishes the Aboriginal Areas Protection Authority (the Authority) as an independent statutory authority with powers to protect sacred sites, access sacred sites across all land, and to prosecute for offences against sacred sites. The Authority is governed by a 12 member Board. Ten members of the Board are custodians of sacred sites who are appointed by the Administrator of the Northern Territory upon the recommendations received by the Minister from the four Northern Territory Aboriginal Land Councils. These Board members are highly respected senior Aboriginal people who have regional knowledge of sacred sites and associated authority for decision making and ceremonial matters. They are drawn from a breadth of geographic regions across the Territory. Two members of the Board are nominated by the Northern Territory Government and appointed by the Administrator, and are typically senior Northern Territory public servants [See Attachment 1 – Board members of the Aboriginal Areas Protection Authority].

The majority of the powers established in the *Sacred Sites Act* are vested in the Board and are not subject to Ministerial control, thus ensuring independence of decision making of the Authority in relation to sacred site matters. The Minister does have limited powers in relation to the operation of *Sacred Sites Act*. The functions of the Authority are set out in Section 10 of the *Sacred Sites Act* and are broadly concerned with protecting sacred sites in the context of development through the provision of advice to proponents based upon consultation with custodians of sacred sites.

The long title of the *Sacred Sites Act* sets out its aims to effect a practical balance between the need to preserve and enhance Aboriginal cultural tradition and the aspirations of Aboriginal and other people of the Northern Territory for economic, cultural, and social advancement. It seeks to minimise risk associated with adverse impacts on sacred sites and subsequent controversy by separating the recognition and protection of sacred sites from requests relating to land access, land use and tenure.

The key elements of the *Sacred Sites Act* in protecting sacred sites are via:

- The issuing of Authority Certificates for any development proposals which identify constraints on proposed works and protections for sacred sites. An authority Certificate offers a defence against the offence provisions of the Act provided the terms of the Certificate are abided by;
- The provision of information to the public about existing sacred sites data through abstracts of records and access to the Registers maintained by the Authority;
- The registration of sacred sites which establishes prima facie evidence that a place is a sacred site;
- Criminal offences that apply to unauthorised entry onto a sacred site (section 33), carrying out work on a sacred site (section 34), contravening an Authority Certificate (section 37) and desecrating a sacred site (section 35);
- Secrecy offences (section 38) which recognise the secret and sensitive aspects of sacred sites by creating criminal offences to protect against publication and dissemination of such information;
- Statutory rights of access to sacred sites for custodians (section 46) to ensure that Aboriginal traditions can be maintained;
- Statutory rights of access to sacred sites across all tenure types in the NT for a purpose permitted by Aboriginal tradition, or to fulfil a function in connection with the Act (S47).

Since 1989 the *Sacred Sites Act* has provided certainty for thousands of development projects in the Territory. There have only been four occasions in the forty year history of the Act in which applicants have requested the Minister to review a decision of the Authority, and only one of these resulting in the Minister issuing a Minister's Certificate under the *Sacred Sites Act*.

Sacred site is defined in the *Land Rights Act*, and mirrored in the *Sacred Sites Act,* as being:

> *A site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes and land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.*

Sacred sites can exist on land and in both freshwater and marine environments. They are typically landscape features such as hills, rocks, trees, plains, reefs or water places such as rivers, soaks and springs, and they extend to include any subsurface features of these places. Sacred sites are enlivened by the traditional narratives of Aboriginal people that give meaning to such places. As such, sacred site areas are associated with a corpus of intangible cultural heritage associated with oral traditions, ritual, language, Aboriginal knowledge and social and economic practices. They may hold significant bio-cultural and biodiversity values that are also likely to be significant in Aboriginal tradition. They are typically not discernible to people who are not versed in local law and custom.

Remote economies are typically dependent on a mix of the state, private and the customary sector.1Customary economies are dependent on intimate knowledge of traditional estates and country, and maintenance of the institutions that ensure transmission of intergenerational knowledge. Knowledge of sacred sites is an integral part of knowledge of country and its resources, as sacred sites are markers of important traditional narratives that define traditional law and custom and normative social and economic practice. Across the Northern Territory such knowledge is localised and intimate. However 'traditional Aboriginal knowledge' is nuanced in linking to broader social and economic networks, and its richness is complex and profound. Sacred sites are integral to this knowledge system.

About one third of the Northern Territory's population is Aboriginal, and about 80% of Aboriginal people live in remote and very remote locations.2 Proportionally the Northern Territory has the largest Aboriginal population of any Australian state or territory.3 Approximately 53% of the Northern Territory is Aboriginal land under the Land Rights Act with significant exclusive and non-exclusive rights recognised under the *Native Title Act*.4 About 84% of the Northern Territory coastline abuts Aboriginal Land with rights extending to the low water mark. Though there are significant urban populations of Aboriginal people in the

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[1] Altman, J.C. 2001. 'Sustainable development options on Aboriginal land: The hybrid economy in the 21st century', Discussion Paper No. 226, CAEPR, ANU, Canberra.

[2] https://nteconomy.nt.gov.au/population#:~:text=About%20one%20third%20of%20the,compared%20to%2037.3%20years%20nationally.

[3] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016* (18 September 2018) Australian Bureau of Statistics <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3238.0.55.001Main+Features1June%202016?OpenDocument>.

[4] Lily O'Neill, Lee Godden, Elizabeth Macpherson and Erin O'Donnell, 'Australia, wet or dry, north or south: Addressing environmental impacts and the exclusion of Aboriginal peoples in northern water development' (2016) 33 *Environmental and Planning Law Journal* 402, 411.

Northern Territory, large numbers of people reside on or near their traditional lands. There are approximately 72 remote communities in the NT with some 500 homelands both on and off Aboriginal land as recognised by the *Land Rights Act.* Typically people who reside in urban centres in the NT maintain links with their traditional estates.

In this context development pressure on sacred sites usually comes from exploration activities and resource sector related projects, Commonwealth funded roadworks, and public housing initiatives, and essential service delivery such as water and electricity infrastructure. Significant development also occurs in the urban centres of the Northern Territory where the same principals of Aboriginal knowledge apply in relation to the observance of traditional law. It is in this context that the *Sacred Sites Act* operates.

Importantly in the Northern Territory the protection of Aboriginal archaeological heritage is subject to the *Heritage Act 2011 (NT) (Heritage Act*). This Act protects all Aboriginal archaeological places in the NT and contains a regime of strong penalties and stop work powers The Heritage Act is discussed in the body of this submission.

There are four land councils in the Northern Territory who, pursuant to the *Land Rights Act,* also have a significant role in the protection of sacred sites, particularly on Aboriginal freehold land, and as native title representative bodies which extends their role to most of the pastoral estate and towns in the Northern Territory. Importantly the *Land Rights Act* gives Land Councils a function to assist in the protection of sacred sites both on and off Aboriginal Land (s23(1)(ba)). Land Councils actively protect sacred sites on behalf of traditional owners and native title holders in the context of their representative functions and in the context of development consent and agreement making processes. Overall there are strong protections for Aboriginal sacred sites in the Northern Territory, but lesser protections for Aboriginal material culture and/or objects which come under the jurisdiction of the *Heritage Act.*

However, whilst the Northern Territory has a robust and successful legislative framework for the protection of sacred sites stemming from the *Land Rights Act* which creates one of the strongest regimes in Australia, there is still room for improvement. Notably, circumstances of state sanctioned heritage destruction, such as that experienced at Juukan Gorge, would likely not occur in the Northern Territory. However, it must be noted that mandatory engagement with the Authority and its processes, stronger regulatory and compliance powers such as stop work orders, and deterrents of significant financial or other penalties are either dormant in, or absent from the current legislative framework.

Recommendation 2: That the views of Aboriginal and Torres Strait Islander people be central in the determination of matters concerning Aboriginal cultural heritage and sacred sites, and that such views and consent be sought by means of free, prior and informed consent (FPIC).

Concepts of cultural heritage, including Aboriginal sacred sites, and their inherent value have enjoyed formal international recognition and protections for many decades. Instruments of particular relevance include the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which enshrines the principles of FPIC particularly in relation to the development of indigenous peoples lands territories or resources,[5] article 27 of the International Convention on Civil and Political Rights, articles 6(2), 13(1) and 14(1) of the International Labour Organisation's Indigenous and Tribal Peoples Convention 169 and the Convention on Biological Diversity (CBD). Of further relevance are the Akwé: Kon Guidelines,[6] born out of the CBD, which provide a collaborative framework for ensuring the full involvement of indigenous and local communities in the assessment of cultural, environmental and social impacts of proposed developments on sacred sites and traditionally occupied lands and waters and how to take into account traditional knowledge, innovations and practices in impact assessment processes.

Combined, these instruments and their supporting material should provide a convincing argument to Australian governments, national and State/Territory, as to the significance of Aboriginal peoples' rights to cultural heritage protection and practice and that any proposed interference with these rights results in a 'heightened duty to conduct consultation, accommodate Indigenous peoples' concerns and seek FPIC at each stage of a project,'[7] particularly in the context of sacred sites.

Notwithstanding the above, Australia's federal and various State/Territory development approval and heritage protection regimes remain divergent in their approaches to Aboriginal and Torres Strait Islander consent requirements and, specifically, the extent to which Aboriginal and Torres Strait Islander people have control over the protection of, and access

[5] Art 32.2

[6] Secretariat of the Convention on Biological Diversity, *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities* (Montreal, 2004).

[7] Stuart Butzier and Sarah Stevenson, 'Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent' (2014) 32 *Journal of Energy and Natural Resources Law* 297, 333.

to, their sacred sites. Regardless, the Northern Territory maintains a comparatively strong Aboriginal cultural heritage protection regime which emphasises the FPIC of Aboriginal peoples. This emphasis is largely born out of the *Land Rights Act*, a Commonwealth Act which only applies in the Northern Territory, a product of the Territory's Constitutional status. The *Land Rights Act* enshrines principles of FPIC via robust consent requirements prior to the grant of any interest on Aboriginal land and/or waters. Section 77A of the *Land Rights Act* is particularly significant providing for both decision making 'according to tradition' or 'agreed to and adopted' decision making processes for traditional owner consents – which are required in the context of: Land Councils carrying out any function with respect of Aboriginal land,[8] the grant, transfer or surrender of any interest in Aboriginal land,[9] township leases,[10] or roads,[11] or the negotiation of terms and grant of mining interests[12]. We emphasise that these standards only apply to dealings relating to Aboriginal land and waters granted pursuant to the *Land Rights Act* and not Native Title areas, Crown land and waters or otherwise privately owned land.

The *Land Rights Act* also includes specific protections for sacred sites on Aboriginal land via offence provisions set out in s 69 of that Act. Further, s 73(1)(a) of the *Land Rights Act* establishes a head of power for the Northern Territory Legislative Assembly to create laws:

> *… providing for the protection of, and the prevention of the desecration of, sacred sites in the Northern Territory, including sacred sites on Aboriginal land, and, in particular, laws regulating or authorizing the entry of persons on those sites, but so that any such laws shall provide for the right of Aboriginals to have access to those sites in accordance with Aboriginal tradition and shall take into account the wishes of Aboriginals relating to the extent to which those sites should be protected.*

This is significant because it establishes a regime for the protection of sacred sites and the right of Aboriginal people to access their sites that not only explicitly prevents desecration of sites but is actually based on the implementation of the wishes of Aboriginal people as to how their sites should be protected. Section 3 of the *Land Rights Act* defines a sacred site as 'a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition,' this definition is mirrored in the *Sacred Sites Act.* [13] This characterisation of sacred sites places the power of

[8] Section 23(3)(a)
[9] Section 19(5)(a)
[10] Section 19A(2)(a)
[11] Section 68(2)
[12] Sections 42(6), 46(4)(a) and 48A(4)(a)
[13] *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) s 3.

determination within Aboriginal tradition, identifying that it is for Aboriginal people themselves to determine what amounts to a sacred site, and further how it should be protected, in accordance with ss 22(1)(d) and 42 of the *Sacred Sites Act*. In fact s 42 of the *Sacred Sites Act* explicitly states that. In summary, the *Sacred Sites Act* is an integral part of a broader legal framework in the Territory that before the Authority or the Minister exercising a power under the Act they must 'take into account the wishes of Aboriginals relating to the extent to which the sacred site should be protected.' This, coupled with the consultation obligations under ss 19F and 22 of the Act, means that custodians of sacred sites – those directly responsible for the sites in accordance with Aboriginal tradition – are consulted and their views taken into account before the Authority issues an Authority Certificate (or any other action permitted under the Act).

Conversely, the Northern Territory's *Heritage Act* does not require any form of consultation with custodians, traditional owners, native title holders/claimants or Aboriginal people in general, prior to the Minister's consideration of whether or not to protect a place. Nor does the *Heritage Act* require that relevant stakeholders – Aboriginal custodians or communities – be notified after a decision has been made which approves destruction. The Authority notes that this issue of notification could be immediately rectified via amendment to the definition of "owner" in the *Heritage Act* to include custodians and/or traditional owners, native title holders/claimants As it stands, the *Heritage Act* does not adequately consider the rights of Aboriginal people in the destruction, salvage or protection of the archaeological record and represents a significant weakness in the Northern Territory legislative framework for the protection of Aboriginal heritage. .As such, substantive reform is required to recognise the need to seek FPIC of the relevant Aboriginal peoples and/or communities in regards to the protection of archaeological and burial sites of significance which currently fall under the jurisdiction of the *Heritage Act*.

In the federal context, both the *ATSIHP Act* and *EPBC Act* fail to require any meaningful level of engagement with Aboriginal and Torres Strait Islander peoples, failing well short of FPIC principles and in many instances, even lacking any form of meaningful consultation. Nevertheless, s 3 of the *EPBC Act* outlines objectives which, on face value, appear to encourage the inclusion of Indigenous worldviews alongside the promotion of biodiversity and heritage conservation.[14] Whilst the objectives stop well short of promoting self-determination or FPIC, even in their current form, they still provide a significant justification for greater

[14] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 3(c)-(ca).

involvement of Aboriginal peoples in environmental and cultural heritage decision-making.[15] Further, s 3(e) aims for the Act to *assist in the co-operative implementation of Australia's international environmental responsibilities*, of which the CBD and associated Akwé: Kon Guidelines tend towards the further recognition and incorporation of Aboriginal and Torres Strait Islander voices in decision-making. Additional points of inclusion throughout the Act are limited, none of which amount to any formal recognition of Aboriginal and Torres Strait Islander self-determination or principles of FPIC. For example, s 49A of the *EPBC Act* establishes an exceedingly low standard for the consideration of Aboriginal and/or Torres Strait Islander views in the context of bilateral agreements and the same in respect of heritage management as set out in divisions 10.01 and 10.05 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth).

The *ATSIHP Act* does not prove much better, providing a reactionary mechanism only available in connection to imminent danger of 'injury or desecration',[16] effectively providing no rights of ongoing use or management to Aboriginal or Torres Strait Islander peoples. The regime's operation also leaves it incumbent on an Aboriginal person or group to make an application to the Environment Minister as opposed to an applicant seeking the consent of the Aboriginal person(s) or group to work on and/or use the area. A common theme of both the *EPBC* and *ATSIHP* Acts is that they do not identify a need for consultation, FPIC or even that the views considered in the requisite processes be those of effected Aboriginal people or groups themselves, but rather the views considered, where consideration is even required, often belong to a government department or purported representative organisation or group (such as the Indigenous Advisory Committee)[17], which more often than not, does not represent the views of the relevant person(s) with cultural responsibilities for the site.

It is the Authority's strong view that Australian Aboriginal and Torres Strait Islander peoples should not be bundled into ill-defined 'cultural' or 'community' stakeholder categories, but should be afforded the right to FPIC in respect of any use or works on or in the vicinity of their sacred sites and/or their traditionally occupied lands and waters more generally. Any cultural heritage regime that does not uphold these principles falls short of international standards and best practice minimum standards for consultation and obtaining the consent of Aboriginal and Torres Strait Islander peoples when work is proposed to occur on or in the vicinity of their sacred sites.

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[15] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s3(d), (f)-(g).

[16] Standing Committee on Industry and Resources, House of Representatives, the Commonwealth Parliament of Australia, *Exploring Australia's Future* (21 August 2003) 113.

[17] EPBC Act s 505A

Recommendation 3: That the protection of Aboriginal and Torres Strait Islander heritage be administered by independent Aboriginal controlled bodies at the national and state level.

The Authority is an independent statutory authority and its operation is overseen by the Authority Board. Custodian Board members are nominated by the four Territory Land Councils and two Government nominated appointees. The Authority Board is the primary policy and decision-making body of the Authority and provides essential senior traditional expertise, guidance and advice related to sacred sites and broader cultural issues. The majority of the powers of the *Sacred Sites Act* are vested in the Board and are not subject to Ministerial control, thus ensuring independence of decision making of the Authority in relation to sacred site matters. The Minister has limited powers in relation to the operation of *Sacred Sites Act.*

The Authority Board ensures Aboriginal control of sacred sites and ensures that any controversy is at arm's length of government. The independence of the Authority creates certainty for proponents and custodians alike. This is achieved through direct consultation with custodians of sacred sites, and the definition of custodian instructions in a legally indemnifying Authority Certificate which is provided to a development proponent. In her 2014 paper about the protection of Indigenous Cultural Heritage in Australia, Justice Pepper noted that the "*fact that the Act is administered by a dedicated Aboriginal body provides an element of ownership and control to Aboriginal groups that is lacking in other States and Territory legislation.*"[18i]

The Northern Territory Government is a significant development proponent in the context of the development of public infrastructure. Roadworks, infrastructure in towns and remote communities such as housing and works associated with essential services are typically undertaken by the Northern Territory Government. On occasions the Authority has prosecuted the Northern Territory Government for breaches of the *Sacred Sites Act.*

In contrast to the Authority Board, the Heritage Council is established under the *Heritage Act* and its role is largely advisory. The Heritage Council is made up of 11 members, of which at least two must be of Aboriginal descent. Five members of the Heritage Council must be:

- the CEO, or a nominee of the CEO, of the Department of Tourism, Sport and Culture
- a nominee from the National Trust

[18] *No Plants or Animals: the Protection of Indigenous Cultural Heritage in Australia,* Paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart, 5 March 2014.

- a nominee from the Aboriginal Areas Protection Authority (AAPA)
- a nominee from an organisation representing the interests of local government
- a nominee from an organisation representing the interests of land owners.

The functions of the Council are set out in s 125 of the *Heritage Act* and are broadly around assessing the heritage significance of places and objects and making recommendations to the Minister about whether or not a place should be declared a heritage place. It is also responsible for making decisions about whether or not to approve works to heritage places (other than major works). The Minister is responsible for making decisions about:

- Whether or not to declare heritage places;
- Whether or not to revoke a declaration about a heritage place;
- Whether or not to approve major works to heritage places.

A recommendation by the Heritage Council in relation to Aboriginal cultural heritage does not guarantee the outcome of the Minister's decision, who must also take into account the priorities of the Government of the day. It is not uncommon for the Minister to make decisions about heritage matters that are contrary to the recommendations of the Heritage Advisory Council.

In the Northern Territory, the Authority's success in protecting sacred sites is largely due to its independence. The existing model ensures that decisions about sacred sites are made at arm's length from government. The *Heritage Act's* current model where key responsibilities sit with the Minister mean that decisions about Aboriginal cultural heritage are considered against other interests.

The Authority asserts that like the *Northern Territory Aboriginal Sacred Sites Act*, all state based and national heritage legislation should enshrine and independent Aboriginal decision making process.

Recommendation 4: That the value of Aboriginal and Torres Strait Islander heritage is recognised nationally for the benefit of Aboriginal people and all Australians

The *Sacred Sites Act* protects all sacred sites in the Northern Territory whether they have been formally identified or not. The *Heritage Act* also extends protection to all Aboriginal material culture in the Northern Territory.

Sacred sites are important for Aboriginal people as key markers of Aboriginal law, beliefs and knowledge systems. They are geographic places and yet they encompass a range of intangible cultural heritage values that exist in memory, in ritual, in spirituality, and narratives

that are integral to law and culture and place. Sacred sites are the responsibility of groups of individuals - custodians who have responsibilities to protect their sites and whose rights and responsibilities are codified through kinship and relationships to land.

Some sacred sites are powerful and dangerous places and may have traditional restrictions associated with gender or seniority. Aboriginal people are concerned to protect all people from contact with these places as to do so could have unintended consequences for both those who transgress and also for the Aboriginal people who are custodians of that place. Aboriginal law dictates that if a sacred site is damaged or infringed upon the custodians are exposed to retribution and sanctions from their kin and may also incur sickness or death as a consequence of offending ancestors whose essence may reside at a sacred site. The consequences of damage, desecration or interference with sacred sites for local and regional Aboriginal communities is immense in terms of sanctions that might apply for the inferred breaches of traditional law and ensuing social rupture.[19]

Secrecy provisions exist within the *Sacred Sites Act* that ensure that information gathered for the purposes of the Act that pertain to secret or sacred information about sacred sites cannot be disclosed. This provides a safeguard against breaches of Aboriginal law in the administration of the Act. While the Authority is subject to Freedom of Information laws through the *Information Act 2001* (NT), the offence in section 38 of the *Sacred Sites Act* preserves the sanctity and secrecy of sacred site information. Provisions such as these create a level of trust in the *Sacred Sites Act* for custodians of sacred sites. Such trust is vital to the operation of any Aboriginal heritage protection framework.

Aboriginal archaeological places in the Northern Territory are many and varied and range from isolated artefacts, to extensive stone arrangements, quarries, and rock art in multiple styles and from an extensive time span. Indeed the Aboriginal archaeological record of the Northern Territory is vital in establishing Aboriginal people as belonging to the oldest living culture. However, the values placed on the archaeological record in the Northern Territory and ascribed by the *Heritage Act* are derived more form a western scientific tradition than from the values that might be placed on such places by Aboriginal people themselves. Sites are protected because of their representative value, and yet provisions exist for the salvage or destruction of the archaeological record. As noted the *Heritage Act* has no mechanism for

[19] Lewis and Scambary 2016 Sacred bodies and ore bodies: conflicting commodification of landscapes by Indigenous peoples and miners in Australia's Northern Territory, IN McGrath, P. (ed) *The Right To Protect Sites: Indigenous Heritage Management in the Era of Native Title*. Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Canberra.

consultation with Aboriginal people in relation to salvage and destruction orders, and these decisions rest with the Minister for Heritage.

Whilst many archaeological places in the Northern Territory are not viewed with the same reverence as sacred sites (with notable exceptions), archaeological places are nonetheless regarded as important elements of Aboriginal heritage. Such places mark the activities of ancestors, of old people who are regarded as having agency in the placement of archaeological objects – the archaeological record is considered to be there because the old people placed it there and did so for a reason. These places represent a deep history that is remembered in traditional narratives and therefore linked to the contemporary beliefs and understandings of Aboriginal people across the Northern Territory.

The value of sacred sites and the archaeological record is immense. It represents a profound corpus of knowledge about the land we live in. the protection of this heritage is not just important to Aboriginal people, but is of vital importance to all Australians.

Recommendation 5: That national and state based legislation for the protection of Aboriginal Heritage define clear and consistent thresholds for engagement in order to provide certainty for Aboriginal people and for proponents of development alike

Across Australian jurisdictions, Aboriginal heritage protection frameworks are often voluntary regimes with unclear and even non-existent applicability thresholds whereby development proponents and/or land owners can either opt-in to the operation of the Act or self-report should an incident arise. The Northern Territory is no different, but for the application of criminal offence provisions, the *Sacred Sites Act* is a largely voluntary regime. The one clear exception to this being the Petroleum industry whereby recommendations made by Justice Pepper as part of the Scientific Inquiry into Hydraulic Fracturing resulted in the amendment of the *Petroleum (Environment) Regulations 2016* (NT) mandating Authority Certificates for any 'regulated activity' under the *Petroleum Act*.[20] Regardless of the generally voluntary nature, the importance of engagement with the *Sacred Sites Act* continues to permeate the Northern Territory jurisdiction with both the Northern Territory Environment Protection Authority (NTEPA) and the Minister for Primary Industry and Resources making recommendations and/or establishing requirements that particularly intensive or controversial projects obtain

[20] Scientific Inquiry into Hydraulic Fracturing in the Northern Territory, above n 2, ch 11.

Authority Certificate(s) from the Authority prior to their requisite environmental or mining approval processes.[21]

That being said, many projects proceed without any engagement with the AAPA or the protection mechanisms afforded under the *Sacred Sites Act*. This can have devastating impacts for both Aboriginal custodians and project operators/land owners who can be faced with a damaged and/or desecrated site coupled with immense cultural and emotional trauma or the prospects of criminal prosecution and/or a loss of community support and ensuing conflict respectively. The vast majority of such incidents could be avoided if the Act and/or the Territory's environment protection and approval framework was amended to introduce a threshold for the compulsory attainment of an Authority Certificate for high risk and/or disturbance activities.

Further, the *Heritage Act* contains highly problematic application thresholds with no definition of what constitutes major or minor works, and ensuing confusion as to when the protection mechanisms of the Act do and do not apply. Currently, the Heritage Council manages this confusion by classifying destruction of archaeological sites as major work (which then requires Ministerial approval) and classifying recording and relocation as minor work. Notwithstanding the fact that the relocation of Aboriginal archaeological sites and/or objects is in and of itself highly controversial and problematic, the Authority notes that including a definition of major and minor work in the *Heritage Act* could provide improved consistency and transparency for all stakeholders.

The *EPBC Act* is also extraordinarily complex and inconsistent in its ability to provide protection to areas of cultural significance to Aboriginal peoples, resulting in inaccessibility but also potential duplication and uncertainty for industry and developers. In relation to application thresholds, Part 3 of the Act sets out the matters of national environmental significance that will trigger the Act's assessment process. For sacred sites or landscapes of cultural significance to Aboriginal or Torres Strait Islander peoples, this means that the area or feature will not attract the *EPBC* Act's assessment, and therefore protection regime, unless officially declared as a World Heritage property,[22] National Heritage place,[23] Ramsar wetland,[24] or if

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[21] Eg, Hon Paul Kirby, Minister for Primary Industry and Resources, *Northern Territory of Australia Mining Management Act Variation of Authorisation to McArthur River Mining Pty Ltd* (15 August 2019).
[22] Ibid s 12.
[23] Ibid s 15B.
[24] Ibid s 16.

the area can be recognised as a habitat for listed species,[25] a Commonwealth marine environment[26] or within relative proximity to projects of a particular nature.[27]

It is clear that the current voluntary nature of cultural heritage protection regimes is highly problematic with immediate change being required to achieve certainty for all stakeholders. Such changes should include mandatory early engagement with relevant Aboriginal peoples and communities based on FPIC, emphasis on protection as opposed to pro-development bias, and the introduction of connectivity between established environment and planning approval processes and cultural heritage surveys and/or clearances (such as Authority Certificates issued by the Authority). Most importantly, the thresholds for application of cultural heritage protection legislation need to be compulsory, clear and consistent for the benefit of all.

Recommendation 6: That bodies tasked with the protection of Aboriginal and Torres Strait Islander cultural heritage (including sacred sites) be adequately resourced and resourced independently of undue political influence

Throughout Australia, there is an increasing expectation that governments have responsibility for protecting cultural heritage, including Aboriginal sacred sites. This comes with the reality that across Australian jurisdictions, cultural heritage regimes have historically, and contemporaneously, been subjected to the influence of competing political demands, with corresponding impacts on resourcing and trends in administrative decision-making. Generally speaking, the federal and State and Territory Aboriginal cultural heritage protection regimes are made up of a piecemeal collection of heritage, environment protection, planning and even criminal laws, that are, on the whole, inadequate, ineffective, overly bureaucratic and incohesive - resulting in inconsistent and insufficient implementation. It is, then, unsurprising that the cross-jurisdictional legislative and regulatory mechanisms that purport to govern this space are neither accessible for Aboriginal custodians nor contain the level of certainty required for industry and development proponents. For custodians (and increasingly the Australian and global consciousness) these inadequacies feed mistrust and fear that sites of incredible global significance could well be destroyed due to the failure and neglect of Australian legislation and it's requisite administrative and/or regulatory bodies.

[25] Ibid s 18.
[26] Ibid 23.
[27] Ibid ss 24D, 26 and 28.

The *ATSIHP* Act, being the Commonwealth Government's primary means of protecting areas and objects of cultural significance to Aboriginal and Torres Strait Islander peoples, was originally 'designed as a short-term measure to enable the protection of Indigenous traditional areas and objects in situations where relevant State and Territory laws are ineffective in protecting heritage.'[28] Yet, three decades later, despite multiple attempts at reform, the regime remains largely unchanged, but for some procedural amendments aimed at improving efficiency for development proponents. This is particularly concerning given claims in the Commonwealth Government's own 2009 discussion paper on Indigenous Heritage law reform that the Act 'has not proven to be an effective means of protecting traditional areas and objects.'[29] As above herein, the *ATSIHP* Act has only demonstrated a very limited capacity to provide protection for sacred sites. One of these limited examples being in the context of the controversial Alice Springs Flood Mitigation project in 1992. In recent years the protections afforded by the Act have become even more inaccessible and unworkable with increasingly conservative administration by way of resourcing limitations and political influence.

Even the comparatively robust legislative framework of the Northern Territory's *Sacred Sites Act* remains subject to politically imposed limitations by way of under resourcing – which has direct impacts on the Authority's ability to administer the Act to its full potential. The main areas in which resourcing constraints have, in recent times, impacted administration are in limitations on the Authority's ability to respond to and progress Aboriginal custodian requests for the registration of sites and in the largely reactive nature of the Authority's compliance regime. The powers of the *Heritage Act* reside with the Minister who has the benefit of advice from a Heritage advisory Council, however this advice is for the Minister's consideration only and is often not followed.

To emphasise, regardless of the strengths afforded under a legislative framework, the effectiveness of Aboriginal cultural heritage protection will continue to be stifled by the funding constraints and the politicisation of heritage protection which is currently seen across Australia. The adequate funding, free from political influence, of relevant administrative bodies and regulators is integral for the protection of Aboriginal sacred sites and cultural heritage across the country and should be prioritised by all sides of politics to enable robust and consistent outcomes for Aboriginal and Torres Strait Islander peoples and developers alike.

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[28] Susan Shearing, 'Reforming Australia's National Heritage Law Framework' (2012) 8(1) *Macquarie Journal of International and Comparative Environmental Law (MqJICEL)* 71, 86.

[29] Commonwealth of Australia, *Indigenous Heritage Law Reform – For discussion 2009: Possible reforms to the legislative arrangements for protecting traditional areas and objects*, 4-5 in ibid 86.

Recommendation 7: That State and National legislation for the protection of Aboriginal and Torres Strait Islander heritage adopt strong penalties to act as a deterrent against damage, interference or desecration of Aboriginal heritage. This should include personal liability for corporate directors and a national compensatory regime.

The Authority is responsible for enforcing the *Sacred Sites Act* and carrying out prosecutions for offenses against the Act. Sections 33-35 of the *Sacred Sites Act* sets out offences, penalties and procedures of entering onto, working on or desecrating a sacred site.
Under the *Sacred Sites Act* the maximum penalties are:

- **Entry onto sacred sites (s33)**

200 penalty units ($30800) for a natural person or 12 months imprisonment
1000 penalty units ($154000) in the case of a body corporate –

- **Works on a sacred site or desecration (s34)**

400 penalty units for a natural person ($61600)
2 years imprisonment and 2,000 penalty units ($308000) for a body corporate

- **Desecration (s35)**

400 penalty units for a natural person ($61600)
2 years imprisonment and 2,000 penalty units ($308000)
for a body corporate

The Authority is concerned that the current penalties do not act as a sufficient deterrence and don't reflect the cultural value of sacred sites. There is risk that a developer may weigh up the cost of a penalty against the potential loss of earnings to the business if they proceed with the works.

In Aboriginal Areas Protection Authority v OM (Manganese) Ltd, Justice Susan Oliver found that OM (Manganese) Ltd had put profit before protection and made the following comment about the importance of deterrence in relation to the *Sacred Sites Act:*

> *I agree that general deterrence is an important issue in these cases. There is significant mining that occurs right across the Northern Territory and I agree with the submission that has been put that there is some risk that companies might be willing to engage in a cost benefit analysis in which they weigh up the applicable fines and determine whether it's simply more profitable to go ahead and cause damage to sacred sites, desecrate a sacred site, as against the profits that can be drawn from that.*

> *So I think general deterrence, that is sending a message to other mining companies who have similar responsibilities, is a strong consideration.*30

Other provisions that would act as deterrents include the introduction of stop work powers and director liability provisions. There is currently no provision in the *Sacred Sites Act* that requires a proponent, whether or not in possession of an Authority Certificate, to stop work immediately should they damage or desecrate a sacred site. There is also no provision that requires a proponent to stop work in the event that their proposed work activity threatens to damage or desecrate a sacred site.

The *Sacred Sites Act* contains no director liability provisions, which means that directors and managers of body corporates (Executives) can't be held personally liable for offences under the *Sacred Sites Act.*

While the *Heritage Act* contains strong compliance provisions such as stop work powers, the Authority is not aware of anyone being prosecuted for breaches under this Act. A submission to the Inquiry from the Northern Territory Government acknowledges that the NT Government does not have a compliance and enforcement policy for the *Heritage Act*, and that the lack of consistent enforcement of the *Heritage Act* can lead to systematic failings in the protection of Aboriginal cultural heritage.

Neither the *Sacred Sites Act* nor *Heritage Act* contain compensation provisions for damage to Aboriginal cultural heritage. Compensation for damage and desecration is necessary because it:

- Helps repair damaged relationships with Aboriginal custodians and traditional owners
- Tangibly demonstrates respect for their traditions; and
- Helps re-establish the goodwill necessary for the cooperative relationship in the future.[31]

In the Territory, compensation negotiations for these types of matters appear to be *ad hoc* and ultimately custodians and traditional owners are disadvantaged by the lack of an accessible and robust compensatory scheme. The Authority is aware that Northern Territory Land Councils pursue compensation matters through civil suits on behalf of their constituents.

The shortfalls in the *Sacred Sites Act* highlight the need for Aboriginal cultural heritage law to have strong deterrence measures to reduce the risk of companies choosing profit over

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[30] *Aboriginal Areas Protection Authority v OM (Manganese) Ltd* [2013] NTMC 019

[31] Sacred Sites Processes and Outcomes Review, p 35.
https://dlghcd.nt.gov.au/__data/assets/pdf_file/0004/297148/sacred-sites-review.pdf

protection. These measures include strong penalties and offences, and stop work and director liability provisions.

The *Heritage Act* highlights that even when cultural heritage laws contain strong offences and penalties, it is critical that the responsible department or body also have the appropriate policies and resourcing in place to support this enforcement function.

Finally, in the Territory and elsewhere in Australia, there is no consistent or accessible way in which Aboriginal people can pursue compensation in relation to their cultural heritage matters. This gap should be addressed through the introduction of a national compensation scheme.

Recommendation 8: Amend State and national legislation to provide custodians and traditional owners with legal standing to apply for reviews in relation to decisions about their cultural heritage.

Under the *Sacred Sites Act*, applicants who have made applications under 19B (Authority Certificate) can apply to the Minister for Environment and Natural Resources for a review if they are aggrieved by:

- a decision of the Authority about an Authority Certificate application; or
- the failure by the Authority within a reasonable time to come to a decision about an Authority Certificate application (s 30).

Applicants seeking to challenge the Authority's decision in relation to an Authority Certificate application, can use the ministerial review provision in the *Sacred Sites Act*, which provides transparency and accountability. The provision has been triggered four times since the *Sacred Sites Act* was enacted, however only one application resulted in a Minister overturning the Authority's decision and issuing a Minister's Certificate (see below).[32]

Section 42 of the *Sacred Sites Act* requires the Authority to take into consideration the wishes of custodians before exercising a power under the *Sacred Sites Act* in respect of a sacred sites. However, custodians do not have standing to apply for Ministerial review in respect of an action or decision made by the Authority. In contrast, applicants who have made applications under 19B for an Authority Certificate can apply to the Minister for a review (section 30).

[32] The Minister overturned the Authority's decision to refuse an Authority Certificate for the Alice Springs flood mitigation dam in 1992, because the development threatened sacred sites. The Minister issued a Minister's Certificate allowing for the development to go ahead. However the development was stopped temporarily, and then for 20 years, by Commonwealth legislation.

In the *Heritage Act*, the Minister is responsible for making decisions about whether or not to approve major works to heritage places (s 74), while the Heritage Council can make decisions about other work (such as minor works).

In accordance with the *Heritage Act* (Schedule 1), the only affected parties who can apply for a review in relation to a decision about a work approval, are the applicants or the owners of the heritage place or object. However where a traditional owner, native title holder or custodian is aggrieved by a decision about a work approval, they have no standing to apply for a review.

Amending both Acts so that custodians and traditional owners have legal standing to apply for reviews acknowledges their direct interest in decisions relating to their cultural heritage.

While custodians don't have legal standing to apply for a review under the *Sacred Sites Act,* they have previously used the Commonwealth's Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (*ATSIHP Act*) to protect sacred sites under threat from development.

The *ATSIHP* Act was intended to be used as a last resort to protect Aboriginal heritage where state and territory laws are ineffective. In the early 1990s, the Northern Territory Government planned to build a flood mitigation dam near Alice Springs. The Authority refused to issue an Authority Certificate for the project because the development would damage sacred sites in the area. In 1992 the Northern Territory Minister overrode the Authority's decision regarding the building of a flood mitigation dam and issued a Minister's Certificate allowing the works to go ahead. Several months later the Minister's decision was subject to a temporary and then 20 year moratorium via the federal Minister under the *ATSIHP Act* (s 10).

Unfortunately in the last few decades, it appears that the *ATSIHP Act* has failed to protect Aboriginal cultural heritage including Juukan Gorge.

The other Commonwealth Act that is designed to provide a safety net of protection is the *Environment Protection and Biodiversity Conservation Act 1999* (*EPBC Act*). This Act provides protection to places or objects that are listed on the National Heritage List and the Commonwealth Heritage list.

The *EPBC Act* is under review and recently released the Interim Report by Professor Graeme Samuel. The Review considers that the *EBPC Act* is not fulfilling its objectives as they relate

to the role of Indigenous Australians in protecting and conserving biodiversity, working in partnership and promoting the respectful use of their knowledge.

In relation to the *Native Title Act 1993 (Cth)* (*Native Title Act*), the Authority is concerned that certain Indigenous land use agreements (ILUA) may contain conditions that restrict traditional owners' ability to access Commonwealth laws to protect their cultural heritage.

Where a native a title claim is made or determined, traditional owners have the right to negotiate under the *Native Title Act.* This provides traditional owners the opportunity to meet with proponents of development and negotiate an Indigenous land use agreement (ILUA). ILUAs are intended to provide benefits for native title holders. The agreements will often include provisions that prevent native title holders from objecting publically about any action of the company, as well as provisions that release the company from actions, objects or claims under Commonwealth and state laws. As noted by the National Native Title Tribunal's submission to the Inquiry *"It might be assumed, therefore, that some of these agreements prevent traditional owner's accessing the last resort measure in the ATSIHP Act."*[33]

The above asserts the need for state and national legislation to provide custodians and traditional owners with legal standing to apply for reviews in relation to decisions about their cultural heritage.

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[33] National Native Title Council Submission to the Inquiry into the destruction of 46,000 old caves at the Juukan Gorge in the Pilbara region of Western Australia, p 11
file:///C:/Users/zwn/Downloads/Sub%20034_National%20Native%20Title%20Council_Published_Inquiry%20into%20the%20destruction%20of%2046000%20year%20old%20caves%20at%20the%20Juukan%20Gorge.pdf