



2 August 2021

The Hon Warren Entsch MP
Chair
Joint Standing Committee on Northern Australia
Parliament of Australia

By email: jscna@aph.gov.au

Dear Mr Entsch

Joint Standing Committee on Northern Australia inquiry into matters relating to Juukan Gorge

Thank you for the opportunity for the MCA to further outline the minerals industry's actions to embed lessons for industry from the tragedy of the caves at Juukan Gorge at the 6 July 2021 hearing of the Joint Standing Committee on Northern Australia (the committee).

Further information on matters raised at the hearing are provided with this letter and Appendices 1-3. A response to the additional Questions on Notice is provided in Appendix 4.

The minerals industry has listened

The minerals industry has followed the committee's important work closely. Industry has also heard directly from some Traditional Owners and communities about industry relationships – what has worked well, what has not and their visions for working together in the future.

Endorsed by the MCA Board, the new [Minerals Industry Statement on First Nations Partnerships \(Appendix 1\)](#) confirms that the sector is committed to, and acting, to be a better partner.

Companies are acting in response to Juukan Gorge

MCA member companies are taking action to embed lessons from the tragedy at Juukan Gorge. Actions taken are specific to company circumstances. Among others, these actions include:

- Reviewing existing section 18 permits under the *Aboriginal Heritage Act 1972 (WA)*, and other permits and approvals
- Adapting mine plans and operating arrangements, where needed
- Undertaking internal and/or independent reviews of cultural heritage protection processes to identify and address risks
- Strengthening cultural heritage protection processes, including standards and requirements
- Trialling new ways of engagement, such as new heritage advisory committees, complementing existing engagement forums
- Accelerating initiatives to demonstrate respect for Traditional Owners
- Bringing in specialist expertise to support heritage protection, Traditional Owner engagement and broader systems and processes.

A multi-year plan to embed lessons across the sector

The MCA committed to develop a national industry plan to embed lessons from the tragedy at Juukan Gorge across the sector in its August 2020 submission to this inquiry. It is informed by this inquiry, direct engagement with Aboriginal and Torres Strait Islander people and organisations, national and global research and other inputs.

Work is led by a committee of MCA member company executives and reports to the MCA Board. The work program focuses on four areas: supporting stronger heritage protection laws and systems, increasing industry transparency and accountability, improving land use agreements, including supporting a more equitable, stable and practical native title regime and further developing industry capability, systems and engagement.

Appendix 2 highlights actions under the plan to date. The MCA website also hosts a list of actions.

UN Declaration on the Rights of Indigenous Peoples in the Australian context

The Australian Government recognises UNDRIP as informing 'the way governments engage with and protect the rights of Indigenous peoples.'¹ The minerals industry recognises and supports UNDRIP as a framework to inform its engagement, decision-making and processes.

UNDRIP includes the principle of free, prior and informed consent. The Productivity Commission's 2020 *Resources Sector Regulation Study Report* considers this principle, including its evolution, different views and international considerations.²

- In Australia, the MCA understands FPIC as evident in the right for Traditional Owners to make agreements with parties about how resources developments can proceed. The minerals industry pursues FPIC as genuine and good faith engagement aiming to achieve consent in the form of a land use agreement that sets out how the parties will work together to maintain the consent over the life a project.

Industry is committed to working to achieve and maintain FPIC, recognising application is influenced by cultural and community-specific contexts. Furthermore, as mines may span generations, each its own perspectives, there is a joint responsibility to engage in an ongoing process over time.

- In addition to requirements under land rights and native title regimes, project assessment and approval processes under legislation apply high rigour surrounding the impacts, benefits and views of Traditional Owners and community members regarding proposed land-based developments.

Through the MCA, the minerals industry is reviewing its application of FPIC, drawing on the work of this committee, the Productivity Commission and other sources, including recent passage of Bill C-15 [*An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples*](#) by the Canadian Parliament. The Canadian Government described FPIC 'as a way of working together to establish a consensus through dialogue and other measures enabling indigenous people to meaningfully influence decision-making.'³

MCA member companies will report on site-level application of FPIC through the Towards Sustainable Mining (TSM) system.⁴ TSM will support companies to consistently assess, verify and report performance against defined good practice indicators. Further information on TSM is provided in Appendix 3.

TSM will be phased in as an expectation of MCA membership. Full reporting will commence in 2025 with MCA members encouraged and supported to voluntarily report as soon as possible.

Recommendations for committee consideration

The MCA appreciates the opportunity to contribute further recommendations for consideration.

¹ Australian Government, [Right to self-determination](#), Attorney-General's Department, viewed 26 July 2021

² Australian Government, [Resources Sector Regulation Study Report](#), Productivity Commission, 2020, p. 327-332.

³ Canada, [Hansard](#), Debates, vol. 150, 2021.

⁴ T. Constable (Chief Executive Officer), [Australian minerals industry takes accountability to the next level](#), Minerals Council of Australia, Media release, 3 March 2021.

In regards to heritage protection, the MCA recommends the committee:

- Support the Australian Government pathway set out to modernise heritage legislation, noting the importance of a process that is co-designed with First Nations and major land users.
- Encourage the Australian Government to use the Australian Heritage Strategy five-year refresh currently underway to develop a national blueprint for collaboration and improvement. The strategy's 11 objectives include to further develop heritage partnerships and to focus protection efforts on Indigenous heritage.⁵ Its refresh is an opportunity to better involve the private sector, including the minerals industry, in actions to support heritage recognition, protection and management.
- Encourage the Australian Government to continue to focus on ensuring nationally and globally important Indigenous heritage is recognised on the National Heritage Register.
- Encourage the Australian Government to take practical measures to support transparent and consistent *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* administration. These include increasing the involvement of the Minister for Indigenous Australians and the National Indigenous Australians Agency in assessment processes, maintaining an online register summarising the status of applications, publishing guidance and establishing clear timeframes for decisions.
- Encourage the Australian Government to maintain increased funding to support timely ATSIHP Act administration, noting increases in the 2020-21 and 2021-21 Budgets
- Encourage initiatives to promote greater appreciation, respect and understanding for Indigenous tangible and intangible heritage.
- While this inquiry is focused on heritage protection, the MCA notes the importance of a stable, practical and equitable native title regime. Industry will contribute to the Social Justice Commissioner's forthcoming review of native title regime operation.
- In advance of this review, the MCA recommends the following measures to support equal partnerships common priorities across the life of a mining projects:
- Support increased government funding and support for PBCs, noting an additional \$36.7 million in funding over four years allocated in the 2021-22 Federal Budget. For about a decade, the MCA has consistently advocated for increased government funding for PBCs to establish operational foundations.
- Recommend the the National Native Title Tribunal review and provide a non-attributable overview of the types and reasons for applications referred for determination
- Consider how measures in the *Native Title Legislation Amendment Act 2021* will support transparency, including the new list of section 31 agreements to be maintained by the NNTT
- Consider improvements included in the *Corporations (Aboriginal and Torres Strait Islander) 2006* exposure bill to simplify and strengthen PBC governance arrangements.
- Recommend NIAA work with the native title sector, the private sector and governments to develop good practice guidance regarding PBC engagement

Yours sincerely

TANIA CONSTABLE PSM
CHIEF EXECUTIVE OFFICER

⁵ Australian Government, [Australian Heritage Strategy 2015 – 2025](#), Department of Environment, December 2015, p. 15.

APPENDIX 1

Minerals Industry Statement of Commitment to First Nations partnerships

The statement below has been endorsed by the MCA Board and is supported by a multi-year work program to be delivered through the MCA. The program complements company-specific actions underway.

Statement

The minerals industry deeply values its relationships with the diverse First Nations landholders, communities and organisations with which it partners. Industry will strengthen these partnerships, respect local cultures, protect heritage and support the near and long-term social and economic aspirations, prosperity and wellbeing of First Nations communities.

- In valuing these relationships, the industry recognises the importance of:
- Respect for the cultures, knowledge, histories, rights and interests of the diverse First Nations landholders and communities with which it partners.
- Senior company and site leadership accountability for engagement, relationships and fulfilment of commitments to First Nations landholders and communities.
- Company and industry capability, systems and processes to ensure respectful, consistent and mutually-beneficial partnerships across the life of a project.
- Understanding the unique history and local cultural, social and economic context of each community and region, and collaborating on locally-appropriate approaches.
- Supporting First Nations-led social, community and economic development initiatives and working to maximise economic participation through tailored employment, training and career advancement and supply and procurement opportunities.
- Ongoing dialogue and review processes, supported by meaningful transparency.
- Equitable, stable and predictable native title and cultural heritage protection regimes.
- Robust cultural heritage protection processes co-developed and monitored with Traditional Owners, including arrangements for ongoing access to country.
- First Nations landholders and communities are core partners in minerals development and integral to the social and economic contribution the industry makes to Australia. The minerals industry is a significant stakeholder in the economic development of Australia's First Nations people through employment, training, supply and procurement, infrastructure and wealth creation.
- Through the MCA, industry will work together to support strong relationships, including driving cultural change across the sector where necessary, through a multi-year work program. Integral to the work program is the implementation of the Towards Sustainable Mining environmental, social and governance performance system as an expectation of MCA membership. TSM indicators relating to heritage protection, engagement and benefits-sharing will be adapted for Australia in collaboration with First Nations organisations.
- Other actions include industry cultural heritage education, contributing to, advocating for and implementing policies that support First Nations-led economic development and increasing senior industry leadership engagement with national Indigenous leaders.
- The industry will also constructively contribute to modernisation of cultural heritage protection regimes and improvements to support a practical, stable and equitable native title system. Stable, predictable and practical frameworks enable responsible land-based development.

APPENDIX 2

MCA Indigenous Partnerships Action Plan

The purpose of the plan is to support sectoral capability, systems and engagement and contribute to equitable, stable and practical cultural heritage protection, native title and other regimes. It is part of a multi-year work program.

Key activities to date

Transparency and accountability

- Released [new industry position statement](#) articulating expectations for sectoral engagement with First Nations landholders, communities and organisations, endorsed by the MCA Board
 - Publicly stated the MCA does not support clauses inhibiting Traditional Owners speaking publicly on heritage or conduct matters, noting that these arrangements were not in all land use agreements
 - Commenced preparations for MCA members to regularly assess, publicly report and verify site-level processes to respect and engage with Traditional Owners and communities. It work alongside other transparency and accountability actions
- Committed to develop a contemporary picture of the type, focus and outcomes from land use agreements and partnerships.

Stronger heritage protection laws and systems

- Supported modernisation of state, territory and Commonwealth heritage protection laws, including the Australian Government's modernisation pathway which includes strong role for First Nations organisations
- Supporting efforts to increase the number of Indigenous heritage sites protected on the National Heritage List
- Proposed practical administrative improvements to increase the transparency and operation of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* – an essential Commonwealth safeguard
- Recommended the Commonwealth sustain funding for ATSIHP Act administration its 2021-22 Budget
- Recommended the Australian Heritage Strategy refresh prioritise Indigenous heritage protection efforts and collaboration
- Considered state and territory heritage protection regimes features, noting leading practice in Queensland and Victorian regimes

- Committed to support initiatives to promoting greater appreciation of tangible and intangible First Nations heritage
Reviewing *Dhawuru Ngilian: A vision for Aboriginal and Torres Strait Islander heritage in Australia and Best Practice Standards in Indigenous cultural heritage management and legislation.*

Improving land use agreements, including supporting a more equitable, stable and practical native title regime

- Identifying ways to support a more equitable, stable and practical native title regime that provides predictability for industry
 - Publicly stated the MCA supports:
 - Traditional Owner engagement commencing from early exploration and continuing consistently across project life
 - Ongoing review process across the life of a project
 - Equal partnerships on common agreed priorities
 - Continued long-term standing advocacy for increased government funding and support for Prescribed Body Corporates, specialist organisations manages native title rights on behalf of Traditional Owners
 - Contributing to *Corporations (Aboriginal and Torres Strait Islander) Act 2006* modernisation, noting importance of simplifying and support local autonomy
 - Recommended the Australian Government develop good practice guidance on PBC engagement
 - Continued a pilot collaborative forum to share good practice and lessons to implement agreements well
- Contributing to the University of Queensland's world-first e-library of research and tools to support First Nations engagement

Further developing industry capability, skills and engagement

- Reviewing industry application of FPIC in the context of the UN Declaration on the Rights of Indigenous Peoples
- Ensuring MCA-funded education, such as the Professional Certificate in [Foundations of Modern Mining](#), supports understanding of the importance of First Nations partnerships
- Continuing promoting quality industry education such by the University of Queensland's Centre for Social Responsibility in Mining
- Commenced scoping an industry cultural awareness package
- Engaging with key national and regional First Nations organisations.

APPENDIX 3

MCA adoption of the 'Towards Sustainable Mining' ESG Performance system

In February 2020, the MCA Board agreed to adopt the [Towards Sustainable Mining](#) (TSM) system in recognition of evolving community expectations of the Australian minerals industry's environmental, social and governance (ESG) performance. TSM was established by the Mining Association of Canada and has been adopted in nine countries.

TSM builds on existing commitments in [Enduring Value – the Australian minerals sustainable development framework](#) – by providing a consistent approach to assess, demonstrate and communicate site level performance in a transparent and accountable way, building community confidence and trust.

MCA members will be expected to use TSM to demonstrate their commitment to ESG performance at a facility level, with full implementation by 2025. The MCA will encourage early member adoption of TSM.

The adoption of TSM will allow industry to better measure and demonstrate ESG performance in a transparent way at the community/site level. TSM will help companies to manage site level ESG risk and maximise opportunities, enhancing trust with communities but also investors and customers and a responsible ESG investment and supplier of choice.

About TSM

TSM is a set of tools and indicators reflecting good practice in environmental and social performance at the site level. The system's guiding principles and [protocols](#) cover:

- **Communities and People:** Indigenous and Community relationships, Safety and Health, Crisis Management and Communication Planning, Preventing Child and Forced Labour
- **Environmental Stewardship:** Biodiversity, Tailings Management, Water Stewardship
- **Climate change:** Corporate commitment, site based management, targets and adaption

The protocols and indicators are designed to measure the quality and breadth of facility-level management. Sites are graded from level C to Level AAA. Mining facilities undertake annual self-assessment to measure performance against each indicator of the TSM protocols, the results of which are independently verified every three years. All results are made publicly available.

All Canadian protocols will be adapted to suit the Australian context before TSM becomes operational in Australia. This review will include input from key industry stakeholders – for example key First Nations representative bodies and conservation non-governmental organisations.

The TSM program is guided by an independent 'Community of Interest' Advisory Panel. The panel serves as a platform for communities and members to discuss and collaborate on issues of mutual concern. The MCA will shortly establish a panel to provide advice on implementation in Australia.

How will TSM support improved engagement with First Nations and heritage protection?

TSM includes specific indicators relating to engagement with First Nations, shared decision making, educating of site-level staff, heritage protection, benefits-sharing and senior level accountability.

The MCA will review and adapt the Canadian protocols for Australia, informed by our commitment to help ensure Indigenous partnerships have the same profile as health and safety. Engagement with First Nations stakeholders will inform this review.

APPENDIX 4

Responses to Questions on Notice from Senator Lidia Thorpe

Can you please provide details of your relationship with the National Native Title Council (NNTC)? Are there any agreements in place between them and the MCA?

Native title and land rights regimes cover the majority of lands on which exploration, project development and mining occur. The National Native Title Council is the peak body for the native title sector, with its membership including land councils and PBCs. It is funded through membership fees and government grants.

Given this, NNTC an important stakeholder for the MCA, alongside other First Nations organisations and groups such as the First Nations Heritage Protection Alliance, the National Aboriginal Community Controlled Health Organisation and Indigenous Women in Mining and Resources.

As with all its stakeholders, the MCA engages transparently and appropriately on matters of mutual interest.

The MCA has engaged with NNTC in different ways over more than a decade. At all times, the NNTC has been a strong and independent advocate for Traditional Owners and the native title sector.

Engagement has included important work to ensure that Traditional Owners receive special taxation status on native title monies arising from land use agreements, broadening the range of asset management vehicles available to Traditional Owners for First Nations-led development and improved economic outcomes for Traditional Owners.

Engagement occurs on a case-by-case basis and there is no formal agreement between the parties.

One area of current MCA engagement with NNTC is a shared pilot initiative connecting the native title sector, government agencies, industry and academia to share and discuss improved implementation of land use agreements. Participants include representatives from Traditional Owner groups, the Centre for Social Responsibility in Mining, the Centre for Native Title Anthropology, Indigenous Women in Mining and Resources Australia, industry and government agencies. The pilot is currently under review.

In your submission you say that MCA perceives native title and land rights regimes as providing comprehensive legal processes and requirements. Do you think current processes are adequate in determining who can speak for Country? Do you acknowledge that there are often issues with who can speak for Country and in some cases the wrong people have been consulted about heritage protection sites, leading to consent for mining which had not have been granted had the right community been consulted.

An overview of this matter is provided below. The MCA would refer to the Committee to state, territory and Commonwealth government agencies for further information.

Aboriginal and Torres Strait Islander people themselves should and can determine who speak for country.

Parliaments have established mechanisms through legislation for Traditional Owners to identify themselves as being the right people to speak for country in various contexts through native title claims, under the Northern Territory Aboriginal Land Rights Act and state cultural heritage protection legislation.

Land users – such as the minerals industry and also government, infrastructure providers, farmers and construction companies - seeking to engage with Traditional Owners can face challenges identifying who to speak to about country. However native title claim determinations and state and territory cultural heritage protection regimes have made this more straightforward. All provide processes for Traditional Owners to determine who speaks for an area within particular country.

Where native title determinations have been made or are well progressed, most state and territory heritage laws provide that it is the native title holders who determine who speaks for country.

Where heritage laws do not rely the native title system, state and territories have processes for Traditional ownership to be recognised for particular areas. These process should ensure that the right Traditional Owners are recognised and that their right to speak for country is accepted by all Traditional Owners for the area.

For example, Queensland's cultural heritage regime establishes the registered native title claimant or last registered native title claimant is the appropriate party to engage. In Victoria, groups can apply to the Victorian Aboriginal Heritage Council to be recognised as an Aboriginal party for an area. It is similar in South Australia.

In the Northern Territory, custodians of sacred sites – those who by Aboriginal tradition have responsibility for a particular site – are consulted by the Aboriginal Areas Protection Authority. Where appropriate, an authority certificate is issued in relation to areas in respect to particular activities following activity between the Authority and the relevant custodians.

Where it is accepted a Traditional Owner group is the right party to speak for an area, that group needs to establish and agree upon its own decision-making processes in order for decisions about country to be made.

The minerals industry has observed that disagreement within a Traditional Owner group about these processes or who speaks for a particular part of country can occur. Like the identification of the right people to speak for country, the determination of the decision-making process of a particular group needs to be resolved by that group. The 2021 amendments to the Native Title Act included mechanisms to support dispute resolution. Measures proposed in the *Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021* may also assist.

These are complex matters that require careful consideration. It is important that companies are able to rely on information provided through established processes in relation to heritage.

You have mentioned, in your evidence given during the hearing, that you and your members regularly deal with Indigenous leaders. Can you please outline how you define 'Indigenous leader'? How do you determine who a leader is in a community? Do you have examples of how you establish this?

In the past 18 months, the MCA has increased its engagement with diverse representatives from different Aboriginal and Torres Strait Islander organisations and groups.

The MCA uses the term leader respectfully and broadly, recognising that people may have different roles in different contexts. The MCA also acknowledges that there may be different views within a community or communities about who is a leader, or can speak on particular matters.

In practice, the MCA aims to engage through Aboriginal and Torres Strait Islander groups, organisations or enterprises, with these groups nominating the appropriate representative. Often this is with the chief executive officer, chair or a senior delegate.

The MCA also aims to engage with a variety of Aboriginal and Torres Strait Islander representatives, including those on government or other advisory groups.

We have repeatedly heard that community receives offers for signing off on agreements, such as offers of cars, jobs etc. Can you please provide details of any inducements which your members have been offering Traditional Owners?

Mining-related agreements have delivered significant and important economic benefits and opportunities for Traditional Owners and communities. The MCA does not agree with the characterisation of benefits/or compensation arising from land use agreements as inducements. That also denies the agency of the Traditional Owners engaged.

The MCA does not support special benefits to individuals involved in the negotiations that are not available to the people on whose behalf they are negotiating.

Given your stated commitment to following Free, Prior and Informed Consent and working closely with Traditional Owners taking into account their positions in decision-making, how would you address a demand from Traditional Owners for net zero emissions by 2050 or before to limit devastating impacts of climate change on cultural heritage and the environment?

Sustained climate action across all nations is required to reduce the risks of human-induced climate change and to support net-zero emissions.

The MCA and its member companies are committed to the Paris Agreement and its goal of net zero emissions globally and in Australia. This should be achieved as quickly as possible.

The MCA has played a leadership role by developing a Climate Action Plan, progress against which is publicly reported. The first progress report, released in June 2021, found the industry was taking important and tangible actions towards decarbonisation, contributing to average emissions abatement potential of around 30 per cent.

The MCA is open to engaging with First Nations stakeholders regarding actions to support the global task of addressing human-induced climate change.

You state that significant progress has been made in mining companies engagement with TOs and that cultural heritage protection is part of every step, from the proposal development to mining and rehabilitation. What processes do you have in place to ensure your members don't destroy or disturb heritage sites?

In line with the Minerals Industry Statement on First Nations Partnerships, company engagement with Traditional Owners should commence at early exploration and, where a project is developed, continue consistently across the life of a project. There should be clear accountability by senior and site leadership.

Through the MCA, the minerals industry is working to improve sectoral capability, systems and engagement and contribute to stronger heritage protection laws. Sectoral actions complement company-specific actions to strengthen Traditional Owner partnerships and heritage protection processes where needed. TSM implementation will further support robust and transparent engagement practices. Actions by the MCA to date are highlighted in Appendix 2.

What do you think would be an adequate penalty for mining companies ignoring heritage and consultation requirements and negatively impacting on our heritage, something that simply cannot be undone?

The minerals industry supports appropriate penalties for any actions – by an organisation, in any sector – that knowingly leads to the destruction of heritage. Enforcement processes should be fair, proportionate, transparent and consistently applied.