



30 July 2020

Hon Warren Entsch MP,  
Chair  
Joint Standing Committee on Northern Australia  
PO Box 6021  
Parliament House  
Canberra ACT 2600

Dear Mr Entsch and Committee Members,

Thank you for inviting submissions addressing the terms of reference for the Joint Standing Committee on Northern Australia's inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia.

I am an independent consultant archaeologist, based in Darwin, Northern Territory. I have worked in the management of the NT's cultural heritage since 2002, including the management of places, objects and documentary records across museums, archives and the NT landscape. For the last ten years, I have run an independent heritage management consultancy, In Depth Archaeology, advising clients across the public and private sectors on appropriate management of Indigenous and non-Indigenous places and objects. I am also a current member of the Northern Territory Heritage Council, appointed by the Minister in 2017. Please note that I am writing this submission in my capacity as an independent consultant, and do not purport to speak on behalf of the Heritage Council.

I have reviewed the inquiry Terms of Reference (TOR), and the 22 submissions available on the inquiry website at the time of writing. My submission will focus on my particular areas of experience and expertise, and I appreciate and endorse the submissions of Mr Bill Gray AM, the National Native Title Tribunal (NNTT), Dr Sue-Anne Wallace, the Australian Research Council Centre of Excellence for Australian Biodiversity and Heritage (CABAH), Mr Bruce Harvey, the Kimberley Aboriginal Law and Cultural Centre (KALACC), and Emeritus Professor Jon Altman. Each of these submissions distils extensive professional knowledge and expertise to specific issues that are germane to the inquiry.

As my professional background relates to cultural heritage management of the NT, I will refrain from making specific comment regarding items (a) to (e) of the TOR. I will limit my comments to the following items:



“(f) the interaction, of state indigenous heritage regulations with Commonwealth laws;

(g) the effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions;

(h) how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites,

[...] and

(j) any other related matters.”

#### **Interaction of state indigenous heritage regulations with Commonwealth laws:**

1. The framework of legislation related to Indigenous heritage in the NT is a complex interweaving of Commonwealth and Territory laws. There are laws that apply directly to heritage (sacred and archaeological), and laws that relate to land tenure, environmental protection, and development activities. These related laws influence the level of consultation required and protection given.
2. Indigenous cultural heritage in the Northern Territory is primarily protected under two Acts, namely the *Northern Territory Aboriginal Sacred Sites Act* (1989) (NTASSA) and the *Heritage Act* (2011). The Heritage Council is established under the terms of the *Heritage Act*. NTASSA mandates consultation with Aboriginal people. The *Heritage Act* does not. The NT Government does not have a compliance and enforcement policy for the *Heritage Act*, and the lack of consistent enforcement of the Act has led to systematic failings in the protection of Aboriginal cultural heritage. There is a lack of oversight to quantify the impact of failure to enforce this Act to date.
3. A number of other NT Acts have provisions regarding potential impacts on cultural or heritage values, including the *Planning Act* (1999), the *Mining Management Act* (2001), and the *Environment Protection Act* (2019), among others.
4. The *Heritage Act* and the *Sacred Sites Act* protect specific types of Aboriginal cultural heritage, regardless of land tenure, and regardless



of whether there are any current threats such as development. The cultural heritage provisions of the other listed Acts are triggered by development proposals.

5. Relevant Commonwealth legislation include:
  - a. *Aboriginal Land Rights (Northern Territory) Act* (1976) (ALRA),
  - b. *Native Title Act* (1993),
  - c. *Aboriginal and Torres Strait Islander Heritage Protection Act* (1984), (ATSIHP) and the
  - d. *Environment Protection and Biodiversity Conservation Act* (1999) (EPBC Act).
  
6. Both ALRA and the *Native Title Act* give Aboriginal people rights regarding land, including the right to negotiate Land Use Agreements. These Commonwealth laws strengthen the standing of Aboriginal people when negotiating agreements over the management of their cultural heritage on subject land within the Northern Territory. In his submission to this enquiry, Emeritus Professor Jon Altman states that a form of free, prior and informed consent (FPIC) exists in the NT. I would like to add clarification to that, in stating that it is only legally required when dealing with sacred sites under NTASSA, or on Aboriginal land granted under ALRA. This leaves large gaps where full consultation is not mandated for archaeological heritage, which leaves wide open the potential for destruction of places similar to Juukan Gorge.
  
7. The EPBC Act is the Commonwealth's main piece of environmental legislation, and applies only when it can be established that a proposed development is likely to directly impact a protected environmental value, including heritage. The Act provides a framework for the management of cultural heritage places of national significance, through the National Heritage List and the Commonwealth Heritage List. The extent of Ministerial and departmental discretion allowable under the Act means that its implementation may be inconsistent across places or protected values. I support the interim findings of the Samuel Review of this Act, released this month.
  
8. The *Aboriginal and Torres Strait Islander Heritage Protection Act* is a site protection Act of 'last resort,' meaning that the Act can provide emergency protection for Aboriginal and Torres Strait Islander heritage sites only when all other avenues have been exhausted.



9. This patchwork of laws creates a complicated legal framework, when it comes to protection of cultural heritage in the NT. Significantly, the Commonwealth laws are limited in their geographic application due to land tenure, leading to the disempowerment of Aboriginal peoples whose traditional lands have not been returned to them under ALRA or Native Title. The threshold of 'national significance' for cultural heritage similarly limits the Commonwealth laws. The NT's laws are unique within Australia for separately dealing with sacred and archaeological heritage, and this is a particular strength that allows for a more tailored approach to these different types of heritage.

**Effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage, with specific reference to the Northern Territory:**

10. The effectiveness and adequacy of the EPBC Act has been detailed by the Samuel Review, and I do not have anything further to add at this time. Other submissions have made detailed consideration of Aboriginal land rights laws (Emeritus Professor Jon Altman) and the ATSIHP Act (Mr Bill Gray AM). Heritage management under the NT's sacred sites legislation is done by anthropologists, and under the *Heritage Act* by archaeologists like myself. Therefore, I will restrict my comments to the effectiveness and adequacy of the NT *Heritage Act*.
11. The Northern Territory *Heritage Act* automatically protects Indigenous and Macassan places and objects, whether they are documented or not. It protects individual places and objects under a nomination, assessment, declaration and registration process – this can be applied to historical heritage places and objects, or individual places and objects already protected under Indigenous and Macassan provisions. The Act also has the capacity for the protection of classes of place (such as lone graves, plane wrecks, etc.), however no classes of place have yet been declared.
12. The *Heritage Act* has many flaws, including in how it addresses historical heritage. However, my comments here are limited to its provisions for Aboriginal cultural heritage.
  - a. **Consultation with Traditional Owners and Custodians** This is not mandated in the Act, so Traditional Owners and Custodians rely on the good will of developers to engage with them regarding the management of archaeological places and objects. The Aboriginal Land Councils, established under ALRA,



have a responsibility for determining who the Traditional Owners are for particular areas, however there is no formal system for developers to connect, via the Land Councils, with the relevant Traditional Owners for their project areas. Sometimes the Land Councils refuse to engage on areas that are not ALRA land or areas of Native Title claim. I have experienced, and witnessed developers experiencing, difficulty in finding out who the Traditional Owners are for the purposes of heritage management consultation. Therefore, even when there is good will on the part of developers (which is not always the case), there are barriers to connecting with Traditional Owners and Custodians. Once connected, there is no formal framework for the level of consultation required.

- b. **Definitions of terms:** The Act requires clarification of a number of terms, including 'owner' (which should take its lead from the NTASSA), the definition of what constitutes major or minor works, the process of defining the extent of heritage places, the definition of 'object' (and related terms, 'relic' and 'artefact'), and the meaning of 'heritage significance.'
- c. **Trigger for assessment:** The Act does not specify a mechanism or trigger to require a heritage assessment prior to works. The NT Government does not have a compliance and enforcement policy for the Act. Therefore, heritage assessments of areas slated for development are undertaken on an ad hoc basis, and often not at all.
- d. **Statutory repository for heritage objects:** The Act does not establish a statutory repository for heritage objects, and the NT Government's Heritage Branch does not take responsibility for any objects recovered through archaeological salvage or other means. The Museum and Art Gallery of the Northern Territory is not required to collect archaeological objects, and for a period of approximately 15 years did not accept archaeological material into its collections. This has resulted in the ad hoc management of archaeological collections. Some of the temporary solutions include for mining companies to keep artefacts in shipping containers or sheds on project areas, the relocation of artefacts from one location to another (disturbing the archaeological integrity of both places), temporary offsite custody by archaeologists on behalf of Traditional Owners, or the storing of artefacts in Aboriginal communities that don't have Keeping



Places with appropriate facilities. This ongoing issue has led to a severe lack of appropriate standards in the care and management of significant archaeological collections, and must be remedied. I also endorse Dr Sue-Anne Wallace's comments in her submission, regarding the appropriate custody and management of archaeological objects.

- e. **Statements of Heritage Value:** The Act does not allow for Statements of Heritage Value (SOHV) to be amended. This means that when further information about the significance of a place comes to light, as happened with Juukan Gorge, the main instrument for legally recognising the significance of the place cannot be updated to reflect this new information. SOHV's should be improved and standardised, and their purpose should be explained in the Act.
- f. **Lack of appeal or review mechanism:** Review notices under the Act are intended for the Applicant, not other stakeholders. Therefore, once works have been approved, Traditional Owners and Custodians do not have a right of appeal under the Act. This is also relevant where further information comes to light after the approval has been granted, as happened in the Juukan Gorge incident.
- g. **Intangible heritage:** The Act does not make provision for intangible heritage, including language and oral traditions, cultural knowledge and practices concerning nature and the universe, traditional craftsmanship, performing arts, rituals and social practices. Last year was the UN's International Year of Indigenous Languages, which aimed to raise awareness on the threats facing Indigenous languages around the world – including the fact that all of Australia's Aboriginal and Torres Strait Islander languages are under threat and require ongoing work to be maintained. The UN has declared an International Decade of Indigenous Languages, commencing in 2022. This acknowledges the serious need for further work to protect Indigenous languages. The risk of loss within the NT and across Australia is dire, and should be addressed in all heritage legislation reform.
- h. **Inadequate protection of human remains:** Aboriginal human remains are classed as archaeological objects under the *Heritage Act*, and suffer the same limited protection as other



archaeological objects under the Act. The Northern Territory Government's Heritage Branch has a protocol developed with the Aboriginal Areas Protection Authority (AAPA – the sacred sites authority) for how to handle human remains, however this provides insufficient protection and does not codify the standards that should be maintained regarding consultation and practice. The *Heritage Act* and the departmental protocol should be reformed to ensure that any management of Indigenous human remains should meet the standards established in the UN Protocol for the Disinterment and Analysis of Human Remains, and the World Archaeological Congress' Vermillion Accord on Human Remains.

- i. **Limited penalty options:** Penalties described within the *Heritage Act* are limited to fines and/or imprisonment. This fails to take into account any necessary reparations that might reduce the impact of offences on heritage places or objects. The introduction of 'enforceable undertakings' could institute measures that make a practical difference to the future management of heritage places – such as funding awareness campaigns or cultural research to the satisfaction of Traditional Owners and Custodians, salvaging whatever heritage materials may be salvaged, funding the ongoing preservation and care of cultural collections, etc. Enforceable undertakings could be modelled after provisions in the Work Safety space. When a company is responsible for the death of a worker or the irreparable loss of significant heritage, a fine and a prison term are not enough. The penalty should bring about necessary change in work practices.

13. In addition to the weaknesses identified in the *Heritage Act*, I hold strong concerns about the lack of enforcement of the Act to date, including the following issues.

- a. The lack of a written NTG Heritage Branch compliance and enforcement policy,
- b. The lack of a strategic plan to guide the efforts of the Heritage Council and the Department,
- c. The lack of consultation requirements with Indigenous stakeholders,
- d. The inconsistent application of, and the failure to enforce, conditions placed on work approvals,
- e. The lack of oversight of approved works, and



- f. Shortcomings in maintaining the archaeological sites database in an up to date manner.

Each of these areas require improvement from the NT Government for the *Heritage Act* to meet a minimum standard of enforcement and compliance in its current form.

14. There is a lack of public awareness in the NT about the difference between the *Heritage Act* and the *Northern Territory Aboriginal Sacred Sites Act*. This lack of awareness extends to stakeholder groups including Aboriginal people, and can result in confusion regarding what is protected, and how it is protected. The Rio Tinto Juukan Gorge incident has highlighted the fact that many people thought there was more protection for Aboriginal cultural and sacred heritage sites than there actually is.
15. The shortcomings in the *Heritage Act*, and in its enforcement, mean that it is entirely possible that destruction of significant heritage could occur in the NT, in the same way that it happened at Juukan Gorge. These shortcomings mean it is also possible that we will never know the true significance of our lost heritage places and objects, as we the NT does not require the level of research undertaken at Juukan Gorge to be undertaken prior to site destruction here. We do not have data to confirm that it has not happened here.

**How Aboriginal and Torres Strait Island cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites:**

16. In my view, the best way to address the identified shortcomings of the existing legislative framework is through wholesale reform of heritage legislation at the Commonwealth and state / territory level. I have not reviewed the heritage legislation of other states in detail, but I am aware of some strengths such as the statutory repository in Victorian legislation. I recommend that a thorough review be undertaken into the operation of heritage legislation in each state / territory, so that appropriate measures can be adopted uniformly across the nation, while still allowing for any necessary regional nuance as is presently the case in the NT with regard to sacred and archaeological places.
17. Key areas of reform include:





- a. Provision for appropriate recognition of Indigenous realities and worldviews, and working towards Indigenous leadership of Indigenous heritage management.
- b. Provision for appropriate levels of consultation with Traditional Owners and Custodians, built on the principles of Free, Prior and Informed Consent (FPIC). With regard to mining and similar development, Prof Altman's submission has highlighted the issue of whether Aboriginal people are ever free to refuse a project on their land. The right to say no is crucial in ensuring that people are not coerced into agreeing to development. Coercion does not equal consent.
- c. Provision for appropriate standards with regard to the care of ancestral human remains, and repatriation of ancestral remains and cultural objects.
- d. Provision of Keeping Places and statutory repositories for the appropriate custody and care of collections.
- e. Clear and consistent definitions of relevant terms, including the meaning of cultural and archaeological significance.
- f. Clear requirements around 'social performance,' as outlined by Mr Bruce Harvey in his submission.
- g. Clear triggers for when heritage assessment is required.
- h. A strategic plan geared around appropriate state / regional thematic frameworks of heritage to encourage the representative preservation of heritage places and objects from multiple worldviews of our shared history.
- i. Provisions for the updating of SOHV's, heritage registers and other documentation when further information about the significance of a place / object is brought to light.
- j. Provisions for review and appeal of decisions, when further information about the significance of a place / object is brought to light.
- k. Provisions for intangible heritage, particularly with regard to the extensive work undertaken by the UN and others in this space.
- l. Provision for a broader framework of penalties, with a view to reparation and not just punishment. Sliding scales of fines should be relative to the size of the company, so that fines are meaningful and felt by the convicted perpetrators.

**Other related matters:**

In addition to the foregoing, I make the following observations on related matters.



18. Establishing best practice in cultural heritage management has many positive flow-on effects. These include:
- a. A streamlined framework across state and federal agencies for the effective preservation and safeguarding of our heritage estate for future generations;
  - b. Ensuring cultural heritage management also delivers on the economic and social aspirations of Aboriginal people, and puts control of their heritage into their hands;
  - c. Providing effective regulation and certainty to industry, and developing meaningful partnerships between industry and Aboriginal people to meet common goals; and
  - d. Balancing the preservation and promotion of our heritage estate to increase the richness of the visitor experience in the tourism market, of which the NT is a leader.
19. Improving heritage management practice in the NT feeds into two of the focus areas in the NT's *'Everyone Together'* Aboriginal Affairs Strategy: truth & healing, and language & culture. I'm sure many other state governments, and the nation as a whole, could improve their reconciliation outcomes by improving heritage management practice.
20. Economic benefits are not the only measure of societal wealth. We should not sacrifice the heritage of millennia of cultural life in the Territory for the short-term gain of economic boost. We should make more effort to get the best out of both without destroying what is essentially the essence and foundation of one.

Thank you for considering my submission. I look forward to learning the outcomes of your inquiry.

Best regards,

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Principal Archaeologist