Joint Standing Committee on Northern Australia
PO Box 6021
Parliament House
Canberra ACT 2600

29 July 2021

Dear Officer,

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

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Joint Standing Committee on Northern Australia, responding to terms of reference (a), (h), (i) and (j) of the inquiry.

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

Summary of Recommendations:

Term of reference (a):

1. Aboriginal heritage should be regarded as a part of a living culture. Any future legislation for the protection of Aboriginal heritage must have regard to the contemporary understanding of Aboriginal culture and be continuously updated through consultation with the Aboriginal community to reflect their understanding of their culture.

2. Explicit provisions requiring consultation of Aboriginal people by the Aboriginal Cultural Materials Committee and the Minister should be implemented.

3. Under section 18 (or similar future legislative provisions), there must be provision for relevant, affected Aboriginal parties to apply for review of a decision under the *Aboriginal Heritage Act 1972* (WA). This seems to be a clear reinforcement and strengthening of protective measures surrounding Aboriginal culture. Without this review mechanism, there is no protection for Aboriginal rights once a decision has been made.

Term of reference (h):

4. There must be a referendum to implement a constitutionally entrenched First Nations' Voice to Parliament in order to better advise on laws pertaining to the protection and promotion of Indigenous heritage.

Term of reference (i):

5. Make provisions for increased consultation with Aboriginal and Torres Strait Islander people throughout **the Act** to address the exclusion of indigenous groups from the policy-making process.

6. Add (d) [The Minister] has met with affected Aboriginal and/or Torres Strait Islander community representative(s) and has created a draft agreement approved by all parties.

    (i) Aboriginal and Torres Strait Islander community representative(s) have the option to veto bilateral agreements, so long as they can justify a significant threat posed to their land,

    (ii) The scope of (d) applies to any indigenous land.

7. Add (c) subsequent reviews as of 2021 must consult with Aaboriginal and/or Torres Strait Islander people. This may include elders, community representatives and advocacy groups.

    (i) The review must include a record of the consultations.

8. Increase discretion awarded to the regulator to address serious contraventions of the Act.
9. Add the following to the end of Note 2 (the rest of the note must be left unchanged): And if the offence relates to an indigenous heritage site, the maximum penalty should increase to not more than 10 years, and the proceeds of the 420 penalty units (if applied) must be put back into the affected indigenous heritage site and the broader indigenous community, vis-a-vis reparation projects. If the corporation and/or individual involved in wrongdoing is, in the court's opinion, of a significant stature, then an additional penalty may be applied to the corporation and/or the individual. The purpose of this added penalty is increased deterrence for other corporations and/or individuals, as the enforcement of these penalties will need to be taken seriously.

10. Create s (5)(c) that requires the Minister to table a report stating the reason(s) for the decision. This report must be conveyed in the following ways:

    (i) A speech in Parliament House,

    (ii) A YouTube upload of the speech to the following channel, "About the House: the official channel of the Australian House of Representatives,"[1] that does not expire,

    (iii) The Hansard transcript of the speech,

[1] 'About the House: the official channel of the Australian House of Representatives', *House of Representatives* (Official YouTube Channel, 11 July 2021) < https://www.youtube.com/user/athnews>.

(iv) An official media release posted to the relevant section[2] of the APH website.

11. There should be amendments to the Corporations Act to mandate human rights due diligence for large companies, to better protect cultural heritage sites by requiring these companies to identify risks and institute vigilance plans for risk management.

On behalf of the ANU LRSJ Research Hub,

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[2] 'Media Releases', *Parliament of Australia* (Web Page, 11 July 2021) <https://www.aph.gov.au/About_Parliament/House_of_Representatives/About_the_House_News/Media_Releases>.

Introduction

The destruction of the 46,000 year old Juukan Gorge rock shelter signifies a failure of our institutions to protect the living culture and heritage of First Nations peoples. This failure has resulted in an irreparable loss for First Nations Culture and therefore Australia's culture as a whole. It is proper that an inquiry is being conducted to ensure that such a tragedy is not permitted to happen again.

This submission addresses terms of reference (a), (h), (i), and (j) of the inquiry.

This submission does not purport to have knowledge of the exact circumstances surrounding Rio Tinto's application and subsequent approval for development. However, as a submission from law students, it hopes to elucidate some of the shortcomings of the legal mechanisms used in the *Aboriginal Heritage Act 1972* (WA) ('**the Act**') and the broader state and federal regimes to protect indigenous heritage.

Term of Reference (a): The *Aboriginal Heritage Act 1972 (WA)*

Since it came into force, **the Act** has been the principal mechanism through which Aboriginal sites of cultural importance have been protected in Western Australia. **The Act** has been criticised as being outdated and antiquated in the method with which it approaches the protection of Aboriginal heritage.[3] It is important to note that **the Act** has been in a process of review since 2018, with a discussion paper released with several proposals to improve protective measures.[4] It has been decided that **the Act** will be completely overhauled with new legislation. The *Aboriginal Cultural Heritage Bill 2020* (WA), which is to replace **the Act**, is currently in draft form after an extended period of public consultation.

HISTORY AND OPERATION OF THE ACT

Understanding the basic premise of **the Act** and how it functions is essential to understanding why it sanctions the damage of Indigenous land of cultural significance.

The Act was one of the first pieces of legislation designed to protect Aboriginal 'places and objects'.[5] However, since the legislation first came into force, it has had no significant amendments to it.[6] Prior to 2018, **the Act** has been subject to major scrutiny by the Western Australian government, with a discussion paper being released in 2012.[7] While being welcomed as an important step forward, the 2012 proposals were largely seen as inadequate and did not address the specific needs of First Nations Peoples.[8]

The Act operates by establishing a basic level of protection for places and objects as defined by **the Act** as important to Aboriginal heritage. Under section 17 it is an offence if a person 'excavates, destroys, damages, conceals or in any way alters any Aboriginal site'. However, this base level of protection has a

[3] Blaze Kwaymullina, Ambelin Kwaymullina and Sally Morgan, 'Reform and Resistance: An Indigenous Perspective on the Proposed Changes to the *Aboriginal Heritage Act 1972* (WA)' (2012) *Indigenous Law Bulletin* 8(1) 7, 7.
[4] Government of Western Australia, Department of Planning, Lands and Heritage, *Review of the Aboriginal Heritage Act 1972* (Discussion Paper, March 2019) 2.
[5] Ibid.
[6] Ibid 3.
[7] Kwaymullina, Kwaymullina and Morgan (n 3).
[8] Ibid.

major caveat. A person does not commit an offence if they act with 'the consent of the Minister under section 18'.[9]

Under section 18, parties may apply for ministerial consent to use land in a way that may damage Aboriginal sites and, if the Minister consents, gain immunity from committing an offence under section 17. Such applications must first be considered by the Aboriginal Cultural Materials Committee (ACMC) (section 28), a committee established under **the Act,**[10] that makes a recommendation to the Minister. The Minister is required by **the Act** to consult with the ACMC. However, there is no wording in **the Act** to suggest they are bound to follow the ACMC's advice.[11] The Minister decides whether to issue (or refuse) consent, and can subject any consent to conditions. **The Act** also enables the Minister to authorise traditional custodians for any place to undertake the Minister's duties in relation to that place (section 9 – which could include deciding section 18 consents).

It was noted in *Minister for Indigenous Affairs v Cantach* by Pullin J in the Supreme Court of Western Australia that Ministerial consent under section 18 'gives a person and others acting on that person's behalf a right to do what would otherwise be a criminal act'.[12] The Court emphasised that this does not give a 'blanket clearance' for all operations on relevant land.[13] However, **the Act** does give general clearance for all operations which are approved of 'for the purpose required'.[14]

CRITICISMS OF THE ACT AND RECOMMENDATIONS

As is noted above, the *Aboriginal Cultural Heritage Bill* is currently being drafted. Criticisms apply directly to **the Act,** however all the recommendations should be seen as applying to **the Act** and all future legislation concerning the protection of Aboriginal and Indigenous heritage in Western Australia.

1. **Outdated conceptualisation of Aboriginal culture**

A common critique of **the Act** is its outdated language and conceptualisation of Aboriginal culture. This is demeaning and unhelpful to the actual protection of Aboriginal heritage. While **the Act** was a major step forward in terms of protecting Aborginal culture, it has remained stagnant and does not account for the modern Aboriginal experience.

It has been noted that **the Act** 'adopts a narrow, site-specific approach to Aboriginal heritage, couched in the language of anthropology and archeology, that remains largely reflective of its origins in the 1970s'.[15] This fails to acknowledge that Aboriginal culture is living and evolving, with significant importance to 21st Century First Nations Peoples.

This has practical effects upon the operation of **the Act.** To treat Aboriginal culture and heritage as a relic of the past is to deny the input and value of those who are living today who have a connection to Aboriginal culture.

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[9] The Act section 17(b).
[10] The Act section 28.
[11] The Act section 39D.
[12] [2001] WASC 268 [41].
[13] Ibid.
[14] The Act section 18(3)(d).
[15] Kwaymullina, Kwaymullina and Morgan (n 3).

The next two criticisms have a direct correlation to this.

Recommendation 1: Aboriginal heritage should be regarded as a part of a living culture. Any future legislation for the protection of Aboriginal heritage must have regard to the contemporary understanding of Aboriginal culture and be continuously updated through consultation with the Aboriginal community to reflect their understanding of their culture.

2. Lack of consultation with Aboriginal people

The Act does not require any compulsory consultation with Aboriginal people. As is discussed, **the Act** requires the Minister to consult with the ACMC. The ACMC consists of

> 'persons, whether or not of Aboriginal descent, having special knowledge, experience or responsibility which in the opinion of the Minister will assist the Committee in relation to the recognition and evaluation of the cultural significance of matters coming before the Committee'.[16]

Note that this makes no requirement for Aboriginal people to be on the ACMC. This is despite the ACMC making advice to the Minister for consents under section 18 to destroy Aboriginal heritage sites. On the other hand, section 28(3) makes it compulsory that one of the members of the ACMC 'shall be a person recognised as having specialised experience in the field of anthropology as related to the Aboriginal inhabitants of Australia'. As per criticism 1 of this term of reference, by viewing Aboriginal culture as a historical relic, contemporary Aboriginal perspectives are not accounted for. Aboriginal representation on the ACMC not being a requirement of **the Act** seems antithetical to **the Act**'s very purpose.

Furthermore, the ACMC is not required to take into account the interests or perspectives of Aborginal people and the Minister is only broadly required to have a 'regard to the general interest of the community' for section 18 consents.[17]. One of the purposes of the ACMC is 'to evaluate on behalf of the community the importance of places and objects alleged to be associated with Aboriginal persons'.[18] The ACMC must evaluate importance with reference to 'any existing use or significance attributed under relevant Aboriginal custom'.[19] However, this does not require consultation with Aboriginal people. Chaney J notes in *Robinson v Fielding* 'there is nothing in the process set out in s 18 which expressly requires consultation with Aboriginal people with interests in sites on the land the subject of a s 18 notice.'[20] Chaney J highlights it is 'plain that the effective operation of the AH Act requires input of some kind from Aboriginal people'.[21] This was later commented on by Pritchard J in *Abraham v Collier* who stated it is a requirement for the ACMC 'to ensure that it had sufficient information from the Aboriginal people', but 'that it is doubtful that there is any obligation to afford procedural fairness to Aboriginal

[16] The Act section 28(4).
[17] Ibid section 18(3).
[18] Ibid section 39(1)(a).
[19] Ibid section 39(2)(a).
[20] [2015] WASC 108 [123].
[21] Ibid [129].

people or groups in the context of dealing with notices under s 18'.[22] It is therefore implied that the ACMC may fulfil its procedural requirements without consultation with the Aboriginal community.

The lack of an explicit requirement in **the Act** for consultation with Aboriginal representatives or groups at any point in the decision-making process only serves to weaken its protective mechanisms and divorce the Aboriginal community from being worthy of recognition in Australian law.

Recommendation 2: Explicit provisions requiring consultation of Aboriginal people by the ACMC and the Minister should be implemented.

3. Lack of review mechanisms

Section 18(5) allows an aggrieved owner of land affected by a section 18 decision to apply to the State Administrative Tribunal (SAT) in Western Australia. This is the only party considered in **the Act** as having statutory standing for review by the SAT. Aboriginal interest groups are not contemplated in **the Act** as having statutory standing for review.

This is particularly egregious as Aboriginal groups who have been closely involved with the decision making process and can clearly establish spiritual and cultural connection to the land will not have statutory standing for review of the decision by the SAT. This was the case in *Robinson v Fielding* (however in this case a valid ground for judicial review was found on the basis of procedural fairness).

The Act is supposed to protect the heritage of Aboriginal people. It seems to only hinder its own purpose when review mechanisms exclude those parties being protected.

Recommendation 3: Under section 18 (or similar future legislative provisions), there must be provision for relevant, affected Aboriginal parties to apply for review of a decision under the Act. This seems to be a clear reinforcement and strengthening of protective measures surrounding Aboriginal culture. Without this review mechanism, there is no protection for Aboriginal rights once a decision has been made.

Term of Reference (h): How Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites

SELF DETERMINATION: A FIRST NATIONS' VOICE

[22] [2016] WASC 269 [177].

This submission agrees with the Law Council of Australia's submission to this inquiry that currently the relevant Commonwealth, state and territory legislation is inadequate in guaranteeing the protection of culturally and historically significant sites.[23]

To adequately protect these significant interests, First Nations Peoples must have a direct role in creating legislation that protects and promotes their interests. This submission wholly endorses the Uluru Statement from the Heart, especially the entrenchment of a First Nations' Voice ('FNV') to Parliament.[24] Entrenching a FNV would help align Australia with its commitment to the United Nations Declaration on the Rights of Indigenous Peoples, especially Article 3 which stipulates the right to self-determination that Indigenous peoples enjoy.[25] In the recent destruction in the Juukan Gorge, Rio Tinto admitted shortfalls in consultations with Traditional Owners of the land which further emphasises this need for self-determination.[26] An entrenched FNV would be able to directly provide recommendations as to flaws in existing legislation and provide suggestions as to amendments to legislation at a Federal level.[27] These could provide a benchmark and a model of good practice for jurisdictions across Australia ensuring that cultural heritage legislation adequately represents the wishes and input of its core stakeholders, First Nations Peoples.[28]

Recommendation 4: There must be a referendum to implement a constitutionally entrenched First Nations' Voice to Parliament in order to better advise on laws pertaining to the protection and promotion of Indigenous heritage.

Term of Reference (i): opportunities to improve indigenous heritage protection through the Environment Protection and Biodiversity Conservation Act 1999

CRITICISMS AND RECOMMENDATIONS

[23] Law Council of Australia, Submission No 120 to the Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia,The Joint Standing Committee on Northern Australia, (August, 2020) ('Submission No 120').
[24] Referendum Council, *Final Report of the Referendum Council* (Final Report, July 17, 2017), 38 ('*Final Report 2017*').
[25] United Nations Declaration on the Rights of Indigenous Peoples, GA/10612, UN GAOR, UN Doc A/61/295 (13 September 2007), Article 3.
[26] Rio Tinto, submission No 25 to the Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia,The Joint Standing Committee on Northern Australia, (July 2020) 2.
[27] See *Submission No 120*, 70.
[28] Ibid.

1. Lack of consultation in the original drafting and passing of the EPBC Act

There was an absence of participation and consultation by aborginal and Torres Strait Islander people in the original drafting and negotiating of **the Act**.[29] This is despite complaints from indigienous groups at the time that there had not been adequate consultation regarding indigenous issues.[30] For example, the consultation paper only allowed less than two months for submissions.[31] There was little detail in the proposal itself, which meant it was difficult for indigenous representative groups to respond to the proposal and consult with those they represented, 'indigenous views were not satisfactorily sought or obtained in the drafting of the bill'[32]. In fact, there were many indigenous groups who were either unaware of the legislation or the importance of the legislation in regards to aborginal and Torres Strait Islander people.[33]

As a consequence, **the Act** at the time failed to recognise the unique and important relationship 'between indigenous people and their land and [the way in which the] environment is integral to their whole identity'[34], simply because they were not part of the original conversation. This lack of consultation is what informs the subsequent recommendations proposed below, central to each criticism and recommendation is that the lack of consultation has contributed to **the Act**'s failure to take into account the relationship between indigenous and Torres Strait islander people with the environment. An EPBC Act that fails to recognise this will fail to adequately protect Australia's unique environment.

Recommendation 5: Make provisions for increased consultation with Aboriginal and Torres Strait Islander people throughout the Act to address the exclusion of indigenous groups from the policy-making process.

2. S 49A - Making a draft agreement

It was noted in a submission made by the Environmental Defenders Office (EDO) that "free, prior and informed consent"[35] must be provided by Aboriginal people and Torres Strait Islanders. Recommendation 5 is an attempt to commence this process by facilitating the opportunity to include First Nations Peoples in decision-making earlier on in the process. The outcome will still be a bilateral agreement between the Commonwealth and the relevant state/territory, as outlined in Division 2 of **the Act**.[36] Nevertheless, First Nations Peoples should have the freedom to veto draft agreements, if they feel that their heritage is significantly threatened by the draft agreement. This added layer satisfies Recommendations 10 and 11

[29] Tony Keys, 'Indigenous Rights Sidelined Again: the Federal Environmental Protection and Biodiversity Conservation Bill' (1999) 4(22), *Indigenous News Bulletin*, 14, 14-15.
[30] Ibid.
[31] Ibid, 14.
[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Environmental Defenders Office, Submission No 107 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* (14 August 2020) 27. (EDO Submission)
[36] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Division 2. (*EPBC Act*)

from the EDO's submission,[37] and creates an added check and balance upon bilateral government agreements. The following recommendation is particularly necessary in the wake of Juukan. The scope of this provision applies to any Aboriginal or Torres Strait Islander land.

Recommendation 6: Add (d) [The Minister] has met with affected aboriginal and/or Torres Strait Islander community representative(s) and has created a draft agreement approved by all parties.

(i) Aboriginal and Torres Strait Islander community representative(s) have the option to veto bilateral agreements, so long as they can justify a significant threat posed to their land,

(ii) The scope of (d) applies to any indigenous land.

3. Failure to mandate consultation of Aboriginal and Torres Strait Islander people in the 10 year review required by s 522A

S 522A requires the Minister to cause an independent review of the operation of **the Act**, as well as to what extent the purpose of **the Act** is being fulfilled, every 10 years.[38] S 522A(1)(a)(b) does not specify how the operation and the purpose should be evaluated. Therefore, it is within the Minister's and the independent reviewer's discretion whether indigneous issues in relation to the operation of **the Act** are reviewed. This is another example of where consultation with Aborginal and Torres Strait Islander people is lacking, the consequences being that their interests and unique perspectives are absent from the conversation. Thus, it is recommended that s 522A(1)(a)(b) should include a requirement that indigenous issues in relation to **the Act** be considered in the review. In order to address this criticism, it is recommended that there be another subsection included in s 522A.

Recommendation 7: Add (c) subsequent reviews as of 2021 must consult with Aboriginal and/or Torres Strait Islander people. This may include elders, community representatives and advocacy groups.

(i) The review must include a record of the consultations.

4. Regulatory Processes

Regulatory practices used in the enforcement of **the Act** are featured in the 'enforcement pyramid', which values responsive regulation.[39] This means that the approach the regulator takes is a process of escalation; the less serious approaches such as dialogue between the parties lie at the bottom of the pyramid, whilst

[37] EDO Submission, 28.
[38] *EPBC Act*, s522A.
[39] Zada Lipman, 'An evaluation of compliance and enforcement mechanisms in the Environment Protection and Biodiversity Conservation Act 1999 (Cth) and their application by the Commonwealth' (2010) 27(98), *Environmental and Planning Law Journal*, 98, 99. ('An evaluation of compliance and enforcement mechanisms')

civil and criminal penalties sit at the top. Those in support of the enforcement pyramid argue that this maintains the seriousness of civil and criminal penalties because if they were deployed too often, these punishments would lose their impact.[40] Civil and criminal penalties should be used in cases where the party in contravention of **the Act** has refused to comply and make changes after there has been a dialogue.[41]

Critics of the enforcement pyramid argue that this results in inconsistent enforcement of civil and criminal penalties for breaches[42]. Instead of the penalties being applicable to any contravention of **the Act**, they are instead only limited to breaches that escalate to the top of the pyramid. This means that serious breaches may not attract civil and criminal penalties if the party in contravention of **the Act** does choose to engage in the dialogue with the regulator and makes changes accordingly.

Whilst making the changes is a positive step, the failure to escalate a serious breach to the point of civil and criminal penalties risks downgrading the seriousness of the contravention, whereby justice for the contravention may not be adequately attained. Although the enforcement pyramid provides a consistent method to respond to contraventions of the **Act**, it is recommended that there be more discretion awarded to the regulator in cases where using dialogue would not adequately address the seriousness of the contravention.

Recommendation 8: Increase discretion awarded to the regulator to address serious contraventions of the Act.

5. Extended jail time/ reparations - s 15C(13)

A plethora of enforcement strategies have been identified, including reparation, both by the Hawke Report[43] and Lipman.[44] Recommendation 9 is a modern suggestion, which serves the purpose of further deterring directors whilst also increasing the efficacy of reparations, particularly given the sheer and irreplaceable damage of the caves in Juukan Gorge. This two-pronged approach is strongly recommended, especially taking into consideration the top tier of the risk-based approach to compliance, ("apply[ing the] full force of the law").[45]

Furthermore, the following extract from Dr Zirnsak's submission to the Penalties for White Collar Crime[46] commission was the impetus for the severe sanctions listed in Recommendation 9:

> "Penalties alone will not act as a deterrent without greater detection. There is growing criminological research in this space, on these crime types, that is demonstrating that that [sic] is

[40] Ibid.
[41] Ibid, 100.
[42] Ibid.
[43] An evaluation of compliance and enforcement mechanisms, 99.
[44] Ibid, 100
[45] Australian Government Department of Energy, *Compliance Policy*, (Report, 2019) 5. (*Compliance Policy*)
[46] Economic References Committee of the Senate, *'Lifting the fear and suppressing the greed': Penalties for white-collar crime and corporate and financial misconduct in Australia,'* (Report, March, 2017) [3.20] 35.

the case… if there is a perception that someone will not be caught then effectively penalties will not be effective."[47]

Recommendation 9: Add the following to the end of Note 2 (the rest of the note must be left unchanged): And if the offence relates to an indigenous heritage site, the maximum penalty should increase to not more than 10 years, and the proceeds of the 420 penalty units (if applied) must be put back into the affected indigenous heritage site and the broader indigenous community, vis-a-vis reparation projects. If the corporation and/or individual involved in wrongdoing is, in the court's opinion, of a significant stature, then an additional penalty may be applied to the corporation and/or the individual. The purpose of this added penalty is increased deterrence for other corporations and/or individuals, as the enforcement of these penalties will need to be taken seriously.

6. Increasing ministerial accountability - s201(5)

Although there has been some discussion in the relevant literature about corporate liability,[48] its flipside, ministerial accountability, has not received adequate attention, particularly in the wake of the destruction of caves in the Juukan Gorge. Therefore, the following recommendation offers numerous methods of increasing ministerial accountability when it comes to granting permits.

Recommendation 10: Create s (5)(c) that requires the Minister to table a report stating the reason(s) for the decision. This report must be conveyed in the following ways:

(i) A speech in Parliament House,

(ii) A YouTube upload of the speech to the following channel, "About the House: the official channel of the Australian House of Representatives,"[49] that does not expire,

(iii) The Hansard transcript of the speech,

(iv) An official media release posted to the relevant section[50] of the APH website.

Term of Reference (j): Any other related matters

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[47] See ibid.
[48] An evaluation of compliance and enforcement mechanisms, 108.
[49] 'About the House: the official channel of the Australian House of Representatives', *House of Representatives* (Official YouTube Channel, 11 July 2021) < https://www.youtube.com/user/athnews>.
[50] 'Media Releases', *Parliament of Australia* (Web Page, 11 July 2021) <https://www.aph.gov.au/About_Parliament/House_of_Representatives/About_the_House_News/Media_Releases>.

In addition to drafting new legislation across Commonwealth, state and territory jurisdictions, corporations in Australia must also be regulated in order to better protect Indigenous cultural heritage. The introduction of mandatory human rights due diligence for large corporations in Australia would help prevent further similar destruction of Indigenous heritage as occurred in the Juukan Gorge.[51] Laws modelled on the French *Corporate Duty of Vigilance Law* ('**Model Law**') would mandate that corporations engage in due diligence to identify risks to Indigenous heritage as well as create regulatory compliance mechanisms to ensure that corporations address these risks.[52]

Currently, 'soft law' frameworks are predominantly in use in the corporate world which rely upon voluntary participation by corporations with little uniformity in guidelines or in compliance.[53] At the time of the destruction in the Juukan Gorge, Rio Tinto had subscribed to several soft law human rights due diligence programs including to the *United Nations Guiding Principles on Business and Human Rights*,[54] the soft law which incidentally forms the basis for the **Model Law**.[55]

Moving to mandatory human rights due diligence, such as in the **Model Law**, would ensure that corporations would have to annually publish a 'vigilance plan' targeted at identifying and mitigating human rights violations in their operations, subsidiaries and in their supply chains.[56] Should a company fail to publish a vigilance plan or publish an inadequate plan, stakeholders including NGOs may mount a court process to compel corporations to adequately publish a plan.[57] Courts could also ensure compliance by imposing penalties where companies fall short of these obligations.[58] Most crucially, the **Model Law** would institute a compensatory mechanism whereby affected victims of a company's breach of human rights due diligence may claim damages through negligence.[59] Critically, Indigenous groups must be embedded within these due diligence laws as they are the key stakeholder in identifying and directing risk management for heritage sites.[60]

Recommendation 11: There should be amendments to the Corporations Act to mandate human rights due diligence for large companies, to better protect cultural heritage sites by requiring these companies to identify risks and institute vigilance plans for risk management.

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[51] See generally, Rachel Chambers and Anil Yilmaz Vastardis, 'Human rights disclosure and due diligence laws: The role of regulatory oversight in ensuring corporate accountability' (2021) 21(2) *Chicago Journal of International Law*, 323 ('*Role of Regulatory Oversight*').
[52] *Code de commerce* [Trade and Industry Code] (France) art L. 225-102-4 ('*Code*').
[53] *Role of Regulatory Oversight* (n 27), 323.
[54] 'Human Rights', Rio Tinto (Web Page), <https://www riotinto.com/sustainability/human-rights>.
[55] 'French Corporate Duty of Vigilance Law', European Coalition for Corporate Justice (Online Article), <https://respect.international/french-corporate-duty-of-vigilance-law-english-translation/>
[56] *Code* (n 28), Article 1.
[57] Ibid, Article 1, II.
[58] Ibid.
[59] Ibid, Article 2.
[60] Gabrielle Appleby and Eddie Synot, 'A First Nations Voice: Institutionalising Political Listening' (2020) 48(4) *Federal Law Review* 529, 540.

Conclusion

As has been attested extensively in numerous submissions to this inquiry, the State and Federal regimes have the potential for significant improvement in protecting First Nations heritage.

Within Western Australia, **the Act** has failed the Aboriginal people and it is proper that it is being overhauled for more robust legislation. Broadly speaking, it is imperative that the new legislation, and any future amendments, continue to take into account the submissions and recommendations which have consistently been made over the past decade.

There is also potential for improvement at all levels of Government through a greater role of First Nations Peoples in actively participating in the legislative process.

Furthermore, it is also important to note the interrelated nature of First Nations heritage legislation and environmental legislation. The First Nations Peoples have a connection to the Australian land which goes beyond the tangible identification of certain sites of significance and historical artifacts. Therefore, it is important that the *Environment Protection and Biodiversity Conservation Act 1999* is robust for a holistic protection of First Nations cultural heritage.

Finally, corporations should be required through legislation to undergo a process of due diligence in relation to protection of First Nations human rights.

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B *Cases*

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