

Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge

AECOM Submission



1.0 Introduction

The destruction of nationally significant Juukan Gorge heritage site complex has led to an open discussion concerning the range of issues present in the State and Territory management of heritage (Indigenous, non-Indigenous and natural heritage) across Australia.

While Rio Tinto has acknowledged in their submission to this Inquiry that there was a failure of internal processes meant to guide company personnel on the management of Indigenous heritage within their estate, the company was as much the victim of the well documented (and lamented) deficiencies in outdated Australian heritage legislation and its lack of incorporation into modern planning approvals process.

2.0 Key Issues

There are seven main issues affecting the majority of Aboriginal and Torres Strait Islander heritage legislation within Australia:

1. Lack of recognition of modern planning requirements

Most Australian heritage legislation fails to acknowledge the importance of undertaking early comprehensive heritage significance assessment **PRIOR** to Project Approval. Queensland, for example, allows for the establishment of Memorandums of Understanding (referred to in legislation as Cultural Heritage Management Plans/Agreements) **BEFORE** survey has even been undertaken. Under legislation, these documents are in effect the permit to proceed with the project. This has led to instances where heritage surveys can be undertaken **AFTER** project approval is obtained. Should significant finds be made at this point, it inevitably leads to dispute and potential legal action between Aboriginal Parties and Proponents as Project design and financing are typically finalised at this point with limited scope for change/review.

2. Responsibilities for decision making are best managed as partnership between Government and Indigenous Parties

Indigenous heritage can only properly be managed when authorised Indigenous Parties have been recognised as **CRUCIAL PARTNERS** with Government and proponents in the decision-making process for heritage management. With that recognition also comes great responsibility to ensure a transparent process that aligns closely with the relevant Planning Act and impact assessment norms. In this regard the Victorian model, which incorporates an Aboriginal Heritage Council who appoint Registered Aboriginal Parties (RAPs) based on representativeness, logistical capability, and financial stability, has demonstrated through 13 years of operation a robust and accountable system of Aboriginal heritage management. RAPs are delegated authority by the State to represent State interests and must abide by a proscribed process. This is contrasted with most other States and Territories where the responsibilities of Indigenous Parties are unclear or interpreted differently by different stakeholders.

3. Lack of standardised heritage assessment and reporting methodologies

The various Australian jurisdictions dictate a range of widely differing methodologies ranging from archaeological and anthropological studies required in Victoria to no formal reporting requirements in Queensland. **Standardised consultation, assessment and reporting requirements** would go significantly towards creating a process that is both fair and transparent to all stakeholders: Indigenous, government and proponents. It would also serve to weed out scrupulous heritage consultants who may lack the basics qualifications required to undertake Indigenous heritage assessments. A peer review process inherent in all modern heritage management regimes would also serve to ensure that the processes are being followed correctly.

4. Surface versus Subsurface Archaeology

Most Indigenous heritage legislative frameworks are **'surface archaeology' focussed** (finds on the ground surface) and fail to appreciate (or demonstrate to the non-professional) that such archaeology is the 'tip of the iceberg' with the more important archaeology being located in subsurface deposits. It is **impossible to characterise the significance of an archaeological site without some form of 'test excavation'** and thereby planning approval without this information can be considered deficient greatly increasing the potential for risk for the project.

Juukan Gorge would have been saved had the Section 18 process in WA **demand**ed that archaeological test excavation be undertaken prior to approval of the destruction of site. This information would be used by Indigenous stakeholders and Government to better inform the approvals process. Early comprehensive assessment as part of the concept design phase would have also de-risked the project for Rio Tinto by providing clear financial, ethical, and reputational justification for a relocation of the proposed mine site to its stockholders and financial backers.

5. “Points-Based” Mapping Fallacy

Heritage can only be properly protected with the use of spatially aware modern databases and the abandonment of the centroid “point-based” approach to heritage sites. Without the insight of a heritage professionals, proponents and their design/approvals team can assume that their project will not impact previously recorded heritage as they have mapped these dots on a map. However, some of these points represent extensive camp sites or site complexes (including burial grounds) that can extend for hundreds of metres and even kilometres.

6. Intangible Heritage

Most heritage professionals are trained in the tangible elements of heritage management (stone artefacts, shell middens etc.). There is a strong realisation in the heritage industry that intangible heritage assessment is a significant gap. While some States and Territories, notably the Northern Territory, have strong legislation to address this, most States do not. Typically, where intangibility is documented in assessment reports, these are secondary considerations to tangible heritage, even though Indigenous communities typically rank intangible heritage with more significance.

7. Heritage as an Opportunity rather than a Constraint

Both heritage and environmental issues are commonly viewed as a constraint to development. Instead, this mindset should be rejected in favour of one that embraces Ecologically Sustainable Governance (ESG). Currently there are few legislative regimes that reward Proponents for making decisions that enhance heritage values. For example, can the full and proper assessment of heritage issues and potential protection of heritage be used to increase the credit rating of proposed developments with financial institutions?

3.0 Proposed Solution

Reform of heritage legislation should not be seen as being Sisyphean feat of insurmountable complexity. Many Australian legislative regimes (The Commonwealth and Victoria being the stand outs) have already implemented fair and pragmatic approaches to ensuring Indigenous heritage is protected where required or impacts mitigated where appropriate. The challenge is that these approaches are haphazard and inconsistent across the Nation leading to the disenfranchisement of Indigenous people in some States and Territories. We propose the following simple approach to seek to redress the

3.1 Intergovernmental Agreement

Similar to the success achieved from the harmonisation process of Occupational Health & Safety regulatory frameworks for the Federation, an ***Inter-Governmental Agreement for Regulatory and Operational Reform into the Protection and Management of Indigenous Heritage*** should be sought through the **National Federation Reform Council**

This process would commit the state, territory, and Commonwealth governments to implementing nationally uniform Indigenous heritage legislation complemented with consistent approaches to enforcement and compliance. This will be achieved through the development and implementation of a model Indigenous Heritage Act (or more broadly a model Heritage Act), model heritage regulations and model heritage codes of practice.

It is worth noting that the Commonwealth and its agencies are already world leaders with respect to the establishment of heritage codes of practice including:

- *Ask First: A guide to respecting Indigenous heritage places and values*
- *Engage early – guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*

- *The Defence Heritage Toolkit* (currently being updated by the *Directorate of Environmental and Heritage Policy Development* – DEHPD – in the Department of Defence)

3.2 Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIHP Act)

Although the EPBC Act has been mentioned as a possible vehicle for the establishment of Indigenous heritage model legislation, we do not support this position. The EPBC Act is best thought of as an overarching Planning Approvals Act. Tacking on Indigenous heritage provisions would make the Act unwieldy and also be seen as disrespectful to Australia's First Nations People by lumping their specific heritage concerns with a majority of environment focussed legislation. Instead the ATSIHP Act should be reformed and re-imagined as the proposed standalone Model Indigenous Heritage Act. The model Act should consider the following key areas of reform:

- Development of standardised 'planning approval trigger'-based approach to heritage assessment similar to the Victorian approach with 'areas of cultural heritage sensitivity' associated with landforms and geology typically utilised by past Indigenous peoples (e.g. 200m from a creek).
- The implementation of Regulations to support the Act. The Act should be the main superstructure to protection of Indigenous heritage in Australia, however truly effective legislation relies on Regulations that are easier and cheaper to reform and update. NSW and Victoria utilise these legislative tools to great effect in their management of their heritage. This way, the core Act can sit as the foundation of heritage management, and only the regulations need be updated, lessening the burden on the Government.
- Complete rethink of the Aboriginal Party/Consultation Process. Establishment of State/Territory based Aboriginal Heritage Councils (already in use in Victoria and to a lesser extent in the Northern Territory for Sacred Sites). Aboriginal Parties are appointed by the Council to represent their areas. They must demonstrate representativeness of community as well as financial/logistical stability.
- Replacement of permitting structures with Cultural Heritage Management Plans (CHMP) that are reviewed/approved by Aboriginal Parties under statutory timeframes. Aboriginal Parties act as agents of the government, thereby if a Party disbands or a new Party is recognised over an area, the existing CHMP stands and Proponents are not forced to renegotiate agreements.

Additional clear points for reform include:

1. Base standards of heritage assessment for Australia developed by Industry recognised heritage experts.
2. Requirement for modern spatially aware heritage databases that inform all Stakeholders of potential project risk before detailed design.
3. Mandatory Reporting of Heritage Assessment and Site Cards to enforceable standards with linkage to the spatially aware heritage database.
4. Engagement with the relevant Planning Act to recognise that heritage assessments can be time consuming and must be undertaken as soon as possible.
5. Ensuring that qualified individuals are undertaking heritage assessments.

Most importantly, none of this can be achieved without also fundamental reform of staffing levels within Aboriginal heritage departments and recognition of the need to support Aboriginal Parties with financial and educational aid to act as representatives of the Government.

4.0 Conclusion

The success of this Inquiry depends on the recognition and recommendation of:

- Active involvement of Indigenous Parties in the impact approvals process
- Establishment of national standards with clear approvals timeframes where needed to derisk/demystify the consultation process for development proponents and provide a level of certainty for respective funding/procurement sources with respect to:
 - engagement of Indigenous custodians

- heritage assessments
- approvals process
- Early heritage assessment by Industry recognised heritage professionals with the potential to inform concept design of developments. Heritage assessment recognise the importance of tangible and intangible heritage values
- The management and protection of Indigenous heritage should be viewed as an opportunity not as a constraint

It is hoped that through this Inquiry, the tragic destruction of Juukan Gorge can be used as the impetus to reform a broken National system to provide confidence to all citizens of Australia that Indigenous heritage is being managed under a fair and pragmatic replacement that balances and satisfies the requirements of the three key stakeholders: government, proponents and most importantly Indigenous Communities.