

**Submission to the Joint Standing Committee on Northern Australia inquiring  
into the destruction of 46,000-year-old caves at Juukan Gorge**

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Thank you for the invitation to make a submission to this important inquiry.

Not long after it was reported in the media that the caves in Juukan Gorge had been destroyed by Rio Tinto, I published a short article that I reproduce in its entirety below. In this submission I look to supplement the views in that article, maintaining a focus on the ability of Indigenous landowners to exercise their native title rights and interests to protect their intertwined environmental and cultural heritage in 21<sup>st</sup> century Australia.

By way of introductory background I have undertaken research on land rights and native title matters for over 40 years, with a focus on the social justice imperatives to return land to its rightful owners; and then, more specifically, on the potential of that land to be deployed by Indigenous landowners for their livelihood benefit. Much of my research has focused on remote and very remote Australia, the geographic jurisdictions where almost all Indigenous titled lands by spatial area have been legally recognised.

Prior to colonization, the Australian landscape was modified anthropogenically by fire and non-anthropogenically by wildfire, the climate and the biosphere.

Settler colonialism resulted in a very different interaction with the landscape whether by industrial scale agriculture or mineral extraction. New forms of technology have allowed quite extraordinary modifications to the environment be it by industrial scale land clearing for agriculture and open cut mining; or by using explosives as at Juukan Gorge.

The Indigenous and settler colonial ontologies about the landscape were, and in many contexts still are, fundamentally at odds: a simplified dichotomy interprets the former as viewing the landscape everywhere as sentient and to be nurtured to deliver livelihood and wellbeing. For those who maintain traditions and customs, the landscape is imbued with Ancestral power. Settler economies see the land and environment as a factor of production, to be exploited, sometimes sustainably, sometimes destructively, for economic gain.

Since the late 1970s, Indigenous people have been able to claim back their ancestral lands, if unalienated, by demonstrating continuity of spiritual connection to the landscape and rights to forage, to extract renewable resources for both use and exchange. Under native title law since 1993, successful determination requires the acceptance whether by the court or by consent that the claimant group maintains continuity of traditions and customs and physical connection to areas being claimed. Continuity of tradition requires an ongoing custodial relationship with a sacred geography that is inevitably negatively impacted by extractive industries.

In the last 50 years Australia has become increasingly dependent on exports of minerals: in 1963–64 Australia's commodity exports were dominated by wool, wheat and beef; today it is iron ore, coal and natural gas.<sup>1</sup> This transformation of economic circumstances has seen two developments.

First, a symbiotic relationship between the Australian state and major extractive corporations has become increasingly apparent: both are wedded to a model to maximise economic growth and profits based on extraction that is, by definition, more greatly valued than the natural environment. The mining industry seeks unimpeded access to crown-owned sub-surface minerals; after the Australian state (the 'crown') issues the licence to extract, it exercises limited regulatory authority over mining activity unless there is a breach or complaint.

Second, the mining and petroleum industries and their peak bodies have become increasingly influential in Australian politics and policy making. This influence, in relation to Indigenous affairs, began in the 1970s in the royal commission deliberations over the vesting of land and mineral rights to Aboriginal people in the Northern Territory. The Australian Mining Industry Council, as it was then known, vehemently opposed the vesting of mineral rights with Aboriginal landowners. Consequently, a second-best regime that included strong right of consent provisions and the payment of the equivalents of statutory mining royalties to Aboriginal interests was established under the *Aboriginal Land Rights (Northern Territory Act) 1976 (Comm)*. Similar strong consent provisions, but with a proponent right of appeal and with more limited royalty rights, were included in the South Australian *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* and the *Maralinga Tjarutja Land Rights Act 1984*. The later year marked a turning point when a concerted campaign by the WA Chamber of Mines saw a proposal for land rights in that State abandoned; and then the Hawke Government's commitment to national land rights was abandoned. In the aftermath of the Mabo High Court judgment the mining industry lobbied vigorously and successfully for no right of consent provisions to be included in the *Native Title Act 1993*. Native title holders, even when holding 'exclusive' possession, only having procedural right to negotiate agreements. Similarly, after the Wik High Court judgment the mining industry was influentially successful in ensuring that status quo extractive access to pastoral lands (where non-exclusive native title could be determined) was maintained.

In recent years we have seen the mining industry flex its political power to see super profit taxation proposals diminished or reversed; and we have seen self-interested and carefully orchestrated climate change scepticism ensure that fossil fuel extraction is prolonged and the moves to renewable energy slowed. Some of these shifts are rehearsed in more detail in a recent essay *The Coal Curse* by Judith Brett.<sup>2</sup>

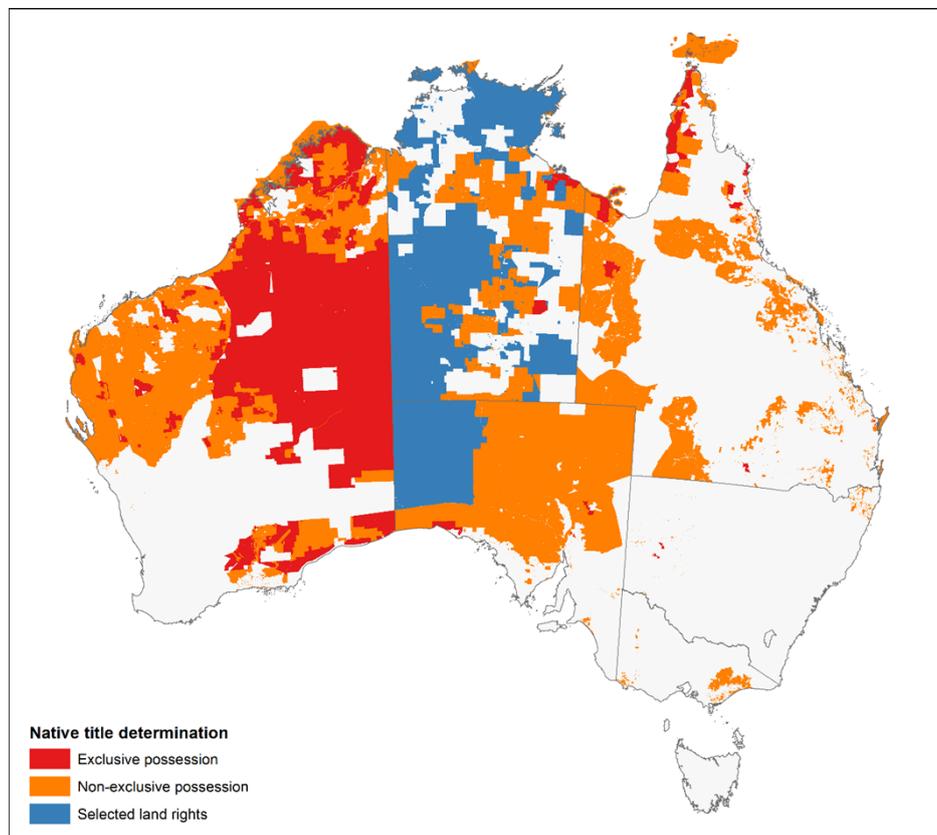
Simultaneously as mining industry influence has grown, we have seen two countervailing trends.

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<sup>1</sup> see <https://www.dfat.gov.au/sites/default/files/fifty-years-of-Australias-trade.pdf>) accessed 21 July 2020.

<sup>2</sup> Judith Brett 2020. 'The Coal Curse: Resources, Climate and Australia's Future', *Quarterly Essay Issue 78*, Melbourne: Black Inc. Also see <https://overland.org.au/2020/07/how-to-cure-australia-from-its-case-of-dutch-disease/> accessed 24 July 2020.

The first is the growth in the spatial coverage of Indigenous titled lands. In Figure 1 I simplify this to three categories, land vested with traditional owners in the NT and SA under land rights laws; and successful native title determinations in two categories, exclusive and non-exclusive possession.



**Figure 1. Main areas of Indigenous-titled lands, May 2020. Map created by Dr Francis Markham, the Australian National University, from various sources.**

As at May 2020, 51 per cent of Australia was under these three forms of legally recognised land rights and native title coverage.<sup>3</sup> While there has been slow spatial expansion of the Indigenous estate over the last four decades, insufficient attention has been paid to its content: while under land rights law traditional owners have a degree of control over extractive interests, under native title law landowners cannot stop extractive multinationals operating on their lands and so are often forced into making land use agreements. Forms of free prior and informed consent only exist in the NT and SA, so a four-tier system (SA and NT and then exclusive and non-exclusive possession) currently operating nationally alongside highly variable State and Territory mining, environment and heritage protection laws.

<sup>3</sup> *Aboriginal Land Rights (Northern Territory Act) 1976*, 638,176 sq kms; *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981*, 102,348 sq kms; *Maralinga Tjarutja Land Rights Act 1984*, 105,950 sq kms; Native Title exclusive possession, 1,012,648 sq kms; and Native Title non-exclusive possession, 2,091,654 sq kms: total 3,950,777 sq kms. Small parcels of Indigenous titled lands in SA, Qld, NSW, Vic and Tas and properties purchased for Indigenous peoples by the Indigenous Land and Sea Corporation and other similar funds are not included as they tend to provide even weaker rights with regards to mining and oil and gas extraction.

The second trend is the rapid growth of Indigenous-titled lands that have been incorporated into the Australian National Reserve System, especially since the establishment in 1997 of the Indigenous Protected Areas program. Most Indigenous land held under land rights in the NT and SA or under exclusive native title was unalienated crown land. Consequently, much was remote and deemed to have little commercial value, hence its availability for claim. Paradoxically, these lands today have relatively high environmental values and so have been welcome additions to the Australian conservation estate: at present 76 Indigenous Protected Areas constitute 44% of the National Reserve, with 12 new IPAs currently in formation likely to increase this proportion to 54% in 2020: nearly one million sq. kms of Indigenous-titled land (including jointly managed national parks) are a part of the National Reserve System.

Such reservation offers a layer of protection against unimpeded mineral extraction, which is still influenced in large measure by the nature of the underlying title. However, as the recently released interim report of the independent review of the EPBC Act headed by Graeme Samuel has highlighted, this important Commonwealth statute has fundamentally failed to protect the environmental and cultural heritage interests of Indigenous Australians.<sup>4</sup> Indeed the Samuel Review with its refreshing independence and integrity is scathing in its critique, noting that Indigenous Australians are entitled to expect stronger national level protection of their cultural heritage; and that there is a culture of tokenism and symbolism that is resulting in Indigenous knowledge and views being marginalised. This is especially problematic in my view as over half of the National Reserve System is already under Indigenous management, inevitably in accord with Indigenous landowner aspirations. The EPBC Act needs to reflect this reality; instead as Samuel summarises, the EPBC Act has failed to fulfil its objectives as they relate to Indigenous Australians.

A similar observation has been made by eminent retired bureaucrat Bill Gray in his submission to this inquiry on the operations of the Commonwealth's Aboriginal and Torres Strait Islander Heritage Protection Act that has not been properly deployed in recent years to protect heritage sites of high cultural significance.<sup>5</sup> Indeed the Samuel review calls for the entire suite of national levels laws that protect Indigenous cultural heritage in Australia to be comprehensively, and I would add independently, reviewed. I would also add that an important element in that suite is the Native Title Act that 27 years after its passage is in urgent need of a comprehensive review that includes right of consent provisions, an issue I return to below.

These inadequate protections have been very clearly and tragically demonstrated by the desecration and destruction of the caves in Juukan Gorge by Rio Tinto, despite direct appeals to both the Minister for the Environment and the Minister for Indigenous Australians that fell on deaf ears and elicited no response. This desecration has at least precipitated this inquiry.

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<sup>4</sup> Graeme Samuel (chair) 2020. *Independent Review of the EPBC Act: Interim Report*. Department of Agriculture, Water and the Environment, Canberra.

<sup>5</sup> See Bill Gray submission no.10 to this Inquiry available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Northern\\_Australia/CavesatJuukanGorge/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/CavesatJuukanGorge/Submissions) accessed 27 July 2020.

In making these observations, I am not suggesting that multinational corporations like Rio Tinto and BHP and others have operated outside the letter of the law. What I am saying is that they have been far too influential in shaping the law to suit their instrumental extractive profit-seeking interests: that is the nature of extractive capitalism, continual expansion of exploration and extraction beyond existing frontiers and then accumulation by dispossession. The growing influence of the mining industry is hardly surprising given the current dependence of Australia on mineral exports and the reality that the windfall profits of mining corporations can only be protected by ensuring that the state does not tax these extraordinarily profitable enterprises properly. The beneficiaries are primarily the foreign shareholders of these corporations<sup>6</sup>; Indigenous landowners, as an often impoverished, small and marginalised interest group, have limited influence especially in native title contexts where the law offers limited leverage in any negotiations. At all jurisdictional levels in Australia there is a degree of state capture by industry.

The Samuel Review, that is yet to be completed, has been very timely for highlighting some fundamental structural tensions in Australian society and economy in relation to ecological sustainable development, the environment and, of especial interest here, Indigenous interests. But it says a great deal about embedded path dependency and the entrenched power of vested interests that even before it was completed the Minerals Council of Australia was releasing its own roadmap for economic recovery.<sup>7</sup> Exploiting national anxiety about the economic recession resulting from the COVID-19 pandemic this road map is calling for reducing project approval delays while maintaining environmental protections. In relation to Indigenous Australians it only considers opportunities generated within the extraction framework, not outside it.<sup>8</sup>

The Morrison government is similarly cheery picking elements of the Samuel Review that suit its political agenda, highlighting a commitment to fast track major projects with an emphasis according to the Minister for the Environment on unlocking job creating projects with ‘green tape’ to be slashed as soon as possible.<sup>9</sup> Some seasoned commentators with bureaucratic and research experience have already cautioned against such undue haste before there has been a public response to the interim report and before the review process

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<sup>6</sup> A 2016 Treasury Working Paper found that the Australian ownership share of major mining projects was just 14%. See [http://web.archive.org/web/20170502025748/https://treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2016/Foreign%20investment%20into%20Australia/Downloads/PDF/TWP\\_201601\\_Foreign\\_Investment.ashx](http://web.archive.org/web/20170502025748/https://treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2016/Foreign%20investment%20into%20Australia/Downloads/PDF/TWP_201601_Foreign_Investment.ashx)

<sup>7</sup> See <https://minerals.org.au/sites/default/files/200525%20MCA%20immediate%20priorities%20to%20accelerate%20economic%20recovery.pdf> accessed 24 July 2020.

<sup>8</sup> Similarly, the Government-appointed National COVID-19 Coordination Commission is dominated by individuals with close connections to the oil and gas industries and has unsurprisingly called for massive governments subsidies of the gas industry as an economic recovery strategy.

<sup>9</sup> See <https://www.theaustralian.com.au/nation/environmental-laws-dated-and-inefficient-review-finds/news-story/01cee9cba52361afe89303ca10f22cec> accessed 31 July 2020.

has been completed.<sup>10</sup> At the same time in relation to Indigenous concerns, some of the culture of tokenism and symbolism identified in the Samuel Report is being played out as Minister Ley proposes to ‘commence a national engagement process for modernising the protection of Indigenous cultural heritage’<sup>11</sup> whatever that might mean. There is no admission that the EPBC Act and the overarching legal framework for protecting Indigenous places and landscapes of environmental and cultural significance are not fit for purpose.

The strengthening and/or effective deployment of existing environmental and heritage protection laws seem to me to be palliative instruments: they require Indigenous stakeholders to make special appeals for protective measures—asking that something is not done to their environmental and cultural assets, when facing threats from powerful corporate interests sanctioned by the state.

What are needed instead are preventative instruments that would empower Indigenous landowners with free prior and informed consent rights as have existed for some time now in the NT and SA under existing laws. Indeed, there is evidence in these jurisdictions that the very undertaking of consultation for consent undertaken by relatively well-resourced and politically astute land councils delivers a degree of protection for sacred sites and areas of environmental significance. In the NT there is a statutory requirement to consult with, and gain the consent of, traditional landowners before any commercial development occurs on Aboriginal-owned land; and this ensures a degree of protection in concert with complementary NT sacred sites protection laws overseen by the statutory Aboriginal Areas Protection Authority. Australia as a nation needs to learn from such domestic best-practice.

I want to end with one observation and two recommendations for the Committee’s consideration.

My observation is that the Native Title Act, a little like the EPBC Act, seems somewhat frozen in the past mainly because this suits corporate developmental interests. But it is not fit for contemporary purpose especially as so much Indigenous titled land with high environmental and cultural values is incorporated into the National Reserve System. There are ongoing incremental efforts, mainly overseen by the bureaucracy responding to party partisan prerogatives, to amend the Native Title Act. There is currently a Bill before the parliament for amendments, that I have vigorously opposed in my submission to a Senate inquiry, that represents reform as a trade-off between competing interests, as if Indigenous landowners are just another interest group in Australian society.<sup>12</sup> This trade-off sees native title potentially recognised over more and more land, but with less and less content—with dilution of content being represented as essential to provide extractive investors lower

<sup>10</sup> See <https://theconversation.com/environment-minister-sussan-ley-is-in-a-tearing-hurry-to-embrace-nature-law-reform-and-thats-a-worry-141697y> accessed 24 July 2020 and <https://www.theguardian.com/commentisfree/2020/jul/21/the-magic-of-the-market-wont-help-the-environment-unless-government-also-takes-responsibility> accessed 24 July 2020.

<sup>11</sup> See <https://minister.awe.gov.au/ley/media-releases/reform-australias-environment-laws> accessed 24 July 2020.

<sup>12</sup> See Jon Altman, submission no. 5 to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Legislation Amendment Bill 2019, available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/NativeTitle/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NativeTitle/Submissions) accessed 27 July 2020.

transaction costs and greater certainty. It is this sort of trade-off that sees native title holders with little bargaining leverage being forced to sign off on risky agreements that results in debacles like the destruction at Juukan Gorge. In the Final Report of the Aboriginal Land Rights Commission in April 1974, Mr Justice Woodward stated: 'I believe that to deny Aborigines the right to prevent mining on their land is to deny the reality of their land rights'.<sup>13</sup> In my view this astute observation has as much, if not more, relevance today as it did 46 years ago.

My **first recommendation** is that immediate and urgent consideration be given to the equitable inclusion of free prior and informed consent rights in the Native Title Act to accord with what is already available to Aboriginal landowners in the NT and SA. Such inclusion would accord with articles in the United Nations Declaration on the Rights of Indigenous Peoples. Such empowering reform of native title law was unfortunately not explicitly included in the terms of reference announced just on seven years ago for the Australian Law Reform Commission's review of the Native Title Act 1993.

My **second and linked recommendation** is to support the Samuel Review recommendation that an independent and comprehensive review is undertaken of the suite of national level laws that protect Indigenous heritage in Australia with such a review being inclusive of native title and land rights laws. A review should also consider the role that an independent compliance and enforcement regulator might play in ensuring Indigenous landowner interests are properly considered so that the Australian nation avoids repeating the wanton destruction of 46,000 year old heritage sites as occurred at Juukan Gorge in May 2020—a stark reminder of the current limitations of native title law.

My opinion piece referred to in introduction is attached below.

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<sup>13</sup> A.E. Woodward 1974. *Aboriginal Land Rights Commission; Second Report April 1974*, Canberra: Australian Government Publishing Service, p. 108.

# THE NATIVE TITLE ACT SUPPORTS MINERAL EXTRACTION AND HERITAGE DESTRUCTION



A 1.43 million tonne blast takes place at BHP's Mt Whaleback Mine today. Picture by Michael Wilson

## **ARENA ONLINE**

**JON ALTMAN**

**16 JUN 2020**

The recent Queen's Birthday holiday seemed like an opportune occasion to reflect on the widespread media commentary on the destruction with explosives of the Juukan Gorge Aboriginal habitation sites in the Pilbara.

Almost all the commentary to date has focused on two issues. First, the disrespect of mining giant Rio Tinto in ignoring the material and spiritual heritage values of these sites, based on the concerted representations made by their native title holders as well as an archaeological survey in 2014 that provided a dating of original occupation to 46,000 years before the present. The company's excuse for its action was a breakdown of cross-cultural communications in agreement implementation with the Puutu Kunti Kurrama and Pinikura (PKKP) people, the recognised holders of native title over these places of global significance.

Second, commentary has highlighted the utter inadequacy of the *Aboriginal Heritage Act 1972* (WA) from a native title perspective and especially its section 18 that allows the destruction of a heritage site, in this case after ‘salvage and store’ remedies were implemented, with the approval of the WA minister for Aboriginal affairs, who is also the heritage minister. The governmental response is that this dated statute is currently being reformed.

In all the coverage of this act of desecration there is a troubling absence of any recognition that such behaviour is a product of our settler-colonial national culture and politics, not just Rio Tinto’s corporate culture. Nor is there recognition that the site has already been modified by another form of mining: salvage archaeology. Owing to the imminent threat of destruction, the material culture content was moved elsewhere, and the site was dated with sophisticated Western technology. Sadly, such a ‘salvage’ approach is the modus operandi in hundreds of places in Western Australia.

There are two higher-order issues that have been totally overlooked as debate has raged over how Rio Tinto’s wanton destruction could be legal under Commonwealth and state laws. The first is the operations of the Commonwealth *Native Title Act*. The second is the direct relationship between the coffers of the state and the extraction of minerals owned by the Crown that is now conferred on Commonwealth, state and territory governments.

In 1993 the *Native Title Act*, the statutory outcome of eighteen months of highly politicised interest-group bickering after the *Mabo* High Court judgment, was passed. It quite intentionally refused to confer free, prior and informed consent rights over mineral extraction—a right of veto—onto native title groups. This was despite the existence of such a right in the earlier *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), Gough Whitlam’s imperfect land-rights framework enacted by Malcolm Fraser’s government. Instead, in native title’s future acts regime, a proponent has the right to explore for and extract minerals subject to negotiating an agreement with those who have a native title determination or are registered claimants.

In 2009, the Rudd government belatedly endorsed the UN Declaration on the Rights of Indigenous Peoples, which explicitly refers to the need for free, prior and informed consent to be granted by Indigenous landowners before any development can occur on their land. In 2011, when opposition leader Tony Abbott (just awarded the nation’s highest award, the Companion of Australia, by the Queen’s representative) tabled legislation in the Australian parliament aiming to provide such free, prior and informed consent rights to Aboriginal owners of Wild Rivers in north Queensland.

But from 2013, when Abbott became prime minister, such sentiment quickly dissipated. Indeed, from then to the present, conservative governments have sought to dilute the already weak future acts regime in the name of ‘national development’ and ‘economic growth’. Complex legal and economic arguments have been made that so-called ‘transaction costs’ need to be lowered to allow less administratively cumbersome, and quicker, extraction of minerals on native title lands.

Through legal claims and consent determinations more and more of the continent has come under Indigenous title. At present native title exclusive possession has been positively determined over one million square kilometres, with non-exclusive (or shared) possession determined over another two million square kilometres. Native title to date covers 39 per cent of Australia. Additionally, earlier land rights in the Northern Territory and South Australia have seen 800,000 square kilometres, or 10 per cent, of Australia vested in inalienable Aboriginal freehold title. Overall, about half of terrestrial Australia is under some form of Indigenous title.

As spatial coverage has expanded—unexpectedly, following socially just judicial decisions and evolving jurisprudence—governmental and corporate attempts to empty native title and land rights laws of content have rapidly escalated. While the law vests rights of natural resource use with native title holders, these are limited to non-commercial, domestic purposes. But valid commercial interests, such as Rio Tinto’s in the Pilbara, always prevail over native title rights and interests.

It is not just corporate interests that benefit and profit from mineral extraction and the inevitable destruction of the natural environment and Aboriginal sacred geography that this entails. As the owners of sub-surface minerals, governments benefit directly from the receipt of royalties and other payments to state coffers—in return, they issue the licences for corporations to operate almost *carte blanche*.

In Western Australia, Australia’s most mineral-dependent state, the current minister for Aboriginal affairs, Ben Wyatt, is also the treasurer and the deputy premier. There is a clear structural tension between cultural heritage protection and state revenue raising. (I say structural intentionally to bypass the additional complication of Wyatt’s indigeneity and family links to the Pilbara.) This tension is replicated everywhere in Australia except to a lesser extent in the Northern Territory.

I want to end with two broader observations.

As the nation debates constitutional recognition, perhaps it is important that advocates for ‘the Voice’ reignite demands for effective land rights as a social justice imperative. Currently, inadequate native title arrangements

are allowing the destruction of Indigenous material and spiritual heritage and eroding forms of Indigenous self-determination and limited sovereignty.

Second, the late historian Patrick Wolfe argued that the Australian settler-colonial formation is premised on displacing Indigenous people from the land to access it for exploitation. Today, the extraction of minerals from native title lands remains an enduring, arguably escalating, characteristic of the late-capitalist settler-colonial society, despite native title law. Marxist geographer David Harvey terms this process capitalist accumulation by dispossession; for those with recently recognised native title, this process is, sadly, accumulation by re-dispossession.

Voluntarily improved corporate behaviour and reformed heritage laws will assist in the protection of Indigenous cultural heritage. But a fundamental restructuring of native title law to include a right of veto is far more important. So is the breaking of the direct nexus between mining and government revenues that invariably results in states operating as brokers for mining corporations rather than as impartial arbiters. Strong consent provisions may not provide a complete solution to the regulatory heritage protection and corporate moral failures we have just witnessed at Juukan Gorge. However, such provisions would legally empower holders of native title to control what happens on their land—in this particular case, in landowner, national and global interests.