



Joint Standing Committee on Northern Australia
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**For the inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the
Pilbara region of Western Australia
Answers to questions taken on notice
by the National Environmental Law Association Ltd ACN 008 657 761 (NELA)
at a public hearing in Canberra on 2 March 2021**

1. What does NELA think genuine and respectful engagement with Aboriginal and Torres Strait Islander peoples is (in practice)?

NELA considers it fundamental that First Nations peoples, knowledges, and law concerning cultural heritage are centred in decision-making. A starting point which centres First Nations rather than one of ‘engagement’ alone is important here.

NELA suggests that international best practice ought to be reviewed in a co-designed policy development process and adopted as a binding and enforceable national environmental standard under proposed amendments to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

NELA’s views on the EPBC Act amendments currently proposed have been submitted to the Senate Environment and Communications Legislation Committee’s inquiry on the [Environment Protection and Biodiversity Conservation Amendment \(Standards and Assurance\) Bill 2021](#).

There are numerous international protocols for developing fair partnerships with Indigenous peoples, including those that expressly protect the right to free prior and informed consent. For example, under the Convention on Biological Diversity, several guidelines have been adopted including:

- The Mo’otz kuxtal Voluntary Guidelines for the development of mechanisms, legislation, or other appropriate initiatives to ensure the “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”, depending on national circumstances, of indigenous peoples and local communities for accessing their knowledge, innovations and practices, for

fair and equitable sharing of benefits arising from the use of their knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge.¹

- The Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities.²
- The Akwé: Kon Voluntary Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and lands and waters traditionally occupied or used by indigenous and local communities.³ The Guidelines (2004) are accessible at <https://www.cbd.int/traditional/guidelines.shtml>

Additional protocols can be accessed on the websites of several United Nations organisations:

- <https://en.unesco.org/indigenous-peoples/un-policies>
- <https://www.un.org/development/desa/indigenouspeoples/resources/2017/06/policies/>.

The Samuel Review of the EPBC Act also provides guidance about what genuine and respectful engagement with Aboriginal and Torres Strait Islander peoples is. The review report suggested that co-designed policy and policy implementation would lead to improved outcomes for Aboriginal and Torres Strait Islanders, including where:

- flexible engagement approaches outside of traditional written and face-to-face consultations, including a flexible approach to how feedback is received
- imbalances of power (including perceived imbalances) are acknowledged and addressed
- the value of Indigenous knowledge across a diverse range of issues is acknowledged, beyond what has traditionally been determined as issues of interest or significance for Aboriginal and Torres Strait Islander peoples.

2. Should there be an absolute veto power for Aboriginal and Torres Strait Islander peoples?

NELA considers that an interim veto power would be appropriate for the protection of Aboriginal and Torres Strait Islander peoples' cultural heritage, where that cultural heritage is otherwise at risk, as that would be consistent with the customary international law norm of 'free prior and informed consent' that Indigenous peoples have under the United Nations Declaration on the

¹ See Convention on Biological Diversity, Ad Hoc Open-ended Inter-sessional Working Group on Article 8(j) and related provisions of the Convention on Biological Diversity, Eleventh Meeting, Montreal, Canada, 20-22 November 2019, UN Doc CBD/WG8J/11/4 <<https://www.cbd.int/doc/c/5025/6cfe/e73ff11af5bf45330f1cbf0c/wg8j-11-04-en.pdf>>.

² Secretariat of the Convention on Biological Diversity (2011) *Tkarihwaí:ri. Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biological Diversity* <<https://www.cbd.int/traditional/code/ethicalconduct-brochure-en.pdf>> .

³ Secretariat of the Convention on Biological Diversity (2004) *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities* <<https://www.cbd.int/traditional/guidelines.shtml>>

Rights of Indigenous Peoples (UNDRIP) in relation to actions that affect their property and cultural heritage. An interim veto power is consistent the rights of Indigenous peoples not to be subjected to destruction of their culture⁴ and the right to maintain, protect and develop manifestations of their culture including archeological and historical sites.⁵

NELA notes that Principle A7(d) of Mo'otz kuxtal Voluntary Guidelines (2016)⁶, published by the Secretariat of the Convention on Biological Diversity, includes the right not to grant approval:

Consent or approval is the agreement of the indigenous peoples and local communities who are holders of traditional knowledge or the competent authorities of those indigenous peoples and local communities, as appropriate, to grant access to their traditional knowledge to a potential user and includes the right not to grant consent or approval

In relation to 'free prior and informed consent', Principle 8 of the Mo'otz kuxtal Voluntary Guidelines refers to:

...a continual process of building mutually beneficial, ongoing arrangements between users and holders of traditional knowledge of indigenous peoples and local communities, in order to build trust, good relations, mutual understanding, intercultural spaces, knowledge exchanges, create new knowledge and reconciliation...

NELA notes, however, that from time to time there may be difficulty with obtaining consensus from traditional owners as to whether a veto power should be exercised. We also note that there are occasionally challenges in identifying traditional owners who have authority to speak for the affected Country and its heritage values. NELA submits that any veto power should be accompanied by a corresponding dispute resolution framework that includes culturally appropriate mediation.

3. Does NELA consider that there could be circumstances where an overriding economic or social interest provides a justification for the minister to not protect Indigenous heritage?

NELA suggests that cultural heritage legislation should provide for the negotiated resolution of disputes with Aboriginal and Torres Strait Islander traditional owners and that the rights of free, prior and informed consent must be respected in accordance with international legal norms. NELA does not consider that a unilateral overriding of traditional owners' wishes can be justified as outcomes consistent with international law could be negotiated.

NELA notes the proposed EPBC Act reforms that provide that the Minister for the Environment may override the proposed new national environmental standards under the EPBC Act if they consider it is in the national interest to do so. The proposed veto power for the Minister under the EPBC Act is analogous to the Minister's decision-making power in relation to Aboriginal and Torres Strait Islander cultural heritage referred to by the Inquiry committee during the hearing.

⁴ See United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), GA Res 61/295, UN GAOR, 61st session 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007), Art 8.

⁵ UNDRIP, above n 4, Art 11.

⁶ Available at <https://www.cbd.int/doc/publications/8j-cbd-mootz-kuxtal-en.pdf>

NELA suggests that proposals to include a Ministerial power to override policy must be treated with extreme caution given that Australia ought to comply with international legal norms, standards and protocols concerning respect for the rights of Indigenous peoples such as the right to self-determination, right of free prior and informed consent, and the continuation of cultural practices and protection of sites and artefacts. NELA notes that unintended biases, histories and cultural differences make it difficult for an individual to appropriately consider and weigh the breadth of cultural, social and economic factors in a decision. Additionally, any Ministerial power to override policy is incongruous with the right to public participation and the need to establish conflict management procedures under the Aarhus Convention.⁷ Any ministerial power not to protect Indigenous heritage should be subject to judicial review.

4. Should the Indigenous groups have their agency taken away and should we protect the environment regardless of their perspective?

NELA does not agree with the framing and assumptions of this question. The suggestion that the agency of any persons should be removed is inherently paternalistic. The continuing rights of Indigenous peoples specifically, including in relation to the custodianship of Country and continuation of culture are well-established and included in the United Nations Declaration on the Rights of Indigenous Peoples.

5. Does NELA have a position about whether Aboriginal rights or 'the environment' take primacy?

As with Question 4, with respect, NELA does not agree with the assumptions of this question. NELA notes that Question 5 is unhelpful as it suggests that environmental concerns require the managing of trade-offs with Indigenous rights. This narrative perpetuates a false nature/culture dichotomy. Indigenous laws, knowledges and worldviews are premised on relational and reciprocal associations between the human and non-human which make up Country.⁸ This relationship is founded on 'becoming family with Country' of love of the Land and in turn being loved by the land.⁹ Acting in accordance with Indigenous law requires the fulfilment of obligations to protect Country.

Similarly, NELA would like to draw attention to the findings of the Global Assessment of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) – the largest most comprehensive global review of the state of knowledge concerning biodiversity and ecosystem services. The IPBES Global Assessment reveals the loss of biodiversity and ecosystem function is much less pronounced on lands managed by Indigenous peoples and local communities. It also recognises the significant role of Indigenous knowledge, governance

⁷ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001). Australia has yet not ratified this important European Convention although it could apply to do so.

⁸ See for e.g. Anne Poelina, Sandra Wooltorton, Sandra Harben, Len Collard, Pierre Horwitz, and David Palmer. 'Feeling and hearing country' *Philosophy, Activism, Nature* 15 (2020): 6–15; Chapter 2 'Kaldowinyeri' in Irene Watson, *Aboriginal peoples, colonialism and international law: raw law*. Routledge, 2014.

⁹ Poelina et al., above n 8.

systems and culturally-specific worldviews which adopt a stewardship approach to managing natural systems.¹⁰

6. Questions regarding the Native Title Act

NELA respectfully declines to answer questions regarding the Native Title Act. We note submissions to this Inquiry made by Land Councils including the Central Land Council and Kimberley Land Council refer to the Native Title Act.

Submitted by Dr Hanna Jaireth, Dr Michelle Lim, Ms Gabrielle Ho and Ms Nadja Zimmermann for the NELA Board.

31 March 2021

¹⁰ IPBES *Report of the Plenary of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services on the work of its seventh session: Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* IPBES/7/10/Add.1 (2019); <https://ipbes.net/global-assessment>.