

**INVITATION to a FORUM on**  
**AUSTRALIA'S INDIGENOUS HERITAGE**  
**THURSDAY 15 OCTOBER 2020**



The First Nations Peoples Concerns Committee of Quakers Australia, and the Committee on Racial Equality (ACT) invite you to join a FORUM on the theme AUSTRALIA'S INDIGENOUS HERITAGE. It will be held *via zoom* on THURSDAY 15 OCTOBER 2020 at 8pm Eastern Daylight Saving Time, 7.30pm Central Time, 7pm Queensland Time, 6.30pm NT Time and 5pm Western Australian and Kuala Lumpur Time.

Forum Speakers

- Dave Johnston (ANU Archaeologist, from Queensland Indigenous background, Founder of Indigenous Australian Archaeologists Association).
- Shane Mortimer (Ngambri Elder Mingku, Canberra, who is campaigning with Canberra residents to preserve the Ainslie volcanic site where an ancient petroglyph has been found).
- Professor Dr Jakelin Troy (Ngarigu Woman from Snowy Mountains, Director of Aboriginal and Torres Strait Islander Research at University of Sydney).
- Pastor Ray Minniecon (Aboriginal pastor in Sydney, with connections to the Kabi Kabi and Gurang-Gurang nations and Ambryn Island)
- Dr Muhamad Hassan Ahmad (Assistant Professor, Faculty of Law, International Islamic University Malaysia, and has a long association with the ANU).

### Q and A

After the contributions from the speakers, there will be an opportunity for questions and comments from other participants. The meeting is expected to last no longer than two hours.

### Attending the Forum

If you wish to attend the Forum, please contact Gedda Fortey at [gtfortey@gmail.com](mailto:gtfortey@gmail.com) with a Cc to Shane Mortimer at [shanejmortimer@gmail.com](mailto:shanejmortimer@gmail.com) by Monday 12 October to receive the details of the *zoom link*.

### Background

There have been ongoing examples of Indigenous heritage sites being damaged or disturbed by development, urbanisation and adverse use of land. This has occurred sometimes as a result of deliberate government policies, sometimes by insensitive and ignorant intrusion by corporations and councils, and sometimes by accident. There is a strong sense of exploitation and despair among First People for the loss of significant sites and disruption of cultural practices.

The Forum arises from the view that Indigenous heritage is a vital part of Australia's heritage and needs to be valued more fully. Policies need to reflect this respect for what Indigenous people have given to our shared heritage.

### Further details of the speakers

#### Archaeologist Dave Johnston

*"Australia's Indigenous Heritage belongs to all of us. It provides the foundations that can define us as a nation of people who are proud of who we are and of this beautiful land. It is Australia's greatest unrealised asset".* Conserving the nation's Aboriginal heritage is Dave's passion. As a consultant archeologist for 27 years he has worked on more than 2,000 heritage projects. In 2014, he was awarded the Sharon Sullivan National Heritage award for his outstanding contribution to the Indigenous heritage environment and his continuing influence. He is the director of the Australian Indigenous Archeological Association. His contributions have been recognised internationally. He was involved in the development of a code of ethics for the World Archaeological Congress.

<https://www.anu.edu.au/alumni/our-alumni/spotlight/david-johnston>

#### Ngambri Elder Guumaal Ngambri Mingku aka Shane Mortimer

Shane established the international legal precedent on Allodial Title of ALL first people. He is fighting to protect a men's business site at the foothills of Mount Ainslie (Canberra) which is about to be cleared for a residential development. The developers and the ACT Government were aware as early as 2013 that the site's rocky outcrops are significant to local First People. Neither the developers nor the Government ever consulted First People, elders or groups about the site. Shane can trace his Aboriginal Ancestry to the woman who first led Scottish settler James Ainslie to Mount Ainslie in 1826.

<https://www.abc.net.au/news/2020-06-22/tennis-court-apartments-to-be-built-over-sacred-aboriginal-site/12372466>

#### Professor Dr Jakelin Troy

Jakelin Troy is a Ngarigu woman from the Snowy Mountains of New South Wales, and Director of Aboriginal and Torres Strait Islander Research at The University of Sydney. Professor Troy's research and academic interests focus on languages, linguistics, archeology, anthropology and visual arts. Professor Troy is Editor in Chief of [ab-Original: Journal of Indigenous Studies and First Nations and First Peoples' Cultures](http://www.historyofemotions.org.au/about-the-centre/researchers/jakelin-troy/)

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#### Pastor Ray Minniecon

Pastor Minniecon is an Aboriginal pastor with connections to the Kabi Kabi and Gurang-Gurang Nations in Queensland and Ambryn Island. He lives in Sydney and has dedicated his life to supporting members of the Stolen Generations of First People who were forcibly removed from their families by government agencies and church missions in an attempt to assimilate them into the culture of white Australia.

<https://www.theforgivenessproject.com/stories/ray-minniecon/>

#### Dr Muhamad Hassan Ahmad

He is an Assistant Professor at the Civil Law Department, Ahmad Ibrahim Kuliyah (Faculty) of Laws, International Islamic University Malaysia. He holds Bachelor of Law (LLB), Master of Comparative Laws (MCL) and Doctor of Philosophy (PhD) in Law. He has special interest in Public International Law; Private International Law; Islamic Banking & Finance, Alternative Dispute Resolution; Comparative Law, Jurisprudence and Online Legal Education. He is an author of three books and a number of research articles published in various academic journals. He has a long association with Australia, including a Visiting Fellowship (2016-2018) at the ANU College of Arts & Social Sciences, Australian National University.

<https://www.iium.edu.my/staff/show/8116>

# **FORUM ON AUSTRALIA'S INDIGENOUS HERITAGE**

**SUSTAINABLE DEVELOPMENT AND PROTECTING THE  
INDIGENOUS HERITAGE SITES IN AUSTRALIA:  
STRIKING A BALANCE**

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**ORGANISER: THE FIRST NATIONS PEOPLES CONCERNS COMMITTEE OF  
QUAKERS AUSTRALIA  
&  
THE COMMITTEE ON RACIAL EQUALITY (ACT)**

**15 OCTOBER 2020 (THURSDAY)**

# TYPES OF HERITAGE IN AUSTRALIA

- In Australia, significant heritage places and sites are identified and grouped into the following categories:
  - World Heritage
  - National Heritage
  - **Indigenous Heritage**
  - Commonwealth Heritage
  - Underwater cultural heritage
  - Overseas Places of Historic Significance to Australia

(Source: <https://www.environment.gov.au/heritage/about>)



# INDIGENOUS HERITAGE

- Indigenous heritage includes places that hold great meaning and significance to Indigenous People (Aboriginal and Torres Strait Islander) such as:
  - ❖ Places associated with dreaming stories depicting the laws of the land and how people should behave;
  - ❖ Places that are associated with their spirituality;
  - ❖ Places where other cultures came into contact with Indigenous People; and
  - ❖ Places that are significant for more contemporary uses.

(Source: <https://www.environment.gov.au/heritage/about/indigenous-heritage>)

# PROTECTING AND MANAGING INDIGENOUS HERITAGE PLACES

- At the National Level, the Environment Minister can make a declaration to protect an area, object or class of objects from a threat of injury or desecration on the application of an Aboriginal person or group of persons under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.
- By virtue of the Environment Protection and Biodiversity Conservation Act 1999, the Commonwealth is responsible for protecting Indigenous heritage places that are nationally or internationally significant.
- At the State Level, the Governments of various States and Territories are responsible for the protection of Australia's Indigenous heritage places.



<b>State</b>	<b>Register</b>	<b>Maintained by</b>
<b>ACT</b>	Heritage Register	Department of Territory and Municipal Services
<b>NSW</b>	State Heritage Register	Heritage Branch Department of Planning
<b>NT</b>	Register of Sacred Sites	Aboriginal Areas Protection Authority
<b>QLD</b>	Aboriginal and Torres Strait Islander Cultural Heritage Register	Department of Natural Resources and Water
<b>SA</b>	Register of Aboriginal Sites and Objects	Department of the Premier and Cabinet
<b>TAS</b>		Tasmanian Aboriginal Heritage Office Department of Environment, Parks, Heritage and the Arts
<b>VIC</b>	Victorian Aboriginal Heritage Register	Aboriginal Affairs Victoria Department of Planning and Community Development
<b>WA</b>	Register of Aboriginal Sites	Department of Indigenous Affairs

(Source: <https://www.environment.gov.au/heritage/about/indigenous-heritage>)

(Source: <https://www.environment.gov.au/heritage/laws/indigenous/protection-under-state-and-territory-laws>)



# APPLICABLE LAWS IN MANAGING AND PROTECTING INDIGENOUS HERITAGE PLACES

- At the National Level, following two legislations are directly applicable in managing and protecting Indigenous Heritage:
  - The Aboriginal and Torres Strait Islander Heritage Protection Act 1984
  - The Environment Protection and Biodiversity Conservation Act 1999
- Other Commonwealth laws regulate aspects of Indigenous Heritage include:
  - The Protection of Movable Cultural Heritage Act 1986
  - The Aboriginal Land Rights (Northern Territory) Act 1976
  - The Native Title Act 1993
- At the State Level, all States and Territories have respective laws that protect various types of Indigenous heritage.

<b>Jurisdiction</b>	<b>Principal Indigenous Heritage Legislation</b>
<b>Australian Capital Territory</b>	Heritage Act 2004 Heritage Objects Act 1991
<b>New South Wales</b>	Heritage Act 1977 National Parks and Wildlife Amendment (Aboriginal Ownership) Act 1996
<b>Northern Territory</b>	Aboriginal Sacred Sites Act 1989 Heritage Conservation Act 1991
<b>Queensland</b>	Aboriginal Cultural Heritage Act 2003 Torres Strait Islander Cultural Heritage Act 2003
<b>South Australia</b>	Aboriginal Heritage Act 1988
<b>Tasmania</b>	Aboriginal Relics Act 1975
<b>Victoria</b>	Aboriginal Heritage Act 2006 Heritage Act 1994
<b>Western Australia</b>	Aboriginal Heritage Act 1972

(Source: <https://www.environment.gov.au/heritage/laws/indigenous>)

(Source: <https://www.environment.gov.au/heritage/laws/indigenous/protection-under-state-and-territory-laws>)

# JUUKAN GEORGE INCIDENT

- In May 2020, two 46000-year-old caves or rock-shelters, at Juukan Gorge in the Pilbara Region of Western Australia, were blown up by Rio Tinto - one of the world's largest metals and mining corporation producing iron ore, copper, diamonds, gold and uranium.
- The heritage site has strong and significant historical, cultural and spiritual importance to the land owners, i.e. the Puutu Kunti Kurrama and Pinikura (PKKP) peoples of Pilbara Region.
- Some archeologists considered the site as “Home to the Dawn of Humanity” and, therefore, these two caves at Juukan Gorge can be even categorised as the “World Heritage”.



# A SECOND OF SILENCE





# ISSUES AND CHALLENGES

## LOOPHOLES IN THE EXISTING LAWS

- Some commentators begin to question whether or not the intent of the Aboriginal Heritage Act 1972 is actually being followed, and carried out.
- According to the Guardian's Full Story investigative documentary, in practice, the destruction of heritage sites has always been regarded as business as usual.
- What makes matters worse is that, under Section 18 of the Aboriginal Heritage Act 1972, only the mining companies can apply to destroy a heritage site and, on the other hand, the "Owners" do not have the right to object an approval of the mining operation on any heritage site, and appeal over any decision that the minister makes.

## CONT.

- As of 2002, the Aboriginal Cultural Materials Committee had processed 957 applications since the Aboriginal Heritage Act 1972 came into force and 702 were recommended for approval.
- During 1 January 2008 - 14 June 2013, a further 646 applications were made under Section 18 of the Aboriginal Heritage Act 1972 and only one was refused by the Minister.
- This trend indicates that Section 18 opens the floodgate of the destruction of Aboriginal Heritage sites rather than protecting them.

(Source: Maddison Barnsby, "The Effectiveness of the Aboriginal Heritage Act 1972", A Parliamentary Internship Report Prepared For the Hon Robin Chapple MLC, [December, 2013], available at:

[https://www.parliament.wa.gov.au/publications/tailedpapers.nsf/displaypaper/3911255c8081f93d62dd059c48257c8c0009f3cd/\\$file/tp-1255.pdf](https://www.parliament.wa.gov.au/publications/tailedpapers.nsf/displaypaper/3911255c8081f93d62dd059c48257c8c0009f3cd/$file/tp-1255.pdf)).



## CONT.

- Although the Environment Minister can intervene and make a declaration to protect a heritage site under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, in practice, it is too technical and hard for the First Nation people to get it done.
- Legal permissions to destroy Aboriginal Heritage sites are procurable through the existing laws and thus most of these destructions are done legally.
- Legally may be right, but what about “**moral**”!!!

# LAND USE AGREEMENTS

- Any mining company that requires using the land usually enters into agreements with the “Owners”.
- According to the Guardian’s Full Story investigative documentary, normally, there is a huge power imbalance between the giant mining companies and the “Owners”.
- There are also standard clauses in such agreements prohibiting the “Owners” from publically objecting to a mining operation on any heritage site.
- Legally, contracts of this nature can be voidable and void at the same time.



## CONT.

- Due to the power imbalance between the parties, the traces of undue influence as well as some degree of coercion can be seen in this type of contract.
- These sorts of contracts also prohibit people from enjoying their legally available rights or freedom of information, opinion and expression under other Federal and State laws.
- Therefore, it is highly recommendable to the “Owners” to review all their land use agreements in order to rectify these mistakes and illegalities.
- If the regime of “unfair contract terms” were to be used in Australia, most of these clauses could be considered as “*void ab initio*” (void from the beginning) due to their unfairness to other parties, undue influence and illegality.

# CONFLICT OF INTEREST

- Normally, when the application for the development or mining is made, the relevant government authority will instruct the applicant company to make a cultural assessment.
- Then, the company will hire or appoint the assessor(s) to prepare and submit a cultural assessment report.
- Usually, the report will be in favour of the company.
- Is not it a crystal clear conflict of interest?
- In Juukan Gorge incident, according to the Guardian's Full Story investigative documentary: "PKKP said after the archeological dig in 2014 that was paid for by Rio Tinto, they said the significant of the site to them known to Rio".
- Parliamentary enquiry also later found that Rio was aware that people did not consent to it.
- Even when the report is not in favour, it can be ignored and the company may carry on with business as usual.



# REMEDIAL MEASURES:

## THE WESTERN AUSTRALIAN GOVERNMENT

- According to the Guardian's Full Story investigative documentary, the Western Australian Government is working towards strengthening the laws to review the Aboriginal Heritage Act 1972 and had prepared a draft.
- The new draft law will give the First Nation People a sit at decision making.
- Now, heritage belongs to the "Owners" (before it belonged to the State).
- The decision making processes are based on principles of agreement making and negotiation (in fact, this was the case before too and the result will be more or less the same if the issue of power imbalance is not addressed properly).
- There is limited right to appeal.
- What is that limitation again for?

## REMEDIAL MEASURES: RIO TINTO

- Simon Thompson, chairman of Rio Tinto, said “... We will implement important new measures and governance to ensure we do not repeat what happened at Juukan Gorge and we will continue our work to rebuild trust with the PKKP people”.
- “The board has decided that J-S Jacques, chief executive; Chris Salisbury, chief executive of Iron Ore; and Simone Niven, Group Executive, Corporate Relations, will not receive a performance-related bonus for 2020 under the company’s Short-Term Incentive Plan (STIP).
- In addition, J-S’s 2016 Long-Term Incentive Plan (LTIP) award, that is due to vest in the first half of 2021, will be reduced by £1 million (subject to vesting)”.

(Source: <https://www.riotinto.com/en/news/releases/2020/Rio-Tinto-publishes-board-review-of-cultural-heritage-management>)



## CONT.

- By mutual agreement, J-S Jacques will step down from his role as an executive director and Chief Executive of the Group.
- Chris Salisbury will step down as Chief Executive, Iron Ore with immediate effect and will leave Rio Tinto on 31 December 2020.
- Simone Niven will step down as Group Executive, Corporate Relations, and will leave the Group on 31 December 2020 after completing an orderly transition of her responsibilities.

(Source: <https://www.riotinto.com/news/releases/2020/Rio-Tinto-Executive-Committee-changes>)

## CONT.

- Is it a form of punishment for the wrong that they have committed or a monetary reward?
- Are these measures amount to sufficient deterrence not to commit it again by anyone in the future anywhere in Australia?
- “Cultural terrorism”: Mandatory long term imprisonments should be considered to have adequate deterrence.
- Above all and the most important issue to be addressed here is that:
- “What about the restoration or compensation for the caves that have been destroyed?”
- “Who (a court of law or the company) will decide how much would be the compensation?”

# THE WAY FORWARD

- **Who holds the beneficial title to the land?**
- The decision making power on how a particular land is to be developed and mined should not be at the hands of the “Ministers” as it should be vested to the “Owners of the Land”.
- Accordingly, the following recommendations are proposed in making decision on the development and mining of lands belonged to the “Owners” across Australia.
  1. There should be “Aboriginal Heritage Councils” (across Australia at National Level, State Level, Territory Level, Regional Level, Group of People Level) which only consist of recognised and well known “Elders of First Nation People”.



## CONT.

2. The Developer or the Company should file the application to use the land for their operations to the respective Minister.
3. Then, the Minister should call upon the Aboriginal Heritage Council(s) of the effected Region and also the Groups of First Nation People to conduct the “Cultural Assessment” in the intended area of operation.
4. Then, the respective Aboriginal Heritage Council(s) need to form a “Cultural Assessment Committee” to survey the intended area and prepare the report whether there is any heritage site or not.



## CONT.

5. The “Cultural Assessment Committee” shall have the following diverse and inclusive representations:
- a) Members Representing the Aboriginal Heritage Council(s) of the effected Group(s) of First Nation People;
  - b) Members Representing the Aboriginal Heritage Councils at the National Level, State Level, Territory Level, and Regional Level;
  - c) Members Representing the Environment Minister at both Federal Level and State Level;
  - d) Members Representing the World Heritage Committee (Australia is a Party to the UN Convention for the Protection of the World Cultural and Natural Heritage);

## CONT.

- e) Members Representing the Australian Heritage Council;
- f) Members Representing the National Heritage Authorities;
- g) Members Representing the Indigenous Heritage Authorities;
- h) Members Representing the Commonwealth Heritage Authorities;
- i) Members Representing the Underwater Cultural Heritage Authorities;
- j) Members Representing the National Native Title Council; and
- k) Independent Archeological Experts.

The “Cultural Assessment Committee” may heir any number of experts, technicians and skilled labours to ensure the proper implementation of its duties.



## CONT.

6. After finalising the “Cultural Assessment Report”, the “Cultural Assessment Committee” shall present it to all the effected “Owners” or “Groups of First Nation People” in the intended area of operation in an Assembly which includes all members of the respective Group(s) of First Nation People.
7. If the “Cultural Assessment Report” finds that **there is any heritage site** in the intended area of operation, the decision **shall be** to protect and preserve the heritage site rather than destroying it. (Logically, indeed, even the current generation of “Owners” or “First Nation Peoples” have no right to consent to the destruction of heritage sites as these are not only belonged to them but also to their ancestors in the past as well as the next generation in the future, and to the whole mankind if it is a “World Heritage”).)



## CONT.

8. Then, the identified heritage site should be listed immediately in one or more of the following list depending on its category:
- a) World Heritage;
  - b) National Heritage;
  - c) Indigenous Heritage;
  - d) Commonwealth Heritage; and
  - e) Underwater Cultural Heritage.

## CONT.

9. If the “Cultural Assessment Report” finds that there is no heritage site in the intended area of operation, then, the “Assembly of Owners” or “Assembly of Groups of First Nation People” in the intended area of operation may decide unanimously, without any interference or influence by any other parties, whether to approve or not to approve, in whole or in part of the proposed development and mining by the Developer or the Company.

## CONT.

10. If the “Assembly of Owners” or “Assembly of Groups of First Nation People” in the intended area of operation decide unanimously to approve the proposed development and mining, at this level, the Developer or the Company may enter into the “Land Use Agreement” with the all the respective effected “Owners” or “Groups of First Nation People” for that particular project only. (This is to balance the bargaining power between the Company and the “Owners” case by case basic and also to make sure that the benefits are equally and fairly distributed among all the beneficiaries of the land rather than a hand full of the “Owners” taking advantage over it.)



## CONT.

11. Then, both parties to the “Land Use Agreement”, i.e., the “Owners” or “Groups of First Nation People” and the Developer or the Company shall inform the Minister of their agreements and registered it with the relevant authorities for the further operations on the intended land.
12. All the “Land Use Agreements” across Australia between the “Owners” or “Groups of First Nation People” and the Developer or the Company shall be published to the public for the purpose of transparency. (If there is nothing to hide, the transparency should not be a problem at all.)

## CONT.

13. The costs of all these processes shall be borne by the Developer or the Company which proposes to use the land for their development or mining operations regardless of whether the proposal is approved or disproved, in whole or in part, by the respective effected “Owners” or “Groups of First Nation People”.
14. The amount of all costs shall be deposited to the Minister and, then, the Minister shall disburse it to the Aboriginal Heritage Council(s) of the effected Region to form a “Cultural Assessment Committee”; conduct the “Cultural Assessment” in the intended area of operation; and to carry out all other the processes accordingly.

## CONT.

- Meanwhile, the government should consider putting a moratorium on all the previously approved projects to rectify again whether there is any heritage site in the areas where the projects would operate by following the abovementioned processes.
- Undeniably, the need for the development is necessary and it needs to be done in the most sustainable way known to mankind.
- By taking into consideration of interests of all the stakeholders of the past, present and future, the above recommendations are humbly proposed: “to do the right thing, in the right way”.



**THANK YOU SO MUCH  
FOR  
YOUR KIND ATTENTION**