



MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO THE JOINT STANDING COMMITTEE ON NORTHERN AUSTRALIA INQUIRY INTO THE DESTRUCTION OF THE 46,000 YEAR OLD CAVES AT THE JUUKAN GORGE IN THE PILBARA REGION OF WESTERN AUSTRALIA

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EXECUTIVE SUMMARY

The Minerals Council of Australia recognises the distress caused to the Puutu Kunti Kurrama and Pinikura People (PKKP) by the destruction of the Juukan Gorge caves and the effect on Aboriginal and Torres Strait Islander people and the broader Australian community. The MCA is deeply sorry.

For more than two decades, Australia's minerals industry has worked to build strong and enduring relationships with the Traditional Owners on the lands on which it operates. The industry remains committed to these relationships.

While matters under inquiry are specific to the caves at Juukan Gorge, the industry is committed to learning from the committee's findings. Drawing on advice from Traditional Owners, Aboriginal and Torres Strait Islander organisations and the committee's findings, the MCA will lead a national work program to capture, share and embed lessons across the sector.

Valuing Aboriginal and Torres Strait Islander cultures, heritage and economic contribution

Australia's minerals industry respects and values Aboriginal and Torres Strait Islander cultures, recognising the diversity, knowledge and histories of the world's oldest continuing cultures.

Robust cultural heritage management and protection practices, underpinned by ongoing engagement, demonstrate respect while enabling land-based development to occur.

In the minerals industry cultural heritage management is an ongoing process that begins during exploration and continues throughout the mine life. It includes pre-development and ongoing cultural heritage surveys and anthropological and archaeological studies to identify and map cultural and archaeological sites and features.

This work can form the basis of free, prior and informed agreement-making with Traditional Owners covering mine and operational planning, design and site protection protocols and obligations under cultural heritage protection and project approval regimes. Ongoing dialogue is integral to shared outcomes.

Survey work, detailed protocols to protect identified sites through exclusion and buffer zones, the removal and storage of items and monitoring arrangements continue throughout mine life. This submission provides an overview of these processes.

Traditional Owners and Aboriginal and Torres Strait Islander communities are an integral part of the economic contribution of mining through their decision to contribute skills, knowledge, understanding of local environments and agreement regarding development of their lands.

Cultural heritage regimes

The MCA supports the Commonwealth's initiative of a national engagement process on increasing the understanding and use of Indigenous knowledge which can serve to assist states and territories to modernise the protection of Indigenous cultural heritage where needed.

While states and territories have responsibility for Indigenous cultural heritage protection, the Commonwealth is in a unique position to assist with the development of leading practice on transparency, knowledge-sharing, collaboration and improvement. This Commonwealth process should not duplicate established state and territory legal responsibilities.

This engagement comes as Western Australia works to complete a comprehensive two-year process to repeal and replace the state's outdated Aboriginal heritage protection regime. The minerals industry supports this process in Western Australia.

The Commonwealth has an important responsibility for national heritage, including heritage with nationally-significant Indigenous cultural values under the *Environment Protection and Biodiversity*

Conservation Act 1999 (the EPBC Act). The MCA is actively engaged in the current independent review of the EPBC Act.

The Commonwealth also administers the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act), an important protection mechanism enabling an Indigenous person to make an application to the Minister for the Environment to make a declaration to protect an object or place. The MCA supports the ATSIHP Act in its current form but notes its administration and operation can be unclear. Improvements in practical administration could be considered without duplicating existing state and territory responsibilities.

The MCA recommends the Commonwealth:

- Offers support to further transparency and knowledge-sharing in the state-led modernisation of Indigenous cultural heritage protection regimes as needed. This should occur while maintaining the existing division of responsibilities.
- Considers improvements to the administration and operation of the *Aboriginal and Torres Strait Islander Heritage Protection Act (1984)* that support state and territory responsibilities.

1. INTRODUCTION

The MCA appreciates the opportunity to make a submission to the Joint Standing Committee on Northern Australia inquiry into the destruction of the 46,000 year old caves at Juukan Gorge in the Pilbara region of Western Australia.

This submission is supported by the Queensland Resources Council, the NSW Minerals Council, the South Australian Chamber of Minerals and Energy and the MCA's Northern Territory and Victorian divisions.

The MCA recognises the distress caused to the PKKP by the destruction of the Juukan Gorge caves. The MCA is deeply sorry.

The MCA is the peak industry organisation representing Australia's exploration, mining and minerals processing industry, nationally and internationally, in its contribution to sustainable economic and social development. MCA members account for the majority of national minerals production and share a common commitment to operating in a way that supports sustainable development for current and future generations.¹

The minerals industry is an integral part of the Australian community and economy. The sector directly employs approximately 240,000 people in highly skilled roles, mostly in regional Australia. The vast majority are permanent and fulltime. The industry's workforce increases to around 1.1 million people when the innovative mining equipment, technology and services sector is included.²

The MCA is proud that around 6,600 Aboriginal and Torres Strait Islander people, many in remote and regional Western Australia, the Northern Territory and Queensland, work in mining.³ The number of Aboriginal and Torres Strait Islander people employed in the sector rose 2.5 times in the decade to 2016 as a result of a collaborative effort by industry, Traditional Owners, Indigenous organisations and governments.⁴

The sector's 8,600 apprentices and trainees are a critical part of the sector, representing the future of the minerals workforce.⁵ Through the Mining Skills Organisation Pilot the sector is accelerating 1,000 new apprenticeships in partnership with the Australian Government, states and the Northern Territory.

Mining is a major contributor to national income. In 2018-19 company taxes and royalties paid by the industry increased by \$8 billion to a record \$39.3 billion, funding essential services and infrastructure.⁶

By keeping its workers, families and communities safe, the industry has continued to underpin the Australian economy during the COVID-19 pandemic. An integral part of the industry's response is working alongside remote Aboriginal and Torres Strait Islander communities to support community-led health, social, housing and other measures. The MCA acknowledges Commonwealth, state and territory government support for the sector's ongoing operations.

Submission structure

The purpose of this submission is to provide the committee with an overview of how industry works alongside Traditional Owners and Aboriginal and Torres Strait Islander communities. It also outlines how the minerals industry interacts with Commonwealth heritage protection legislation.

¹ Minerals Council of Australia, [Enduring Value – The Australian minerals industry framework for sustainable development](#), MCA, Canberra, 2019.

² Deloitte Access Economics, *Mining and METS: engines of economic growth and prosperity for Australians*, a report prepared for the Minerals Council of Australia, MCA, released 29 March 2017.

³ Department of the Prime Minister and Cabinet, [Closing the Gap Prime Minister's report 2018](#), Department of the Prime Minister and Cabinet, Canberra, 2019, p. 78.

⁴ *ibid*, p. 78.

⁵ Data Source ABS, Cat no. 6291.0.55.003, [Labour Force, Detailed, Quarterly, February 2020](#), released 25 March 2020.

⁶ Deloitte Access Economics, [Estimates of royalties and company tax accrued in 2018-19 Minerals Council of Australia](#), Deloitte Access Economics, Australia, 1 May 2020, p. 3.

This submission is structured as follows:

- **Section 2 – Background:** An overview of the Australian minerals industry’s approach to engaging with and working alongside Traditional Owners and Aboriginal and Torres Strait Islander communities.
 - This includes an overview of agreement-making processes and common approaches to implementing agreements between Traditional Owners and mining proponents. This section focuses on consultation, negotiation and implementation processes, rather than specific aspects of native title and land rights regimes.
- **Section 3 – Regulatory frameworks:** Cultural heritage protection regimes in Western Australia, New South Wales, Queensland, the Northern Territory, South Australia and Victoria.
 - This section has been developed in consultation with the Chamber of Minerals and Energy Western Australia, the South Australian Chamber of Minerals and Energy, the NSW Minerals Council and the MCA’s Victoria and Northern Territory divisions.

2. WORKING ALONGSIDE TRADITIONAL OWNERS AND COMMUNITIES

- Native title and land rights regimes provide comprehensive legal processes and requirements to consult and negotiate with Traditional Owners regarding land use. Negotiations can extend over many years, and establish terms under which minerals development can occur. Voluntary agreements and partnerships are also common.
- Recognition and protection of culturally significant heritage is delivered through extensive cultural heritage management processes throughout the life of a mine. These include mapping and design, establishment of exclusion zones, monitoring practices and access to protocols. Tens of thousands of hours can be dedicated to these activities.

Partnerships with Aboriginal and Torres Strait Islander communities

The minerals industry respects the rights and interests of Aboriginal and Torres Strait Islander people regarding the lands to which they have a connection.

Over several decades, the minerals industry has worked to transform how it operates alongside Traditional Owners and Aboriginal and Torres Strait Islander people, communities and organisations. The minerals industry shifted its approach from limited engagement to focusing on actively supporting local aspirations. Industry learnt many lessons as it changed its approach.

Maintaining and strengthening culture and achieving economic empowerment and social aspirations, including employment and business pathways for young people, are a priority for many of the Traditional Owner groups and Aboriginal and Torres Strait Islander communities with which the industry engages.

Decades of shared focus have helped the mining sector contribute to these aspirations. Approximately 6,600 Aboriginal and Torres Strait Islander people now choose to work in the minerals industry – 2.5 times more than in 2006.⁷ Many other Aboriginal and Torres Strait Islander people are now working in other sectors after gaining new qualifications and experience in the minerals industry, with many of these roles in remote and regional areas.

In 2016, consulting firm PwC estimated the economic value range of Indigenous enterprises servicing the mining industry as \$200 million to \$350 million. This does not include enterprises classified in other business categories servicing the sector.⁸

At the height of the mining construction phase, the total value of native title-related payments for access to land for mining was estimated at approximately \$3 billion.⁹ In 2013 it was estimated that approximately \$3 billion to \$5 billion was held in trusts from agreement-making, with Aboriginal and Torres Strait Islander communities owning up to \$40 billion in assets.¹⁰

Legal context

Native title and land rights regimes establish clear legal processes and comprehensive requirements to consult and negotiate with Traditional Owners and recognised parties regarding land use, including minerals development. Minerals companies recognise the process of engagement is important in building understanding and developing relationships in addition to negotiating the terms of land use.

Each process is prescriptive, requiring a high standard of conduct, extensive consultation and for negotiations to occur in good faith. Consultation and negotiation activities often extend over many years, well exceeding statutory minimum periods.

⁷ Department of the Prime Minister and Cabinet, op. cit. p. 78.

⁸ PwC Indigenous Consulting, [The contribution of the Indigenous business sector to Australia's economy](#), PwC, Australia, 2016 p.15.

⁹ M. Langton, *Boyer lectures 2012: The quiet revolution*, Harper Collins, Sydney, March 2018.

¹⁰ S. Rose, 'Indigenous groups' asset opportunity for wealth advisors', *Australian Financial Review*, June 2013.

In many cases, companies fund the cost of high quality independent legal representation and other specialist services for native title holders during negotiations.

The MCA also notes its long-standing support for increased, stable and sufficient funding for representative bodies and Prescribed Bodies Corporate to enable these bodies to undertake statutory duties and economic development priorities.¹¹

The Australian Government's 2016 *Mining for Sustainable Development Program Working with Indigenous Communities* handbook sets out steps in leading practice negotiations. These include:

- Background preparation to inform free, prior and informed agreement-making, including building respectful relationships and understanding who to engage with regarding particular lands
- Developing a shared protocol for the negotiation, including who to involve, what issues are to be negotiated, the community decision-making process and other factors
- In-principle agreement, such as detailing the type of compensation and benefits, consultation and engagement structures, measures to protect and promote identified Indigenous cultural heritage and ongoing access to lands for cultural purposes, mine rehabilitation and closure activities
- Formal negotiations that involve particular aspects, terms and arrangements. This may include specific arrangements regarding disclosure of information regarding the agreement.¹²

In some circumstances, companies and Traditional Owner groups may hold joint celebrations or events to commemorate the signing of the agreement and to signify the relationship.

It is estimated there are about 2,000 land use agreements between Traditional Owners and exploration and mining proponents. Only a small proportion of those agreements is referred to the National Native Title Tribunal for arbitration.¹³

In circumstances where an agreement is not required, many minerals companies and Traditional Owners have formalised relationships through voluntary agreements, memorandums of understanding and other arrangements.

¹¹ Minerals Council of Australia, [Indigenous economic development](#), MCA, Canberra, 2016, p. 2.

¹² Department of Industry, Science, Energy and Resources, [Leading Practice Sustainable Development Program for the Mining Industry Working with Indigenous Communities](#), Department of Industry, Science, Energy and Resources, Canberra, 2016, pp. 47-49.

¹³ T Bauman and L Glick (eds), *The limits of change: Mabo and native title 20 years on*, AIATSIS Research Publications, Canberra, June 2012.

Box 1: Protecting sacred and culturally significant areas in the Northern Territory

The mining agreement covering a mine in the Northern Territory includes stringent commitments to protection of Aboriginal interests and excluding any sacred sites from operations any sacred sites. The agreement was made under the Commonwealth's *Aboriginal Land Rights Act (Northern Territory) Act 1976*.

The operation has a robust procedure in place where a notification of any proposed disturbances is made to the local council through the submission of clearance application. This is followed by an on-ground work area clearance completed by the Traditional Owner estate group and a land council appointed archaeologist/anthropologist.

When field work is completed to the satisfaction of traditional custodians, the company is issued a sacred site clearance certificate detailing conditions it must meet. These include establishing exclusion zones and management controls and supporting geospatial data. The data is included into site geospatial information systems to ensure all personnel involved in field activities can readily identify, protect and avoid sacred sites and culturally significant areas.

Management and protection of sacred and culturally significant areas are undertaken in collaboration with the custodians through either a fee for service or employment development program. This has led to a tailored ranger program.

This positive relationship has enabled the mine to work with traditional custodians on integration of traditional ecological knowledge into cultural heritage management, mine land rehabilitation and closure processes.

Implementation of land use agreements and partnerships

The agreement-making process formalises the relationship between Traditional Owners and exploration and mining companies and establishes arrangements under which mining activities will occur. Implementation of benefits and arrangements is an ongoing process that continues for the life of the agreement. For many companies, delivering on commitments within land use agreements requires the establishment and ongoing implementation of site protocols, programs and mechanisms.

Box 2 includes examples of common company commitments and ongoing activities relating to cultural heritage. Box 3 includes examples of other common company commitments and activities to deliver these.

Box 2: Common actions for leading practice implementation cultural heritage commitments

Common commitments	Common activities to manage, protect and recognise cultural heritage sites and items in accordance with approvals
Conservation of identified culturally significant heritage, including sacred sites	<ul style="list-style-type: none"> • Site management plans detailing site leadership responsibility for compliance and compliance with land use agreements and/or regulatory approvals and requirements • Physical and administrative controls in accordance with approved arrangements. Controls can include all or a combination of the following: <ul style="list-style-type: none"> - Exclusion zones and buffers to avoid physical impact or damage to identified heritage - Monitoring equipment to monitor for land movements that may affect heritage - Protocols restricting access to non-Traditional Owners and for enabling access by Traditional Owners for cultural purposes - On-site permitting processes prior to the commencement of any new land disturbing works - Specific arrangements relating to the collection and storage of heritage items in accordance with approved arrangements. • Ongoing dialogue and engagement with Traditional Owners about mine technical studies and design activities to avoid disturbing identified culturally significant and sacred sites • Monitoring of identified sites to ensure this heritage is preserved • Collection, recording and storage of certain cultural heritage items in accordance with approved conditions – this can include support for community-led keeping places, video and digital recording of languages, stories and histories and archiving of material • Workforce induction processes to inform workers about Traditional Owner cultures, histories and heritage – inductions and training are often conducted by Elders and local knowledge holders • On-site activities to commemorate cultures, language and knowledge, including signage, events and cultural immersion activities • Verification and audit of cultural heritage management processes to ensure compliance with corporate standards and requirements.

Box 3: Other common land use commitments and implementation activities

Commitment	Common implementation activities
Consultation and engagement mechanisms	<ul style="list-style-type: none"> Establishment of formal mechanisms for ongoing consultation, such as consultative committees, community update presentations and other engagement activities Provide formal updates on certain types of activities including environmental and cultural heritage protection, employment and training initiatives Establishment of regional engagement committees and mechanisms to support implementation of agreements across regions.
Preferential supply and procurement commitments	<ul style="list-style-type: none"> Business development support for Indigenous businesses with a focus on Traditional Owner operated and led organisations Preferential tendering and contract arrangements and access to on-site expertise and support Requirements for major and specialist suppliers to actively engage with Indigenous businesses and seek to employ local Aboriginal and Torres Strait Islander people.
Preferential employment and tailored career pathway commitments	<ul style="list-style-type: none"> Skills identification processes to identify candidates that may wish to join the minerals workforce. Companies often work with Traditional Owner representative organisations and education providers to identify candidates and advertise vacancies Specialised work readiness, apprenticeship, traineeship and other career pathway activities, including dedicated mentoring and support Career development support including traineeships, apprenticeships and university cadetship and scholarship opportunities.
Financial compensation for the impact of land use activities	<ul style="list-style-type: none"> Financial payments for the impact of land use activities Support for governance, strategic planning and staff training as Traditional Owner organisations are established and mature Support for identified social, economic and environmental priorities.
Support for other social investment activities	<ul style="list-style-type: none"> Support for social development initiatives including community-led health, education and services provision and infrastructure.
Review and engagement activities	<ul style="list-style-type: none"> Specific arrangements to review the operation of governance and consultative mechanisms at certain intervals.
Consultation and engagement mechanisms	<ul style="list-style-type: none"> Establishment of formal mechanisms for ongoing consultation, such as consultative committees, community update presentations and other engagement activities Provide formal updates on certain types of activities including environmental and cultural heritage protection, employment and training initiatives Establishment of regional engagement committees and mechanisms to support implementation of agreements across regions.

Cultural heritage management practices

In the Australian minerals industry, cultural heritage management describes an ongoing process of working with Traditional Owners to manage identified sites of cultural heritage significance in accordance with approval conditions and/or land use agreement and partnership commitments. It is an intensive process with thousands of hours often allocated to establish agreed controls, protections and recognition, review potential impacts and engage on findings, outcomes and approach.¹⁴ It should continue across the life of an operation.

The cultural heritage management process can include establishment of exclusion or buffer zones and other physical protections to conserve identified culturally-significant heritage, including sacred sites, manage access to these sites in accordance with cultural protocols and store items that may require relocation.

These arrangements may be outlined in a site Cultural Heritage Management Plan (CHMP) or detailed in site management plans. Plans often outline how the mine will meet its obligations under local cultural heritage regulation, arrangements with Traditional Owners (including native title and other land use agreements) and corporate standards and requirements. Plans are usually periodically reviewed and updated to incorporate new information, protocols and the outcomes of engagement.

Plans often identify and require exclusion zones, detail cultural protocols for accessing heritage sites and have processes for new works involving ground disturbance and monitoring actions. Responsibility for implementation of the plan is usually assigned to site leadership.

Leading practice minerals industry cultural heritage management approaches also strive to contribute to broader appreciation and recognition of Aboriginal and Torres Strait Islander cultures in addition to the conservation of identified physical heritage. These processes often include site-based cultural awareness and/or immersion training by Elders or other nominated local knowledge holders for workers. It can also include on-site signage and videos to continually recognise and respect Traditional Owners. In addition, companies often contribute to community-led programs to strengthen and promote cultures, knowledge and language.

Industry approach to cultural heritage management across the mine-life cycle

This section provides an overview of common cultural heritage protection processes at different stages of mining activity.

Exploration

Engagement to identify and document Indigenous heritage commences during early exploration. While regulation is tailored to local arrangements, all states and the Northern Territory require explorers to avoid harm to Indigenous heritage without authorisation.

Cultural heritage surveys are undertaken prior may be undertaken prior to exploration to identify, document and map areas of significance.¹⁵ This is undertaken by Elders or local knowledge holders identified through relevant legislative processes. The site is then be mapped with exploration activities structured to avoid sites of significance.

Prior to project development

If an area is prospective for minerals development, a comprehensive assessment process to understand the cultural, social and historical values of the relevant area will commence.

These assessments usually include cultural heritage and ethnographic surveys to document items and places of significance as well as cultural mapping.

¹⁴ E. Bradshaw, K. Bryant, T. Cohen, [Why Cultural Heritage Matters](#), Rio Tinto, Australia, 2011.

¹⁵ *ibid*, p. 32.

Traditional Owners and local knowledge holders together with anthropologists and other heritage specialists undertake this work.¹⁶ This is an intensive process, including field and desktop work.

While surveys may be required under state and territory legislation, leading practice mining industry approaches developed by the Australian industry go well beyond regulatory requirements. For example, it is common for tens of thousands of hours to be spent dedicated to cultural heritage specific activities and engagement for a major project. Furthermore, the industry often commissions additional research that can make an important contribution to local Aboriginal and Torres Strait Islander histories and records.

Data collected through baseline cultural heritage and other social and environmental impact assessments inform mine planning and design. This information enables project designers to develop the mine and infrastructure plan in a way that minimises impact on culturally significant heritage, including identified sacred sites and sites of cultural heritage significance. Further consultation is then undertaken with Traditional Owners and/or registered Aboriginal and Torres Strait Islander groups regarding mine design and planning.

State and territory project approval processes generally require companies to outline how social, cultural and economic considerations have been addressed in the mine plan. This includes engagement with Traditional Owners and how views and feedback have been incorporated.

Box 5: Supporting aspirations for young people through heritage and environment activities

In planning for development of a new mine in Queensland, a company worked with Traditional Owner Elders to develop a long-term heritage, environment and communities management plan. The plan outline formally involves the landowners in both planning and implementation activities in accordance with an overarching land use agreement.

A key objective is for younger people to understand their culture, connection and responsibilities as landowners. To support these goals, the Traditional Owner group partnered with the company to establish a tailored environmental management program.

The program is currently operated through the mine's environmental department to support its early development. Over time the aim is for the program to become a standalone community organisation and service.

Program team members are also enabling the company to integrate traditional ecological and cultural knowledge into ongoing environmental activities.

During development

The minerals industry engages local knowledge holders – usually an Elder or local knowledge holder nominated by the Traditional Owner group – to monitor new land disturbance works. Where there is agreement with Traditional Owners, cultural heritage items such as artefacts may be collected and stored in accordance with the wishes of Traditional Owners. The MCA recognises the importance of Keeping Places to store and conserve heritage items.

Establishing exclusion zones and protections

Exclusion zones and protections may be established to provide a buffer between sites of cultural heritage significance, including sacred sites, and mine infrastructure. Activities may be undertaken to collect, store and transport heritage items for keeping by Traditional Owners in accordance with cultural protocols. Other protocols may be established to restrict access to only Traditional Owners. These protocols are generally developed with Traditional Owners and periodically reviewed to ensure effectiveness.

¹⁶ E. Bradshaw, K. Bryant, T. Cohen, [Why Cultural Heritage Matters](#), Rio Tinto, Australia, 2011, p.32.

Ongoing management and monitoring

Some sites engage local knowledge holders on a permanent basis to support implementation of the mine CHMP. Where new land disturbing activities are limited, cultural heritage monitors are engaged as required following initial survey work. It is common for sites to provide stakeholder updates on implementation of the CHMP, subject to cultural protocols.

In New South Wales, mine sites are required to publish CHMPs and monitoring reports. Many companies also voluntarily publish regular updates on implementation of cultural heritage recognition, management and protection arrangements.

Post-mining rehabilitation

All mine sites must develop, maintain and deliver mine rehabilitation plans. This includes plans to rehabilitate areas near or surrounding places of cultural heritage significance in accordance with Traditional Owner aspirations. Other actions can include selecting plants of cultural significance for land revegetation and constructing final landforms to ensure Traditional Owners have full view of local landscapes at important locations.

Many companies are also placing greater focus on engaging Traditional Owners, local Aboriginal and Torres Strait Islander businesses and Indigenous rangers in delivery of mine rehabilitation activities.

Ongoing dialogue and consultation

Maintaining ongoing dialogue to ensure open, continuous and informed discussions on matters relating to cultural heritage recognition, management and protection is critical. It is important that information is available in a way that is accessible to communities with formal avenues for questions, grievances and concerns.

Activities may include:

- Site visits by Traditional Owners or representative bodies to monitor and provide feedback on implementation of the plan detailing cultural heritage recognition, management and protection protocols and arrangements
- Independent monitoring of sites to identify and recommend arrangements to further conserve particular values or sites
- On-site events to build workforce awareness of the importance of identified sites and support appreciation and respect for local Aboriginal and Torres Strait Islander cultures
- Company support for further research to contribute to local histories.

Complementary activities

The minerals industry often undertakes complementary activities to physically protect culturally-significant Indigenous heritage by supporting community-led initiatives to foster cultural, social and spiritual wellbeing.

3. CULTURAL HERITAGE REGULATORY FRAMEWORK

- The MCA supports the Commonwealth's initiative of a national engagement process on increasing the understanding and use of Indigenous knowledge which can serve to assist states and territories to modernise the protection of Indigenous cultural heritage where needed.
- The minerals industry supports the comprehensive two-year process to repeal and replace the state's outdated West Australian Aboriginal heritage protection regime to enable Traditional Owners to make decisions about their own heritage under a modern protection framework.
- The practical administration of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* could be improved while maintaining the current division of responsibilities.

Overview

The MCA supports the Commonwealth's initiative of a national engagement process for modernising the protection of Indigenous cultural heritage. While states and territories have general responsibility for cultural heritage protection, the Commonwealth is in a unique position to encourage leading practice on transparency, knowledge-sharing and improvement. This Commonwealth process should not seek to duplicate established state and territory responsibilities.

Cultural heritage protection legislation should seek to respect Traditional Owners' cultures and knowledge, including the recognition and protection of culturally and nationally significant heritage, and provide stable, efficient and predictable processes under which proponents can undertake land development activities.

In addition to compliance with legal processes and protections, the MCA considers that companies should seek to maintain strong and respectful relationships with host Traditional Owners. Respect for Aboriginal and Torres Strait Islander cultures, language and knowledge should underpin these relationships.

A leadership role for the Commonwealth

The Commonwealth's obligations regarding environment and heritage matters are clarified in both the 1992 Inter-government Agreement on the Environment (IGAE) and the 1997 Heads of Agreement on Commonwealth/State Responsibilities on heritage.¹⁷ This includes obligations to deliver international environmental commitments and an important leadership and facilitation role.¹⁸ The MCA supports maintenance of this division of responsibilities.

Commonwealth regulation

Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)

The EPBC Act is the Commonwealth's central environmental legislation and provides a legal framework enabling the Australian Government to protect matters of national environmental significance (MNES). These include world heritage properties and national heritage places. The EPBC Act establishes both the National Heritage List and Commonwealth Heritage List for this purpose.

¹⁷ Intergovernmental Agreement on the Environment, 1 May 1992,

¹⁸ Department of Agriculture, Water and the Environment, [Australian National Heritage Strategy](#), Commonwealth of Australia, Department of Agriculture, Water and the Environment, Canberra, 2015, pp. 8-9.

The list provides a consistent process for recognising national heritage places with outstanding Indigenous, natural and historical values, which is overseen by the National Heritage Council. Once listed, activities, including minerals projects that are likely to have a significant impact on these heritage places and other MNES require assessment and approval under the EPBC Act.

The MCA, together with environmental conservation, Aboriginal and Torres Strait Islander and other representative bodies, is actively engaged in the independent review of the EPBC Act.

Aboriginal and Torres Strait Islander Heritage Protection Act 1984

The Commonwealth also administers the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act), an important protection mechanism enabling an Indigenous person to make an application to the Minister for the Environment to make a declaration to protect an object or place.

Proposed minerals development activities may be subject to the Act where an Indigenous person makes an application for the minister to make a declaration to protect an object or place. The MCA supports the form of the ATSIHP Act but notes the administration and operation can be unclear. The process and status of applications is not easy to identify and there can be multiple applications over the same area, again with a lack of clarity on status or progress.

Improvements in practical administration could be considered without duplicating existing state and territory responsibilities.

Australian Heritage Strategy

Australia's first national heritage strategy was released in 2015 following extensive consultation with the heritage sector. The Australian Heritage Strategy provides a framework to focus action on identified national heritage priorities.¹⁹ Actions under the ten year strategy are currently being refreshed in consultation with the heritage sector and state and territory governments.

This refresh provides the Commonwealth, together with states, territories and the heritage sector, with an opportunity to develop shared actions to promote leading heritage conservation, management and engagement. Potential actions could include:

- Increasing the profile of Indigenous cultural heritage sites listed on the national and Commonwealth heritage lists or protected under state and territory regimes (subject to Traditional Owner wishes)
- Profiling leading practice arrangements to conserve culturally significant and nationally significant Indigenous heritage, including partnerships between Traditional Owners with different land users
- Broaden stakeholder engagement on heritage-related matters to include land users, including the minerals industry.

The MCA would welcome opportunities to facilitate engagement with the minerals industry as part of its role in promoting national leading practice.

State and territory cultural heritage protection regimes

At a practical level, cultural heritage protection is most effectively managed by locally-focused regimes. This ensures local knowledge and context are fully accounted for in policy development and decision-making. State and territory-level protection also ensures that protection and recognition frameworks consider Indigenous cultural heritage as part of broader landscape management and accounting for multiple values.

¹⁹ Australian Government, [Australian Heritage Strategy](#), Australian Government, Canberra, 2015, p. 12.

Northern Territory

The Commonwealth *Aboriginal Land Rights Act 1976*, the *Northern Territory Aboriginal Sacred Sites Act 1989* and the *Heritage Act 2011* establish the Northern Territory's cultural heritage protection regime.²⁰

The Aboriginal Sacred Sites Act establishes and confers important functions on the Aboriginal Areas Protection Authority. The independent statutory authority oversees protection of sacred sites on the Northern Territory's lands and waters.²¹ Its functions include responding to requests from Traditional Owners for sacred site protection, documenting and recording sacred sites.

The authority's role also includes assessing applications for authority certificates and determining whether to issue the certificate which allows activities in certain areas. The assessment process involves consultation with Aboriginal custodians to determine restrictions on proposed activities at or near sacred sites.²²

It is an offence under the Act to enter a sacred site without proper authorisation, contravene conditions imposed by an authority certificate or to fail to comply with conditions.²³

Western Australia

Aboriginal cultural heritage protection in Western Australia is currently governed by the *Aboriginal Heritage Act 1972*. The Act provides a mechanism for consideration of proposed impacts to cultural heritage through an Aboriginal Cultural Materials Committee (ACMC). Membership of this committee is currently a majority of Aboriginal Traditional Owners in addition to archaeologists and government representatives. The ACMC provides recommendations to the Western Australian Minister for Aboriginal Affairs on development applications for land users involving a potential impact on heritage. Ministerial approval is required for the impact or there is an offence under the Act.

The Western Australian resources industry recognises the need for reform and supports modernisation of the state's cultural heritage protection regime through a repeal and replace process. This is necessary given the absence of significant reform since the Act's introduction. The industry is committed to modernisation of the regime as soon as possible.

Western Australia's cultural heritage regulation modernisation process has been underway for more than two years. It has included extensive stakeholder consultation, particularly with Traditional Owners and communities in remote areas, and industries including the resources sector.

The repeal and replacement process is now entering in its final phase of consultation. The MCA has been advised that a draft bill is expected to be tabled in Parliament of Western Australia by the end of 2020.

Issues that have been raised in development of the draft bill include:

- A greater focus on agreement making with Traditional Owners to deliver improved heritage management outcomes at a local level and provide a stronger voice for Traditional Owners to make decisions about their heritage
- Update and expansion of the definition of Aboriginal cultural heritage to include cultural landscapes and intangible heritage
- Improvement of transparency through equitable rights of review and appeal mechanisms for stakeholders
- Strengthening of compliance and enforcement mechanisms.

²⁰ Austrade, [Sacred sites and heritage](#), Australian Government, viewed 21 July 2020.

²¹ Aboriginal Areas Protection Authority, [About Us](#), Northern Territory Government, viewed 21 July 2020.

²² *ibid*, viewed 21 July 2020.

²³ Aboriginal Areas Protection Authority, [Offence Provisions of the Act](#), Northern Territory Government, viewed 21 July 2020.

The industry supports cultural heritage legislation that effectively recognises and protects the cultural heritage of Traditional Owners in Western Australia, operates efficiently and provides the certainty for industry to operate now and into the future.

The reform's focus on agreement-making between Traditional Owners and project proponents and local engagement on cultural heritage management is supported by industry.

For several decades the Western Australian resources industry has championed best practice agreement-making, which has sought to facilitate economic and social aspirations and outcomes through comprehensive long-term agreements. The proposed shift to agreement on cultural heritage protection will further enable good heritage outcomes founded on respectful and positive relationships between proponents and Traditional Owners across Western Australia.

Queensland

Queensland's Aboriginal and Torres Strait Islander cultural heritage framework is governed by three laws: the *Aboriginal Cultural Heritage Act 2003 (Qld)* and the *Torres Strait Islander Cultural Heritage Act 2003 (Qld)*, known together as the Cultural Heritage Acts, and the *Human Rights Act 2019 (Qld)*.

In particular the Human Rights Act states that 'Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community, to enjoy maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observations, beliefs and teachings.'

Positive obligations – agreement-making

Under the Cultural Heritage Acts, an overarching duty of care is imposed on all people undertaking activities on land in Queensland. This duty of care requires a person to take all reasonable and practicable measures to ensure that an activity does not harm cultural heritage.

The Cultural Heritage Acts focus on the consent of Traditional Owner groups, enabling Traditional Owners to establish arrangements concerning cultural heritage with minimal government involvement. Compliance with the *Duty of Care Guidelines* gazetted under the Cultural Heritage Acts, an approved CHMP, or a native title agreement ensures a land user complies with the cultural heritage duty of care.

Agreement can be reached by various means, commonly through a cultural heritage management plan jointly developed by the land use proponent and Traditional Owners for the project. Since the Cultural Heritage Acts commenced in 2004, a CHMP is required to accompany an environmental impact statement or an environmental assessment.

While encouraged to reach shared agreement, parties have recourse to the state's Land Court in circumstances where agreement cannot be reached. The Queensland Land Court also has jurisdiction to conduct mediation between the parties to seek to achieve agreement.

If the matter does not proceed to a hearing, the Land Court must after hearing evidence from all parties make a recommendation to the minister to either approve (with or without amendments) or refuse the CHMP. Where a referral to the Land Court is made a recommendation will only be made by the minister where the Land Court is satisfied that the CHMP makes (or a suitable amendment will make) adequate provision to avoid harm to cultural heritage, or to minimise harm where harm cannot be reasonably avoided. Most CHMPs are entered into voluntarily, which means very few have been referred to the Land Court.

Compliance obligations – stop orders and injunctions

Queensland has a strong compliance and enforcement regime. For example, under section 32 of the Cultural Heritage Acts, the minister, a delegate of the minister or an authorised officer can issue a stop order if there are reasonable grounds for concluding that an activity is harming, threatening to harm or will have a significant adverse impact on cultural heritage (section 32). There is also power to investigate suspected breaches and statutory offences and penalties. The maximum penalty for breaching a stop order is more than \$2 million.

Traditional Owners may also apply to the Land Court for an injunction, which it can issue under Queensland's *Land Court Act 2000*.

There is also power to investigate suspected breaches and statutory offences and penalties, including \$1,334,500 for corporations and \$133,450 for individuals.

New South Wales

New South Wales' Aboriginal cultural heritage protection regime incorporates the *National Parks and Wildlife Act 1974*, the *Heritage Act 1977*, the *Environment Planning and Assessments Act 1979*, the *Aboriginal Land Rights Act 1983* and *Native Title Act 1994* as well as associated guidelines and policies.

In 2010 the New South Wales Government commenced a process to modernise the state's Aboriginal cultural heritage framework. The NSW Minerals Council has actively participated in this process and is broadly supportive of the proposed reforms.

The existing legislative and policy framework provides significant measures to engage and protect Aboriginal cultural heritage and ensure engagement with Traditional Owners and Aboriginal communities as well as offences for non-compliance. Measures include:

- The ability for the minister to declare any area as a place of 'special significance to Aboriginal culture', enabling the protection of areas with tangible and intangible values
- Protection for all sites and artefacts, with disturbance of any heritage only permitted with the approval of a relevant authority
- Significant community consultation to be undertaken in accordance with established processes and guidelines
- Recording of all identified sites and artefacts into the state's register of Aboriginal heritage
- The ability for authorised persons to impose stop work orders where there is a risk or concern of unauthorised impact.

This comprehensive legislative and policy framework protecting Aboriginal cultural heritage is also embedded into the assessment of mining projects. Mining projects in New South Wales are generally categorised as state significant developments, requiring assessment under the state's *Environmental Planning and Assessment Act 1979*. The project proponent must address all of the environmental assessment requirements in its application for project approval. This includes requirements regarding aboriginal cultural heritage protection.

Assessment requirements generally include:

- An assessment of the project area's likely Aboriginal and historical heritage and the impacts of development
- Identification and description of tangible and intangible Aboriginal cultural values across the project area – this work should be undertaken in accordance with the *Aboriginal Cultural Heritage in New South Wales Guide*

- Consultation with Aboriginal custodians regarding this heritage, with consultation documented as per requirements under Aboriginal cultural heritage consultation requirements. The significance of heritage to Aboriginal custodians with a cultural connection to the project area must also be documented.

The assessment processes usually extend over several years, involve significant consultation and are closely overseen by the regulator.

Conditions of consent, including in regards to Aboriginal cultural heritage, are imposed by the state if the project is approved. A CHMP detailing how the project will manage operations in accordance with conditions of consent must be approved before land disturbance works can commence. Ongoing consultation with Aboriginal custodians is a critical aspect of the plan.

Victoria

Victoria's *Aboriginal Heritage Act 2006* (AH Act) and *Aboriginal Heritage Regulations 2018* (AH regulations) establish the state's Indigenous cultural heritage framework.

The AH Act and AH regulations provide the circumstances when a CHMP is mandatory but CHMPs can also be voluntary. Mandatory CHMPs are required in a number of circumstances. This includes where 'high impact activities' are being undertaken on 'areas of cultural heritage sensitivity', as those terms are defined in the AH regulations.

If a CHMP is required, it must be prepared in accordance with the prescribed standards. The general purpose of a CHMP is to assess the likelihood of harm and actions to manage risks of harm to any Aboriginal cultural heritage within the given area.²⁴

The AH Act lists several statutory authorisations which cannot be granted by the relevant authority unless a CHMP is approved in relation to the activity. The list of statutory authorisations includes a planning permit and a work plan required by licensees under the Victorian *Minerals Resources (Sustainable Development) Act 1990*.

The Victorian Government's Code of Practice for Minerals Exploration provides guidance for minerals explorers to meet requirements to safeguard Aboriginal cultural heritage.²⁵ The 2019 north central Victoria goldfields ground release also sought to enhance engagement between Traditional Owners and explorers by providing additional specific guidance on Indigenous cultural heritage protection. A Traditional Owner advisory panel was also convened to help evaluate tender responses for the minerals exploration rights.

Victoria's Aboriginal cultural heritage framework includes significant monitoring and enforcement measures.

South Australia

The South Australian *Aboriginal Heritage Act 1988* provides for the protection and preservation of Aboriginal cultural heritage significance in the state. The Act applies to all land within South Australia and is not limited to land covered by native title.

Under the Act, it is an offence to:

- Damage, disturb or interfere with any Aboriginal site or damage any Aboriginal object
- Where any Aboriginal object or remains are found, to disturb or interfere with the object or remains
- Remove the objects or remains.

²⁴ Victorian Government, [Aboriginal heritage legislation](#), Aboriginal Victoria, viewed 21 July 2020.

Mining operators must always comply with the requirements of the Act, even where a Part 9B agreement or an Indigenous land use agreement sets out procedures for undertaking cultural heritage surveys.

The Act was amended in 2017. A key change is the introduction of Recognised Aboriginal Representative Bodies (RARBs) to manage the effects of exploration, mining, development and other activities on Aboriginal heritage across South Australia.

A RARB may enter into local heritage agreements with land use proponents so that impacts on Aboriginal heritage are managed in culturally appropriate ways and in agreement with the traditional owners. If heritage is not represented by a RARB, certain agreements with Traditional Owners (mostly native title agreements) setting out how the heritage may be affected can also be approved under the Act. These are known as Division A2 Agreements.

Local heritage agreements are submitted to the Minister for Aboriginal Affairs and Reconciliation with the relevant request for authorisation under section 21 or section 23 of the Act for approval. Approval is dependent on the agreement satisfactorily dealing with any heritage that may be located in the relevant area. Once approved, the minister must grant the associated authorisation.

Box 6: Implementing cultural heritage management practices in South Australia

A South Australian company's agreement with Traditional Owners provides a framework to protect sites of cultural heritage significance, ongoing consultation and economic benefits and opportunities. The company's annual compliance report documents its actions to respect Indigenous cultural heritage. Actions included documentation of Aboriginal heritage clearance surveys, quarterly meetings with Traditional Owners regarding cultural heritage and no disturbance of identified sites of cultural heritage significance.

Stronger Partners, Stronger Futures

The South Australian Department of Energy and Mining ran the 'Stronger Partners, Stronger Futures' consultation process between 2016 and 2020 to review the interactions between explorers and native title groups in relation to land access.

This process benefited from dedicated engagement by Aboriginal and industry stakeholders and has resulted in recommendations for updated policy guidance on issues like early engagement, clearer terminology around exploration activity and development of a consolidated leading practice framework.