

Submission
August 2020



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

Submission to Joint Standing Committee on Northern Australia

The way forward: Resources industry position statement

This statement represents a commitment to a pathway forward in WA on matters relating to land, Aboriginal cultural heritage, and agreement-making.

The resources sector takes the responsibility of operating on Native Title land seriously. Partnership agreements with Traditional Owners form a cornerstone of mining both in the Pilbara region and more broadly across Western Australia. The long-term relationships forged between proponents and local Traditional Owners are vitally important to the success of mining operations. Traditional Owners make an important contribution to the economic prosperity of all Australian's by enabling mining on their lands through ongoing partnerships with industry.

The CME and it's members acknowledge that improvements must be made to the way we, as an industry, approach our partnerships with Traditional Owners. It is our responsibility as a sector to examine the way we work with our Aboriginal partners, and commit to listening and responding to the individual priorities of local Traditional Owners.

Traditional Owners, industry and the State Government are the key stakeholders in the management of Aboriginal Heritage in WA. It is important that Aboriginal Heritage legislation functions in a way that gives confidence and certainty to all. The repeal and replacement of the existing *Aboriginal Heritage Act 1972* currently underway will assist to further deliver this. We commend the commitment the McGowan government has shown to delivering this significant reform.

A modernised legislative framework will deliver better outcomes for the management of Aboriginal Cultural Heritage in WA. The current Act pre-dates two seminal pieces of Australian legislation: the *Racial Discrimination Act 1975* (Cwth) and the *Native Title Act 1993* (Cwth). It is time for our Aboriginal Heritage legislation to better reflect the landscape of self-determination in WA.

The WA resources industry and Traditional Owners are partners on Aboriginal cultural heritage. Traditional Owners know their country and culture better than anyone else. As partners in the management of land and heritage there are important principles that we agree must be considered and respected for the success of our relationships as we move forward;

- The mining and resources industry respect the deep cultural connection between Indigenous people and their land and heritage
- We consider committed partnerships between Traditional Owners and project proponents – in the form of agreement making – are the way forward to ensure Indigenous land and cultural heritage is managed for future generations
- Traditional Owners must be afforded the principle of self-determination over their cultural heritage (and land). This includes all parties acting in good faith to seek consent prior to development or disturbance; and Traditional Owners being afforded a formal decision-making role in approvals processes (where it currently may not exist).
- Approvals relating to heritage must involve a right of appeal for Traditional Owners – alongside project proponents and Government.
- Long term shared commitment to relationship building, based on meaningful engagement and respect, is critical to the success of partnership agreements between Traditional Owners and resource proponents.

Mining has occurred in the Pilbara for more than six decades and things have evolved considerably in this time. As we look ahead to coming decades, the value of an ongoing, open dialogue has never been more central. As partners in managing land on which development occurs, we must continue to invest in our relationships and strengthen them through real listening and active participation.

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Executive Summary

The Chamber of Minerals and Energy of Western Australia (CME) appreciates the opportunity to provide a submission to the Joint Standing Committee on Northern Australia inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia (Inquiry into Juukan Gorge).

CME is the peak resources sector representative body in Western Australia, representing member companies responsible for more than 84 per cent of the State's mineral and energy production and workforce employment¹. Iron ore is currently the State's most valuable commodity at \$78 billion². The value of royalties received from the sector totalled \$6.8 billion in 2018-19, accounting for 21 per cent of general government revenue³.

In making this submission, CME has engaged the independent advice of CBG Solutions who bring decades of experience and context to the interactions of the resources industry, Traditional Owners and government stakeholders on Native Title and Aboriginal cultural heritage matters in the Pilbara region and across Western Australia.

The provision of this background context is directly relevant to the Inquiry Terms of Reference as it gives an understanding of the broader landscape of partnership between industry and Traditional Owners.

Acknowledgement and shared commitment to self determination

Developing strong and lasting relationships with Traditional Owners is core business to the resources sector. Our sector recognises and respects Aboriginal people's connection to the land and culture, which is fundamental to these relationships.

The resources sector has partnered with Traditional Owners for many decades in the Pilbara region. In many respects, the major iron ore miners have led the way in this regard. These partnerships have delivered a range of social and economic outcomes, with the focus centred squarely on maximising the sharing of benefits that resource sector operations bring to a region.

It is not unreasonable to say that there is further work to be done to fully deliver on the promise of these partnerships in certain situations. The incident at Juukan Gorge has brought this into sharp focus for all stakeholders. As we move forward into the coming decade, it is incumbent on our sector – as indeed it is across all sections of the economy - to continually assess and improve upon the way we partner with Aboriginal people in the development of our nation.

The current reform of the *Aboriginal Heritage Act 1972 (WA)* presents a once in a generation opportunity to improve the legislative environment for the management of Aboriginal cultural heritage in Western Australia. This reform retains the full support by the resources industry, as a key stakeholder in land and heritage management. Prioritisation of localised decision-making and a pivot towards agreement-making on heritage management will deliver improved outcomes for all stakeholders in Western Australia.

¹ Sum of average number of individuals directly employed by member producers in 2018-19, excludes non-operating sites. Government of Western Australia, 2018-19 Economic indicators resources data, Safety Regulation System, Department of Mines, Industry Regulation and Safety, August 2019.

² Government of Western Australia, Latest statistics release: Mineral sector highlights, Department of Mines, Industry Regulation and Safety, September 2019: <http://dmp.wa.gov.au/About-Us-Careers/Latest-Statistics-Release-4081.aspx>

³ Government of Western Australia, 2018-19 Annual report on State finances, Department of Treasury, September 2019, p. 8.

Summary of recommendations

CME makes the following recommendations for consideration by the Committee. These recommendations are covered in further detail throughout the submission and address Inquiry Terms of Reference (a) and (f) – (g).

Regulation of Aboriginal cultural heritage

- CME recommends that State legislation retains primacy on regulation of cultural heritage, without introduction of duplication at a Federal level.
- CME recommends that the focus remain on supporting the progression of new cultural heritage legislation in Western Australia to deliver a modernised Act which prioritises involvement of Traditional Owners.

Agreement making and cultural heritage management in practice

- CME recommends the Committee note the intrinsic link between Native Title and cultural heritage processes and the grant of tenure for major resources projects, providing for the involvement of Traditional Owners from the earliest stages of project development.
- CME recommends the Committee consider the extensive investment in and complex nature of agreements in Western Australia.
- CME recommends the Committee note the scale of sustained investment in Aboriginal cultural heritage by the resources industry.
- CME recommends the Committee note the extent of Traditional Owner involvement in cultural heritage processes through agreements, and the critical nature of these processes to project development.

History of mining in Western Australia

Mining has a long and intrinsic link to the development of Western Australia. It began with the discovery of gold in the 1890s, which brought unprecedented activity to the Eastern Goldfields region of Western Australia. By 1903, the State had tripled in population and more than 85% of WA's export income was attributed to the gold industry⁴. Today, the Western Australian gold industry remains a major player globally with 11 of the world's largest gold mines located in Western Australia, sustaining a major region and representing WA's second most valuable mineral commodity⁵.

Iron ore was first mined from small deposits east of Perth around the turn of the twentieth century, followed some decades later by larger scale mining at Koolan Island. By the 1960s the production of iron ore for export began in earnest in the 1960s following the major discovery of deposits at Goldsworthy, Tom Price, Newman, Pannawonica and Paraburdoo in the Pilbara region of Western Australian. The lifting of a World War Two era embargo on export enabled iron ore from Yampi Sound to make its way to Japan⁶. With the substantial backing of State and Commonwealth Governments, two distinct major resources construction booms have seen hundreds of billions of dollars invested across the Pilbara region in world class iron ore and petroleum supply chains.

Western Australia is now the largest iron ore supplier in the world, contributing more than \$4.4 billion in royalties to the State Government in 2018 alone⁷, and accounting for 17% of gross state product and 47% of WA's merchandise exports⁴. In 2018-19 major resources sector operators in the Pilbara region contributed more than \$8 billion to the Commonwealth budget⁸

The resources sector has played an important role in the development of the State of Western Australia for more than a century, and will continue to play a critical part in the future growth of the nation for decades to come.

Operating in the Pilbara region

The Pilbara region extends inland from the Indian Ocean coast to the Great and Little Sandy Deserts. In contrast to the sandy deserts to the east, Pilbara terrain is dominated by uplands and ranges, dotted with rock shelters and caves. Rock shelters are small overhangs, often occurring in the sides of gullies within outcrops of banded iron formation. Ephemeral creeks, sometimes with rock holes and soaks, occur in the valley bottoms. Rock shelters and caves in particular are known to have been used in the past by Aboriginal people, often as shelter from the elements or for ceremony⁹.

It is the banded iron formations present throughout the landscape that contain the iron rich deposits suitable for mineral exploitation known generally as iron-ore. The banded iron formations of the Pilbara's Hamersley Province are the thickest and most extensive rocks of this type in the world. It is estimated that after they were originally deposited (about 250 million years ago) they covered 150,000 km², containing around 300 trillion tonnes of iron ore. Typical banded iron formation consists of alternate layers of silver to black iron oxides, either hematite or magnetite, alternating with bands of iron-poor chert, often red in colour¹⁰.

Intrinsically, the very same geological processes that are responsible for the formation of the most iron-rich province in the world are also responsible for creating the rock shelters and caves that have been used by Aboriginal people through millennia, and are now the centre of some of the largest mining operations in Australia and the world.

⁴ Gold Industry Group, *WA's golden history*, April 2017: <https://www.goldindustrygroup.com.au/news/2017/4/13/was-golden-history>

⁵ Chamber of Minerals and Energy Western Australia, *Gold*, August 2020: <https://cmewa.com.au/about/wa-resources/gold/>

⁶ State Library of WA, *Western Perspectives on a Nation: Iron Ore*, August 2020: <https://slwa.wa.gov.au/wepon/mining/html/ironore3.html>

⁷ Chamber of Minerals and Energy Western Australia, *Iron Ore*, August 2020: <https://cmewa.com.au/about/wa-resources/iron-ore/>

⁸ Lawrence Consulting, *CME member expenditure survey economic impact assessment 2018-19*, prepared for CME, April 2020.

⁹ Government of Western Australia, Western Australian Museum Rock Collections: Banded Iron Formations, 2014: <http://museum.wa.gov.au/research/collections/earth-and-planetary-sciences/rock-collection/banded-iron-formation>

¹⁰ Bird, C. Rhoads, J. Hook, F ND, *Persistent Places of Memory: Archaeological markers of long-term connection to country in the inland Pilbara. WA*. Unpublished paper.

Legislative framework: Native Title, tenure and Aboriginal cultural heritage

The *Native Title Act 1993* (Cwth) (NTA) was promulgated in 1993. It established a process for claiming and recognising Native Title rights to lands and waters in Australia. The NTA aims to balance Indigenous and non-Indigenous people's rights to land, and sets out how Native Title rights and interests integrate into Australian law.

Native title has been described as a "bundle of rights" - such rights may include the right to camp, hunt, use water, hold meetings, perform ceremonies and protect cultural sites. In most cases, Native Title is found to co-exist alongside other non-Indigenous property rights, including mining tenure.

Stable access to land is critical to a mining operation. Native Title processes are a key element to gaining approval to hold mining tenure, and exercise the associated rights to extract ore on Crown land in Western Australia. In fact, most projects begin their land access and Native Title negotiations well in advance of any other approvals streams. With more than 90% of the land and sea mass in Western Australia subject to a Native Title claim or determination¹¹, the majority of projects in Western Australia must navigate this process.

Land tenure for mining is tightly linked to Native Title and project tenure is generally not granted for mining purposes until Native Title negotiations conclude, and heritage protocols are in place. In practice, this means that Traditional Owners are involved in major mining projects from their inception. The grant of tenure for the purpose of a mining lease does not give the proponent freehold rights to the land. Mining tenure is a finite right with a limited timeframe: all time is critical. Long-term certainty of tenure is also crucial for sovereign risk and investment purposes.

Aboriginal cultural heritage sites in Western Australia are protected under the *Aboriginal Heritage Act 1972* (AHA). This piece of legislation was highly progressive when introduced and created a requirement for consideration to be given by both proponents and Government in the design of projects with a view to minimising impacts to heritage. This was landmark legislation for the time, elevating Aboriginal cultural heritage to a standing within Government approvals and decision-making processes previously unheard of in Australia. It is worth noting that this Act pre-dated the *Racial Discrimination Act 1975*; a seminal piece of Australian legislation which markedly shifted the national Indigenous affairs dialogue.

In the decades since, the landscape around land access and heritage has changed considerably. Introduction of agreement-making under the NTA has facilitated ongoing developments in best practice heritage management. The AHA has not been significantly amended since its inception, leading to a prevailing view that the Act requires amendment to keep pace with leading practice.

At a high level, the Act defines Aboriginal cultural heritage which must be considered, and requires proponents to investigate and consider potential impact to heritage in concert with broader State approval processes. At a practical level, the Act provides for a range of approvals and offences, which proponents must operate within as appropriate on a site by site basis.

CME recommends the Committee note the intrinsic link between Native Title and cultural heritage processes and the grant of tenure for major resources projects, providing for the involvement of Traditional Owners from the earliest stages of project development.

Native Title and heritage management in practice: Agreement-making

Resource projects undergo a wide variety of extensive and complex approvals processes in order to gain the requisite permits, permissions and approvals to undertake exploration, construction and operations in Western Australia. Stable, life-of-mine access to land is fundamental to the long-term success of operations. Agreement making with Traditional Owners is a critical component of project development, with complex negotiations often extending for years prior to signing of an agreement.

Whilst every project has its own idiosyncrasies, these negotiations generally follow a similar pattern. Negotiations between Native Title parties and industry proponents are held with a view to coming to an agreement on proposed project impacts to Native Title rights. Ultimately, agreements are a mechanism for accountability and provide proponents and communities with mutual performance indicators that cover all stages of a project.

¹¹ Australian Government, *Native Title in Western Australia*, Australian Trade and Investment Commission, August 2020: <https://www.austrade.gov.au/land-tenure/Native-title/native-title-in-western-australia>

Negotiation of agreements is guided by what is important to Native Title holders and communities and the specifics of the development proposed. There is no 'one-size-fits-all' agreement. Some common elements relate to¹²:

- Access to land and consent for activities to be conducted
- Financial benefits and compensation for impact
- Cultural heritage management protocols
- Governance, procedure and implementation processes
- Employment and training commitments, including for contractors
- Contracting, procurement and economic development opportunities and commitments
- Community support
- Co-management of environmental impacts

The sophistication and extent of these provisions differs across agreements and projects, guided by the type of agreement and scale of project.

The successful conclusion of these negotiations usually results in the signing of a Native Title Agreement or Indigenous Land Use Agreement (ILUA), where impacts to the exercise of existing Native Title rights are compensated for, and a set of behaviours agreed upon that set the tone for the relationship through the life of the project. Establishment of clear, mutually agreed processes to guide engagement across the life of an agreement is key to successful negotiations.

Compensation provisions are individual to each agreement, and are generally built around three pillars:

- Milestone payments to acknowledge impact through the negotiation period, construction of the project and first production;
- Royalty payments based on a calculation of product extracted and shipped from the site, usually annual;
- Commitments to Aboriginal employment and commercial opportunity targets through contracts.

Prescribed Bodies Corporate (PBC's) are set up by Native Title claimants or holders as vehicles to provide governance and administration for payments and obligations within agreements, supported by pre-eminent legal support and independent professional trustees. Native Title compensation is usually divided up into direct benefits to members, and contributions to trusts created to invest and use the funds to build community capacity and improve social, economic, and education outcomes for communities.

Industry contributions through Native Title agreements are significant. In the Pilbara region alone, Native Title compensation packages can in some cases amount to more than \$100 million per year for an individual industry proponent.

Agreements outline expected behaviours, define how the relationship between the parties will be maintained, and set processes for how the agreement will be implemented. Regular meetings between the parties are mandated to provide project updates and to discuss and report on a range of commitments, including Aboriginal employment and commercial opportunities. Significant investment of time and financial resources is committed to the implementation of agreements.

At the core of a good agreement is the relationship that is built and endures through the life of a project. Agreements are 'living' documents – they undergo evolution and change throughout the project lifecycle. This is particularly important in situations where an expansion of a project is planned, or when significant changes in circumstances occur within communities.

To this end, industry acknowledges it must maintain close attention to the health of the relationships and agreements it holds with Aboriginal communities. One of the fundamental tenets of these relationships is the need to review and adjust to reflect changing circumstances and position the agreement to best deliver on intended outcomes. Indeed, regular consultation and periodic reviews of progress (in alignment with, but not limited to, agreements) is considered core to maintaining strong and transparent relationships with Traditional Owners.

¹² Rio Tinto, *Why agreements matter*, March 2016: <https://www.csr.com.au/media/docs/1378/whyagreementsmatter-web.pdf>

CME recommends the Committee note the extensive investment in and complex nature of agreements in Western Australia.

Cultural heritage management through agreements

Agreements typically contain agreed Aboriginal heritage protocols which outline how heritage will be managed as part of the broader partnership. These protocols include how heritage surveys will be undertaken, how heritage sites will be recorded, investigation and research commitments, and what process will be followed should heritage sites be unavoidably impacted during the project lifecycle.

Comprehensive heritage surveys begin during the exploration phase of a project. Surveys are, almost exclusively, undertaken in collaboration with local Traditional Owners and establish whether there is cultural heritage present in the areas proposed for ground disturbance and future development.

Cultural heritage sites and artefacts can take many different forms. Artefacts with attributed cultural heritage significance can include portable objects like stones, glass, wood or bone which has been utilised or modified by Aboriginal people in relation to traditional cultural life. Cultural heritage sites can include locations like historical ceremonial sites, fireplaces, scarred trees, grinding patches or grooves on rock surfaces, rock shelters and rock art¹³.

Ethnographic heritage sites are often broader landforms or landscape-based sites which are known to Traditional Owners as part of their cultural traditions or storytelling, and have mythological or ceremonial significance⁷. An example of an ethnographic site might be a rocky outcrop or creek which holds mythological symbolism.

Where heritage is identified as present, site-avoidance is incorporated into mine planning and disturbance footprints where practicable. Where impact to existing heritage sites will occur, agreed heritage protocols provide for culturally appropriate processes to investigate the best practicable outcome.

To establish this, surveys and investigations are paid for by industry and operate in collaboration with the local Traditional Owners, usually facilitated by the relevant PBC. Professional archaeologists and anthropologists are employed to accompany the survey and collate the information gathered into a final report. Heritage protocols within agreements generally also make provision for payments to PBC's for administration costs and other on-costs incurred.

Surveys are extensive operations, with all participants paid for time spent in the field. In the Pilbara region, an average survey will run for a minimum of one week, and in more complex environments can extend to multiple months in the field. On average, major industry proponents operating in the Pilbara region spent more than 435 individual days on survey each year in the decade to 2020.

Every year, each major industry proponents in the Pilbara region individually invest tens of millions of dollars fulfilling heritage commitments. This is indicative of the long-term, sustained commitment from proponents to management of heritage.

CME recommends the Committee note the scale of investment by industry in Aboriginal cultural heritage.

More than 100,000ha of the Pilbara has been subjected to formal survey by professional archaeologists, anthropologists and Aboriginal people and funded by the resources industry. Translated into units of measurement relevant to Western Australia, this is equivalent to 250 Kings Parks or 46,000 Optus Stadium playing fields. Many thousands of Aboriginal sites have been identified, recorded and investigated as a result of this work. One of the key reasons that the Pilbara region is relatively well-studied is because industry has supported this work as part of its commitment to operating in the region. Once heritage sites are identified and mapped, proposed impacts of development are analysed, factoring in the significance assigned to the site by the local Traditional Owners. Discussions are then held with Traditional Owners, to inform the next stage of mitigative planning and engineering in order to have as little impact as practicable.

One of the outcomes of these discussions is often that the proponent will lodge a Notice under Section 18 of the AHA. An approval under Section 18 allow proponents to impact a site. It is important to note that this does not always mean destroy. A large number of Section 18 applications do not contemplate the destruction of heritage. The Aboriginal Cultural Materials Committee considers and makes a recommendation to the Minister for Aboriginal Affairs for a determination on the application.

¹³ Government of Western Australia, *Aboriginal Heritage Act Due Diligence Guidelines*, Department of Planning, Lands and Heritage, April 2013: <https://www.dplh.wa.gov.au/getmedia/74896bd3-4be3-49ed-be75-38ba72f10d72/AH-Due-diligence-guidelines>

Traditional Owner participation in the process of heritage management is crucial and includes involvement in:

- The negotiations of the native title agreements
- The design of the heritage survey process;
- The heritage surveys;
- Decisions about heritage site significance;
- Consultation about impacts contemplated to heritage sites;
- Post-Section 18 salvage of heritage sites and further research;
- Monitoring of ground disturbing works.

This involvement is key to the successful implementation of projects. Without Section 18 approval processes in concert with Traditional Owners, billions of dollars of highly prospective iron-ore deposits would be quarantined from access.

CME recommends the Committee note the extent of Traditional Owner involvement in cultural heritage processes through agreements, and the critical nature of these processes to project development.

Modernised legislation for Western Australia

Western Australia is currently undertaking an extensive repeal and replace process of the existing *Aboriginal Heritage Act 1972*. This highly significant and long-awaited reform has been championed by the Minister for Aboriginal Affairs in the McGowan Government, Hon. Ben Wyatt MLA. Since commencing in March 2018, this reform has prioritised extensive and wide-reaching stakeholder consultation. The need to modernise WA's legislative arrangements to better reflect expectations of both Traditional Owners and industry land users has been an overarching theme of this process.

In the years preceding this reform, Aboriginal people across WA clearly voiced the need for a stronger say in what happens to their heritage. As a long-term stakeholder in the management of cultural heritage, the resources industry added its voice to the calls for reform. The drafting of proposals for new legislation has been further informed by contemporary approaches in other jurisdictions, movements internationally towards embedding the principles and intent of United Nations Declaration on the Rights of Indigenous Peoples within heritage legislation, and best-practice heritage outcomes delivered by leading proponents.

The proposed legislation contemplates a pivot towards agreement-making on heritage, and looks to empower local Traditional Owners to make decisions about impact to, and management of, their cultural heritage. This approach, largely mirroring leading industry practice in WA, provides for consultation between industry and Traditional Owners to deliver agreed heritage outcomes. This in turn provides opportunity for customisation and nuance in heritage management approaches between regions, Traditional Owner groups, projects and sites.

The WA resources sector understands the fundamental importance of cultivating respectful relationships with Aboriginal people to deliver mutually beneficial outcomes. Having partnered with local Traditional Owners for decades on matters relating to Aboriginal heritage, Native Title, tenure and management of land, the sector believes unequivocally in the role of the State as the primary regulator of Aboriginal cultural heritage.

CME recommends that the focus remain on supporting the progression of new cultural heritage legislation in Western Australia to deliver a modernised Act which prioritises involvement of Traditional Owners.

While the role of both the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the *Environment Protection and Biodiversity Conservation Act 1999* are supported for specific, targeted circumstances - including World Heritage Listings - there is no evidence to indicate that an expansion of Federal jurisdiction on Aboriginal cultural heritage would deliver improved outcomes for stakeholders in WA.

Local Traditional Owners know their country better than anyone. It is the position of the WA resources sector that an increase in Federal oversight on Aboriginal cultural heritage will serve only to damage the agency of Traditional Owners to make decisions on the management of their country. This in turn risks compromising community aspirations for economic and social empowerment, often in locations with very limited opportunities to pursue meaningful self-determination.

CME recommends that State legislation retains primacy on regulation of cultural heritage, without introduction of duplication at a Federal level.

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It is the responsibility of each State to ensure that their Aboriginal cultural heritage legislation is fit for purpose and meets community expectations. The WA State Government reform acknowledges the importance of this responsibility and continues to be strongly supported by industry in WA.

Achievement of a broad consensus, including from both sides of politics, will be critical to delivering success on this front. Industry remains optimistic that bipartisan support throughout WA can be maintained for the final stage of the reform process at the end of 2020. Delivery of a modernised Aboriginal Heritage Act which prioritises the involvement of Traditional Owners remains the priority for Western Australia.

Conclusion

CME welcomes the opportunity to provide a contribution to the Committee Inquiry into Juukan Gorge and looks forward to ongoing engagement with the Committee throughout the Inquiry process.