

INDIGENOUS CULTURAL HERITAGE PRESERVATION: ADDRESSING THE CRY OF THE EARTH AND THE CRY OF THE POOR

We are currently celebrating two very important Justice Dates – Laudato Si’ Week (celebrated in Australia 16 – 24 May 2022) and National Reconciliation Week (27 May – 3 June 2022). This edition of *Just Now* examines an issue of Justice which incorporates both these events – the protection of First Nations Peoples’ cultural heritage. National protections for First Nations Peoples’ cultural heritage have proved insufficient, enabling the devastating destruction of cultural heritage sites and the natural environment. This edition of *Just Now* will look at the current state of cultural heritage protection, and how you can support a genuinely co-designed course of action.

LAUDATO SI' AND RECONCILIATION WEEK

This theme for this year's Laudato Si' Week is "Listening and Journeying Together," corresponding with the encyclical's call to "bring the whole human family together to seek a sustainable and integral development," (LS 13), in "a conversation which includes everyone, since the environmental challenge we are undergoing, and its human roots, concern and affect us all" (LS 14). It is fitting that in Australia, Laudato Si' Week precedes National Reconciliation Week, a week for Indigenous and non-Indigenous Australians to come together to learn about our shared histories, cultures, and achievements, and to move further towards reconciliation in Australia.

The Church has come a long way from the *Doctrine of Discovery*, emanating from Pope Alexander VI's 1493 papal bull *Inter Caetera*, which permitted any Christian "discovering" land inhabited by non-Christians to claim it. The

Doctrine of Discovery ultimately justified British colonisation of Australia, and ensuing government approaches to our Indigenous Peoples.

Laudato Si' however now urges us to make indigenous communities our "principal dialogue partners, especially when large projects affecting their land are proposed" as "pressure is being put on them to abandon their homelands to make room for agricultural or mining projects which are undertaken without regard for the degradation of nature and culture" (LS 146).

"For them, land is not a commodity but rather a gift from God and from their ancestors who rest there, a sacred space with which they need to interact if they are to maintain their identity and values. When they remain on their land, they themselves care for it best" (LS 146).

WHAT IS INDIGENOUS CULTURAL HERITAGE AND HOW IS IT PROTECTED?

For First Nations Peoples, their cultural heritage consists of an interconnected system of places, traditions, beliefs, customs, values and objects, that embodies a physical and spiritual connection to land and water, often referred to as 'Country'. Preservation of cultural heritage is essential to an individual's and community's collective cultural identity, sense of belonging and wellbeing. There are numerous mechanisms for protecting Indigenous culture and heritage,

that function at a Federal, State or local level. Federal mechanisms include:

- protection as a world, national or commonwealth heritage area;
- protection under Native Title;
- protection under the Environmental Protection and Biodiversity Conservation Act;
- or protection under the Aboriginal and Torres Strait Islander Heritage Protection Act.

Each state and territory has its own heritage laws that protect First Nations Peoples' cultural heritage to varying degrees. Usually, these laws automatically protect various types of areas or objects, while enabling developers to apply for permission to proceed with activities that might affect Indigenous heritage.

HAVE THESE MECHANISMS BEEN EFFECTIVE?

The inadequacy of cultural heritage laws around Australia at a federal and state/territory level has been raised over many years by Traditional Owners, First Nations organisations, academics and lawyers.

Gaining protection of sites of significance is not easy. And even where they are recognised, there is still a high rate of approved destruction rather than protection. For example, under Western Australia's Aboriginal Heritage Act, between 2001 and 2007 488 applications for development were considered and permission to disturb heritage given 480 times.

There is a significant value gap between what First Nations Peoples' cherish as part of their heritage, and what governments are prepared to protect. The value of Indigenous heritage to ALL Australians is downplayed. Settler heritage, such as the iconic 'dog on the tucker box,' is indisputably preserved and celebrated, while significant ancient trees linked to the songs and stories of the local Indigenous people, are cut down to build highways.



Each jurisdiction has its own definition for Indigenous cultural heritage, varying criteria for establishing significance, as well as different reporting requirements, levels of protection, processes for authorising destruction, ways to access procedural fairness and appeal decisions, and arrangements for consultation. This makes it impossible to benchmark heritage outcomes nationally.

JUUKAN GORGE

On May 24 2020, mining company Rio Tinto detonated caves at Juukan Gorge, WA, including two rock shelters of great cultural significance to the Puutu Kunti Kurrama and Pinikura (PKKP) peoples. One of these shelters contained evidence of continuous Aboriginal occupation dating back some 46,000 years.

Rio Tinto had legally undertaken this action in order to expand an iron ore mine, under WA's

Aboriginal Heritage Act. It has since become evident that Rio Tinto could have adopted alternatives that would not have destroyed the rock shelters. The action has been absolutely devastating to the PKKP peoples and sparked national and international outrage over the ineffectiveness of legislation, and lack of corporate responsibility displayed by Rio Tinto.

"The material and geographical manifestations of Aboriginal cultures developed over more than 65,000 years are being rapidly destroyed by mining companies, urban settlement, road and infrastructure development, and vandalism. This destruction is authorised by state and federal governments... The regulatory regime has failed to prevent destruction across vast landscapes. Small red flags are waved on the sidelines of a political and economic struggle for enormous mineral wealth and settler expansion that sacrifices places, culture and heritage." ~ Marcia Langton, The Saturday Paper, 19 September 2020.

REVIEWS OF ABORIGINAL CULTURAL HERITAGE PROTECTION

THE EPBC ACT



The *Environment Protection and Biodiversity Conservation 1999 (EPBC) Act*, which guides assessment and approval processes for all major projects that may have an environmental (including heritage places) impact, underwent a review in 2019-20. Chapter 2 of the Final Report of the review criticised the Act for failing to protect and conserve Indigenous cultural heritage, nor allowing for a working in partnership with Indigenous Peoples, or promoting the respectful use of their ontologies and epistemologies. The Report therefore recommended a number of key reforms, including:

- The co-design of policy and implementation to improve outcomes for Indigenous Australians
- Indigenous views, knowledge and participation to be incorporated into regulatory processes and decision-making
- Indigenous knowledge and western science to be considered on an equal footing in the provision of formal advice to the Environment Minister
- Comprehensive review of national Indigenous cultural heritage protections.

You can read the full chapter [here](#), and learn more about the *EPBC Act* in a previous *Just Now* [here](#).

THE JUUKAN GORGE PARLIAMENTARY INQUIRY

Public outcry to Juukan Gorge prompted a parliamentary inquiry, with a wide scope. It not only examined the specific case of Juukan Gorge, but the effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage

After almost 18 months of submissions and hearings, the final report, titled *A Way Forward*, was released in October 2021. It explains how the current regulatory system favoured Rio Tinto in their desire to destroy the caves, while disempowering the PKKP peoples from being able to prevent it, indicative of wider systemic problems that shun genuine consultation and consent.

It recommended major legislative reforms, including:

- a new national Aboriginal cultural heritage act co-designed with Indigenous peoples
- a new national council on heritage protection
- a review of the *Native Title Act 1993* to address power imbalances in negotiations on the basis of free prior and informed consent.

Industries have already expressed opposition to the recommendations, and two committee members, Senator Dean Smith and MP George Christensen, disagreed with the recommendation of the wider committee that the Commonwealth should set standards for states' cultural heritage protection laws, stating that this would inhibit the mining industry.

REVISION OF WA'S ABORIGINAL CULTURAL HERITAGE ACT

Following the Juukan Gorge incident, the Western Australian government conducted a review of its *Aboriginal Heritage Act (1972)*, with a Cultural Heritage Bill being passed in December 2021. The new *Aboriginal Cultural Heritage Act (2021)* has been highly criticised by Traditional Owners, Aboriginal leaders, land councils, industry leaders, state and federal politicians across the country, and even the UN, for failing to balance development with cultural heritage protection, or take seriously the findings of the Parliamentary Inquiry.



WHAT ACTION IS BEING TAKEN?

CULTURAL HERITAGE PROTECTION CO-DESIGN

In response to the Recommendations of the Parliamentary Inquiry, in November 2021, a partnership between the First Nations Heritage Protection Alliance and the federal government was announced, aiming to co-jointly reform federal cultural heritage protections.

The First Nations Heritage Protection Alliance is made up of Aboriginal Land Councils, Native Title Representative Bodies and Aboriginal and Torres Strait Islander Community Controlled Organisations from across Australia. The partnership involves a national consultation process that will take place in two stages:



- Stage 1 (February - May 2022): Consultations with industry stakeholders, relevant State Government departments, and regional or peak First Nations representative bodies. They will consider the review of the *EPBC Act*, *Dhawura Ngilan (Remembering Country): A Vision For Aboriginal And Torres Strait Islander Heritage In Australia*, and the Final Report of the Juukan Gorge Inquiry, to assess the current regulatory framework. From this will be developed a Directions Report and a policy options paper.
- Stage 2 (June - September 2022): The Policy Options Paper will be made available for national consultation. While focussing on First Nations peoples and groups around Australia, this will be open to all interested community members. Following the completion of the national consultation, an Options Report will be drafted and presented to the Minister for Indigenous Australians and the Minister for the Environment, who will deliberate and make decisions.

WHAT CAN YOU DO?

Much like the Indigenous Voice Co-Design Process, it is important that the Indigenous right to subsidiarity and self-determination is upheld, so that the final options legislative protections are selected and implemented by the government, in full consultation with Aboriginal and Torres Strait Islander Peoples.

We encourage you, when Stage 2 commences, to consider a submission to the national consultation process, emphasising these rights. Stay updated on the Co-Design Process on the Department of Agriculture, Water and the Environment Page [here](#).

Learn more about Indigenous cultural heritage protections by reading [Dhawura Ngilan \(Remembering Country\): A Vision For Aboriginal And Torres Strait Islander Heritage In Australia](#), or watching [Time for Change - a discussion about Aboriginal Cultural Heritage laws](#).

