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Committee Secretary
Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

By email: jscatsia@aph.gov.au

Dear Committee Secretary

MCA comments on the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia

The MCA appreciates the opportunity to provide some comments and recommendations of the minerals industry in relation to the current inquiry being conducted by the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs (JSCATSIA). The JSCATSIA inquiry will help to shape new and better aligned employment and enterprise pathways, along with enhanced economic participation opportunities for Aboriginal and Torres Strait Islander Australians.

The Australian minerals industry has long-standing and transformative partnerships with Aboriginal and Torres Strait Islander Traditional Custodians and the communities they represent, with the principles of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) informing productive relationships long before UNDRIP was adopted by the United Nations General Assembly in 2007.

As UNDRIP is intended for state parties (i.e. national governments), the MCA agrees that it could be a useful tool in informing business relationships with Aboriginal and Torres Strait Islander communities but not at the detriment of the significant focus on relationship building that 'has been positively transformed by more than 20 years of reform in the rights of Indigenous Australians and innovative engagement on the part of the minerals industry'.¹

The MCA agrees that UNDRIP should assist by informing engagement, due diligence and decision-making, however its implementation must not override existing Australian law and good faith agreements that have been entered into between Aboriginal and Torres Strait Islander communities and the minerals industry.

By continuing to listen to the local communities and entering into community led agreements, the MCA supports governments, community led organisations and local Traditional Custodians in their endeavours that will bring about positive and practical intergenerational opportunities for greater health outcomes and increased economic participation for Aboriginal and Torres Strait Islander Australians.

¹ M Langton, *From Conflict to Cooperation*, MCA, Canberra, 2015, p. 7.

Working together in advancing free, prior and informed consent

The minerals industry pursues free, prior and informed consent (FPIC) through principles of genuine and good faith engagement to reach agreement about how activity can occur. This engagement and agreement making occurs subject to the provisions and timings associated with the *Native Title Act 1993* and other environmental regulatory instruments. Native title agreements are documented between the recognised Traditional Custodians and the industry operator to achieve and document ongoing consent setting out how the parties have agreed to work together.

For third parties not directly involved in the agreement making process, it may appear that negotiation and agreement making has not taken place. This is not true. Agreements that are executed as native title agreements 'are confidential contracts between two private parties, Indigenous peoples have the same rights as private parties to non-native title agreements to have the confidentiality of their agreements protected'.²

Many factors influence how industry and Traditional Custodians have existing protocols to work together and apply good faith agreement making principles. These include the local context, community aspirations and priorities, project characteristics including potential impacts and opportunities, and other legal requirements.

The MCA is of the strongest view that FPIC is a shared responsibility as the concept is not defined within UNDRIP. FPIC is not a right of veto but an assurance of gaining a shared responsibility that continues until the completion of the agreement.

In 2020-21, the MCA undertook work to identify key considerations to guide the practical application of FPIC. While this process is ongoing, the MCA has identified a range of considerations that are relevant as they pertain to reaching mutually beneficial agreements that have been co-designed by the authorised Traditional Custodian and industry member. These include:

- Ensuring heritage is considered as early as possible to identify areas for protection and inform project design and development
- Working with Traditional Custodian representative bodies and individual communities to respectfully engage the appropriate custodians to speak for particular country
- Respecting Traditional Custodian group autonomy and decision-making processes
- Ensuring engagement processes are culturally-appropriate, timely and comprehensive
- Recognising the diversity of views within Aboriginal and Torres Strait Islander communities
- Providing additional assistance, where necessary, to ensure Traditional Custodians can participate fairly in the negotiation processes
- Striving to achieve an outcome that is mutually acceptable to all parties and documented.

Through these existing and long-standing processes, heritage arrangements can be made covering:

- Areas for exclusion and protection
- Ongoing monitoring and survey arrangements
- Cultural protocols for access to protected areas
- Management of heritage items and information collected as part of heritage arrangements
- Processes of review and improvement.

² Aboriginal and Torres Strait Islander Social Justice Commissioner, [Native title payments discussion paper – Optimising Benefits from Native Title Agreements](#), Australian Human Rights Commission, viewed 28 September 2022.

Integrating rights and interests

One of the most significant challenges for policy and decision-makers as well as land users, including the minerals industry, is how to give practical effect to FPIC.

Recent policy recommendations have appropriately recognised the importance of FPIC in guiding how industry and governments negotiate with Aboriginal and Torres Strait Islander peoples regarding their heritage. While largely focused on the minerals industry, these are relevant to all land users.

There is a need to consider the implementation of FPIC in the context of overriding other rights and interests where agreement cannot be reached or where clarity is lacking regarding who to reach agreement with.

The Productivity Commission considered this issue in detail in its 2020 Resources Sector Study Report reflecting that ‘these principles are not absolute: they must be balanced against other interests’.³ It also notes ‘governments should be explicit and transparent that they are weighing up competing rights in making a decision to allow a project to proceed’.⁴ The commission also notes ‘in making decisions, proportionality of the impact should also be a key consideration’.⁵

Looking globally, the Canadian Government also provides instructive insights. It has described the principles as ‘reflecting the ideals behind the relationship with Indigenous peoples, by striving to achieve consensus as parties work together in good faith on decisions that impact Indigenous rights and interests’.⁶

The Canadian Government also confirms that FPIC does not provide a right of veto over government decision-making.⁷

The MCA’s role in strengthening partnerships

The MCA represents Australia’s exploration, mining and minerals processing industry with its members accounting for the majority of national minerals production. Advancing responsible business practices through policy advocacy and practical support is an important part of this role in maintaining industry awareness of the social licence to operate.

Contributing to policies, research and resources to enable industry to support the economic priorities and share of wealth creation of Aboriginal and Torres Strait Islander Australians is a long-standing MCA priority. Key actions include:

- Developing [Enduring Value – The Australian Mining Industry Framework for Sustainable Development](#) in 2005 to articulate the sector’s commitment and approach to sustainable development⁸
- Partnering with the Australian Government to directly promote local employment, training and enterprise opportunities for Indigenous Australians between 2005 and 2015, including *Getting it right: Indigenous enterprise success in the resources sector*
- Leading industry-wide engagement with national and regional Indigenous leaders to build shared understanding and unlock economic pathways. This led to the landmark 2011 *Minerals Industry Economic Development Strategy*⁹

³ Productivity Commission, op. cit, p. 249.

⁴ Ibid, p. 249.

⁵ Productivity Commission, 329.

⁶ Government of Canada, [Backgrounder: United Nations Declaration on the Rights of Indigenous Peoples Act](#), Government of Canada, viewed 23 September 2022.

⁷ Ibid.

⁸ Minerals Council of Australia, [Enduring Value Framework](#), MCA, viewed 23 September 2022.

⁹ Minerals Council of Australia, *Indigenous Economic Development Communique*, MCA, Canberra, 2016.

- Co-developing and jointly advocating for policies and programs to improve the native title regime, enable native title holders to realise economic benefits and support Indigenous Australian business owners and entrepreneurs ¹⁰
- Commissioning important research to understand, improve and guide strong partnerships between industry and Indigenous Australians, such as *Conflict to Cooperation* in 2015 and [Crafting the Future: Minerals industry engagement with Indigenous Australia](#) in 2017
- Contributing to leading practice national and global guidance, including the Australian Government's [Leading Practice Handbook: Working with Indigenous Communities](#).

In its national leadership role, the MCA is working with industry to assist companies to continue strengthening partnerships with Aboriginal and Torres Strait Islander communities. Work is led by a committee of senior industry executives and reports directly to the MCA Board. Actions underway or planned include:

- Implementation of the Towards Sustainable Mining system. MCA members will regularly and consistently report on site-level performance against defined social, community, environmental and governance through TSM. Adaptation for the Australian context, including indicators regarding Aboriginal and Torres Strait Islander partnerships, is ongoing ¹¹
- A statement of commitment reinforcing industry's commitment to respectful partnerships with Traditional Custodians and the communities they represent on common priorities
- A baseline survey capturing the type and impacts of industry social and economic commitments and programs, such as preferential procurement programs
- Supporting improvements to ensure an equitable, stable and practical native title regime, and better enable native title holders to deploy monies for economic development. Increased funding for Traditional Custodian corporations is critical to improved economic outcomes
- Acting as secretariat for an MCA-initiated pilot forum bringing together industry, Indigenous organisations, government agencies and academia to share strategies and research relating to land use agreement implementation. Outcomes include a world-first online library for leading practice research, tools and guidance ¹²
- Advancing industry Indigenous employment, career development and enterprise programs and advocating for fit-for-purpose Australian Government initiatives.

Supporting practical opportunities

The Uluru Statement from the Heart invites Australians to walk with the Aboriginal and Torres Strait Islander peoples in a movement that will carve out a better future for all Australians.

The MCA is committed to working through respectful, equal and enduring relationships with the diverse communities of Traditional Custodians, landholders and communities with which it partners. The MCA considers the strongest partnerships are developed and sustained where each party has in place the capability, systems and processes to support effective engagement.

Building on decades of engagement, the minerals industry has worked hard over the past two years to give practical effect to The Uluru Statement from the Heart in how it partners each and every day. The minerals industry has sought to further strengthen and refine its engagement capability and systems. This has included recruiting new staff, improving internal governance arrangements,

¹⁰ See various submissions, including the 2019 submission to the Joint Standing Committee on Northern Australia inquiry into Traditional Owner participation in Northern Australian development.

¹¹ T. Constable (Chief Executive Officer), [Australian minerals industry takes transparency to the next level](#), media release, 3 March 2021.

¹² Centre for Social Responsibility in Mining, [Indigenous Mining Futures](#), University of Queensland, viewed 23 September 2022.

clarifying senior leadership accountability and undertaking extensive cultural awareness and competency training.

During this time, the minerals industry has also reflected on the elements of effective local decision-making by Aboriginal and Torres Strait Islander communities. The MCA observed this most often occurs when:

- Traditional Custodian representative bodies have well-developed and culturally-appropriate governance and consultation structures established and operating effectively
- There is clarity on the appropriate Traditional Custodians to speak for particular country supported by broad consensus within the relevant community – particularly where native title has not been determined
- Systems, processes and capability to jointly implement, monitor and review heritage agreements are available and appropriate
- There are positive and trusted relationships between Traditional Custodian representative bodies and native title services providers, supported by effective communication
- Government agencies are accessible and regularly provide clear and tailored information about laws, policies, programs and decisions, ensuring all parties have access to quality information.

There is still much more to do as we accept the invitation to walk with Aboriginal and Torres Strait Islander Peoples.

Governments, including the Commonwealth, have an important role in enabling strong and equal partnerships between industry and Aboriginal and Torres Strait Islander communities. Accordingly, the MCA recommends that governments should:

- Fulfil their responsibilities for providing sufficient and sustained baseline funding to enable Traditional Custodian organisations to establish foundations (such as recruitment) and undertake core activities. Fee-for-service and funding arrangements between land users and Traditional Custodian organisations should not, and cannot, replace sustained baseline government funding
- Effectively and continually communicate and outline heritage laws, processes, systems and safeguards to avoid information asymmetry
- Work in partnership with Aboriginal and Torres Strait Islander communities, minerals proponents, heritage specialists and others to document and promote leading practice approaches to co-design, co-management and protection
- Support and ensure Traditional Custodian representative bodies are accountable and transparent in operations, including how they engage with Traditional Custodians in decision-making
- Be transparent about reasons for decisions and conditions relating to projects, including how information, rights, interests, benefits and impacts have been assessed and weighed and the protections in place¹³
- Ensure parties providing advice to Aboriginal and Torres Strait Islander communities are held to the highest professional standards of conduct
- Work with the native title sector and industry to develop tailored guidance on working with Traditional Custodian organisations.

¹³ Joint Standing Committee on Northern Australia, [The Way Forward](#), Parliament of the Commonwealth of Australia, October 2021, p. xxix.

Creating an enabling environment by investing in the fundamentals

Strong and equal partnerships are developed and sustained where each party has in place the capability, systems and processes to support effective decision making.

Effective local decision-making supports stability, clarity and predictability for both Aboriginal and Torres Strait Islander communities and industry on all matters associated with self-determination, reconciliation and co-design. This most often occurs where Traditional Custodian representative bodies have well developed governance and consultation structures and positive, trusted relationships with native title service providers. Access to advice, systems and capability to jointly implement, monitor and review agreements is another success factor. Clarity and consensus within each community about who speaks for country is a crucial element.

The MCA is actively supporting capability development to enhance Aboriginal and Torres Strait Islander opportunities that are fit for the individual community needs while working with communities to improve governance systems that will strengthen and sustain partnerships.

The MCA strongly advocates for governments having an important role in enabling strong and equal partnerships and support decision making by providing sufficient and sustained baseline funding to Traditional Custodian representative bodies.

Ongoing work will be required in consultation with stakeholders to understand how to give practical effect to the way FPIC is utilised in native title agreements. The MCA looks forward to contributing to this process.

Aboriginal and Torres Strait Islander peoples are a core partner in mining and industry is a major stakeholder in transforming economic and health disparity of Traditional Custodians and their communities. Mining embraces its responsibility to support Aboriginal and Torres Strait Islander peoples to have a voice over their culture and their heritage as well as achieving their economic aspirations and wealth creation for generations to come.

Yours sincerely

**TANIA CONSTABLE PSM
CHIEF EXECUTIVE OFFICER**