AMEC SUBMISSION

To: JOINT STANDING COMMITTEE ON NORTHERN AUSTRALIA

Re: Inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia

31 July 2020

Introduction

The Association of Mining and Exploration Companies (AMEC) appreciates the opportunity to provide a submission to this Inquiry. Our members continue to strive to build positive and long-standing relationships with local Traditional Owners, and Indigenous group, built on respect, clear communication and understanding.

About AMEC

AMEC is a national industry body representing over 275 mining and mineral exploration companies invested in regional and remote Australia.

The mining and exploration industry make a critical contribution to the Australian economy, employing over 255,000 people. In 2017/18, these companies collectively payed over $31 billion in royalties and taxation, invested $36.1 billion in new capital and generated more than $250 billion in mineral exports.

Response to the Inquiry

AMEC continues to have a long-standing objective for increased clarity, certainty, efficiency and effectiveness of native title and cultural heritage processes to:

- ensure fair, equitable and quality negotiated outcomes and benefits for Aboriginal people, governments and industry;
- reduce delays and costs for all stakeholders;
- provide increased trust, integrity and confidence in decision making; and
- ensure compliance.

These objectives are intended to enhance, and not diminish native title or cultural heritage values.

Australian mining and mineral exploration seek to build respectful relationships with Traditional Owners that are based on genuine understanding and stewardship. Companies seek to go beyond the minimum legislated requirements and seek to amend operations so that any potential damage can be absolutely minimised.

On behalf of the mining and mineral exploration industry, the Inquiry's Terms of Reference will be addressed as per below.

(a) the operation of the Aboriginal Heritage Act 1972 (WA) and approvals provided under the Act;

The *Aboriginal Heritage Act (WA) 1972* was ground-breaking when originally introduced, preceding the Mabo Decision by 15 years. In the Act's subsequent 48 years of operation it has gradually become dated.

Despite now being outdated, the Act has successfully protected thousands of sites of Aboriginal cultural significance across Western Australia.

In 2018 a process to update and modernise the Act began. The modernisation is an election commitment of the current State Government, the delivery of which has been a priority of the Western Australian Department of Planning Lands and Heritage. AMEC and industry have been actively engaged throughout the process and look forward to engaging constructively on the drafted legislation when it is released for comment in the latter months of 2020.

The multi-stage consultation process regarding the conceptual framework of the proposed legislation has been productive, pragmatic, and exhaustive.

AMEC requests that the Inquiry carefully considers its response to this clause of the Terms of Reference. Any recommendation for Commonwealth Government intervention at this stage of the legislation's development is unlikely to improve outcomes for any of the participants. The operations of the Act have been acknowledged as needing modernisation, which is being delivered through the current reforms.

b) the consultation that Rio Tinto engaged in prior to the destruction of the caves with Indigenous peoples;

(c) the sequence of events and decision-making process undertaken by Rio Tinto that led to the destruction;

(d) the loss or damage to the Traditional Owners, Puutu, Kunti Kurrama and Pinikura people, from the destruction of the site;

(e) the heritage and preservation work that has been conducted at the site;

AMEC is unable to comment to on the provisions (c) – (e), as Rio Tinto are not a member of our association. Speculation by third parties on this sensitive matter is not constructive.

(f) the interaction, of state indigenous heritage regulations with Commonwealth laws;

The Commonwealth Governments engagement in indigenous cultural heritage management is to duplicate State legislation through a range of Acts.

The Commonwealth has interfaces with indigenous heritage through the *Environmental Protection and Biodiversity Conservation Act 1999*, and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC) defines the Commonwealth Government responsibility for protecting Indigenous heritage to places that are nationally or internationally significant, or those that are situated on land that is owned or managed by the Commonwealth. The EPBC is currently under a statutory 10-year review.

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The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIHP Act)* provides protection for areas and objects that are of significance to Aboriginal people. The ATSIHP Act allows the Environment Minister, on the application of an Aboriginal person or group of persons, to make a declaration to protect an area, object, or class of objects from a threat of injury or damage.

The 2013 Productivity Commission Inquiry into *Mineral and Energy Resources Exploration in Australia* summarises, concerns with this legislation[1]:

> *There are several concerns, including that the ATSIHP Act:*
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> *• is considered ineffective and costly to administer*
>
> *• is seen by some as being redundant, as they argue that all states and territories now have legislation protecting Indigenous heritage. Others, however, question whether legislation is effective in some states*
>
> *• could result in 'jurisdiction shopping', causing delays and duplication for explorers.*
>
> *The Commission proposes that, to address overlap between Commonwealth and state and territory legislation, the ATSIHP Act should be amended to allow state and territory arrangements to be accredited if Commonwealth standards are met.*

No amendments have been made to the ASIHP Act to address these long-standing concerns identified by the Productivity Commission.

The *Native Title Act 1993* while not directly addressing cultural heritage makes provision for Traditional Owners that hold determined Native Title to reach a range of different types of agreements with proponents seeking to carry out future act activities. The negotiation of Indigenous land use agreements, section 31 agreements, and ancillary agreements all allow native title holders an opportunity to identify cultural heritage protection and monitoring safeguards before future act works are undertaken.

AMEC considers that the current legislative framework provides sufficient scope for protection, and that there remains scope for streamlining of legislation.

The Commonwealth Government bodies directly involved with cultural heritage management, as discussed later, are currently under resourced which leads to suboptimal outcomes.

(g) the effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions;

Each State's cultural heritage legislation is undergoing, or has undergone, some form of review in the last five years. The exceptions are the Northern Territory and the Australian Capital Territory, however the Territory's recent environmental legislative reforms included consideration of Aboriginal Cultural heritage in the approvals process.

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[1] Page 22, Productivity Commission 2013, *Mineral and Energy Resource Exploration*, Inquiry Report No. 65, Canberra. Available: https://www.pc.gov.au/inquiries/completed/resource-exploration/report/resource-exploration.pdf

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No jurisdiction has achieved the 'perfect' legislative framework with each faced by issues of timeliness and cost.

(h) how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites;

The cultural heritage laws in Australia could be improved by improving certainty and transparency as well as reducing the costliness of their operation.

Increasing the certainty and transparency of where cultural and historically significant sites are located would improve the decisions made by investors, companies, and the Government. The sensitivity around requesting such openness is understandable. However, the current opacity creates information asymmetry, costly duplications, and increases the risk of unintended consequences.

Each State has a register of culturally and historically significant sites. Improving the comprehensiveness of each register would lift the level of understanding of where sites are. This would consequently improve early decision making of how sites can be protected, which would support all activities proposed to be undertaken.

The cost to undertake cultural heritage surveys are substantial. As outlined by WA Government in a submission to the Productivity Commission's inquiry in to *Mineral and Energy Resources Exploration in Australia*, the "Aboriginal heritage market is a substantive barrier to mineral and energy resource exploration in WA."[2]. The submission provides a detailed case study on pages 12-13 that is indicative of the difficulties faced by mineral exploration companies in the cultural heritage space.

(i) opportunities to improve indigenous heritage protection through the Environment Protection and Biodiversity Conservation Act 1999; and

As previously stated, the Western Australian *Aboriginal Heritage Act (1972)* amendments are currently being drafted. A part of that process it is hoped is removing the consideration of Aboriginal cultural heritage from the definition of 'social surroundings' in the Western Australian environmental legislation and providing these provisions in a stand-alone Act. AMEC has strongly recommended the EPBC review consider the Western Australian example and reduce the overlap and duplication of how this sensitive area is regulated.

The EPBC is a cumbersome piece of legislation that is difficult and complex to implement as demonstrated by the lengthy timeframes for an approval.

Productivity Commission's current Inquiry into Resource Sector Regulation found that for the EPBC, "the average time between project referral and approval for resources projects over the five years to 30 June 2019 was 1014 days, or nearly three years"[3]. The Productivity Commission draft report goes on to recommend improving the EPBC Act to facilitate more bilateral assessments. The Draft report

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[2] Pg. 7, Western Australian Government Submission, Productivity Commission Inquiry: *Non-financial barriers to the Mineral and Energy Resources Exploration in Australia* https://www.pc.gov.au/inquiries/completed/resource-exploration/submissions/submissions-test/submission-counter/sub029-resource-exploration.pdf

[3] Pg. 151, Productivity Commission Resources Sector Regulation Draft Report, https://www.pc.gov.au/inquiries/current/resources/draft

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states: "*Bilateral assessment agreements are leading practice arrangements that reduce duplication by allowing proponents to prepare a single set of assessment documentation for both Commonwealth and State or Territory decision makers. Participants have indicated that they are of demonstrable benefit but that duplication in approval conditions, and in monitoring and reporting requirements, remains problematic."*[4] Draft Recommendation 6.2 recommends amendments to facilitate the implementation of such bilateral agreements.

It seems counter-intuitive that as the State legislation, the Commonwealth Government's statutory EPBC Act Review and the Productivity Commission's Resource Regulation Sector Inquiry all seek to reduce overlap, the Joint Standing Committee contemplates expanding duplication.

Any move to expand the existing duplication of Commonwealth Government legislation will be an overreach. It is our view that Aboriginal Heritage will be best, and most appropriately, protected through State legislation.

(j) any other related matters.

As outlined in the WA Government submission to 2013 Productivity Commission's inquiry into *Mineral and Energy Resources Exploration in Australia* the Commonwealth Government's "chronic underfunding of PBCs (prescribed bodies corporate) in undertaking their core functions" needs to be rectified.

Seven years later and this issue remains.

The PBC is a Commonwealth Government body, incorporated under the Commonwealth legislation, and ultimately a Commonwealth Government responsibility.

Unfortunately, this is not simply a matter of a lack of funding. The Commonwealth Government has taken a deliberately hands-off approach to the governance of prescribed bodies corporate due to potential political complexities. This is leading to poor outcomes. One of the unintended consequences of the lack of funding and oversight is that "a PBC may be more likely to approach heritage agreements as a central source of revenue from native title"[5]

As observed in an Opinion Piece to the *Financial Review,* Senator Smith, "*Until the role and responsibilities of Prescribed Corporate Bodies and Native Title Representative Bodies are thoroughly reviewed, and their levels of governance and transparency improved, the traditional owners they support will continue to be constrained by a Native Title process conceived in the spirit of helping the people it now punishes."*[6]

Improving the governance, transparency, and funding of the PBCs presents the best opportunity for the Commonwealth Government to improve cultural heritage management across Australia.

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[4] Pg., 15, Ibid
[5] Ibid.
[6] Senator Smith, *Australian Financial Review*, 23 June 2017, "Native Title needs reforming or more Indigenous opportunities will be lost" https://www.afr.com/opinion/native-title-needs-reforming-or-more-indigenous-opportunities-will-be-lost-20170723-gxgujn

Final comment

AMEC appreciates the opportunity to provide a perspective of Industry for this important Inquiry.

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