



26 September 2022

Mr Josh Wilson MP  
Chair  
Joint Standing Committee on Treaties

By email: [jsct@aph.gov.au](mailto:jsct@aph.gov.au)

Dear Chair

### **Response to question on notice from 20 September 2022 hearing**

The MCA appreciated the opportunity to appear before the Joint Standing Committee on Treaties on 20 September. Your important inquiry will help shape new and better employment and enterprise pathways and participation opportunities for all Australians.

Noting the minerals industry's long-standing partnerships with Aboriginal and Torres Strait Islander traditional custodians and the communities they represent, the committee has requested further information pertaining to what impacts, if any, the *Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland* will have on the protection of cultural heritage through the *United Nations Declaration on the Rights of Indigenous Peoples* principle of free, prior and informed consent. This adds to the MCA's March 2022 submission.<sup>1</sup>

### **Working together in advancing free, prior and informed consent**

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) is intended for state parties (i.e. national governments) however, it also informs business relationships with Indigenous Peoples. The Australian minerals industry recognises UNDRIP as a framework to inform engagement, due diligence and decision-making.

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 mandatory provisions and timings associated with the *Native Title Act 1993*. 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.

The shared responsibility of FPIC is not a right of veto but an assurance of gaining a shared responsibility that continues until the completion of the agreement.

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

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<sup>1</sup> Parliament of Australia, [Submission to the inquiry into the Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland](#), MCA, Canberra, March 2022.

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 agreement in relation to heritage. 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. This can be in addition to fee arrangements for heritage surveys, assessments and 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.

### **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 focussed 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.'<sup>2</sup> 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.'<sup>3</sup> The Commission also notes 'in making decisions, proportionality of the impact should also be a key consideration.'<sup>4</sup>

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.'<sup>5</sup>

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<sup>2</sup> Productivity Commission, op. cit, p. 249.

<sup>3</sup> Ibid, p. 249.

<sup>4</sup> Productivity Commission, 329.

<sup>5</sup> Government of Canada, [Backgrounder: United Nations Declaration on the Rights of Indigenous Peoples Act](#), Government of Canada, viewed 23 September 2022.



The Canadian Government also confirms that FPIC does not provide a right of veto over government decision-making.<sup>6</sup>

### The MCA's role in strengthening partnerships

The MCA represents Australia's exploration, mining and minerals industry 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.

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 development<sup>7</sup>
- 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*<sup>8</sup>
- 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<sup>9</sup>
- 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<sup>10</sup>
- 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

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<sup>6</sup> Ibid.

<sup>7</sup> Minerals Council of Australia, [\*Enduring Value Framework\*](#), MCA, viewed 23 September 2022.

<sup>8</sup> Minerals Council of Australia, *Indigenous Economic Development Communique*, MCA, Canberra, 2016.

<sup>9</sup> See various submissions, including the 2019 submission to the Joint Standing Committee on Northern Australia inquiry into Traditional Owner participation in Northern Australian development.

<sup>10</sup> T. Constable (Chief Executive Officer), [\*Australian minerals industry takes transparency to the next level\*](#), media release, 3 March 2021.

- 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<sup>11</sup>
- Advancing industry Indigenous employment, career development and enterprise programs and advocating for fit-for-purpose Australian Government initiatives.

### **Creating an enabling environment by investing in the fundamentals**

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 the economic development of Traditional Custodians and their communities. Mining embraces its responsibility to support Aboriginal and Torres Strait Islander peoples to have a voice over their cultural heritage as well as achieving their economic aspirations and wealth generation.

Yours sincerely

Tania Constable PSM  
Chief Executive Officer  
Minerals Council of Australia

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<sup>11</sup> Centre for Social Responsibility in Mining, [Indigenous Mining Futures](#), University of Queensland, viewed 23 September 2022.