

Modernisation of Aboriginal and Torres Strait Islander cultural heritage protections

Discussion Paper- Stage 1

Purpose of the discussion paper

This discussion paper has been developed to accompany the stage 1 national engagement process towards the modernisation of Aboriginal and Torres Strait Islander cultural heritage protections. It has been drafted jointly between the First Nations Heritage Protection Alliance and the Commonwealth Department of Agriculture, Water and the Environment as part of a co-design partnership. It is intended to inform participants about past reviews and reports and current legislative arrangements for First Nations cultural heritage protection.

Background

First Nations people have long been concerned about what they consider to be the lack of protection for their cultural heritage.

It has been well documented by a number of independent reviews¹²³ and reports that the current legislation pertaining to First Nations cultural heritage is not providing adequate and effective cultural heritage protections and is resulting in incremental destruction of First Nations cultural heritage.⁴

Since the destruction of Juukan Gorge in May 2020, there has been an ongoing national conversation about the protection of First Nations cultural heritage. While First Nations people have been raising their concerns for many years about what they consider is the ongoing and systematic degradation of cultural heritage, it was this event, more than any other in recent times, that made clear the urgent need for reform, and what the nation stood to lose unless change occurred. There have been numerous attempts to review these inadequate protections in the past.

Two months after the events at Juukan Gorge, in July 2020, the Hon. Sussan Ley MP, Minister for the Environment, announced a commitment to develop a national engagement process for modernising the protection of First Nations cultural heritage. Since that time, there have been several processes and reports directly or indirectly dealing with First Nations cultural heritage, including:

- the development of the *Dhawura Ngilan* Vision and Best Practice Standards, released in September 2020, and produced by the Heritage Chairs of Australia and New Zealand, as a roadmap to improving First Nations cultural heritage protections;⁵
- the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, tabled October 2020 (**Samuel Review**);⁶ and

¹ Samuel, G (2020), *Independent Review of the EPBC Act- Final Report*, Department of Agriculture, Water and the Environment, Canberra.

² Joint Standing Committee on Northern Australia (2020), *Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia- Interim Report*, Commonwealth of Australia, Canberra; and (2021) the Final Report, *A Way Forward*

³ Elizabeth Evatt, Parliament of Australia, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Report no. 170 of 1996, July 1996).

⁴ Mackay R (2016), *Heritage: Pressures on Indigenous heritage*, Australia state of the environment 2016, Australian Government Department of the Environment and Energy, Canberra, <https://soe.environment.gov.au/theme/heritage/topic/2016/pressures-indigenous-heritage>

⁵ Heritage Chairs of Australia and New Zealand (2020), *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia*, Canberra.

⁶ Samuel, G (2020), *Independent Review of the EPBC Act- Final Report*, Department of Agriculture, Water and the Environment, Canberra.

- the *Never Again* report, tabled December 2020, (**Interim Report**), and *A Way Forward* report (**Final Report**), tabled October 2021, produced by the Parliamentary Joint Standing Committee on Northern Australia’s Inquiry into Juukan Gorge.⁷

Further, many State and Territory governments are currently, or soon to undertake reviews of their own legislation.

The conversation so far

The protection of First Nations heritage is a matter of importance for all Australians.

Many First Nations people, their organisations, concerned members of the wider community, as well as industry representatives, have already made considerable contributions, through written submissions and in person consultations, to the development of the above reviews, reports and standards, as well as others that pre-date them.

These prior review processes will inform this engagement process which will seek to learn, and to build from the past, and to be mindful that in interrogating these issues, there is potential to re-ignite past traumas.

For that reason, it should be made clear that this process is not about just identifying problems, which to a large extent have already been examined, but is about finding real and tangible solutions. The solutions developed through this process will be put to the Minister for the Environment, and the First Nations Heritage Protection Alliance who can then consider the various options for reform through a partnership process.

What has been said in past reviews?

Over a period spanning 26 years, various reviews have been undertaken to assess the effectiveness of Commonwealth legislation in protecting First Nations cultural heritage. These reviews include:

- the *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (**Evatt Review**), released in 1996,⁸
- the Commonwealth *Discussion paper on the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (**ATSIHP Act**), released in 2009;⁹
- the *Australian Environmental Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999, Canberra* (**Hawke Review**), released 2009;¹⁰ and

⁷ Joint Standing Committee on Northern Australia (2020), *Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia- Interim Report*, Commonwealth of Australia, Canberra; and (2021) the Final Report, *A Way Forward*.

⁸ Elizabeth Evatt, Parliament of Australia, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Report no. 170 of 1996, July 1996).

⁹ Department of Environment and Heritage, *The Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Guide to purposes, applications and decision-making*, August 2009.

¹⁰ Hawke, A (2009), *The Australian Environmental Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999*, Canberra.

- in the wake of Juukan Gorge, the *Dhawura Ngilan* Vision and Best Practice Standards¹¹, the Samuel Review (2021)¹², and the Interim and Final Reports of the Parliamentary Joint Standing Committee on Northern Australia.

All of these reviews found that Commonwealth cultural heritage laws needed to be amended or replaced in order to be effective mechanisms for cultural heritage protection. They noted that the ATSIHP Act, which was only ever intended as an interim measure, was never replaced by more comprehensive legislation as intended. A further recurring theme from these reviews is that the integration between cultural heritage matters, native title and Aboriginal land rights legislation was never achieved.

The reviews consistently recommended the development of national cultural heritage standards to ensure a consistent and/or best practice approach to cultural heritage protections. *Dhawura Ngilan* went so far as to develop best practice standards that should be applied across all jurisdictions.

The more recent reviews suggest that Commonwealth legislation should align, embed or ratify principles from the *United Nations Declaration on the Rights of Indigenous People (UNDRIP)* and international treaties such as the *Convention for the Safeguarding of the Intangible Cultural Heritage 2003*. Furthermore, past reviews have found that Native Title, Aboriginal Land Rights and other Commonwealth legislation, intersect with, and should appropriately consider cultural heritage matters, and noted that this could be achieved either through amendments to relevant legislation, or through the development of new Commonwealth cultural heritage legislation to replace existing legislative functions and/or to facilitate integration between existing legislation.

All reviews called for a greater role for First Nations peoples in cultural heritage matters, including recommendations to mandate engagement with First Nations peoples, and/or a national cultural heritage advisory body made up of First Nations peoples with the authority to approve or deny cultural heritage protection applications.

The State of the Environment report, released every five years, is a comprehensive national assessment of the state of the environment. Previous reports have identified significant risks to cultural heritage¹³. The next State of the Environment report is due in 2022, and relevant findings will be incorporated into subsequent documentation for this co-design process.

Truth-telling around cultural heritage destruction has also emerged as a theme. More efforts are needed for education and awareness with industry, government and broadly across Australia about the damage and destruction of cultural heritage sites.

More recent reviews also called for greater resourcing for Native Title Prescribed Bodies Corporate (PBCs) to engage in the management of their cultural heritage, and greater resourcing for cultural heritage management more broadly.

¹¹ Heritage Chairs of Australia and New Zealand (2020), *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia*, Canberra.

¹² Samuel, G (2020), *Independent Review of the EPBC Act- Final Report*, Department of Agriculture, Water and the Environment, Canberra.

¹³ Commonwealth of Australia 2017-2018, *Australia State of the Environment 2016*, <<https://soe.environment.gov.au/>>

The EPBC Act reviews recommended greater involvement of First Nations peoples in environmental matters and better recognition of traditional knowledge, sciences and Indigenous lands (such as Indigenous Protected Areas).

First Nations views

First Nations people have long advocated for reform to First Nations cultural heritage protections and have engaged in the range of reviews and other processes to date. The following common themes and views are evident from First Nations submissions to a number of reports and reviews (summarised as **attachment 1**):

- First Nations people need to be in control of their cultural heritage, and their free, prior and informed consent should be obtained in any dealings with that heritage.
- First Nation cultures have intersecting tangible and intangible dimensions that are inextricably connected to a broader concept of Country encompassing land and waters that are not bounded by State and Territory jurisdictions
- Increased consistency across jurisdictions is needed through applying strong national standards to protect First Nations cultural heritage.
- State and Territory legislation is failing to protect First Nations cultural heritage.
- Commonwealth legislation is viewed as ineffective at protecting cultural heritage.¹⁴
- There are conflicts between the pressures of economic development and the need to protect cultural heritage. The failure to protect First Nations cultural heritage threatens industry's social licence to operate.
- Australia is failing to meet its international obligations under the *UNDRIP*.
- Protection of cultural heritage involves management and resourcing beyond just legislative measures.

Other stakeholder views

The Australian Government recognises the urgent need to lift the standards on First Nations cultural heritage protection and is committed to cultural heritage reform through a co-design process with First Nations peoples.

There are a range of stakeholders that are interested in reforming cultural heritage protections, with many having common objectives such as:

- the need for increased certainty for cultural heritage protection and management;

¹⁴ In relation to the Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, as of February 2022, only 12 declarations have been made in favour of protecting First Nations heritage, out of the 573 applications received since the commencement of the Act in 1984.

- working collaboratively with First Nations people on matters of cultural heritage, particularly during the scoping and design of new projects and facilitating open and ongoing dialogue with First Nations people;
- supporting engagement, partnership and consultation with First Nations people; and
- achieving greater consistency in the cultural heritage legislative and policy frameworks.

Through this national engagement process, it is essential that the views of interested stakeholders and the broader community are canvassed to gain a better understanding of the changes that are necessary to improve the legislative and policy settings affecting First Nations cultural heritage to realise the common objectives.

Existing Cultural Heritage Protection Legislation

The legislative framework for the protection of First Nations heritage is currently primarily a matter for State and Territory governments. All states and territories have laws that protect various types of First Nations heritage.

A summary of the legislation in each jurisdiction is at **Appendix 2**.

In general, First Nations heritage protection laws can protect areas, places and objects of cultural significance to First Nations people, as well as the remains of First Nations people. Some schemes also incorporate mechanisms to protect intangible heritage. Most jurisdictions' legislation include the ability for the relevant Minister to make protection orders, enter conservation agreements, and/or impose development controls to prevent activities that could damage First Nations heritage. All jurisdictions' First Nations heritage legislation provide for criminal penalties.

The efficacy of these laws varies and is influenced by implementation and resourcing. Submissions by First Nations people to the 2021 Parliamentary Joint Standing Committee on Northern Australia's Inquiry into the destruction of Indigenous heritage sites at Juukan Gorge contained the following recurring themes:

- All First Nations heritage legislation should be consistent with the UNDRIP, including its principle of free, prior and informed consent,
- There is a power imbalance in current decision-making by politicians and bureaucrats, where destruction is approved at a high rate,
- Penalties and other enforcement measures for unauthorised cultural heritage destruction are an inadequate deterrent,
- Legislation on cultural heritage across different jurisdictions is inconsistent in scope, definitions, administration and enforcement; and
- Legislation needs to provide better recognition of and protection for intangible cultural heritage.

In recognition of deficiencies in state and territory legislation, a number of jurisdictions are undertaking reviews of their cultural heritage legislation.

Commonwealth protections are largely contained in the ATSIHP Act, and the EPBC Act.

The ATSIHP Act is legislation of last resort, available where State or Territory laws have failed to provide protections. It is also only activated when an application is made, placing the onus on First Nations people to take action against a known threat, rather than creating protection from the outset and without application. There are opportunities to modernise the legislative approach to provide the avenue for seeking protection of First Nations cultural heritage prior to a threat being imminent.

The EPBC Act is designed as a means of protecting a defined set of ‘protected matters’, including cultural heritage where it is of national significance, through assessment and approvals processes. Decision making power sits with the Minister for the Environment (or their delegate). The Act’s threshold test of ‘national significance’ is an inappropriate test for cultural heritage, noting that Australia contains many diverse First Nations groups. The EPBC Act may, therefore, not be an appropriate avenue for the protection of First Nations cultural heritage. Other mechanisms could provide for consideration of significance at the regional or language-group level.

Finally, native title law, and the *Native Title Act 1993* (NTA), does not directly protect First Nations cultural heritage in an enforceable way.

Firstly, native title rights and interests are restricted to a narrow form of land tenure, with rights only capable of recognition on Crown land, where the rights have not been extinguished by a prior act of government, and the group has been able to maintain an ongoing connection with the land. While this means native title recognition is achievable in only some areas, cultural heritage exists across all forms of land tenure.

Secondly, while the NTA facilitates the recognition of certain traditional rights, it provides only limited procedural rights to claim groups and native title holders when a development is proposed. These include the right to receive notice, comment, or negotiate on development proposals. These rights do not allow a claim group or native title holders to stop or veto a project. While the NTA permits a development to be stopped on grounds of protecting tangible or intangible culture, the National Native Title Tribunal overwhelmingly approves developments. This occurs in a context where it falls on the native title party to discharge the burden of proof, operating within a constrained timeframe, and with limited resources, while often facing a distinct power imbalance.

What do we want to hear about?

To help design reform options for further consultation, we want to hear your views about strengthening cultural heritage protections. An online survey will also be developed.

1. Do you support reform to current First Nations cultural heritage protections? What type of reforms do you think are a priority?
2. Have you been involved in a process or project that involved cultural heritage legislation? What was your experience?
3. Can you give any examples of best practice cultural heritage protection models or standards in other jurisdictions, whether in Australia or overseas?

4. Do you have any experience of contractual mechanisms or other *arrangements that limit or prevent* First Nations people from freely discussing or seeking cultural heritage protections? If so, what was your experience?
5. Do you support the development of national standards for cultural heritage protection? If so, what should be the key priorities for national standards? How could the national standards be enforced?
6. Are you aware of Dhawura Ngilan? How could it be implemented, particularly relating to its four visions:
 - (i) to make First Nations people the custodians of their heritage;
 - (ii) that cultural heritage is central to Australian heritage;
 - (iii) that cultural heritage is managed consistently across jurisdictions; and
 - (iv) that First Nations heritage is recognised for its global significance.
7. What does Free, Prior and Informed Consent look like to you? How can Free, Prior and Informed Consent be achieved?
8. What does local decision-making look like in relation to cultural heritage management? Are you aware of any best practice decision-making models or standards?
9. How could all levels of government work with First Nations people to address the power imbalance in decision-making on cultural heritage matters?
10. Are there any other priorities around First Nations cultural heritage that you would like to raise, eg policy or administrative improvements, concerns around climate change, repatriation and sacred artifacts, or Indigenous Cultural Intellectual Property?

What happens next?

A national consultation process will commence in the first quarter of 2022, with meetings scheduled across the country. The intention is to undertake online consultations and face-to-face consultations where practical to do so.

The priority in the first phase of consultation will be to hear from First Nations peak bodies or representative bodies who deal directly with cultural heritage through Native Title/ILUAs/Land Rights and heritage councils. Many of these groups may have already been consulted through the EPBC reviews, Juukan Gorge Inquiries or other cultural heritage reviews. To ensure these previous inputs are recognised, Appendix 1 includes a focus on First Nations submissions to key reviews.

Industry representatives, states and territories and the broader community will also be invited to participate as consultation proceeds. This national consultation process will then inform the development of a Policy Options Paper.

The Policy Options Paper will be endorsed by the First Nations Heritage Protection Alliance and the Department of Agriculture, Water and the Environment. It will analyse legislative gaps and take into consideration other independent reports and joint-parliamentary enquiries into First Nations heritage protection and other submissions made to these independent inquiries. A further process of national consultation will take place in mid-2022, in order to receive feedback on, and to refine, potential options for reform.

It is intended that by late 2022, the Minister for the Environment and the First Nations Heritage Protection Alliance will be provided with a finalised Options Report, outlining practical and implementable reform options to modernise cultural heritage protections.

[How are stakeholders going to be informed about the outcomes of these consultations? Will the report be publicly available?](#)

A summary of the findings from the consultation process will be made publicly available following its conclusion.

[Can we make written submissions?](#)

Yes. While the process will focus primarily on face-to-face engagement which will inform our conversations and advice to Ministers, there is also an opportunity to make comments through an online survey which is under development.

[How will States and Territories be engaged?](#)

The States and Territories play an important role in regulating and protecting First Nations cultural heritage and need to be part of any conversation around reform.

State and Territory governments will be included in consultations. The Minister for the Environment, and the Minister for Indigenous Australians, also convened a Ministerial Roundtable in September 2020, attended by all State and Territory Ministers responsible for First Nations affairs and heritage protection, at which they committed to undertake this national consultation process. Once consultation has commenced, it is also intended that a second Ministerial Roundtable will be convened with representatives from the First Nations Heritage Protection Alliance to discuss options for reform.

[Are First Nations people going to attend the roundtable? If so, who?](#)

Yes. Ministers in the last roundtable agreed that an invitation should be extended to First Nations representatives. First Nations representatives will be determined by the First Nations Heritage Protection Alliance.

[Will there be further opportunities to comment?](#)

We will be open to community feedback and comments whilst the consultation process is taking place. However, once the Options Report is provided to the Minister, it will be at the Ministers discretion as to next steps, and whether there will need to be further opportunities to comment.

Appendix 1 – Summary of past reports and enquiries

Below is brief summary of each of the reports and enquiries that have reviewed or made recommendations about First Nations cultural heritage protections.

1. *Dhawura Ngilan* Vision and Best Practice Standards

Background

In May 2018, the Heritage Chairs and Officials of Australia and New Zealand (**HCOANZ**) expanded their membership to include representatives from First Nations heritage organisations from across Australia.

In October 2019, the Commonwealth hosted a HCOANZ Indigenous forum in Canberra, comprising the Chairs and Officials responsible for Indigenous heritage.

Inspired by the work of the Māori Heritage Council in New Zealand, and its visions for places of Māori heritage, *Tapuwae*, the group agreed that *Best Practice Standards for Indigenous Cultural Heritage Management and Legislation (Best Practice Standards)* should be drafted, to set a benchmark for the protection of First Nations cultural heritage in Australia. They also committed to support the development of a *Vision for Aboriginal and Torres Strait Islander heritage in Australia (the Vision)*.

Following extensive consultation with First Nations stake holders and peak representative bodies, advisory councils and committees, the *'Dhawura Ngilan: Vision and Best Practice Standards'* were endorsed by the HCOANZ in September 2020.

These two documents – the Vision and the Best Practice Standards - provide a roadmap for improving approaches to First Nations heritage management in Australia.

The Vision

Dhawura Ngilan embodies the long-held aspirations of Aboriginal and Torres Strait Islander people for their heritage, expressed around 4 vision statements:

1. Aboriginal and Torres Strait Islander people are the Custodians of their heritage. It is protected and celebrated for its intrinsic worth, cultural benefits and the wellbeing of current and future generations of Australians.
2. Aboriginal and Torres Strait Islander heritage is acknowledged and valued as central to Australia's national heritage.
3. Aboriginal and Torres Strait Islander heritage is managed consistently across jurisdictions according to community ownership in a way that unites, connects and aligns practice.
4. Aboriginal and Torres Strait Islander heritage is recognised for its global significance.

Under each vision statement are key areas of focus. They take the form of recommendations to guide the actions of all Australian governments for the next decade, including:

- All jurisdictions adopt and work towards achieving the Best Practice Standards;
- Australia embraces truth-telling about our heritage and our heritage lists reflect the truth;
- All jurisdictions work with Australian collecting institutions to return ancestors to First Nations communities in a coordinated way;
- Heritage Chairs support increased focus on identifying and taking forward First Nations' heritage places for inscription on the World Heritage List.

It is expected that all jurisdictions will develop implementation plans and associated targets to address the key areas of focus and will report on progress.

The Best Practice Standards

The Standards describe structures and processes for Indigenous Cultural Heritage (ICH) legislation that conform with the Self-Determination principles of UNDRIP. The recommended Best Practice Standards are that:

- Definitions in legislation recognise the fact that ICH is a living concept;
- Legislation is structured so that it provides a blanket protection for ICH subject only to authorisations granted with the consent of affected Indigenous peoples;
- Authorisation is made by an Indigenous organisation that is genuinely representative of Traditional Owners. Legislation should include mechanisms for the identification and appointment of an organisation that can genuinely be accepted as the 'representative organisation' of the affected community to undertake this role;
- ICH issues are considered early in any development process;
- Indigenous communities are provided with adequate resources to manage ICH processes;
- Enforcement regimes are effective and broadly uniform;
- Regimes for the management of Indigenous ancestral remains and secret or sacred objects are based on the primacy of Traditional Owners;
- Recognition of frontier conflict sites is undertaken only with the participation and agreement of affected Indigenous communities.

The purpose of the Best Practice Standard is to operate as a guide for jurisdictions moving to review and reform the First Nations cultural heritage legislation and management processes. They inform the process of a development of a nationally uniform standards that has the capacity to operate as part of an integrated framework of Commonwealth, State and Territory First Nations cultural heritage legislation.

The Best Practice Standards are consistent with the UNDRIP and as a foundational principle, state that First Nations peoples are entitled to expect cultural heritage protection legislation will uphold the international legal norms contained in the UNDRIP. The Best Practice Standards provide clear guidance on:

- Basic principles to underpin legislation;
- Basic structures of legislation;
- Definitions of 'Indigenous Cultural Heritage';
- How to incorporate principles of self-determination;
- Process;
- Resourcing participation;
- Resourcing compliance and enforcement;
- Indigenous ancestral remains;
- Secret and sacred objects; and
- Nation legislation and intangible Indigenous cultural heritage.

2. *Independent Review of the EPBC Act*

Background

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is the Australian Government's key piece of environmental legislation.

The EPBC Act enables the Australian Government to join with the states and territories in providing a truly national scheme of environment and heritage protection and biodiversity conservation.

The EPBC Act focuses Australian Government interests on the protection of matters of national environmental significance, with the states and territories having responsibility for matters of state and local significance.

Every 10 years there is an independent review into the operations of the EPBC Act. The first review, the Hawke Review found that there needs to be both better recognition of the role and better promotion of Indigenous knowledge when it comes to biodiversity and conservation. The *Independent Review of the EPBC Act- Final Report October 2020* by Prof Graeme Samuel AC found that the EPBC Act is not fulfilling its objectives as they relate to the role of Indigenous Australians in protection and conserving biodiversity and heritage and promoting the respectful use of knowledge. The operation of the Act forgoes the enormous benefits that can be derived when Indigenous knowledge is fully considered in decision-making.

Independent EPBC Act review recommendations relating to First Nation matters

Hawke 2009, First Independent Review of the EPBC Act

Recommendation 3

(5d) recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity;

(5e) promote the use of Indigenous peoples' knowledge of biodiversity with the involvement of, and in cooperation with, the owners of the knowledge.

Samuel 2020, Independent Review of the EPBC Act

Recommendation 5: To harness the value and recognise the importance of Indigenous knowledge, the EPBC Act should require decision-makers to respectfully consider Indigenous views and knowledge. Immediate reform is required to:

- a) amend the Act to replace the Indigenous Advisory Committee with the Indigenous Engagement and Participation Committee. The mandate of the Committee will be to refine, implement and monitor the National Environmental Standard for Indigenous engagement and participation in decision-making
- b) adopt the recommended National Environmental Standard for Indigenous engagement and participation in decision-making
- c) amend the Act to require the Environment Minister to transparently demonstrate how Indigenous knowledge and science is considered in decision-making.

Themes from First Nations submissions to the review

- The Act has an ad hoc approach to First Nations people and does not properly recognise the role and interests of First Nations people
- The Act does not recognise First Nations knowledge or land management practices of First Nations people in managing the environment
- Consultation with First Nations people should be mandated including decisions around management and access to lands, waters, seas, cultural and sacred sites.
- Free, Prior and Informed Consent (FPIC) should be explicit as a distinct requirement for interactions with First Nations people
- As per Australia's obligation as a signatory to the UNDRIP, consultation and engagement should be premised on FPIC which allows First Nations people to play an active role in decision making
- FPIC should be applied to consultations on any matters relating to Traditional Owners and done before any decisions are made
- Consultations under the EPBC Act should consider the restraints upon First Nations communities, including capacity, high cost of participation, remoteness, accessibility of information and timeframes
- State and Territory cultural heritage legislations are not adequately protecting cultural heritage
- State and Territories should ensure that any assessment and development processes engage early with First Nations people
- State and Territories should have a role to play in executing processes and facilitation assessments, oversights, monitoring and assurance of outcomes with Federal responsibility to ensure consistency and transparency
- State and Territories should prioritise cultural heritage assessments early in the process, prior to approvals being made

- The ATSIHP Act needs to be amended, at a minimum with a set of national standards
- Indigenous Protected Areas should be recognised as a matter of national environmental significance
- The Australian Government is not meeting its obligations to international agreements on biodiversity
- The Act is slow to move and doesn't respond fast enough to increasing challenges with climate change, the oil and gas industry, land clearing and the emergence of IPAs
- The EPBC Act needs to be strengthened to protect First Nations cultural heritage protection
- Strengthen the Indigenous Advisory Council to have a stronger mandate

3. Joint Standing Committee inquiries into the destruction of Juukan Gorge: Interim and Final reports

Background

Following the destruction of the 48,000-year-old Juukan Gorge, the Federal Parliament's Joint Standing Committee on Northern Australia were tasked to undertake an inquiry into the failure to protect these sacred sites. The terms of reference included reviewing current Western Australian heritage legislation, the interaction of state First Nations heritage laws with Commonwealth laws, the effectiveness and adequacy of state and federal laws cultural heritage laws and opportunities for improvement. Furthermore it sought to understand the sequence of events and decision-making process undertaken by Rio Tinto.

Never Again: Inquiry into the destruction of the 46,000-year-old caves at Juukan Gorge in the Pilbara region of Western Australia- interim report was released in December 2020. It made seven recommendations, many of the recommendations were made to Rio Tinto, the resource sector and the Western Australian Government, with some recommendations made to the Australian Government. The majority of recommendations have been captured in the final report.

A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge was released in October 2021. The final report made eight recommendations, particularly to the state, territory and commonwealth governments through legislative reform and international ratification.

The inquiry received over 177 written submissions and 23 public hearings.

Recommendations in A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge

1. Appoint the Minister for Indigenous Australians as the Minister responsible for Aboriginal and Torres Strait Islander cultural heritage by amending the ATSIHP Act and EPBC Act and transfer administrative responsibility to the portfolio agency of the Minister for Indigenous Australians.

2. Establish a definition and the primacy of cultural heritage by applying international standards for Aboriginal and Torres Strait Islander cultural heritage by ratifying the *Convention for the Safeguarding of the Intangible Cultural Heritage 2003*.
3. The Australian Government legislate a new framework for cultural heritage protection at the national level that is co-designed with Aboriginal and Torres Strait Islander people and sets out minimum standards in line with international law and Dhawura Ngilan.
4. Review the *Native Title Act 1993* to implement standards around the negotiation of FPIC, prohibit gag clauses, explicitly delegate authority and responsibility to PBCs and Representative bodies and review the future act regime.
5. The Australian Government endorse and commit to implementing Dhawura Ngilan. Dhawura Ngilan articulates four visions that include making Aboriginal and Torres Strait Islander people the custodians of their heritage, that cultural heritage is central to Australian heritage, that cultural heritage is managed consistently across jurisdictions and that Aboriginal and Torres Strait Islander heritage is recognised for its global significance.
6. The Australian Government commit to a truth telling and reconciliation process and develop a model for truth-telling that encapsulates how cultural heritage has been managed, altered and destroyed. This process would allow others, such as individuals, governments and companies to join this journey.
7. The Australian Government establish an independent fund to administer funding for Prescribed Bodies Corporate (PBCs). Further, it recommends that PBCs be required to demonstrate transparency and accountability in their decision-making processes.
8. Amend the *Native Title Act 1993* to require PBCs and Native Title Representative Bodies to demonstrate adequate consultation with, and consideration of, local community views prior to agreeing to the destruction/alternation of any cultural heritage sites.

Themes from First Nations submissions to the review

- Cultural heritage legislation does not provide for adequate protection for First Nations peoples at the state, territory and commonwealth
- The legislation on cultural heritage is inconsistent, including its management and definition across state, territory and commonwealth jurisdictions
- Cultural heritage legislation across all jurisdictions needs reform
- Cultural heritage is being destroyed at an alarming rate. Most ATSIHP Act applications approve cultural heritage destruction.
- Cultural heritage protection should be consistent with UNDRIP, consent and FPIC
- Better recognition of intangible cultural heritage
- ATSIHP is an Act of last resorts, its outdated and ineffective.
- The ATSIHP Act also is limited in operation due to constitutional arrangements and political relations between the States and Commonwealth

- ATSIHP Act should be replaced with an effective legislative regime
- Cultural heritage laws must honor commitments enshrined in the UNDRIP and work proactively to incorporate Declaration aims into domestic policy and legislation
- Develop and implement best practice standards on cultural heritage protection for all State, Territories and Commonwealth legislation on cultural heritage protection
- Best practice standards could be accredited and regulated
- Decisions on development or resource use should not be made by politicians or bureaucrats. There is a power imbalance in this decision-making, where destruction is approved at a high rate
- Any decisions on cultural heritage protection should be deferred to a national First Nations heritage commission. Or could be done through a dual authorisation process
- Establish a new independent statutory body to regulate cultural heritage protection
- Increase fines for cultural heritage destructions legislated by the commonwealth
- Any inquiries should consider the interaction between *Native Title Act 1993* and cultural heritage regimes, including the future acts regime.
- The Confidentiality of ILUAs present a real problem for Traditional Owners. Further, ILUAs have short timeframes and negotiation periods. If Traditional Owners don't meet these timelines it leads to further loss of rights.
- Consent should not be assumed under ILUAs. Further, ILUAs need to be better regulated
- Broad consent should be sought as there may be disputes in communities on the management and protection of sites.

4. Summary of older reviews of ATSIHP Act

2009 Discussion Paper on the ATSIHP Act

In 2009 the then Minister for the Environment, Heritage and the Arts proposed reform to the ATSIHP Act. At the time of proposing reform to the Act, the Minister found that the Act had not been effective in meeting its purpose, which was to provide a direct and immediate means for the Commonwealth to protect traditional areas and objects when there are gaps in state and territory legislation. It was identified that the Act had not been an effective means of protecting traditional areas and objects, for example 93% of applications since 1984 had not resulted in a declaration. Furthermore the Act was intended as a short-term measure which has led to a number of problems with the legislation.

The Minister released a discussion paper that set out the options to amend or replace the Act.

It also recommended improvements for First Nations heritage protection laws in every state and territory, based on a common set of standards. The changes proposed included strong protection for traditional areas and objects, a central role for traditional custodians in decision-making, opportunities for early engagement with traditional custodians in planning processes and decision-making.

The aim of the reform was:

- To ensure that Indigenous Australians have the best opportunities to protect their heritage; and
- Cut duplication and red tape by establishing a nationally consistent approach to protecting Indigenous heritage based on best practice standards.

The proposed reform never progressed.

Evatt 1996, Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*

Background

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* is the key piece of Commonwealth legislation relating to cultural heritage protections. The purpose of the ATSIHP Act is to preserve and protect places, areas and objects of a particular significance to First Nations people and for related purposes. It enables the Minister to make short term and long-term declarations to protect areas, and objects with significance.

The ATSIHP Act was designed as interim legislation with a proposed life of two years with the view that it would be replaced by more comprehensive legislation dealing with Aboriginal land rights, native title and cultural heritage.

The Hon. Elizabeth Evatt AC was tasked with providing a comprehensive review of the ATSIHP Act over a six-month period. Her review found that the original intent of the ATSIHP Act was that it would operate only where State and Territory laws did not provide adequate protection or did not exist, and as a measure of last resort. Further, Ministerial decisions on cultural heritage matters had been the subject of several high profile court challenges¹⁵. At the time of undertaking the review in 1996, the Act had only been amended to repeal the sunset clause and insert a section that only applies in Victoria.

The review consulted with Aboriginal and Torres Strait Islander communities, State and Territory governments, business and industry and received 68 written submissions. Of these submissions, 38% of submissions were from Aboriginal organisations and individuals.

Goals for reform of the Act

There have been developments in thinking, law and policy since the mid-1990s when the Evatt Review was undertaken, however, some recommendations remain relevant today.

Rather than explore the lengthy recommendations, it is worth considering the goals for reform of the legislation. These include;

- To respect and support the living culture, traditions and beliefs of Aboriginal people and to recognise their role and interest in the protection and control of heritage
- To retain the basic principles of the ATSIHP Act as an Act of last resort

¹⁵ Explanatory Memorandum, *Aboriginal and Torres Strait Islander Heritage Protection Bill 1998* (cth)

- To ensure that the ATSIHP Act can fulfil its role as a measure of last resort by encouraging States and Territories to adopt minimum standards for the protection of Aboriginal cultural heritage as part of their primary protection regimes
- To avoid duplication and overlap with State and Territory jurisdictions by recognition and accreditation of their processes
- To provide access to an effective process for the protection of areas and objects significant to Aboriginal people
- To provide a process that operates in a consistent manner, according to clear procedures, in order to avoid unnecessary duplication, delays and costs
- To ensure that Aboriginal people participate in decisions about the protection of their significant sites and that their wishes are taken fully into account
- To ensure that heritage protection laws benefit all Aboriginal people, whether or not they in traditional lifestyle, whether they are urban, rural or remote. The objective should be to protect living culture/tradition as Aboriginal people see it now.

The recommendations from the Evatt Review have not been implemented.

5. Reference list

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Appendix 2 – Summary of International instruments, Commonwealth, State and Territory legislation and dealing with First Nations cultural heritage

<p><i>United Nations Declaration on the Rights of Indigenous Peoples</i></p>	<p>The UN Declaration on the Rights of Indigenous (UNDRIP) is an important document which articulates world Indigenous peoples’ rights to set and pursue their own priorities for development, and to maintain and control their cultural heritage. This has not been formally adopted into Australian law, but it was endorsed in 2009. There are remaining steps to be taken before UNDRIP can be adopted into national law. Much of the content of UNDRIP is relevant to consideration of cultural heritage laws. The key provisions of UNDRIP include that Indigenous people have the right to, Article 11, Article 12, Article 13, Article 14, Article 31, Article 32 and Article 40.</p>
<p><i>Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)</i></p>	<p>The EPBC Act enables the Australian Government to join with the states and territories in providing a national scheme of environment and heritage protection and biodiversity conservation.</p> <p>The EPBC Act is designed as a means of protecting a defined set of ‘protected matters’, including cultural heritage where it is of national significance, through assessment and approvals processes. Decision making power sits with the Minister for the Environment (or their delegate). The EPBC Act focuses Australian Government interests on the protection of matters of national environmental significance, with the states and territories having responsibility for matters of state and local significance.</p>
<p><i>Underwater Cultural Heritage Act 2018 (UCH)</i></p>	<p>The UCH Act continues the protection of Australia’s shipwrecks, and has broadened protection to sunken aircraft and other types of underwater cultural heritage including Australia’s Aboriginal and Torres Strait Islander Underwater Cultural Heritage in Commonwealth waters.</p> <p>The UCH Act also continues much of the successful policy framework established under the Historic Shipwrecks Act and implements the recommendations from the public Review of the Historic Shipwrecks Act 1976 and consideration of the requirements arising from the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage (the UNESCO 2001 Convention).</p>
<p><i>Protection of Movable Cultural Heritage Act 1986</i></p>	<p>The Protection of Movable Cultural Heritage Act 1986 ensures objects that have cultural significance remain in Australia. The Act also provides for the return of foreign cultural property which has been illegally exported from other countries and imported into Australia.</p> <p>The Protection of Movable Cultural Heritage Regulations 2018 contain the National Cultural Heritage Control List, which specifies the categories of Australian cultural property subject to export control. The Explanatory Statement outlines the purpose of the Regulations.</p>

<p><i>Copyright Act 1968</i></p>	<p>The Copyright Act 1968 grants automatic rights to the creators and owners of literary, dramatic, artistic or musical works and other subject matter such as films and recordings.</p> <p>Indigenous people who are the copyright owners of their works have the exclusive right to prohibit or do certain acts such as publish, reproduce, communicate and adapt their work. Similarly, where Indigenous people are the owners of copyright in films or sound recordings, they can prevent or permit reproduction of the film and sound recording. Being the holders of these rights allows them to control their own individual creative works and outputs.</p> <p>Indigenous Cultural Intellectual Property (ICIP) refers to all the rights that Indigenous people have, and want to have, to protect their traditional arts and culture. Sometimes the words “Cultural Heritage” are used to mean the same thing. The idea of ICIP is based on the principle of self-determination.</p>
<p><i>Native Title Act 1993 (NTA)</i></p>	<p>The NTA provides a framework for recognising and protecting the traditional rights and interests of Aboriginal and Torres Strait Islander people on areas of land and waters where native title has not been extinguished. This can include vacant Crown land and reserves, forests and parks, as well as seas and inland waters.</p> <p>Once a claim has been lodged and continuing through to the Federal Court making a determination that native title rights exists, the native title group has procedural rights when certain developments may impact upon their rights. These include the right to be notified, to make comment, or in certain circumstance, to negotiate an agreement about the how the development will be carried out. While this process may provide some opportunity for the native title group to negotiate cultural heritage protections, the NTA is not designed for this purpose, and does not provide the native title holders a final say in respect to cultural heritage matters.</p> <p>Once the Federal Court makes a determination that rights exist, the NTA requires native title holders to establish a corporation called a Prescribed Body Corporate (PBC) to manage and protect their native title rights and interests. These corporations are called ‘prescribed bodies’ because they have certain prescribed obligations under the NTA, including a requirement to incorporate under the Corporations (Aboriginal and Torres Strait Islander Act) 2006 (CATSI ACT).</p>
<p><i>National Parks and Wildlife Act 1974 (NSW) (NPW Act)</i></p>	<p>The National Parks and Wildlife Act 1974 (NSW) (NPW Act) is the main law in NSW that protects Aboriginal culture and heritage. The NPW Act is managed by the Minister for Energy and Environment with assistance from the National Parks and Wildlife Service along with its Chief Executive.</p> <p>The Office of Environment and Heritage is responsible for protecting Aboriginal culture and heritage in NSW.</p> <p>The Aboriginal Cultural Heritage Advisory Committee advises the Minister on matters relating to the identification, assessment and management of Aboriginal culture and heritage (s.28).</p>

<p><i>Aboriginal Heritage Act 2006 (VIC) (Act),</i></p>	<p>Indigenous heritage is protected by a single Act within Victoria, the Aboriginal Heritage Act 2006 (VIC) (Act), which protects Aboriginal Objects, Aboriginal Areas and Aboriginal cultural heritage. The Act is administered by the Minister for Aboriginal Affairs and the Victorian Department of Premier and Cabinet.</p> <p>The Act protects Aboriginal cultural heritage and Aboriginal intangible heritage (s.1) which is defined to include:</p> <ul style="list-style-type: none"> • for Aboriginal cultural heritage, Aboriginal places, Aboriginal objects and Aboriginal ancestral remains which are each subject to their own definition (s.4); and • for Aboriginal intangible heritage, any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public (s.79B).
<p><i>The Aboriginal Cultural Heritage Act 2003 (Qld)</i></p> <p><i>Torres Strait Islander Cultural Heritage Act 2003 (Qld)</i></p>	<p>The Aboriginal Cultural Heritage Act 2003 (Qld) and the Torres Strait Islander Cultural Heritage Act 2003 (Qld) (Indigenous Cultural Heritage Acts) are the main laws in Queensland that protect Indigenous cultural heritage.</p> <p>The Indigenous Cultural Heritage Acts are administered by the Minister for Aboriginal and Torres Strait Islander Partnerships and the Cultural Heritage Unit of the Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP). These Acts largely mirror each other</p>
<p><i>Aboriginal Heritage Act 1988 (SA)</i></p>	<p>Indigenous heritage in South Australia is protected by the Aboriginal Heritage Act 1988 (SA) (Act).</p> <p>The responsible Minister for the Act is the Minister for Aboriginal Affairs and Reconciliation.</p> <p>The Act is managed by the South Australian Department of the Premier and Cabinet.</p> <p>Under the Act, the Minister’s functions include protecting and preserving Aboriginal sites, objects and remains, searching for Aboriginal sites or objects, and researching Aboriginal heritage (s.5).</p> <p>In carrying out these functions, the Minister must consider relevant recommendations of the State Aboriginal Heritage Committee.</p>
<p><i>Aboriginal Heritage Act 1972 (WA)</i></p> <p><i>Aboriginal Cultural Heritage Act 2021 (WA)</i></p>	<p>The <i>Aboriginal Heritage Act 1972 (WA)</i> continues to operate in Western Australia, but will be superseded, upon the completion of regulations, by the <i>Aboriginal Cultural Heritage Act 2021 (ACH Act)</i></p> <p>The ACH Act provides a new framework for the recognition, protection, conservation and preservation of Aboriginal cultural heritage.</p> <p>Before the ACH Act comes into operation there will be a transitional period of at least 12 months during which the regulations, statutory guidelines and operational policies will be developed to ensure the ACH Act will have its intended effects. The transitional period will allow for</p>

	<p>the new Aboriginal cultural heritage management system to be fully established and to enable parties to prepare for the new system.</p> <p>During the transitional period the Aboriginal Heritage Act 1972 will remain in force to allow proponents to continue to seek section 18 consent for any activity that will impact Aboriginal sites. Any section 18 consents applied for and granted during this period will be limited to 5 years and will be subject to additional protection mechanisms, including the requirement to report new information about the existence or the characteristics of Aboriginal cultural heritage.</p>
<p><i>Aboriginal Heritage Act 1975 (Tas)</i></p>	<p>Indigenous Heritage in Tasmania is protected primarily by the Aboriginal Heritage Act 1975 (Tas) (Aboriginal Heritage Act). The Aboriginal Heritage Act establishes a scheme for the protection of Aboriginal relics (which are broadly defined to include objects, places and sites). The Aboriginal Heritage Act is administered by the Minister for Heritage through Aboriginal Heritage Tasmania in the Department of Primary Industries, Parks, Water and Environment (Department). Indigenous heritage, which is in or on reserved land, may also be protected by the National Parks and Reserves Management Act 2002 (Tas) (NPRM Act), which provides for broader management of reserved lands. The NPRM Act is administered by the Minister for Crown Lands in the Department.</p>
<p><i>Northern Territory Aboriginal Sacred Sites Act 1989 (NT)</i></p>	<p>The <i>Northern Territory Aboriginal Sacred Sites Act 1989 (NT)</i> (NTASS Act) is the primary legislation for the protection of Indigenous heritage in the Northern Territory.</p> <p>The NTASS Act creates a Register of Aboriginal sacred sites (s.10(d)) and a procedure for people who want to enter onto, use, or carry out works on, sacred sites for them to obtain approval (s.19B). The NTASS Act also establishes criminal offences for entering onto or damaging sacred sites (Part IV). The NTASS Act is administered by the Minister for Aboriginal Affairs.</p> <p>The <i>Aboriginal Land Rights Act (Northern Territory) 1976 (Cth)</i> (ALRA) is Commonwealth legislation allowing for the granting of Aboriginal freehold title to the Traditional Owners. About 50% of the Northern Territory is now held as Aboriginal freehold, allowing traditional owners to consent or veto all activity on their lands, a power often used to protect sacred sites and cultural heritage. ALRA also establishes a criminal offence for entering or remaining on a sacred site without a legally valid reason (s.69).</p>
<p><i>Heritage Act 2011 (NT)</i></p>	<p>The Heritage Act 2011 (NT) (Heritage Act) sets up a system for assessing, declaring and protecting heritage places in the Northern Territory. The Heritage Act is administered by the Minister for Arts, Culture and Heritage and the Department of Lands, Planning and the Environment.</p>

<p><i>Heritage Act 2004 (ACT)</i></p>	<p>The Heritage Act 2004 (ACT) (Act) is the primary legislation in the ACT that protects Indigenous heritage. The Act deals with the protection of Aboriginal, non-Indigenous and natural heritage, as well as Aboriginal objects and places.</p> <p>The Act is managed by the Minister for the Environment, Minister for Heritage and Minister for Sustainable Building and Construction (Minister), with support from the ACT Heritage Council (Council) and ACT Heritage (part of the Environment, Planning and Sustainable Development Directorate).</p> <p>The Act protects the following:</p> <ul style="list-style-type: none"> • Aboriginal objects – objects associated with Aboriginal people because of Aboriginal tradition and; • Aboriginal places – places associated with Aboriginal people because of Aboriginal tradition. <p>Aboriginal tradition is defined to mean customs, rituals, institutions, beliefs or general way of life of Aboriginal people (s.9).</p>
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