

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

# Never Again

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

Joint Standing Committee on Northern Australia

December 2020  
CANBERRA

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# Foreword

Never again can we allow the destruction, the devastation and the vandalism of cultural sites as has occurred with the Juukan Gorge—never again!

On 24 May 2020, Rio Tinto destroyed a site that represented 46,000 years of culture and history for the Puutu Kunti Kurrama and Pinikura (PKKP) peoples of the Pilbara in Western Australia. The blast devastated a place of personal, community, national and international significance. The Parliament responded to this tragedy by tasking the Joint Standing Committee on Northern Australia with investigating its immediate causes and consequences, and its wider ramifications for the protection of Indigenous heritage.

The scale of the inquiry, the sheer volume of evidence that the Committee has received, and continues to receive, and the serious constraints posed by COVID-19, means that the Committee felt unable to do full justice to the inquiry in so short a time. As a result, the Committee has chosen to table this interim report addressing its findings to date and setting forth recommendations which will be built upon at a later date.

The Committee has chosen to break this inquiry into several phases. The first phase was an investigation of the immediate causes of the destruction of Juukan Gorge rock shelters and permanent water source. It involved an exhaustive investigation of the role played by the PKKP, Rio Tinto and the Western Australian Government. It has also taken in the experience of other stakeholders in Western Australia, including industry and Indigenous groups. The next phase of the inquiry will involve taking a broader view of the issues, looking at the experience of other jurisdictions and the role of the national government in the protection of Indigenous heritage.

The final report of the Committee will do a range of things. It will look more closely at the evidence concerning the destruction of the shelters at Juukan

Gorge—including the role of Rio Tinto, the Western Australian Government and other stakeholders. It will conduct a closer examination of the current Western Australian Aboriginal Heritage Act and the proposals to reform that Act. It will look at the experience of other stakeholders—Traditional Owners and mining companies—who all work with the current legal regime in Western Australia, with all its faults and failings.

The final report will also encompass the Indigenous heritage experience outside Western Australia, looking at Indigenous heritage regimes in the States and Territories and the impacts of Commonwealth law. The Committee has already received evidence flagging concerns in all these areas and is conscious of the need for legislative reform more broadly at the State and Commonwealth level.

There are a lot of things which contributed to the destruction of the shelters. The PKKP faced a perfect storm, with no support or protection from anywhere. They were let down by:

- Rio Tinto
- The Western Australian Government
- The Australian Government
- Their own lawyers
- Native Title law

Rio Tinto's role in this tragedy is inexcusable. Rio knew the value of what they were destroying but blew it up anyway. It pursued the option of destroying the shelters despite having options which would have preserved them. Rio knew of the site's archaeological significance and its cultural significance to the PKKP. It had funded studies which had uncovered some 7,000-odd artefacts, including a four thousand year old human hair belt that linked the site directly to the ancestors of the current Traditional Owners. The Rio-funded archaeological report identified Juukan 2 as a place of 'the highest archaeological significance in Australia'. Rio also funded a documentary that highlighted the cultural significance of the shelters. Yet, even though there were other options available, the only option put to the PKKP for the mining of the area involved the destruction of the shelters. The evidence presented to the Committee raises significant issues about the culture and practices inside Rio Tinto and highlights a need for the internal reform of the company.

Western Australian law played a critical role in the destruction of the shelters. The *Aboriginal Heritage Act 1972* has failed to protect Aboriginal Heritage, making the destruction of Indigenous heritage not only legal but almost inevitable. It is inconceivable that such a valuable heritage site could be destroyed in complete

accordance with the law and without any means for Traditional Owners or their representatives to effectively intervene — yet it happened. The Western Australian legislation that enabled the destruction of Juukan Gorge is woefully out of date and poorly administered. Everyone accepts this. The need for new laws is widely recognised. In the meantime, without government and industry action, Indigenous heritage will continue to be at risk.

The destruction of Juukan Gorge also highlighted the shortcomings of federal law. The *Environment Protection and Biodiversity Conservation Act 1999* has proved of limited value in Indigenous heritage protection. The *Aboriginal and Torres Strait Island Heritage Protection Act 1984* is virtually moribund. Moreover, confusion about who is responsible for the legislation and inadequate legal advice from the PKKP's legal representatives, destroyed any hope of the federal heritage protection Act offering any protection at all. Underlying these problems is the vexed issue of Native Title. Ironically, Native Title has become another means to destroy Indigenous heritage. The lack of rights given to Traditional Owners to protect their own heritage, the legal and procedural precedence given to other land holders, and the imbalance of power in the agreement making process have all been highlighted in the inquiry. The Committee will give further consideration to the need to amend the Native Title Act as the inquiry progresses.

The Traditional Owners of the Pilbara are not opposed to mining. They see the possibilities that development offers both to themselves and to other Australians. They do not accept, and we should not accept, that the destruction of their ancient culture and heritage is the price to pay for potentially short term prosperity. Damage is being done not because it is unavoidable, but because people are not doing enough to avoid it. There was nothing inevitable about the destruction of Juukan Gorge. By its own admission, Rio Tinto had options for mining the site which did not involve the destruction of the shelters — they simply chose to proceed with the destruction of the gorge.

The defining moment of the first phase of this inquiry was the visit to Western Australia. It was an opportunity for the Committee to experience the destruction of the site from the perspective of those affected most directly, the PKKP. The Committee's visit out to the Juukan Gorge site to see the devastation firsthand was quite distressing. The grief of the Traditional Owners was almost overwhelming for everyone who witnessed it. They had lost more than a piece of heritage — they had lost part of themselves, a piece of their living culture which was infused with the still present spirits of their ancestors and pregnant with the future stories of their descendants.

But there was also some optimism there. The PKKP and Rio had discussed remediation of the Juukan Gorge site. Juukan 1 appeared to have survived but there was remediation work that needed to be done. The most significant shelter was Juukan 2. It was totally destroyed, but there was still hope that the floor of the cave had survived. The other shelters and a fair amount of the gorge was still intact. Within the snake's head waterhole, while the destruction of the area had impacted on the spring flow, which had stopped, they were very keen to try and get remediation. Included in that will be a 'keeping place' for the thousands of artefacts and the like that have been stored in containers and removed from the site. The PKKP is very keen to have that keeping place that they can control.

This was an incident waiting to happen. We have all paid a price for that. Rio Tinto has paid a high price in reputation for its failure at Juukan Gorge. Other resource companies need to take note: governments, investors and the community will no longer tolerate such tragedies. Protecting Indigenous heritage should be a priority of all governments. The best way to achieve certainty for all stakeholders is to ensure adequate legal protections for Indigenous heritage are in place. The States and Territories and the Commonwealth have an absolute obligation to preserve our Indigenous heritage for the benefit of all Australians, and corporate Australia can no longer ignore the link between its social licence to operate and responsible engagement with Indigenous Australia. The Committee has made the point all the way through this inquiry that the destruction at Juukan Gorge has not just impacted on a small and discreet group of Traditional Owners in the middle of the Pilbara; it has robbed a significant piece of history from all Australians—from the world.

I would like to conclude with some words of thanks. Many people have contributed to this inquiry, including Traditional Owners, Indigenous organisations, companies, governments, lawyers and academics, and members of the public who were outraged by the incident and wished their voices heard. I would particularly like to thank the PKKP who, despite their grief, have embraced the inquiry and assisted with its work. Thanks also goes to Rio Tinto, who, perhaps in contrition for their error, have been forthcoming with evidence—not always to their advantage—and who facilitated the Committee's visit to Juukan Gorge. I would like to think that Juukan Gorge marks a turning point for that company and the mining industry as a whole. I would also like to thank my Committee colleagues for their attentive and constructive contributions to a difficult inquiry undertaken under challenging circumstances. And last, but not least, I would like to thank the secretariat for their sterling work. They have been outstanding.

Never Again!

**Hon Warren Entsch MP, Chair**

# Members

## *Chair*

Hon Warren Entsch MP Leichhardt, QLD

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Senator Anthony Chisholm ALP, QLD

## *Members*

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Senator Rachel Siewert AG, WA

Senator the Hon Matthew Canavan NATS, QLD

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# Terms of Reference

## **Inquiry into the destruction of Indigenous heritage sites at Juukan Gorge**

The Joint Standing Committee on Northern Australia to inquire into and report on, by 9 December 2020:

The destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia with particular reference to:

- (a) the operation of the Aboriginal Heritage Act 1972 (WA) and approvals provided under the Act;
- (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;
- (f) the interaction, of state indigenous heritage regulations with Commonwealth laws;
- (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;
- (h) how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites;

- (i) opportunities to improve indigenous heritage protection through the Environment Protection and Biodiversity Conservation Act 1999; and
- (j) any other related matters

# Abbreviations

ACMC	Aboriginal Cultural Material Committee
ATSIHP Act	<i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i>
EPBC Act	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
FMG	Fortescue Metals Group
NTA	<i>Native Title Act 1993</i>
NNTT	National Native Title Tribunal
PKKP	Puutu Kunti Kurrama and Pinikura
RNTBC	Registered Native Title Body Corporate
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
YMAC	Yamatji Marlpa Aboriginal Corporation



# List of Recommendations

## Recommendation 1

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1.53 That Rio Tinto:

- Negotiate a restitution package for the destruction of the Juukan rock shelters with the PKKP
- Ensure a full reconstruction of the Juukan rock shelters and remediation of the site at its own expense, with guidance and oversight from the PKKP, acknowledging Rio Tinto's undertaking in this regard and the steps taken to date. The reconstruction should specifically include steps to mitigate water and other damage to the creek that flows in Juukan Gorge and protect the Sacred Snake-head Rock Pool
- Commit to a permanent moratorium on mining in the Juukan Gorge area, negotiated with the PKKP, and that this is respected by all mining and exploration companies
- Undertake an independent review of all its agreements with Traditional Owners to ensure they reflect best practice standards
- Remove any gag clauses or restrictions on Traditional Owner rights under heritage and other laws
- Commit to a stay on all actions under Rio Tinto's current Section 18 permissions until they are properly reviewed to ensure that free, prior and informed consent has been obtained from Traditional Owners and is current

- Commit to a voluntary moratorium on applying for new Section 18 permissions, pending either the passage of stronger heritage protections in Western Australia or the negotiation of a protocol with relevant Traditional Owners to establish an improved process for site surveys, cultural protection and work area clearances based on the principle of avoiding damage wherever possible
- Return all artefacts and other materials held by Rio Tinto to PKKP and after negotiation and by agreement with PKKP, fund appropriate keeping places for artefacts and other materials to be supervised and controlled by the PKKP.

## **Recommendation 2**

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1.58 That the Western Australian Government:

- Replace the *Aboriginal Heritage Act 1972* with stronger heritage protections as a matter of priority, noting the progress already made in consultation on the draft Aboriginal Cultural Heritage Bill 2020. Any new legislation must as a minimum ensure Aboriginal people have meaningful involvement in and control over heritage decision making, in line with the internationally recognised principles of free, prior and informed consent, including relevant RNTBCs under the Native Title Act. Any new legislation should also include a prohibition on agreements which seek to restrict Traditional Owners from exercising their rights to seek protections under State and Commonwealth laws
- Place a moratorium on the consideration and approval of new Section 18 applications until the new legislation is passed unless it can be established and verified that there is current free, prior and informed consent obtained from Traditional Owners
- Strongly encourage mining companies with existing Section 18 permissions to not proceed with these approvals but to have them reassessed under the new legislation once it is passed unless it can be established and verified that there is current free, prior and informed consent obtained from Traditional Owners
- Urgently establish new procedures to improve the quality and transparency of decision making by the Registrar and ACMC prior to

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any legislative change, including processes for appropriate escalation of urgent matters to the Minister

- Adequately resource the ACMC
- Institute rolling membership of the ACMC to ensure the involvement of Traditional Owners of the country that is the subject of any decision, as nominated by the relevant RNTBC
- Investigate the large number of heritage sites de-registered since 2011 and ensure that proper procedures are in place for the removal of heritage sites from the register
- Reinstate sites to the register where these were inappropriately removed
- Undertake a mapping and truth-telling project to record all sites that have been destroyed or damaged pursuant to the AHA, including visual representations of the impact to country, with a view to establishing a permanent exhibition or memorial in the Western Australian Museum.

### **Recommendation 3**

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1.59 That all mining companies operating in Western Australia whether or not on Native Title land:

- Undertake independent review of their agreements with Traditional Owners and commit to ongoing regular review to ensure consistency with best practice standards. In particular, companies should review final compensation clauses in recognition that free, prior and informed consent requires continuous review and engagement with traditional owners
- Issue public confirmation that they will not rely on gag clauses or clauses preventing Traditional Owners from exercising their rights under state and Commonwealth heritage laws and remove these clauses from their agreements with Traditional Owners
- Commit to a stay on all actions under currently held Section 18 permissions until they are properly reviewed to ensure that free, prior and informed consent has been obtained, and is current, from Traditional Owners for any damage or destruction to significant sites

- Commit to a voluntary moratorium on applying for new Section 18 permissions, pending either the passage of stronger heritage protections in Western Australia or the negotiation of a protocol with relevant Traditional Owners to establish an improved process for site surveys, cultural protection and work area clearances based on the principle of avoiding damage wherever possible
- Fund appropriate keeping places for artefacts and other materials to be agreed on with and controlled by the relevant Traditional Owners. Wherever possible, working together with other companies operating on country to jointly fund keeping places in agreement with Traditional Owners
- Facilitate the sharing of all heritage information and mapping technology used by mining companies with relevant PBCs, to correct information asymmetry and ensure Traditional Owners have access to records of their cultural heritage and are resourced to set up their own mapping initiatives
- Actively support and fund efforts by the Western Australian and Commonwealth governments to establish mapping and truth telling initiatives as recommended above
- Work with Traditional Owners to ensure better access to country.

## **Recommendation 4**

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1.62 The Committee recommends that the Australian Government:

- Seek to legislate a prohibition on agreements that restrict Traditional Owners from publicly raising concerns about heritage protection or exercising their rights under heritage legislation;
- Implement and publicly publish improved procedures within the Ministers offices, the National Indigenous Australians Agency and the Department for responding to and recording heritage concerns raised by Traditional Owners, including protocols for communicating and escalating urgent concerns to the responsible Minister and their Department;

- Work with Western Australia to implement the recommendation above for a mapping and truth telling project in relation to heritage that has been damaged or destroyed, and to extend this project at the national level in collaboration with other states and territories.

## **Recommendation 5**

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- 1.64 The Committee recommends to the Australian Government that ministerial responsibility for the administration of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* revert to the Minister for Indigenous Australians, and that the National Indigenous Australians Agency become the administering authority.

## **Recommendation 6**

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- 1.65 The Committee recommends to the Australian Government that the relevant Minister direct their office and department to more vigorously prosecute use of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* in Western Australia until such time as new legislation is enacted in Western Australia replacing the current *Aboriginal Heritage Act 1972 (WA)*.

## **Recommendation 7**

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- 1.66 The Committee recommends that the Australian Government urgently review the adequacy of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.



# 1. Juukan Gorge - Interim Report

My name is John Ashburton. I am a proud Puutu Kunti Kurrama man. My father was John Ashburton Senior. His father was Tommy Ashburton, who was also known as Juukan, and was born at Jukarinya, also known as Mount Brockman. He married Topsy Williams, a Pinikura woman. Juukan Gorge was named after my grandfather. My connection to our country is strong, direct and ancient. Today, I am proud to represent the Puutu Kunti Kurrama and Pinikura peoples as the chairperson of the board of the PKKP Aboriginal Corporation.<sup>1</sup>

## Juukan Gorge

- 1.1 On 24 May 2020, Rio Tinto conducted a blast as part of its extension of the Brockman 4 iron ore mine. The blast devastated Aboriginal heritage sites at Juukan Gorge, including two rock shelters of great cultural, ethnographic and archaeological significance. Indeed, one of these shelters had provided evidence of continuous occupation going back some 46,000 years, making it a site of national and international significance. For the Puutu Kunti Kurrama and Pinikura (PKKP) peoples, it was something even worse – the theft of a vital part of their living culture. Their grief at the loss, which the Committee witnessed at first-hand on visiting the site, is indescribable.

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<sup>1</sup> Mr John Ashburton, Chairperson, PKKP Aboriginal Corporation, *Committee Hansard*, 12 October 2020, p. 1.

1.2 Mr Burchell Hayes, a proud descendant of Juukan (his grandfather), told the Committee:

Juukan Gorge is an anchor of our culture, with a number of individual cultural sites that makes it unique, an important place. There is also a number of rock shelters along the deep and narrow sandstone gorge. Each of these is a museum of heritage, featuring thousands of artefacts, including grinding stones, rock seats, blade quarries, flaked stone material and human hair, likely to be from a hair belt that has been genetically matched to our people.

Juukan Gorge also includes the distinctive and sacred rock pool that used to hold water long after the rain had fallen. The shape of a snake's head entering the ground forms the shape of what used to be a permanent water source. This rock pool is a very spiritual place, which is still visited by the spirits of our people. The Juukan Gorge is known to be a place where the spirits of our relatives who have passed away, even recently, have come to rest. It is a place that the very, very old people still occupy. Purlykuti has been specifically referred to by the old people as a place of pardu, which refers to the special language only spoken during ceremonies in the Pilbara. Our elders state that it is certain that the spirits are very disturbed, and their living relatives are also upset at this. This is why Juukan Gorge is important. It is in the ancient blood of our people and contains their DNA. It houses history and the spirits of ancestors and it anchors the people to this country.<sup>2</sup>

1.3 He emphasised that the loss of the Juukan caves was not just a loss for his people:

The loss of Juukan Gorge rock shelters is also a loss to all First Nations people and the community within Australia and internationally – communities who have lived to continuously endure the destruction of their physical, cultural and spiritual land with little to no reprieve through legislation or the courts. It is yet another example of the low importance attached to Aboriginal people and Aboriginal culture.

There are other groups, including our Kurrupa neighbours, who have a direct connection with this place through their own knowledge and songlines and through the creation stories and through families. They have told us that they also feel powerless and angry at this having happened. We have an obligation to look after country in accordance with traditional law and customs. It is our obligation to the old people, who also looked after it. It was on loan to us to pass on to our future generations, our Puutu Kuntj Kurrama and Pinikura

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<sup>2</sup> Mr Burchell Hayes, Director and Traditional owner, PKKP Aboriginal Corporation, *Committee Hansard*, 12 October 2020, p. 2.

children, and the future generations yet to come. The disaster has now left a gaping hole in our ability to pass on our heritage to our children and grandchildren.<sup>3</sup>

## The inquiry

- 1.4 On 11 June 2020, the Senate referred to the Joint Standing Committee on Northern Australia the inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia.<sup>4</sup> The original reporting date was 30 September, but this was subsequently extended to 9 December.
- 1.5 The terms of reference for the inquiry are ambitious, and deliberately so. The inquiry is not only examining the immediate circumstances of the tragedy at Juukan Gorge, but the wider context surrounding the destruction of Indigenous heritage in Western Australia and nationally. Indeed, some of the evidence received by the Committee has emphasised that this tragedy has international dimensions – other Indigenous peoples face the same threat to their culture and heritage from the same corporations operating in the Pilbara.
- 1.6 To date, the inquiry has received 142 submissions, received numerous supplementary submissions and other documents, and held 11 public hearings. The Committee also held a yarn session with the PPKP people, at which people were able to speak freely of their grief, anger and hopes to the Committee, before a visit to the Juukan Gorge site itself. This visit, delayed twice because of COVID-19, was essential to the inquiry, allowing the Committee to bear witness to the destruction of the caves and its impacts on the Traditional Owners.
- 1.7 The extent of the evidence received to date, the complexity of the issues, the need to examine matters more widely in Western Australia and nationally, and the disruptions caused by COVID-19, means that the Committee feels that it cannot do full justice to the issues raised by the inquiry with a final report at this date. The Committee has decided, therefore, to present an interim report, outlining its findings to date, its plans for the future, and making some broad recommendations which it hopes will inform discussion

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<sup>3</sup> Mr Burchell Hayes, Director and Traditional owner, PPKP Aboriginal Corporation, *Committee Hansard*, 12 October 2020, p. 2.

<sup>4</sup> *Journals of the Senate*, 11 June 2020, p. 1848.

and policy in government at the State and Federal level, within the corporate sector, and within the community.

## Findings

### *Impact of Juukan Gorge*

- 1.8 The destruction of the caves at Juukan Gorge is an event with numerous implications. For the PKKP the destruction was personal and visceral—and a sharp reminder of how vulnerable their culture and heritage are to the imperatives of governments and corporations. For other Indigenous peoples, it highlighted the vulnerability of their culture and heritage to the same processes. Rio Tinto suffered a significant stain on its corporate reputation and three senior executives have lost their jobs. Other companies operating in the Pilbara have taken the opportunity to revisit existing policies and agreements and explore new ways of managing their relationships with the Traditional Owners of the lands upon which they operate. In a warning to companies, institutional investors have also begun to take a closer look at how companies manage their relationships with Traditional Owners. The Western Australian Aboriginal Heritage Act was already under review when Juukan Gorge was destroyed. The incident has placed renewed emphasis on the need to reform or replace that Act, and give meaningful protection to Aboriginal heritage in the State. The Commonwealth Environment Protection and Biodiversity Conservation Act (EPBC Act) is also currently being reviewed—a review which, so far, has identified serious inadequacies in terms of Indigenous heritage protection in both the EPBC Act and the Aboriginal and Torres Strait Islander Heritage Protection Act. The Committee is interested to see how much of this activity will lead to meaningful change, and how much is simply the result of the spotlight of inquiry and media scrutiny.
- 1.9 The Committee is aware that Rio Tinto has undertaken a significant re-evaluation of its relationship with the PKKP—including looking into the rehabilitation of the Juukan Gorge site and placing a moratorium on further development in the area pending further consultation with the PKKP and a re-evaluation of the interaction between heritage and mining. The Committee has also become aware that Fortescue Metals Group (FMG) has recently obtained a mining tenement in the same area, within the moratorium template, and would urge FMG to join the development moratorium until the heritage issues on the site have been fully resolved.

## *Juukan Gorge*

1.10 The evidence presented to the Committee indicates that the following factors were instrumental to the destruction of Juukan Gorge:

- The legal framework for the protection of Aboriginal heritage in Western Australia and at the Federal level is completely inadequate. The Western Australian *Aboriginal Heritage Act 1972* (AHA) made the destruction of the site legal and offered no avenue to protect it even when its archaeological significance had been revealed. Federal legislation offered no meaningful protection.
- The agreements between Rio Tinto and the PKKP required the PKKP to cede their rights and prevented them from contesting company decisions, raising concerns, or having recourse to law to protect heritage sites.
- The culture and institutional structure within Rio Tinto did not adequately prioritise Indigenous heritage. Indeed, it would appear that Juukan Gorge was effectively destroyed from the moment Section 18 consent—allowing for the disturbance, damage or destruction of sites<sup>5</sup>—was granted in 2013. There is no concrete evidence that Rio Tinto ever intended to avoid the site despite having options to do so—in fact, the opposite is true.
- The Section 18 administrative process approving the consent was seriously flawed. Clear evidence as to the significance of the rock shelters was ignored, mistakes in the application forms were missed, and the PKKP and key consultants were not contacted by state government officials for their views on the application.
- Communication between Rio Tinto and the PKKP failed, with the two sides remaining largely oblivious to each other’s plans and concerns until it was too late to save the site.

1.11 These factors have implications for Aboriginal heritage protection in Western Australia more broadly. The legal framework and the administration of heritage protection processes impacts the entire State, meaning all Traditional Owners and corporate entities are affected by the shortcomings of the law. The extremely low bar of protections offered by legislation has meant that the best option for heritage protection available to most Traditional Owners is the agreements they can make with companies. However, the nature of Native Title and the legal framework surrounding it

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<sup>5</sup> *Aboriginal Heritage Act 1972*, ss. 17–18.

means that these agreements are not between parties of equal power. In effect, agreements are offered on a take-it or leave-it basis by the mining companies, and failure to accept terms means effective exclusion from the benefits—royalties, training, employment, commercial engagement—which flow from these agreements. Most agreements have contained ‘gag’ clauses, which have prevented Traditional Owners from taking legal action or voicing their concerns to prevent the destruction of heritage. Indeed, once signed, the agreements often require consent to the destruction of heritage. Even those mining companies that do not enforce compliance through agreements are prepared to enforce it through other forms of legal action. There is widespread frustration among Traditional Owners with both process and outcomes. It has created the situation, as one Traditional Owner put it, where her people ‘utilise our Mining Royalties to protect our Heritage from Mining Companies that do not meaningfully engage with us’<sup>6</sup>. She stated:

The loss we feel is compounded by lack of power we have. By the fake responsibility that the white man’s system expects us to shoulder. By the fundamental conflict that affects each and every Traditional Owner in the Pilbara who is forced to rely on what mining brings to the Pilbara and, each day, is a little more diminished, by what it does to the Pilbara.<sup>7</sup>

### *The role of Rio Tinto*

- 1.12 A primary purpose of this inquiry was to examine the sequence of events and decision-making processes undertaken by Rio Tinto that led to the destruction of the significant rock shelters at Juukan Gorge in the Pilbara region of Western Australia on 24 May 2020.
- 1.13 Substantial evidence was provided to Rio Tinto over many years about the cultural importance of the rock shelters at Juukan Gorge to the Puutu Kunti Kurrama and Pinikura (PKKP) people and indeed its global significance as a site of human occupation over 46,000 years. Excavations of the rock shelters had identified thousands of artefacts, including fragments of an ancient hair belt dated to 4000 years ago and a grinding stone dated to 30,000 years ago.
- 1.14 Despite this knowledge, Rio Tinto made a deliberate decision to choose the only one of four mine expansion options that required the destruction of the rock shelters on the basis that it would maximize the company’s access to

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<sup>6</sup> Ms Sara Slattery, *Submission 139*, p. 15.

<sup>7</sup> Ms Sara Slattery, *Submission 139*, p. 12.

the lucrative iron ore body located in the area. They were legally permitted to do so by the grant of a Section 18 permit approved by the Western Australian Minister in 2013 under the *Aboriginal Heritage Act 1972* (WA). There is no evidence that the four options for the mine site were ever put to the PKKP for their consideration. Rather, Rio Tinto's communications with the PKKP indicated that there was no possibility of avoiding the sites, which on Rio Tinto's own admission was not correct.

- 1.15 The evidence before the committee demonstrates severe deficiencies in the company's heritage management practices, internal communication protocols and relationship practices with the PKKP. It is the Committee's view that these deficiencies have not been fully grappled with in Rio Tinto's Board Review.
- 1.16 This includes failures to properly consult with the PKKP Traditional Owners, lack of transparency regarding information and decision making, a structure which sidelined heritage protection within the organisation, lack of senior management oversight and no clear channel of communication to enable the escalation of heritage concerns to executives based in London.
- 1.17 The events immediately preceding the destruction of the rock shelters also reveal Rio Tinto's legalistic approach to heritage protection, including a self-interested reliance on outdated laws and unfair agreements containing gag clauses prohibiting PKKP from critiquing the operations of the company and restricting their rights to access state and federal heritage protections without first obtaining the company's consent.
- 1.18 Collectively, these deficiencies represent more than just a series of 'unfortunate mistakes' or mere ineptitude by individuals. Rio Tinto's conduct reflects a corporate culture which prioritised commercial gain over the kind of meaningful engagement with Traditional Owners that should form a critical part of their social licence to operate. This corporate culture belied Rio Tinto's public rhetoric of working in partnership with First Nations people, as reflected in the company's (now dis-endorsed) Reconciliation Action Plan. The Committee will give a more detailed assessment of the events and communications between Rio Tinto and the PKKP in its final report.

## *The Aboriginal Heritage Act 1972*

1.19 The *Aboriginal Heritage Act 1972* (WA) is the principal legislation affording protection to Aboriginal Heritage in Western Australia. Theoretically, it offers protection to:

any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;

- a) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;
- b) any place which, in the opinion of the Committee<sup>8</sup>, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State; or
- c) any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.<sup>9</sup>

1.20 In practice, a combination of inherent shortcomings, legislative amendments and administrative practice have rendered the protections of the Act ineffectual.

1.21 Rio Tinto were legally sanctioned to destroy the rock shelters under Section 18 of the AHA, an Act which is outdated, unfit for purpose and in urgent need of replacement. The State began a review of the AHA in early 2018, but has done little to curtail the existing regime that enables the destruction of Aboriginal sites.

1.22 The Committee's inquiry has highlighted several aspects of the AHA which contributed to the destruction of the Juukan rock shelters, particularly the operation of the current Section 18 process. This includes lack of proper scrutiny of Section 18 applications by the Aboriginal Cultural Material Committee (ACMC) and the absence of appeal avenues for Traditional

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<sup>8</sup> Aboriginal Cultural Heritage Committee, formed under the *Aboriginal Heritage Act 1972* to 'evaluate on behalf of the community the importance of places and objects alleged to be associated with Aboriginal persons', including evaluating Section 18 notices. *Aboriginal Heritage Act 1972*, ss. 18, 28, 39.

<sup>9</sup> *Aboriginal Heritage Act 1972*, s. 5.

Owners. Far from ensuring principles of free, prior and informed consent are upheld, the AHA does not provide for any meaningful involvement of Aboriginal people in the decisions made over their heritage.

- 1.23 In practice, the operations of the various bodies and decision-makers under the AHA have evolved into a system designed to facilitate mining operations rather than proactively protecting Aboriginal heritage.
- 1.24 The Committee received concerning evidence of a large number of sites being removed from the state register of protected places since 2011. Concerns were also raised about the perfunctory nature of the ACMC's consideration of applications under Section 18, as well as a broader lack of awareness by the Registrar and ACMC of the practical context including the existence of 'gag' orders restricting traditional owners from raising objections under the Act.
- 1.25 These inadequacies in the text and administration of the AHA are exemplified by the absence of scrutiny by the ACMC of Rio Tinto's application under Section 18 to destroy the Juukan rock shelters, which failed to identify and challenge inaccuracies in the information provided by Rio Tinto and resulted in a fixed decision which was unable to be reversed when further evidence about the heritage value of the site came to light.
- 1.26 Different stakeholders have placed a different emphasis on which of these shortcomings are the most significant, but there is general acceptance that the Act needs reform, and the Western Australian Government has embarked on the development of new legislation. A consultation draft of the new Aboriginal Cultural Heritage Bill has been released. Key features include:
- an updated Aboriginal Cultural heritage definition that recognises living culture and cultural landscapes
  - recognition of Aboriginal custodianship and control of cultural heritage and encourages the return of secret and sacred objects to the rightful Aboriginal custodians
  - establishment of a new directory of Aboriginal cultural heritage including permits and plans
  - ensuring Aboriginal voices in decision- making
  - allowing new information that has come to light to be taken into account
  - prohibiting contracts from modifying its operation, voiding agreement clauses which seek to limit or restrict rights available to Traditional Owners under the Bill
  - amended processes for protection orders

- increased penalties for breaches
- extending the right of review to all parties involved in an application.<sup>10</sup>

1.27 The Committee supports the intention to replace the Aboriginal Heritage Act and the broad principles outlined in the Aboriginal Cultural Heritage Bill, but is conscious that many stakeholders have reservations about aspects of the proposed legislation. The experience of the PKKP with Rio Tinto, and that of other Aboriginal groups, would suggest that the Bill's focus on agreement-making needs careful consideration. There are concerns that the tiered approvals process could operate in a way that encourages proponents to minimise expected impacts to avoid regulatory oversight. There is no provision for the resourcing of the Local Aboriginal Cultural Heritage Services which will provide heritage assessment at the local level. There are also concerns about the lack of information about the content of supporting regulations—regulations that will provide detail in relation to timeframes for approvals following new information coming to light, and appeals. The Aboriginal Affairs Minister can, on appeal by a proponent, override decisions of the new Aboriginal Cultural Heritage Council if they think it is in the 'interests of the State'—a relationship reminiscent of that between the Minister and the Aboriginal Cultural Material Committee (ACMC) under the current Act. The passage of the Bill is likely to be delayed by the Western Australian election in March 2021, meaning there is still opportunity to consider the Bill in detail. The Committee will give a more considered assessment of the proposed legislation in its final report.

### *The broader Western Australian experience*

1.28 The corporate failures which led to the destruction of the Juukan rock shelters are not unique to Rio Tinto. The Committee has heard evidence of significant systemic issues across companies operating in Western Australia and nationally. Similar to Rio Tinto, other mining companies have taken advantage of the inadequate protections in State and Commonwealth laws for commercial advantage at the expense of cultural heritage and Traditional Owners.

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<sup>10</sup> Overview, Aboriginal Cultural Heritage Bill 2020, available at: <<https://www.dplh.wa.gov.au/getmedia/9dbb101f-8cb8-406f-8453-84b89fbc5530/AH-ACHB-overview>>.

- 1.29 There is particular concern surrounding existing Section 18 permissions and the potential for future damage to heritage sites as a result of historical approvals under this demonstrably flawed system.
- 1.30 The Committee has heard evidence of other companies entering into agreements that include gag clauses and restrictions on Traditional Owners' ability to exercise their legal rights. Rio Tinto has joined BHP in communicating an intention not to rely on these clauses, however, there is still some uncertainty about how far and in what circumstances the protection extends.
- 1.31 The evidence before the Committee indicates that companies have failed to respect the rights and interests of Traditional Owners in a variety of ways, including creating division among Traditional Owner groups and seeking to undercut the authority of native title bodies including PBCs.
- 1.32 Entering into early, fixed agreements with Traditional Owners has advantaged mining companies, particularly if executed before there is an opportunity to undertake comprehensive heritage surveys. Companies must recognise that free, prior informed consent requires an ongoing process of review and engagement with Traditional Owners.
- 1.33 While Rio Tinto has faced direct scrutiny, there is nevertheless a clear public expectation that other companies will reform their practices and that Governments will enforce higher standards of respect for First Nations heritage and culture.

### *The Indigenous heritage experience outside of Western Australia*

- 1.34 To date, the Committee has focused on developments in Western Australia, especially with regard to the specific events surrounding the destruction of Juukan Gorge. Nonetheless, the Committee is aware that Indigenous heritage protection is a live issue across the nation. Submissions have been received from most jurisdictions outlining concerns about the protection and management of particular sites and Indigenous heritage protection more broadly. It is the Committee's intention to expand its consultations in the new year to encompass other jurisdictions, both with a view to addressing particular issues and to developing a nationally consistent response to heritage protection.

### *Commonwealth law*

- 1.35 The agreements negotiated between Rio Tinto and the PKKP in the context of the *Native Title Act 1993* (Cth) (NTA) form an essential part of the background to the destruction of the Juukan rock shelters. These agreements were not negotiated from positions of equality between Rio Tinto and the PKKP. Rather, the PKKP's position – and consequently its ability to protect cultural heritage – was significantly weakened by inferior resourcing and the lack of any real bargaining power provided by the NTA.
- 1.36 The Committee is aware of concerns with the quality of representation provided to the PKKP by the Yamatji Marlpa Aboriginal Corporation (YMAC) in negotiations with Rio Tinto, particularly YMAC's joint representation of PKKP alongside other Traditional Owner groups and whether the organisation made sufficient efforts to communicate the complex and lengthy agreements to the PKKP prior to signing. It was incumbent on the PKKP's representatives to ensure the communication of these detailed agreements in an intelligible form. It is of great concern to the Committee that members of the PKKP gave evidence that they did not understand the terms of the agreement they signed. It is difficult to see how free, prior and informed consent can be achieved in such circumstances. All parties to agreements in this context ought to take steps to ensure the integrity of the negotiating process.
- 1.37 Nevertheless, even without these factors, Rio Tinto had a substantial advantage in negotiations with the PKKP because of the current operation and interpretation of the NTA. The likelihood that mining companies will be granted exploration or mining permits and the difficulty faced by Traditional Owners in enforcing the right to negotiate under the NTA gives mining companies an advantage in agreement making at the expense of Traditional Owners and heritage protection.
- 1.38 One result of this inequality in negotiating positions in the agreements between the PKKP and Rio Tinto was the inclusion of 'gag clauses' and clauses that prevented the PKKP from exercising their rights under state and federal laws, including heritage laws.
- 1.39 Attempts by the PKKP to seek assistance at the Commonwealth level despite these restrictions were unsuccessful. Lack of communication between the two Federal Ministers' offices and their departments frustrated the PKKP's efforts to protect the Juukan rock shelters from destruction and denied the PKKP the option of injunctive relief. The PKKP were further compromised

by the fact that their legal representative did not adequately advise the PKKP of the legal avenues available at the federal level.

- 1.40 It is clear that Commonwealth protections are essential in safeguarding First Nations heritage, especially where states and territory governments have a financial interest in facilitating mining and other developments on their land. The Committee is aware of significant concerns about failures to adequately protect First Nations heritage in almost all states and territories.
- 1.41 It is the strong view of the Committee that the Commonwealth should play a far more significant role in ensuring and enforcing a standard of heritage protection across the states and territories that is consistent with Australia's international obligations.
- 1.42 Currently, there are three principal pieces of Commonwealth law covering aspects of Indigenous heritage:
- *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)
  - *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act)
  - *Native Title Act 1993*.
- 1.43 Evidence received by the Committee highlights the inadequacy of current Commonwealth protections under both the ATSIHP and the EPBC Act. The process for Traditional Owners to access the protections in either Act is complex and often unsuccessful. The limited number of declarations made under ss. 9 and 10 of the ATSIHP Act and the small number of sites added to the National Heritage List primarily for their Indigenous values demonstrate how rarely these Acts have been used to effectively protect First Nations heritage.
- 1.44 The EPBC Act provides protection to Indigenous heritage sites through National or World Heritage listing. The Act is currently under review by Professor Graeme Samuel AC. In its interim report, published in June 2020, the Review observed that 'the EPBC Act is not fulfilling its objectives as they relate to the role of Indigenous Australians in protecting and conserving biodiversity and heritage, and promoting the respectful use of their knowledge'<sup>11</sup>. It also found that 'the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) provides last-minute intervention

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<sup>11</sup> *Independent Review of the EPBC Act*, June 2020, p. 6.

and does not work effectively with the development assessment and approval processes of the EPBC Act'.<sup>12</sup> The review concluded:

The current laws that protect Indigenous cultural heritage in Australia need comprehensive review. This review should explicitly consider the role of the EPBC Act in providing national-level protections. It should also consider how comprehensive national-level protections are given effect, for example how they interact with the development assessment and approval and regional planning processes of the Act.<sup>13</sup>

1.45 The legal and administrative shortcomings of the ATSIHP Act were revealed by the Juukan Gorge fiasco, where attempts to invoke the Act were frustrated by stakeholder confusion over ministerial responsibility and administrative delay. But the evidence received by the Committee to date also indicates that there are deeper problems with the legislation and that it will require thorough review. Likewise, the evidence received by the Committee to date backs the interim findings of the Samuel review with regard to the EPBC Act. Both these Acts will require substantial revision to make them effective and bring them in line with community expectations and international obligations. The substantive questions raised to date are whether:

- primacy should continue to be given to State legislation
- the issue of Indigenous heritage protection at the Federal level should be entirely subsumed within the EPBC Act
- there should be more effective stand-alone Indigenous heritage protection legislation at the federal level—incorporating national standards and expectations with which to benchmark and back-up State and Territory legislation.

The Committee will examine this more closely in its final report.

1.46 The main role of the Native Title Act in heritage protection is through agreement making. Agreements allow for the development of protocols and procedures in relation to works proposed to impact cultural heritage, the reservation of sites between Native Title holders and other land users and the negotiation of benefits between Native Title holders and land users. BHP explained in its submission that:

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<sup>12</sup> *Independent Review of the EPBC Act*, June 2020, p. 30.

<sup>13</sup> *Independent Review of the EPBC Act*, June 2020, p. 6.

In BHP's experience, these agreements include a package of financial benefits (such as royalties) and non-financial benefits (for example employment, educational, training and business opportunities and cultural training requirements) in return for native title consents as well as compensation for land impacts. Moreover, BHP's agreements in Western Australia provide consents for BHP to carry out its business according to agreed heritage protocols, subject to 'Exclusion Zones' which are sites expressly identified by traditional owners as ones that BHP cannot disturb or seek section 18 consents, or where greater protections apply (referred to as 'Exclusion Zones').<sup>14</sup>

- 1.47 One of BHP's partners in the Pilbara, the Banjima people, put a different slant on the process stating:

Claim Wide Agreements place traditional owners in a position of being expected to trade away their heritage for mining interests. In this regard, the contribution that Aboriginal people make to support the prosperity of this nation is significant, and largely goes unrecognised.<sup>15</sup>

- 1.48 For Indigenous people there are significant concerns around the Native Title process—as summed up in the submission of the Kimberley Land Council:

The KLC submits to the Committee that it should not be assumed that consent given under ILUAs<sup>16</sup> which purport to provide the agreement of native title holders to acts done under the "right to negotiate" provisions of the NTA<sup>17</sup> is freely given for the simple reason that, should the native title holders not agree and provide their consent, the proponent may make an application to the NNTT<sup>18</sup> for the act to be done even without the agreement of native title holders. Since 1994, the NNTT has determined 163 future act determination applications (not including applications withdrawn, dismissed or resolved by consent). Of these 163 determinations, three have resulted in a determination that the act may not be done, while 160 have resulted in a determination that the act may be done or done subject to conditions. That is, if native title holders do not agree to an act being done and the matter proceeds to determination before the NNTT, there is a 98% chance that the NNTT will determine that the act can be done or done subject to conditions. The extremely high likelihood that proponents will obtain the necessary approvals even if they don't reach agreement with and obtain the consent of native title

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<sup>14</sup> BHP, *Submission 86.1*, p. 2.

<sup>15</sup> Banjima Native Title Aboriginal Co. RNTBC, *Submission 89*, p. 4.

<sup>16</sup> Indigenous Land Use Agreements under the Native Title Act.

<sup>17</sup> *Native Title Act 1993*.

<sup>18</sup> National Native Title Tribunal.

parties means that the playing field for agreement-making is never level and native title parties participate in the future act process knowing that if they don't reach agreement with a proponent there is an almost 100% chance the proponent will have its interest granted if it makes a future act determination application.<sup>19</sup>

- 1.49 Other stakeholders have also questioned the efficacy and fairness of the agreement making process surrounding Native Title, and it has been identified as a significant factor in the destruction of Juukan Gorge. Resource companies in Western Australia have indicated their intention to revisit these agreements. The Committee wholly supports this process and recommends that it be undertaken across the whole of industry with a view to ensuring free, prior and informed consent and the removal of any provisions which restrict the legal rights of Traditional Owners and their representatives to seek recourse to law to protect their land, culture and heritage. The Committee will make a more detailed assessment of the Native Title Act and agreement making in its final report.

### *International laws and covenants*

- 1.50 International law potentially plays a significant role in Indigenous heritage protection. Australia is a signatory to a number of conventions which seek to protect and preserve Indigenous heritage and is a supporter of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which encapsulates comprehensive standards for the human rights of Indigenous People and articulates principles of international law. As the inquiry progresses, the Committee will seek to look more closely at this issue as a means of benchmarking standards of heritage management in Australian law.

### **Solutions**

- 1.51 It is too early in the inquiry process for the Committee to offer a comprehensive set of recommendations addressing the terms of reference, but the Committee is already in a position to articulate certain findings.
- 1.52 The Committee is conscious of the pain experienced by many Rio Tinto staff at the destruction of the caves at Juukan Gorge and the genuine desire to right the wrong as far as it is possible. This is evidenced by the proposal to rehabilitate the site, put a moratorium on further development pending

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<sup>19</sup> Kimberley Land Council, *Submission 101*, pp. 4–5.

consultations with the PKKP, and waiving the 'gag' provisions of the agreements. The Committee would like to see that good will taken further. The previous excavation of the site produced a significant amount of culturally significant material which is now in temporary storage, inaccessible to Traditional Owners. The Committee believes that Rio Tinto should negotiate a restitution package for the destruction of the Juukan rock shelters with the PKKP, including keeping places where artefacts and other material could be stored and displayed for the benefit of Traditional Owners.

## **Recommendation 1**

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### **1.53 That Rio Tinto:**

- **Negotiate a restitution package for the destruction of the Juukan rock shelters with the PKKP**
- **Ensure a full reconstruction of the Juukan rock shelters and remediation of the site at its own expense, with guidance and oversight from the PKKP, acknowledging Rio Tinto's undertaking in this regard and the steps taken to date. The reconstruction should specifically include steps to mitigate water and other damage to the creek that flows in Juukan Gorge and protect the Sacred Snake-head Rock Pool**
- **Commit to a permanent moratorium on mining in the Juukan Gorge area, negotiated with the PKKP, and that this is respected by all mining and exploration companies**
- **Undertake an independent review of all its agreements with Traditional Owners to ensure they reflect best practice standards**
- **Remove any gag clauses or restrictions on Traditional Owner rights under heritage and other laws**
- **Commit to a stay on all actions under Rio Tinto's current Section 18 permissions until they are properly reviewed to ensure that free, prior and informed consent has been obtained from Traditional Owners and is current**

- **Commit to a voluntary moratorium on applying for new Section 18 permissions, pending either the passage of stronger heritage protections in Western Australia or the negotiation of a protocol with relevant Traditional Owners to establish an improved process for site surveys, cultural protection and work area clearances based on the principle of avoiding damage wherever possible**
- **Return all artefacts and other materials held by Rio Tinto to PKKP and after negotiation and by agreement with PKKP, fund appropriate keeping places for artefacts and other materials to be supervised and controlled by the PKKP.**

- 1.54 The Committee is also of the view that Rio Tinto could re-establish itself as a leader in Indigenous relations by reviewing its agreements with Traditional Owners, making them more flexible and responsive to the needs of Traditional Owners, removing gag provisions, and benchmarking them against international best practice in free, prior and informed consent. The Committee will expand on this in its final report.
- 1.55 Probably the most basic issue facing Traditional Owners in the protection of heritage is the simple recognition of their knowledge of their own culture, heritage and lore. Traditional Owners know their own culture and traditions, they know the significance of sacred, ceremonial and heritage sites, and, at least roughly, their geographical location. They should not have to fight to prove what is already known to them. Their knowledge should be accepted in Australian law.
- 1.56 Another critical problem is the resourcing of Traditional Owners and their representative groups, especially the Registered Native Title Bodies Corporate (RNTBC). Evidence gathered in this inquiry, and in the Committee's other inquiry on the economic engagement of Traditional Owners, highlights the problems of managing basic legal and administrative obligations, let alone heritage protection, under current funding arrangements. Consideration needs to be given to providing RNTBCs with a basic level of funding to manage basic legal and administrative obligations, and providing additional funding to manage their responsibilities under Native Title and State and Commonwealth heritage law. The current funding situation means that RNTBCs are reliant on intermittent grant funding or the good will of the resources sector to fund heritage management.

1.57 Action must be undertaken by the Western Australian Government and the mining industry to rebalance the relationship between the mining industry and Traditional Owners. It is important that Traditional Owners be seen as partners of industry, able to engage on equal terms with other land users. Traditional Owners are not opposed to mining—that has been made clear in the evidence presented to the Committee—but they wish the relationship between Indigenous people and the mining sector to be reset on more equitable terms. The Committee is mindful that there should not be an absolute freeze on mining developments while the Western Australian Government establishes better legislative protections for Indigenous heritage. Such a freeze would impose a high cost on the Indigenous Australians that would miss out on a job or a contract. That said, mining companies should take extra caution to ensure that free, prior and informed consent is provided while the new legislation is being established.

## Recommendation 2

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1.58 That the Western Australian Government:

- **Replace the *Aboriginal Heritage Act 1972* with stronger heritage protections as a matter of priority, noting the progress already made in consultation on the draft *Aboriginal Cultural Heritage Bill 2020*. Any new legislation must as a minimum ensure Aboriginal people have meaningful involvement in and control over heritage decision making, in line with the internationally recognised principles of free, prior and informed consent, including relevant RNTBCs under the *Native Title Act*. Any new legislation should also include a prohibition on agreements which seek to restrict Traditional Owners from exercising their rights to seek protections under State and Commonwealth laws**
- **Place a moratorium on the consideration and approval of new Section 18 applications until the new legislation is passed unless it can be established and verified that there is current free, prior and informed consent obtained from Traditional Owners**
- **Strongly encourage mining companies with existing Section 18 permissions to not proceed with these approvals but to have them reassessed under the new legislation once it is passed unless it can be**

established and verified that there is current free, prior and informed consent obtained from Traditional Owners

- Urgently establish new procedures to improve the quality and transparency of decision making by the Registrar and ACMC prior to any legislative change, including processes for appropriate escalation of urgent matters to the Minister
- Adequately resource the ACMC
- Institute rolling membership of the ACMC to ensure the involvement of Traditional Owners of the country that is the subject of any decision, as nominated by the relevant RNTBC
- Investigate the large number of heritage sites de-registered since 2011 and ensure that proper procedures are in place for the removal of heritage sites from the register
- Reinstate sites to the register where these were inappropriately removed
- Undertake a mapping and truth-telling project to record all sites that have been destroyed or damaged pursuant to the AHA, including visual representations of the impact to country, with a view to establishing a permanent exhibition or memorial in the Western Australian Museum.

### **Recommendation 3**

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1.59 That all mining companies operating in Western Australia whether or not on Native Title land:

- Undertake independent review of their agreements with Traditional Owners and commit to ongoing regular review to ensure consistency with best practice standards. In particular, companies should review final compensation clauses in recognition that free, prior and informed consent requires continuous review and engagement with traditional owners

- **Issue public confirmation that they will not rely on gag clauses or clauses preventing Traditional Owners from exercising their rights under state and Commonwealth heritage laws and remove these clauses from their agreements with Traditional Owners**
- **Commit to a stay on all actions under currently held Section 18 permissions until they are properly reviewed to ensure that free, prior and informed consent has been obtained, and is current, from Traditional Owners for any damage or destruction to significant sites**
- **Commit to a voluntary moratorium on applying for new Section 18 permissions, pending either the passage of stronger heritage protections in Western Australia or the negotiation of a protocol with relevant Traditional Owners to establish an improved process for site surveys, cultural protection and work area clearances based on the principle of avoiding damage wherever possible**
- **Fund appropriate keeping places for artefacts and other materials to be agreed on with and controlled by the relevant Traditional Owners. Wherever possible, working together with other companies operating on country to jointly fund keeping places in agreement with Traditional Owners**
- **Facilitate the sharing of all heritage information and mapping technology used by mining companies with relevant PBCs, to correct information asymmetry and ensure Traditional Owners have access to records of their cultural heritage and are resourced to set up their own mapping initiatives**
- **Actively support and fund efforts by the Western Australian and Commonwealth governments to establish mapping and truth telling initiatives as recommended above**
- **Work with Traditional Owners to ensure better access to country.**

1.60 The first stage of the Committee's inquiry has demonstrated the importance of the Native Title, ATSHIP and EPBC Acts in heritage protection. It has also highlighted the broader policy dilemma underlying these three legal frameworks: that of balancing the desire for development and wealth creation alongside the protection of the world's oldest continuing culture.

What is clear is that this balancing act can no longer be maintained at the expense of First Nations people.

- 1.61 As a nation we will need to find new ways to resolve these policy tensions and to strengthen heritage protection at the Commonwealth level. A thorough investigation of the options for reform is contemplated by the Committee for the second phase of its inquiry, but in the meantime it makes the following recommendations:

#### **Recommendation 4**

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**1.62 The Committee recommends that the Australian Government:**

- **Seek to legislate a prohibition on agreements that restrict Traditional Owners from publicly raising concerns about heritage protection or exercising their rights under heritage legislation;**
- **Implement and publicly publish improved procedures within the Ministers offices, the National Indigenous Australians Agency and the Department for responding to and recording heritage concerns raised by Traditional Owners, including protocols for communicating and escalating urgent concerns to the responsible Minister and their Department;**
- **Work with Western Australia to implement the recommendation above for a mapping and truth telling project in relation to heritage that has been damaged or destroyed, and to extend this project at the national level in collaboration with other states and territories.**

- 1.63 The Commonwealth Government must also reposition itself with regard to the Aboriginal Heritage Act. The Commonwealth has been reluctant to utilise the ATSIHP Act where existing State Indigenous heritage regimes are in place. In the case of Western Australia, where that regime is widely acknowledged as being dysfunctional, including by the relevant Minister, it would be appropriate for the Australian Government to apply its intervention of last resort more willingly and effectively than it has to date, giving Traditional Owners in Western Australia another mechanism for protecting Indigenous heritage. It is also the Committee's view, given that absence of any synergies between the administration of the EPBC Act and the ATSIHP Act, and the apparent confusion among stakeholders about ministerial responsibility at the time of Juukan Gorge, that the

administration of the ATSIHP Act should revert to the Federal Minister for Indigenous Australians.

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## Recommendation 5

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- 1.64 The Committee recommends to the Australian Government that ministerial responsibility for the administration of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* revert to the Minister for Indigenous Australians, and that the National Indigenous Australians Agency become the administering authority.**

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## Recommendation 6

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- 1.65 The Committee recommends to the Australian Government that the relevant Minister direct their office and department to more vigorously prosecute use of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* in Western Australia until such time as new legislation is enacted in Western Australia replacing the current *Aboriginal Heritage Act 1972 (WA)*.**

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## Recommendation 7

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- 1.66 The Committee recommends that the Australian Government urgently review the adequacy of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.**
- 1.67 The ultimate conclusion of this report is that the tragedy of Juukan Gorge must not be repeated. While arguments might be had about the details of events and the impacts of laws, the ultimate cause of the destruction of the caves was that insufficient value has been placed on the preservation of Indigenous culture and heritage—a living culture with a timeless heritage. That must change. As Ms Sara Slattery, ‘a proud Robe River Kuruma woman and the CEO of the Robe River Kuruma Aboriginal Corporation’,<sup>20</sup> put it:

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<sup>20</sup> Ms Sara Slattery, Traditional Owner and Chief Executive Officer, Robe River Kuruma Aboriginal Corporation, *Committee Hansard*, 2 November 2020, p. 16.

**Traditional owners aren't going anywhere. We must live with the mistakes of others.** We want you all here too, cleaning up the mess, atoning for your mistakes, understanding our pain and building a better future with us.<sup>21</sup>

**Hon Warren Entsch MP**

**Chair**

**3 December 2020**

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<sup>21</sup> Ms Sara Slattery, *Submission 139*, p. 12.

# Additional Comments

## *Senator Dean Smith, Senator for Western Australia*

The recent destruction of the rock shelters in the Juukan Gorge of the Pilbara region is devastating for all parties involved and was clearly avoidable.<sup>1</sup>

### *Introduction*

- 1.1 In its interim report, the Committee has acknowledged the terms of reference for the inquiry are ambitious, and deliberately so and the scope of the inquiry is not limited to an examination of the immediate circumstances of the tragedy at Juukan Gorge, but the wider context surrounding the destruction of Indigenous heritage.
- 1.2 While the Committee has received 143 submissions and conducted 11 public hearings with 89 witnesses, it can confidently make early observations regards items (a) - (e) as part of its interim report.
- 1.3 However, the matters captured in the terms of reference (f) - (i), which refer to the interaction and effect of state/territory heritage laws and the suitability of broadening the scope of the *Environmental Protection and Biodiversity Conservation Act 1999*, have not been sufficiently canvassed or contested by a wide enough range of interested parties for the Committee to comment at this stage.
- 1.4 It is important to note the Inquiry into the matters captured by terms of reference (f) to (i) will require extensive and thorough investigation and will

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<sup>1</sup> Western Australian Government, *Submission 24*, p. 1.

be highly technical in their nature. The Committee should not be averse to referring these matters to other Parliamentary Committees for more detailed and expert examination.

- 1.5 While the final reporting date has been extended, there is no inhibition on the Committee issuing a further interim report on its deliberations and to use this mechanism to foreshadow significant and technical jurisdictional issues.
- 1.6 With the economic value of Indigenous enterprises servicing the mining industry ranging between \$200 million and \$350 million and native title related payments estimated at \$3 billion in 2013,<sup>2</sup> it is necessary to highlight the costs of delay and uncertainty should the Committee's recommendations be implemented. This is a cost that will not only be borne by resource and mining companies, but also Indigenous and Non-Indigenous communities across Western Australia.
- 1.7 It is important to acknowledge the commitment of the resources and mining industry to ongoing improvement:

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.<sup>3</sup>

### *Rio Tinto's accountability*

- 1.8 The Committee has indicated that it intends to make further commentary on Rio Tinto's timeline prior to the destruction of the Juukan Gorge in its final report.
- 1.9 However, I feel it is important to canvass these issues in this interim report, in order for Rio Tinto to hold those responsible accountable, end the uncertainty for those involved, and enable the deep wounds this incident has caused to begin healing.

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<sup>2</sup> Minerals Council of Australia, *Submission 104*, p. 7.

<sup>3</sup> Chamber of Minerals and Energy, *Submission 83*, p. 2.

- 1.10 Rio Tinto has now admitted that the destruction of the Juukan rock shelters should not have occurred.<sup>4</sup>
- 1.11 It is disappointing that it took Rio Tinto until its submission to the Committee to finally reach this conclusion.
- 1.12 On 31 May 2020, Rio Tinto Iron Ore Chief Executive Chris Salisbury apologised for the ‘distress we have caused’.<sup>5</sup> He did not apologise for the destruction of the 46,000-year-old rock shelters.
- 1.13 On 9 June 2020, Mr Salisbury stated in an internal meeting with staff:  
... we haven’t apologised for the event itself, per se, but apologised for the distress the event caused.<sup>6</sup>
- 1.14 On 12 June 2020, nearly 20 days after the incident, and three days after Reconciliation Australia revoked its endorsement of Rio Tinto as an Elevate RAP organisation,<sup>7</sup> Rio Tinto Chief Executive Jean-Sebastien Jacques repeated the apology for distress caused. Again, there was no apology for the destruction of the rock shelters themselves.<sup>8</sup>
- 1.15 I am pleased that Rio Tinto changed its position and apologised for the incident itself, but the delay in doing so further damaged Rio Tinto’s social licence and unfairly affected the social licence of the entire mining industry.
- 1.16 Accordingly, Rio Tinto should review why it took so long to properly acknowledge its failings, and those within the organisation who argued for apologising only for the distress caused should consider their positions within the industry.

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<sup>4</sup> Rio Tinto, *Submission 25*, p. 2.

<sup>5</sup> Rio Tinto, Statement on Juukan Gorge, Media Release, 31 May 2020, <https://www.riotinto.com/en/news/releases/2020/Statement-on-Juukan-Gorge>.

<sup>6</sup> Hannah Cross, Employee unrest grows inside Rio Tinto over Juukan Gorge blasts, 16 June 2020, <https://nit.com.au/employee-unrest-grows-inside-rio-tinto-over-juukan-gorge-blasts/>.

<sup>7</sup> Reconciliation Australia, ‘Statement on Rio Tinto’ Media Release, 9 June 2020, <https://www.reconciliation.org.au/statement-on-rio-tinto/>.

<sup>8</sup> Statement on Juukan Gorge, *Media Release*, 12 June 2020 <https://www.riotinto.com/en/news/releases/2020/June-statement-on-Juukan-Gorge>.

*Further scrutiny required of Rio Tinto's actions in the days before Juukan was destroyed*

- 1.17 According to Rio Tinto's evidence, on 14 May 2020 a Rio Tinto heritage team member met with PKKP representative Dr Heather Builth. At this meeting Dr Builth asked whether a site visit to Juukan Gorge could be arranged as part of NAIDOC week. The heritage representative undertook to make inquiries.<sup>9</sup>
- 1.18 It is concerning that Rio Tinto's heritage team was unaware at this time that loading of blast holes at the site had already commenced. This is crucial, because delays in the provision of information to PKKP at this time reduced the already limited time available to prevent the blasts from occurring. If Rio Tinto staff were feigning ignorance in order to count-down-the-clock, they must be held accountable.
- 1.19 Rio Tinto continued to load blast holes following the meeting with PKKP, with a further 62 holes loaded on 16 May 2020, 72 holes loaded on 17 May 2020 and 22 holes loaded on 19 May 2020.<sup>10</sup>
- 1.20 On the 18 May 2020, the Rio Tinto heritage team recommended that all planned blasting within a 350 metre radius of Juukan 1 and 2 be temporarily suspended to allow for further consultation with the PKKP.<sup>11</sup>
- 1.21 I emphasise that 22 blast holes were loaded on the following day.
- 1.22 Notes provided by Rio Tinto from a teleconference on 21 May 2020 indicate their concern at this stage was focused around ensuring other significant sites, not subject to the Section 18 approval, were not damaged by the blasting:

C Salisbury summarised our position that the blast can proceed provided we do not impact the New Potential Sites. B Haynes and N Tole agreed from Communities and Legal perspectives. Chris reiterated the need to do all necessary due diligence to prevent potential damage to the New Potential Sites.<sup>12</sup>

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<sup>9</sup> Rio Tinto, *Submission 25*, paragraph 1.

<sup>10</sup> Rio Tinto, *Submission 25*, paragraph 209.

<sup>11</sup> Rio Tinto, *Submission 25*: paragraph 218–222.

<sup>12</sup> Rio Tinto, *Submission 25.1*, Attachment 4, p. 2.

- 1.23 Had these other sites been damaged, Rio Tinto would have potentially committed an offence against Section 17 of the *Aboriginal Heritage Act 1972*.
- 1.24 The documents also highlight Rio Tinto had engaged and briefed a legal firm in preparation for an attempted injunction by PKKP.
- C Salisbury queried injunction risk. N Tole advised preparations were underway and external law firm Ashursts is instructed.<sup>13</sup>
- 1.25 Disturbingly, they demonstrate that PKKP was reminded of its ‘gag’ capacity under the participation agreement in an effort to prevent it from issuing a media release:
- PKKP indicated it intended to make a press release. The respect legal teams have spoken. Our position is that our Participation Agreement includes a non-disparagement clause. A reactive media statement will be prepared if required.<sup>14</sup>
- 1.26 A briefing note to support this meeting was provided to the Committee on a confidential basis. For the sake of transparency, I encourage Rio Tinto to release this document with appropriate redactions.
- 1.27 Ms Niven held responsibility for both global communications and heritage matters, so it is my view that her testimony to the Committee that she was unaware of the significance of the site until 24 May 2020<sup>15</sup> is unreliable.
- 1.28 Ms Niven spoke with Chief Executive on the 21 May 2020:
- When I spoke with JS Jacques, our chief executive, we were talking more broadly. I did mention to him that there was an issue at Brockman and that he should speak with Chris Salisbury, the chief exec of iron ore at the time. This was because it was an operational matter, as I saw it. I thought Chris, given that he was running the iron ore resilience team, would be best placed to make sure that information was shared in an accurate way.<sup>16</sup>
- 1.29 Given that Rio Tinto was preparing itself for PKKP taking the issue to the media, and lawyers had been engaged for a potential injunction, it is odd that Ms Niven did not inform Mr Jacques.

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<sup>13</sup> Rio Tinto, *Submission 25.1*, Attachment 4, p. 2.

<sup>14</sup> Rio Tinto, *Submission 25.1*, Attachment 4, p. 3.

<sup>15</sup> Ms Simone Niven, Rio Tinto, *Committee Hansard*, 16 October 2020, p. 10.

<sup>16</sup> Ms Simone Niven, Rio Tinto, *Committee Hansard*, 16 October 2020, p. 9.

- 1.30 In evidence to the Committee, Mr Jacques stated he was unaware of the significance of the rock shelters until 24 May 2020.
- 1.31 This is also difficult to believe and, if true, would indicate that Ms Niven and Mr Salisbury facilitated a state of deliberate ignorance for Mr Jacques.

### *The loaded blasts*

- 1.32 The Committee was provided with technical evidence to support Rio Tinto's position that it was unsafe to unload the explosives from the blast holes. Independent technical advice sought by PKKP supported this.
- 1.33 Mr Salisbury, in evidence to the Committee, stated:
- I had called an emergency meeting, what we call a business resilience team meeting, on the Thursday with all of the senior leaders and our technical staff, and we decided to progress to determine whether in fact it was possible, through risk assessment, to remove some of the holes. We met again on Friday 22 May, and we'd confirmed that we would be able to remove some, which we actually did on the Saturday – 23 May. We attempted to remove eight holes, which took in fact 10 hours and, of those eight holes we only managed to recover seven. We actually lost the booster and detonator, which meant that the hole was still live. That took 10 hours. I guess what I'm trying to do is paint a picture here that, despite the risks involved, which we managed under careful risk assessment, it was obvious to us that we couldn't remove all 382 holes.<sup>17</sup>
- 1.34 The seven blast holes that Mr Salisbury states were removed ensured that Rio Tinto was not committing an offence under Section 17 of the *Aboriginal Heritage Act 1972*.
- 1.35 I reluctantly accept the technical advice provided to the Committee that once the charges had been laid there was no safe way to remove them.
- 1.36 However, this advice by Rio Tinto is undermined by the fact that it was able to remove seven explosives that would have led to an offence under Section 17, but unable to remove any of explosives that caused damage to the rock shelters.
- 1.37 I encourage Rio Tinto to explain this anomaly further.

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<sup>17</sup> Mr Chris Salisbury, Rio Tinto, *Committee Hansard*, 7 August 2020, p. 3.

## *Culture at Senior Levels of Rio Tinto*

### 1.38 The Board Review found that:

These changing realities in the period from 2018 should have prompted a review within Rio Tinto of the implications of the new ethnographic and archaeological reports for the Brockman 4 mine development plans, and especially their timing and sequencing. Such a review should have been initiated even in the absence of a formal request by the PKKP. It should have involved input that included formal risk assessment and proactive management of the heritage and social consequences associated with the planned destruction of the Juukan rock shelters. It should have been coordinated at appropriately senior levels from areas within Rio Tinto responsible for communities, heritage, mine planning and mine operations. And the outcomes of such a review should have been escalated to the Senior Leadership Team in Iron Ore. These steps were not taken and important opportunities for pausing and re-considering options were missed until the PKKP formally raised their concerns in May 2020, by which time, as described in our submission to the Inquiry, it was no longer safe and practicable to protect the sites.<sup>18</sup>

### 1.39 However, the Review failed to adequately address why these issues were not raised with the Iron Ore Senior Leadership Team, or why the executive responsible for heritage internationally was unaware of the Juukan rock shelters.

### 1.40 The Australian Financial Review reported in 2018:

Shortly before becoming Rio Tinto chief executive in July 2016, Jean-Sebastien Jacques fronted a town hall staff meeting in Brisbane where he was asked about his approach to dealing with ‘deadwood’ among the mining giant’s 50,000 employees...

‘If someone is stuck in the past,’ he told the gathering, ‘they can either fit in or f--- off.’<sup>19</sup>

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<sup>18</sup> Rio Tinto, *Board Review of Cultural Heritage Management*, 23 August 2020, <https://www.riotinto.com/-/media/Content/Documents/News/RT-Cultural-Heritage-Board-Review.pdf>.

<sup>19</sup> James Chessell, *Rio Tinto’s JS Jacques looks to growth as miner emerges from ill-starred decade*, 9 March 2018, <https://www.afr.com/work-and-careers/management/rio-tintos-js-jacques-looks-to-growth-as-miner-emerges-from-illstarred-decade-20180207-h0v6n3>.

1.41 In response to questions regarding this phrase, the Joint Company Secretary of Rio Tinto provided a written response to the Chair on the 30 September 2020, providing context to the statement:

... although the relevant question at the Brisbane town hall meeting was not confined to safety issues [it covered safety, honesty/transparency and integrity/social licence], the comment 'fit in or f--- off' was made by Mr Jacques to emphasise his views as to the non-negotiable importance of safety and being straightforward.<sup>20</sup>

1.42 I view this defence by the Joint Company Secretary as evidence that Mr Jacques' management style created a poor culture at Rio Tinto that was endorsed by the board.

1.43 It is my view that those board members involved with the appointment and ongoing performance management of Mr Jacques enabled a culture to develop at Rio Tinto where non-executive level management did not feel empowered to inform the executive of the significance of the rock shelters.

1.44 On 11 September 2020, Rio Tinto announced that Ms Niven and Mr Salisbury would leave Rio Tinto on 31 December 2020 and Mr Jacques would step down on 31 March 2020.<sup>21</sup>

1.45 No doubt all three will be well remunerated, particularly given their insensitive endorsement by the Chairman of Rio Tinto in the relevant statement.

1.46 These golden handshakes from Rio Tinto will further damage both its social licence and relationship with traditional owner groups.

1.47 The Chairman of Rio Tinto stated:

What happened at Juukan was wrong and we are determined to ensure that the destruction of a heritage site of such exceptional archaeological and cultural significance never occurs again at a Rio Tinto operation. We are also determined to regain the trust of the Puutu Kunti Kurrama and Pinikura people and other Traditional Owners. We have listened to our stakeholders' concerns that a lack of individual accountability undermines the Group's

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<sup>20</sup> Rio Tinto, *Submission 25.3*, p. 1.

<sup>21</sup> Rio Tinto, Rio Tinto Executive Committee changes, *Media Release*, 11 September 2020 <https://www.riotinto.com/news/releases/2020/Rio-Tinto-Executive-Committee-changes>.

ability to rebuild that trust and to move forward to implement the changes identified in the Board Review.<sup>22</sup>

- 1.48 I am of the view that further group and individual accountability is required from Rio Tinto.

### *Location of Rio Tinto executives*

- 1.49 Of Rio Tinto's ten executives, only one is based in Western Australia.<sup>23</sup> Of the three Australian-based directors, none are from Western Australia.

- 1.50 Western Australian Minister for Aboriginal Affairs, the Hon. Ben Wyatt MLA, addressed this issue:

We have a range of companies in Western Australia where the vast majority of earnings come out of the Pilbara. Obviously iron ore is the standout. I think for Rio it's about 74 per cent; for BHP, it's over 50 per cent. It's not just iron ore; oil and gas are similar. But iron ore is the standout. It has worried me for some time that there is a vast distance between the boards of these organisations and the area in which they generate the majority of their wealth.<sup>24</sup>

- 1.51 Given the level of profit generated from Western Australia, it is only appropriate that Rio Tinto should recognise this with additional executive level and board presence in the state.
- 1.52 The executive responsible for heritage matters is currently based in London. I can understand how this is of concern to, and viewed as particularly insensitive by, Aboriginal traditional owners. I would strongly encourage Rio Tinto to relocate this position to Australia.

### *Rio Tinto does not reflect the values of the broader mining industry*

- 1.53 It is disappointing that the Committee Report creates an impression that Rio Tinto's behaviour is reflective of the values of the entire Western Australian mining industry.
- 1.54 The reaction from the two industry associations that represent Western Australian miners makes this clear.

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<sup>22</sup> Rio Tinto, Rio Tinto Executive Committee changes, Media Release, 11 September 2020 <https://www.riotinto.com/news/releases/2020/Rio-Tinto-Executive-Committee-changes>.

<sup>23</sup> Mr Jean-Sebastian Jacques, Rio Tinto, *Committee Hansard*, 16 October 2020, p. 24.

<sup>24</sup> Hon Ben Wyatt MLA, WA Minister for Aboriginal Affairs, *Committee Hansard*, 7 August 2020, p. 43.

- 1.55 In evidence provided to the Committee, Chief Executive of the Chamber of Minerals and Energy (CME), Paul Everingham stated:

I think it's upset a lot of people in the resources industry in Western Australia. Across the workforce of the mining sector and the oil and gas sector in WA – 140,000 people, I think – there's long been a sense of pride in both the relationships and the collaboration between traditional owners and resource sector companies. The Juukan incident, which was very regrettable, has shaken that sense of pride and belief in collaboration and partnership with traditional owners, and we feel we've got a fair amount of work to do, as an industry, to rebuild the faith and trust to bring us back to the table with traditional owners in Western Australia.<sup>25</sup>

- 1.56 Similarly, the Chief Executive of the Association of Mining and Exploration Companies (AMEC) stated in evidence:

Australian mining and mineral exploration companies seek to build strong relationships with traditional owners that are based on genuine understanding and respect. These companies seek to amend operations so that any potential disturbance or damage can be avoided and minimised wherever possible. All of our exploration and mining companies have a deeply vested interest in the engagement with traditional owners and Aboriginal people, the processes by which this happens and ensuring mutually beneficial and lasting relationships between them. These agreements, deserving of scrutiny in this inquiry, have also delivered many benefits for traditional owners and Aboriginal people – delivering jobs, training, social and community contributions, as well as financial payments.<sup>26</sup>

- 1.57 The community should be confident that the resources and mining industry is committed to strong relationships with traditional owners, sharing the benefits of Australia's mineral wealth in a way that benefits all.

### ***Replacement of Aboriginal Heritage Act 1972 (WA)***

- 1.58 The Committee indicates (paragraph 1.27) it is conscious that many stakeholders have reservations about the proposed legislation, detailing a number of specific concerns.
- 1.59 Given the consultation for the *Aboriginal Cultural Heritage Bill 2020* included consultation with more than 550 participants, including 40 workshops and 130 submissions, followed by a second consultation phase with more than

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<sup>25</sup> Mr Paul Everingham, CME, *Committee Hansard*, 17 September 2020, p. 17.

<sup>26</sup> Mr Warren Pearce, AMEC, *Committee Hansard*, 2 October 2020, p. 1.

500 participants attending workshops across the state and a further 70 submissions,<sup>27</sup> the final legislation is unlikely to fully satisfy all stakeholders.

1.60 It is disappointing that the Committee has not been able to provide a more fulsome endorsement of this vital reform, especially given previous attempts have failed.

1.61 I share the confidence of the Hon. Ben Wyatt MLA, who stated on the release of the draft bill:

On this occasion, I am confident that we have a path forward to introduce historic reform that reflect modern values.

I have been enormously pleased with the constructive approach taken by Aboriginal people and the resources industry through all consultation phases.

I am confident that the effort undertaken to reach broad consensus on these reforms will allow the best possible chance for a Bill to be supported by the 41st Parliament.<sup>28</sup>

1.62 The Western Australian Government is to be commended for progressing this important legislation and I believe that it will address many of the concerns raised by traditional owners and industry throughout this Inquiry.

### *Problem with moratorium and its unintended consequences*

1.63 A moratorium on Section 18 applications is a handbrake on the resources and mining industry in Western Australia.

1.64 It will also cease upgrades, maintenance and construction of public infrastructure in the state.

1.65 This is demonstrated by the agenda for the Aboriginal Cultural Material Committee (ACMC) meeting to be held 9 and 10 December 2020. Of the 17 applications to be considered, nine are for public infrastructure, two are for agricultural development and the remaining seven are related to mining.<sup>29</sup>

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<sup>27</sup> Government of Western Australia, *Submission 24*, p. 5.

<sup>28</sup> Government of Western Australia, Path forward for historic reform of WA Aboriginal heritage laws, *Media Release*, 18 November 2020, <https://www.mediastatements.wa.gov.au/Pages/McGowan/2020/11/Path-forward-for-historic-reform-of-WA-Aboriginal-heritage-laws.aspx>.

<sup>29</sup> Government of Western Australia, ACMC Agenda, <https://www.dplh.wa.gov.au/getmedia/e3b96585-7d3d-473f-a37e-7824a08c31be/2020-8-December-ACMC-Advert-1-Notice-of-Receipt> [accessed 4 December 2020].

- 1.66 Western Australia is the world's largest supplier of iron ore, with exports valued at \$78 billion.<sup>30</sup>
- 1.67 As a bulk ore, mining operations have a large footprint, with an ongoing requirement for sustained investment to maintain output.
- 1.68 Given Western Australia's rich and widespread Aboriginal history, it would be impossible to undertake any mining activity without affecting any Aboriginal heritage.
- 1.69 Effects on heritage should be minimised, and significant locations like Juukan Gorge should be fully protected, but it must be acknowledged that traditional owners and industry should be able to continue to make agreements for these heritage matters.
- 1.70 AMEC, in its submission to the Productivity Commission's Draft *Resources Sector Regulation Report* described a moratorium well:
- Moratoriums are a blunt instrument to manage resources that undercut the risk-based approach to regulation. Moratoria are usually implemented for political rather than scientific rationale. AMEC is opposed to moratoria in principle as poor economic policy. The introduction of a moratorium removes certain property rights, reduces optionality for both taxpayers and investors, as well as extinguishes an economic growth pathway for a jurisdiction. In the short term, a moratorium has the most obvious negative impact directly on the affected subsection of the industry. In the longer term, the willingness of a Government to resort to moratoria erodes a jurisdiction's investment attractiveness and can lead to the disappearance of skills and understanding associated with the industry under the moratoria, which move to more welcoming jurisdictions.<sup>31</sup>
- 1.71 The Committee should acknowledge the complexity of balancing heritage and economic growth.
- 1.72 The Committee's proposal for a moratorium is out of step with the broader cross-aisle efforts to grow the Australian economy and does not

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<sup>30</sup> Chamber of Minerals and Energy, *Submission 83*, p. 4.

<sup>31</sup> Submission DR90 - Association of Mining and Exploration Companies (AMEC) - Resources Sector Regulation - Commissioned study (pc.gov.au).

acknowledge the significant support the industry has provided the economy during the COVID-19 pandemic.<sup>32</sup>

- 1.73 What should be of high interest to the Parliament is the risk that a moratorium would have on the economic development of Northern Western Australia.

### *Confidence in the current Section 18 process*

- 1.74 The inference by the Committee (Paragraph 1.22 to 1.23) that there is still no meaningful involvement by Aboriginal people in the decisions over their heritage is misleading.
- 1.75 The Aboriginal Heritage Due Diligence guidelines highlight the requirement for 'meaningful' consultation with the relevant Aboriginal people.<sup>33</sup>
- 1.76 Paragraph 2.23 of these guidelines are clear:

Please note. Consultation with relevant aboriginal people is a pre-condition to the Committee's consideration of an application for consent or approval under the AHA.<sup>34</sup>

- 1.77 While the AHA does not require the membership of ACMC to be Aboriginal, the majority of committee is Aboriginal. Currently, the final decision on a Section 18 application is made by WA Minister for Aboriginal Affairs, the Hon Ben Wyatt MLA, who is of Yamatji heritage.
- 1.78 Minister Wyatt gave an insight into his decision making during the Inquiry:

Well, there are thousands and thousands of sites around Western Australia with various levels of significance, as we know. Section 18s apply to some of those that won't be contentious at all, as I've outlined earlier on in our conversation. And I just again come back to that point: I will always defer to those Aboriginal groups, because they know the significance of their locations. I don't require a particular anthropologist or archaeologist to come along and

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<sup>32</sup> Lanai Scarr, *The West Australian*, <https://thewest.com.au/business/mining/federal-treasurer-josh-frydenberg-thankful-to-was-mining-and-resources-sector-amid-coronavirus-pandemic-ng-b881656363z>, 2 September 2020.

<sup>33</sup> Government of Western Australia, Aboriginal Due Diligence Guidelines v3, <https://www.dplh.wa.gov.au/getmedia/74896bd3-4be3-49ed-be75-38ba72f10d72/AH-Due-diligence-guidelines>, paragraph 2.19.

<sup>34</sup> Government of Western Australia, Aboriginal Due Diligence Guidelines v3, <https://www.dplh.wa.gov.au/getmedia/74896bd3-4be3-49ed-be75-38ba72f10d72/AH-Due-diligence-guidelines>.

tell me that a site is significant when I can certainly get that information from an Aboriginal group.<sup>35</sup>

- 1.79 I have confidence in the advice of the members of the ACMC and the final decision-maker, Minister Ben Wyatt, to ensure that future Section 18 approvals are appropriately balanced.

### *Support for Prescribed Bodies Corporate*

- 1.80 During evidence to the Committee, Minister Ben Wyatt highlighted what the Commonwealth could do to improve agreement making without legislative intervention:

So one thing that I think the Commonwealth can do, rather than create a separate heritage regime, is actually invest in the architecture that's been created under the Native Title Act. I see that as the real opportunity now. If we're wanting to elevate agreement making, if we're wanting to elevate the voice of Aboriginal people at this table, the Commonwealth has an easy way to do it—it's to provide more support to PBCs.<sup>36</sup>

- 1.81 AMEC, in its submission, also highlighted this issue:

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.”<sup>37</sup>

- 1.82 Until the role and responsibilities of Prescribed Bodies Corporate 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 the people it now punishes.

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<sup>35</sup> Hon Ben Wyatt MLA, WA Minister for Aboriginal Affairs, *Committee Hansard*, 7 August 2020, p. 44–5.

<sup>36</sup> Hon Ben Wyatt MLA, WA Minister for Aboriginal Affairs, *Committee Hansard*, 7 August 2020, p. 35.

<sup>37</sup> AMEC, *Submission 66*, p. 5.

### *Expansion of Commonwealth Jurisdiction*

1.83 There needs to be strong evidence that any expansion of Commonwealth jurisdiction will lead to efficient, effective outcomes.

1.84 I place strong weight on the views of the Minister Ben Wyatt in regard to this issue:

My view is that Aboriginal heritage regimes should be legislated and implemented by state and territory government.<sup>38</sup>

1.85 This is a view that is shared by industry in Western Australia:

CME recommends that State legislation retains primacy on regulation of cultural heritage, without the introduction of duplication at a Federal level.<sup>39</sup>

1.86 AMEC rightly points out:

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.<sup>40</sup>

1.87 I remain open to improvements between the overlap of Commonwealth and state legislation; however it is important that decisions on heritage are made on a local level.

### *Effectiveness of the ATSIHP Act*

1.88 The Productivity Commission inquiry in 2013 into *Mineral and Energy Resources Exploration in Australia* highlighted a number of concerns with the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*:

There are several concerns, including that the ATSIHP Act:

- 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 the legislation is effective in some states...<sup>41</sup>

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<sup>38</sup> Hon Ben Wyatt MLA, WA Minister for Aboriginal Affairs, *Committee Hansard*, 7 August 2020, p. 42.

<sup>39</sup> Chamber of Minerals and Energy, *Submission 83*, p. 5.

<sup>40</sup> AMEC, *Submission 66*, p. 5.

1.89 I support the urgent review of *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

**Signed**

**Senator Dean Smith**

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<sup>41</sup> Productivity Commission, 2013, *Mineral and Energy Resource Exploration*, Inquiry Report No.65, p. 22.