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13 August 2020

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

Dear Mr Entsch

Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia

On behalf of Australia ICOMOS I write to provide the attached submission regarding this very important inquiry.

Please contact me if Australia ICOMOS can be of further assistance.

Yours sincerely

Helen Lardner
President

AUSTRALIA ICOMOS
International Council on Monuments and Sites

Australia ICOMOS Submission

to the

Joint Standing Committee on Northern Australia Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia

August 2020

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Executive Summary

Australia ICOMOS, a national committee of ICOMOS (the International Council for Monuments and Sites), is a non-government professional organisation that promotes expertise in the conservation of cultural heritage in Australia. Australia ICOMOS, which has over 700 members in a range of heritage professions, has had a major focus on developing and promoting the use of best practice standards for cultural heritage conservation in Australia. As part of this it takes a major interest in Indigenous cultural heritage management and in legislative protections for cultural heritage.

Australia ICOMOS was highly concerned about the destruction of the Juukan rockshelters earlier this year, noting in a media statement and correspondence in June 2020 to the Commonwealth Minister for the Environment and the Western Australian Minister for Aboriginal Affairs that the destruction of the significant Juukan Gorge rockshelters underscores a pressing need for reform and modernisation of the WA *Aboriginal Heritage Act 1972* and review of Commonwealth Indigenous cultural heritage protection legislation.

This submission to the *Joint Standing Committee on Northern Australia Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* builds on Australia ICOMOS' previous reviews and submissions into legislative reform.

The current Commonwealth legislation includes the *Environment Protection and Biodiversity Conservation Act 1999* and *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. The former addresses World, National and Commonwealth heritage, and the latter is intended to provide a safety net for inadequate State and Territory processes. Both are in need of substantial reform.

State and Territory legislation is variable, with some legislation being seriously flawed and out of date. While intended to provide state and territory-wide protection for Indigenous cultural heritage, the State and Territory legislation provides only partial protection in most cases. This is due largely to:

- the narrow scope of Indigenous cultural heritage recognised under the legislation (generally only archaeological sites);
- inadequate provision for Indigenous participation in decision making at all levels;
- inadequate protections for Indigenous cultural heritage within the legislation; and
- poor integration with related legislation.

Key current issues that need to be addressed are how Commonwealth, State and Territory Indigenous cultural heritage protection legislation can provide a rights-based approach to Indigenous cultural heritage protection, and how this legislation works with Native Title legislation.

The standards of effective Indigenous heritage protection can be identified, and all legislation and associated systems should meet these qualities – Commonwealth, State and Territory.

In this context, Australia ICOMOS recommends:

1. All State and Territory Indigenous cultural heritage protection legislation should be reviewed to meet modern, best practice for Indigenous cultural heritage protection.
2. The Commonwealth Indigenous cultural heritage protection should be reviewed to meet modern, best practice for Indigenous cultural heritage protection.
3. A focus of such review should be how the different pieces of legislation (at all levels) relate or integrate, including with respect to related legislation such as the *Native Title Act 1993*.
4. Another focus of such review should be the provision of a rights-based approach to Indigenous cultural heritage protection (a requirement under the *United Nations Declaration on the Rights of Indigenous Peoples)*.
5. That all existing Section 18 permits under the WA *Aboriginal Heritage Act 1972* be reviewed as a matter of priority to identify whether similar problems may arise at other important heritage places as happened at Juukan Gorge.

In relation to the Commonwealth Indigenous cultural heritage protection legislation Australia ICOMOS also recommends:

6. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* should be replaced.
7. The heritage provisions of the *Environmental Protection and Biodiversity Conservation Act 1999* should be removed to/replaced by a separate heritage Act.
8. The heritage Act would ideally address natural, Indigenous and historic heritage in order to achieve an integrated approach.
9. However, if this proves unwieldy, consideration could be given to a separate Indigenous heritage Act.

Australia ICOMOS suggests that this Inquiry, while a good start, cannot take the place of a more comprehensive and independent expert joint review of national and State and Territory Indigenous heritage legislation, and areas of overlap with the *Native Title Act 1993* (NT Act). We recommend that such a review be a recommendation of this Inquiry. The review should be led by the Commonwealth, it should establish principles for effective and workable Commonwealth, State and Territory legislation; emphasise a rights-based approach which gives clear powers to make decisions to relevant Indigenous groups; and include thorough and widespread consultation and discussion with Indigenous people across Australia.

1.0 Introduction

ICOMOS – the International Council on Monuments and Sites – is a non-government professional organisation that promotes expertise in the conservation of cultural heritage. ICOMOS is also an official Advisory Body to the World Heritage Committee under the World Heritage Convention. Australia ICOMOS, formed in 1976, is one of over 100 national committees throughout the world. Australia ICOMOS has over 700 members in a range of heritage professions. We have expert members on a large number of ICOMOS International Scientific Committees, as well as on expert committees and boards in Australia, which provides us with an exceptional opportunity to see best-practice internationally. We have a particular interest in Australia's World and National Heritage places.

Australia ICOMOS has had a long term interest in cultural heritage protection legislation. The policy and guidelines developed by Australia ICOMOS, much of which is recognised Australia-wide, includes the 2005 *Australia ICOMOS Objectives for Heritage Legislation*, and Australia ICOMOS is currently a member of a multi-cultural heritage association working group developing guidance for best practice Indigenous heritage legislation.

Australia ICOMOS has also made a number of submissions or had other input into the various reviews of Indigenous cultural heritage legislation that have been, and are being, undertaken in Australia, including most recently in Western Australia, Tasmania, New South Wales and Queensland. Australia ICOMOS was involved in the development of the heritage provisions in the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act), and we have remained keenly interested in their subsequent implementation and operation, including making a submission to the EPBC Act review in April this year.

Australia ICOMOS was also highly concerned about the destruction of the Juukan rockshelters located in Puutu Kunti Kurrama and Pinikura (PKKP) country in the Pilbara region of Western Australia earlier this year. In response we issued a media statement noting that the destruction of the significant Juukan Gorge rockshelters underscores the pressing need to reform and modernise the WA *Aboriginal Heritage Act 1972* and its administrative processes (see attached). In June 2020 we also wrote to the Commonwealth Minister for the Environment and the Western Australian Minister for Aboriginal Affairs strongly urging both governments to examine how the relevant Indigenous cultural heritage legislation is being used, and to review this legislation (see letters attached).

Our submission to the *Joint Standing Committee on Northern Australia Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* responds specifically to the Inquiry's terms of reference. It has been prepared by a small group of Australia ICOMOS members, some of whom are Indigenous, with expertise in the area of Indigenous cultural heritage management and/or Indigenous cultural heritage protection legislation. Please note that this submission does not address terms of reference (b), (c), (d) or (e) as these are outside the expertise and knowledge of Australia ICOMOS.

Our submission also emphasises the Indigenous cultural heritage legislative approach taken in Victoria, through the *Aboriginal Heritage Act 2006,* which has successfully tackled a number of the issues still inherent in other Indigenous cultural heritage protection legislation and, as such, it is widely regarded as being the best State-level legislation. It is however not perfect, and since it has been designed specifically for the Victorian situation, will not be suitable in many respects for use in other parts of Australia or at the national level.

2.0 General Comments

The events leading up to and including the incident at Juukan Gorge are deeply regrettable from an Indigenous cultural heritage management and protection perspective. The incident highlights a number of systemic failures which will continue to lead to such incidents if not addressed at both national and State-level through policy and legislative reform.

There are five things Commonwealth, State and Territory governments can do to mitigate against future Juukan-type incidents. They can:

1. through strong State and Territory Indigenous heritage legislation, empower Traditional Owners at the local level to make authoritative, early, informed and accountable decisions about their cultural heritage when threatened by development;
2. through strong State and Territory Indigenous heritage legislation, facilitate and require structural hurdles in State planning and natural resources legislation preventing land use and development occurring until these decisions are made;
3. through strong State and Territory Indigenous heritage legislation, ensure that comprehensive Indigenous heritage assessments are prepared before agreements allowing harm to Indigenous heritage are acted upon under native title or any other agreements;
4. through strong State and Territory Indigenous heritage legislation, ensure that decisions impacting Indigenous cultural heritage are able to be re-made if subsequent information points to a failing or the inappropriateness of an original decision; and
5. invest in and improve the economic, political and legislative power and capacity of Traditional Owner groups so that they can negotiate with large corporations on Indigenous cultural heritage matters under the native title process on a more level playing field.

Neither the Commonwealth nor the States and Territories should have the ability to override a decision of a Traditional Owner group who has made an informed decision in accordance with strong State or Territory Indigenous heritage legislation.

Consideration should be given to Commonwealth Indigenous heritage protection that is independent of the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act), not subsumed within it. It can be argued that the EPBC Act is not constructed to adequately provide for the protection of Indigenous cultural heritage at the national level, even in tandem with the other national level Indigenous heritage protection legislation. Indigenous cultural heritage has distinct values which require very different management and protection processes to natural heritage, or even historic cultural heritage, including far greater consultation imperatives and a broader concept of heritage.

The rights of Indigenous peoples to control and make decisions about their cultural heritage afforded by the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and other instruments should be given full effect through legislation in order to be more effective. In particular, considering the absence of a constitutional right to be consulted on matters impacting their lands (eg. as in Canada), in Australia this right would be best recognised through specific standalone Commonwealth Indigenous legislation.

We suggest that this Inquiry, while a good start, cannot take the place of a more comprehensive and independent expert joint review of national, State and Territory Indigenous heritage legislation, and areas of overlap with the *Native Title Act 1993* (NT Act), the EPBC Act and other laws. Such a review should be led by the Commonwealth, and the review should be a recommendation of this Inquiry.

A national review should:

1. involve a comprehensive review of all State, Territory and Commonwealth legislation and international instruments impacting the protection of Indigenous cultural heritage;
2. establish principles for workable Commonwealth, State and Territory legislation;
3. emphasise a rights-based approach consistent with the UNDRIP which gives clear powers to make decisions to relevant Indigenous groups;

4. emphasise the need for rigorous Indigenous heritage assessment at State and Territory level to inform decisions; and
5. include thorough and widespread consultation and discussion with Indigenous people across Australia.

Without anticipating the results of this national review, we suggest that new Commonwealth legislation could take a coordinating national level approach with State and Territory responsibilities being clearly defined under this approach. This might perhaps be by way of an accreditation process overseen by a representative group of Indigenous people.

Regardless of whether the above review occurs, we suggest the Commonwealth take the following complimentary actions, which can be addressed without the need to amend Commonwealth Indigenous cultural heritage protection legislation:

1. establish a national process for dealing with Indigenous ancestral remains matters which cross State and Territory borders;
2. establish a national Indigenous intangible heritage agreement process which aligns with Commonwealth intellectual property, patent and copyright legislation; and
3. establish a national process for addressing matters relating to Indigenous rights regarding the movement of portable Indigenous heritage under the *Protection of Movable Cultural Heritage Act 1986* (PMCH Act).

Finally, we note previous reviews of Commonwealth Indigenous cultural heritage protection have not led to any changes of substance to related legislation. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act), an important piece of Commonwealth Indigenous cultural heritage protection legislation, was supposed to be interim legislation. It has, however, remained relatively unchanged for 36 years. It is past time that a national review is undertaken and a decision is made as to whether to repeal and replace, or substantially amend this Act.

3.0 Specific Comments

Although this submission addresses the terms of reference of the Inquiry in order, we wish to note that term of reference (h) is in our view the most critical in progressing adequate protection of Indigenous cultural heritage from the perspective of the Commonwealth-State/Territory relationship.

It should also be noted that this submission does not address terms of reference (b), (c), (d) or (e) as these are outside the expertise and knowledge of Australia ICOMOS.

3.1 Item (a) – the operation of the Aboriginal Heritage Act 1972 (WA) and approvals provided under the Act;

The Western Australian *Aboriginal Heritage Act 1972* (WA AH Act 1972) is a product of its time. That is to say, it has not evolved to accommodate Traditional Owner rights to Aboriginal cultural heritage management decisions, particularly after Mabo No 2[1] and the development of *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), to which Australia has been a signatory since 2007.

There are several deficiencies in the operation of the WA AH Act 1972 and its associated approvals, including decision-making powers, processes for granting sections 16 and 18 approvals, and the lack of an appeals process for Traditional Owners.

3.1.1 Decision making powers

The WA AH Act 1972 accords no statutory decision-making powers to Traditional Owners. There is also no statutory obligation to consult with or involve Traditional Owners at any point of the process.

The Minister for Aboriginal Affairs alone holds the power under the WA AH Act 1972 to decide whether to allow land to be used in a way that will impact upon, or harm, Aboriginal cultural heritage. Whilst the Minister is provided with recommendations by a State Advisory Committee (the Aboriginal Cultural Materials Committee (ACMC)), the Minister is not bound to follow the ACMC's recommendations. The Minister may disregard ACMC advice on the basis of the importance of the proposed land use to the wider Western Australian community.

Decisions about whether a place or object is considered 'Aboriginal heritage' under the WA AH Act 1972 are made by the ACMC. The ACMC determines whether a place meets the definition of section 5 of the WA AH Act 1972 and therefore whether it becomes registered and protected, or alternatively if it is considered to be 'not-a-site'. The ACMC is not obliged to provide any reasons or justifications as to its decisions.[2]

Decisions under section 16 relating to excavating Aboriginal places or removing Aboriginal cultural heritage objects are made by the Registrar, which in practice is also approved by the ACMC.

By contrast, Victoria's *Aboriginal Heritage Act 2006* (the Vic AH Act 2006) and Queensland's *Aboriginal Cultural Heritage Act 2003* (the Qld ACH Act 2003) provide direct statutory decision-making roles to Traditional Owners, and prevent (in the case of Victoria) or limit (in the case of Queensland) the ability for proponents to obtain statutory approvals to commence works before necessary Indigenous heritage management work has been completed to inform those decisions.

3.1.2 Approvals processes

The principle focus of the WA AH Act 1972 is on facilitating approval under section 18 for landowners to use land on which Aboriginal cultural heritage is located. The legislated process comprises the following steps:

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[1] *Mabo v Queensland (No 2) (1992) HCA 23 175 CLR 1*

[2] *Wintawari Guruma Aboriginal Corporation RNTBC v The Hon Benjamin Sana Wyatt [2019] WASC 33 171*

1. A landowner applies to the Minister under section 18 of the WA AH Act 1972 to use land on which Aboriginal heritage is located, for a specific purpose.
2. The ACMC assesses all known Aboriginal heritage places located on the specified land against section 5, using the criteria outlined in section 39. The ACMC decides whether to declare those place(s) Registered Aboriginal Site(s) or 'not a site'.
3. The ACMC then makes a recommendation as to whether the Minister should give consent for the landowner to use the land on which the site is located (and thereby impact upon the Aboriginal Site).
4. The Minister considers the ACMC's recommendation and decides whether to grant a section 18 consent.

There is nothing in the WA AH Act 1972 or its Regulations obliging landowners to conduct any sort of due diligence, consultation or investigative work prior to section 18 consent to use the land being granted. A number of other State Acts have much stronger provisions in relation to this. This is a lost opportunity to better understand Aboriginal heritage on a specific site and to make an informed decision.

Although a parallel approvals process exists under section 16 of the WA AH Act 1972 to enter an already declared Registered Aboriginal Site and excavate, examine or remove anything from a Registered Aboriginal Site; there is no legal mechanism that links or necessitates section 16 investigations, or any other comprehensive heritage assessment, to be undertaken prior to a section 18 consent being granted. Indeed, Martin J ruled in *Wintawarri Guruma v Wyatt* [2019] WASC 33 that, 'the subject matter of s 16, is in effect, salvage related – rather than directed towards the conducting of an inquiry or investigation directed at the ascertainment of whether a place is or is not an Aboriginal Site'.

The WA AH Act 1972 further contains no mechanisms to review or revoke a section 18 consent, particularly in light of new information, and a section 18 consent is only invalidated when the landowner changes or the purpose of the use of the land changes. This is out of step with cultural heritage generally where international best-practice allows for an iterative process.

3.1.3 No right of appeal

Under the WA AH Act 1972 the right to appeal the Minister's decision is reserved to the landowner only. Traditional Owners have no right of appeal against any decision made under the WA Act, such as the ACMC's determination as to whether a place constitutes an Aboriginal Site or not, or a Ministers decision to grant section 18 approval. Other interested parties also have no right of appeal.

3.1.4 No emergency stop-work process

Linked to the lack of review and appeal of section 18 decisions is the absence of an emergency or stop-work process. Where conflicts arise over the destruction of Aboriginal cultural heritage, provisions to address these issues prior to the heritage being destroyed are essential.

3.1.5 Juukan Gorge Rockshelters

Based upon the above summary of issues with the WA AH Act 1972, in the case of the destruction of the Juukan Gorge rockshelters, the operation of the Act can be seen to have been specifically deficient in that it:

- did not require any in-depth cultural heritage assessment of the Juukan rockshelters prior to granting section 18 consent;
- did not have any mechanisms by which new information gained during the section 16 process could lead to a reassessment and review of the section 18 consent;
- contains no right of appeal for Traditional Owners or any other interested parties except the landowner;
- contains no mechanism to revoke a section 18 consent, unless by way of a change of purpose or landowner; and
- has no mechanism to enact an emergency stop work order.

It is a compelling indictment that the destruction of the Juukan Gorge rockshelters was compliant with the operation of the Act and the consequences have been universally condemned.

3.1.6 Recommendations

It is Australia ICOMOS's view therefore that the operation of the WA Act could be greatly improved by:

- Devolving decisions of the Committee and the Minister to Traditional Owners, whilst at the same time integrating these decisions into other statutory approval processes to require proponents to obtain Aboriginal cultural heritage approvals before works can commence or be substantially advanced.
- Adding the obligation for a detailed cultural heritage assessment to be undertaken before any section 18 consent is granted.
- Adding mechanisms to review section 18 approvals in light of new information.
- Adding emergency stop works procedures.
- Adding appeal rights for Traditional Owners and interested parties.
- Substantially increasing penalties for harm offences to act as a deterrent.
- Establishing an independent heritage appeals tribunal, which would need to be designed to respond to Indigenous cultural needs.

The cultural heritage audit provisions in Victoria (see Section 3.3.8) have direct relevance to the Juukan Gorge matter. With an audit process, the WA Minister could have ordered a halt to works after receiving the additional information about the significance of the rockshelters. The Minister could then have ordered a reassessment of the heritage conditions applied to Rio Tinto; reviewed the information which came to light about the rockshelters after the approval of their destruction, and changed the management recommendations to prevent or minimise harm. The Minister could have exercised these powers within the context of Aboriginal cultural heritage protection processes, rather than through other legislative means which may pose a perceived threat to investment certainty (such as the power under section 55 of the Western Australian *Interpretations Act 1984* which allows the Minister to revisit a decision[3]).

3.2 Item (f) – the interaction of state Indigenous heritage regulations with Commonwealth laws

There are three main Commonwealth Acts with which State and Territory Indigenous heritage legislation interact or have relevance. These are the:

1. *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act),
2. *Native Title Act 1993,* and
3. *Aboriginal and Torres Strait Islander Heritage Protection Act 1984.*

Other relevant Commonwealth legislation includes the *Protection of Movable Cultural Heritage Act 1986* and various specific laws pertaining to different Commonwealth land uses, such as the *Airports Act 1996* and the *Defence Act 1903*.

3.2.1 The EPBC Act

Australia ICOMOS supports Aboriginal self-determination through empowering Indigenous groups to have statutory powers over their cultural heritage under State and Territory Indigenous heritage legislation in relation to how their cultural heritage is managed and protected. This, however, can be argued not to be the case yet for any Commonwealth, State or Territory Indigenous heritage protective legislation, with the EPBC Act being possibly the most deficient in this area, and Victoria

[3] "The *Interpretation Act 1984* (WA) provides an express power to correct errors in administrative decisions. Section 55 states that where a written law confers a power or imposes a duty to do any act or thing of an administrative or executive character, the power or duty may be exercised or performed as often as necessary to correct any error or omission, notwithstanding that the power or duty is not generally capable of being performed from time to time." Commonwealth Ombudsman 2009, https://www.ombudsman.gov.au/__data/assets/pdf_file/0010/31141/issues_paper_mistakes_and_unintended_consequences.pdf, accessed 1 July, 2020.

the most advanced with the *Aboriginal Heritage Act 2006* providing Aboriginal people, where there are Registered Aboriginal Parties, with specific statutory decision-making powers over approving cultural heritage permits and heritage management plans.

There is also extremely limited interaction between the EPBC Act and State and Territory Indigenous cultural heritage protection legislation. For example, the WA *Aboriginal Heritage Act 1972* and the Tasmanian *Aboriginal Heritage Act 1975* have little interaction with the EPBC Act, with the EPBC Act being relevant only for places that are World Heritage properties, National Heritage places or Commonwealth Heritage places. This interaction is limited given the limited number of Australian places of this type.

At the other end of the spectrum is Victoria, which has slightly more interaction through its *Environment Effects Act 1978.* In this case, when a controlled action is declared under the EPBC Act, Victoria's Environment Effects Statement process, accredited under section 45 of the EPBC Act, is triggered under the Victorian *Environment Effects Act 1978*. Under Victorian law, assessments conducted under both of these laws automatically trigger the Victorian *Aboriginal Heritage Act 2006* 'Cultural Heritage Management Plan' (CHMP) requirements which prevent works from being conducted until a CHMP has been approved for the project. CHMPs are also triggered under development applications under the Victorian *Heritage Act 2017*. This mechanism also ensures relevant Aboriginal people will be consulted or will have statutory decision-making powers (depending on whether a 'Registered Aboriginal Party' has been appointed) in relation to EPBC Act controlled actions.[4] EPBC Act accreditation and the compulsory *Aboriginal Heritage Act 2006* trigger also ensures that proponents only need to have their CHMP approved once (under the State legislation), without needing a second approval under the EPBC Act to account for Aboriginal heritage impacts. It provides the certainty of process necessary for secure investment decisions.

This process also ensures that Aboriginal cultural heritage impacts are addressed early and before development approvals can be given for development. Without CHMP approval, Environment Effects Statements cannot be approved, and development cannot occur. This structural legislative threshold is essential to provide Victorian Traditional Owners with the "level playing field" necessary to negotiate effective Aboriginal cultural heritage management with often large corporate or Government developers. We suggest any new Western Australian Aboriginal heritage legislation establish similar structural thresholds.

3.2.2 The Native Title Act

Whilst the WA *Aboriginal Heritage Act 1972* does not acknowledge or directly interact with the *Native Title Act 1993*, the two pieces of legislation are often used in conjunction to protect Aboriginal heritage in Western Australia.

Under the *Native Title Act 1993*, Indigenous heritage management is frequently negotiated and dealt with under the Future Acts and Indigenous Land Use Agreement provisions. These negotiations are formalised through legal agreements that incorporate heritage management obligations, such as consultation processes, specify minimum standards for the conduct of heritage work, oblige proponents to undertake heritage surveys, and specify section 18 conditions.

In some cases, however, *Native Title Act 1993* agreements contain clauses that prevent Traditional Owners from objecting to section 18 applications or discussing matters with the Minister without the proponent's permission. The confidentiality and opaqueness of these agreements has led to complex arrangements for Aboriginal cultural heritage management in Western Australia.

It is important that the right Traditional Owners are empowered to make informed cultural heritage management decisions. State and Territory legislation generally respects the native title process to determine the "right people for country".

[4] In Victoria, Aboriginal people are provided with specific statutory decision-making powers for approving cultural heritage permits and management plans through the *Aboriginal Heritage Act 2006*. These powers are exercised by Registered Aboriginal Parties (RAPs) appointed by the Victorian Aboriginal Heritage Council to be responsible for the heritage on their specific territories. This system provides Aboriginal people, and specifically Traditional Owners, with the power to determine what appropriate cultural heritage management and protection measures are required for particular development proposals.

It is also important that the process be clear and not duplicated. The Victorian *Aboriginal Heritage Act 2006* is an example of how this can be achieved. This Act is drafted in such a way as to ensure that consent processes relating to future acts under the *Native Title Act 1993* and 'Cultural Heritage Management Plan' (CHMP) approval processes under the *Aboriginal Heritage Act 2006* are dealt with once only, via the CHMP system. This means that a mining corporation, for example, seeking to operate on Crown land subject to native title, only has to consult with a single Traditional Owner party (ie. the 'Registered Aboriginal Party' which is also the native title body) in relation to their development in order to satisfy both native title and cultural heritage requirements. If a CHMP is required to be approved before the mining licence is granted, the CHMP for the project will also be evaluated by the Registered Aboriginal Party.

It is understood RAPs cover 74% of Victoria – there are gaps and there is at least one area where more than one RAP exists. The latter shows the adaptability of the approach.

It should also be noted, however, that in some regions and jurisdictions (eg. Tasmania) native title is taken to be have been extinguished. In such cases there is no opportunity for the *Native Title Act 1993* to apply and alternative approaches to recognising the rights of Australia's first nations people will need to be developed.

3.2.3 The ATSIHP Act

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act 1984) and State and Territory Indigenous heritage laws operate separately as the two generally, and deliberately, do not intersect. Under the ATSIHP Act 1984, any Indigenous person may apply to the Commonwealth Minister for a declaration of preservation over an Indigenous place. State and Territory legislation does not interfere with this right. The Commonwealth Minister, however, is obliged to consider the operation of State laws when considering whether to make a declaration, and to consult with the relevant State Minister. This method of operation was established because the ATSIHP Act 1984 was intended to act as a national level 'back stop' where State and Territory laws did not recognise or otherwise provide protection for Indigenous cultural heritage.

It is our understanding that the attempt to use the ATSIHP Act 1984 was not effective in the case of the Juukan Gorge rockshelters because of a range of factors.

We are of the strong opinion that the ATSIHP Act 1984 requires major reform in preference to incorporating this protection for Indigenous cultural heritage into the EPBC Act.

3.3 Item (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

The following section discusses some of the main focuses of State and Territory Indigenous cultural heritage legislation and matters which should be addressed by this legislation by all jurisdictions.

The basic purpose of Indigenous cultural heritage law is to protect Indigenous heritage from harm due to land use, development and other causes. This is generally done in different jurisdictions using a range of statutory mechanisms from a simple permit process requiring little or no prior cultural heritage assessment of impacts of proposed development, through to full statutory cultural heritage management plan processes requiring thorough heritage assessment of impacts. In all cases:

1. there is an approval authority responsible for approving or refusing to approve actions which will impact Indigenous heritage; and
2. that approval sits in a sequence of approvals which may be required by a proponent before they can proceed with their development activity.

3.3.1 Statutory Approvals for development should not be given before full assessment and an approved heritage management plan is in place

In most jurisdictions, approval may be obtained for a development activity before an approval needs to be obtained to harm Indigenous cultural heritage.

Any statutory approval which is placed in the context of a statutory planning system must interact effectively with that system. Depending on the objective of the approval, it could be sequential (eg. placed precisely in a particular sequence of approvals) or flexible (it could be sought at any time in the approvals process), or some combination of both.

It is most effective to specifically prevent the final statutory authority allowing works to commence from being issued until a comprehensive Indigenous cultural heritage assessment and management plan has been approved where one is required. In such cases, because the proponent is forced to obtain an approved heritage assessment and management plan before they can commence their activity, proponents normally elect to manage their Indigenous heritage obligations early in the approvals process. This means that unforeseen circumstances can be adequately addressed. It also means that proponents will take their Indigenous heritage obligations seriously. Finally, it means that Indigenous Australians are not under pressure to approve assessments or permits to harm heritage, because the development proposal is not a fait accompli and machinery, for example, is not "on the ground".

It also means that Indigenous heritage protection measures under native title agreements must also pass through the heritage assessment and approvals process before development can proceed. This prior comprehensive assessment would potentially have prevented the destruction of the Juukan Gorge rockshelters by providing Traditional Owners, the Committee and the Minister with enough information to make a fully informed decision.

This single provision is arguably the most important. It not only provides Traditional Owners with leverage in discussions with proponents, but it also provides proponents with the certainty that Indigenous cultural heritage matters will be addressed before development begins. This saves proponents time and money as they do not need to stop works once started to address heritage issues which were not accounted for by an Indigenous cultural heritage assessment and management plan.

Indigenous heritage management plans also should have contingency conditions to follow if unidentified heritage material arises during works. There should be no need to revisit the statutory approvals process. If substantial undiscovered Indigenous cultural heritage comes to light during development works, there should be an audit process allowing the approved heritage management plan to be amended (see Section 2.4.8).

3.3.2 Minister and Department should not be empowered to make Aboriginal cultural heritage decisions or to overturn Traditional Owner decisions

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) is clear in according the right to control decisions about their cultural heritage to Indigenous peoples, through their own representative organisations. We support legislation which upholds this right.

We note that some native title agreements compel Traditional Owners to agree to land development activities occurring, even where further information subsequently arises about the Indigenous heritage to be impacted (eg. Juukan Gorge). Such clauses should be rendered unlawful by appropriate amendments to the *Native Title Act 1993*.

The Victorian *Aboriginal Heritage Act 2006* is one of the only Australian Indigenous cultural heritage protection laws that provide statutory decision-making power directly to local Traditional Owners. It also does not include a power for a Minister or department to overturn a decision of a Traditional Owner group. In Victoria, Traditional Owner decisions are only able to be overturned by an independent tribunal (the Victorian Civil and Administrative Tribunal) or the courts. This removes political influence from Aboriginal cultural heritage decisions.

In Queensland, the Chief Executive of the relevant department approves heritage management plans, and is bound to approve these if the relevant Traditional Owner group approves it. Any refusal to approve a heritage management plan is appealable to the Land Court. The Land Court makes a recommendation, which is acted upon by the relevant Minister, although the Minister is not bound by the Land Court's recommendation.

The other Australian States and Territories however mostly operate on a 'permit' system where a permit to undertake works that will, or may, harm Indigenous cultural heritage are issued under the relevant state Indigenous heritage protection law, usually after a heritage assessment, with conditions, and generally on the recommendation of a statutory advisory committee (not always composed entirely of Indigenous Australians). In these cases, heritage management plans are not required, and the decision to issue a permit is ultimately the decision of the Minister. This is the case in Western Australia, the Northern Territory, New South Wales and Tasmania, while South Australia has a slightly different arrangement. In South Australia, where a Recognised Aboriginal Representative Body is in place, a proponent may reach an agreement with this body about an activity through a Local Heritage Agreement, however the Local Heritage Agreement must be approved by the Minister before taking effect.

In addition, in Western Australia and New South Wales decisions to refuse consents for a development are appealable by the proponent to the State environmental, planning or administrative tribunal. In the Northern Territory, a refusal to grant consent is appealable directly to the relevant Minister, while in Tasmania and South Australia the only appeal is via the courts.

3.3.3 Open and Accountable decision-making

The devolvement of government authority to make decisions about Indigenous cultural heritage to Traditional Owners requires these decisions to be firstly focused on cultural heritage matters only, and secondly to be accountable to independent expert review.

Unlike native title or other open agreements which often have other objectives, heritage approvals should allow Traditional Owners to refuse to approve a heritage assessment and/or a heritage management plan on cultural heritage grounds if an activity cannot adequately avoid causing harm, or adequately minimise harm to Indigenous cultural heritage. Traditional Owners should also be able to refuse to approve a heritage assessment and/or a heritage management plan if these do not adequately apply specific measures to manage heritage affected by the activity, have inadequate contingencies or have inadequate custody arrangements for heritage found during the course of the activity.

The decision as to whether a heritage assessment and/or a heritage management plan adequately meets these requirements should be entirely for the Traditional Owners. In our view, government Ministers and departments should be responsible for regulating the minimum standards applied to heritage assessments and heritage management plans, if required; but should not be involved in making the decision as to whether to refuse or consent to the proposed work. The proponent, however, should have the option of challenging that decision in an independent tribunal or the courts.

In this way, Indigenous heritage assessments and heritage management plans will be focused on cultural heritage management and protection measures alone. It also means that decisions by Traditional Owners need to be reasonable, robust and defendable in an independent review. Further, agreements relating to employment, compensation or other matters are not appropriate for heritage assessments and/or heritage management plans, and should be dealt with outside of this process.

3.3.4 The Heritage Assessment and Approval

As stated, the principal purpose of Indigenous cultural heritage legislation is to protect Indigenous cultural heritage from harm due to the impact of land use and development. In Australia ICOMOS' view it is therefore critical that an Indigenous cultural heritage assessment and heritage management plan process form part of the statutory approvals processes for high-impact development activities, and for such assessments to be properly regulated.

In relation to this, it is also critical that:

1. this assessment and planning occurs, and is approved before, statutory planning approval is given; and
2. minimum Indigenous cultural heritage assessment standards, dictated by current best cultural heritage practice and by compulsory involvement of Traditional Owners, form the basis for this heritage assessment and planning.

This will ensure both Traditional Owner rights to exercise control over cultural heritage decisions as well as rigorous standards of cultural heritage practice.

3.3.5 Blanket protection

A fundamental element of best practice Indigenous cultural heritage legislation is "blanket protection".

Blanket, automatic, deemed, or presumptive protection "means that all areas and sites falling within the legal definition of heritage are automatically protected by sanctions which make it an offence to cause damage or desecration to the site or area".[5.] It is irrelevant whether the site or area has been registered or previously identified as Indigenous.

Blanket protection is significantly different to selective approaches (used commonly for historic heritage and for all heritage within the EPBC Act), where only registered or listed heritage is afforded legal protection. Selective approaches require some form of categorisation and identification of value before heritage is afforded legal protection. Blanket protection, by contrast, assumes value and protects in a precautionary way. Such protection is also used in the case of other types of heritage, for example archaeology in Victoria.

Experience has shown that where a selective system is used, there is repeated failure to adequately protect sites because they are not listed or because their legitimate listing is challenged, often on technical grounds. Approaches that rely on listing also have limited success with protection through emergency stop work or listing provisions (the latter being rare in the Australian context). Another significant issue in Australia with the selective approach is the lack of comprehensive assessment of cultural heritage (largely a resourcing issue), meaning that a large volume of significant cultural heritage remains unlisted at the national, State, Territory and local levels.

The principle of blanket heritage protection for indigenous cultural heritage has a long history in Australia and in many countries (eg. USA, South Africa, countries in south east Asia and Europe). It is generally seen, and continues to be seen, as the most appropriate approach for indigenous cultural heritage protection. The approach also has the positive (albeit unintended) consequence of having protected a range of heritage that might not have been protected with changing perspectives on what constitutes significant heritage over time.

3.3.6 The Harm Offences and Penalties

Indigenous cultural heritage legislation needs effective offence provisions to provide a deterrent to people and corporations who would otherwise harm Indigenous cultural heritage. Effective offence provisions include three main elements – penalties which are high enough to have a deterrent effect while being reasonable; offence provisions with varied burdens of proof; and effective enforcement and compliance measures.

Western Australia's maximum penalty for breaching the *Aboriginal Heritage Act 1972* is $50,000. This is manifestly inadequate. Today, only one other state, South Australia, shares this same inadequate penalty level.

Compared to this, the maximum penalties for the worst offences against Aboriginal cultural heritage in the other Australian jurisdictions are currently:

- Commonwealth (ATSIHP Act 1984) – $111,000
- Australian Capital Territory (*Heritage Act 2004*) – $810,000
- Northern Territory (*Northern Territory Aboriginal Sacred Sites Act 1989*) – $314,000

[5] Evatt, E 1996, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, unpub. report, Office of the Minister for Aboriginal and Torres Strait Islander Affairs, Canberra, p.81

- Queensland (*Aboriginal Cultural Heritage Act 2003*) – $1,334,500
- New South Wales (*National Parks and Wildlife Act 1974*) – $1,100,000
- Victoria (*Aboriginal Heritage Act 2006*) – $1,652,200
- Tasmania (*Aboriginal Heritage Act 1975*) – $1,720,000[6]

In Australia ICOMOS' view, a maximum figure below $1 million per offence will not act as a significant deterrent for corporations, particularly large multi-national mining corporations, and would be manifestly inadequate.

Strict liability offences (with correspondingly lower penalties) should also be available in all Australian States and Territories. New South Wales, Victoria and the Australian Capital Territory currently are the only States and Territories with strict liability offences in relation to cultural heritage.

3.3.7 Indigenous Heritage Listing

Any Indigenous cultural heritage systems applying blanket protection and harm offences require secure and comprehensive information databases with controlled access. A key provision in existing Indigenous cultural heritage legislation is its establishment of a list (usually termed a 'register'), the purposes of which are specified and include acting as a central repository for all information about Indigenous cultural heritage.

Currently, because of the nature of the Indigenous cultural heritage legislation throughout Australia, these heritage registers mainly consider only Indigenous archaeological sites.[7] This fails to reflect the full scope of cultural heritage, including cultural heritage that is of significance to Indigenous Australians. Legislative change is therefore required to protect the full range of Indigenous cultural heritage (see also Section 3.3.8).

3.3.8 Indigenous Intangible Heritage

Indigenous intangible heritage includes traditional knowledge and understanding of plants and animals and their properties, traditional practices, stories, language, art and knowledge about the universe, among other things. Except for Victoria, intangible heritage is not specifically able to be protected under legislation, particularly where it is not related to a specific place.[8]

In Victoria, however, the legislation allows a Traditional Owner group to register such information on the Register, which is held securely and is not subject to the same access allowances as other information. Once registered, if any other person or corporation wishes to use that intangible heritage, they must enter into an Indigenous intangible heritage agreement with the Traditional Owner group who registered that information. It is an offence to use Indigenous intangible heritage without an agreement, or to breach an agreement.

3.3.9 Emergency powers, review and amendment

Indigenous heritage assessments and heritage management plans are not fool-proof. Sometimes they do not discover the full extent of harm to be caused to Indigenous cultural heritage by a development activity; or in other cases, the full extent of harm is only discovered during construction or works. Therefore, effective Indigenous cultural heritage legislation also requires emergency intervention procedures to address the discovery of critical additional information about the impact of development on Indigenous cultural heritage after heritage assessments have been approved.

In Victoria, this is achieved through cultural heritage 'audit' provisions which allow for works to be halted if the basis on which the approval for work has been issued needs to be changed to account for new information discovered post-approval. Also in Victoria, if development work has been approved, but it is plain that the development is causing greater impact to Indigenous cultural heritage than was originally envisaged, the Minister also has the power to stop works and order the proponent to conduct an audit of the activity. Once completed, the audit report can then result in changes being

[6] The penalties under this Act were only upgraded in 2016.
[7] The key exceptions to this are the Northern Territory legislation which provides for sacred sites, and the Victorian legislation which was amended in 2016 to specifically recognise intangible cultural heritage.
[8] This is because most Indigenous cultural heritage protection legislation operates through designating the protection of places (ie. areas of land/sea) that contain values.

made to the approval conditions to prevent further harm; and can also recommend prosecutions where warranted. Audits of an activity can also be ordered if the proponent is, or is likely to be, breaching the approval conditions.

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

There are a number of reforms which, we submit, would improve Commonwealth, State and Territory Indigenous cultural heritage protection laws to afford greater protection to Indigenous cultural heritage and to help avoid future incidents such as at Juukan Gorge.

The following discussion provides general comments and also specific comments on where, in our view, States and Territories could improve their laws. Specific comment on the role of the EPBC Act is provided in Section 3.5 (addressing item i).

3.4.1 Principles

Australia ICOMOS recommends that a critical starting point for reviewing cultural heritage legislation is the development of legislative principles. It is our view therefore, that as a priority, a comprehensive independent expert national review of State, Territory and Commonwealth Indigenous cultural heritage legislation should be undertaken to develop the underlying general principles for such laws.

Without pre-empting the findings of this comprehensive national review, suggested principles and components for new Commonwealth Indigenous cultural heritage legislation could include the following:

1. Blanket protection for Indigenous cultural heritage.
2. Recognition and protection for the broad scope of Indigenous cultural heritage.
3. Recognition of the rights of Indigenous people to make decisions about their heritage.
4. Recognition that the States and Territories are better placed to administer specific Indigenous cultural heritage protection and that Commonwealth law should continue to be a law of last resort, except regarding Commonwealth actions and lands.
5. Establishment a system of national accreditation of State and Territory Indigenous cultural heritage legislation.
6. Provision of a mechanism to review State and Territory decisions impacting Indigenous cultural heritage only where State and Territory laws do not meet minimum accreditation standards, or where there is flawed interpretation, administration or operation of the laws.

3.4.2 Other Suggested Improvements to State Indigenous Cultural Heritage Legislation

It is Australia ICOMOS' view that all State and Territory Indigenous heritage legislation should contain at least the following threshold elements:

a. Establish Indigenous statutory authorities to exercise certain functions, and to provide independence and access to relevant expertise in decision-making.
b. Define Indigenous cultural heritage in legislation, with any amendment to require the agreement of the Indigenous statutory authorities.
c. Definitions of Indigenous cultural heritage that include the range of Indigenous heritage, including intangible heritage.
d. Decisions allowing heritage impacts from development to be made by those Indigenous people with responsibility for the heritage in question (ie. by Traditional Owners and/or other Indigenous custodial group), not by Ministers or departments.
e. That statutory Indigenous decision-making rights are not able to be overturned by Ministers or departments, but subject to independent tribunal and/or court review.

f. Provisions requiring Indigenous heritage impact assessments and heritage management plans as a basis for development approvals (similarly to Victoria and Queensland).
g. Regulated minimum standards for Indigenous heritage assessments based on current best practice cultural heritage management.
h. Mechanisms to ensure that native title agreements incorporate State or Territory heritage assessment and heritage planning processes as a minimum before development can occur (see f. above).
i. Provisions preventing the granting of other statutory approvals allowing development to commence until statutory Indigenous heritage legislation approvals are in place.
j. Provisions recognising that harming Indigenous cultural heritage is a last resort and only permissible after proper assessment of options and impacts, and identification of mitigation measures.
k. Provisions allowing for decisions to be reviewed upon receipt of additional information that changes the understanding of the Indigenous heritage, including decisions which are incorrect or poorly-informed.
l. Appropriate enforcement and compliance provisions.
m. Penalties and offences with appropriate deterrent effect.
n. Appropriately protected and maintained registers of known Indigenous cultural heritage.
o. More than one type of protective mechanism (eg. heritage management plans, permits, protection declarations, agreements, works audits).
p. A requirement that the system be adequately resourced (which could include royalties and/or administration fees, not only a Government funding allocation).

We further suggest consideration of a Commonwealth-led national standards and accreditation process, to help ensure that all Indigenous cultural heritage legislation, including at the State and Territory level, address the above matters adequately.

3.4.3 The Juukan Gorge site destruction evaluated under a minimum standards regime

As an example of how the minimum standards outlined above might operate to protect Indigenous cultural heritage, the following explores how they might have operated in relation to Juukan Gorge.

Firstly, the native title agreement between the Traditional Owners and Rio Tinto would have progressed as normal, however a heritage management plan would have had to be approved by the Traditional Owners before the mine could be given a statutory authority under State mining legislation to commence operations, or extend into a new area. This heritage management plan would have required complex excavation of the rockshelters to determine their nature, extent and significance before mining operations were able to be approved. With this information in hand, the Traditional Owners would have been able to make a prior and informed decision about the management and protection of the rock shelters.

Secondly, if the Traditional Owners had approved the heritage management plan and the mine was provided with its statutory approval to commence operating, and additional information about the significance of the rockshelters subsequently came to light, the operations could have been halted and an audit conducted of the heritage management plan. Appropriate changes to the management recommendations could have been made at that point.

Thirdly, Rio Tinto would have had the opportunity to appeal the decision to an independent tribunal or court.

This process does not guarantee that Juukan Gorge would have been saved, but it does guarantee a fully informed, early and accountable decision-making process, with a post-approval emergency intervention procedure available.

3.4.4 Administering a national process for dealing with cross-border and international Indigenous ancestral remains matters

State and Territory processes for caring and repatriating Indigenous ancestral remains may be strong within their borders. However, only national law can effectively manage Indigenous ancestral remains issues which involve cross-border or international elements.

The Commonwealth therefore needs to establish thorough processes to effectively manage the transfer of Indigenous ancestral remains from one jurisdiction to another, and from international collections back to Australia.

The Commonwealth could also direct a national program for caring for Indigenous ancestral remains for which no origin can be established. Many Indigenous ancestral remains discovered are not able to be provenanced.

3.4.5 Administering an Indigenous intangible heritage agreement process

As with Indigenous ancestral remains, Indigenous intellectual property rights may best be addressed at a national level.

Australia lacks a comprehensive national legal framework to manage Indigenous intangible heritage and intellectual property. Australian intellectual property legislation generally applies requirements that do not accord with Indigenous conceptualisations of traditional knowledge or intellectual property, and therefore fail to provide adequate protection. For example, knowledge, skills or practices, including environmental or ecological knowledge, are unlikely to be protected – unless these amount to a patentable invention, identify a registrable plant variety (and these are registered under the relevant legislation) or where the law will protect that knowledge as confidential.

Even where intellectual property rights could protect Indigenous intangible heritage, there are other issues. Intellectual property rights generally require the identification of one or more individual authors, artists, designers, inventors or other makers. This is problematic as Indigenous intangible heritage is collective, and has developed over time. As Indigenous intangible heritage is 'traditional' rather than newly created, it will not meet the various requirements for novelty (design and patents) or originality (copyright) that exist for some intellectual property rights. Also, rights in registered patents, trademarks, designs and plant varieties, and (with some exceptions) copyright, subsist for a limited time, which is not appropriate for knowledge which has been, and will be, handed down through generations.

Accordingly, Australian intellectual property rights do not provide a comprehensive framework to ensure that Traditional Owners can control conservation, research, development or commercial use of their intangible heritage and intellectual property. Nor do intellectual property rights currently provide a mechanism to ensure that Traditional Owners can be remunerated where Indigenous intangible heritage is commercially exploited by third parties.

Because of Australia's federal system, any State or Territory legislation ceases to function beyond its borders. Therefore, while Indigenous intangible heritage can be specifically registered and protected under State and Territory laws, this protection does not apply outside.

We would therefore like to see concerted Commonwealth efforts to address this matter, despite its reluctance to ratify the 2003 United Nations *Convention for the Safeguarding of the Intangible Cultural Heritage*. We suggest an approach similar to the Trade Marks Maori Advisory Committee and the Patents Maori Advisory Committee established under Aotearoa/New Zealand intellectual property regimes may be appropriate for Australia.

This solution would address a significant gap in intellectual property protection in Australia, and would directly address the discrimination inherent in current intellectual property protection systems which do not recognise the distinct characteristics of Indigenous intellectual property.

3.4.6 Regulating the trade and movement of portable Indigenous heritage across borders and internationally

Another issue requiring consistent national regulation is the trade and exchange of movable Indigenous cultural heritage across borders and internationally.

In keeping with the *United Nations Declaration on the Rights of Indigenous Peoples* (particularly Articles 3, 11, 12 and 31), Indigenous Australians should have the right to control the movement of their cultural heritage objects out of Australia, and the Commonwealth Government should take effective measures to recognise and protect the exercise of this right.

Notwithstanding the current constitution of the National Cultural Heritage Committee including one Indigenous member, we do not consider this adequate representation of Indigenous people to make such decisions or to provide necessary advice in relation to Indigenous cultural heritage.

Related to this issue is the sale of Indigenous cultural heritage across State and Territory borders. As with Indigenous intangible heritage and intellectual property protection, Australia lacks consistent laws at the State and Territory level relating to buying and selling Indigenous cultural heritage. This means that the sale or movement of objects of significance to Traditional Owners in South Australia, for example, are not able to be controlled by those Traditional Owners outside that State. Traditional Owners are disempowered by other State and Territory laws which do not recognise this authority.

The Commonwealth could therefore act to coordinate applications for permits to buy or sell Indigenous portable objects with the appropriate Traditional Owner organisation in cases where the objects are from a different State or Territory to that in which the sale is to occur and an appropriate Traditional Owner organisation exists.

3.5 Item (i) – opportunities to improve Indigenous heritage protection through the Environment Protection and Biodiversity Conservation Act 1999

Indigenous cultural heritage protection and management would seem to require a separate law because of its special requirements, in particular in relation to Indigenous participation as required through a rights-based approach. It is therefore considered inappropriate to include Indigenous cultural heritage protection within broader environmental protection legislation and processes which emphasise the protection and management of natural heritage, biodiversity and species.

For this reason we argue that merging all Indigenous heritage protection under the EPBC Act is likely to be undesirable, and consequently alternative approaches should be considered. Our specific reasons for this position include:

1. In national jurisdictions where Indigenous heritage is protected under national environment protection laws, this protection is inadequate (eg. in Australia and Canada). Environment protection becomes the main purpose and as a result Indigenous heritage protection is neglected.

2. Environment protection legislation ignores the appropriate authorising environment for Indigenous cultural heritage decisions – Indigenous people. Under environment protection laws, environment Ministers or departments are given authority to make decisions about Indigenous cultural heritage.

3. Indigenous cultural heritage has unique management demands, and the *United Nations Declaration on the Rights of Indigenous Peoples* is clear, at Article 31, that Indigenous peoples have the right to control decisions about their cultural heritage. Unless environment protection laws can incorporate separate decision-making processes, these should be left to separate laws.

4. Philosophically, merging environment and Indigenous heritage signals that the jurisdiction diminishes the importance of the heritage of first peoples. Given recent discourse and

advances in Indigenous rights, this is not seen as appropriate and would run counter to discussions relating to the *Uluru Statement from the Heart* and various Treaty discussions now occurring at State level.

5. Further, merging environment and Indigenous heritage is not necessary if processes, plus State and Territory laws, are aligned and integrated.

It is therefore our view that the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* needs to be repealed and replaced with more comprehensive and effective Indigenous cultural heritage protection legislation, rather than its protections being merged within the EPBC Act; that consideration should be given to removing Indigenous cultural heritage protection from the EPBC Act into standalone Indigenous cultural heritage protection legislation; and that the EPBC Act should be amended to better align with other Commonwealth, State and Territory Indigenous cultural heritage protection laws.

3.6 Item (j) – any other related matters

Over-reliance on the *Native Title Act* to protect Indigenous cultural heritage in States and Territories with large-scale mining industries is clearly inadequate for preventing Juukan Gorge-type incidents. Native title agreements that include conditions to further investigate or research Indigenous cultural heritage without the State or Territory also requiring this in order to obtain statutory approvals is insufficient. Local level native title agreements need to be reinforced by strong State and Territory Indigenous heritage laws which facilitate informed decisions by Traditional Owners prior to being able to be acted upon. Only under the condition that large mining corporations may not obtain their development approvals will they fully apply appropriate Indigenous cultural heritage management processes before seeking statutory approval for their activities. The threat of substantial penalties will also assist.

The recommendations in this submission reinforce the principle of free, prior and informed consent as a necessary prerequisite for true Indigenous self-determination in this area. Strong State and Territory Indigenous cultural heritage legislation that properly empowers Indigenous Traditional Owners to make decisions about their cultural heritage can narrow the power differential between large corporations and many Traditional Owner groups. The reforms to Commonwealth, State and Territory Indigenous cultural heritage legislation suggested in this submission will help to avoid Juukan Gorge-type incidents.

4.0 Conclusion

The current Commonwealth legislation includes the EPBC and ATSIHP Acts. The former addresses World, National and Commonwealth heritage, and the latter is intended to provide a safety net for inadequate State or Territory processes. Both are in need of substantial reform.

State and Territory legislation is variable, with some legislation being seriously flawed and out of date. While intended to provide jurisdiction-wide protection for Indigenous cultural heritage, the State and Territory legislation provides only partial protection in most cases. This is due largely to:

- the narrow scope of Indigenous cultural heritage recognised under the legislation (generally only archaeological sites);
- inadequate provision for Indigenous participation in decision making at all levels;
- inadequate protections for Indigenous cultural heritage within the legislation; and
- poor integration of related legislation.

Key current issues that need to be addressed are how Commonwealth, State and Territory Indigenous cultural heritage protection legislation can provided a rights-based approach to Indigenous cultural heritage protection, and how this legislation interacts with Native Title legislation.

The qualities of effective Indigenous heritage protection can be identified, and all legislation and associated systems should meet these qualities – Commonwealth, State and Territory.

In this context, Australia ICOMOS recommends:

1. All State and Territory Indigenous cultural heritage protection legislation should be reviewed to meet modern, best practice for Indigenous cultural heritage protection.
2. The Commonwealth Indigenous cultural heritage protection should be reviewed to meet modern, best practice for Indigenous cultural heritage protection.
3. A focus of such review should be how the different pieces of legislation (at all levels) interact, including with respect to related legislation such as the *Native Title Act 1993*.
4. Another focus of such a review should be the provision of a rights-based approach to Indigenous cultural heritage protection (a requirement under the *United Nations Declaration on the Rights of Indigenous Peoples)*.

In relation to the Commonwealth Indigenous cultural heritage protection legislation, Australia ICOMOS recommends:

5. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* should be replaced.
6. The heritage provisions of the *Environmental Protection and Biodiversity Conservation Act 1999* should be removed to/replaced by a separate heritage Act.
7. The heritage Act would ideally address natural, Indigenous and historic heritage.
8. However, if this proves unwieldy, consideration could be given to a separate Indigenous heritage Act.

Attachment 1: Australia ICOMOS Statement on the destruction of the Juukan rockshelters, June 2020

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Australia ICOMOS statement on Juukan Gorge rockshelters – Western Australia

The recent destruction of the significant Juukan Gorge rockshelters, located in Puutu Kunti Kurrama and Pinikura (PKKP) country in the Pilbara region of Western Australia, underscores the pressing need to reform and modernise the WA *Aboriginal Heritage Act 1972* and its administrative processes.

Although consent to destroy the site was granted in 2013 under Section 18 of the Act, subsequent archaeological excavations revealed remarkable new information about the significance of Juukan Gorge. It was found to contain evidence of over 46,000 years of human occupation, which places the site in the oldest bracket of dates for the human occupation of Australia's arid regions. DNA evidence from a 4,000 year old plaited human hair belt also directly associates the site with contemporary PKKP Traditional Owners.

Australia ICOMOS is concerned that the Western Australian *Aboriginal Heritage Act 1972* legislative and administrative processes are not in line with modern, best-practice heritage management principles such as *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance*, 2013 (Burra Charter). That it authorised the destruction of a place *before* the cultural significance of that place was fully understood is a major flaw of the Act and its associated administrative processes, and is in direct contradiction of the Burra Charter Process, as set out in Article 6 of the Charter:

> 6.1 The cultural significance of a place and other issues affecting its future are best understood by a sequence of collecting and analysing information before making decisions. Understanding cultural significance comes first, then development of policy and finally management of the place in accordance with the policy. This is the Burra Charter Process.

It is also problematic that the Act and its administrative processes do not allow for the consideration of new information or up-to-date assessments of significance to be considered once a section 18 permit has been issued, nor is there currently any avenue for the Traditional Owners to appeal a decision.

Australia ICOMOS will be urging the Western Australian government to expedite the development of the proposed new Aboriginal Cultural Heritage Act, and to ensure that:

- The new Act is developed with the full participation of representatives of Western Australian Aboriginal communities;
- The new Act adopts the Burra Charter principles and process;
- The cultural significance of a place is comprehensively understood before making irreparable land use or development decisions;
- The new Act is responsive to changes in circumstance, new information or perspectives about the cultural significance of places;
- The new Act Includes mechanisms for Traditional Owners and other stakeholders to appeal decisions; and
- The new Act and its administration must have a high level of openness and transparency, particularly around decision-making.

Whilst we acknowledge that it will take some time to complete, Australia ICOMOS also strongly recommends that all existing Section 18 permits be reviewed to identify whether similar problems may arise at other heritage places.

Australia ICOMOS will also be contacting the Commonwealth Minister for the Environment to ensure existing statutory mechanisms can operate in a timely manner to afford protection in situations where State processes fail to protect precious heritage places.

While these comments address the role of governments, there is also the role of the company, Rio Tinto, which undertook works which resulted in the destruction of the rockshelters and deserves scrutiny. Australia

ICOMOS will approach the company to seek a detailed understanding of its processes and decision-making which led to the destruction and how this situation can be avoided in the future.

3 June 2020

Attachment 2: Australia ICOMOS letters to the Commonwealth Minister for the Environment and the Western Australian Minister for Aboriginal Affairs regarding on the destruction of the Juukan rockshelters, June 2020

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9 June 2020

The Honourable Sussan Ley MP
Minister for the Environment
Parliament House
Canberra ACT 2600

Dear Minister

Juukan Gorge rockshelters – Western Australia

I write following the recent destruction of the significant Juukan Gorge rockshelters, located in Puutu Kunti Kurrama and Pinikura (PKKP) country in the Pilbara region of Western Australia. Australia ICOMOS has prepared a statement on this matter and a copy is attached.

While primary responsibility for statutory protection rests with the Western Australian Government, none the less, there are possible roles for the Commonwealth in such matters under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and under the *Environment Protection and Biodiversity Conservation Act 1999*.

It appears that the Commonwealth was approached on behalf of the Traditional Owners, although it is not clear publicly whether the Commonwealth's protective role was formally triggered and, if so, what action was taken.

My reason for writing is to ask you to review these circumstances to ensure that everything possible was done to provide for the protection of the rockshelters under Commonwealth legislation, and to ensure that the destruction of highly significant heritage will not occur in the future. It is important that the Commonwealth's protective role can work effectively and in a timely manner.

Australia ICOMOS is particularly concerned about existing approvals under Section 18 of the Western Australian *Aboriginal Heritage Act 1972* which may not be responsive to changes in circumstance, new information or perspectives about the cultural significance of places. There is also no appeal right for Traditional Owners. Until this Act is amended or replaced, the Commonwealth's role is essential to avoid other potential losses of very significant Indigenous heritage places.

The current refresh of the Australian Heritage Strategy provides one opportunity for reform and progress to support Indigenous communities achieve the effective protection of their heritage places, along with conservation, management and, where appropriate, interpretation. Objectives 5 and 9 of the existing Australian Heritage Strategy 2015 provide direction for improvement of the mechanisms and processes for the protection of Indigenous heritage, in particular through collaborative Commonwealth and state level actions.

I would be happy to discuss this matter with you.

Yours sincerely

Helen Lardner
President

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9 June 2020

The Honourable Ben Wyatt MLA
Minister for Aboriginal Affairs
Parliament House
GPO Box A11
Perth WA 6837

Dear Minister

Juukan Gorge rockshelters – Western Australia

I write following the recent destruction of the significant Juukan Gorge rockshelters, located in Puutu Kunti Kurrama and Pinikura (PKKP) country in the Pilbara region of Western Australia. Australia ICOMOS has prepared a statement on this matter and a copy is attached.

ICOMOS – the International Council for Monuments and Sites – is a non-government professional organisation that promotes expertise in the conservation of cultural heritage. ICOMOS is also an Advisory Body to the World Heritage Committee under the World Heritage Convention. Australia ICOMOS, formed in 1976, is one of over 100 national committees throughout the world. Australia ICOMOS has over 700 members in a range of heritage professions. We have expert members on a large number of ICOMOS International Scientific Committees, as well as on expert committees and boards in Australia.

Primary responsibility for the protection of such Aboriginal heritage rests with the West Australian Government, and there have been many public comments about the problems with the current *Aboriginal Heritage Act 1972*. I write to urge the Government to expedite the development of the proposed new Aboriginal Cultural Heritage Act, and to ensure that:

- The new Act is developed with the full participation of representatives of Western Australian Aboriginal communities;
- The new Act adopts the Burra Charter principles and process;
- The cultural significance of a place is comprehensively understood before making irreparable land use or development decisions;
- The new Act is responsive to changes in circumstance, new information or perspectives about the cultural significance of places;
- The new Act Includes mechanisms for Traditional Owners and other stakeholders to appeal decisions; and
- The new Act and its administration must have a high level of openness and transparency, particularly around decision-making.

Whilst we acknowledge that it will take some time to complete, Australia ICOMOS also strongly recommends that all existing Section 18 permits be reviewed as a matter of priority to identify whether similar problems may arise at other important heritage places. We also recommend that you immediately implement a process for Traditional Owners to exercise a right of appeal, to be in place until the new Act is enacted.

Yours sincerely

Helen Lardner
President