



N° 22/203

The Australian Permanent Mission to the United Nations in Geneva presents its compliments to the Special Procedures Branch of the Office of the High Commissioner for Human Rights and has the honour to refer to the Joint Communication from Special Procedures dated 22 September 2022.

The Australian Permanent Mission has the honour to convey with this Note a response to the Special Procedures from the Australian Permanent Representative dated 21 November 2022.

The Australian Permanent Mission avails itself of this opportunity to renew to the Special Procedures Branch the assurances of its highest consideration.



GENEVA
21 November 2022



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Beatriz Balbin
Chief
Special Procedures Branch
Office of the High Commissioner for Human Rights
Reference: AL AUS 3/2022
Palais des Nations
1211 Geneva 10
Switzerland

Dear Ms Balbin,

Thank you for your correspondence of 22 September 2022 in relation to a joint communication from Special Procedures prepared by the Special Rapporteurs. Australia welcomes the opportunity to engage in constructive dialogue with the Special Rapporteurs.

The Australian Government has two main legislative instruments to protect Indigenous heritage, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act). The EPBC Act protects heritage sites located in World Heritage properties, National Heritage places and heritage on Commonwealth land. The ATSIHP Act can provide for the protection or preservation of an Indigenous area or object that is of particular significance to Indigenous peoples in accordance with traditions.

In May, there was a change of government at the federal level, and the Australian Government is now pursuing an extensive program of environmental and heritage protection reform. The Australian Government acknowledges the inadequacies of existing legislation in protecting cultural heritage and has committed to co-design a standalone piece of cultural heritage legislation, in partnership with Indigenous peoples.

Significant commitments and initiatives to improve protections for cultural heritage are contained in the Australian Government response to the Joint Standing Committee on Northern Australia's inquiry into the destruction of 46,000-year-old cultural heritage sites at Juukan Gorge, Western Australia. The response will be made public soon. This response will provide further detail about proposed heritage protection reforms.

The Australian Government is currently working in partnership with a coalition of 29 member organisations representing Indigenous peoples from across Australia, under the First Nations Heritage Protection Alliance, to co-design options for cultural heritage reform. This partnership is currently undertaking a year-long national engagement process to develop options for reform, which will be drawn from the foundational principles of self-determination and the United Nations Declaration on the Rights of Indigenous Peoples

(UNDRIP). The principles outlined in UNDRIP are fundamental in developing options to reform Indigenous cultural heritage protections in Australia.

Further information about these reforms can be found on the Australian Government Department of Climate Change, Energy, the Environment and Water's website at: <https://www.dcceew.gov.au/parks-heritage/heritage/about/indigenous-heritage>.

The first stage of our cultural heritage reform process was informed by the *Stage 1 Discussion Paper* (available at <https://www.dcceew.gov.au/sites/default/files/documents/discussion-paper-modernisation-atsi.pdf>). The second stage of our cultural heritage reform process is being informed by a *Directions Report*, which outlines feedback from the first stage of consultations (available at <https://www.dcceew.gov.au/sites/default/files/documents/indigenous-heritage-directions-report.pdf>).

Based on this information, the Australian Government and the First Nations Heritage Protection Alliance have developed an *Options Paper* outlining some early options for heritage protection reform (available at <https://www.dcceew.gov.au/sites/default/files/documents/indigenous-heritage-options-paper.pdf>).

Aligned with this cultural heritage reform process is the Australian Government's proposed reforms to the EPBC Act. The Australian Government will deliver a full response to the *Independent Review of the EPBC Act* before the end of this year. The response will outline the government's proposed reform of our national environmental laws to protect, manage and restore our environment and heritage. A new National Environmental Standard on First Nations Engagement and Participation in Decision-Making will ensure that Indigenous peoples are engaged early in relevant environmental approval and decision-making processes under the EPBC Act.

The government has committed to introducing new legislation in this term of Parliament to deliver these reforms to lift the standard of protection for Australia's environment and heritage.

The Federal Government elected in May has taken immediate action on climate change and understands the risks it presents to Australia's unique environment and heritage. In addition to our commitments to reduce national emissions to 43 per cent below 2005 levels by 2030, and to achieve net zero by 2050, the government is working with Indigenous peoples to address the impacts of disasters and climate change. Australia is aiming to ensure that Indigenous communities have a voice in global forums such as the United Nations Framework Convention on Climate Change, the Convention on Biological Diversity and other UN bodies. We want to see meaningful progress on action at the intersection of climate change, gender equality, human rights, and Indigenous issues in those fora.

Together Australian governments are co-designing a First Nations Clean Energy Strategy with Indigenous peoples. The First Nations Clean Energy strategy will provide a path for Indigenous peoples to have a greater say in the priorities for the National Energy Transformation Partnership and will help ensure Indigenous peoples are able to participate in the design, development and implementation of energy policies and programs. Further, in recent weeks the Australian Government committed funds to establish the Torres Strait

Climate Centre of Excellence. The Centre will be Torres Strait led with on-ground traditional knowledge embedded to establish the Centre as a national showcase of excellence in driving integrated climate resilience development.

In response to the concerns raised about cumulative emissions from the Scarborough gas project, any emissions associated with the project that occur within Australia's jurisdiction would be covered by Australia's commitments to reduce emissions by 43 per cent below 2005 level by 2030, and to net zero by 2050. As part of its strong action on climate change, the Government's reforms to the Safeguard Mechanism will support emissions reductions in the industrial sector (including natural gas extraction and processing) within a trajectory to net zero. Any emissions from the use of exported gas would be included in importing countries' international emissions reporting to the UNFCCC and Paris Agreement, and inform the Nationally Determined Contributions submitted by those countries under the Paris Agreement.

Environmental impact studies carried out prior to the approval of and/or during the development of Woodside Energy's Burrup Hub project were carried out in accordance with the EPBC Act. That includes an assessment of the ecological, biodiversity, cultural and social features of the matters of national environmental significance that may be affected.

Woodside currently has three Scarborough project environment plans under assessment by the National Offshore Petroleum Safety and Environmental Management Authority for 4D B1 marine seismic survey activity; drilling and completions; and seabed intervention and trunkline installation. Environment plans must meet strict criteria for acceptance as set out in the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* including demonstrating that all environmental impacts and risks will be of an acceptable level and reduced to as low as reasonably practicable.

With respect to the measures that have been taken to obtain the free and informed consent of Indigenous peoples and communities and protect the cultural rights of Indigenous peoples, your letter mistakenly attributes views of some Traditional Owners from the Burrup peninsula as representing all views, when they do not. As you might expect, these are communities with robust and vibrant representative and democratic structures with a variety of viewpoints, and engagement with Indigenous peoples must be respectful of those differences of opinion. Government decision making requires respecting the representative structures that Indigenous peoples have chosen for themselves.

In accordance with that principle, the Australian Minister for the Environment and Water, who is the decision maker under the ATSIHP Act, visited Murujuga on 15 and 16 August 2022. The Minister was there to determine whether to make an emergency declaration under section 9 of the ATSIHP Act. This application for an emergency declaration had been made by two Traditional Owners from the area. The application was opposed by other Traditional Owners from the area. In fact, the emergency application to halt work was opposed by the democratically elected and legally recognised group of Traditional Owners.

The Minister met with the Indigenous people who had made the application. The Minister also met with the Murujuga Aboriginal Corporation (the MAC), which is a democratic, member-based organisation that represents the five Traditional Owner groups in the area. It is the recognised Traditional Owner group.

The Murujuga Aboriginal Corporation (MAC) and the company Perdaman had reached agreement on the five sites in question under the section 9 application: two petroglyphs, two grinding patches and one cumulative grinding patch and stone arrangement. Four are registered sites and one is an unrecorded site.

The agreement reached by MAC and Perdaman is to relocate three sites with appropriate cultural protocols and to protect the fourth site where it stands. A fifth site will be properly assessed and recorded before any further decisions are made about it. As a result of this, the Murujuga Aboriginal Corporation and the Circle of Elders who advise the MAC, did not support the section 9 emergency application, because of the formal undertakings they received from Perdaman about the protection of Aboriginal sites.

The Minister was satisfied because of the agreement reached on the relocation of these sites they were not under "serious and immediate threat", which is the statutory test under the ATSIHP Act. Accordingly, the Minister did not make the section 9 emergency declaration. The applicants were supplied with written reasons for the Minister's decision. The applicants have the opportunity to seek judicial review of the Minister's decisions through the independent court system.

It is worth noting that the site of the proposed Perdaman urea plant is within the Burrup Strategic Industrial Area, established in 2003. The Burrup Strategic Industrial Area was set aside for state significant industrial projects. Approximately 46% of the Burrup Peninsula is zoned industrial, 2% is zoned residential, and the rest of the Murujuga is protected as National Park or National Heritage listed.

The Australian Government has been working closely with the MAC to support and progress the nomination for World Heritage listing for Murujuga. Murujuga is a site that should be recognised for its outstanding universal value as a site of immense cultural value. This nomination will show that industry and cultural heritage can co-exist.

The promotion and protection of human rights and the multilateral human rights system is a priority for the Australian Government. Australia has a longstanding and deep commitment to human rights and a long history of positive and constructive engagement with the UN human rights system. The multilateral human rights system gives Australia the opportunity to stand up for what it believes in and allows us to work closely with our region and beyond on a range of thematic and country-specific human rights issues. Australia does not shy away from fair scrutiny of our own human rights record and is willing to participate in UN accountability mechanisms. Accountability through the work of UN Special Rapporteurs and other Special Procedure mandate holders contributes to regional stability and security. All countries should be willing to have their human rights obligations reviewed and be open to the opportunity to make improvements.

I would also like to outline a number of interim measures in place to address matters raised in the joint communication.

- An application for long-term protection for Murujuga is currently under assessment under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). In accordance with the usual regulatory process, an independent cultural heritage reporter has been appointed to prepare a report for the federal Minister for the Environment and Water on the application. Part of the role of this reporter is to assess

the assertion that the petroglyphs and songlines are being damaged by emissions from the Burrup Strategic Industrial Area.

- The Dampier Archipelago (including the Burrup Peninsula, but excluding the Burrup Strategic Industrial Area) is included on the National Heritage List, which provides protections under the EPBC Act. This means that an action that will have, or is likely to have a significant impact on the place's listed National Heritage values would need to be assessed under the EPBC Act. The Murujuga Aboriginal Corporation is preparing a World Heritage nomination for Murujuga Cultural Landscape, in partnership with the Western Australian Government and with support from the Australian Government. The Australian Government recently provided \$2 million to the Murujuga Aboriginal Corporation to assist them in preparing the nomination. The Murujuga Aboriginal Corporation is also engaging with the question as to whether petroglyphs are being damaged by emissions. The nomination dossier will be submitted to UNESCO by 1 February 2023. If the World Heritage nomination is agreed, this will provide further protections for that landscape under the EPBC Act.

I would be happy to provide you with the Australian Government's response to the Juukan Gorge inquiry and the Australian Government's response to the *Independent Review of the EPBC Act* when they are available over the coming weeks, should you feel this would benefit your work.

Thank you for contacting us on these matters. I trust this information is of assistance.

Yours sincerely



Amanda Gorely
Ambassador and Permanent Representative
Australian Permanent Mission to the United Nations
Australian Delegation to the Conference on Disarmament