



AUSTRALIAN INSTITUTE FOR THE CONSERVATION OF CULTURAL MATERIAL (INC)

## **AICCM Submission to the Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia**

31 July 2020

This is a submission by the Australian Institute for the Conservation of Cultural Material (AICCM) to the Joint Standing Committee on Northern Australia on the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia. The AICCM is Australia's primary professional association for experts in conservation of cultural heritage. The AICCM is a not-for-profit organisation concerned with the conservation, preservation, research of, and access to Australia's tangible and intangible cultural, historical and scientific heritage. Since 1973, the AICCM has actively worked to promote the long-term care of Australia's heritage in recognition of the role that it plays in developing and enhancing our national, community and familial identities.

The AICCM registers its condemnation and dismay at the destruction of the Pilbara Caves by Rio Tinto. We extend our sympathy to the Puutu Kunti Kurrama and Pinikura people (PKKP), for whom this is a devastating loss of cultural and historical significance.

The AICCM addresses the Inquiry in relation to the following Terms of Reference:

### **(a) the operation of the Aboriginal Heritage Act 1972 (WA) and approvals provided under the Act;**

The issues with the operation of the *Aboriginal Heritage Act 1972 (WA)* are that it does not require consultation with traditional owners, nor does it stipulate that Aboriginal people must be part of the Advisory Committee set up to recognise and evaluate cultural significance (Section 18). This is particularly important given that it is this committee that can consent to proceed with a mining activity that is likely to breach Section 17 of the Act (the section that specifically details that anyone who excavates, destroys, damages, conceals or in any way alters any Aboriginal site is committing an offence). The AICCM is heartened to see that this Act is currently under review, and we hope that the newly proposed Aboriginal Heritage Council in the updated legislation will address these issues.

Furthermore, it will be vital that any changes to the new Act will be reflected in relevant mining acts and retrospectively applied to protect areas that are already approved or



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being actively mined under the current Act. What was highlighted in the destruction at Juukan Gorge was the unchangeable aspect of the mine's approval, which meant that when further archaeological information came to light about significant cultural material, the approval could not be amended.

### **(e) the heritage and preservation work that has been conducted at the site;**

The AICCM argues that more attention needs to be placed on the preservation of found artefacts during the mining process and that this should be explicitly stated in any project plan approval. Marcia Langton has written on Rio Tinto's response to cultural heritage practice in the preservation of Juukan Gorge cultural heritage artefacts. Langton writes,

Rio Tinto's response was typical of its cultural heritage practice: removal of important objects from their ancestral places and isolation in shipping containers on Rio Tinto mining lease areas. The company refers to this practice as "rescue". But it contravenes globally acknowledged cultural heritage standards, especially human rights standards in relation to the cultural heritage of Indigenous peoples, their rights to practice their culture, to control their heritage and the right to free, prior and informed consent in relation to matters affecting them.<sup>1</sup>

Approvals for any project that includes the possibility of artefacts being removed from their contextual landscape should have a transparent conservation plan as a requirement. It is recommended that the plan includes:

- approval by traditional custodians following extensive consultation,
- clear statement on how these items are to be removed and by whom,
- documentation, mapping and photography at time of removal to ensure cultural heritage context is kept, and
- project funding to ensure a proper keeping place for these objects, which includes sufficient funding to ensure their long-term preservation in appropriate environmental and storage conditions.

In the AICCM Code of Ethics and Code of Practice, under 'Cultural issues,' the following applies:

The AICCM member should be informed and respectful of the cultural and spiritual significance of cultural material and should, where possible, consult with all relevant stakeholders before making treatment or other decisions relating to such cultural material. The AICCM member

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<sup>1</sup> Marcia Langton "We need a thorough investigation into the destruction of the juukan Gorge Caves. An apology will not cut it", *The Guardian*, 28 July 2020. <https://www.theguardian.com/commentisfree/2020/jul/28/we-need-a-thorough-investigation-into-the-destruction-of-the-juukan-gorge-caves-a-mere-apology-will-not-cut-it>



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should recognise the unique status of Aboriginal and Torres Strait Islander peoples as first peoples, and as key stakeholders in the conservation of their cultural heritage material. When undertaking conservation of Aboriginal and Torres Strait Islander cultural property, the AICCM member should recognise that the objects and the information relevant to them are of equal importance, and that conservation practice must adapt to cultural requirements, particularly in respect of secret/sacred items.

The expectations in the Code are that AICCM members work within the informed and respectful parameters with documentation being a key component of conservation work, which could be an example of requirements for heritage and preservation work done on site.

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

The AICCM would argue that the circumstances at the destruction of the caves at Juukan Gorge highlight that the current interaction between state and Commonwealth laws is inadequate. With regards to the *EPBC Act*, cultural heritage must be considered to be of 'national heritage' value before the Act can be triggered. As we saw in the case of Juukan Gorge, the problem was, as the site had no national heritage listing at the time of approval, the *EPBC Act* had no application, so state laws applied. The significant shortcomings to the *Aboriginal Heritage Act 1972 (WA)* have already been mentioned in section (a).

The destruction at Juukan Gorge was also not stopped by the Federal Minister for the Environment who can implement the Emergency Declaration as is their prerogative under Sections 9 & 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act*<sup>2</sup> thereby halting the works until further action could be considered. The shortcomings of this Act have been known since 1995.<sup>3</sup> Implementing Authorised Officers,<sup>4</sup> like those in the *Victorian Heritage Act (2006)*, who have the power to issue a stop order in emergency situations, could provide an alternate course of action.

### **(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;**

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<sup>2</sup> Commonwealth Consolidated Acts *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 - Sect 9 Emergency declarations in relation to areas*, available online [http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol\\_act/aatsihpa1984549/s9.html](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/aatsihpa1984549/s9.html)

<sup>3</sup> Extracts from Evatt Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 <http://ymac.org.au/wp-content/uploads/2013/04/Extracts-from-Evatt-Review-of-the-Aboriginal-and-Torres-Strait-Islander-Heritage-Protection-Act-1984.pdf>

<sup>4</sup> <https://www.aboriginalvictoria.vic.gov.au/protecting-heritage-and-enforcing-act>



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Submissions to the planning permission for the Narrabri Gas Project (NSW) highlight the documentation issues surrounding cultural heritage protection. Archaeologist Peter Kuskie considered the Santos documentation regarding Aboriginal Heritage considerations and noted a number of shortcomings including a lack of accompanying documentation to confirm the statements made about engagement and process with regards to consultation with traditional owners.<sup>5</sup> Furthermore, Gomeroi elder Dolly Talbot, writing on behalf of the Gomeroi traditional owners, noted:

An Aboriginal Cultural Heritage Management Plan seems to be provided to cover off or mask the inadequacy of the assessment as some sort of formulaic answer to the inadequacy and unsupported statements made in the ACHAR.

The "methodology and logistics for the Pre-Clearance survey of the work area" in section 4.8 b of the CHMP is totally inadequate, run by Santos employees and involving no one with any qualifications in the area, with Santos as the arbitrator of any disagreement. As Traditional Owners and Elders we find this insulting and completely unacceptable in terms of the methodology for a heritage survey.<sup>6</sup>

As noted in section (e), requirements for conservation planning and thorough documentation are recommended.

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

Australian law could be improved if Aboriginal communities had the right of veto in proposed mining lease or development applications that involve relevant culturally and historically significant sites. This could be enacted at a federal level as part of a Heritage Act and sit above any state mining or planning Acts. The WA Department of Planning, Lands and Heritage's<sup>7</sup> response to their review of the Heritage Act infer that land users'

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<sup>5</sup> Peter Kuskie, *Narrabri Gas Project - Aboriginal Cultural Heritage Assessment Expert Review*, May 2017, available online

<https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSD-6456%2120190320T011237.187%20GMT>

<sup>6</sup> Dolly Talbot and Gomeroi Traditional Custodians, *Narrabri Gas Project - Aboriginal Cultural Heritage Assessment Submission Response - Gomeroi Traditional Custodians - Elders and community RAPs*, 20 May 201, available online.

<https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSD-6456%2120190320T011226.716%20GMT>

<sup>7</sup> Department of Planning, Lands and Heritage, Government of Western Australia, *Review of the Aboriginal Heritage Act 1972*, Consultation Paper, March 2019, available online



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(mining company) rights as being more important than landowners' rights when they state with regards to Proposal 3(A), regarding the creation of Local Aboriginal Heritage Services, that "fully devolved decision-making to local Aboriginal people, as in the Victorian model, is unlikely to be supported by a significant proportion of land users, who consider the absence of Ministerial decision-making in contentious land use proposals would create a risk to future investment."<sup>8</sup> In contrast, Justice Woodward (in 1972) recognised the inherent land rights of Aboriginal people, when he stated, "I believe that to deny Aborigines [sic] the right to prevent mining on their land is to deny the reality of their land rights."<sup>9</sup> Traditional owners should be able to veto exploration licences and mining projects on their traditional lands, in the same way they should be able to participate in royalties when mining projects occur on their lands. The AICCM would argue that the present legislative frameworks do not fully support the rights of Aboriginal communities and native title holders with regards to cultural heritage protections.

The situation at Juukan Gorge showed a failing in the unchangeable nature of the state-approved project parameters when new cultural material was unearthed. It also highlighted the flawed process of relying on a minister as the sole recourse to implement emergency stop work powers. Trained professional cultural heritage specialists in positions of authority would perhaps be better equipped to deal with these issues. A federal Heritage Act which includes inalienable land rights, emergency powers put in appropriate hands, and clear processes for mediation, is far more appropriate than the current cultural heritage decision making process.

### **(i) opportunities to improve indigenous heritage protection through the Environment Protection and Biodiversity Conservation Act 1999**

The *EPBC Act* does not adequately cover cultural landscapes as tangible and intangible components of Aboriginal living culture. This requires attention, surveys and funding, to include such places in the national register if the *EPBC Act* is to continue as the main federal legal avenue for such assessment. At the very least, the nine matters of national significance noted in the Act, should be extended to explicitly include Aboriginal cultural

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<https://www.dplh.wa.gov.au/getmedia/d156a20c-f353-4f21-b067-c810ee7e80ee/AH-Review-AHA-consultation-paper>

<sup>8</sup> Ibid.

<sup>9</sup> Central Land Council, *The History of the Land Rights Act*, available online <https://www.clc.org.au/articles/info/the-history-of-the-land-rights-act/#:~:text=Justice%20Woodward%20reported%20that%20the%20aims%20of%20land%20rights%20were%3A&text=The%20preservation%20%20where%20possible%2C%20of.heart%20of%20his%20spiritual%20beliefs>



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landscapes and intangible heritage. As traditional lands can exist over state boundaries, it would be prudent to have a consistent national approach to cultural heritage protections.

The AICCM agrees with the EPBC Act Review Interim Report that, "An independent compliance and enforcement regulator, that is not subject to actual or implied political direction from the Commonwealth Minister, should be established. The regulator should be responsible for monitoring compliance, enforcement and assurance. It should be properly resourced and have available to it a full toolkit of powers."<sup>10</sup> This regulator needs to be adequately staffed with cultural and heritage professionals, representing all states and territories in Australia.

### **(j) any other related matters**

Finally, the AICCM recommends the Australian Government consider a Heritage Act that creates clear legal guidelines for the treatment of Aboriginal and Torres Strait Islander cultural heritage, one that puts heritage protection and community consultation at the heart of all processes. It also needs to give legislative endorsement to the fact that, as the Yamatji Marlpa Aboriginal Corporation put it in their submission to the review of the *Western Australia Heritage Act*, "Aboriginal cultural heritage belongs to the Aboriginal people with traditional or familial connections to the area from which the heritage originated."<sup>11</sup> There should be inalienable rights that go with that recognition. Intangible heritage (with its links to tangible environments) needs to be adequately covered and protected in this Act.

The system of Authorised Officers in use in Victoria, mentioned in section (f), may still remain one of the most powerful tools for cultural heritage protection, if there was an overarching set of national standards attached to the new Heritage Act, then these Authorised Officers, could be the local representatives of this Act.

Change is needed at local, state and federal levels, as recommendations from numerous inquiries remain unimplemented and outdated laws remain in a number of key states in Australia. However, change will not be possible without meaningful and long-term collaboration, transparent actions and reporting, and individual agreements between Aboriginal and Torres Strait Islander communities and relevant levels of government.

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<sup>10</sup> Interim Report | Independent review of the EPBC Act, available online  
<https://epbcactreview.environment.gov.au/resources/interim-report>

<sup>11</sup> Yamatji Marlpa Aboriginal Corporation, YMAC submission to Review of Aboriginal Heritage Act 1972. March 2019, available online  
<http://ymac.org.au/wp-content/uploads/2016/03/YMAC-submission-to-Review-of-Aboriginal-Heritage-Act-1972-Consultation-Phase-2-March-2019.pdf>



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The AICCM thanks the Joint Standing Committee on Northern Australia for the opportunity to make a submission to this inquiry. For further information, please contact the AICCM Secretariat.

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