Background Paper

Cultural Heritage Protection Reform 2023

ANTAR

First Nations Cultural Heritage Protection Reform

The need to improve protection for First Nations cultural heritage was tragically brought into sharp relief by the destruction of Juukan Gorge by Rio Tinto in May 2020 and the subsequent findings of various inquiries and reviews of the legislation.

On 24 May 2020, as part of the expansion of its existing Brockman 4 Mine, Rio Tinto Corporation destroyed the Juukan Gorge in the Pilbara of Western Australia, a site rich in Aboriginal cultural heritage, located on the lands of the Puutu Kunti Kurrama and Pinikura (PKKP) people. This included material evidencing continual human occupation of the area for over 46,000 years. The blast devastated a place of personal, community, national and international significance.

While the destruction was authorised under the *Aboriginal Heritage Act 1972* (WA) and did not breach an Indigenous land use agreement under the *Native Title Act 1993* (Cth) between Rio Tinto and the PKKP people, what it exposed is that current legislative frameworks for the protection of First Nations cultural heritage sites are inadequate and no longer fit for purpose. There was also widespread dismay that the laws of a modern, progressive, prosperous nation like Australia could not protect cultural heritage of such value to humanity and highlighted the fact that the protection of First Nations cultural heritage is a matter of importance to all Australians.

The reality of the current situation is that each jurisdiction contributes to a dysfunctional whole, with inconsistent definitions of what constitutes cultural heritage, different assessment and registration systems, different processes for assessment and different reporting of activities impacting on cultural heritage places, making it impossible to get a national picture of heritage outcomes.

First Nations peoples' recurring themes for reform

First Nations peoples have been working for reform of cultural heritage protections in Australia for many decades, echoing the following recurring themes:

- All First Nations heritage legislation should be consistent with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), including the 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.

The current legislative framework for the protection of First Nations cultural heritage

Legislation for the protection of First Nations cultural heritage is primarily the responsibility of States and Territories. A summary of the current Indigenous and Non-Indigenous Cultural Heritage Legislation around Australia can be found here.

All states and territories have statutes, regulations, codes of practice and management prescriptions that govern the management of Aboriginal and Torres Strait Islander heritage sites, places and objects. These instruments provide a level of protection for Aboriginal and Torres Strait Islander heritage sites by minimising damage or disturbance to the sites, by imposing penalties

for significant impacts, and by requiring prior consultation with the relevant Aboriginal or Torres Strait Islander Heritage body or council regarding actions that might affect the site.

The Commonwealth's role in protecting First Nations cultural heritage only occurs through the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) and the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

The ATSIHP Act is legislation of last resort, available where state or territory laws have failed to provide adequate protections. It is in practice only activated when an application is made by an Aboriginal and/or Torres Strait Islander person, placing the onus on First Nations peoples to take action against a known threat, rather than creating protection from the outset and without application.

The EPBC Act is designed as a means of protecting a defined set of 'matters of national environmental significance' (MNES), including heritage values that are of world, national or Commonwealth heritage significance, through assessment and approvals processes. Decision making power sits with the Minister for the Environment (or the Minister's delegate). The Act's threshold test of 'national significance' is benchmarked against the Western notion of there being one Australian nation, rather than against the multiple, diverse First Nations groups contained within the Australian continent.

Over the past 26 years there have been three major reviews assessing the effectiveness of the Commonwealth's legislation, and all of these reviews found that the legislation is ineffective and in need of significant reform with greater attention to the overlaps and gaps between cultural heritage matters, native title rights and interests and the statutory Aboriginal and Torres Strait Islander land rights schemes around the country.

All jurisdictions around Australia have attempted legislative reforms to their Indigenous heritage statutes over the last decade or so, but the processes have been 'drawn out, controversial and, for the most part, unsuccessful'.[1]

Destruction of Juukan Gorge and the case for change

In June 2020, the Australian Senate referred the Parliamentary Joint Standing Committee on Northern Australia the terms of reference for an inquiry into the destruction of Juukan Gorge. The Committee produced two reports, Never Again, tabled in December 2020, (Interim Report), and A Way Forward, (Final Report), tabled in October 2021.

The Committee's final report emphasises that what happened at Juukan Gorge is not unique. It is an extreme example of the destruction of Aboriginal and Torres Strait Islander cultural heritage which continues to happen in this country. The Committee made eight recommendations, including that a new framework for cultural heritage protection be developed at the national level through a process of co-design with Aboriginal and Torres Strait Islander peoples consistent with the UN *Declaration on the Rights of Indigenous Peoples*. And the Dhawura Ngilan Vision and Best Practice Standards produced by the Heritage Chairs of Australia and New Zealand as a roadmap to improving First Nations cultural heritage protections.

In June 2020, Aboriginal leaders from across Australia met to express their outrage at the destruction of the 46,000 year-old heritage site at Juukan Gorge and vowed to pursue national reforms to prevent this from ever happening again. They took the opportunity to form the First Nations Heritage Protection Alliance as a coalition of member organisations including major Native Title, Land Rights, Traditional Owner, and community-controlled organisations nationally, and gave the Alliance a mandate to strengthen and modernise

[1] McGrath, P. and Lee, E. (2016) *The fate of Indigenous place-based heritage in the era of native title*, Chapter 1 in McGrath, P. (2016) *The right to protect sites: Indigenous heritage management in the era of native title.*

cultural heritage laws and to create industry reforms that ensure Indigenous Cultural Heritage is valued and protected for the future.

Coincidentally, a ten-yearly periodic Independent Review of the EPBC Act was already underway by Professor Graham Samuel when the Juukan Gorge incident occurred. The final report of the Review also concluded that the national-level laws for Indigenous cultural heritage protection require immediate and comprehensive review.

The State of the Environment Report (SOER) is a five-yearly requirement under the EPBC Act. The 2021 SOER was released in July 2022 and included the following succinct summary of the current position with respect to First Nations cultural heritage protection:

> "Significant reform of Indigenous heritage legislation is required. The destruction of the Juukan Gorge rock-shelter in 2020 highlighted that the range of legislation that relates to Indigenous heritage is either not working effectively (e.g. the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, the EPBC Act in relation to emergency powers), or not working effectively together (e.g. the *Native Title Act 1993* and state-level Indigenous Management heritage legislation), resulting in devastating loss of Indigenous heritage.
>
> In addition, despite having significant connections to heritage sites, and the knowledge, cultural practices and ecological management that come with this, Indigenous Australians have limited control and decision-making power over the management of Indigenous sites across Australia. This demonstrates a disregard for Indigenous people's right to self-determination over their cultural heritage, as outlined in the United Nations *Declaration on the Rights of Indigenous Peoples*."

Co-design options to reform First Nations heritage protections

On 29 November 2021, the Australian Government and the First Nations Heritage Protection Alliance entered into a partnership agreement to co-design options to reform First Nations heritage protections. It is a unique partnership agreement informed by the principles set out in the 2020 National Agreement on Closing the Gap. Following the change in government in the May 2022 federal elections, the partnership agreement was re-negotiated in November 2022 and will continue until 30 June 2024.

Under the partnership agreement, the parties have embarked on undertaking a national engagement process to co-design options for modernising cultural heritage protections. This engagement is being undertaken in two stages. The aim is to finalise a recommendation on the option(s) for legislative reform to the Minister by 30 May 2023 and to conduct further consultation on policy and implementation detail from April to December 2023.

Outcomes of the Stage 1 Engagements

Thirty-two engagements with First Nations heritage bodies, peak First Nations advisory bodies, industry organisations, and state and territory governments were undertaken during Stage 1. Discussions were guided by ten questions about cultural heritage protections and the results are presented in a Directions Report. Key findings are:

1. All respondents indicated support for cultural heritage reform.
2. There was broad support for developing mandatory National Standards that states and territories would need to meet, and significant support for Standards to be implemented through local decision making.
3. Further engagement is needed to inform the process for modernising Aboriginal and Torres Strait Islander heritage protections, particularly about how potential options for reform could be implemented.

The Stage 1 consultations have shown that across First Nations Peoples and their organisations, state and territory governments, statutory authorities, industry and industry peak bodies, academics and specialised professionals there is a shared understanding around many of the changes that are necessary to address the need for better protections of First Nations cultural heritage.

The overwhelming message from the Stage 1 consultations is that reform of First Nations cultural heritage protections is urgent and necessary in the context of ongoing destruction of important cultural heritage, and that doing nothing is not a viable option. This is consistent with the Australian Government's clear commitment to legislative reform for First Nations cultural heritage protection, and consistent with the principles in the United Nations Declaration on the Rights of Indigenous Peoples.

The following key themes also emerged from the consultations:

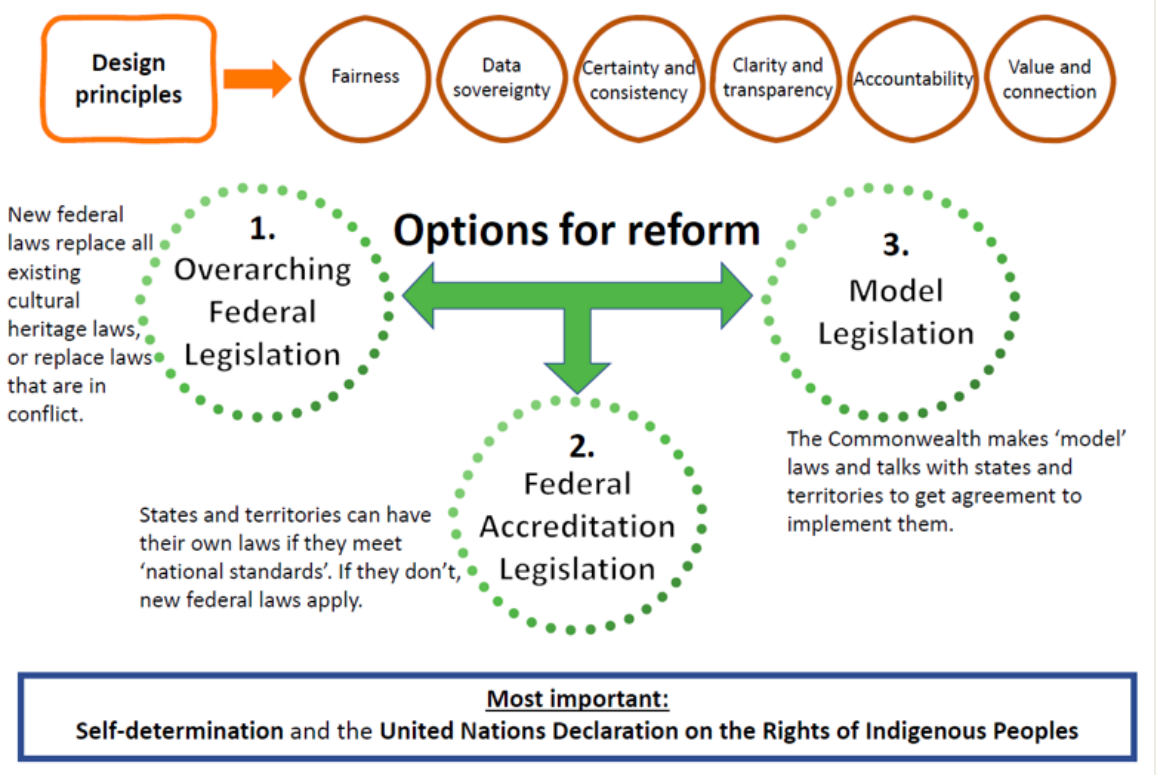
- First Nations peoples should be making decisions about their own heritage;
- First Nations heritage should be considered at the earliest possible opportunity, ideally before project conception;
- Intangible heritage needs to be better considered by governments, proponents and in legislation;
- Protections should focus on protection and celebration of First Nations heritage, rather than on the 'managed destruction' facilitated by most current legislative regimes;
- Effective, well-resourced compliance and enforcement mechanisms are needed; and
- Enhanced resourcing of First Nations peoples and their representative organisations is required in order for First Nations people to be able effectively engage in consultation processes and decision-making.

Stage 1 Engagements also highlighted that the principles of the United Nations *Declaration on the Rights of Indigenous People* (UNDRIP) should be central to the design of reform options. Several particular principles emerged as key considerations in design reform options, including fairness, data sovereignty, certainty and consistency, clarity and transparency, accountability, and value and connection.

Stage 2 Consultations and options for legislative reform

Stage 2 consultations are currently taking place. An Options Paper has been prepared, which outlines three options for legislative reform which emerged from the first stage of national engagements.

The three options (see Diagram below) have the potential to meet the principles of UNDRIP and self-determination, and the design principles mentioned above, in an efficient and effective manner. The second stage of national engagements is aimed at determining how these options could apply and operate, and which model may be preferred.



Broadly, the three options are:

1. Overarching federal standalone legislation and repeal of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act). This option would introduce a new national regime for cultural heritage protection, replacing all current federal legislation, and state and territory regimes.

   The Australian Government would establish standalone federal legislation to protect First Nations cultural heritage. This would replace the ATSIHP Act with legislation that provides an overarching national regime for cultural heritage protection. The new legislation would override existing state and territory First Nations heritage protection legislation, providing a consistent and high standard of protection nationally. Protection for First Nations cultural heritage already in place under the heritage listings of EPBC Act would remain, and could be supplemented by further protections under the new legislation.

   This legislation would be separate from, and would replace, existing federal, state and territory legislation, and other protections provided at the state and territory level under heritage, planning and environmental laws. Under this option, the ATSIHP Act would be repealed once the new legislation came into effect, with legacy ATSIHP Act cases managed through to their conclusion.

2. Federal accreditation of state and territory legislation where mandatory national standards are met, and repeal of the ATSIHP Act. This option would establish 'national standards'. The cultural heritage regime in each state and territory would have to comply with these standards, and if not, the Australian Government would step in.

   Under this option, the Australian Government would develop a set of best practice national standards, consistent with the principles of self-determination and the design principles referred to above. These

national standards could be developed using existing publications, such as the 'Best Practice Standards in Indigenous Cultural Heritage Management and Legislation' included in Dhawura Ngilan. State and territory legislation that met those national standards could be accredited. If state and territory legislation was not accredited, federal legislation would apply. This federal legislation would be similar to that referred to in option one.

3. 'Model' legislation, and exemption from the operation of the ATSIHP Act once enacted. This option would see the Australian Government develop 'model' best practice legislation, and then negotiate with each state and territory to have it implemented.

   Under this model, the Australian Government would draft overarching model legislation to protect First Nations cultural heritage, which would implement UNDRIP, including the right to free, prior and informed consent, and self-determination in relation to First Nations heritage protection. This legislation would be adopted and implemented by the Australian Government and states and territories within their individual jurisdictions, subject to the agreement of those jurisdictions. As this legislation is enacted within a state or territory, it would replace the current state and territory legislation, and the ATSIHP Act would no longer be in effect other than to manage legacy cases. This would be because, if successfully implemented, states and territories that enact the 'model' legislation would have sufficient heritage protections and no longer require the last resort protections offered by the ATSIHP Act.

Several other options were also considered, but these were deemed not to be fit for purpose against the design principles mentioned above.

The Joint Working Group supporting the work of the Partnership sought feedback on the three options prior to March 2023. It posed the following key questions:

- Are the design principles right?

- How can it be ensured that ownership and responsibility for First Nations cultural heritage protection is where it needs to be in any of the three options?
- Will these options work in all jurisdictions? If not, why not? If so, then what is required to ensure it works in accordance with the design principles?
- What might be required in each model to make it work effectively? Resourcing? Capacity building? Public education?
- Under the first model, a new national body would need to be created. While it would have to be representative of First Nations from each State and Territory, there are many questions that still need to be explored. Such as how people should be selected and appointed, the scope of its role, and how it should be resourced.

The Options Paper includes more specific questions on each of the three options that the Joint Working Group considered.

Comment

The three options canvassed in the Options Paper each have their pros and cons.

- Option 1 would see the Commonwealth taking full responsibility for the protection of First Nations cultural heritage protection. While the creation of a new national body representative of First Nations from each state and territory would put First Nations peoples at the centre of decision making in relation to their own cultural heritage, there is a very real risk that the national system will not interact very well with state/territory and local planning and other related legislation. This option will depends on whether the Commonwealth is courageous enough to wrest control of First Nations heritage powers away from the States (and Territories, although it still has the power to govern the Territories under s.122 of the Constitution despite

the fact that it has granted the NT and the ACT a form of self-government) and whether the Commonwealth is willing to take on such an enormous and complicated role in every jurisdiction.

- Option 2 would see the Commonwealth developing a 'national standard' which the States and Territories could comply with, or if not, then the Commonwealth would step in with its legislation. This option provides some flexibility in that where existing arrangements meet the best practice requirements of the new national standard, they could be retained or modified to suit. Where they don't meet the standard, the Commonwealth would step in. This option will depend on the Commonwealth being brave enough to set and enforce a strong enough national standard reflecting the wishes of the First Nations peoples for much stronger protections than currently exist and having the courage to override a State or Territory if they fail to apply and comply with the national standard. There is also a high risk of ongoing inconsistency and non-compliance across jurisdictions. Compliance with a national standard is not something governments across all jurisdictions are necessarily good at.

- Option 3 would see the Commonwealth developing 'model' legislation and then negotiating with each jurisdiction to have it implemented. While model legislation might drive consistency, there is a risk that different jurisdictions will still want to have different interpretations or to want to implement it differently. This option will depend on the Commonwealth developing model legislation and then persuading the States/Territories to adopt it. There does not appear to be an accountability mechanism to ensure compliance and consistency across the country. The risk is still a very strong risk that the legislative reform objectives will not be achieved consistently across the country and that they will be eroded over time.

One thing is for sure: the current legislative framework for the protection of First Nations cultural heritage protections has failed them and that doing nothing is **not** an option, as the Stage 1 consultations found.

Perhaps another option is to consider a mix of elements from each of the three options; that the Commonwealth Parliament passes national legislation which sets a national framework in place and, like the *Native Title Act 1993* (Cth), includes provisions whereby the States and Territories can establish their own institutions and mechanisms for certain parts of the system, but they must conform with the national legislation.

What is important here is that any new cultural heritage protection regime must permeate all of our systems of governance, not just at the national and State/Territory levels, but also at the local level. To date, the material generated by the First Nations Cultural Heritage reform process does not appear to have considered the local government's role.

Section 5 of the *Local Government Act 2008* in the Northern Territory includes a provision whereby:

"The rights and interests of Indigenous traditional owners, as enshrined in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Native Title Act 1993* (Cth), are to be recognised and the delivery of local government services must be in harmony with those laws."

The only problem with this provision is that local governments in the Northern Territory have no responsibility for land use planning and development decision making, that remains with the NT Government.

However, other Local Government Acts around Australia should be amended to include similar provisions, with a reference also to Aboriginal and Torres Strait Islander heritage protection in line with the national standard which is likely to emerge from the national reforms.

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With thanks:

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ANTAR is proud to acknowledge and pay our respects to First Nations Peoples as the traditional owners of the lands on which we work across the continent.

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