

Public Consultation Phase Three Final Consultation of the Aboriginal Heritage Act Review

October 2020

Background

HESTA welcomes the opportunity to make a submission to phase three of the public consultation of the review of the W.A. Aboriginal Heritage Act.

HESTA is an industry superannuation fund dedicated to meet the specific needs of employees working in the health and community services sector. HESTA has \$52 billion of assets and 870,000 members, many of whom have dedicated their lives to advancing the aims of equality and reconciliation in this country. HESTA was the first industry super fund to launch a Reconciliation Action Plan (RAP). We take our obligations to advance the ambitions of reconciliation in this country seriously.

Our connection and interest to this review is primarily through investee companies who require relationships with Indigenous communities to obtain and maintain their social license. In Western Australia, this is concentrated in the resource sector and therefore our comments are made with this context in mind.

We were dismayed when Rio Tinto, one of our investee companies, tragically destroyed culturally significant caves in Juukan Gorge. Consequently, the risks for investors caused by inadequate cultural heritage management and systemic inequalities faced by Indigenous communities at the negotiating table with companies and in aspects of heritage legislation, were pulled into sharp focus for us. We are motivated to do what we can to ensure that we never have another catastrophe like Juukan Gorge occur again.

Investment Certainty

Like the mining sector, investors prefer certainty. However, we can face uncertainty when:

- i) The law lags community expectations
In instances in which the law lags community expectation, investee companies cannot always rely on lawful behaviour as the standard which they need to meet. Although we expect companies to recognise this and make appropriate decisions to safeguard and enhance the value of the company over the long term, it would be less costly and easier for all parties if this gap did not exist.

On occasions where companies make decisions and discover a gap between the letter of the law and community expectations, it is investors such as HESTA who bear the costs, which ultimately results in lower returns for our members. For example, in the case of Rio Tinto and the decision to destroy culturally significant caves in the Juukan Gorge, investors will pay the long-term costs of the damage to Rio Tinto's license to operate, and that of the mining industry more broadly, in the form of:

- Potential future delays in permitting;

- A lack of trust from Traditional Owners and understandable reticence to engage in future agreement-making processes;
- Board and management time and resources responding to the fallout of the company's actions and;
- The resource-intensive road ahead for Rio Tinto and the industry to rebuild its reputation as leaders in the area of Indigenous Relations.

ii) There are differing standards across State and Federal legislation

Investors and companies face uncertainty when there are inconsistencies between State and Federal legislation and therefore, we prefer a regime which adheres to clear national standards.

iii) Significant power inequalities exist between negotiating parties without oversight or regulation

In reviewing the versions of events leading to the destruction of the caves at Juukan Gorge by relevant parties, it may appear that there were many factors which contributed to it.¹ However, these factors are often derived by the significant power differential that exists between Traditional Owners and companies and the lack of oversight of agreements negotiated in the context of this differential. When significant power imbalances exist, we have learned that they typically eventuate in poor long-term outcomes which are costly for investors, companies and society in general. While we encourage our investee companies to adopt and promote a culture which asks whether companies 'should' do something rather than whether they 'can' do something, unfortunately incidents such as Juukan Gorge prove that industry cannot self-regulate. As such, the only reliable mechanism for investors to reduce uncertainty generated by inequalities is a strong legal framework which sets minimum standards and embeds mechanisms which seek to reduce or regulate these inequalities.

Investment Certainty – the case for Best Practice Standards

It is accepted by a wide range of stakeholders that Western Australia's Aboriginal Heritage Act has needed a significant review for many years. Given that substantial legislative reviews are infrequent, we believe the best way to achieve certainty for as long as possible for all stakeholders, is for updated legislation to incorporate best practice standards at the time of the review.

We recognise and support aspects of the draft legislation which reduce the risk of another incident of the magnitude of Juukan Gorge occurring again, such as:

- i) Equal appeal rights
- ii) An expanded definition of heritage
- iii) Contingency arrangements to cater for situations in which new cultural heritage is discovered or new information about the significance heritage is provided

¹ *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*. PKKP Aboriginal Corporation, September 2020, <https://www.aph.gov.au/DocumentStore.ashx?id=774c71e8-0f07-4774-bb7e-b6aff5d067d4&subId=692089>; *Submission and supplementary submissions 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*. Rio Tinto, 31 July 2020, <https://www.aph.gov.au/DocumentStore.ashx?id=a40d53cc-020b-458d-a75f-6f02fa3e9906&subId=690644>

iv) Stop work orders

However, in discussion with stakeholders with deep experience and expertise in this area, it has become clear to us that the proposed draft does not reflect current best practice standards.

Many of the improvements in the draft, although welcome, merely correct for the obvious inadequacies in current legislation which have emerged in the decades between the passing of that legislation and the evolution of expectations since. As such, in its current form, we do not believe that the draft creates a regime in which investors, companies and Indigenous communities can have certainty that adhering to legal standards in Western Australia in regards to the protection of cultural heritage will definitively prevent another incident similar to that which occurred at Juukan Gorge and/or will match community expectations.

In order to develop an Aboriginal Heritage Act in Western Australia that is best practice, we believe that the draft should reflect the standards articulated in the Heritage Chairs and Officials of Australia and New Zealand's (HCOANZ) September 2020 publication, *'Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation.'* We note that these standards have been developed and endorsed by the Chairs of Australia's national, state and territory Indigenous heritage bodies, with support from peak bodies representing every major land council and native title representative body in Australia.

We refer to the similar conclusions drawn in submissions made by the National Native Title Council (NNTC), the Kimberley Land Council (KLC) and the Australian Association of Consulting Archaeologists Incorporated (AACAI), that the current draft bill does not meet best practice standards. In particular, we note NNTC's observations in their supplementary submission to the Senate Inquiry into the Destruction of the Caves at Juukan Gorge, which analyses the current draft against these standards and their conclusion that:

"Without being able to assess the scheme in its entirety, the NNTC can say that the WA Bill falls significantly short in many respects of the Standards, particularly with regard to the principle of self-determination, the requirement of free prior and informed consent and a failure to adequately resource Traditional Owner groups and organisations to engage with proponents let alone perform their most basic statutory functions. In short, the WA Bill does little to redress the legislative pitfalls and significant power imbalance that exists between mining companies and Traditional Owners that led to the destruction of Juukan Gorge."

We recognise that the consultative process to arrive at this version of the draft has been extensive. However, in light the recent, significant and highly relevant twin events of the destruction of caves at Juukan Gorge and the release of the Vision and Standards by HCOANZ, we urge the Minister to reconsider the current draft and take this once-in-a-generation opportunity to bring Western Australia's Aboriginal Heritage laws up to the 2020 best practice standards outlined by HCOANZ.