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Joint Standing Committee on Northern Australia

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Parliament House

CANBERRA

Canberra ACT 2600

By email: jscna@aph.gov.au

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Dear Committee

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

The Quandamooka People stand in solidarity with the Puutu Kunti Kurrama People and the Pinikura People. We are appalled in equal measure with the actions of the mining company Rio Tinto in deliberately misleading the native title holders and then destroying their heritage, as we are with the continued failure of successive Federal (and State) Governments who purport to protect cultural heritage with their legislation, but instead usurp the role of the true owners of that heritage in direct contravention of international human rights law.

Who benefits? Companies (For Rio Tinto in 2020, \$4.6 billion half year profit) and their shareholders (\$2.15 per share). Wealthy people, people with savings, people who have housing security, people with access to education, people who live longer. Who pays? Aboriginal people personally bear the brunt of that failure to uphold our basic human rights, it is a particularly heavy burden for our Elders. It contributes to the stress Aboriginal people around Australia experience. It contributes to the inequity reported on annually in the Closing the Gap targets. It continues the original dispossession. A cost paid by not as wealthy people, not as educated people, not so healthy, or safe people, the most incarcerated people on the planet. So much of

our culture has been taken, so much has been destroyed, it makes that which is left is all the more precious¹.

It survives, like we do. Bearing witness, waiting for long promised justice and equity.

International law, as ratified by Australia provides that Aboriginal Peoples have the right to protect cultural heritage, and it is for States to provide effective mechanisms to uphold and protect those rights. Instead the State (and State government) pays a small fortune to employees to preside over permitting the destruction of our cultural heritage. Sitting in capital cities, with their privileged access to education and power, being paid to look the other way, acting to disempower and diminish us, and to facilitate the ongoing colonial dispossession of our heritage.

Australia, as a signatory to the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention of the Elimination of all forms of the Discrimination, and (although much delayed) the Universal Declaration on the Rights of Indigenous Peoples must enact laws that uphold and protect our basic human rights, and restore our cultural heritage to its rightful owners.

QYAC's submission will address the following matters in the Committee's Terms of Reference:

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

(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;

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

¹ *Anderson v D-G of the Dept of Environment and Conservation* (2006) 144 LGERA 43; [2006] NSWLEC 12; *Anderson v D-G of the Dept of Environmental and Climate Change* (2008) 163 LGERA 400; 251 ALR 633; [2008] NSWCA 337

(i) opportunities to improve indigenous heritage protection through the Environment Protection and Biodiversity Conservation Act 1999;"

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

With respect to the above term of reference, QYAC notes that proponents, State Owned Corporations and agencies in Queensland are all unclear on the interaction between the *Aboriginal Cultural Heritage Act 2003 (Qld)* (**'Qld Act'**) and the *Native Title Act 1993 (Cth)*. This is despite orthodox constitutional law, and clear guidance in section 13(c) of the Qld Act, and section 13A of the *Acts Interpretation Act 1954 (Qld)*. Nothing in the Qld Act affects native title rights and interests in cultural heritage.

Section 223(1) of the *Native Title Act 1993 (Cth)* (**'NT Act'**) defines Native Title² as follows:

*"(1) The expression **native title** or **native title rights and interests** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:*

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia."

Once a Native Title Claim is determined, and it includes cultural heritage rights, only the Registered Native Title Body Corporate as authorised by the common law holders should be consulted on cultural heritage in their area. All previous acts, such as Cultural Heritage Surveys

² *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422 at [32]; 194 ALR 538; 77 ALJR 356 (12 December 2002); *Commonwealth v Yarmirr* [2001] HCA 56; 184 AJR 113; 208 CLR 1 at [7]; 75 ALJR 1582 (11 October 2001)

and or Management Plans, unless they are binding under the NT Act, should be null and void and no longer binding as the purported clearance and authority was not given by the appropriate people. DATSIP, the State Agency charged with regulatory responsibility of the Qld Act does not support that view.

Section 227 of the NT Act provides:

*“An act **affects** native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.”*

An act to take, destroy or remove Aboriginal objects or to similarly impact upon lands and waters, and/or to purportedly issue permits or consents to do so, are acts which would otherwise be wholly or partly inconsistent with the continued existence, enjoyment and exercise of native title rights, and are therefore acts affecting native title. It is a case-by-case proposition the degree to which an act affects native title rights and interests, and their existence, enjoyment or exercise.

The Federal Court (including the National Native Title Tribunal) should ensure that there is cheap effective access for Native title holders to the Court for mediating and publishing guidance on this issue. Until such cheap and effective practical administration which supports the enforcement of recognised native title rights, QYAC Elders and Board choose to utilise some of the mechanisms in the Qld Act to enhance the protection of their cultural heritage.

QYAC notes that any Qld Act process, such as Duty of Care Guidelines self assessment, Cultural Heritage Management Plans, and any clearances which rely upon them are of no force or effect against Native Title Holders with native title determinations regarding their rights with respect to cultural heritage. This should be clearly and consistently communicated to proponents and local government authorities by both State and Federal governments. There is no statement to this effect on the DATSIP website, and the enquiry form to the Register and Database tells proponents they can rely on the query when utilising the Duty of Care provisions of the Act. There is no disclaimer as to the inability to provide native title consent.

For freehold lands, there is even more confusion, despite the clear main purpose (section 4), guiding principles (section 5) and how the main purpose is to be achieved (Section 6) which purports to give the Aboriginal owners the primary role, and calls for respect for Aboriginal owners views.

For example, the Part 6 Cultural Heritage Surveys and Part 7 Cultural Heritage Management Plans, once registered, allow Quandamooka People access to quicker and cheaper justice. It is also cheaper for State Agencies, local government and proponents, however that does not preclude many misunderstanding that the selective use of the Qld Act, is at the election of QYAC, and does not extend to the use of the very unclear Duty of Care guidelines in the Qld Act.

Unfortunately, DATSIP, and the Registrar, as a matter of policy refuse Prescribed Body Corporate and Aboriginal Party requests to migrate their cultural heritage from the Database (section 38) to the Register (section 46), despite the purpose of the Register (section 47). The current policy is to not record cultural heritage information unless an expensive Part 6 Survey has been completed, and signed by the owner and or occupier of the land. Not surprisingly, there are not many places on the Register. This is due to the expense of Part 6 Surveys, and the unwillingness of owners of land to sign them, not to mention the extraordinary delay once those two hurdles have been overcome, by DATSIP to add them to the Register.

Self assessment against the Duty of Care Guidelines is the part of the Qld Act which is of most concern to QYAC. If a developer self-assesses that the project that they are undertaking is within categories 1-4, then Aboriginal People are not notified and therefore cannot provide advice nor make an informed decision on whether there will be an impact to Aboriginal cultural heritage.

No proponent has the expertise, and the Qld Act clearly intends that the Aboriginal owners must determine cultural heritage significance. QYAC who employ and engage senior Archaeologists with many years experience at the very top of their fields to work with Quandamooka People on articulating clearly and professionally cultural significance in accordance with the Part 6 Cultural

Heritage Study criteria regularly have non-qualified local government, State owned corporations and corporates call their expertise into question without any factual basis. QYAC has had a Local Government want to send their officer, with no expertise, to the field with the archaeologists and Elders so they could argue about significance. QYAC has also had a CEO with no archaeological or cultural heritage experience want to edit the findings of Surveys. It is highly disrespectful.

QYAC Board and Elders note respect, and trust are lacking in these interactions. Proponents assume if they are paying for a Study, they can query or refute significance, often without any professional training. Some are more disrespectful and infer that there is a lack of bona fides in the process which we can only conclude is projection.

QYAC believes the State has a duty of care to Aboriginal people exercising roles under the Qld Act. The Statute puts Aboriginal People into this statutory process with no funding, no support, and the State does little to support them, or protect them from parties with strong profit motives to downplay cultural heritage issues. There is no panel of lawyers, or archaeologists to assist, and once again Aboriginal People are effectively put into the position of underwriting the State's process of regulation of cultural heritage.

The Duty of Care guidelines are vague, and when combined with no power to enter land and inspect a breach of the Act turn the Qld Act into a toothless tiger. Without a clear statutory compliance power, the Qld Act is a sham and does not protect cultural heritage at all. You cannot prosecute if you cannot collect evidence. QYAC has had a situation where a recorded artefact could not be found after a disturbance and DATSIP sent an investigator who refused to inspect the property on the basis they had no power.

DATSIP conducted a review of the Qld Act last year, and released the Options Paper – Stage 1 Legislative Proposals on 16 January 2020, allowing only 10 days for Aboriginal people to respond. The Options Paper failed to deal with the above issues, repeatedly raised by Aboriginal people in their submissions. Only two of the 5 substantive issues were dealt with

legislatively, the rest left to policy development, choosing to leave Aboriginal People to the mercy of the department, and the view of the government of the day.

In 2014, a review of the Qld Act compliance³ was damning, out of 79 reported breaches there was only one prosecution. In 54 cases, no further action was taken. Only 6 were discontinued for lack of evidence, and 3 were considered within legislative exemptions.

(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;

International Human Rights Law

QYAC notes that it is the Federal Government who has the responsibility to enact domestic laws which uphold and protect the international human rights laws which they have ratified.

Particularly relevant are:

- (i) Universal Declaration of Human Rights – Article 27, and note Article 17(2);
- (ii) International Covenant on Economic Social and Cultural Rights – Article 15;
- (iii) International Convention on the Elimination of all forms of Racial Discrimination – Articles 5(e)(vi), and Article 6; and
- (iv) Universal Declaration on the Rights of Indigenous Peoples – Articles 8(1), 11(1), and 12 (2).

Australia was one of only four nations to vote against the adoption of the Declaration on the Rights of Indigenous Peoples ('DRIP')⁴ on 13 September 2007. On 3 April 2009, over a decade ago now, the Australian Government through Minister Macklin made a statement that supported and formally endorsed the DRIP, however Australia has not yet legislated to implement DRIP into domestic law.

³ Rowlands, M., and S. Ulm and J. Reid., 2014 "Compliance with Indigenous cultural heritage legislation in Queensland: Perceptions, realities and prospects." *Environmental and Planning Law Journal*, Vol 31 (5) pp. 329-351.

⁴ <http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx>

International law explicitly recognises the power imbalance between States, and Indigenous Peoples. In purporting to exercise sovereignty, States accept there are proper limits on that power, and agree to act beneficially to protect and uphold the fundamental human rights of all people in the manner ratified. It is equitable in nature, a beneficial relationship of trust.

Given Australia has ratified each of these laws, proposals to uphold Aboriginal Peoples' human rights to:

- a) Identify and define their tangible and intangible cultural heritage;
- b) Articulate how it should be maintained and protected;
- c) Have access to effective mechanisms to protect their cultural heritage at law; and
- d) Enjoy their cultural heritage in situ, and be present and teach their children cultural heritage in situ;

can have the full support of the Committee. QYAC asks the Committee to make public findings as to why Aboriginal Peoples' fundamental human rights with respect to their cultural heritage have not yet been enacted in domestic law by the Federal Government.

QYAC notes that the United Nations Sustainable Development Goals require governments to incorporate inclusive decision-making and safeguards that will protect cultural heritage. This can be seen in the following Goals and Targets⁵:

Goal	Target
Goal 11 - Make cities and human settlements inclusive, safe, resilient and sustainable	Target 11.4 - Strengthen efforts to protect and safeguard the world's cultural and natural heritage

⁵ United Nations (2017) *Sustainable Development Goals*. Available at: <https://sustainabledevelopment.un.org/sdgs>

<p>Goal 16 - Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels</p>	<p>Target 16.7 - Ensure responsive, inclusive, participatory and representative decision-making at all levels</p>
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QYAC notes that the Australian Government has a responsibility to report on its implementation of the United Nations Sustainable Development Goals, by race. In Australia’s most recent voluntary report, the Australian Government committed to ensuring that all goals which are specifically of relevance to Aboriginal Peoples that they will adopt an approach consistent with the human rights of Aboriginal People and report on measures which promote their being included in all decision making⁶.

(i) opportunities to improve indigenous heritage protection through the Environment Protection and Biodiversity Conservation Act 1999;”

QYAC submitted the following recommendations for improvement to the EPBC to the Hawke review:

- **That the objects of the EPBC Act be amended to include a new object:**

“to give effect to relevant international agreements and, in particular, to provide for special measures, in accordance with those agreements, to address the threats to the environment

Definitions: ***relevant international agreement*** means the following:

- (a) *UN Declaration on the Rights of Indigenous Peoples;*
- (b) *2030 Agenda for Sustainable Development;*
- (c) *the Ramsar Convention;*
- (d) *the Biodiversity Convention;*

⁶https://sustainabledevelopment.un.org/content/documents/20470VNR_final_approved_version.pdf

- (e) *the Desertification Convention;*
- (f) *the Bonn Convention;*
- (g) *CAMBA;*
- (h) *JAMBA;*
- (i) *ROKAMBA;*
- (j) *the Climate Change Convention;*
- (k) *any other international convention to which Australia is a party and that is:*

- (i) *relevant to the use and management of the Environment; and*
- (ii) *prescribed by the regulations for the purposes of this paragraph”*

- **That the EPBC Act ensure that Aboriginal People give their free, prior and informed consent to any decisions made which would impact upon their cultural and human rights.**

QYAC notes that Article 19 of the DRIP⁷ provides:

“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

Conclusion

The relationship of trust and respect which is needed for effective cultural heritage measures which are consistent with international human rights law cannot flourish in a legislative context

⁷ <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

which allows those driven by profit to self assess, or in systems where governments wield power to facilitate cultural heritage destruction.

It cannot flourish in a system which pits Aboriginal Peoples' against the might of the State and multinationals without resources. It cannot flourish while people with no cultural heritage, or technical expertise continue to think 'they know best' and are only 'trying to help'.

Aboriginal People do not need that 'help'. They have the responsibility, the law and custom which mandates they act to protect their cultural heritage.

It is an internationally recognised human right. It is a well recognised issue of power imbalance. This is the issue the Committee must deal with. It cannot be avoided.

Aboriginal People understand that the desire of the State to facilitate all development, even at the cost of the worlds oldest living culture, is our true opponent.

If it was inappropriate to destroy Juukan Gorge, what else is inappropriate? To allow decades old cultural heritage plans negotiated between an international multinational and an impoverished group of Elders which allows destruction without any survey or supervision to destroy many thousands of hectares of cultural heritage of the Quandamooka People? Even after the finding of a Federal Court that there is a more representative group?

To allow people to grade through burials, to allow them to plough a field scattering teeth across ancestral lands, when in both instances they were clearly advised that there were burials in that precise location. Is that appropriate?

What is too much to lose? We know, and we have confidence that all Aboriginal Peoples in Australia have the skills, expertise, grace, dignity, law and custom to administer their rights properly.

QYAC thanks you for the opportunity to make a submission, we would be very happy to answer any further questions the Committee has,

Yours sincerely,

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Native Title and Cultural Heritage Manager