



20 November 2020

The Chair
Joint Standing Committee on Northern Australia
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CANBERRA
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**Submission to the inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge
in the Pilbara region of Western Australia**

Introduction

1. The National Environmental Law Association Ltd ACN 008 657 761 (**NELA**) welcomes the opportunity to contribute to the inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia.
2. NELA acknowledges the irreversible loss and continuing impact upon the Puutu Kuntj Kurrama and Pinikura peoples that was caused by the destruction of part of their land, culture and connection to their ancestors in May 2020.

About NELA

3. NELA is a national, multi-disciplinary, member-based association focused on environmental law and sustainability. NELA serves the needs of practitioners in law, planning, natural resources and environmental science and management. NELA obtains and exchanges information on issues relevant to environmental law and policy. One of NELA's objectives is to provide a forum for and otherwise assist in the discussion, consideration and advancement of environmental law among the legal profession and the wider community.
4. NELA has a national board, a division in Western Australia, more than 100 members across other Australian jurisdictions, and governance documents including a Board Charter, strategic plan and various other governance policies.

5. The NELA Board has approved the submission.¹ Ms Gabrielle Ho coordinated the preparation of this submission with input from NELA member lawyers Mr Lachlan Motti, Mr Jamie Truong, Ms Grace Bramwell and Ms Anne McConnel.

Executive Summary

6. NELA's view is that Indigenous cultural heritage laws must recognise the significance of Aboriginal and Torres Strait Islander people's people's connection to land and water as agreed by Aboriginal and Torres Strait Islander peoples. Laws must provide for Aboriginal and Torres Strait Islander peoples to make decisions about the protection of places and objects of significance to Aboriginal and Torres Strait Islander people's identity and community.
7. Land and water forms part of Aboriginal and Torres Strait Islander people's living culture, tradition, relationships and law. Aboriginal and Torres Strait Islander people's heritage is not simply historic or static, it is non-linear and contemporary. In an Aboriginal worldview, geographical landscapes are metaphysical landscapes where 'each part of country is not only alive, but has a life of his or her own – and is as capable as human beings of resistance and subversion.'² Aboriginal country is 'a collection of relationships bound together by the sustaining and renewal of the connections between all life.'³ Aboriginal cultural heritage 'shapes identity and is a lived spirituality fundamental to the wellbeing of communities through connectedness across generations'.⁴
8. NELA makes the following key recommendations for reform:
 - a. NELA endorses the recommendation in the *Interim Report of the Independent Review of the Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act)* that current cultural heritage legislation be thoroughly reviewed and provide national-level protection.
 - b. NELA also supports recommendation 6 of the Environmental Defenders Office's submission to this Inquiry. That is, a cross-jurisdictional review of all Indigenous cultural heritage laws across Commonwealth, states and territories should be undertaken and led by Aboriginal and Torres Strait Islander peoples.
 - c. NELA supports the recommendation made by the Law Council of Australia, that reforms to the EPBC Act should be pursued to improve the EPBC Act's role in

¹ The board has a strong mix of directors from state and Territory Bars, private sector not-for profit law firms, government and academia, namely Dr Hanna Jaireth (ACT) President, Jess Hamdorf (WA) Immediate Past President and Director, Natasha Hammond (NSW) Vice-President and Company Secretary, Nadja Zimmermann (VIC) Treasurer, Matt Floro (NSW) Director, Tiphonie Acreman (VIC) Director, Dr Katie Woolaston (Qld) Director, Dr Michele Lim (NSW) Director, Matt Littlejohn (NT) Director and Rebecca Digney (TAS). The profiles of board members can be accessed on NELA's website www.nela.org.au/about/board-members/

² A Kwaymullina and B Kwaymullina, 'Learning to read the signs: law in an Indigenous reality' (2010) 34(2) *Journal of Australian Studies* 195, 201

³ Ibid 203

⁴ Victorian Aboriginal Heritage Council, 'Aboriginal Cultural Heritage' (Web page, 12 May 2020) <www.aboriginalheritagecouncil.vic.gov.au/aboriginal-heritage>

protecting Indigenous cultural heritage, as part of a broader suite of Commonwealth legislation in this area, and its genuine, respectful engagement with Indigenous Australians' knowledge and expertise of environmental and heritage issues.

- d. New Commonwealth legislation is warranted in addition to the EPBC Act to ensure that all sites with Indigenous culture value are adequately protected. NELA is in full support of the recommendations made in the EPBC Act review interim report that the national level settings for Indigenous cultural heritage protection are in need of urgent comprehensive review.
- e. The EPBC Act should require that Traditional Owners have the opportunity to be involved in proactively managing areas that have been listed as heritage places and that free, prior and informed consent (**FPIC**) should be embedded in the Act.
- f. In order to reflect community concern about the protection of Indigenous heritage sites, the severity of penalties for damage to protected Indigenous heritage sites should be increased.
- g. NELA recommends that indigenous cultural heritage laws should:
 - i. Make Aboriginal and Torres Strait Islander peoples the primary decision makers in relation to protected Indigenous cultural heritage. NELA endorses the Environmental Defenders Office recommendations to this inquiry. Indigenous cultural heritage laws should vest ownership, management and control of protected cultural heritage with First Nations. The outcome should be to provide Traditional Owners with access to country in order to protect their cultural heritage and maintain distinctive spiritual, cultural and material relationship with country and sea country.
 - ii. Define indigenous cultural heritage according to Aboriginal and Torres Strait Islander people's worldviews, including intangible cultural heritage.
- h. As interim reforms pending the introduction of new legislation, the meaning of 'effective protection' in s 13(2) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* (ATSIHP Act) should be clarified and strengthened to ensure that the area object or objects are effectively protected, as verified by the Traditional Owners.
- i. NELA recommends implementing a rebuttable presumption in the ATSIHP Act in favour of making a declaration when the Minister is satisfied that an area is significant and at risk of injury or desecration (s 10(1)(b)). The proposed presumption may be rebutted by non-heritage protection considerations, including social and economic considerations. There should be clear guidance for the consideration of social and economic factors including thresholds which such factors must overcome in order to outweigh heritage protection considerations. This presumption would clarify and limit the Minister's discretion.

- j. NELA recommends including further provisions guiding non-heritage protection considerations to operate alongside the presumption. Specifically, provisions requiring the Minister to consider principles of intergenerational equity, as well as how long competing social or economic benefits may last and the extent to which those benefits impact Australian communities. The Minister may use the report prepared under s 10(4) to guide their decision.
- k. NELA recommends further reforms to Indigenous cultural heritage laws must be led by and conducted in partnership with Aboriginal and Torres Strait Islander peoples.

Elaboration of NELA's views

ToR (f) the interaction, of state indigenous heritage regulations with Commonwealth laws

- 9. Indigenous cultural heritage is predominantly regulated under state and territory laws. At the Commonwealth level, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIHP Act)* is the primary source of cultural heritage legislation. The ATSIHP Act is intended to operate as a back-stop to state and territory cultural heritage legislation.
- 10. The starting position for understanding the ATSIHP Act's relationship with state and territory cultural heritage laws is section 7(1):

This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.

- 11. The ATSIHP Act can only be relied upon in circumstances where state or territory legislation is deemed ineffective at protecting Indigenous cultural heritage. For example, before the Minister for the Environment can make an emergency declaration under the ATSIHP Act to preserve or protect a specified area or object from injury or desecration, it must have first "consulted with the appropriate Minister of that state or territory as to whether there is, under a law of that state or territory, [regarding the] effective protection of the area..."⁵ and consider a 'report' that explains "the extent to which the area is or may be protected by or under a law of a state or territory, and the effectiveness of any remedies available under any such law".⁶
- 12. Declarations under the ATSIHP Act can also be revoked at a later time under section 13(5) to take into account new state and territory cultural heritage laws:

Where the Minister is satisfied that the law of a State or of any Territory makes effective provision for the protection of an area, object or objects to which a declaration applies, he or she shall revoke the declaration to the extent that it relates to the area, object or objects.

- 13. NELA agrees with the Environmental Defenders Office submission that this places an unacceptable burden on Aboriginal and Torres Strait Islander peoples to first seek

⁵ Section 13(2) of the ATSIHP Act.

⁶ Section 10(4)(g) of the ATSIHP Act.

protection under state or territory legislation and then apply for a declaration under federal law.⁷

14. NELA notes that the Commonwealth Government was largely absent in relation to the Juukan Caves incident.⁸
15. The efforts of the Djab Wurrung Traditional Owners to protect sacred trees from injury or desecration as a result of the duplication of the Western Highway in Victoria also illustrates the disjointed nature of the interaction between state and Commonwealth indigenous cultural heritage laws in practice. In *Clark v Minister for the Environment* (2019) 274 FCR 99, the Djab Wurrung Traditional Owners sought judicial review of the Commonwealth Minister for the Environment's decision under the ATSIHP Act to not make a declaration to preserve and protect a specified area where five culturally significant trees were located. Robertson J held that the Minister for the Environment's decision to not make a declaration was erroneous because the Minister had oversimplified the statutory definitions and concepts of Aboriginal tradition and injury or desecration. In doing so, the Minister had 'a seriously flawed appreciation of the operation of the *Heritage Protection Act 2006* (Vic)'.⁹ The matter was remitted back to the Minister for reconsideration. The subsequent felling of a culturally significant 'directions tree' prompted the Australian Institute for the Conservation of Cultural Material Inc to issue a statement of concern on 13 November 2020.¹⁰
16. There are numerous other examples of the destruction of Aboriginal and Torres Strait Islander people's cultural heritage.
17. NELA endorses recommendation 6 of the Environmental Defenders Office submission to this Inquiry. That is, that Aboriginal and Torres Strait Islander people should lead a cross-jurisdictional review of all Indigenous cultural heritage laws across the Commonwealth, states and territories. Such a review would identify issues and opportunities concerning Australia's approach to cultural heritage regulation. The review would pave the way for fundamental reforms to the structure of our cultural heritage laws.

ToR (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

18. As noted above under ToR(f), the ATSIHP Act was designed as a last resort measure to protect significant Indigenous areas from injury or desecration where state or territory laws failed to do so. Specifically, under sections 9 and 10, the Minister can make

⁷ Environmental Defenders Office 'Submission to the Inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia' (August, 2020) (Submission 107).

⁸ Australian Broadcasting Corporation, 'Ley insists federal government was powerless to prevent caves destruction' (Radio National interview between Hamish Mcdonald and Sussan Ley, 11 September 2020) <<https://www.abc.net.au/radionational/programs/breakfast/ley-insists-federal-government-was-powerless/12653766>>.

⁹ *Clark v Minister for the Environment* (2019) 274 FCR 99 [202].

¹⁰ 'Statement by the Australian Institute for the Conservation of Cultural Material on the felling of the Djab Wurrung 'Directions' Tree' <<https://aiccm.org.au/wp-content/uploads/2020/11/Statement-by-the-Australian-Institute-for-the-Conservation-of-Cultural-Material-on-the-felling-of-the-Djab-Wurrung-'Directions-Tree.pdf>> 13 November 2020.

emergency and non-emergency declarations to protect an area. Declarations for objects can be made under section 12.

19. NELA notes that in practice, the ATSIHP Act is rarely used. According to the Department of Agriculture, Water and the Environment, 541 applications under the ATSIHP Act have been received since 1984. Of these, only seven have resulted in long-term declarations and at least 21 other types of declaration have also been made. Only two remain in place.¹¹ The fact that so few declarations have been made since the Act's commencement in 1984 indicates that the Act has been ineffective in achieving its purpose of heritage protection.
20. NELA sees four problems with the Act that make it ineffective, including broad ministerial discretion, the politicised nature of decisions making under the Act, the lack of clarity surrounding what constitutes 'effective protection' under section 13, and the deference to state and territory legislation. These are elaborated in turn.

The Minister has broad and unconfined discretion to make a declaration.

21. Under section 10, the Minister has a broad and unconfined discretion to make a declaration. The Act provides no guidance as to how the Minister should exercise this discretion and there is no requirement for the Minister to make a declaration, even when satisfied that an area is significant and at risk of injury or desecration. The Act only states that the Minister *may* make a declaration if satisfied of the criteria in section 10(1).
22. Furthermore, the Minister can take into account considerations that are not directly related to heritage protection under section 10(1)(d) ('non-heritage protection considerations'). These are primarily economic and social considerations. However, the Act provides no guidance or threshold as to how the Minister should weigh up these considerations against heritage protection considerations. The Act in effect allows the Minister to consider any matter they deem relevant and give those matters whatever weight they deem acceptable.
23. The Minister's unconfined and unguided discretion is problematic as it means the Minister can make decisions which may be influenced by non-heritage protection considerations and contrary to the Act's heritage protection purpose. For instance, the Act would allow the Minister to refuse to make a declaration even where they are satisfied that an area is of high significance and will likely be destroyed, and where competing considerations are minimal and short-term. Additionally, as the Minister is never required to make a declaration, the Act would be operating validly even if no declarations or few declarations are made (as is the case now). This illustrates that the Act is not fit for purpose.
24. Furthermore, the lack of guidance surrounding the consideration of social and economic factors is particularly concerning given that this Act is a last resort measure, and the Act will usually be dealing with contentious developments that have already been approved

¹¹ Department of Agriculture, Water and the Environment, Submission 23 to the Australian Parliament's 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 9.

at a state level. Thus, there will frequently be strong, countervailing social and economic considerations.

Decisions under the ATSIHP Act are highly political

25. Decisions under the ATSIHP Act are politicised due to the Minister's political status, unconfined ministerial discretion, unguided consideration of social and economic factors, and the requirement for the Minister to consult with the relevant state or territory government as part of the decision-making process (section 13). This is problematic and draws the focus of the decision away from heritage protection. For the Act to effectively operate as a last resort heritage protection measure, heritage protection considerations must be the central focus of the decision.

Lack of clarity surrounding what constitutes 'effective protection' under ATSIHP Act section 13

26. The vagueness of the term 'effective protection' in s 13 creates confusion and prevents the Act from providing consistent protection for areas and objects. Section 13(2) requires the Minister to consult with the relevant state or territory government to decide whether their laws provide 'effective protection' of the area. However, there is no definition for 'effective protection' in the Act. It is unclear how a state or territory law could be deemed to 'effectively protect' an area when that area has been denied protection under that law. This seems, then, to be a matter decided upon the Minister's discretion. The term 'effective protection' must be clarified.

State and territory legislation

27. Indigenous cultural heritage is mainly protected under state and territory legislation, although the strength of protection of First Nations' cultural heritage varies between jurisdictions. NELA notes that the Law Council of Australia's review of state and territory legislation in their submission to this Inquiry found that all jurisdictions have deficiencies in their regimes. Whilst some states such as South Australia, Victoria and Queensland have implemented statutory schemes that improve involvement for First Nations peoples' in recognising and protecting their cultural heritage, there is still a need for further improvements to ensure these laws are consistent with international standards under the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**).

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

28. Future legislation and frameworks should be proactive, protective and preventative, recognising that contemporary First Nationhood is living, changing and critically threatened. The single most important reform is exemplified in the Banjima submission to the present inquiry that calls for Traditional Owners to take a central and primary place in

the decision-making surrounding the reform and redrafting process as well as in the subsequently created statutory frameworks.¹²

29. In 2009, Australia endorsed the UNDRIP.¹³ While its status of national endorsement does not create legal rights or obligations, it represents the international customary law standard.¹⁴ With respect to heritage, the UNDRIP states that:

*Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains*¹⁵

30. The articles of the UNDRIP are extensions of well accepted and established human rights that have legal status in treaties such as the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights.¹⁶ The concepts under the UNDRIP must be regarded as politically, morally and legally relevant to Australian legislation.¹⁷

31. Article 11 of the UNDRIP is central to the present inquiry. It recognises the right of First Nation peoples to practice and maintain past, present and future manifestations of their cultural traditions and customs.

Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.

32. Heritage laws must eschew any 'frozen' concepts of heritage or culture. The Australian Law Reform Commission recognised this in 1982, stating that the dynamic nature of First Nations' customs post colonisation is neither surprising nor contributes to a diminished

¹² M Parker, 'Inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia Submission of Banjima Native Title Aboriginal Corporation' (Submission 89, Banjima Native Title Aboriginal Corporation, 2020) 6

¹³ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295*, available at: <https://www.refworld.org/docid/471355a82.html> [accessed 15 July 2020]

¹⁴ S Gbendazhi Barnabas 'The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law' (2007) 6, 2007 *International Human Rights Law Review* 242

¹⁵ United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) 12

¹⁶ United Nations Human Rights Council (UNHRC), Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), Study of the Expert Mechanism on the Rights of Indigenous Peoples - Free, Prior and Informed Consent: a human rights-based approach, A/HRC/39/62, 10 August 2018, para. 3.

¹⁷ Special Rapporteur James Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, UN Doc A/HRC/12/34, 15 July 2009, para.38

importance to those who practice them.¹⁸ Heritage legislation cannot remain rooted in Western anthropological and archeological concepts of heritage.

33. Article 11 also requires states to provide effective co-developed mechanisms of redress to protect cultural, intellectual, religious and spiritual property:

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken with-out their free, prior and informed consent or in violation of their laws, traditions and customs.

34. With the view to create *effective* mechanisms, NELA highlights two specific rights for First Nations peoples:

- a. The right to self-determination in respect of their political status, economic pursuits, social and cultural development
- b. The right to exercise FPIC.

35. The UNDRIP explicitly requires that these rights be recognised.¹⁹ Heritage legislation in Australia cannot merely provide consultation rights as FPIC includes concepts of affirmative agreement or concurrence.²⁰

36. First Nation heritage legislation should decentralise the decision-making processes from the Ministry. First Nation peoples are distinct political entities, not minor stakeholders or special interest groups. The devolution of power directly to First Nations and Traditional Owners is key to self-determination and would add credibility to decisions taken under heritage frameworks.

Recommendations

37. NELA recommends that any further reforms to Indigenous cultural heritage laws must be led by conducted in partnership with First Nations peoples. NELA recommends that indigenous cultural heritage laws should:

- a. Make First Nations the primary decision makers. NELA endorses the Environmental Defender's recommendation to this inquiry. Indigenous cultural heritage laws should vest ownership, management and control of protected cultural heritage with First Nations.
- b. Define indigenous cultural heritage according to First Nations' worldviews, including intangible cultural heritage.

¹⁸ Australian Law Reform Commission, *Aboriginal Customary Law: a General Regime for Recognition*, research paper (1982), 247

¹⁹ UNDRIP, above n 13, 3

²⁰ B Lindsay and H Jaireth 'Australian environmental democracy and the rule of law — thoughts from APEEL' (2016) October 2016 *Australian Environmental Review* 245, 245–246

- c. Provide Traditional Owners with access to country in order to protect their cultural heritage and maintain distinctive spiritual, cultural and material relationship with country and sea country.
38. NELA recommends implementing a rebuttable presumption in the ATSIHP Act in favour of making a declaration when the Minister is satisfied that an area is significant and at risk of injury or desecration (s 10(1)(b)). The proposed presumption may then be rebutted by non-heritage protection considerations, including social and economic considerations. This presumption would place a legislative limit on the Minister's discretion. It would also provide necessary guidance for the consideration of social and economic factors. It does this by creating a consistent threshold which such factors must overcome in order to outweigh heritage protection considerations. In doing so, it brings heritage protection back to the forefront of the decision.
 39. NELA recommends including further provisions guiding non-heritage protection considerations to operate alongside the presumption. Specifically, provisions requiring the Minister to consider principles of intergenerational equity, as well as how long competing social or economic benefits may last and the extent to which those benefits impact Australian communities. The Minister may use the report prepared under s 10(4) to guide their decision.
 40. NELA recommends that the phrase 'effective protection' in section 13 should be clarified and strengthened to ensure that the area object or objects are effectively protected, as verified by the Traditional Owners.

ToR (i) Opportunities to improve (I)ndigenous heritage protection through the *Environmental Protection and Biodiversity Conservation Act 1999*

41. The purpose of the *Environmental Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) is to "protect and manage" environmental sites that are considered to be of national environmental significance.
42. However, the Juukan mine assessment process shows how an inadequate understanding of Indigenous culture may result in a failure to protect the heritage significance of even a UNESCO listed site. This is not the first time that a cultural heritage site that is UNESCO listed has been destroyed. The loss of important cultural heritage value was also evident during the Jabiluka uranium mine assessment.
43. The approval of the destructive blasting and mining in the Juukan Gorge also highlights serious flaws in the environmental impact assessment process applied to this project. NELA is particularly concerned that Aboriginal people were given little opportunity to make effective comment on the environmental impact statements prior to the Commonwealth's approval of the proposed action.
44. We note the Interim Report of the Independent Review of the EPBC Act (**interim report**) conducted by Professor Graeme Samuel AC, identified that:

Indigenous Australians are seeking stronger national protection of their cultural heritage. The Aboriginal and Torres Strait Islander Heritage

*Protection Act 1984 (ATSIHP Act) provides last-minute intervention and does not work effectively with the development assessment and approval processes of the EPBC Act. The national level arrangements are unsatisfactory.*²¹

45. Professor Samuel also recommended a thorough review of current cultural heritage laws and consideration of the role of the EPBC Act in providing national-level protections. NELA is in full support of these recommendations.
46. Despite the Act being in operation for over two decades, there continues to be uncertainty about how the EPBC Act is implemented, particularly the environmental assessment process if a proposed action is deemed a controlled action. In addition, the Act does not address the valuable contributions by First Nations to manage their heritage sites.
47. In June 2020 the Prime Minister announced a ‘priority list of 15 major projects that are on the fast-track for approval’ and intended to cut approval times for major projects to 30 days.²² One of the 15 major projects includes ‘iron ore projects’ (expansion and new projects) in Western Australia.²³ NELA expresses concerns about whether the protection of Indigenous cultural heritage will be further impacted by measures that significantly reduce the statutory timeframes within which environmental assessments are conducted, given the need for extensive engagement with the Traditional Owners of First Nations’ cultural heritage.
48. NELA supports the introduction of strong national standards under the EPBC Act in the form of strategies, programs, standards and protocols, and regional plans. These national standards must be developed with the engagement of scientists, legal experts, environment, industry and employer groups, Indigenous Australians and the broader Australian public in partnership or co-design with government policymakers and regulators. The Australian National Audit Office should be responsible for auditing compliance with these national standards at all levels of government, with Commonwealth override should significant non-compliance be found.
49. NELA notes the emphasis placed on involvement by the Indigenous peoples’ in the assessment phase of proposed actions. Contributors to the Review highlighted that the EPBC Act should more actively facilitate Indigenous participation in decision-making processes. Specifically, contributors called for the normalisation of incorporating Aboriginal and Torres Strait Islander peoples’ knowledge in environmental management planning and environmental impact assessment through culturally appropriate engagement.²⁴

Recommendations

²¹ Graeme Samuel AC, *Interim Report of the Independent Review of the EPBC Act* (June 2020) 30

²² https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview2020/21/EnvironmentalApprovals

²³ <https://www.environment.gov.au/epbc/major-projects>

²⁴ Graeme Samuel, *Interim Report of the Independent Review of the EPBC Act* (June 2020) 36

50. NELA supports the recommendation made by the Law Council of Australia, that reforms to the EPBC Act should be pursued to improve the EPBC Act's role in protecting Indigenous cultural heritage, as part of a broader suite of Commonwealth legislation in this area, and its genuine, respectful engagement with Indigenous Australians' knowledge and expertise of environmental and heritage issues.
51. New Commonwealth legislation is warranted in addition to the EPBC Act to ensure that all sites with Indigenous cultural value are adequately protected. NELA is in full support of the recommendations made in the EPBC Act review interim report that the national level settings for Indigenous cultural heritage protection are in need of urgent comprehensive review.²⁵
52. The EPBC Act should require that Traditional Owners have the opportunity to be involved in proactively managing areas that have been listed as heritage places and that FPIC should be embedded in the Act.
53. In order to reflect community concern about the protection of Indigenous heritage sites, the severity of penalties for damage to protected Indigenous heritage sites should be increased.

²⁵ Ibid 30, 38