

**PUUTU KUNTI KURRAMA PEOPLE AND PINIKURA PEOPLE SUBMISSION  
TO THE JOINT STANDING COMMITTEE ON NORTHERN AUSTRALIA  
INQUIRY INTO THE DESTRUCTION OF 46,000-YEAR-OLD CAVES AT THE  
JUUKAN GORGE IN THE PILBARA REGION OF WESTERN AUSTRALIA**



*'Myself, my family, our elders and our ancestors are in mourning at the desecration of our sacred site. This is a part of our land that we are deeply connected to and which was an important feature of our future. Healing is slow and painful and will not come easily. Our trust in the system and our partners has been broken completely. I hope that some good can come out of our pain as we all work to build a new future for ourselves and future generations.'*

– PKKP Traditional Owner, Burchell Hayes, after the 2020 Juukan Gorge disaster

Accordingly, this submission contains no photographs of Juukan Gorge after the blast of 24 May 2020.

**Warning: This submission may contain images or names of deceased persons**

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## ACRONYMS AND DEFINITIONS

<b>2014 Revised Proposal</b>	A revised plan of the approved 2006 proposal for the Brockman 4 Mine
<b>ACMC</b>	Aboriginal Cultural Material Committee, which determines whether sites are 'Aboriginal sites' for the purpose of the AH Act
<b>AH Act</b>	<i>Aboriginal Heritage Act 1972 (WA)</i>
<b>ATSIHP Act</b>	<i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)</i>
<b>BIA</b>	Binding Initial Agreement between PKKP and Rio Tinto dated 28 June 2006
<b>Brockman 4</b>	The Rio Tinto mine planned for the Juukan Gorge area
<b>Builth 2013 Report</b>	Report by Dr Heather Builth, as engaged by YMAC in 2013.
<b>CHMP</b>	Cultural Heritage Management Plan
<b>CNC</b>	Central Negotiating Committee established in 2003 at the request of 10 Traditional Owner groups in the Pilbara to better represent their interests and concerns when negotiating with Rio Tinto for land use
<b>CWPA</b>	Claim Wide Participation Agreement between Rio Tinto and PKKP
<b>DAA</b>	Department of Aboriginal Affairs, Western Australia
<b>DPLH</b>	Department of Planning, Land and Heritage, Western Australia
<b>EP Act</b>	<i>Environmental Protection Act 1986 (WA)</i>
<b>EPA</b>	Environmental Protection Authority
<b>EPBC Act</b>	<i>Environmental Protection and Biodiversity Conservation Act 1999 (Cth)</i>
<b>Hamersley Iron Ltd Pty</b>	Subsidiary of Rio Tinto, under which Rio Tinto acquired the initial mining lease over the Brockman 4 site in 1963
<b>ILUA</b>	Indigenous Land Use Agreement

<b>Jackson and Fry 2003 Report</b>	Archaeological report by Gavin Jackson and Rachel Fry of Gavin Jackson Pty Ltd
<b>Juukan 1</b>	A culturally and archeologically significant site on PKKP native title claim land, so named by Roina Williams in her December 2008 ethnographic report. Referred to as 'Brock 20' by Rio Tinto
<b>Juukan 2</b>	A culturally and archeologically significant site on PKKP native title claim land, so named by Roina Williams in her December 2008 ethnographic report Referred to as 'Brock 21' by Rio Tinto
<b>LAC</b>	Local Aboriginal Corporation
<b>L'Estrange report</b>	Rio Tinto Board Review of Cultural Heritage Management, 23 August 2020
<b>LIC</b>	Local Implementation Committee
<b>ML4SA</b>	Mining lease granted to Rio Tinto in 1963 concerning PKKP land and the Juukan Gorge. Is not regarded as 'past act' under the NT Act for the purposes of the CWPA
<b>MS717</b>	Ministerial Statement 717, published 24 March 2006
<b>MS1000</b>	Ministerial Statement 1000, published 11 March 2015
<b>NNTR</b>	National Native Title Register
<b>NT Act</b>	<i>Native Title Act 1993</i> (Cth)
<b>NTRB</b>	Native Title Representative Body
<b>Participation Agreement</b>	The agreement signed by PKKP and Rio Tinto on 18 March 2011. Inclusive of the CWPA, the ILUA, Cultural Heritage Protocol, Opt-In Deed and Deed of Assumption and Release.
<b>PBC</b>	Prescribed Body Corporate
<b>PKKP</b>	Puutu Kunti Kurrama and Pinikura people (or PKKPAC, depending on the context)
<b>PKKP Named Applicants</b>	The group of persons authorised by the PKKP Claim Group to make the Native Title Determination Application on its behalf
<b>PKKPAC</b>	Puutu Kunti Kurrama and Pinikura Aboriginal Corporation (or PKKP, depending on the context)
<b>PNTS</b>	Pilbara Native Title Service, a now defunct branch of YMAC

<b>Purlykuti</b>	A culturally and archeologically significant Aboriginal site connected to Juukan Gorge (at times including the wider site complex, depending on the context)
<b>RFD</b>	Regional Framework Deed
<b>Rio Tinto submission</b>	Submission by Rio Tinto to this Inquiry dated 31 July 2020
<b>Rio Tinto supplementary submission</b>	Supplementary submission by Rio Tinto to this Inquiry
<b>RNTBC</b>	Registered Native Title Body Corporate
<b>RRAs</b>	Rights Reserved Areas
<b>RTIO</b>	Rio Tinto Iron Ore
<b>Scarp 2008 Report</b>	Archaeological report by Richard Fullagar of Scarp Archaeology
<b>Scarp 2018 Report</b>	Archaeological report by Dr Michael Slack of Scarp Archaeology
<b>Section 16</b>	Section 16 of the AH Act
<b>Section 18</b>	Section 18 of the AH Act
<b>Section 18 Consent</b>	Approval by the DPLH for an area of cultural significance to be disturbed pursuant to section 18 of the AH Act
<b>Section 18 Notice</b>	Application by a party to disturb an area of cultural significance pursuant to section 18 of the AH Act
<b>Stevens 2003 Report</b>	Ethnographic report by Robin Stevens of the PNTS
<b>Williams 2008 Report</b>	Ethnographic report by Roina Williams of PNTS
<b>YMAC</b>	Yamatji Marlpa Aboriginal Corporation
<b>YMAC submission</b>	Submission by Yamatji Marlpa Aboriginal Corporation to this Inquiry dated 28 August 2020

## **PUUTU KUNTI KURRAMA PEOPLE AND PINIKURA PEOPLE**

### **SUBMISSION TO THE JOINT STANDING COMMITTEE ON NORTHERN AUSTRALIA INQUIRY INTO THE DESTRUCTION OF 46,000-YEAR-OLD CAVES AT THE JUUKAN GORGE IN THE PILBARA REGION OF WESTERN AUSTRALIA**

Dear Committee Members

The PKKP People welcome this opportunity to make a submission to the Joint Standing Committee on Northern Australia Inquiry into the Destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara Region of Western Australia (the Inquiry).

Our submission will address each of the Terms of Reference. It will also make comment on the submissions made by Rio Tinto and others.

We would welcome an opportunity to expand on this submission, including by providing further documentary evidence and by providing oral evidence during the course of the Inquiry, as PKKP culture is grounded in an oral tradition.

### **KEY POINTS FROM THIS SUBMISSION**

1. On the morning of 24 May 2020 Rio Tinto detonated explosives destroying the Juukan 1 and 2 rockshelters. Juukan 1 and Juukan 2 record human occupation going back approximately 46,000 years, having harboured thousands of artefacts, including grinding stones, rock seats, a blade quarry and flaked stone materials, and remains of a belt made of human hair that has been genetically identified to match PKK descendants. The destruction of Juukan 1 and Juukan 2 has caused immeasurable cultural and spiritual loss and profound grief to the PKKP People.
2. The PKKP People are deeply hurt and traumatised by the desecration of a site which is profoundly significant to us and future generations. The Juukan Gorge disaster is a tragedy not only for the PKKP People. It is also a tragedy for the heritage of all Australians and indeed humanity as a whole. The rarity of this site demonstrates its value as a record of human development through massive environmental change which has also been recorded over a period of at least 46,000 years – a record which has now been put at grave risk.
3. We emphasise that this is a national disaster with international implications. The world is watching us and how we learn from this painful lesson. Our common heritage is at risk. It is in all of our hands to turn this tragedy into an opportunity to

create a new future - one which values our common legacy and which entrenches it into the value and knowledge systems of future generations.

4. We deeply appreciate the seriousness with which this matter is being treated by the Federal Parliament. We hope that this Parliamentary Inquiry will assist us all in our healing, will pave the way for constructive future engagements between Aboriginal Traditional Owners and the resource industry Australia-wide, and will cause measures to be put in place to ensure that this never happens again.
5. Until immediately before the Juukan Gorge disaster, PKKP had an active working relationship with Rio Tinto. However, the relationship was not equal. The information provided by Rio Tinto to PKKP was limited. Rio Tinto rebuffed repeated attempts at increasing communication with Traditional Owners and took a narrow, procedural approach to the relationship.
6. We are extremely angry that, over an extended period, Rio Tinto did not act on our input nor the input of specialist archaeologists and anthropologists relating to the cultural importance of the Juukan Gorge rockshelters. The rockshelters are part of a sensitive and significant cultural landscape related to a particular ceremony and men's rites.
7. We are also angry that, once we raised the alarm bells in the months and weeks leading up to the disaster, Rio Tinto ignored our requests and concerns. In the days before the disaster Rio Tinto kept loading charges around Juukan 1 and Juukan 2 and then only took steps to avoid blast damage to sites over which they did not have legal authority to destroy.
8. In addition to Rio Tinto's refusal to avoid mining the rockshelters entirely, we believe that Rio Tinto could have done more to avoid the destruction of the rockshelters once our concerns were heard and the explosive holes had been drilled – as demonstrated by their ability to avoid damage to other sites during the same blast.
9. The Juukan Gorge disaster tells us that Rio Tinto's operational mindset has been driven by compliance to minimum standards of the law and maximisation of profit. PKKP believes that this is reflective of the industry as a whole.
10. Rio Tinto has made numerous claims of compliance with Free, Prior and Informed Consent (FPIC) principles throughout its submission, yet its behaviour is clearly at odds with these principles. This is yet another example of the resources industry saying one thing and doing another.
11. PKKP do not accept Rio Tinto's position that, before May 2020, it was unaware of the ethnographic and archaeological significance of the Juukan Gorge. Neither does



PKKP accept that if Rio Tinto had known the ‘new information’ contained in Dr Builth’s further report dated 18 May 2020 it would not have proceeded with the blast.<sup>1</sup>

12. The crux of the matter lies in how relationships between companies and Aboriginal communities and organisations are conducted. Heritage management is a critical part of the solution and it will require transformational cultural, attitudinal and behavioural change.
13. We believe that history has amply demonstrated that the resources industry cannot be relied on to attach true value to Aboriginal heritage. As such, the primary response to the Juukan Gorge disaster must include significant legislative changes to strengthen the currently inadequate protections.
14. We believe that the Government of Western Australia could have done much more to avoid the destruction of the rockshelters. Even within the limitations of the existing legislation, more rigorous and equitable implementation of the processes mandated by law could have ensured the protection of these critical heritage sites.
15. Aboriginal communities are currently living with legacy agreements which have further disadvantaged them, and which do not reflect the provisions of the United Nations Declaration on the Rights of Aboriginal Peoples. As such we believe that legislation should be enacted to ensure transparency and administrative fairness, and that existing agreements must be reviewed with a view to preventing the watering down of Aboriginal heritage rights, upholding statutory rights and achieving a more equitable relationship between mining proponents and Aboriginal communities.
16. We believe that attitudes that promote minimum compliance and which undervalue heritage protection and proper consultation have been consistently demonstrated by Rio Tinto. The problems within Rio Tinto that led to the Juukan Gorge disaster are deep-seated and systemic and revolve around culture and behaviour. PKKP believes the same culture is exhibited by the overwhelming majority of resource industry proponents in Western Australia. Under current conditions a disaster of this kind could easily happen elsewhere. All of this demonstrates that the industry cannot be left to regulate itself.
17. We believe that Aboriginal culture and heritage is undervalued in Australia and throughout the world. Steps need to be put in place to adequately protect, rehabilitate, capture and celebrate it.
18. Despite our pain, we are committed to work with stakeholders, including Rio Tinto and our other mining partners, to build a positive legacy of best practice engagement from the rubble of the Juukan Gorge disaster. PKKP is determined to ensure that there will be a positive legacy from this disaster that benefits all Aboriginal Traditional Owners and the resource industry as a whole. This should include as a minimum,

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<sup>1</sup> Rio Tinto, Board Review of Cultural Heritage Management, 23 August 2020, [34] (L’Estrange Review).

policy, legislative and corporate attitudinal and behavioural change, aimed at properly valuing and protecting Aboriginal heritage at its true worth to Traditional Owners and to humankind. It should also include finding ways to celebrate Aboriginal heritage and ensure that its value is preserved for future generations – a truly sustainable approach.

19. We will work with Rio Tinto to rebuild our partnership whilst creating a new future built on mutual respect and shared values. We will work with them because they continue to operate on our land, of which we are custodians. Our future work with Rio Tinto will include the recovery and rehabilitation of the destroyed sites, establishment of enduring mechanisms for the protection of our shared heritage, a fundamental review of all current agreements, improved liaison and communication processes and the establishment of facilities and institutions aimed at preserving and celebrating Aboriginal culture, values and heritage. We will encourage the other mining companies with which we deal to follow this lead.
20. Rio Tinto has agreed to a temporary moratorium which provides immediate protection to the Juukan Gorge and Purlykuti area whilst we negotiate agreements on a broader plan for site recovery and a best practice relationship. This is a necessary and welcome first step.

## THE PUUTU KUNTI KURRAMA AND PINIKURA PEOPLE



Figure 1: PKKP Country, Pilbara Region, Western Australia

21. The PKKP are two distinct Aboriginal socio-territorial groups, the Puutu Kunti Kurrama people and the Pinikura people, whose country lies in the West Pilbara region of Western Australia.
22. The Puutu Kunti Kurrama people and the Pinikura people are separate peoples with discrete rights and interests in country, though we have some shared laws and customs. Puutu Kunti Kurrama are also closely related to, and share boundaries with, the Eastern Guruma to the east and Kuruma Marthudunera to the north.
23. PKKP country includes areas of Puutu Kunti Kurrama country, areas of Pinikura country, and shared areas as shown in **Figure 1**. Puutu Kunti Kurrama people speak for Puutu Kunti Kurrama country and the Pinikura people speak for Pinikura country.
24. The PKKP People filed applications for native title on 30 October 2001 (PKKP #1, WAD6007/2001) and 1 June 2005 (PKKP #2, WAD126/2005) respectively. Named applicants from both language groups were included at all times throughout the claim process, though a number of the named applicants changed prior to the determination of the claim.
25. Juukan Gorge was included in the PKKP #1 claim area and lies entirely within Puutu Kunti Kurrama country.
26. The Federal Court recognised native title over almost the entirety of the PKKP claim area, including Juukan Gorge, by the making of a Consent Determination on 2 September 2015.
27. In making this Consent Determination, the Federal Court recognised the PKKP people's native title rights and interests. These rights and interests include the right to enter, travel over, visit and remain on country; to use the traditional resources of the land; and to engage in cultural activities on country, including visiting places of cultural or spiritual importance, and preserving the integrity of those places.
28. The Consent Determination also recognised PKKP peoples' connection to country through their many land-related laws and customs which facilitate their 'ongoing spiritual connection to country'.<sup>2</sup> It recognised that PKKP connection to country retained 'an active spiritual potency'.<sup>3</sup>
29. The *Native Title Act 1993* (Cth) (NT Act) makes provision for native title rights and interests to be held by a Registered Native Title Body Corporate (RNTBC) in trust or as an agent for native title holders. A RNTBC is a prescribed body corporate (PBC) which is registered on the National Native Title Register (NNTR).<sup>4</sup>

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<sup>2</sup> *Chubby on behalf of the Puutu Kunti Kurrama People and Pinikura People #1 and #2* [2015] FCA 940 at [16](g), (h).

<sup>3</sup> *Ibid* at [16] (j); *Ashburton & Ors v State of Western Australia & Ors* (2015) FCA (Reasons for judgment) at 7 [16](j).

<sup>4</sup> *Native Title Act 1993* (Cth) sections 56, 57, 59, 193(2) and 253; *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth) regulations 3 and 4.

30. Following the determination of their native title rights, the PKKP native title holders resolved to nominate the PKKP Aboriginal Corporation (PKKPAC) as their prescribed body corporate.
31. PKKPAC was registered as an Aboriginal Corporation on 27 October 2011 pursuant to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), and on 18 July 2012 became the Local Aboriginal Corporation (LAC) under the Claim Wide Participation Agreement and a party to the Aboriginal Land Use Agreement (ILUA) between PKKP and Rio Tinto dated 15 November 2012.<sup>5</sup>
32. On 20 January 2016, PKKPAC was registered on the NNTR as the RNTBC holding the native title rights and interests on trust for the PKKP people.
33. PKKPAC has two Land Committees; one representing the interests of the Puutu Kuntj Kurrama people, and the other representing the interests of the Pinikura people. Members of each Land Committee are elected from within their relevant group. Pursuant to the PKKPAC's Rules, there must be an equal number of PKKPAC directors from each Land Committee. The members of each Land Committee make decisions for their corresponding country, and collectively make decisions for shared country.

## **YAMATJI MARLPA ABORIGINAL CORPORATION**

34. Yamatji Marlpa Aboriginal Corporation (YMAC) is the Native Title Representative Body (NTRB) for the Yamatji and Pilbara regions of Western Australia, pursuant to Part 11 of the NT Act.
35. NTRBs are Aboriginal and Torres Strait Islander bodies funded by the Commonwealth Government to fulfil certain statutory functions on behalf of native title claimants and holders. These statutory functions are:
  - a. to, in consultation with native title claimants or native title holders (as applicable), facilitate and assist with the drafting of native title applications; and assist in proceedings, negotiations and consultations regarding native title, future acts, rights of access and ILUAs;
  - b. to certify native title applications and applications for registration of ILUAs;
  - c. to assist with dispute resolutions amongst constituents or in proceedings in relation to native title, future acts, ILUAs and rights of access;

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<sup>5</sup> YMAC, Submission No. 114 to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara Region of Western Australia* (28 August 2020) 2 [2]. (YMAC submission).

- d. to ensure that notices provided to the NTRB relating to the native title claim area or determination area (as applicable) are brought to the attention of the relevant native title holders;
  - e. to, in consultation with native title claimants or native title holders (as applicable), be party to ILUAs; and
  - f. to undertake internal reviews of any of their own decisions or actions.
36. YMAC has acted for a number of native title claim groups in the Yamatji and Pilbara regions. YMAC acted as the legal representative of the PKKP people until PKKPAC became the RNTBC on 20 January 2016, including acting for the PKKP in their native title claim determined in 2015.<sup>6</sup>
37. In its capacity as legal representative of the PKKP, YMAC represented the PKKP people in the negotiation and execution of a number of agreements with Rio Tinto, including, in particular, the Binding Initial Agreement dated 28 June 2006 (BIA), the Claim Wide Participation Agreement dated 18 March 2011 (CWPA), and the ILUA dated 15 November 2012 and registered 24 April 2013.
38. YMAC also acted as the PKKP's Heritage Service Provider until 30 June 2019. In its capacity as Heritage Service Provider, it was responsible for organising and facilitating the surveys undertaken by Rio Tinto and PKKP in relation to PKKP country, and for associated procedural and legal matters.<sup>7</sup>
39. PKKPAC took over the role of Heritage Service Provider from YMAC on 1 July 2019.

## **THE SIGNIFICANCE OF THE JUUKAN COMPLEX**

40. Puutu Kunti Kurrama and Pinikura country is located between Tom Price and Onslow, in the west Pilbara. It includes plains to its west and a significant western section of the Hamersley Range to its east.
41. The significance of the local environment cannot be overstated for the many language groups of the Pilbara, whose socio-economy has evolved with the many developments in the area.
42. PKKP country is spectacular due to the intersection of various ranges, plains and waterways. The Duck, Boolgeeda and Beasley waterways flow east to west into the

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<sup>6</sup> YMAC submission [13].

<sup>7</sup> YMAC submission [17-18].

Ashburton River, and parallel between the east to west ranges. These ranges are high and rugged and the waterways function as ancient 'corridors through country'.<sup>8</sup>

43. The Juukan Gorge is a perfect, ephemeral eastern tributary of the Purlykuti Creek, which functioned as such a corridor, by providing north to south access between the Beasley and Boolgeeda Rivers. This creek is significant on a number of levels within a wider cultural landscape for the Puutu Kunti Kurrama.
44. Purlykuti Creek connects places of high cultural significance, both ethnographic and archaeological, including the Vivash Gorge, which features extensive engravings, blade quarries and ochre deposits.<sup>9</sup> Purlykuti is the gateway to the important ceremonial places in the south-west of PKKP country.
45. Juukan Gorge joined with Purlykuti Creek and was a discrete cultural complex, featuring a number of secluded and individual cultural sites that together made it a unique and important place.
46. The Juukan Gorge was only 400m long (550m to the Purlykuti Creek centre) by 70m wide at its maximum.
47. There were a number of rockshelters along the distinctive, deep and narrow ironstone gorge, described, as a consequence of the separate archaeological excavations in 2014, as Juukan 1 and 2 (located near the Gorge's eastern end) and Juukan 3 and 4 (located near the western end). Each of these rockshelters held a 'museum of information', harbouring thousands of artefacts, including grinding stones, rock seats, a blade quarry and flaked stone materials, and human hair from a hair belt that has been genetically identified to match PKK descendants.<sup>10</sup> Many of these sacred objects are now stored either in a shipping container or are on display at the administration building at the Brockman 4 mine site, or at the Rio Tinto Heritage building in Dampier, and PKKP access to them is restricted.<sup>11</sup>
48. Juukan Gorge is a treed ravine with many smaller plants along its ephemeral creek, with a distinctive and sacred rock pool that holds water long after the rains have fallen. The shape of a snake's head entering the ground – and thus forming the shape of this perennial water source – after slithering down the Gorge's steep rockface, can clearly be seen in **Figure 2** on page 16 of this submission.
49. This rock pool has been identified as a significant spiritual place which was known to be still visited by the spirits of the PKKP. This is why the rockshelters had been so

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<sup>8</sup> Dr Heather Builth Report for the PKKP Survey: Brockman 4 Pit 1 Ethnographic Site identification Survey 2013 being YMAC PKK122-45/RTIO 51\_B4 Pit1 s18\_2013 (Site Identification Assessment for S18), 30 July 2013, 30. (Builth 2013 Report).

<sup>9</sup> Builth 2013 Report, 29.

<sup>10</sup> Scarp Archaeology, Brockman 4 Pit 1 Salvage (Final Report for Rio Tinto) December 2018, 13. (*Scarp 2018 Report*).

<sup>11</sup> Rio Tinto, Submission No 25 to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara Region of Western Australia* (31 July 2020) 27 [175]. (Rio Tinto Submission).

important to the old people, and hence accounts for the great length of time the rockshelters in the valley have been used, and protected, by the old people. A python was in the snake pool when the Gorge was last visited on 17 September 2020 which is confirmed by PKKP People as proof of its continuing spirituality and therefore sacredness for them.

50. Bush medicine was also collected here, such as lemon grass and grinding seeds.<sup>12</sup> There is a cultural 'walled-up' section in a rockshelter high up in the Gorge, holding material and stories. There were many artefact scatters (now salvaged) to the west of the Gorge, where it joined the larger Purlykuti waterway.
51. This landscape, the Purlykuti Creek in particular, gave the Puutu Kunti Kurrama their name.<sup>13</sup> It bestows the ancient archaeological sites with a greater depth of meaning and adds a greater cultural dimension to the area. Juukan Gorge is named after Juukan, or Tommy Ashburton, a PKK man. Juukan was born at Jukarinya (Mt Brockman) and married Topsy Williams, a Pinikura woman, both having a great many PKKP descendants, whose connection ran strong before, and will continue, despite the pain caused by the disaster.
52. Both the tangible and intangible cultural importance of the Juukan complex, and the rockshelters in particular, cannot be overstated.

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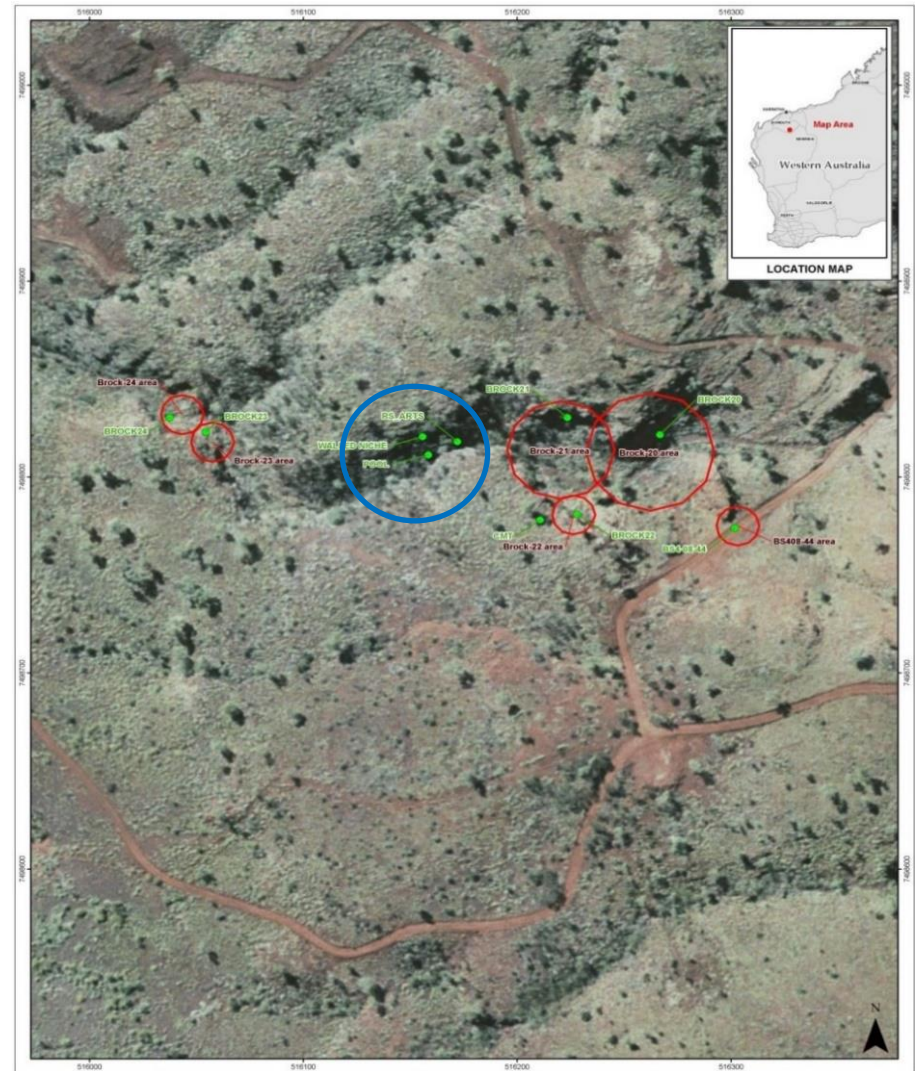
<sup>12</sup> Stephen Morgan, Report of an ethnographic site identification and Section 18 consultation (YMAC) May 2018, 24; Builth 2013 Report, 25.

<sup>13</sup> Builth 2013 Report, 27.





**Figure 2: Sacred Snake pool rock hole in Juukan Gorge**



**Figure 3: Aerial view of Juukan Gorge (Sacred Snake Rockhole shown as pool in centre, within blue circle. Juukan Rockshelters are shown within the two red circles to the right of the pool (Buith, 2013))**



## STRUCTURE OF THIS SUBMISSION

In this submission, PKKP will set out the background to its relationship with Rio Tinto, including its legal relationship, over the past 17 years. PKKP will also set out what it did to communicate the significance of the Juukan Gorge complex to Rio Tinto, in order that Rio Tinto, by adhering to its own standards, might find a way to protect the Juukan 1 and Juukan 2 rockshelters from destruction. These communications occurred over a lengthy period and continued into the months, weeks, days and hours before the blast on 24 May 2020.

PKKP will respond to Rio Tinto's submissions. PKKP will also respond to the Inquiry's terms of reference.

In **Section One** of this submission PKKP will cover:

- a. the consultation that Rio Tinto engaged in prior to the destruction of the caves. This covers the process leading up to PKKP entering into certain agreements with Rio Tinto, the resulting legal relationship between PKKP and Rio Tinto, and the process by which Rio Tinto communicated with PKKP about its mining activities on PKKP country;
- b. the sequences of events and decision-making processes undertaken by Rio Tinto that lead to the destruction. This covers the intense communications between PKKP and Rio Tinto and other relevant parties, some of which have only come to light through Rio Tinto's engagement with PKKP subsequent to the blast;
- c. the loss and damage to the Traditional Owners, Puutu Kunti Kurrama and Pinikura people, arising from the destruction of the site; and
- d. the heritage and conservation work that needs to be undertaken at the site. This covers PKKP's aspirations in relation to the appropriate next steps to restore the land to the maximum extent possible and to maintain it for future generations.

In **Section Two** of this submission PKKP will cover:

- a. the operation of the *Aboriginal Heritage Act 1972* (WA) and approvals provided under the Act;
- b. the interaction of State Aboriginal heritage regulations with Commonwealth laws;
- c. the effectiveness and adequacy of State and Federal Laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each Australian jurisdiction;
- d. how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites; and
- e. opportunities to improve Aboriginal heritage protection through the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

In relation to Section Two of the submissions, PKKP would like to recognise the contributions of its legal advisers and heritage experts.

In Section Three, PKKP considers other matters arising from the Juukan Gorge disaster and makes suggestions about a constructive way forward.

PKKP appreciates the commitment made by Rio Tinto's CEO, Jean-Sebastian Jacques, as made clear to this Inquiry and to PKKP in writing, that Rio Tinto will not take any objection based on the restrictions contained in various agreements PKKP has with Rio Tinto concerning the exercise of Aboriginal heritage rights, confidentiality and communications between PKKP and Rio Tinto and its representative. This is a very important gesture because it enables PKKP to speak freely about issues which require urgent review and reform without fear of reprisal.

In making this submission, PKKP has endeavoured to give this Inquiry the full picture insofar as it has been possible to do so, given the limited time, PKKP's lack of access to all relevant material and the culturally sensitive nature of some information.

PKKP's preference is to always conduct its dealings in person and, while COVID-19 has limited our capacity to do that, we hope that this submission is received for what it is – the loud and clear voice of the Traditional Owners of PKKP country.

## **SECTION ONE: WHAT HAPPENED?**

This section of the submission will address Terms of Reference (b), (c), (d) and (e) and will describe the history of PKKP's relationship with Rio Tinto, and events leading up to, during and after the Juukan Gorge disaster.

### **TERM OF REFERENCE (b): THE CONSULTATION THAT RIO TINTO ENGAGED IN PRIOR TO THE DESTRUCTION OF THE CAVES WITH ABORIGINAL PEOPLES**

53. Negotiations between Rio Tinto and PKKP commenced in 2003, when the State of Western Australia issued notices under Section 29 of the NT Act to PKKP in relation to the grant of General-Purpose Leases and the extension of Mineral Lease 4SA over land covered by the PKKP's native title claim.
54. In an effort to address the inequitable negotiation position between the Pilbara traditional owner groups and Rio Tinto's entities, a number of Pilbara traditional owner groups formed a Central Negotiation Committee (CNC) for the purpose of negotiating the terms of a standard mining agreement between claim groups and Rio Tinto. It was hoped that this approach would be more favourable to each individual group.

55. The CNC comprised representatives from 10 traditional owner groups, with Donna Meyer and John Ashburton representing the PKKP.

### **First Cultural Heritage Surveys**

56. Prior to any agreement being entered into between Rio Tinto and the PKKP Claim Group, Rio Tinto commissioned and carried out archaeological and ethnographic surveys of the Brockman 4 mine area to facilitate the commencement of a drilling exploration program. A list of surveys conducted for Rio Tinto are included in **Appendix 2**.
57. The Brockman 4 mine area lies on the boundary between the PKKP native title land and Eastern Guruma native title land. The PKKP portion of the Brockman 4 mine area constitutes the vast majority of the proposed mine area with dimensions of approximately 2.1km by 14km.<sup>14</sup> The reported aim of the first cultural heritage surveys was to examine the area in full.<sup>15</sup>
58. 12 PKKP representatives were involved in Jackson and Fry's archaeological surveys, which were carried out between 25 March and 7 April 2003, and 5 and 8 May 2003 respectively. Five PKKP representatives were also involved in Robin Stevens' ethnographic survey, which was conducted concurrently with the latter part of Jackson and Fry's archaeological survey on 6 and 7 May 2003.
59. Jackson and Fry's report was a site-avoidance survey. The methodology used by the Survey Team 'entailed the walking of a series of closely spaced transects across the Survey Area'.<sup>16</sup> Approximately 75% of the area was surveyed, and the survey identified 24 Aboriginal Archaeological sites, including two rockshelters in the Juukan Gorge (described in the report 'Brock-20' and 'Brock-21').<sup>17</sup>
60. The areas to the immediate north and south of the Juukan rockshelters were not (and have never been) archaeologically surveyed and have since been destroyed in part

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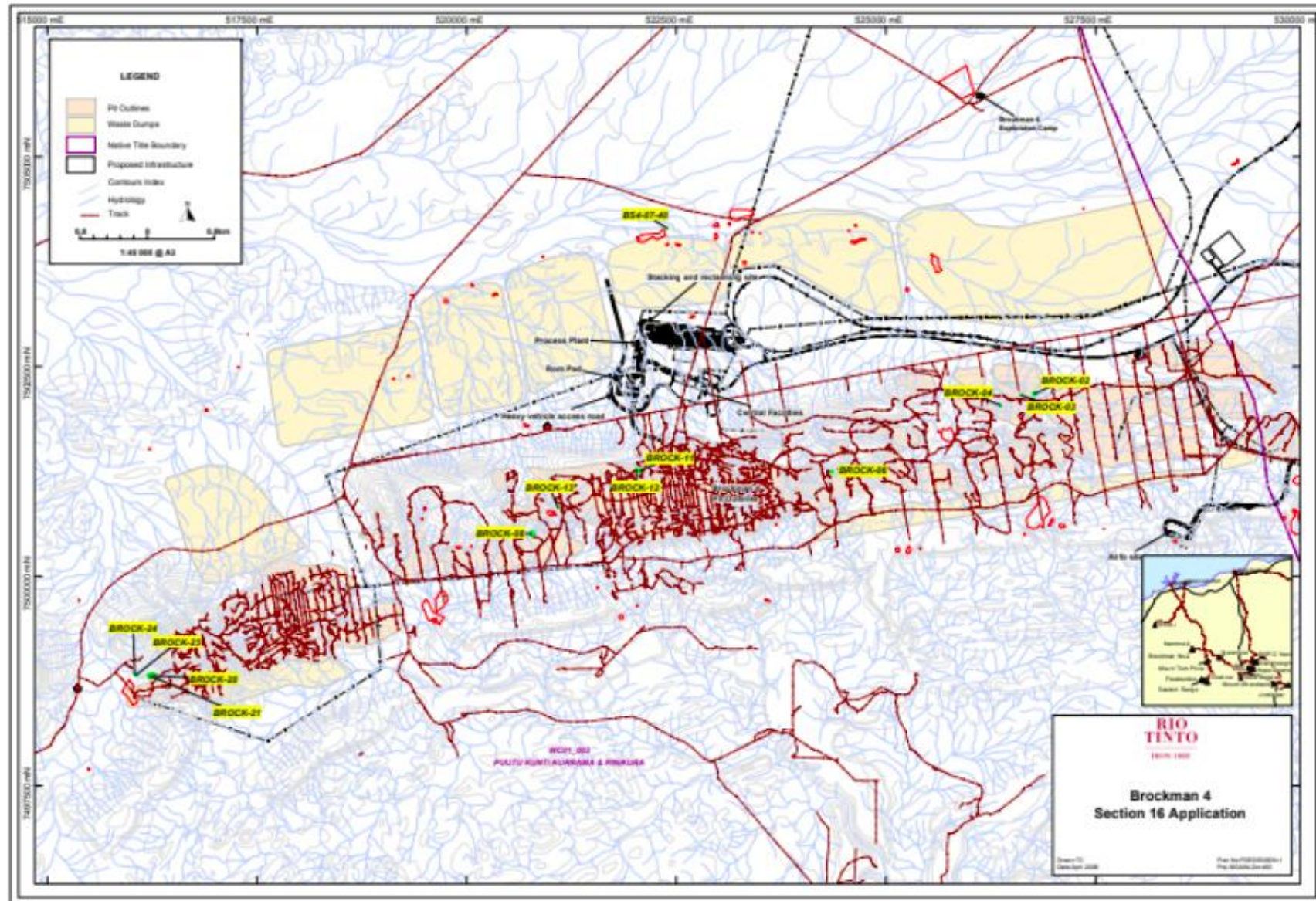
<sup>14</sup> Gavin Jackson and Rachel Fry, A Report of an Aboriginal Archaeological Survey of the Proposed Brockman Syncline Section 4 Exploration Drilling Program Area, Western Australia (prepared for Hamersley Iron Pty Ltd) May 2004, 2. (*Jackson & Fry 2004 Report*).

<sup>15</sup> It is worth noting that there has never been an examination of the entire site by archaeologists or anthropologists, as both Dr Builth and Ms Williams state in their work from 2013 and 2008, respectively.

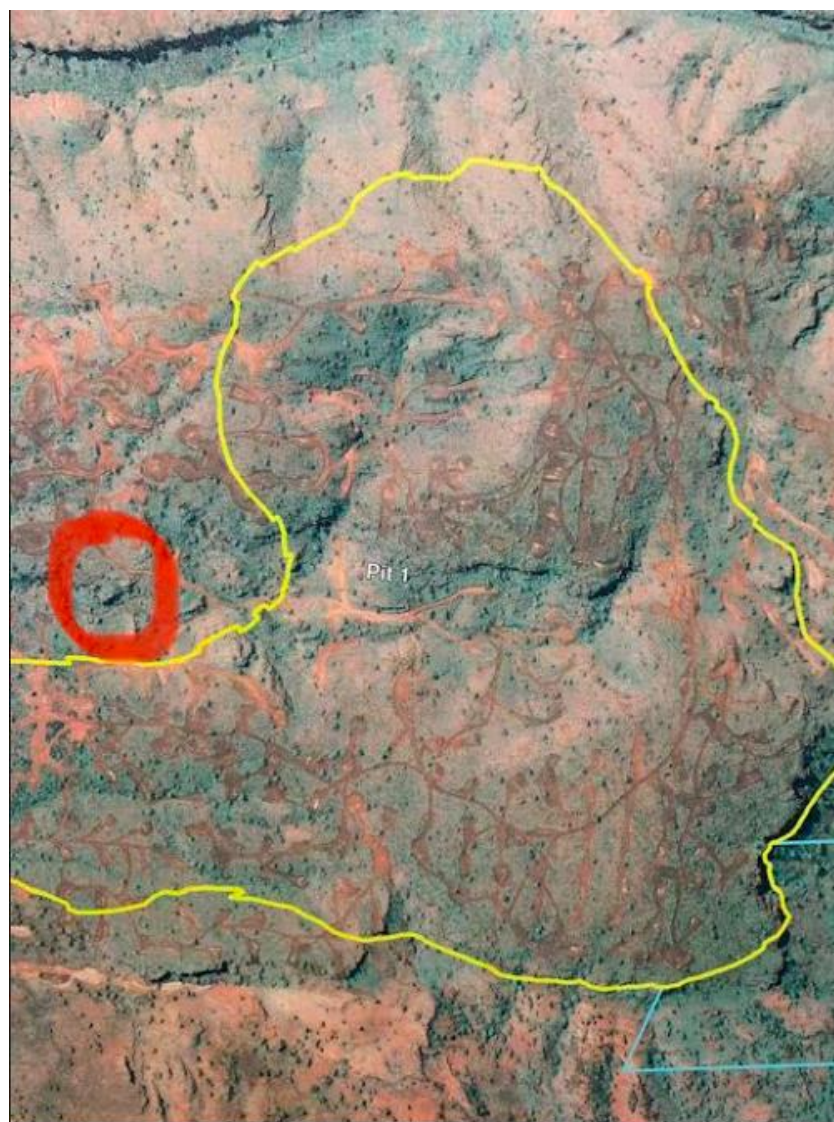
<sup>16</sup> Jackson & Fry 2014 Report, 16.

<sup>17</sup> Ibid, 24 -25.

Figure 4: 2008 Brockman 4 Syncline Mine Map showing excluded heritage sites







**Figure 5: 2011 Brockman 4 Syncline Mine Map showing Juukan rockshelters outside of Pit 1 within red circle, as displayed in Brockman 4 Office reception.**

61. Both of the Juukan rockshelters were reported to contain ‘a significant amount of cultural material’ and were both assessed ‘as having a moderate to high degree of archaeological significance’.<sup>18</sup> Jackson and Fry made generic recommendations in relation to the avoidance of both sites by Rio Tinto personnel and contractors.<sup>19</sup> The report also indicated that, should it prove necessary to disturb the sites in the future:
- a. an application be made to the Minister for approval under Section 18 of the AH Act seeking consent to disturb the sites, and that support from the PKKP native title claimant group should be sought; and
  - b. further investigation and recording of the sites be carried out prior to their disturbance, with support from the PKKP native title claimant group.<sup>20</sup>
62. The preliminary results of Jackson and Fry’s report were made available to Robin Stevens for the purposes of the ethnographic survey. Stevens conducted a ‘work program clearance’ in which various locations identified by Rio Tinto for proposed drilling exploration were visited and considered by the survey team.<sup>21</sup> The proposed exploration program site was given ethnographic heritage clearance subject to no drilling or ground disturbing activity taking place within a 50m radius ‘of any GPS coordinates recorded for sites by either the archaeology or ethnography survey teams’ which included Juukan 1 and Juukan 2.<sup>22</sup>
63. It is not clear from Stevens’ report whether or not the Juukan Gorge was visited by the survey team.<sup>23</sup> It is clear that not all of the sites identified by Jackson and Fry were visited in the course of Stevens’ ethnographic survey.
64. Stevens did not report on the ethnographic significance of Juukan Gorge.
65. Consultation work conducted by Dr Heather Builtth in 2013 noted that the PKKP people were dissatisfied with the original surveying and reporting on the site.<sup>24</sup> Thus, PKKP does not agree with Rio Tinto’s submission that Stevens’ report was a ‘high level ethnographic report’.<sup>25</sup>
66. Whilst the PKKP representatives were involved in these initial surveys, to the extent that it may have been in Rio Tinto’s contemplation at the time, the survey team members were not informed or consulted about the proposed destruction of the sites identified within the Brockman 4 mine area. Stevens’ report indicates that results of the evaluation drilling program would ‘contribute to a feasibility study on the

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<sup>18</sup> Ibid, 93 – 99.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid, 99.

<sup>21</sup> Robin Stevens, Report of an Ethnographic Heritage Survey: Brockman 4 (AML70/004; E47/053; E47/1037) Near Mount Brockman, Pilbara (prepared for Hamersley Iron Pty Ltd) May 2003, 5. (*Stevens 2003 Report*).

<sup>22</sup> Stevens 2003 Report, 7.

<sup>23</sup> Stevens 2003 Report, 7. It should be noted that the map of the survey area for this report was not supplied to PKKP for this submission.

<sup>24</sup> Builtth 2013 Report, 5.

<sup>25</sup> Rio Tinto Submission [72].

development of an iron ore mine'.<sup>26</sup> It was not understood or agreed by the PKKP Traditional Owners that these surveys formed a part of a greater mitigation strategy.

## Negotiations with Rio Tinto

67. In March 2004, at Rio Tinto's request and in accordance with an agreed Negotiation Protocol dated 2 December 2003, PKKP agreed to negotiate with Rio Tinto as a single traditional owner group. The PKKP claim group, which was represented by YMAC, appointed a team to conduct the negotiations with Rio Tinto on behalf of all PKKP people. This team included John Ashburton, Peter Jeffries, Donna Meyer, Susanne Hay-Hughes, Maurice Daulbin and Toni Stewart.
68. Rio Tinto submits that its preference was to negotiate agreements on a 'project by project' basis, and that Traditional Owners sought claim wide agreements.<sup>27</sup> The PKKP do not agree with that proposition for the following reasons.
69. Most of Rio Tinto's Pilbara mining leases were granted decades earlier under agreements with the state of Western Australia (entered into without the consent of the Traditional Owners). Section 125 of tenement ML 4SA, within which the Juukan rockshelters and much of the Brockman Syncline 4 project are located, was granted to Rio Tinto in 1964 under the *Iron Ore (Hamersley Range) Agreement Act 1963* (WA).
70. In negotiations with PKKP and the CNC, Rio Tinto took the position<sup>28</sup> that in relation to historic grants of mining tenure, the right to negotiate provisions of the NT Act did not apply and Rio Tinto was not obliged to pay compensation or royalties to the Traditional Owners in respect of its activities.<sup>29</sup>
71. At the outset of the negotiations, Rio Tinto very clearly asserted that it would not provide financial benefits to the Traditional Owners in relation to its activities on those historic leases. Rio Tinto asserted that the State of Western Australia was liable in respect of any compensation payable to the (then) native title claimants under the NT Act. At the time, the law was not settled in relation to both the extinguishing effect that mining leases may have had on native title, and what (if any) compensation PKKP would be entitled to receive from the State. As a result of Rio Tinto taking this position, and on advice, PKKP agreed to negotiate a claim-wide agreement which would ensure PKKP were afforded *some* rights, protections and benefits in relation to the pre-1975 tenements over and above those Rio Tinto asserted PKKP were entitled to.
72. The negotiations between PKKP's negotiating team and Rio Tinto were ultimately not successful.

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<sup>26</sup> Stevens 2003 Report, 3.

<sup>27</sup> Rio Tinto Submission [75].

<sup>28</sup> PKKP should not be taken to be endorsing this position or this view of the state of the law at that time.

<sup>29</sup> Including the 1964 grant of section 125, and also its renewals in 1986 and 2006.

73. In 2005, Rio Tinto agreed to engage again with the CNC on behalf of a number of Pilbara claim groups.
74. These negotiations were hard-fought and culminated in the concept of a 'New Mine' being included in the BIA whereby Rio Tinto would make payment of royalties to claim groups in relation to any 'New Mine' (meaning iron ore mining operations commencing production after 1 January 2006) within their respective claim areas, irrespective of whether those mines were on pre-1975 tenements.
75. The terms of the BIA reflected the context in which they were negotiated. In exchange for Rio Tinto's acceptance of provisions relating to its 'New Mine' activities, the CNC had to make significant concessions.
76. On 28 June 2006, five Pilbara claim groups, including PKKP, entered into individual BIAs with Rio Tinto.
77. Notwithstanding the very limited archaeological and ethnographic data in existence at the time of these negotiations, PKKP agreed to the classification of eight sections of ML4SA (comprising the Brockman Syncline 4 Project) as a 'Priority Project'.
78. As a Priority Project, PKKP claimants were restrained from making representations in opposition to any Section 18 notice, and/or from seeking any declaration under the ATSIHP Act in relation to Rio Tinto's activities on 'Priority Project Licenses' subject to Rio Tinto:
  - a. supplying PKKP claimants with a copy of any Section 18 notices relating to sites within the Priority Project; and
  - b. using its 'reasonable endeavours' to minimise the impact of the Priority Project operations on Aboriginal Sites, including consultation with PKKP claimants about the means of doing so.
79. PKKP's agreement to the above was a direct consequence of its inequitable negotiating position. PKKP were a group of native title claimants negotiating with a company with seemingly unlimited resources. In these circumstances, PKKP agreed to enter into a regional 'one-size fits all' agreement restricting their already very limited rights in relation to cultural heritage on land which included the Juukan complex. They did so in circumstances where:
  - a. no surveying of the Priority Project area had been carried out pursuant to the terms of any agreement between PKKP and Rio Tinto;
  - b. scant anthropological and archaeological evidence existed in relation to Juukan 1 and Juukan 2;
  - c. PKKP did not have the means to carry out further surveying of these highly significant areas itself; and



- d. there had been limited consultation, specifically with the PKK people, in relation to the proposed use of the land generally.

- 80. The BIA was as an 'initial' agreement. It facilitated the grant of additional Brockman Syncline 4 mining tenure to Rio Tinto and provided Rio Tinto with enormous certainty in relation to its operations on PKK land, including any future operations. In exchange, PKK received some certainty in relation to financial benefits PKK people would receive, which were to be paid to and held under a charitable trust.
- 81. Under the BIA, it was contemplated that within 12 months the parties would finalise a final Claim Wide Co-Existence Agreement containing provisions in relation to employment and training, contracting, environmental protection, cultural heritage protection, cultural awareness and such other provisions as were considered necessary. This did not occur.
- 82. Rio Tinto asserts that this was an agreement 'aimed at accounting for and formalising Traditional Owners rights to an extent greater than their recognition under Australian law, including the right to manage cultural heritage'.<sup>30</sup> If that was the aim, PKK considers the BIA was a failure.

## Section 16 application

- 83. After the execution of the BIA, Rio Tinto determined to obtain authorisation under the AH Act to disturb the Juukan sites.
- 84. In March 2008, Rio Tinto engaged Richard Fullagar of Scarp Archaeology to 'propose an archaeological testing program for rockshelters targeted for consent to destroy'.<sup>31</sup> Simultaneously, Roina Williams of the Pilbara Native Title Service, a now defunct branch of YMAC, was engaged to carry out an ethnographic survey. Site visits occurred between 15 and 18 March 2008.
- 85. Williams indicated in her preliminary advice to Rio Tinto that 'Brock 21...may be of very high significance to PKK', and it was agreed that 1m x 1m testing would be carried out at Juukan 1 and Juukan 2, described as 'Brockman 20' and 'Brockman 21', respectively.<sup>32</sup> In her conclusions, Williams noted that 'the PKK Survey Team understand that a Section 16 is being sought for the purposes of further research'.<sup>33</sup>
- 86. On 20 March 2008, Rio Tinto made a Section 16 application seeking authorisation to carry out test-excavations in relation to 12 rock-shelters including 'Brock 20' and

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<sup>30</sup> Rio Tinto Submission [36]

<sup>31</sup> Scarp Archaeology, Appraisal of Archaeological Sites at Brockman 4, PKK Survey Areas, Pilbara, Western Australia (prepared for ATAL, Pilbara Iron and the PKK) March 2008, 5. (*Scarp 2008 Report*).

<sup>32</sup> Roina Williams, Preliminary Advice for the Ethnographic Site Identification Survey of Sites on Brockman Syncline 4 Proposed Mine Development Project: Tenement AML 70/00004; Sec. 123, 125 & 279 (prepared for Pilbara Iron Pty Ltd) April 2008, 6. (*Williams Preliminary Advice 2008*).

<sup>33</sup> *Ibid*, 8.

‘Brock 21’. Permit number 430 was granted by the Western Australian Department of Aboriginal Affairs on 1 May 2008.

87. Rio Tinto engaged Dr Michael Slack of Scarp Archaeology to carry out the test excavations. Dr Slack carried out investigations of the 12 rockshelters including Juukan 1 and 2 (described as ‘Brock 20’ and ‘Brock 21’). In his report of October 2008, Dr Slack noted that Rio Tinto had indicated to him that the ‘sites are situated within the actual pit and waste dumps and avoidance is not possible’.<sup>34</sup> This does not accord with the 2011 Mine Pit map currently displayed in the Brockman 4 building which clearly shows Juukan 1 and Juukan 2 to be outside the mine pit (see **Figure 5** on page 21 of this submission).

88. Dr Slack recorded:

- a. a single 1m x 1m test pit was excavated at the site described as ‘Brock 20’ (Juukan 1), revealing artefacts as old as 32,000 years old;
- b. the artefacts recovered indicated that the antiquity of ‘Brock 20’ was ‘amongst the greatest in the region’;
- c. the site was of high archaeological significance and had the potential to yield more information about the human use of not only the local landscape but also of the greater Pilbara region; and
- d. a single 1m x 1m test pit was also excavated at the site described as ‘Brock 21’ (Juukan 2) revealing another deposit of ‘great antiquity’ with ‘the potential to be even older’.<sup>35</sup>

89. Dr Slack recommended that Juukan 2 be protected.<sup>36</sup>

90. According to Dr Slack, the Juukan Gorge findings indicated occupation pre-dating the Lower Glacial Maximum period.<sup>37</sup> He reported that the findings were significant in the context of his previous research, which had estimated the antiquity of occupation of the area to be around 10,000 years.

91. Prior to receiving Dr Slack’s report, Rio Tinto also engaged Roina Williams to carry out what it described as an ‘ethnographic consultation survey’ in relation to sites including Juukan 1 and Juukan 2. In the scope of works, Rio Tinto indicated:

*‘43 recorded archaeological sites are situated within the pit and waste dumps where avoidance is not possible. The aim of the ethnographic consultation survey, the subject of this scope, is to show representatives of the PKKP group the sites proposed for disturbance due to the mine development*

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<sup>34</sup> Scarp Archaeology, Brockman 4 Site Re-Recording and S16 Excavation Program, Final Report (prepared for Pilbara Iron Pty Ltd) October 2008, 16. (*Scarp 2008 Report*).

<sup>35</sup> *Ibid*, 127.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid*, 33. The Lower Glacial Maximum (LGM) period occurred some 30, 000 years ago.

*program. RTIO seek their ethnographic comment and opinions on what mitigative measures should take place prior to disturbance. As the 43 sites, the subject of this consultation, are located in areas proposed for mine pits & waste dumps, there is unfortunately no flexibility to avoid these sites*<sup>38</sup>

92. It is clear from paragraph 13 of Rio Tinto's submission to this Inquiry that it was not the case that avoidance of the sites was 'not possible'. PKKP was not aware until it read paragraph 13 of the submission that in 2012 and 2013 Rio Tinto developed and considered four pit options for Brockman 4 Pit 1 – three of which 'avoided the shelters to varying distances'.<sup>39</sup>
93. The map provided to DIA in support of the Section 16 application indicated that the sites described as Brock 20, 21, 22, 23 and 24 were, in fact, outside the proposed pit and waste dump areas. The same map was provided to Williams for the purposes of the ethnographic consultation.
94. This issue is somewhat confusingly dealt with in Rio Tinto's supplementary submission to this Committee.<sup>40</sup>
95. Rio Tinto notes that the proximity of the sites to the outline of the pit meant that 'they could not be expected to have avoided impacts to the rockshelters from mining activities, including blasting'.<sup>41</sup> PKKP's experience (consistent with Rio Tinto's submission) is that it is not unusual for Rio Tinto to seek and obtain authorisations which it ultimately does not require.
96. However, Rio Tinto goes on to say that 'the likelihood that the original pit design would be amended over time...was apparent from at least 2008 when the archaeological and ethnographic surveys were conducted having regard to the likelihood that section 18 consents would be required'.<sup>42</sup> Rio Tinto notes that the reports prepared in respect of those surveys included statements to the effect that Rio Tinto had indicated the sites were situated within the pit and that avoidance of those sites was not possible.
97. Rio Tinto appears to be asserting that the surveys of 2008 were carried out on the basis that either the sites were outside the pit and prone to inadvertent damage (essentially a risk management measure), or that the pit design was likely to be amended to include the sites. However, at all times Rio Tinto 'consulted' with PKKP (including by presenting to the PKKP claim group at a Community Meeting on 11 November 2008), its advisors and its experts, on the basis that the sites were within the pit design and were unavoidable.

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<sup>38</sup> Rio Tinto's Scope of Work dated 25 September 2008 as provided to PNTS/YMAC.

<sup>39</sup> Rio Tinto Submission [13].

<sup>40</sup> Rio Tinto Supplementary Submission, 27 and 76.

<sup>41</sup> Rio Tinto Supplementary Submission, 27.

<sup>42</sup> Rio Tinto Supplementary Submission, 27.

98. It appears to PKKP that Rio Tinto considered that its obligation under the BIA to use its 'reasonable endeavours' to minimise the impact of its operations on Aboriginal Sites did not extend to taking steps to avoid the disturbance of significant sites which were, at the time, outside the mine plan.
99. Williams' ethnographic consultation survey took place between 18 and 21 November 2008. Having regard to Dr Slack's findings in relation to the antiquity of habitation of the land, Williams reported:
- 'PKKP traditional knowledge systems resonate with this, as their ongoing practice of law and custom upholds the belief that their dreaming ancestors have walked on country since 'the time when the land was soft''<sup>43</sup> (emphasis added)*
100. Williams noted that the name Juukan was given to the rockshelter site complex, which was 'considered to be of high ethnographic significance to the PKKP' and represented a potentially enormous 'museum of information about their ancestors' work and lives.<sup>44</sup> Williams' report also clarified that Purlykuti Creek, 'a named place of relative significance to the PKKP' flowed past Juukan Gorge.<sup>45</sup> She indicated that a 'ceremonial site and grounds is most likely in the vicinity of the site complex Juukan' and that she held suspicions that the survey team members were reluctant to share information in relation to it.<sup>46</sup>
101. Williams advised salvage and excavation of Juukan 1 and Juukan 2.
102. It is a recurring theme in Rio Tinto's submissions that Rio Tinto characterises its failures in the lead up to the Juukan disaster as failures of omission, rather than a failure to be proactive in its heritage protection management. Paragraph 30 of the L'Estrange Review asserts:
- 'Material new knowledge and understanding of the Juukan Gorge came to light as a result of expert ethnographic advice in July and September 2013 and archaeological excavations and preliminary reports in 2014. With the ethnographic reports of Dr Builth in July and September of 2013, and the preliminary archaeological reports of Dr Slack in 2014, important new knowledge and understanding were gained about the Juukan Gorge area that was not available at the time that the decision in relation to the Brockman 4 Pit 1 mine design was made in 2013'.<sup>47</sup>*

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<sup>43</sup> Roina Williams, A Puutu Kunti Kurrama and Pinikura Ethnographic Site Identification Survey of Brockman 4 Mine Area (prepared for Rio Tinto Iron Ore Expansion Projects) December 2008, 5 (*Williams 2008 Report*).

<sup>44</sup> Williams 2008 Report, 13.

<sup>45</sup> *Ibid*, 14.

<sup>46</sup> *Ibid*, 17.

<sup>47</sup> Rio Tinto, Board Review of Cultural Heritage Management, 23 August 2020, [30]. (*L'Estrange Review*).

103. Rio Tinto received the Builth report prior to its October 2013 Section 18 submission and yet in its supplementary submissions, Rio Tinto laments 'missed opportunities to re-evaluate the mine plan in light of this material new information'.<sup>48</sup>
104. PKKP does not agree with this proposition. From December 2008, when Rio Tinto received Williams' report, Rio Tinto was in possession of detailed archaeological and anthropological evidence indicating the Juukan sites were of high ethnographic and archaeological significance. Notwithstanding that knowledge, including Dr Slack's express recommendation that the site Juukan 2 be protected, Rio Tinto chose the pit design and applied for Section 18 authorisations which would ensure the destruction of the entire Juukan Gorge.
105. It is convenient to assert that the Juukan disaster was a consequence of 'missed opportunities', but to do so ignores the facts. The 'material new information' received by Rio Tinto after making the decision to extend the mine-plan was information which confirmed what Rio Tinto already knew. At the time Rio Tinto made the decision to extend the mine plan, Rio Tinto was aware that the Juukan 1 and Juukan 2 were sites of high significance, and it made its decision on the basis that its profit was of greater importance.

#### **Claim Wide Participation Agreement (CWPA), Regional Framework Deed (RFD) and the Indigenous Land Use Agreement (ILUA)**

106. Between 2006 and 2010, as contemplated under the BIAs, Rio Tinto and the Pilbara claim groups (represented by YMAC) negotiated the terms of a more comprehensive agreement to replace the BIAs.
107. PKKP opted out of the CNC (by then known as the Marnda Mia CNC) and instead conducted negotiations with Rio Tinto through a working group and with the assistance of YMAC.
108. The CWPA, which replaced the BIA, was executed by PKKP named applicants on 18 March 2011. At the same time, the PKKP claimants executed and opted into the RFD. Comments on certain provisions and on the adequacy of the 2011 agreements generally are provided later in this submission.
109. In relation to the Juukan rockshelters, Rio Tinto has submitted:
  - a. 'The Participation Agreement included a list of sixteen areas of high cultural heritage significance identified by the PKKP, and referred to as 'Rights Reserved Areas', which it was agreed would have additional protections. The Juukan sites were not included on that list of Rights Reserved Areas.'<sup>49</sup>

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<sup>48</sup> Rio Tinto Supplementary Submission, 73

<sup>49</sup> Rio Tinto Supplementary Submission 29.

- b. 'in respect of the sites such as the Juukan sites that did not form part of the 'Rights Reserved Areas' under the Participation Agreement, the PKKP agreed not to object to any application, including under the AH Act, made for the purposes of Rio Tinto's Iron Ore operations'.<sup>50</sup>
  - c. 'both parties had an understanding of the high significance of the Juukan sites at the times when the contractual arrangements (including compensation and releases) were negotiated and entered into',<sup>51</sup> and
  - d. 'The PKKP's agreement not to object to mine development in this way is the expression of the PKKP's legal consent for Rio Tinto to mine on their lands in return for the financial and non-financial benefits negotiated'.<sup>52</sup>
110. PKKP notes that Rio Tinto submits 'through those negotiations and under the terms of these agreements, Rio Tinto believes that, in exchange for financial and non-financial benefits, it obtained the 'Free, Prior and Informed Consent' of the PKKP to conduct mining operations on PKKP land...which included the land on which the Juukan rockshelters were located'.<sup>53</sup>
111. PKKP understands Rio Tinto to be asserting that, as a result of the Juukan sites not being included in the Rights Reserved Area, PKKP had given its free, prior and informed consent to the inclusion of the sites within the pit design subject to Rio Tinto undertaking mitigation works.
112. PKKP totally rejects that proposition.
113. In this respect, Rio Tinto's submission ignores the grossly unequal negotiating position of the parties, a matter Rio Tinto was acutely aware of.
114. It also indicates how, with the prime purpose of securing certainty of mining, Rio Tinto turned a blind eye to the difficulties and complexities of securing certainty of heritage protection. We deal with this issue further in our general responses to Rio Tinto's submissions in Section Three.
115. The concept of Rights Reserved Areas was introduced in 2010 in negotiations between the Nyiyaparli claimants and Rio Tinto. PKKP's advisors, YMAC, (who also acted for Nyiyaparli) introduced the concept to PKKP on 30 July 2010.
116. Following discussions between YMAC and Rio Tinto, the advice given by YMAC to PKKP on 30 July 2010 was very clear:
- a. PKKP's proposal of Rights Reserved Areas could not include too many sites, or Rio Tinto may reject the proposal altogether; and

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<sup>50</sup> Rio Tinto Supplementary Submission, p 42.

<sup>51</sup> Rio Tinto Supplementary Submission, p 25.

<sup>52</sup> Rio Tinto Supplementary Submission p 21.

<sup>53</sup> Rio Tinto Submission [10].

- b. given the late stages of negotiations between Rio Tinto and PKKP, there were severe time constraints, and there would be only one opportunity to present the proposal to Rio Tinto.
- 117. PKKP resolved at that meeting to propose 16 sites for Rio Tinto's consideration.
- 118. The information available to PKKP at the time was that Rio Tinto considered the Juukan sites were 'unavoidable'. As a result, none of the sites proposed by PKKP to be Rights Reserved Areas were within the proposed footprint or immediate vicinity of Rio Tinto's Brockman 4 mine.
- 119. By entering into the CWPAs and RFDs, PKKP did not, and does not, consent to Rio Tinto's disturbance of any and all Aboriginal sites outside of the Rights Reserved Areas. PKKP entered into those Agreements in the expectation that they would provide some level of protection to all Aboriginal sites.
- 120. PKKP, in its negotiations, relied on Rio Tinto's representations about Rio Tinto's values, which included the recognition of culture and protection of heritage. PKKP trusted that Rio Tinto would approach the concept of 'practicability' in good faith, having regard to the information PKKP would give to Rio Tinto in relation to the significance of each site.
- 121. That the Juukan disaster occurred under the framework of the CWPAs and the RFD is a clear indictment of those agreements. It demonstrates that, despite PKKP's constant efforts to articulate the significance of its sites, these Agreements have allowed the PKKP traditional owners to be ignored.

## **Section 18 authorisation**

- 122. On 28 March 2013 and 16 July 2013, at meetings of the Local Implementation Committee (LIC), Rio Tinto and PKKP representatives discussed the proposal by Rio Tinto for Section 18 applications in relation to the sites identified in the Juukan Gorge.<sup>54</sup> The LIC was a committee comprising three Rio Tinto representatives and six PKKP representatives.
- 123. The LIC was established under the CWPAs. The LIC's role is to provide a forum for discussion, exchange of information between the parties, and implement (and monitor the implementation of) the commitments of the parties under the CWPAs and RFD.
- 124. The minutes of the LIC meeting of 28 March 2013, indicate that Rio Tinto reported to the PKKP representatives that Rio Tinto 'may submit a Section 18...which...may contain up to 7 heritage sites' which included Brock-20 and Brock-21 (Juukan 1 and

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<sup>54</sup> Rio Tinto Submission [14] [122].

Juukan 2). Rio Tinto's representatives noted that further ethnographic consultation would be required.

125. The minutes of the LIC meeting of 16 July 2013, indicate that Rio Tinto gave a presentation to the PKKP in relation to the potential of seven Section 18 applications being submitted by September 2013. It was noted that ethnographic surveying of the sites had been completed in June 2013. The presentation noted 'Brock 20' and 'Brock 21' were two of the seven sites, and an aerial photograph identifying the seven sites was displayed. In Rio Tinto's submission,<sup>55</sup> it is noted that Rio Tinto's 'understanding based on that meeting [was] that the PKKP supported the Section 18 and the notion of further excavation, and that it was understood by the PKKP that the consequence of this would be disturbance to the sites in the future'. This understanding is apparently recorded in internal emails between Rio Tinto employees.<sup>56</sup>
126. Rio Tinto received Dr Heather Builth's Site Identification Assessment report on 10 September 2013.
127. Dr Builth's report addressed the significance of the Juukan complex as a whole, picking up on the significance of Purlykuti as identified in Williams' 2008 report. Dr Builth indicated that the significance of Purlykuti, which was the source of the name Puutu Kunti, had been 'underestimated in previous survey's and reports'.<sup>57</sup> She assessed the place as a whole, which included the creek, a pass, and the Juukan rockshelters, to be of high significance and recommended that Purlykuti be recorded with DAA as an ethnographical place of high significance.
128. Dr Builth's report also recommended that:

*'following the identification of unrecorded cultural material places within the valley and between sites Brock-23 and Brock 21, and dissatisfaction expressed at the minimal coverage of the original and only 'block' archaeological survey carried out across the area now proposed for development of the Brockman 4 mine Pit 1... it is recommended that further heritage survey take place in those areas pertinent to the present Brockman Pit1 proposed development that were omitted in the initial survey to record any unrecorded cultural material places.'*

129. This recommendation was not actioned by Rio Tinto.<sup>58</sup>

130. The 2013 Builth report provided the following further information on the Juukan site complex, or Juukan Gorge:

*'Ethnographic support of the significance of the valley along which six of the seven archaeological sites are located was provided by the PKKP group*

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<sup>55</sup> Rio Tinto Submission [ 122].

<sup>56</sup> Rio Tinto Supplementary Submissions, p 31.

<sup>57</sup> Builth 2013 Report, p 27.

<sup>58</sup> Rio Tinto Submission [119] [120] [127].



*representatives during our site visit on 13 June. They already knew of the existence of a particular pool and its meaning to them. ... The pool was identified as a significant spiritual place that was created by a water snake, which still bears the shape of the snake entering the ground and making the pool. This was also stated to be the reason why the rockshelters here had been so important to the old people, and hence accounted for the great length of time the rockshelters in the valley could be used by the old people.*

*For all of these reasons, this particular location of Purlykuti creek with its adjacent large artefact scatter of Brock 25 and nearby rockshelters, Brock 20-24, is of high significance to Puutu Kunti Kurrama, in the old days and still today. It is therefore questioned why this location has not been recorded previously as an ethnographic place. It is considered there is sufficient information available at present to record Purlykuti for DAA records and the S18 ethnographic submission.*

*There has been a request (subsequent to our survey of the 13 June and my submission of the PA) from PKKP Elder and representative, Angie Cox and Robert McKay, that we now record Purlykuti as an ethnographic site with DAA (personal communication, 18 July 2013).*

*The cultural material places that were visited and that have been excavated by members of this ethnographic survey, including Harold Ashburton and Robert (RJ) McKay, are a part of the old people's lives and story but they also exist today and therefore physically and spiritually make the connection between the old times and the present. This is what makes their presence so significant and the story that they may still tell so important to the PKKP, and which hopefully will be revealed during further archaeological excavations here.<sup>59</sup>*

131. Following the submission of her report Dr Builth was never contacted again by Rio Tinto or YMAC in relation to her findings including her suggestion for recording the site of Purlykuti for the PKK.
132. Rio Tinto, in its supplementary submission to this inquiry, contends that 'the records of engagement [including Dr Builth's report] do not reveal any significant dissent or opposition to the section 18 process' on the part of PKKP<sup>60</sup> and laments the lack of a 'strong Traditional Owner voice...communicating what is important'.<sup>61</sup>
133. PKKP does not agree with those submissions.
134. PKKP's experience has been that the LIC has served as a forum for Rio Tinto to notify PKKP of its activities on PKKP land. It has never operated as a forum for

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<sup>59</sup> Builth 2013 Report, 27-29.

<sup>60</sup> Rio Tinto Supplementary Submission, page 32.

<sup>61</sup> Rio Tinto Supplementary Submission, page 5,22.

genuine consultation between Rio Tinto and PKKP. In any event, PKKP was not in a position, given the CWP provisions, referred to later in this submission, to prevent the lodgement of a section 18 application. PKKP is pleased to read Rio Tinto's acknowledgment of this and its desire to modernise its agreements with PKKP.

135. To the extent that Rio Tinto submits that there was an absence of a strong Traditional Owner voice, PKKP does not agree. There can be no doubt that PKKP's voice was both strong and clear in relation to the significance of the Juukan Gorge. Dr Builth's report and the numerous other reports relied on engagement with Traditional Owners, and were the reason that Rio Tinto was aware of the high significance of the Juukan Gorge. Those reports are summarised in **Appendix 2**.
136. Whilst 'the approval did not come out of the blue',<sup>62</sup> nor did the significance of the Gorge, or PKKP's opposition to the destruction of the sites (which was presented by Rio Tinto to PKKP from 2008 as inevitable), which was best expressed through statements of the ethnographic significance of the place. It was not PKKP's voice that was the issue, but rather Rio Tinto's preparedness to hear it.
137. In good faith PKKP relied on Rio Tinto's understanding and acceptance of the significance of the Juukan Gorge, but Rio Tinto's submission at paragraph 40 encapsulates the problem:
- 'Rio Tinto engages with Traditional Owners and relevant specialists to identify potential Aboriginal heritage sites in areas that are being explored or identified for mining. The information that is uncovered through that process is taken into account in mine design and planning. **Where the location of an ore body would result in the likelihood of impact to a heritage site and it is impracticable to avoid that site, relevant approvals are sought**'*  
(emphasis added)
138. On 3 October, 2013, Rio Tinto sent a copy of the draft Notice for its Section 18 application and supporting submissions to Cath McLeish of YMAC. YMAC has informed PKKP that YMAC has no record to suggest that YMAC passed the draft notice and accompanying documents on to PKKP, nor did YMAC consider it was within its role as PKKP's heritage body under the Participation Agreement to assess the notice. There is no evidence that PKKP ever received the section 18 notice and accompanying documents before it was submitted.
139. Dr Builth's report and Dr Slack's 2008 report were attached to Rio Tinto's Section 18 applications dated 15 October 2013.
140. The submission in support of Rio Tinto's Section 18 applications purported to demonstrate that Rio Tinto had 'consulted extensively' with the PKKP.<sup>63</sup> The submission gave details of the surveys carried out and its presentation at the March

<sup>62</sup> Rio Tinto Supplementary Submission, page 32.

<sup>63</sup> Rio Tinto, Supporting submission for an application under section 18 of *Aboriginal Heritage Act 1972* (WA), page 4.

2013 LIC meeting. In documenting the sites, the submission omitted or misrepresented a number of details of significance:

- a. in its summary of the sites within the Juukan complex, the ethnographic significance of those sites was listed as 'N/A';
- b. in summarising Dr Builth's 2013 survey, the submission recorded 'No new ethnographic sites were recorded during the ethnographic survey';
- c. the recommendation of Dr Slack in relation to the preservation of Juukan 2 was omitted; and
- d. on page 8 under Section 8 of the s18 Submission: 'Summary of potential effects on Aboriginal sites and possible management responses' and 'Strategies to minimise or avoid identified sites' it was stated:

*'Hamersley Iron is committed to limiting the impact of its operations on Aboriginal heritage sites. However, given the nature of the orebody location, existing infrastructure and topography there has been little scope to modify the proposal to avoid the sites which are part of this application.'*

141. The submission concluded by listing the four rockshelters of Juukan Gorge, including Brock-20 and Brock-21, and stating that further salvage excavation would be required, as recommended by Slack, Williams and Builth. In light of the documented archaeological and ethnographic significance of the sites, PKKP does not understand why Rio Tinto proposed to undertake those investigations after submitting an application in relation to those sites.

### **Heritage Information Submissions (HISFs) and Section 5 of the AH Act**

142. Pursuant to sections 4 and 5 of the *Aboriginal Heritage Act*, 'Aboriginal site' is defined as:
  - (a) *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;*
  - (b) *any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;*
  - (c) *any place which, in the opinion of the Committee, 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;*

*(d) 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*

143. Heritage Information Submission Forms (HISFs) are Site Recording forms. It is the information provided in these forms that allows the APMC to decide if the heritage site will be registered as a site or not, whether it should be given a recommendation for consent to disturb by the APMC, and, if it is given consent by the Minister, what conditions are put on this consent to disturb. HISFs are intended to be completed by archaeologists or anthropologists when nominating a cultural heritage place for registration as a heritage site on the WA State Heritage Register.
144. PKKP understands that the DPLH currently only assesses Aboriginal heritage sites for registration in response to a Section 18 application 'to disturb' these places. DPLH does not register sites of its own motion or under any other prerogative of protection or preservation.
145. Only registered sites can lawfully be given Ministerial consent to be destroyed, after receiving an evaluation from APMC.<sup>64</sup> As a result, HISFs have become part of the heritage compliance process for Section 18 applications.

### **Rio Tinto's 2013 Section 18 Application to DAA**

146. In connection with the Juukan Gorge Section 18 applications, Rio Tinto prepared and submitted individual HISFs in relation to each site. Rio Tinto's HISFs named Dr Michael Slack of Scarp Archaeology as 'the Recorder'.
147. Pages 4 - 5 of the HISFs identified each separate site with their ID, location and boundary details, their condition and a paragraph on the recording history and site assessment – being of high archaeological significance or otherwise.
148. Almost every detail in the HISF supplied by Rio Tinto for Juukan 2 (Brock -21), the site that Dr Slack had recommended be preserved, was incorrect. The information provided was identical to that supplied in the HISF for Juukan 1 (Brock-20) apart from pages 4 - 5.
149. Rio Tinto submitted to this Inquiry that there was 'some incorrect information'<sup>65</sup> in 'some sections of the form', and sought to downplay this in its oral evidence to this Inquiry, stating the error was 'just relating to the cover page'.<sup>66</sup> In its responses to questions on notice Rio Tinto has continued to downplay these errors, suggesting

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<sup>64</sup> *Aboriginal Heritage Act 1972* (WA), section 18(2).

<sup>65</sup> Rio Tinto Submission [133].

<sup>66</sup> Joint Standing Committee on Northern Australia, Inquiry into the destruction of 46,000-year-old rockshelters at the Juukan Gorge, Public Hearing Transcript, 7 August 2020, page 14.

that it had ‘incorrectly created the impression that Juukan 2 was in fact older by approximately 10,000 years than had been established at the time’.<sup>67</sup>

150. There is no evidence available to PKKP that either the DAA, YMAC or the ACMC picked up Rio Tinto’s errors. The ACMC recommended only that Juukan 1 and Juukan 2 be registered and placed on the Aboriginal Heritage Information System (AHIS) and, simultaneously, that a Section 18 Consent to disturb be granted to Rio Tinto for these two rockshelters, with one condition attached.
151. Dr Builth’s contact details were provided in the HISF. Dr Builth was never contacted by Rio Tinto, ACMC or the DAA in relation to her report about the Juukan rockshelters or Purlykuti.
152. No contact details for Traditional Owners were supplied in the HISF.
153. There was no information supplied by Rio Tinto under section 39(2) or section 39(3) of the AH Act connecting the Traditional Owners to either site by their knowledge of and connection with it – both in the past and the present, thereby giving it ethnographic significance. This was a major omission by Rio Tinto.

#### **The implications for the s 18 application from the details supplied on the Brock-20 and Brock-21 HISFs**

154. The nature and quality of Rio Tinto’s Section 18 application raises some very serious concerns.
155. Rio Tinto’s statement in the Section 18 submission that there were no ethnographic sites found at Juukan Gorge, is at odds with Dr Builth’s findings and also paragraph 63 of Rio Tinto’s submission which acknowledges that ‘the end of the Juukan Gorge connects to the Purlykuti Creek, which is also a culturally significant area for the PKKP’.
156. There are gross inaccuracies and misleading information in the supporting submissions and HISFs. The documents asserted that in relation to Juukan 1 and Juukan 2, there was:
  - a. no sacred artefacts found;
  - b. no historical or traditional use of significance;
  - c. no potential anthropological or ethnographic or archaeological interest;
  - d. no culturally sensitive or confidential information associated with these rockshelters; and
  - e. no Traditional Owner and PKK contact details.<sup>68</sup>

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<sup>67</sup> Rio Tinto Supplementary Submission, page 78.

157. PKKP's finds it concerning that Rio Tinto submitted its section 18 application in 2013 prior to receiving results of its much more extensive archaeological excavations which were carried out 7 months later and, at the same time, chose to ignore the ethnographic information already supplied to it in both the 2008 and 2013 ethnographic reports. Those reports were commissioned by Rio Tinto for this very purpose.
158. It is difficult to avoid the conclusion that Rio Tinto was not concerned about the archaeological or ethnographic findings in relation to the significance of the Juukan Gorge and was only interested in maximising the yield of iron-ore.
159. Only one condition was applied to the granting of Rio Tinto's Section 18 permit for Brockman 4 Pit 1. This was for the provision of a written report back to DAA upon completion of the purpose.

### **After section 18 Consent**

160. In December 2013 Rio Tinto arranged an ethnographic site identification survey and section 18 consultation in relation to Purlykuti. The purpose of the survey was reported by Linda Geddes (anthropologist) to be 'to record nominated sites in sufficient detail to adequately characterise them and assess their cultural significance including against the Section 5 criteria of the Aboriginal Heritage Act'.
161. In her report, Geddes noted the previous reports of Builth and Williams, which she said identified 'knowledge of a sacred aspect of Purlykuti, the nature of which is highly sensitive with detailed knowledge of this only held by senior members of the group'.
162. Geddes reported, 'Purlykuti is an ethno-geographical feature, named place and sacred, historical, archaeological and resource place and likely camp... The Purlykuti site is a discrete section of the creek located where the creek passes through a gorge which forms a gap in the ranges.'
163. Geddes' assessment found that the Purlykuti site met the criteria of a site under subsections 5(a), 5(b) and 5(c) of the AH Act.
164. Significantly, Geddes noted that 'the Juukan site complex is considered part of Purlykuti' and that 'the ethnographic significance of the camp place and the archaeological material...are aspects that should not be separated between Juukan and Purlykuti'.
165. Regardless of the outcomes of ACMC's assessment, Geddes requested and recommended that Rio Tinto facilitate further recording of the site, including a video record.

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<sup>68</sup> Rio Tinto Iron Ore, Heritage Information Submission Form (prepared for Department of Aboriginal Affairs, Government of Western Australia) 15 October 2013, page 9.

166. Given the Juukan rockshelters had already been the subject of a section 18 approval, Purlykuti was submitted to DAA and ACMC as a separate site. **Appendix 3** to this submission outlines the outcome of that assessment.
167. In 2014, over the course of a number of field trips, salvage and excavation works were conducted by Dr Slack at the Juukan Gorge. Interim reports were provided to Rio Tinto in July and August 2014. In relation to Juukan 2, Dr Slack noted in his July report that 'further excavations completed for this trip have concluded that this site is one of the most archaeologically significant sites in Australia. Further excavations at the site are recommended if the site cannot be protected'.
168. In accordance with Linda Geddes' recommendation, Rio Tinto funded the preparation of a documentary in relation to Purlykuti. Rio Tinto was clearly aware of the contents of this documentary as it notes in its submission to this Inquiry that 'some PKKP members interviewed lamented that the sites were facing destruction due to expansion of the mine'.<sup>69</sup> Rio Tinto considers that 'it does not appear that the sentiments were directed to Rio Tinto specifically'.<sup>70</sup>
169. The documentary Ngurra Minarli (In Our Country) contains interviews with Joan Ashburton, Harold Ashburton, Angie Cox, Sandra Hayes and Toby Smirke, all of whom are PKKP Traditional Owners. Numerous comments are made by the traditional owners in relation to the detrimental effect of Rio Tinto's mining.
170. Angie Cox explains that the water snake is gone due to the mining.
171. Standing in front of the Juukan rockshelters, Harold Ashburton said:  
*'they shouldn't have been up here blasting on this area because of what is here. Goes to show how much respect the mining company has got for people who own the country. This cave here, we've got dates showing back how long our old people was here. Now there's nothing'*
172. Sandra Hayes said, 'even though you know how hard we fight to try and save all the sites around the area, we never win. It's like we're going up a brick wall'.
173. Harold Ashburton further stated:  
*'Our kids are going to miss it all because of the mining. Doing the hard work and everything today is exposing the country for them to open it up, blow it up, giving them access'*  
*'Rio Tinto is planning to expand its mine and this place will be lost. We the Kurrama people are fighting for our country to protect and pass down what we can. We are sad that we weren't able to stop this mining from going ahead'*

<sup>69</sup> Rio Tinto Submission [181].

<sup>70</sup> Rio Tinto Supplementary Submission, page 80.

*‘Our old people been here a long time ago, still here today, but are not going to be any further.’*

**TERM OF REFERENCE (c): THE SEQUENCE OF EVENTS AND DECISION-MAKING PROCESS UNDERTAKEN BY RIO TINTO THAT LED TO THE DESTRUCTION**

174. It is clear that Rio Tinto had been provided with comprehensive evidence concerning both the archaeological and ethnographic significance of Juukan Gorge and in particular the Juukan 1 and Juukan 2 ancient rockshelters. The information that had been provided to Rio Tinto is summarised in **Appendix 2** and in the paragraphs below.
175. It is on the basis of both the formal and informal communications that PKKP has had with Rio Tinto over the course of our relationship, that PKKP does not accept Rio Tinto’s position that if it had had time to consider the ‘new information’ contained in Dr Builth’s further report dated 18 May 2020 it would not have proceeded with the blast.<sup>71</sup>

**Environmental Protection Act 1986 (WA) – Part IV approval process**

176. Rio Tinto currently has a proposal before the EPA to expand and join a number of its existing mines into one project known as the Brockman Syncline Proposal (the Proposal).
177. Rio Tinto referred the Proposal to the EPA under section 38 of the EP Act in July 2019. When a proponent refers a proposal, it does so in recognition that the Proposal is a ‘significant proposal’ within the meaning of the EP Act; in other words that it ‘is likely to have a significant effect on the environment’.<sup>72</sup>
178. Rio Tinto’s referral states that ‘sites of high ethnographic significance have been identified in the Greater Brockman region including creek lines (e.g. Caves Creek, Duck Creek and Purlykuti Creek).
179. Notwithstanding the Section 18 Consent already granted in relation to the Juukan sites, PKKPAC’s heritage team determined in about July 2019 that Part IV of the EP Act provided a potential mechanism for protection of Juukan 1, Juukan 2 and surrounding areas.
180. Rio Tinto were also concerned that they adequately include ‘social surroundings’ in their application for approval under Part IV of the EP Act. In connection with that process, and in light of the decision in *Beelias*<sup>73</sup> (and consequently the EPA’s Social

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<sup>71</sup> L’Estrange Report [34].

<sup>72</sup> EP Act s 37B(1).

<sup>73</sup> *Save Beelias Wetlands (Inc) & Anor v The Hon Albert Jacobs MLA & Ors (CIV 2445/2015)*.



Surroundings Environmental Factor Guidelines dated December 2016), Rio Tinto had to provide sufficient information to the EPA so as to identify areas of ethnographic significance to PKKP in the Proposal area.

181. In consultation with Rio Tinto's Brockman Syncline Project EP Act Part IV Assessment Team (Rio Tinto's EPA Assessment Team), PKKPAC identified areas of significance which warranted protection under the 'social surroundings' provisions of the EP Act.
182. Between 24 and 28 February 2020, PKKPAC's Culture and Heritage Unit participated in helicopter surveys of Rio Tinto's Brockman Syncline tenements. In the course of those surveys, Daniel Bruckner (PKKP consultant anthropologist) identified the Juukan rockshelters and Purlykuti as sites falling within that description.
183. On 13 March 2020, after receiving some sensitive ethnographic information from a PKKP elder regarding the cultural significance of Juukan 1, Juukan 2 and the gorge itself, Dr Builth put Rio Tinto's heritage specialist on notice that PKKPAC would be seeking to protect the Juukan Gorge and Purlykuti. This conversation occurred during a teleconference between Dr Builth, Rio Tinto's heritage specialist and Rio Tinto's archaeologist. Rio Tinto's heritage specialist encouraged Dr Builth to nominate the places PKKP were most interested in protecting.
184. On 20 March 2020, Daniel Bruckner (on behalf of PKKP) emailed Rio Tinto's EPA Assessment Team attaching the draft social surroundings preliminary advice which identified Purlykuti creek and the tributary gorge featuring Juukan 1 and Juukan 2 rockshelters as of high significance to PKKP.
185. The draft preliminary advice states:

*"...the group [the Traditional Owners] discussed aspects that were overall relevant to the group in this context. These values included but were not limited to; surface and subsurface water flow, presence and absence of certain plants and animals, access to these areas, historical campgrounds and meeting places and places with an overlap of these aspects with cultural values.*

*The areas/localities that have been identified as being of high importance to PKK TOs are as follows:*

- *Vivash Spring, Gorge and Engraving Site*
- *Palm Springs (while outside the assessment envelope it is of concern to all Kurrama groups with downstream impacts)*
- *Purlykuti Creek and tributary Gorge featuring Juukan 1 & 2 Rockshelters"*

186. On or about 25 March 2020, Dr Builth was provided with further ethnographic information in relation to Juukan 1 and Juukan 2 from another PKKP elder which supported the information she had received in early March and reiterated the cultural and spiritual significance of Juukan 1 and Juukan 2. The existence of this information was later communicated to Rio Tinto's EPA Assessment Team.
187. PKKPAC's Culture and Heritage Unit continued to regularly liaise with Rio Tinto's EPA Assessment Team with a view to having Juukan 1 and Juukan 2 (as part of Juukan Gorge and Purlykuti, plus an area within Vivash and Palm Springs) protected as part of the EP Act Part IV assessment process for the Brockman Syncline project.
188. On or about 20 April 2020, Daniel Bruckner issued the final social surroundings preliminary advice to Rio Tinto, again identifying Juukan Gorge, including the Juukan 1 and Juukan 2 rockshelters, as areas of high significance. The further preliminary advice identified the same three areas/localities as the draft preliminary advice. It stated:

*"No detailed boundaries have yet been established for the three locations. PKKP suggest that a detailed recording and mapping will be undertaken during the next field exercise."*

*"As per section above, three areas/locations have been identified as holding significant values under the Environmental and Social Surroundings framework that are within or affected by the development assessment envelope provided by RTIO."*

It also recommended:

*"Further consultation is required with PKKP elders to inform the baseline report identifying Social Surroundings values. PKKP AC will facilitate internal consultation."*

...

*RTIO to facilitate detailed recording and mapping of the three identified areas/locations with the aim to establish an acceptable baseline to monitor against.*

...

*RTIO to establish and implement a consultation framework for ongoing collaboration with PKKP in relation to the Brockman Syncline expansion program, including preparation of the Social, Cultural and Heritage Management Plan.*

..."

189. PKKP's Culture and Heritage Unit felt actively encouraged by this process and that Rio Tinto had a genuine appetite to protect Juukan Gorge. PKKP's heritage team felt that Rio Tinto gave a clear impression that it, Rio Tinto, was willing to consider the areas of significance.
190. On 29 April 2020 Dr Builth had a telephone conversation with Rio Tinto's heritage specialist and confirmed that PKKP had additional important ethnographic information about the Juukan tributary (associated with Purlykuti, specifically in respect of Juukan 1 and Juukan 2) that had not been included in previous reports. This conversation was then confirmed in an email from Rio Tinto to PKKPAC.

### **Communications prior to the blast on 24 May 2020**

191. On 28 October 2019, PKKP representatives visited the Purlykuti cultural sites adjacent to the Juukan Gorge with the LIC members and Dr Builth. While on site at Juukan Gorge, Dr Builth specifically reiterated to Rio Tinto's Mine Operations Manager the ethnographic and archaeological significance of the Juukan Gorge area and particularly the Juukan 2 rockshelter.
192. At this site visit, while standing at the base of the Gorge and pointing directly to the rockshelters, Dr Builth asked the Mine Operations Manager about the status of the mining activity at Juukan Gorge and what plans Rio Tinto had for the immediate area.
193. The Mining Operations Manager assured Dr Builth that:
  - a. there were no plans to extend the mine to the Juukan Gorge or the Purlykuti area west of Juukan Gorge; and
  - b. Juukan Gorge was currently being monitored for the vibration effects of local blasting to safeguard the rockshelters
194. As a result of this conversation Dr Builth felt reassured that Rio Tinto was taking steps to protect Juukan Gorge and the culturally significant sites within and surrounding it. She shared this view with others on the visit including Rio Tinto heritage staff.
195. On 4 March 2020 Dr Builth attended a meeting with the acting Superintendent of Rio Tinto's Agreements Team and others and requested a site visit to Juukan Gorge as part of the 2020 NAIDOC week celebrations in July (prior to the national celebration being moved to November due to COVID-19). The request for the site visit was documented in Rio Tinto's PKKP Implementation Plan.
196. Dr Builth received no response.
197. On 13 May 2020, unknown to PKKP, Rio Tinto loaded 226 blast holes within a larger drill pattern of 382 holes on the northern side of the Juukan rockshelters.

198. On 14 May 2020, Dr Builth met with the Superintendent for Rio Tinto Heritage. At that meeting Dr Builth:
- a. followed up on the PKKP's proposed site visit for NAIDOC week in July; and
  - b. advised the Superintendent that she had received new important additional ethnographic information from the survey team and PKKP Elders in relation to Juukan Gorge and the rockshelters which the PKKP would like to share with Rio Tinto
199. Later that day, Dr Builth received Rio Tinto's minutes of the meeting. They did not include any reference to the requested site visit to Juukan Gorge for NAIDOC week nor mention the additional ethnographic information referred to by Dr Builth.<sup>74</sup>
200. After the meeting on 14 May 2020, the Superintendent of Rio Tinto Heritage contacted Rio Tinto Heritage Compliance to enquire about the possibility of a visit to the Juukan Gorge for NAIDOC week.
201. On 15 May 2020, at 3.06pm, as a result of the second request to access Juukan Gorge for NAIDOC week, Rio Tinto rang and also emailed the PKKP and advised:
- a. some blasting had already occurred near the rockshelters which had caused some damage (this was subsequently found to be incorrect);
  - b. charges had already been laid in close proximity to Juukan Gorge;
  - c. further blasting was set to be fired on Sunday 17 May 2020 which would destroy the Juukan caves; and
  - d. a request to put a hold on the blasting had been made
202. On 15 May 2020, Rio Tinto made a decision to reschedule the blast to 20 May 2020.<sup>75</sup>
203. On 16 May 2020, despite PKKP being told the blast had been delayed, and without informing PKKP, Rio Tinto loaded a further 62 blast holes at the site.<sup>76</sup>
204. By telephone, on 17 May 2020, the Rio Tinto Heritage Compliance Specialist advised Dr Builth that Rio Tinto would consider calling off the blast on the basis of the new important ethnographic information but that this information must be provided as soon as possible for urgent consideration by Rio Tinto.<sup>77</sup>

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<sup>74</sup> See Rio Tinto's submission at [213].

<sup>75</sup> Rio Tinto Submission [216, 224].

<sup>76</sup> Rio Tinto Submission [209].

<sup>77</sup> This request for further information on 17 May 2020 has not been mentioned by Rio Tinto in any public document to date in this Parliamentary Inquiry.

205. On 17 May 2020, without informing PKKP, Rio Tinto loaded a further 72 blast holes at the site.<sup>78</sup>
206. On the morning of Monday 18 May 2020, responding to Rio Tinto's request for further details of ethnographic information and in support of PKKP's request to suspend the blast, PKKP emailed Rio Tinto reiterating the significance of the Juukan Gorge area to the PKKP and attaching Dr Builth's further report.<sup>79</sup>
207. In this report Dr Builth provided Rio Tinto with very important additional ethnographic information from the PKKP Elders and the survey team. This provided further evidence that the Juukan Gorge not only represented a deep connection with the spiritual and cultural past for the PKKP People but that Juukan Gorge was also a living and continuing part of PKKP culture. This information confirmed that for the PKKP people the Juukan Gorge, including the ancient rockshelters, represented the highest level of spiritual attachment to their land.
208. Dr Builth was concerned that Rio Tinto had not read her first report dated June 2013 which set out the archaeological and ethnographical significance of the Juukan Gorge ancient rockshelters so she copied large portions of her 2013 report for inclusion in her further report of 18 May 2020 (Further Report).
209. Despite promising to consider the Further Report, Rio Tinto did not respond to it, nor is there any evidence that Rio Tinto considered the additional ethnographic information, or the information provided in Dr Builth's original 2013 Report.
210. On 19 May 2020, without informing the PKKP, Rio Tinto loaded a further 22 blast holes at the site.<sup>80</sup>
211. On 19 May 2020, Dr Builth and Carol Meredith (PKKPAC CEO) instructed Richard Bradshaw, Special Counsel of the Adelaide law firm, Johnston Withers, about the prospective destruction of the two Juukan rockshelters and of their very high significance as Aboriginal sites, both from an archaeological and ethnographic point of view. Mr Bradshaw was informed of the shock of the Traditional Owners at finding out about the proposed blasting and was provided with a copy of a draft of Dr Slack's Archaeological Report identifying one of the rockshelters as recording 46,000 years of human occupation. He was also informed of the 2013 section 18 consent.
212. On 19 May 2020, Rio Tinto identified that it did not have Section 18 consent over three additional heritage sites which were likely to be impacted by the blast, including the Sacred Snake Pool, identified in the Builth 2013 Report and as attached to Dr Builth's email on 18 May 2020.<sup>81</sup> In fact, the minutes of Rio Tinto's teleconference meeting of 21 May 2020 identifies these three additional heritage sites (referred to as

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<sup>78</sup> Rio Tinto Submission [209].

<sup>79</sup> Not the afternoon, as stated in Rio Tinto Submission [221].

<sup>80</sup> Rio Tinto Submission [209].

<sup>81</sup> Rio Tinto Submission [228].

the 'New Potential Sites') by reference to the map contained in Dr Builth's 2013 Report.

213. At no stage did Rio Tinto disclose this to PKKP and it was not until reading Rio Tinto's submission to this Inquiry that the PKKP became aware that the three additional heritage sites, for which there was no section 18 consent were to be affected by the blasts.<sup>82</sup>
214. On 19 May 2020, at 12.50pm PKKP requested, by email, an immediate suspension of all blasting operations in the vicinity of Juukan Gorge for at least 48 hours to allow the PKKP time to consider its options.
215. At 4.09pm that day, by email, Rio Tinto denied PKKP's request for an extension of time and confirmed the deadline of 1.00pm on Wednesday 20 May 2020 on the basis that:
  - a. the north area of Juukan sites had already been drilled and loaded; and
  - b. for practical and safety reasons the shot could not be removed.<sup>83</sup>
216. At no stage did Rio Tinto inform the PKKP that a significant number of the charges, which it considered made it unsafe not to continue, had been loaded in the preceding three days - after blasting had been put on hold.
217. On 19 May 2020, at 9.37pm PKKP emailed Rio Tinto and again asked for an extension of time for 48 hours for the purpose of:
  - a. obtaining urgent independent advice from a mining expert;
  - b. fully understanding the risks and implications for all parties; and
  - c. having further discussions with Rio Tinto.
218. In the same email the PKKP also advised Rio Tinto that:
  - a. it had instructed its legal advisors to seek an emergency declaration pursuant to Section 9 of the ATSIHP Act prohibiting the damage to the site;
  - b. however, due to Rio Tinto's advice that the charges were in place and that blasting was now unavoidable due to safety reasons, it had reconsidered its position on the basis of the issues of human safety raised by Rio Tinto; and
  - c. it intended to obtain urgent independent advice from a mining safety expert and requested a further 48 hours beyond the proposed detonation time to obtain that advice.

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<sup>82</sup> Rio Tinto Submission [228].

<sup>83</sup> Rio Tinto Submission [226].

219. On the morning of 20 May 2020 Mr Bradshaw spoke by phone to Mr Jarrod Lomas in Minister Ken Wyatt's office. He advised Mr Lomas of Rio Tinto's prospective destruction of 46,000-year-old rockshelters on PKKP land in the Pilbara and of the possibility of an application for an emergency declaration under the ATSIHP Act to prevent this. Mr Lomas advised that Minister Wyatt was not the Minister with responsibility under the ATSIHP Act, but rather Minister Ley. He recommended Mr Bradshaw contact her office and the National Aboriginal Australians Agency (NIAA) to brief them and provided their telephone numbers for this purpose.
220. Mr Bradshaw then:
- a. contacted Minister Ley's office and explained the circumstances on behalf of PKKP and flagged the possibility of an application for an emergency declaration under the ATSIHP Act to prevent the destruction of ancient rockshelters in the Pilbara, and was informed that a particular individual in the Minister's office would call back;
  - b. contacted the NIAA and briefed two senior advisors of the situation, one in the Pilbara office and the other in Perth; and
  - c. later on the same day (20 May) followed up Minister Ley's office chasing up on the promised return call (which was never returned).
221. During Mr Bradshaw's first telephone call to Minister Ley's office, he provided his telephone number and was told that someone within the Minister's office called 'James' would call him. Contrary to the Department of Agriculture, Water and Environment's (DAWE) additional submission to questions on notice from the Inquiry, Mr Bradshaw was never 'advised' to put his 'query in writing'. No 'written details' were received because he was awaiting the promised phone call back from Minister Ley's office.
222. In an interview with *Radio National* on 11 September 2020, Minister Ley stated that a return of Mr Bradshaw's call would not have made any difference because the explosives had already been laid.
223. On 20 May 2020, PKKPAC engaged an independent mining safety expert, Cameron McKenzie of Blastech, to advise on an urgent basis whether the whole of the blast or part of the blast could be uncharged or unloaded to mitigate the damage to the Juukan 1 and Juukan 2 rockshelters or whether the blast could otherwise be delayed.
224. Given Rio Tinto's imposition of strict deadlines there was insufficient time to attend the site. Mr McKenzie therefore prepared his opinion on the basis of a photograph of the site and the information provided by Rio Tinto.
225. By email on 20 May 2020, Mr McKenzie advised PKKP that:

*‘Uncharging the blast, or part of the blast, I believe that this would be practically difficult, but perhaps not impossible. The shot appears to be using electronic initiation, and stemming can therefore be removed from holes without electronic initiation using a vacuum sucker. Explosive could then be removed by flushing, using a water truck, but the procedure would require a Risk Analysis which may find that the process is unsafe given the size of blast, the possibility of sucking up or not recovering a live booster and detonator. If the blast is actually a non-electric blast, then removal of the stemming by a sucker truck would not be sanctioned by either the government or the company, so uncharging of even a part of the blast would not be safe... In my opinion the blast will destroy the structure, even if the directly-overlying holes are of relatively small diameter... by law, I believe that the company cannot fire part of the blast and leave the remaining part loaded and primed. However, it would be possible to leave the entire blast fully loaded (sleeping) for a period of up to about 3 weeks, depending on the product loaded, and the advice of the supplier...’*

226. By email on 20 May 2020, at 2.19pm, Rio Tinto confirmed that ‘the blast scheduled for 1pm has been rescheduled for Friday [22 May]’ and advised:

*‘It is not possible for this shot to be delayed any further post Friday due to the inherent safety and environmental risk it poses by being left in the ground unfired.’*

227. Rio Tinto failed to disclose to PKKP the basis of its decision to defer the blast and reminded PKKP of its confidentiality obligations under the Claim Wide Participation Agreement:

*‘With this additional time period, we hope to engage further in discussions about the sites and Rio Tinto’s operational vision. We appreciate being updated on PKKP not continuing to seek an emergency declaration under the [ATSIHP Act]. I would also like to note that such an application is contemplated under our Participation Agreement provided the process is followed and [Rio Tinto] consent is provided. Additionally, please note that the Participation Agreement provides restrictions on making public comment in relation to matters under the Agreement’.*

(The reference to the provision of consent is to clause 28.13 (c) and (d) of the Claim Wide Participation Agreement (CWPA) which prohibits the PKKP making such an application without the consent of Rio Tinto.)

228. PKKP’s lawyers received an email from Rio Tinto’s external legal advisors, Ashurst, later that day which stated:

*‘...the Participation Agreement contains various provisions relevant to these heritage matters, and on which we expect you will need to seek instructions*



*from PKKP Aboriginal Corporation before, and to inform next steps on your end, including before any further engagement with regulators.'*

229. Ashurst provided a 'non-exhaustive list of relevant provisions. The provisions referred to were the following clauses of the CWWA:
- a. 11 (main consent regime);
  - b. 11.10 (no objections or challenges to RTIO's Pilbara iron ore business);
  - c. 28.13 (restrictions on the making of Protected Area Applications including under section 9 of the ATSIHP Act without the consent of Rio Tinto). In their email, Ashurst set out the terms of clause 28.13 in full;
  - d. 28.14 (revocation of a Protected Area Declaration);
  - e. 32 (suspension and forfeiture of payments); and
  - f. 42.3 (confidentiality, including no disclosure of information and no public announcements).
230. On 20 May 2020, at 4:34 pm, Mr McKenzie of Blasttechnology sought information from Rio Tinto before providing his concluded views.
231. In his email to Rio Tinto, Mr McKenzie included his interim advice to PKKP (set out above) and asked whether Rio Tinto agreed with his interim advice and for further information on the following matters:
- *'Uncharging the blast – probably impractical to try and uncharge hundreds of blastholes, and probably would be deemed an unsafe practice. Do you concur with that expectation?'*
  - *'The depth of the blast and the proximity of the charges to the roof of the cave. The holes above the cave seem to be drilled in contour material with a small diameter rig. Can you confirm the diameter of those holes, please?'*
  - *'The presence of reactive ground in any section of this blast?'*
  - *'How long the shot could be safely slept before firing. You will note that I have said that the shot must now be fired since it is loaded, and cannot be left indefinitely without firing'*
232. Between 4:34pm on 20 May and close of business on 21 May 2020, PKKP sent two follow-up emails to Rio Tinto and attempted to contact Rio Tinto by phone, to request a response to Mr McKenzie's questions as a matter of urgency.

233. On the morning of 21 May 2020, Rio Tinto engaged an independent blast consultant, Blast It Global, to advise on how it might minimise or avoid the impact of the blast on the three additional heritage sites, that it did not have section 18 Consent to disturb.
234. Rio Tinto engaged Blast It Global on the morning of 21 May 2020 only for the purpose of advising on mitigating the damage to the three heritage sites - not in relation to mitigating damage to Juukan 1 and Juukan 2<sup>84</sup>.
235. Later in the evening of 21 May Rio Tinto asked Blast it Global the questions Cameron McKenzie had asked. Blast It Global prepared its second report to address these questions<sup>85</sup>.
236. Having received no response from Rio Tinto, PKKP then sent a follow-up email to Ainslie Bourne of Rio Tinto to ask that PKKP receive definitive advice as to whether or not it was safe to remove the charges as a matter of urgency.
237. On the afternoon of 21 May 2020, Rio Tinto was advised by its independent consultant on potential mitigation options 'to rectify the concerns raised [by Rio Tinto] around potentially exceeding licence conditions at the site'<sup>86</sup> – ie the three heritage sites only.
238. Rio Tinto has now provided this Inquiry with the minutes of a business resilience meeting held via teleconference at 10:30am on 21 May 2020 (prior to receiving any advice from its independent blast expert) which record that:
- a. there was 'no preventative action possible' to save the Juukan rockshelters;
  - b. its primary and only real concern was to prevent damage to the 'New Potential Sites' i.e. the three additional heritage sites for which there was no Section 18 Consent;
  - c. there was concern over whether the 'New Potential Sites' without section 18 Consent could affect the validity of the existing section 18 Consent which covered Juukan 1 and Juukan 2;
  - d. a request for a review of Rio Tinto's internal systems/communications had been made to ensure the 'earlier identification of additional concerns', i.e. to ensure future heritage sites were not overlooked in Section 18 Applications;
  - e. preparations were underway and an external law firm, Ashurst, had been instructed to defend any injunction brought by PKKP to protect Juukan 1 and Juukan 2; and

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<sup>84</sup> Rio Tinto Submission [235] and subsequently confirmed by a letter from Rio Tinto to PKKP dated 3 September 2020, 2.

<sup>85</sup> Rio Tinto Submission [239].

<sup>86</sup> Extract from Rio Tinto blast consultant report.

- f. Rio Tinto's legal team had spoken to PKKP legal representatives in respect of PKKP's intention to issue a press release and noted the non-disparagement clauses in the CWP, and confirmed that a reactive media statement would be prepared if required.

239. Rio Tinto has told this Inquiry that in the afternoon on 21 May 2020, Rio Tinto's Senior Leadership Team members and relevant operational and technical leaders met via teleconference to consider Rio Tinto's options.<sup>87</sup> Rio Tinto has submitted to this Inquiry that at that meeting they concluded:
- a. there was no preventative action possible for Juukan 1 and Juukan 2; and
  - b. the blast would be delayed to 23 May 2020 '*to allow further due diligence on risk mitigation to be carried out*' in respect of the three additional heritage sites that had not been approved by the Minister for destruction.<sup>88</sup>
240. Rio Tinto has now provided this Inquiry with the minutes of a business resilience meeting held via teleconference at 3:30pm on 22 May 2020 which record that:
- a. an update on PKKP engagement was given;
  - b. potential options to minimise the risk to the 'New Potential Sites' were presented;
  - c. there were 'learnings' for how Rio Tinto co-ordinates internally in relation to knowledge of specific sites, i.e. the three additional heritage sites without section 18 Consent.
241. Given the above, PKKP does not accept Rio Tinto's assertions that it was 'canvassing all options' to protect Juukan 1 and Juukan 2 over this period.
242. On 22 May 2020, at 10:54am, Rio Tinto responded to Mr McKenzie's questions by email in the following terms:

*'Apologies again for the delay for providing this information. We have carefully considered the matter, given the concerns raised. Please see the answers below to your questions:*

*Uncharging the blast – probably impractical to try and uncharge hundreds of blastholes, and probably would be deemed an unsafe practice. Do you concur with that expectation?*

*Yes. We considered whether it would be feasible to uncharge the blastholes. There are inherent safety risks in doing so, to people, and potentially the environment if this was attempted due to the fragmented ground. So it is not feasible to uncharge the blastholes. As you know, the*

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<sup>87</sup> Rio Tinto Submission [233].

<sup>88</sup> Rio Tinto have not provided the Inquiry with any Minutes of this meeting

*process of uncharging requires removing the stemming and the detonator and primer. Typically best practice when using a vacuum truck to remove the stemming (gravel at the top of the hole on top of the explosives to control flyrock) would be to successively remediate 95% of the blast holes – ie remove the stemming, detonator and primer. However, given the ground conditions at Brockman 4, we understand other sites have achieved variable remediation rates of 50-90% in similar conditions. Therefore there is a high likelihood that there would be a **significant** number of blast holes for which the stemming could not be removed, meaning that the detonator and primer would remain trapped in the hole, **posing an ongoing and unacceptable safety risk**. As such, we concur that un-charging all the holes is not practicable and **poses an inherent safety risk**. [emphasis added]*

*The depth of the blast and the proximity of the charges to the roof of the cave. The holes above the cave seem to be drilled in contour material with a small diameter rig. Can you confirm the diameter of those holes, please?*

*We confirm that the hole diameter is a nominal 165mm. We do not have accurate pick up of the cave roof but from observation it seems the holes will not be far off the cave in [the] questions location, estimated to be approximately 11m. The surface is sloping down to the edge of the blast and fragmented as detected by the drilling activity prior to loading.*

*The presence of reactive ground in any section of this blast?*

*None of the ground in any section of the blast is considered to be reactive.*

*How long the shot could be safely slept before firing. You will note that I have said that the shot must now be fired since it is loaded, and cannot be left indefinitely without firing.*

*The Technical Data Sheet for the product used (Energan Nova 11) states 14-day sleep time. The shot cannot be slept indefinitely. The explosive product loses sensitivity the longer it remains in the ground and has the potential to misfire and it can also slump or drop into cavities associated with the holes.'*

243. Thus, between 20 May 2020 and 22 May 2020, Rio Tinto obtained two reports from Blast it Global – one relating to the 'additional heritage sites' which did not refer to the Juukan rockshelters, and another specifically answering Mr McKenzie's questions.
244. Rio Tinto did not disclose the existence of either of these reports to PKKP.
245. Rio Tinto, in the email of 22 May 2020 to PKKP, repeated the advice from Blast it Global without acknowledging its source. However, Rio Tinto inserted some additional comments (marked in bold in the text of the 22 May Rio Tinto email above) to their experts' advice. These additions were clearly intended by Rio Tinto to

exaggerate their advisors' assessment of the safety risks of removing some or all of the charges.

246. On 23 May PKKP representatives had been told by a senior Rio Tinto employee, who they were meeting in relation to the impending blast, that work was being undertaken at Juukan Gorge to reduce the effect of the blast on the cultural heritage. They were told by the Rio Tinto official that Rio Tinto was taking out the explosives from the holes over the top of the Juukan rockshelters.
247. The PKKP representatives were not told that the charges being removed related to the 8 holes considered most likely to damage the three additional heritage sites for which Rio Tinto did not have s 18 consent. They were led to believe that the removal of these charges was to minimise the damage to the Juukan rockshelters.
248. It is very difficult to resist the conclusion that Rio Tinto manipulated the information about the practicability, safety and true purpose of removing charges in its communications with PKKP before 24 May.
249. At the same time, PKKP believed it was entitled to, and was receiving, full and frank disclosure about what was characterised by Rio Tinto as a very serious safety issue. PKKP engaged with Rio Tinto in good faith on that basis.
250. Having received Rio Tinto's response on 22 May 2020, Mr McKenzie advised PKKP at 12:09 pm, on 22 May 2020 in the following terms:

**Can the blast holes be uncharged?** *It is possible to uncharge blastholes, but the procedure can be lengthy, even for just a single hole, and there is not always a 100% success rate in removing all the explosive, and most importantly, in removing the small (~450 grams) high-explosive component at the bottom of each hole. For this reason, it would be very rare to try to un-charge a large number of blastholes such as can be seen in this blast. Almost certainly some holes would be left with high-explosive components, and that would mean a permanent hazard.*

**The expected impact on the shelter** *Rio Tinto has confirmed that the bottom of the blastholes which are directly above the shelter are very close to the roof of the shelter. The holes are approximately 11 metres long and 165 mm (6 ½ inch) diameter. The shelter will be destroyed, and mostly buried by the blast.*

**Is there an option to not blast?** *By regulations, and by every consideration of human safety, now that the holes have been charged with explosives, they must be fired. Explosives have a shelf life, and regulations require that the charges be fired before that shelf life expires. Rio Tinto advise that the charges used in this blast cannot remain in the ground more than 14 days. However, the longer the charges are left un-detonated, the greater is the risk that some of the holes will not fire, and will be left with live explosive, and a*

*live high-explosive component at the base. Such a situation places the safety of the public and mine workers at significant risk.*

251. Subsequent to Rio Tinto's submission to this Inquiry, PKKP sought further clarification of the instructions provided by Rio Tinto to their blast expert -particularly in relation to any advice directed to protecting the Juukan rockshelters.

252. PKKP asked Rio Tinto the following questions:

- a. *Could you please provide us with full details of the questions asked of Blast It Global and all information provided to them (whether in writing or oral) on which their opinions were to be based. Could you please include details of which holes were to be the subject of the Blast It Global opinions?*
- b. *Did Rio Tinto ever instruct its expert to advise specifically on whether the blast holes closest to J1 and J2 could be unloaded or altered to avoid (or at the very least minimise to the maximum extent possible the impact on Juukan 1 and 2) and in particular were those instructions given to Blast It Global prior to Blast It Global providing its answers in its second report (with the reference to three questions)?*

253. Rio Tinto's response was as follows:

*...Blast It Global was engaged to provide advice on the mitigation options in relation to whether the entire blast site could be unloaded to protect the Juukan rockshelters and whether any additional steps could be taken to further minimise risk of indirect damage to the new heritage points identified by the PKKP by email on 18 May 2020.*

*The questions which were provided to Blast It Global in respect of the second report are replicated on pages 2 and 3 of that document, as provided to you on 21 August 2020.*

*In response to question 3(b) given the direct proximity of the entire blast site to the Juukan rockshelters, Rio Tinto sought advice on the potential to unload the entire shot.*

and

*'Rio Tinto immediately took steps in response to the information shared by PKKP on 18 May and the technical circumstances of the loaded shot, and sought to unload the blast holes that could be safely unloaded on the edge of the loaded shot. Given the circumstances we were regrettably unable to safely unload the shot entirely'*

254. It is clear there were no immediate steps taken to protect the Juukan 1 and Juukan 2 rockshelters— given Rio Tinto agreed to put the blast on hold on 15 May but kept

loading more blast holes and failed to instruct its expert about the significance of the Juukan 1 and Juukan 2 rockshelters on the morning of 21 May.

255. PKKP can only conclude from Rio Tinto's answer, referred to in paragraph 253 above, that when Rio Tinto did finally instruct its expert to answer PKKP's expert's questions, Rio Tinto's independent blast consultant was not given specific information in relation to Juukan 1 and Juukan 2 and its significance and was not asked specifically to advise on a possible mitigation strategy to avoid or minimise the impact on the Juukan 1 and Juukan 2 rockshelters – unlike the advice that was sought (and given) to mitigate the damage to the three heritage sites for which Rio Tinto had realised it did not have section 18 Consent. It is extremely disappointing and distressing to PKKP that, even at this late stage, Rio Tinto did not appear to be open and honest about the sequence of events leading up to the blast on 24 May 2020.
256. For a number of reasons, but primarily because of the risks to human safety raised by Rio Tinto, PKKP instructed Johnston Withers not to pursue the application for an emergency declaration under the ATSIHP Act or any form of injunction to stop the blasting.
257. On 23 May 2020, and without informing PKKP, Rio Tinto unloaded seven of the blast holes within close proximity to the additional heritage places.<sup>89</sup>
258. Rio Tinto did not need to remove all of the other charges to protect Juukan 1 and Juukan 2. However, notwithstanding its successful removal of these seven charges, Rio Tinto did not attempt to remove any of the charges most likely to damage the Juukan 1 and Juukan 2 rockshelters.
259. It has been deeply disturbing for PKKP to learn that despite the intense, and apparently frank, communication engaged in during this period and, despite Rio Tinto's subsequent expression of remorse for the destruction of the rockshelters, Rio Tinto did not disclose important information to PKKP after Rio Tinto became aware that PKKP had grave concerns about the destruction of Juukan 1 and 2 and wished to visit the site in July. That information included that:
- a. Rio Tinto had continued to load a further 156 blast holes comprising 40% of the blast pattern (including holes immediately behind the Juukan 1 and Juukan 2 rockshelters) progressively on 16 May, 17 May and 19 May, in circumstances where it knew that once blast holes were loaded it is extremely difficult and sometimes may be impossible to 'unload', and had received requests by PKKP and had agreed to delay the blast;

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<sup>89</sup> Rio Tinto Submission [244].

- b. Rio Tinto became very concerned there were three heritage sites which had not been subject of section 18 approvals which would likely be damaged in the blast; and
  - c. Rio Tinto had engaged its own expert for the purpose of advising on mitigating the impact of the blast on the three additional heritage sites for which approval had not been granted
260. On the morning of 24 May 2020 Rio Tinto fired the shots destroying the Juukan 1 and 2 rockshelters which were approximately 46,000 years old, having harboured thousands of artefacts, including grinding stones, rock seats, a blade quarry, flaked stone materials, and the remains of a belt made of human hair that has been genetically identified to match PKK descendants and causing immeasurable cultural and spiritual loss and profound grief to the PKKP people.
261. Mindful of its obligations under the CWPA, referred to above, PKKP made no public comment or criticism of Rio Tinto in relation to the blasting of Juukan 1 and Juukan 2 until issuing a press release on 25 May 2020. The press release is **Appendix 5**.
262. PKKP gave Rio Tinto an opportunity to comment on the press release before it was issued. Rio Tinto availed itself of that opportunity and suggested changes to the press release, some of which were adopted by PKKP.
263. One of the changes proposed by Rio Tinto was that PKKP remove all references to Rio Tinto and its Brockman operations, 'so as not to disclose information about RTIO's Pilbara Iron Ore Business'.

**TERM OF REFERENCE (d): THE LOSS OR DAMAGE TO THE TRADITIONAL OWNERS, PUUTU KUNTI KURRAMA AND PINIKURA PEOPLE, FROM THE DESTRUCTION OF THE SITE**

**Physical damage**

264. The impacts to the overall area from mining activities are major. There is no remnant landscape in those parts directly affected by mining, with a relatively flat, albeit even landscape of blasted rock and levelled mining benches.
265. Impacts to the Juukan Gorge itself are mixed, with the eastern part of the Gorge destroyed entirely by mining development and the western end wholly intact, albeit with the remains of blasted trees and branches blown down the Gorge.
266. The condition of the middle section of the Gorge around the Juukan rockshelters is mixed – the valley floor remains relatively intact but the sides have been destroyed by blasting on both the northern and southern flanks.



267. The condition of the two rockshelters post blast has been assessed by reference to photographs, drone footage and 7 August and 17 September 2020 site visits by PKKP Traditional Owners and advisors. A close-up physical inspection was not permitted by Rio Tinto due to safety concerns around potentially unstable scree materials resulting from the blast. The area of the shelters was viewed from a distance of approximately 25m at the closest point. This has limited the ability to properly assess impacts.
268. No photo of the current state of the rockshelters is attached as it causes great and continuing distress to the Traditional Owners.
269. Against this background the physical damage can be summarised as follows.

#### *Juukan 1*

270. The area immediately above the rockshelter has been covered in a thick layer of blasted rock with scree material falling over the front edge of the cave in a number of locations covering ground at the cave entrance.
271. The rock outcrop forming the cave wall and roof appear to be intact, giving some basis for optimism that the inner chamber and sediment floor of the cave may not have been destroyed. It is also possible to see part of the cave entrance in a couple of locations.
272. It will not be possible to ascertain the stability of the structure until the blasted overburden material has been removed from the roof and front of the cave to allow for a closer inspection.
273. Whilst it is understood that drill holes did not extend vertically below the level of the cave floor, it is feared that blasting may have fractured internal parts of the cave structure that are currently not visible, resulting in collapse or major instability.

#### *Juukan 2*

274. This rockshelter was closest to the blast with the nearest charge hole being 11 metres behind the cave, according to Rio Tinto. The Juukan 2 rockshelter has been dated to 46,000 years in age, and was a place precious to both the PKKP's ancestors, who still visited and resided within this cloistered space, and their descendants. Juukan 2 contained a treasure trove of artefacts of national and global significance. From observations on site, it appears that the Juukan 2 rockshelter has been completely destroyed by the blast.
275. The areas where the cave entrance once stood have been completely buried by blasted rock material. The cave entrance, if it remains, is entirely obscured by blasted material. There is no evidence of remnant structure and those areas that might have the potential to comprise in-situ material appear to be heavily fractured.

276. Again, it is understood that the drill holes did not extend vertically below the level of the cave floor, meaning that part of the internal structure and sediment floor may remain intact. It will not be possible to ascertain this until remedial works are commenced to carefully remove overburden materials.

### **Cultural damage**

277. It is very difficult to distil in words the loss and damage caused to PKKP as a result of the destruction of the Juukan 1 and Juukan 2 rockshelters.
278. The archaeological richness of the rockshelters is undeniable. The Gorge and the wider Purlykuti area clearly supported human populations over millennia. We are yet to have a full appreciation of all of the activities that have taken place here. Much more analysis of the various archaeological discoveries is required.
279. Despite two periods of excavations of the Juukan rockshelters, Dr Michael Slack has advised representatives of PKKP that only 50% of the surface area of the Juukan 2 cave that had excavation potential was excavated. Dr Slack said this was due to the time and funding constraints that were put in place by Rio Tinto.
280. To destroy that cave when it had not been fully investigated is incomprehensible to PKKP.
281. Understanding the nature of the connection PKKP Traditional Owners have with their country is a critical starting point in assessing the impact of the destruction of the rockshelters.
282. PKKP have maintained continuing physical and spiritual connection with their land and have retained "an active spiritual potency."<sup>90</sup> This connection was acknowledged by the Federal Court by the recognition of their native title in 2015. However, PKKP People have always known they are the custodians of PKKP country, and as such, are obliged to look after and protect it in accordance with their laws and customs.
283. The effect of the destruction of important spiritual places on an Aboriginal person was described by the High Court of Australia in *Northern Territory v Griffiths* (2019) HCA 7 at [206] in the following terms:

*‘...the people, the ancestral spirits, the land and everything on it are ‘organic parts of one indissoluble whole’; the effects [of the destruction of sites] on the sense of connection are not to be understood as referable to individual blocks of land but understood by the ‘pervasiveness of Dreaming’; the effects are upon an Aboriginal person's feelings, in the sense of his or her engagement with the Dreamings; an act can have an adverse effect by physically damaging a sacred site, but it can also affect a person's perception*

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<sup>90</sup> *Chubby on behalf of the Puutu Kunti Kurrama People and Pinikura People #1 and #2* [2015] FCA 940 at [16(j)].

*of an engagement with the Dreamings because the Dreamings are not site specific but run through a larger area of the land; and as a person's connection with country carries with it an obligation to care for it, there is a resulting sense of failed responsibility when it is damaged or affected in a way which cuts through the Dreamings.'*

284. This describes how the PKKP people feel here. The damage done by the destruction of the Juukan rockshelters cannot be measured by reference to those rockshelters alone but by reference to the entire Purlykuti complex of which the Juukan rockshelters are part. Juukan Gorge and the adjacent area referred to as Purlykuti are part of the same cultural landscape and mythology for the PKK. The site complex includes other rockshelters, a rockhole and artefact scatters. This cultural precinct gave the Puutu Kuntji their name, and these caves are a significant part of particular ethnographic, ceremonial and law business.

### **Obligations to other Traditional Owners**

285. Accordingly, the destruction of the rockshelters causes a loss of the connection of places and stories to each other as part of the whole spiritual and cultural life of the Purlykuti complex. In addition, it disrupts the connection that exists with places outside PKK country and the obligations of the PKKP to those outside of, but connected to, PKK country.
286. Other Traditional Owner groups are blaming PKK for the loss of the caves. They say PKKP should have stopped it.
287. PKK people have been approached by other Pilbara Traditional Owners who are very angry about this. There are other groups, including our Kurrama neighbours, who have a direct connection with this place through their own knowledge of songlines and the creation stories and through family. They have told PKKP that they also feel powerless and angry at this having happened.
288. PKKP People are born with obligations to look after country in accordance with traditional laws and customs. PKK were required by their traditional laws and customs to look after this place. It was their obligation to the old people, who had also looked after it. It was a gift from the old spirits to them forever.
289. PKKP people feel immense grief, guilt and a sense of failure for not being able to exercise their responsibility to look after country.

### **The loss of culture and language**

290. PKKP People say visiting country and spiritual places makes them happy. It means they can pass on the stories and language to the next generation ensuring continued

Indigenous culture, connection and identity. With the destruction of the rockshelters comes a loss of teaching and learning which should be passed on to the next generation. PKKP people say it means a loss of hope for them and for their children.

- 291. Normally, grass seeds, bones and emu egg shells are not preserved in rockshelters but they were exceptionally well preserved in the Juukan Gorge. This is evidence that the Gorge was a very special place.
- 292. The artefacts found in the Juukan rockshelters provide a glimpse into the overall use of this area. These ancient sites were not mere domestic activity places. They have a deeper spiritual meaning.

### **Spiritual loss**

- 293. The Juukan Gorge is known to be a place where the spirits of PKK relatives who have passed over, even recently, have come to rest. It is the place of the 'very, very old people'.
- 294. Purlykuti has been specifically referred by the old people as the place of 'Pardu' which refers to the special language spoken during ceremonies in the Pilbara.<sup>91</sup>
- 295. Not all the details of the meaning of this place can be shared here.
- 296. The spirits are very disturbed and their living relatives are extremely upset by this. PKKP People who work for Rio Tinto have asserted being visited by the old spirits at night, and do not know what to do. PKKP People are feeling fear, anxiety and a sense of hopelessness thinking about the spirits of their ancestors who no longer have their resting place.
- 297. When PKK elders visit places where mining infrastructure has replaced traditional country and sites, they can get sick and take this home to their little ones, the children, who through no fault of their own can also get sick.

### **Immense pain, grief and agony and a loss of hope**

- 298. PKKP people are experiencing great spiritual, emotional and physical pain.
- 299. The distress and feelings of loss arise because of the spiritual connection to this country and its stories that had continued so long and remained strong.
- 300. Within the PKKP family is an old lady. She is in her late 90s and quite frail. She is the last remaining daughter of Juukan, and she named the Gorge and the rockshelters on behalf of her father, who is a very respected ancestor of many. No one has told

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<sup>91</sup> Williams, September, 2008 p9-10, report to Rio Tinto

her that the rockshelters and Gorge have been lost as they all fear it will result in her passing. Everyone hopes she will never find out.

- 301. PKKP are in shock. The PKKP people feel betrayed. Nothing could prepare them for this.
- 302. On 17 September 2020 PKK Traditional Owners were recorded by film talking about the Juukan destruction and what its loss means to them personally. PKKP wishes to show the film to the Joint House Standing Committee when oral evidence is taken.

### **Other losses**

- 303. The loss of the Juukan Gorge rockshelters is not only a loss to the PKKP people. It is also a loss to all First Nations' people and communities within Australia and internationally, who have had to continually bear witness and 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 accorded to Aboriginal people and Aboriginal culture.
- 304. It is also a loss to the Australian and global community as a whole, of our collective human history, and further fractures reconciliation attempts between Aboriginal and non-Aboriginal Australia.

### **TERM OF REFERENCE (e): THE HERITAGE AND PRESERVATION WORK THAT HAS BEEN CONDUCTED AT THE SITE**

#### **Suggested next steps to assess and minimise the damage**

- 305. PKKP and Rio Tinto have agreed on a moratorium period on mining and exploration activities in an area that includes the Juukan Gorge, the rockshelters and Purlykuti Creek until at least 20 January 2021. The moratorium area is depicted on the map below (**Figure 6**, on page 87 of this submission).
- 306. PKKP considers that the following needs to occur to properly assess and, to the greatest extent possible, remediate the damage to Juukan 1 and Juukan 2:
  - a. the current western pit boundary to become a permanent line defining the limit of mining operations in this area;
  - b. no further mining activity to the immediate west of the moratorium eastern boundary to protect the Juukan Gorge, Purlykuti Creek and its catchment;
  - c. Rio Tinto should adopt a change in purpose for the part of the pit within the moratorium area, from productive mining to post mining rehabilitation. This

principle should guide all of Rio Tinto's decision making and implementation plans for this area currently and into the future; and

### **Priority actions**

307. The Juukan Gorge rockshelters have been isolated and a stabilisation plan has been agreed to protect the site until a full assessment is completed and a rehabilitation plan can be actioned. The following actions have been proposed:
- a. Complete water run off assessment, impact and management plan;
  - b. Establishment of a redirection windrow/trench across the northern end of the blasted material to the north of Juukan 1 and Juukan 2 to prevent/minimise water ingress into the blasted material and further damage to the heritage sites;
  - c. Removal of loose material above the two rock shelters to make it safe to access from below. This is to be limited to the rounding of the crest only and must avoid any impact on the remnant structure of the rockshelters;
  - d. Removing minimal loose material on the southern side of the Gorge in front of the shelters to allow for safe access to the Gorge and prevent inadvertent run-off from the large southern blasted area;
  - e. Establishment of a temporary mechanism to minimise any silt run-off into the downstream portion of Juukan Gorge.

This is subject to the following conditions:

- a. The water run-off assessment and management plan is to be reviewed and verified by an independent third party and PKKP is to have direct and independent access to that party;
- b. Any work on site is only to be undertaken in the presence of two PKKP traditional owner monitors, who will have the absolute right to stop work at any time should they believe it is necessary. In addition, PKKPAC advisors are to be present.

### **Long term plan**

308. The longer-term plan requires:
- a. a reprofiling and revegetation of the damaged pit area within the moratorium area, using all of Rio Tinto's innovative capacity;
  - b. remediation and protection of Juukan 1 and Juukan 2 to the greatest extent possible and, importantly, to allow for Traditional Owner viewing and

access, something that has been denied them at present. This is likely to require stabilisation and reinstatement of the rockshelter walls and roof using ground support mechanisms, a complete (and independently verified) water run off assessment, impact and management plan, protection of the cave floors from rainfall and drainage to protect any remaining artefacts in the cave floors, using all of Rio Tinto's innovative capacity;

- c. extensive discussion between the Traditional Owners and Rio Tinto concerning the prospect of remediating Juukan 1 and Juukan 2 in such a way that they ultimately remain as an active memorial to their heritage and for the public at large;
- d. re-instatement of the original landscape view from the rockshelters as close as possible to the pre-mining outlook;
- e. the new western wall of the pit adjacent to the moratorium area to be designed and engineered for permanent stability so as not to impact the Juukan Gorge, Purlykuti Creek and surrounds in years to come;
- f. independent Traditional Owner access for cultural practice and ceremonies;
- g. PKKP to map and assess the Purlykuti Creek and surrounds as a heritage landscape with a view to registration and protection, as Juukan Gorge and Purlykuti are not viewed as separate sites but rather an interconnected living landscape. This includes the Purlykuti catchment which encompasses a large part of the moratorium area on the eastern side, hence the need to map this heritage landscape for its permanent protection, as part of the rehabilitation works;
- h. Rio Tinto to promptly commence rehabilitation of the drill sites west of the pit on, and around, Purlykuti Creek and, if PKKP wish, repatriate artefacts previously salvaged from the area with Traditional Owner involvement; and
- i. Delineation of an area covering Juukan Gorge and Purlykuti under PKKP control and management.

309. The remediation options for the Juukan 1 and Juukan 2 rockshelters will need to be revised as work progresses. At this stage it is not known how much of the structure and cultural materials remain intact, in particular for Juukan 2. The ability for PKKP to stop work and reassess options as the project progresses will be critical.

### **Conclusions: Rio Tinto, the resource industry and Aboriginal cultural heritage**

310. Protection and management of Aboriginal cultural heritage is not fulfilled by salvaging sacred objects from sites and keeping those objects in shipping containers or Rio Tinto corporate property.

311. Rio Tinto has repeatedly referred to its relationship with Traditional Owners as a 'partnership' and says in its submission that partnership is 'core' to its approach to cultural heritage management and there should be 'shared success through partnership'.<sup>92</sup> The sequence of events that led to the destruction of the Juukan Caves demonstrates that there was and is currently no true partnership with the PKKP people.
312. Until immediately before the Juukan Gorge disaster, PKKP had an active working relationship with Rio Tinto. However, the relationship was not equal. The information provided by Rio Tinto to PKKP was limited. Rio Tinto rebuffed repeated attempts at increasing communication between Rio Tinto and Traditional Owners and took a narrow procedural approach to the relationship.
313. In a true partnership, Rio Tinto would not have deliberately withheld the three options for the extension of the mine which avoided Juukan 1 and Juukan 2. Rio Tinto would not have deliberately chosen the one option which would destroy country and heritage that its partner valued highly.
314. The Juukan Gorge disaster has shown that Rio Tinto's compliance mindset has been driven by compliance to the minimum standards of the law and by profit maximisation. PKKP believes that this is reflective of the industry as a whole.
315. Rio Tinto has made numerous claims of compliance with Free, Prior and Informed Consent (FPIC) principles, yet their behaviour is clearly at odds with this. This is yet another example of the resources industry saying one thing and doing another.
316. The crux of the matter lies in how relationships between companies and Aboriginal communities and organisations are conducted. This will require transformational cultural, attitudinal and behavioural change.
317. We believe that history has amply demonstrated that the resources industry cannot be relied on to attach true value to Aboriginal heritage. As such, the primary response should be to significantly change the legislation to strengthen the currently inadequate protections.
318. We believe that the State Government of Western Australia could have done much more to avoid the destruction of the shelters. Even within the limitations of the existing legislation, more rigorous and equitable implementation of the processes mandated by law could have ensured the protection of these critical heritage sites.
319. Aboriginal communities are currently living with legacy agreements which have further disadvantaged them, and which do not reflect the provisions of the United Nations Convention on the Rights of Aboriginal Peoples. As such we believe that legislation should be enacted to restore the right to transparency and administrative justice, and that existing agreements must be reviewed with a view to preventing the

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<sup>92</sup> Rio Tinto Submission [24] [30] [283].



watering down or contracting out of Aboriginal heritage rights, to uphold statutory rights and achieve a more equitable relationship between mining proponents and Aboriginal communities.

320. We believe that attitudes that promote minimum compliance and which undervalue heritage protection and proper consultation have been consistently demonstrated by Rio Tinto. The problems within Rio Tinto that led to this are deep seated and systemic and revolve around culture and behaviour. The same culture is exhibited by the overwhelming majority of resource industry proponents in Western Australia. An incident of this nature can still happen elsewhere. All of this demonstrates that the industry cannot be left to regulate itself.
321. In addition to the failure to avoid mining the rockshelters entirely, we believe that Rio Tinto could have done more to avoid the destruction of the shelters once our concerns were heard and drill holes had been and continued to be loaded with explosives – as demonstrated by their ability to avoid damage to other sites during the same blast.

## **SECTION TWO: THE CURRENT LEGISLATIVE FRAMEWORK**

This section will assess the inadequacies of both State and Federal legislation in response to Terms of Reference (a), (f), (g), (h) and (i). It will also consider the need for reform, and what model these reforms may take.

### **TERM OF REFERENCE (a): THE OPERATION OF THE *ABORIGINAL HERITAGE ACT 1972 (WA)* AND APPROVALS PROVIDED UNDER THE ACT**

322. The primary purpose of the *Aboriginal Heritage Act WA 1972* (AH Act) is to protect Aboriginal cultural heritage from destruction and to preserve sites of high significance to Aboriginal people and communities.<sup>93</sup> However, over the 48 years the Act has been in force there has been a growing number of complaints, protests and disasters associated with the Act, with the destruction of the Juukan rockshelters only the latest, but arguably the most damning, example of the lack of effective protection for Aboriginal heritage afforded by the Act.
323. Once praised for its progressive and wide-ranging coverage to ensure protection of Aboriginal cultural heritage, it is now abundantly clear that the AH Act is in serious need of reform. It is not a system in which Aboriginal people may have any confidence.

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<sup>93</sup> As noted by the DPLH in their submission at page 1.

324. In the implementation of Section 18 of the AH Act, there is no requirement (or practice) for the evaluation and identification of Aboriginal sites or other places of cultural significance, and of State, national or international significance in advance of development proposals. Decision-making is reactive and evaluations are unbalanced. There is no land use planning, nor is there adequate consultation with Aboriginal groups and communities.
325. Furthermore, Minister for Aboriginal Affairs, Ben Wyatt, has previously stated that the 'Section 18 process does not discriminate on the basis of significance.'<sup>94</sup> Neither does the ACMC or the Minister, in real terms. There is almost a statistical certainty that authorisation will be given to impact any site in WA.
326. When a conflict between a proposed land use and the continued protection of an Aboriginal site or object arises, there is a more than 99 percent probability that the authorisation required under s 18 of the AH Act to damage and disturb the Aboriginal site will be given.<sup>95</sup>
327. Between 2008 and 2011, the Minister considered 302 notices seeking authorisation to interfere with, or damage, Aboriginal sites given under Section 18 of the AH Act. In all but one case, the authorisation was given.
328. Since 1 July 2010, there have been 463 Section 18 notices considered by the ACMC involving land subject to mining leases. The Minister has not refused any of these notices in that period. Minister Wyatt's representative in the Legislative Council said that this statistic confirmed that:
- '...the obligations under the Aboriginal Heritage Act 1972 are not an impediment to the effective operations of the mining industry, particularly where mining companies enter into positive consultations with Traditional Owners'*<sup>96</sup>
329. A longstanding deficiency of the current Act is that the power to permit damage to an Aboriginal site is exercised by the Minister and that appeal mechanisms are only available to landowners and developers- and not to Traditional Owners. It is repugnant to Traditional Owners that the 'owner of any land' for the purpose of Section 18 does not include the Traditional Owners, and instead:
- 'includes a lessee from the Crown, and the holder of any mining tenement or mining privilege, or any right or privilege under the Petroleum and Geothermal Energy Resources Act 1967 (WA), in relation to the land'*<sup>97</sup>

<sup>94</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 18 June 2020.

<sup>95</sup> Western Australia, *Parliamentary debates*, Legislative Council, Question on Notice 4000, 16 August 2011 (Hon Peter Collier, Minister for Indigenous Affairs).

<sup>96</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 May 2020 in answer to Question on Notice, 2878.

<sup>97</sup> *Aboriginal Heritage Act 1972* (WA) section 18(1).

330. The corrosive effect of this upon Aboriginal people and communities has long been recognised but never addressed. For example, the Evatt Report in 1984 notes:

*'The government of the day can decide in the interests of the broader community what Aboriginal sites should be destroyed or damaged, no matter how sacred or important or special their significance to Aboriginal people.'*<sup>98</sup>

*The developer and landowner can appeal the Minister's decisions, but Aboriginal people may not appeal. The WA government acknowledges that the absence of a specified mechanism of appeal from the decision of the Minister is a problem of the Act.'*<sup>99</sup>

331. The Act places a greater burden upon Aboriginal people to disclose cultural information to government, with no independent support, and to participate in fast-tracked administrative processes, whilst denying Aboriginal people any effective avenue to protect their interests themselves.
332. Rio Tinto, at para [266] of its submission relating to the effectiveness and adequacy of the current heritage legislation declared that Rio Tinto:

*'also supports transparency in decision making and appeal rights for Traditional Owners and land use proponents for future statutory approvals that authorize disturbance of heritage sites'*

333. Two points need to be made about this.
334. First, Rio Tinto's support is limited to future statutory approvals. This would not have assisted the Traditional Owners in a situation like the Juukan Gorge disaster or any other situation where the statutory approval has already been given.
335. Second, the submission is inconsistent with clause 28.13 of the Claim Wide Participation Agreement which is currently in force between Rio Tinto and PKKP which prevents PKKP from making a Protected Area Application (which, as defined, would prevent the exercise of any such appeal right and application for a related ancillary protection order) except where PKKP has given Rio Tinto at least 6 weeks' notice of the application (including a draft of the application) and Rio Tinto has given its consent.
336. This is one of the many compelling reasons for a complete review of the current CWPA and related agreements between PKKP and Rio Tinto.
337. An assumption appears to have been made when drafting the AH Act – which has never been seriously revisited - that the State will properly represent the heritage interests of affected Aboriginal people at all times and act in the interests of

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<sup>98</sup> Western Australian Aboriginal Land Inquiry (1984) at paragraph 8.16 CHECK

<sup>99</sup> Hon Elizabeth Evatt, Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, 21 June 1996, Annex VIII 'State and Territory Laws on Aboriginal Cultural Heritage'.

Aboriginal people. This has not happened. The modern tendency for Ministers to be responsible for numerous other portfolios as well as the Act, further compounds this problem.

338. Ministerial decision-making under the Act should involve a balancing of the issues and interests, subject to the performance of the overriding duty in section 10. There is no evidence that balance is sought or achieved.
339. The Minister's view appears to be, that by the time things reach his desk, controversy has largely been dispelled. This is attributable to the fact, that:

*'Over time, the Section 18 process under the Heritage Act has gone from the fractious government versus traditional owner groups to a process whereby, generally, by consent or with no objection, a Section 18 will come to the desk of the Minister of the day that is usually consistent with agreements being reached.'*<sup>100</sup>

340. There is also a view that 'the Aboriginal Heritage Act cannot require surveys to be conducted', or alternatively that 'surveys are not a requirement of the Act.'<sup>101</sup> On a literal reading of the AH Act, that is true. However, the Minister's duty in section 10, to ensure that, so far as 'is reasonably practicable, there is effective preservation of Aboriginal heritage, provides the mandate and requirement for the Act to function effectively, and for robust decision-making.
341. The successive failure of Ministers to discharge this duty is a key reason the decision-making under, and administration of, the AH Act is so unbalanced and so detrimental to the interests of Aboriginal people.
342. It has been recognised by the courts of Western Australia that it is a fundamental requirement of the AH Act that decision-makers have before them sufficient information from those Aboriginal persons who might be affected by a decision as to the existence, significance and importance of sites which might be affected by a proposal under Section 18.<sup>102</sup>
343. It follows that 'the effective operation of the AH Act requires input of some kind from Aboriginal people' because they are the principal source of information as to the existence and significance of sites to which the AH Act applies.<sup>103</sup> What this may require in the particular circumstances will vary. In most circumstances, consultation and surveys will be the only way to discharge this requirement. In almost every case it will be the most effective.
344. The Minister's duty is not absolute, but it is clear that the performance of this duty by a succession of Ministers has been derelict. The legislative requirement is clear, but

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<sup>100</sup> Western Australia, *Parliamentary debates*, Legislative Council, 18 June 2020.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Robinson v Fielding* [2015] WASC 108 at [140]-[141].

<sup>103</sup> *Abraham v Collier* [2016] WASC 269 at [71], quoting *Robinson v Fielding* [2015] WASC 108 at [129].

in practice the responsibility for identifying and recording places of traditional or current sacred ritual or ceremonial significance to Aboriginal people is left to the private sector in the context of large development proposals and under heritage agreements negotiated in the shadow of the NT Act.

345. A genuine evaluation of the relative importance of places of significance also requires sufficiently detailed baseline information about a large number of places. The recent administration of the Act does not encourage detailed information to be gathered, either by the Minister, her or his department, or by others.
346. It is a gravely flawed model indeed if the foremost method of identifying and preserving Aboriginal heritage is the product of plans for mining and resource extraction, rather than through intentional discovery and protective measures. Unfortunately, the way in which the DAA dealt with the site complex at Purlykuti in August 2014 is an example of the inadequacy of the current heritage protection models. This example is set out in detail in **Appendix 3**.
347. Reports are required to be submitted on actual impacts at the end of the approved activity purpose (i.e. the end of life of the mine) rather than when the impacts occur. There is little active monitoring or inspection for compliance purposes, regardless of concerns raised by Aboriginal communities.
348. In its submission to this Inquiry, the DPLH highlighted that the Act's 'primary purpose' must be the preservation and protection of Aboriginal cultural heritage, and that the current Act did not provide for or encourage this.<sup>104</sup> It recommends redrafting and harsher penalties for those who flout its provisions.<sup>105</sup>
349. DPLH's submission also highlights the procedural injustices experienced by those who rely on its protection, as well as information deficits and a lack of transparency. It should be noted, however, that these issues are entirely open to remedy. Change to, and implementation of, the AH Act directly relies on the Ministerial discretion of whomever holds the DPLH portfolio in any given Cabinet.
350. DPLH refers to these matters blandly, as if it were not the responsible agency or that it is beyond its or the Minister's power to increase transparency, to undertake significantly better consultation and to ensure that it has adequate information for decision-making in the first place. Arguably, this dissonance is as great a problem as the AH Act itself.
351. This dissonance is particularly evident in relation to the application of section 18(2) of the AH Act, which provides:

*'Where the owner of any land gives the Committee notice in writing that he requires to use the land for a purpose which, unless the Minister gives his*

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<sup>104</sup> DPLH, Submission no 24 to this Inquiry, page 1.

<sup>105</sup> Ibid.

*consent under this section, would be likely to result in a breach of section 17 in respect of any Aboriginal site that might be on the land, the Committee shall, as soon as it is reasonably able, form an opinion as to whether there is any Aboriginal site on the land, evaluate the importance and significance of any such site, and submit the notice to the Minister together with its recommendation in writing as whether or not the Minister should consent to the use of the land for that purpose, and, where applicable, the extent to which and the conditions upon which his consent should be given.'*

352. A proper approach to Section 18(2) should include the requirement that the ACMC have adequate information, not only concerning the facts and history of a site but to enable the ACMC to make a relative assessment of the importance and significance of a site and to form a recommendation about whether the proposed impacts are permissible in light of that and, if permissible, under what conditions.<sup>106</sup> Information regarding the importance and significance of the site should address the matters that ACMC is required to have regard to under s 39(2)-(3) of the Act so that the ACMC is properly able to consider the full range of recommendations that might be made (approval; approval with conditions; refusal).<sup>107</sup>
353. Furthermore, although DPLH guidelines identify that it should be applied, there is no evidence that decision-makers under the AH Act routinely apply the precautionary principle to ensure that risk is appropriately managed. In practice, the risk is largely shifted to Traditional Owners. The application of the precautionary principle is central to DPLH's Aboriginal Heritage Due Diligence Guidelines (2013, version 3.0). The principle is defined in these terms in the guidelines:
- 'To apply a precautionary approach to the assessment of risk to Aboriginal heritage ensures all aspects of potential risk are considered and appropriate steps are applied to avoid or minimise damage to Aboriginal sites'*<sup>108</sup>
354. The Guidelines state that the precautionary principle should be applied 'to any circumstance where doubt exists ... about the potential impact to Aboriginal heritage; and the nature and level of potential impact of the proposed activity(ies)'.<sup>109</sup>
355. Making an approval recommendation without having first obtained as complete an understanding as possible of the Aboriginal heritage significance and values of the land is contrary to the precautionary principle.<sup>110</sup> It also undermines the certainty that the Traditional Owners, the resource industry and government need. Otherwise, there is a real and unacceptable risk that new information which might enhance the significance of known sites, and hence change the overall assessment of the cultural

<sup>106</sup> *Aboriginal Heritage Act 1972 (WA)*, section 18(2).

<sup>107</sup> Rather than merely being 'conceptual pointers', the criteria in s 39(2)-(3) are mandatory considerations for the ACMC to use when undertaking an evaluation for the purposes of s 18(2).

<sup>108</sup> DPLH, *Aboriginal Heritage Due Diligence Guidelines*, 2013, page 2.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48 (Warkworth) as per Preston CJ at [59].

significance of those sites, may become available too late to influence the ACMC's recommendations and the Minister's approval / authorisation decisions.<sup>111</sup> If the precautionary principle had been adequately utilised, as it should have been, the Juukan rockshelters would have been better protected, and less likely to be destroyed.

356. Another concerning pattern is the preparedness of those administering Section 18 to routinely accept incomplete, preliminary and inadequate heritage information when making decisions for the purposes of the Act, as happened in this case. It appears that the justification advanced for this approach is the requirement in Section 18(2) of the Act that states:

*'... the Committee shall, as soon **as it is reasonably able**, form an opinion as to whether there is any Aboriginal site on the land, evaluate the importance and significance of any such site, and submit the notice to the Minister together with its recommendation in writing...'* (emphasis added)

357. Information gathering about Aboriginal sites and their cultural significance is largely left to the proponent of the notice, rather than something the Minister or the Department investigates to its own satisfaction to properly fulfil the Minister's duty under section 10 of the Act.
358. One objective of the Section 18 scheme, according to the Supreme Court in *Wintawari Guruma Aboriginal Corporation RNTBC -v- The Hon Benjamin Sana Wyatt*<sup>112</sup>, is that of providing long term commercial certainty to landowners and land users about the permissible uses of land. That speaks to the critical importance of a thorough and robust, rather than formulaic or abbreviated, evaluation of the importance and significance of Aboriginal sites by the ACMC. It also highlights the necessity for the information before the ACMC in relation to a particular Notice to adequately address the matters in section 39 of the AH Act.
359. Minister Wyatt stated in his evidence that the current reporting regime for execution of Section 18 consents requires the reports to be submitted at the conclusion of the purpose. In this context, the purpose is the mine. If that is correct, or if this is how the DPLH chooses to administer the AH Act, this means that Rio Tinto would only need to report to the DPLH when its mining operations at Brockman 4 are completed: there is not effective scrutiny of proponents and their operations during the life of a mine.
360. In considering whether to make a recommendation to the Minister to authorise interference with or destruction of Aboriginal sites, and consistently with the Act's primary purpose, the ACMC should take into account the fact that Aboriginal sites (and Aboriginal cultural heritage) are a non-renewable resource, as has been

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<sup>111</sup> *Aff Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure & Anor; Australian Walkabout Wildlife Park Pty Limited (ACN 115 219 791) as Trustee for the Gerald and Catherine Barnard Family Trust v Minister for Planning and Infrastructure & Anor* [2015] NSWLEC 1465 ('Darkinjung') at [310].

<sup>112</sup> [2019] WASC 33 at [116]-[117].

recognised in land use planning decisions regarding Aboriginal heritage in other parts of Australia.<sup>113</sup> Their destruction should be a matter of last resort, after all other less impactful land uses have been explored.

361. Neither the AH Act nor the *Environmental Protection Act 1986* (WA) (which has, in recent times, been applied by the Environmental Protection Authority to afford protection to Aboriginal heritage values of particular Aboriginal sites) precludes recourse to Commonwealth legislation - in particular, the ATSIHP Act - for the purposes of securing protection of 'significant Aboriginal areas'. It is generally understood, however, that this recourse will only have a prospect of achieving the desired outcome if protection under the State legislation has failed or is no longer a possibility.

#### **TERM OF REFERENCE (f): THE INTERACTION OF STATE ABORIGINAL HERITAGE REGULATIONS WITH COMMONWEALTH LAWS**

362. As the National Native Title Council has noted in their submission of 31 July 2020 ('NNTC Submission'), the primary legislative responsibility for protection of Aboriginal heritage lies with the States and Territories across 9 pieces of legislation. This legislation overlaps to some extent with an additional 4 Commonwealth Acts. The result of this patchwork of legislation is that there are significant gaps in what would be considered best practice Aboriginal cultural heritage protection. Significant parts of the relevant legislation are complex, confusing and not easily accessible by Traditional Owners. The particular difficulties for native title groups in seeking to protect Aboriginal heritage in the context of the NT Act, as an example, are discussed below.
363. Subdivision P in Part 2 of Division 3 of the NT Act provides native title groups with a 'right to negotiate' with mining companies and the State before a mining lease (and certain mining tenements giving a right to mine or explore) may be granted on native title land, but this right is substantially qualified.
364. Whilst all three parties have an obligation to negotiate in good faith<sup>114</sup> from the initiation of the process by means of a section 29 notice, one of the parties (the State) is in effect a non-participant. Fundamentally, the State produces a standard State Deed for the purposes of section 31, insisting there be no changes to it and enquiring from time to time as to the other parties' progress towards the negotiation of a so-called Ancillary Agreement.
365. The mining company and the native title group engage in negotiations, where the latter is substantially dependent on being provided in a timely manner with necessary

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<sup>113</sup> *Darkinjung LALC v Minister for Planning* [2015] NSW LEC 1465.

<sup>114</sup> *Native Title Act 1993* (Cth) section 31(1)(b).



details, including as to the proposed mining operations, mine life, and likely production.

366. The native title group invariably requires funds to be provided by the mining company so as to be able to obtain legal, anthropological, economic and other expert advice (which funding, from the native title group's point of view, should not be dependent on the successful outcome to the negotiations, but not infrequently is, or is restrictively 'capped').
367. In the event that an agreement has not been entered into within 6 months of the section 29 notification day (section 35), a party (customarily either the mining company or the State) may apply to the National Native Title Tribunal (NNTT) for a determination under section 38.
368. Unless the native title group satisfies the NNTT that there has been a failure by the mining company or the State to negotiate in good faith (section 36(2)), the NNTT will have jurisdiction to inquire into the matter and make a determination as to the grant of the proposed mining lease or other tenement. However, the NNTT is specifically precluded from imposing (or proposing) conditions for the payment of financial benefits to a native title group calculated by reference to mineral production volume or mining revenue or profits.<sup>115</sup>
369. For many native title groups in WA, there have been competing (often equally pressing) claims on their time and resources, including other mining negotiations at the same time as well as progressing their native title claims to trial or a negotiated consent determination. This has been overwhelmingly the experience of other Pilbara native title groups, as well as that of PKKP.
370. All these factors are the consequence of what Subdivision P prescribes and what it prohibits - and (to a degree) what it does not include - such as greater obligations on the part of mining companies and the State to support a more level playing field for the negotiations and of a fairer outcome for the native title group.
371. This has resulted in enormous pressure on PKKP and other native title groups in their negotiations with mining companies. The concept of Free, Prior and Informed Consent is almost entirely a mirage, particularly given the relevant native title group will not participate in any of the financial benefits to be derived from mining by the mining company, its shareholders and (through statutory royalties) the State, if no agreement is reached during the negotiation period.
372. Native title groups, in ostensibly consenting to native title mining agreements, invariably authorise them to be entered into because the alternative process in the NNTT will, almost inevitably, give rise to a substantially worse outcome – and, as is well known, the number of times the NNTT has recommended against the grant of a mining lease or tenement is minuscule.

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<sup>115</sup> *Native Title Act 1993* (Cth) section 38(2).

373. In that sense it is perhaps not surprising that a number of native title groups in WA have been persuaded (whether by mining companies or native title representative bodies) to negotiate claim-wide agreements (or occasionally project-related agreements), which are therefore not limited in scope to the individual mining leases and tenements to which the originating section 29 notice related.
374. There are however other dangers inherent in such agreements (and the negotiation of them), including the kind PKKP have experienced with regard to the Claim Wide Participation Agreement. Unequal and restrictive provisions become entrenched and are not considered and ameliorated upon review, unless and until something cataclysmic such as the destruction of the Juukan rockshelters occurs.
375. An example of such a provision is clause 28 of the Rio Tinto and PKKP CWPAs which requires support and non-objection to all operations pursuant to so-called 'Agreed Acts', e.g. not to object to (or indicate non-support for) Section 18 applications or other 'Key Approvals' and not to seek declarations under the Aboriginal and Torres Strait Islander Heritage Protection Act without having given 6 weeks' notice and obtained the mining company's prior consent to exercise the statutory right.
376. Subdivision P, in imposing an obligation on the parties to negotiate in good faith each time there is a section 29 notice, does not contemplate claim wide agreements or other non-project agreements. Arguably, such agreements defeat one of the purposes of the Subdivision: to ensure that there is a separate negotiation for agreements in relation to the proposed mining tenements identified in a section 29 notice – and further, that such agreements are invalid (or invalid to the extent that they affect native title), save to the extent that they may be specifically ratified by a subsequent ILUA or are themselves ILUAs satisfying the requirements of Subdivision B or C of the NT Act.
377. This potential invalidity becomes particularly evident when one takes into account the special exceptions to the 'right to negotiate' provisions in Subdivision P, including s 26D (2) (conjunctive agreements covering both exploration and mining, where that right does not ordinarily apply to the later act of the grant of a mining lease following successful exploration). Also significant are section 29(9) and section 42A relating to project acts and their implementation. The State may, in its section 29 notice, identify a project proposed to be carried on in a specified area, where two or more mining tenements applied for constitute or form part of the project. In those circumstances the 'right to negotiate' applies to all of the 'project acts' as if they were a single act.
378. By Subdivision P (including by virtue of its differences to Subdivisions B and C regarding ILUAs), Federal Parliament recognised that ordinarily mining agreements with native title groups must be specific (and limited) to mining tenements applied for and the subject of a prior section 29 notice; and they should not (as with claim wide and other non-project-related agreements) oblige those groups (without further negotiation at the relevant time) to consent to any number of future mining tenements

which have not yet been applied for (and accordingly are not directly under consideration) and may not be applied for, for many years, if ever.

**TERM OF REFERENCE (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 JURISDICTION**

379. The ability of Traditional Owners to protect their cultural heritage and to have real and lasting improvements in their health and wellbeing is dependent on ownership of land. The dispossession of Aboriginal peoples in Western Australia has never been properly addressed by governments. Aboriginal peoples in Western Australia have no opportunity to own the mineral and other resources in their country. By contrast, Aboriginal Land Councils in New South Wales own most of the minerals and resources in the land they own.<sup>116</sup>
380. In his evidence to this Inquiry, Minister Wyatt stressed that, in his opinion, cultural heritage should be governed by State and Territory laws. However, the State of Western Australia has never addressed dispossession, and has failed to provide Traditional Owners with the ability to protect their cultural heritage. Instead, the State focusses on Section 18 approvals rather than the other provisions of the AH Act which could be used to protect cultural heritage.
381. In addition, the AH Act is anachronistic, having been formulated in the pre-native title era. Most other State Acts have been significantly amended in the last two decades to incorporate native title bodies as Aboriginal organisations with a significant role in Aboriginal heritage protection and cultural heritage agreements and management plans as an important heritage protection option.<sup>117</sup>
382. Despite cataloguing in detail, the deficiencies of the current Commonwealth ATSIHP Act, the WA DLPH nevertheless contends that it is effective (enough) to protect Aboriginal heritage such that there is no real role for the ATSIHP Act in WA. The approach is reminiscent of State's rights and protectiveness of constitutional boundaries, rather than a genuine appraisal of the deficiencies of the State Act and its administration.
383. There are many instances in which the ATSIHP Act could provide better, and more culturally relevant, protection for places, areas and things which are significant according to Aboriginal tradition.
384. The AH Act and ATSIHP Act regulate activities affecting different kinds of places and occasioning different kinds of impacts. The ATSIHP Act has the ability to prevent

<sup>116</sup> See section 45 of the *Aboriginal Land Rights Act 1983* (NSW).

<sup>117</sup> *Aboriginal Heritage Act 2006* (Vic) ss4, 42-79; *Aboriginal Cultural Heritage Act 2003* (Qld) ss 35, 80 -120; *Aboriginal Heritage Act 1988* (SA) ss 19B, 19H.

injury or desecration, which the State AH Act may not have the power to do. The presence of the offence of desecration for the wilful and serious damage of sites – which also appears in the Northern Territory *Aboriginal Sacred Sites Act 1989* – is an important deterrent.<sup>118</sup> Their complementary potential is diminished by the opposition of the State to what it perceives as Federal intervention.

385. Section 9(1)(b) of the ATSIHP Act gives the relevant Minister the power to make a declaration of preservation or protection for a 'significant Aboriginal area' from injury or desecration which can remain in place for up to 60 days.<sup>119</sup> For this purpose, the Minister must be satisfied:

(i) *that the area is a significant Aboriginal area; and*

(ii) *that it is under serious and immediate threat of injury or desecration*<sup>120</sup>

386. The term 'significant Aboriginal area' for this purpose means an area of land in Australia which is of particular significance to Aboriginals in accordance with Aboriginal tradition.<sup>121</sup>

387. The ATSIHP Act is reactive to a threat of injury or desecration. It does not provide a system for registering or recording Aboriginal cultural heritage so that these places may be protected or avoided in land use planning. Declarations made under the ATSIHP Act prevent activities that may cause harm, but these are rarely made and processes under the Act move slowly.<sup>122</sup>

388. It is noted that the interim report into the Commonwealth EPBC Act, by Professor Graeme Samuel AC of June 2020, made a number of findings in relation to protection of Aboriginal heritage. That report stated that the Act had failed its objectives as they relate to Aboriginal Australians and that it embodied a 'culture of tokenism and symbolism rather than one of genuine inclusion of Aboriginal Australians'. Professor Samuel stated that Aboriginal Australians are entitled to expect a stronger national-level protection of their cultural heritage. The Best Practice Standards in Aboriginal Cultural Heritage Management and Legislation (as set out in the NNTC Submission) describe the principles for developing a comprehensive review of national laws and how those laws should interact with State based legislative schemes.<sup>123</sup> PKKP supports these findings by Professor Samuels and supports the establishment of such a legislative review.

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<sup>118</sup> *Native Title Act 1993* (Cth) section 35; See *Aboriginal Areas Protection Authority v OM (Manganese)Ltd* [2013] NTMC 19.

<sup>119</sup> *Native Title Act 1993* (Cth) section 9.

<sup>120</sup> *Ibid*, section 9(1)(b).

<sup>121</sup> '*Aboriginal tradition*' means the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships; ATSIHP Act, section 3(1).

<sup>122</sup> In a 2009 review of the ATSIHP Act by the Department of Environment, Water, Heritage and the Arts, it was stated that 93 per cent of approximately 320 valid applications received since the Act commenced in 1984 have not resulted in declarations. This trend has continued in the years since 2009.

<sup>123</sup> National Native Title Council, Submission no 34 to this Inquiry, page 5.

389. Professor Samuels noted:

*'The ATSIHP Act does not align with the development assessment and approval processes of the EPBC Act. Cultural heritage matters are not required to be broadly or specifically considered by the Commonwealth in conjunction with assessment and approval processes under Part 9 of the Act. Interventions through the ATSIHP Act occur after the development assessment and approval process has been completed'.<sup>124</sup>*

390. PKKP awaits Professor Samuels' final report but, in the meantime, endorses his criticisms of the inadequacies of the Commonwealth legislation. In particular, PKKP agree that it is unacceptable that Traditional Owners and Aboriginal cultural heritage are not among the first considerations when development proposals are being prepared by proponents.
391. PKKP agrees with the submissions by Professor Langton and the NNTC that the Commonwealth should implement a national regime for Aboriginal cultural heritage in line with the draft Best Practice Standards in Aboriginal Cultural Heritage Management and Legislation that were developed in consultation with the National Native Title Council.<sup>125</sup> We agree with Professor Langton that State laws need to be harmonised with, and be subordinate to, Commonwealth laws to prevent destruction of cultural heritage with the approval of the States or Territories.
392. PKKP also agrees with the submissions of Professor Langton that mining companies must implement ILUAs and commercial agreements in good faith and in consultation with Traditional Owners. PKKP also agree that they are entitled to reparations for the destruction of their cultural heritage and the lack of access to their country and to their cultural heritage which is kept by Rio Tinto.

**TERM OF REFERENCE (h): HOW ABORIGINAL AND TORRES STRAIT ISLANDER CULTURAL HERITAGE LAWS MIGHT BE IMPROVED TO GUARANTEE THE PROTECTION OF CULTURALLY AND HISTORICALLY SIGNIFICANT SITES**

393. The AH Act and the ATSIHP Act embody an outmoded and discriminatory approach to cultural heritage management. The principal purpose of cultural heritage management should be the protection and preservation of cultural heritage for the benefit of the owners of that heritage. The AH Act purports to protect sites, objects and places (i.e. disconnected things) for the benefit of the community at large, but, in practice and outcome, leans heavily towards the facilitation of activities which detrimentally affect culture and heritage.

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<sup>124</sup> EPBC act review interim report, 2.1.2.

<sup>125</sup> Attachment to the NNTC submission (no. 34)

394. As stated by Justice Pepper of the Land and Environment Court of New South Wales:

*‘Aboriginal cultural heritage is taken to mean all things tangible and intangible that give a place its significance in the lore of the local Aboriginal group. This includes objects like spearheads, rock engravings, burial grounds and bark paintings; sites of ancient or recent history, including post-colonial massacre sites; and importantly more intangible elements such as specific cultural associations that tell a story about the area and the people that existed there. This includes birthing sites, traditional routes, songlines which connect sacred places ‘like railway lines’, and particular associations with specific plants and animals.’<sup>126</sup>*

395. There has been judicial recognition of each of the elements of the expanded definition of Aboriginal cultural heritage in Justice Pepper’s definition above. Significantly, this has occurred in the context of planning legislation rather than in heritage legislation. Planning legislation produces a relatively more robust brand of decision-making than occurs under Aboriginal heritage legislation. Standards for assessment, and the information and reporting requirements in Environmental Impact Statement documents, are much clearer.
396. Other Australian jurisdictions have managed to legislate consultation standards in one way or another in relation to Aboriginal cultural heritage. As examples, we refer to:
- Sections 60 – 61 of the *National Parks and Wildlife Regulation 2019 (NSW)*;
  - Section 23 of the *Aboriginal Cultural Heritage Act 2003 (Qld)*;
  - Sections 12-13 of the *Aboriginal Heritage Act 1988 (SA)*; and
  - Section 42 of the *Northern Territory Aboriginal Sacred Sites Act 1989 (NT)*
397. A more contemporary approach to cultural heritage management should be adopted which has, as a principal object, the protection of Aboriginal cultural heritage for the benefit of the Traditional Owners of that cultural heritage, and for all Australians. The contemporary approach should be consistent, with and not detract from, any minimum standards provided by other relevant statutes, in particular the NT Act and the *Racial Discrimination Act 1975 (Cth)*.
398. Aboriginal heritage protection legislation should reflect best practice management and decision-making approaches, including the Free, Prior and Informed Consent standard as found in:

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<sup>126</sup> *Not Plants or Animals: the Protection of Aboriginal Cultural Heritage in Australia* by the Hon Justice Rachel Pepper, 5 March 2014 at [10], footnotes omitted.

- Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, which effectively recognises the right to enjoy places and objects of Aboriginal cultural heritage significance as a human right<sup>127</sup>;
- Article 15 of the International Covenant on Economic, Social and Cultural Rights, where it is recognised that the ability to maintain and protect places and objects of Aboriginal cultural heritage significance and the cultural heritage, traditional knowledge and traditional cultural expressions associated with those places and objects is a human right;
- Article 8 of the UN Declaration on the Rights of Aboriginal Peoples (UNDRIP), which provides that Aboriginal peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture;
- Article 43 of the UNDRIP, which states that the human rights recognised in the UNDRIP ‘constitute the minimum standards for the survival, dignity and well-being of the Aboriginal peoples of the world’; and
- the process and framework for best practice cultural heritage management set out in the Burra Charter 2013, including the broader and more culturally appropriate definitions of ‘place’<sup>128</sup> and processes for assessment of cultural heritage significance

399. Aboriginal people should have the primary say as to how the legislation should be changed to provide for best practice Aboriginal heritage protection and management. Both State and the Commonwealth legislation should be:

- comprehensive;
- uniform;
- simple and accessible, including appeal rights; and
- properly supported by resources and funding

400. Overall responsibility for protection of Aboriginal heritage should be given to the Commonwealth Government, having regard to its international obligations, including under the United Nations Declaration on the Rights of Aboriginal Peoples.

401. The Juukan Gorge disaster graphically illustrates the need to include in State and Federal Aboriginal heritage protection legislation provisions which:

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<sup>127</sup> ‘For Aboriginal people, participation in cultural activities is associated with those places and objects that are of cultural value or significance. If Aboriginal heritage is destroyed, their ability to participate and enjoy participation in associated cultural activities is diminished’: *Anderson v DG, Department of Environment and Conservation* (2006) 144 LGERA 43 per Pain J at [64].

<sup>128</sup> Particularly as compared to section 5(b) of the current Act.

- Make it an offence, which carries significant criminal penalties, to desecrate a site – as provided by s 35 of the Northern Territory Aboriginal Sacred Sites Act 1989; and
- Prohibit parties to mining, development and related agreements circumscribing or contracting out of their heritage protection rights.

**TERM OF REFERENCE (i): OPPORTUNITIES TO IMPROVE ABORIGINAL HERITAGE PROTECTION THROUGH THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (CTH)**

402. There are certain sections of EPBC Act which have the potential for affording protection to Aboriginal sites of ‘outstanding [Aboriginal] heritage value to the nation’. These include section 324JL, which allows the Minister to include on the National Heritage List a place which she believes to be under ‘likely and imminent threat’.<sup>129</sup> In order to better protect Aboriginal cultural heritage sites, relevant sections of the EPBC Act should be strengthened.
403. Amongst other things, the EPBC Act allows the relevant Minister to include on the National Heritage List a place which she believes to be:
- (a) a place which has or may have one or more National Heritage values; and*
  - (b) any of those values is under threat of a significant adverse impact; and*
  - (c) that threat is both likely and imminent*<sup>130</sup>
404. This emergency process is quite separate from the usual process for inclusion on the National Heritage List under the annual nomination and assessment process provided for in sections 324J to 324JJ.
405. Section 324D provides for regulations prescribing National Heritage values criteria for the natural heritage values, the Indigenous heritage values and the historic heritage values of places for their inclusion on the National Heritage list as National Heritage places. The ‘Indigenous heritage value’ of a place means the heritage value of the place that is of significance to Aboriginal persons in accordance with their practices, observances, customs, traditions, beliefs or history.<sup>131</sup>
406. Regulation 10.01A of the EPBC Regulations sets out the National Heritage criteria for places. The standard of heritage value to the nation required is ‘outstanding’, for example:

<sup>129</sup> *Environmental Preservation and Biodiversity Conservation Act 1999* (Cth), chapter 5, section 324JL(1)(c).

<sup>130</sup> *Ibid*, section 324JL.

<sup>131</sup> *Ibid*, section 528.



- (g) *the place has outstanding heritage value to the nation because of the place's strong or special association with a particular community or cultural group for social, cultural or spiritual reasons; or...*
- (i) *the place has outstanding heritage value to the nation because of the place's importance as part of Indigenous tradition.*<sup>132</sup>

407. It is submitted that the Juukan rockshelters satisfy the National Heritage values criteria.<sup>133</sup>
408. Subsections 15B (1) and (2) of the EPBC Act prohibits the 'taking of an action that has, will have or is likely to have a significant impact on the National Heritage values of a National Heritage place'. Subsection (4) specifically prohibits a person from 'taking any action that has, will have or is likely to have a significant impact on the National Heritage values', unless there is a relevant approval or decision made under the EPBC Act. In addition, section 15C creates offences for taking an action which results or will result in a significant impact on the National Heritage values of a National Heritage place. The extent (if at all) to which the assessment of that impact and its significance would be determined by reference to the values of the place's Traditional Owners is unclear.
409. PKKP agrees with Professor Graeme Samuels that the EPBC Act is not protecting Aboriginal cultural heritage and is dated.<sup>134</sup> It dilutes Aboriginal knowledge and views. It does not comply with Australia's obligations under international agreements because:
- a. Aboriginal knowledge or views are not fully valued in the advice which is given to decision-makers;
  - b. the ATSHIP Act only provides last-minute intervention. It does not work with the development approval process in the EPBC Act. The destruction of the Juukan Gorge shelters is evidence of this failure;
  - c. decisions are made by the Director of National Parks, not Traditional Owners';
  - d. there are no mechanisms for redress or for ensuring free, prior and informed consent
410. PKKP also agrees with the key reform proposals recommended by Professor Samuels in his interim report, namely:

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<sup>132</sup> The cultural aspect of a criterion means the Aboriginal cultural aspect, the non-Aboriginal cultural aspect, or both: regulation 10.01A(3).

<sup>133</sup> It is noted that some international archaeological experts compared the destruction of the Juukan rockshelters to that of the World Heritage Listed Bamiyan Buddhas by the Taliban and Palmyra (in Syria) by ISIS.

<sup>134</sup> Independent Review of the EPBC Act, Interim Report, June 2020: <https://epbcactreview.environment.gov.au/resources/interim-report>.

- a. reforms to the EPBC Act and the proposed National Environmental Standard as they relate to Aboriginal cultural heritage protection;
- b. Traditional Owner management of land must be designed in close collaboration with Aboriginal Australians;
- c. a National Environmental Standard for best-practice Aboriginal engagement to make sure that Aboriginal Australians who speak for country have the opportunity to do so from the beginning of the decision-making process; and
- d. national-level cultural heritage protections need to apply to tangible and intangible cultural heritage

## SECTION THREE: MOVING FORWARD

### **TERM OF REFERENCE (j): OTHER RELATED MATTERS**

#### **PKKP response to Rio Tinto submission and evidence**

##### *Certainty*

- 411. At many points in its submission Rio Tinto makes it clear that, whilst heritage protection is important, Rio Tinto's paramount consideration is certainty, about what it can and cannot mine and that heritage protection must ultimately give way to this certainty.<sup>135</sup>
- 412. PKKP is surprised and disappointed that Rio Tinto cannot resist having this undercurrent in its submission – even after the Juukan Gorge disaster; where Rio Tinto grasped at its own version of certainty about the importance or otherwise of Juukan Gorge and then turned the deafest of ears to every indication of concern.
- 413. Certainty may be important to mining companies but that is no reason to make heritage protection a second or third tier objective - subservient to certainty of profit. Mining and heritage protection are not incompatible outcomes.
- 414. Mining companies are very experienced and well-resourced to model certainty in their mining operations. Indeed, the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (JORC Code)<sup>136</sup> requires that 'Modifying Factors', including environmental and social factors, be taken into account when calculating ore reserves in order to demonstrate that extraction can reasonably be justified.

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<sup>135</sup> Including at paras [36], [267 – 269] [275]; L'Estrange Review paras [25], [58].

<sup>136</sup> Joint Ore Reserves Committee, *The JORC Code* (2012 edition), pages 8 and 16.

415. However, the clear lesson in relation to Aboriginal heritage protection in Australia over the last 40 years is that obtaining certainty about Aboriginal heritage sites and their seminal relationship to Aboriginal mythology, religion and culture requires considerable resources, patience and very respectful negotiation with Aboriginal traditional owners on their terms. Other heritage protection disasters in the last 25 years - like Hindmarsh Island and the desecration of the Bootu Creek sacred site by a Manganese mining company in the NT – have illustrated graphically the consequences of not properly and patiently obtaining and taking into account all available information about sites and not dealing appropriately with the Traditional Owners who have authority to talk about the site.<sup>137</sup>
416. The Hindmarsh Island case illustrated a feature of Aboriginal Heritage Protection which is now well known but about which infinite care must be taken to properly ascertain and consult with all the appropriate Traditional Owners. Early in the course of planning for the construction of the Hindmarsh Bridge, the SA Minister for Aboriginal Affairs, Dr Armitage, authorised under powers similar to section 18 of the WA AH Act,<sup>138</sup> the destruction of some middens and relics of camp sites on the banks of the River Murray adjacent to the proposed bridge site. The Minister did not address his mind to the critical site in the bridge dispute – the meeting of the fresh water of the Murray with the salt water of the Coorong – because he was not aware of its seminal significance to particular Ngarrindjeri women. The Minister was not aware of that at this stage because the time-honoured mechanism adopted by Ngarrindjeri Women for the protection of this site and the corresponding mythology was to keep it secret.
417. The critical first objective must always be obtaining certainty about all the Aboriginal heritage<sup>139</sup> which is under threat from mining through a fair, respectful, transparent and properly negotiated process where both parties and the regulators are adequately resourced. The precautionary approach to the assessment of risk spelt out in DPLH's Aboriginal Heritage Due Diligence Guidelines should form part of that process, as should articles 3, 6, 12 and 13 of the *Burra Charter 2013*.<sup>140</sup>
418. Rio Tinto in paras 36 and 37 of their submission to this Inquiry refer to the current process, stemming from PKKP's consent to 'its operations on their country', which Rio Tinto asserts:

*'allowed and continues to allow steps to be taken, by Rio Tinto and PKKP together, to manage impacts of mining activities, including to identify Aboriginal heritage sites and mitigate impacts of those activities. This identification and mitigation process is necessarily traditional owner led and*

<sup>137</sup> *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 (21 August 2001) at e.g. [301-309], [320-331] and *Aboriginal Areas Protection Authority v OM (Manganese) Ltd* [2013] NTMC 19.

<sup>138</sup> *Aboriginal Heritage Act 1988* (SA), section 23.

<sup>139</sup> *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure & Anor* [2015] NSWLEC 1465, 309 – 310.

<sup>140</sup> *Darkinjung*, 471.

*involves deep engagement with both traditional owners and relevant specialists...*

- 419. Two points need to be made. First, the necessary fair, respectful, transparent and properly negotiated process relates not just to identification and mitigation but, more fundamentally, to preservation and protection of Aboriginal heritage sites. Second, the 'deep engagement' with Traditional Owners' in relation to Juukan Gorge never occurred.
- 420. Once certainty about all the Aboriginal heritage which is under threat from mining has been properly attained, certainty of mining outcomes will follow.
- 421. PKKP has commented on many aspects of Rio Tinto's submissions which deal with particular matters and events under terms of reference (b) and (c) above. Some of Rio Tinto's submissions which are of a more general nature are dealt with below.

*Admissions and concessions made by Rio Tinto in relation to the Juukan Gorge Disaster*

- 422. In its submissions to this Inquiry and in its Board Review of Cultural Heritage Management (L'Estrange Review) Rio Tinto has made many appropriate admissions and concessions. These are set out in **Appendix 4** to this submission. When considered together with **Appendix 2** and the events leading up to the blast, they paint a grim picture of gross organisational dysfunction and a level of disdain, bordering on contempt, for Aboriginal heritage within Rio Tinto.
- 423. However, whilst these admissions are welcomed by the PKKP, it will be clear from this submission that there are many other matters for which Rio Tinto deserves censure.
- 424. PKKP expects that Rio Tinto will address these matters, including by completely frank and constructive discussions with PKKP as part of a best practice future relationship.

*A best practice future relationship between PKKP and Rio Tinto*

- 425. Rio Tinto points out in its submission (paras 253 -255) that it has suspended all activities with potential to impact a heritage site (irrespective of whether it has an approval to disturb it) and is in discussions with PKKP to establish a joint process, including agreeing the terms of a moratorium on mining activity over an area to be agreed around the Juukan Gorge.
- 426. On 20 August 2020 Rio Tinto and PKKP, following a site visit and extensive discussions, reached agreement on all the terms of a moratorium on mining and exploration activity over a significant defined area (see **Figure 6** on page 87) - which includes Purlykuti and the Juukan Gorge and rockshelters - until at least 20 January

2021. The duration of the moratorium is subject to review, having regard to the progress of matters relating to the protection of heritage sites in the moratorium area.

427. PKKP has made it clear, and Rio Tinto has acknowledged, that the moratorium is essential to the creation of a best practice future relationship between them. At paras 55 to 59 of Rio Tinto's Board Review of Cultural Heritage Management it expresses a willingness to change and to work with PKKP towards a much better future relationship and future heritage protection regime. Rio Tinto's proposals and initiatives include:
- a. an unreserved apology to all PKKP people [para 54];
  - b. a commitment to working with PKKP on how to manage additional sites in the Juukan Gorge area [para 54];
  - c. Rio Tinto needs to liaise actively with PKKP on, and commit its practical support to, the establishment of a Keeping Place under PKKP control and on PKKP country for the remains, artefacts and other items salvaged from the Juukan 1 and Juukan 2 rockshelters;
  - d. Rio Tinto needs to upgrade its engagement with the LIC that was established under the PA as a central point of interaction and co-operation; and
  - e. Rio Tinto should also continue to explore new employment and business opportunities with the PKKP [para 55].
  - f. Rio Tinto would welcome discussions with PKKP to introduce greater flexibility into the PA to respond better to material new information that may emerge about cultural heritage sites of exceptional archaeological and cultural significance [para 57]
428. PKKP notes that Rio Tinto recognises that there is great room for improvement in the relationship and for the need to achieve real and tangible respect and effective heritage protection. Similarly, PKKP notes that Rio Tinto is considering and committing to means of achieving this.
429. The Rio Tinto initiatives set out above will go some way towards achieving this.
430. However, if Rio Tinto is genuine in its submissions that it wants a partnership with the PKKP People then the terms of its Participation Agreement and ILUA will require wholesale review and amendment. Rio Tinto must acknowledge, and seek to correct, the unequal bargaining positions that have always resulted in a disadvantage for Traditional Owners'.
431. PKKP is committed to developing and implementing a best practice future relationship with Rio Tinto and all other mining companies and recognises that Rio Tinto is indicating a willingness to embrace this.

432. In spite of all this, PKKP is mindful of the deep concerns it has in relation to Rio Tinto's corporate culture and value system which has allowed the Juukan Gorge disaster to take place. This could be viewed as a major constraint to good faith engagements on a future relationship with Rio Tinto. As such PKKP will require firm commitment from Rio Tinto as to its approach and the principles it will be applying in future engagements.
433. As part of rebuilding trust in Rio Tinto and its personnel, PKKP will need to witness Rio Tinto and its personnel take action which supports Rio Tinto's corporate line that it wants to change and do better in the future. To date, PKKP has been disappointed that Rio Tinto's Head of Corporate Relations and apparent head of Indigenous relations, Simone Niven, has had no dealings with PKKP, either before, during or after the blast. PKKP has also noted that when Rio Tinto announced the resignation of their CEO they said that their Board had '*engaged extensively with... Traditional Owners*',<sup>141</sup> where the true position is that to date Rio Tinto's Board has had no contact with the PKKP Traditional Owners.
434. PKKP welcomes the expressions of support provided by numerous of the submissions to this Inquiry and, more broadly, throughout Australia and across the world. We further welcome the almost universal support for legislation which is more balanced and equitable, and which provides better protection to Aboriginal peoples and their culture and heritage.
435. PKKP does not agree with those who indicate that current legislation, coupled with the current practices of the resource industry, are adequate to afford this protection. The Juukan Gorge disaster, as well as current section 18 applications (both granted and under consideration), emphasises the urgency of changes to current practice.
436. Time and resources have not enabled PKKP to fully analyse all submissions to date. We would welcome an opportunity to comment further should this be required

*Generic difficulties with the current agreements between PKKP and Rio Tinto in respect of exploration and mining on PKKP country*

437. Whilst it has been claimed that the CWSA and the RFD between Rio Tinto and PKKP were industry best practice for their time, they were not. They are even less so now.
438. PKKP agrees with the submission by the National Native Title Council<sup>142</sup> that there needs to be a mechanism that allows oversight of terms regarding confidentiality in native title mining agreements to make sure that they comply with the law

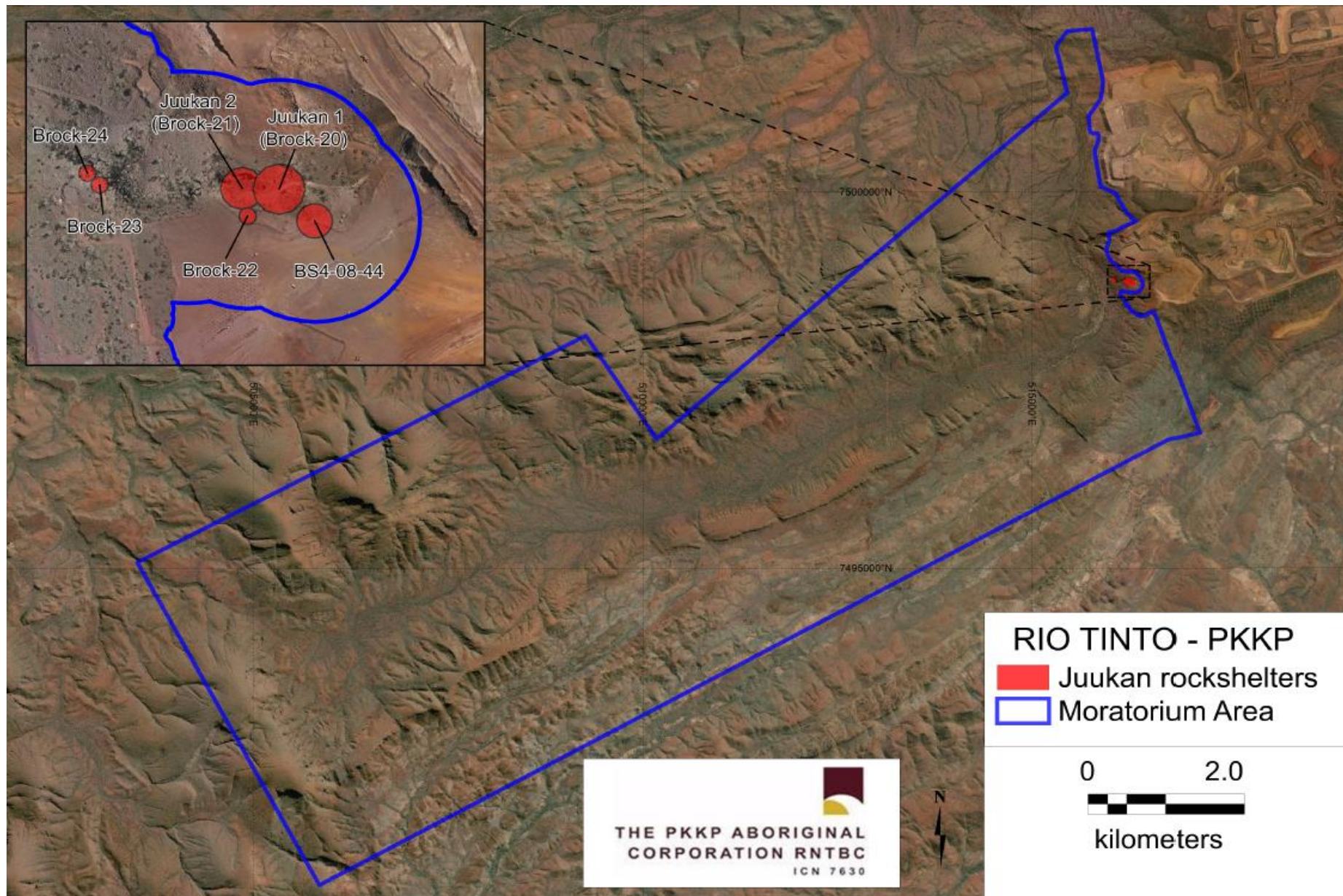
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<sup>141</sup> Rio Tinto, *Rio Tinto executive committee changes*, press release, 11 September 2020.

<sup>142</sup> National Native Title Council, Submission no 34 to the Inquiry, p 11.



Figure 6: 2020 Moratorium Area



439. The following summary of the most significant difficulties with the current agreements focusses primarily on the CWPA made between PKKP and Rio Tinto on 18 March 2011. It is not intended to be an exhaustive analysis of these agreements or the difficulties they have created.
440. There are a number of provisions within the CWPA which are highly restrictive of the PKKP People and PKKPAC's statutory and other rights and impose heavy obligations of confidentiality on PKKP, inconsistent with national or international best practice, including the principle of Free, Prior and Informed Consent. As this submission has indicated, Rio Tinto used the threat of these provisions to seek to prevent PKKP from attempting to stop the blasting of Juukan Gorge or publicly criticising Rio Tinto about it.
441. The provisions of the CWPA about which PKKP is very concerned include the following:
- a. general provisions prohibiting opposition by PKKP to the giving of any government approval that will result in Aboriginal sites being impacted and prohibiting PKKP objections to any application by RTIO for a section 18 authorisation or other Key Approval<sup>143</sup>. [This should be compared with clauses 11.1 and 11.2 of the previous agreement, the BIA, which required that Rio Tinto 'use its reasonable endeavours to minimise the impact of Operations/the Priority Project operations on Aboriginal Sites and must consult [the PKKP People] about means of doing so', failing which 'nothing in this Agreement will prevent the [PKKP People] from making representations in opposition to a notice pursuant to section 18 of the Aboriginal Heritage Act'];
  - b. specific provisions prohibiting any application for a declaration or proclamation under any State or Commonwealth legislation (including the Aboriginal Heritage Act, the ATSIHP Act and the EPBC Act) that could have the effect of limiting, preventing, delaying or inhibiting any Agreed Acts or any part of RTIO's Pilbara Iron Ore Business, except to the extent specifically permitted in clause 28.<sup>144</sup> Under clause 28.13 PKKP is required to give 6 weeks' written notice and obtain RTIO's consent before making any application under the ATSIHP Act for an emergency or permanent declaration to protect an Aboriginal Site from destruction or damage;
  - c. specific provisions limiting comments which may be made by PKKP about a Key Approval Application, including specifically prohibiting comments which indicate that the PKKP People oppose, do not support, or have not been adequately consulted by RTIO about, the Key Approval Application<sup>145</sup>;

<sup>143</sup> See CWPA clauses 11.9 (b)/(c), 11.10(b)(i)(C)/(c)(i).

<sup>144</sup> CWPA, clauses 11.10 (b)(v)/(c)(v).

<sup>145</sup> Ibid, clause 28.6.



- d. provisions prohibiting the making of adverse public comments e.g. in relation to Agreed Acts, Key Approval Applications or (more generally) in relation to RTIO's Pilbara Iron Ore Business;<sup>146</sup>
- e. provisions which prohibit the PKKP People and PKKPAC from encouraging or assisting others to take any of these prohibited steps or actions;<sup>147</sup>
- f. confidentiality provisions<sup>148</sup> which render confidential any information about RTIOs 'Pilbara Iron Ore Business' – which expression is very broadly defined;<sup>149</sup>
- g. the requirement of the CWPA that each individual member and each new member of PKKP individually ratify and adopt these obligations;<sup>150</sup>
- h. under Clause 32 of the CWPA (suspension and forfeiture of payments), in the event of a Default Event (defined as a 'breach by any member of the PKKP People of any of their obligations under [the CWPA] and which in RTIO's reasonable opinion is likely to cause or contribute to ... a material delay or impediment in the Grant to RTIO or another RTIO Entity of an RTIO Title... or ... a material adverse impact on RTIO's Pilbara Iron Ore Business') and of a failure to remedy to RTIO's reasonable satisfaction, RTIO may suspend the making of further royalty and related payments. There is also the potential for forfeiture of payments which have already been made; and
- i. there are 16 Areas reserved in schedule 16 to the CWPA which are 'of especially high cultural significance to the PKKP People'.<sup>151</sup> Clause 11 is modified in relation to these Areas such that, whilst the PKKP People agree to the Grant of Interests in relation to them, there is no agreement to the 'doing of any Ground Disturbing Activity' within them, unless otherwise agreed. However, there is no provision in the CWPA which allows for additional Rights Reserved Areas, as a result limiting those areas to Areas identified for inclusion in schedule 16 in March 2011.

442. In light of the Juukan Gorge disaster, PKKP is also very concerned about various provisions of the Regional Framework Deed (RFD), a deed which establishes Rio Tinto's Pilbara-wide 'Standards' in relation to various matters including cultural heritage management. Under the RFD Rio Tinto gives different types of 'commitments' which have varying levels of enforceability. By and large, Rio Tinto's commitments are largely unenforceable and subject to the caveat of 'practicability', which is defined under the RFD as being Rio Tinto, acting reasonable, considers practicable, taking into account various factors. The views of the relevant Aboriginal

<sup>146</sup> Ibid, clause 11.10 (b)(ii)/(c)(ii).

<sup>147</sup> Ibid, clauses 11.10 (b)(vi)/(c)(vi)).

<sup>148</sup> Ibid, clause 42.3.

<sup>149</sup> Ibid, clause 11.6.

<sup>150</sup> Ibid, clauses 8.4 / 7.2 (b). The terms of the Ratification Deed are set out in Schedule 4 to the CWPA.

<sup>151</sup> Ibid, clause 12.

group are one factor that Rio Tinto must take into account. Operational and business objectives are another. The RFD's limits on Rio Tinto's consultation obligations undermines the requirement for Rio Tinto to take into account the views of relevant Aboriginal groups. Absent any power to say no, the Cultural Heritage Management Standard is no more than token.

443. As Rio Tinto indicated in its submission<sup>152</sup>, the ILUA between Rio Tinto and PKKP mirrors certain clauses of the CWP. In particular, it provides PKKP consent to 'and support of the parts for Rio Tinto's Iron Ore Business within the agreement area' including consent to any necessary approvals for the impact and destruction of any Aboriginal heritage places.

444. The view which appears to underlie this regime is that Aboriginal heritage and Aboriginal heritage protection rights are commodities that can be traded off or forfeited in return for royalties.

445. This is made clear in clause 28.6 of the CWP – the plain English version - which reads:

*'the PKKP People have under this agreement given their consent to aspects of RTIO's Pilbara Iron Ore Business in return for things such as the Mining Benefit Payments and the opportunity to participate in a Regional Framework.*

*Because of that, the PKKP People can't make comments that would make someone reading those comments think that the PKKP People do not agree to RTIO's activities.*

*RTIO appreciates that it is not in all circumstances culturally appropriate for the PKKP People to say they agree to the destruction of their cultural heritage. This clause therefore permits the PKKP People to make comments about the importance of cultural heritage and the environment and its significance – provided those comments are not read as meaning that PKKP People oppose RTIO's development'.*

446. PKKP wishes to make it clear to the resource industry that:

- Aboriginal heritage and Aboriginal heritage protection rights are not a commodity to be traded off;
- whilst particular Traditional Owners may speak for particular Country, they do not own the heritage. They are the custodians of the heritage for all Traditional Owners and of all Australians; and
- one of the paramount traditional and religious obligations of a traditional owner is to celebrate and protect that heritage

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<sup>152</sup> Rio Tinto Submissions [114].

447. Thus, it is wrong and highly offensive for the resource industry to negotiate with Traditional Owners on the basis that they contract out of their traditional rights and obligations to protect heritage and out of their legal rights to protect it.
448. There are many examples under Australian law of legislation which forbids a party from contracting out of their legal rights.<sup>153</sup>
449. Professor Langton's comments in her submission are apposite:
- 'Rio Tinto has little regard for the spirit of the agreement that establishes a partnership with the Traditional Owners';<sup>154</sup>
  - 'Part of the process of mending that relationship [the severely damaged relationship between Rio Tinto and Traditional Owners post Marandoo] was negotiating the very agreement under which the Juukan caves were destroyed';<sup>155</sup> and
  - A 'deliberate breach of trust with the native title parties'.<sup>156</sup>
450. Rio Tinto at para 36 of its submission asserts that:
- 'Rio Tinto's BIA of 2006 and its Participation Agreement executed with the PKKP in 2011, were aimed at accounting for and formalising Traditional Owners' rights to an extent greater than their recognition under Australian law, including the right to manage cultural heritage.'*
451. PKKP is at a complete loss to see how a Participation Agreement with very heavy confidentiality restrictions and which prevents the PKKP Traditional Owners from exercising their limited statutory rights to prevent the destruction of Aboriginal heritage is 'formalising Traditional Owners' rights to an extent greater than their recognition under Australian law'.
452. Thus, PKKP contends a complete re-negotiation of the CWPA, RFD and ILUA between Rio Tinto and PKKP is required.

## Access to Country

453. Since mining operations commenced in 2010, PKKP Traditional Owners have found accessing their land in the areas surrounding Rio Tinto's operations to be increasingly difficult.

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<sup>153</sup> *Insurance Contract Act 1984* (Cth), section 52; *Rail Safety National Law 2015* (WA), section 262; *Credit Act 1984* (WA), section 157; *Construction Contracts Act 2004* (WA), section 53; *Return to Work Act 2014* (SA) section 191; *Court Security and Custodial Services Act 1999* (WA) section 46.

<sup>154</sup> Professor Langton, Submission no. 103 to this Inquiry, page 2.

<sup>155</sup> *Ibid*, 3.

<sup>156</sup> *Ibid*, 5.

454. In modern times, Traditional Owners have accessed their country freely via tracks. However, mining companies including Rio Tinto have erected fences and locked gates to prevent access to their tenements and pastoral leases, which has restricted Traditional Owner access to large parts of country including areas extending well beyond those companies' mining activities. This has led to the situation where native title holders with native title and/or statutory rights to access their land must obtain a mining company's consent and assistance to do so.
455. Since 2015 it has become virtually impossible for the Traditional Owners (and PKK PAC staff) to access culturally significant land in the vicinity of the Brockman 4 mine.

### Best Practice

456. It is well established that effective engagement with Aboriginal persons is a key element of the social licence to operate for business and industry. In 2007 this became a de facto obligation when the United Nations adopted the Declaration on the Rights of Aboriginal Peoples.<sup>157</sup> This Declaration, coupled with the United Nations Universal Declaration on Human Rights, led to the production of the United Nations Guiding Principles on Business and Human Rights<sup>158</sup> in 2011. Since then we have seen the business sector, especially the investing and financial sector adopting practices which support the concept of Free, Prior and Informed Consent, which is core to the Declaration on the rights of Aboriginal people.
457. The United Nations Global Compact was launched in 2000 as a voluntary initiative for companies to align their strategies and operations with universal principles on human rights, labour, environment and anti-corruption. Rio Tinto was a founding signatory to the UN Global Compact.
458. In 2014 the UN Global Compact released a Good Practice Note on 'Aboriginal Peoples' Rights and the Role of Free, Prior and Informed Consent'.<sup>159</sup> This practice note reinforces the fundamental relationship between universal human rights and Free, Prior and Informed Consent for Aboriginal peoples. In essence, it summarises Free, Prior and Informed Consent as follows:

#### *Free*

- Involvement in the process which is free from coercion and manipulation

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<sup>157</sup> Resolution adopted by the General Assembly on 13 September 2007, 61/295. United Nations Declaration on the Rights of Aboriginal Peoples.

<sup>158</sup> *United Nations Guiding Principles on Business and Human Rights*, OHCHR, 2011.

<sup>159</sup> Aboriginal Peoples' Rights and the Role of Free, Prior and Informed consent, A Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labour Working Group on 20 February 2014.

- Allowing sufficient time for the engagement process to occur, so that Aboriginal communities do not feel rushed, or believe that the process was window-dressing
- Clear articulation that the community is free to reject a project
- A commitment not to pursue the project without consent

#### *Prior*

- Consent should occur before a government gives a concession, and before commercial activities commence
- consent should protect the substantive rights of Aboriginal peoples, including the right to self-determination, cultural life, heritage and livelihoods
- Consent should not only be given at the start of a project, but that it must be obtained prior to major new milestones of a project that present risks relevant to the community

#### *Informed*

- Aboriginal communities should be provided with sufficient information to understand the project and engage in decision-making
- Information must be communicated in a comprehensible manner
- Companies might need to support capacity building for Aboriginal communities so that they better understand the technical aspects of projects, as well as complex legal documents
- Companies should train their own employees and contractors on engagement with Aboriginal communities in order to build a positive and respectful working relationship
- Collaborative approaches to information-gathering support mutual understanding. This can include designing and conducting joint impact assessments and mitigation plans.

#### *Consent*

- In order to obtain consent that is free, prior, and informed, companies must engage in meaningful, good faith consultations
- Consent means agreement to a company activity, not merely consultation
- It should be seen as a formal, documented social license to operate, based on a mutually agreed process that is respectful of Aboriginal peoples' customary decision-making processes

- Companies should work with experts and Aboriginal communities themselves to identify legitimate representative structures and decision-making processes
- Even after a community expresses consent to a project; a company should continue to engage with the community in order to maintain its social licence to operate. A company may also need to later obtain consent for unforeseen and substantial changes to the project
- Mechanisms must be put in place that enable ongoing interactions with communities that keep both sides informed, allows concerns to be addressed and ongoing approvals to be considered

These last two dot points encapsulate critical elements of a best practice future relationship.

459. In translating this into industry specific best practice, the International Council on Mining and Metals (ICMM), of which Rio Tinto is a founding member, has a position statement on Aboriginal Peoples and Mining which aims to achieve '.... constructive relationships between mining and metals companies and Aboriginal Peoples that are based on mutual respect, meaningful engagement, trust and mutual benefit.'<sup>160</sup>
460. The position statement goes on to detail the commitment of member companies to specific processes aimed at ensuring adequate free, prior and informed consent. These are largely aligned in principle with the best practice recommendations of the UN Global Compact, however there is no mechanism to measure compliance nor to determine whether best practice is indeed complied with. As such, it is recommended that an industry wide protocol, with adequate processes, safeguards, monitoring and compliance mechanisms be considered to supplement legislation and to strengthen the relationship between the mining sector and Aboriginal peoples.
461. There are other international standards and Conventions which govern relationships between corporate entities and Aboriginal groups. These standards and Conventions have been developed in recognition of the significant socio-economic challenges to which virtually all Aboriginal groups have been subjected.
462. These standards include:
- a. the United Nations Declaration on the Rights of Aboriginal Peoples (UNDRIP);
  - b. the International Labour Organization Aboriginal and Tribal Peoples Convention, 1989 (ILO 169); and
  - c. the International Finance Corporation's Performance Standard 7: Aboriginal Peoples.

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<sup>160</sup> Aboriginal Peoples and Mining Position Statement, International Council on Mining and Metals, May 2013

463. As a global extractive corporation, Rio Tinto is aware of these external standards, and like many other mining operators, has developed internal standards that were intended to ensure compliance with or exceeding of these standards. This represents risk-mitigation on at least two levels: firstly, it ensures global consistency of social risk management. Otherwise, operations in Chile and Brazil, both of which have ratified ILO 169, would need to operate at a higher Aboriginal engagement standard than Australian operations, as Australia has not ratified that convention. Secondly, from a reputational perspective, a consistent best practice approach to engaging Aboriginal peoples is almost a baseline for large-scale extractives. To perform otherwise invites the criticism of investors, activists, communities and governments.
464. Rio Tinto's stated approach in the past has been clear. Its publication 'Why Human Rights Matter' (2013) states that 'we support' the United Nations Declaration on the Rights of Aboriginal Peoples' (p.23), and that Rio Tinto's projects are required to achieve Free, Prior and Informed Consent (FPIC) as per the IFC guidance (p.23).
465. Rio Tinto's 'Standard - Communities and Social Performance', states that:
- 'In relation to Aboriginal peoples, businesses must:*
- a) *operate in a manner consistent with the UN Declaration of the Rights of Aboriginal Peoples (UNDRIP) in those jurisdictions that have signed the Declaration, and elsewhere consistent with the Declaration's principles;*
  - b) *strive to achieve the Free, Prior, and Informed Consent (FPIC) of affected Aboriginal communities as defined in the IFC PS 7 on 'Aboriginal Peoples'; (p.5).*
466. The consequence for Rio Tinto is that non-compliance with its self-developed standards represents a clear breach of its undertakings to the market and to its shareholders.
467. As the Traditional Owners of the land on which Rio Tinto is mining PKKP needs to be regarded by Rio Tinto as its most important stake holder.
468. As this submission demonstrates, Rio Tinto has fallen a long way short in its understanding and application of and adherence to these principles. The crucial challenge for Rio Tinto and other mining and resource companies is to honestly and transparently admit to its mistakes and learn from them. Nothing short of the development and maintenance of a best practice relationship for the future will suffice.

## CONCLUDING COMMENT

469. The Juukan Gorge disaster has wrought incalculable cultural loss, pain and distress upon the PKKP Traditional Owners – from which it is impossible to fully recover.
470. In spite of our pain, we are committed to work with stakeholders, including Rio Tinto and our other mining partners, to build a positive legacy of best practice engagement from the rubble of the Juukan Gorge disaster. We have consistently demonstrated this through our words and actions since the disaster occurred. Best practice engagement should include, as a minimum, policy, legislative and corporate behavioural change, aimed at always valuing Aboriginal heritage at its true worth to humankind. It should also include finding ways to celebrate this heritage and ensure its value is preserved for future generations – a truly sustainable approach.
471. We will work with Rio Tinto to rebuild our partnership whilst creating a new future built on mutual respect and shared values. This will include the recovery and rehabilitation of the destroyed sites, the establishment of enduring mechanisms for the protection of our shared heritage, a fundamental review of all current agreements, improved liaison and communications processes and the establishment of facilities and institutions aimed at preserving and celebrating Aboriginal culture, values and heritage. We will encourage the other mining companies that PKKP deals with, to follow this lead.



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## APPENDICES

### APPENDIX 1: CHRONOLOGY OF EVENTS FROM OCTOBER 2019 LEADING UP TO THE JUUKAN GORGE DISASTER

Date	Event
28 October 2019	LIC committee members visit Purlykuti cultural sites and Juukan Gorge and reiterate the archaeological and cultural significance of the rockshelters.  Rio Tinto confirm no plans to mine Juukan Gorge.
24 and 28 February 2020	PKKPAC Culture and Heritage Unit participate in helicopter surveys of Rio Tinto's Brockman Syncline tenements to identify sites important to the PKKP.
4 March 2020	PKKPAC request a site visit to the Juukan Gorge as part of NAIDOC week.
13 March 2020	Dr Builth advises Rio Tinto that PKKPAC intend to seek to protect Juukan Gorge pursuant to the EP Act. Rio Tinto encourage Dr Builth to nominate the places most important to PKKP.
20 March 2020	PKKP email Rio Tinto Anthropologist Daniel Bruckner's draft social surroundings preliminary advice, identifying Purlykuti and Juukan 1 and Juukan 2 as of high significance to PKKP.
20 April 2020	Daniel Bruckner issues final social surroundings preliminary advice to Rio Tinto, again identifying Purlykuti and Juukan 1 and Juukan 2 as of high significance to PKKP, and recommending further consultation, recording and mapping.
29 April 2020	Dr Builth advises Rio Tinto that she has additional sensitive ethnographic evidence concerning the Juukan rockshelters that had not been included in previous reports.
29 April 2020	Rio Tinto confirm by email Dr Builth's advice that she has additional ethnographic evidence concerning the Juukan rockshelters that had not been included in previous reports.
13 May 2020	Rio Tinto loads 226 blast holes at the site (RS 209).
14 May 2020	PKKPAC makes second request to visit the Juukan Gorge as part of NAIDOC week and reminds Rio Tinto of the existence of additional ethnographic evidence concerning the Juukan rockshelters.

15 May 2020	Rio Tinto advises PKKP that blasting is scheduled to take place on <b>17 May 2020</b> . A request to hold the blast has been made but 'the holes have been drilled and the shot placed' (RS 216 and 217).
15 May 2020 (afternoon)	Rio Tinto re-schedules the blast to <b>Wednesday 20 May 2020</b> (RS 216 and 224).
16 May 2020	Rio Tinto loads a further 62 blast holes at the site but does not inform PKKP (RS 209).
17 May 2020	Rio Tinto asks PKKP to provide the foreshadowed additional sensitive ethnographic information concerning Juukan Gorge so that it can consider whether to call off the blast.
17 May 2020	Rio Tinto loads a further 72 blast holes at the site but does not inform PKKP.
18 May 2020	PKKPAC emails Rio Tinto reiterating the significance of the Juukan Gorge area and provides additional ethnographic information, as requested.
19 May 2020	PKKPAC instructs its solicitors.
19 May 2020	Rio Tinto loads a further 22 blast holes at the site but does not inform PKKP (RS 209).
19 May 2020 (midday)	PKKPAC requests suspension of the blast for at least a further 48 hours to allow PKKP to review its options.
19 May 2020 (afternoon)	Rio Tinto denies PKKPAC's request and the deadline of <b>1pm on Wednesday 20 May 2020</b> is confirmed (RS 226).
19 May 2020 (evening)	PKKP repeats request for an extension of time, foreshadows section 9 Application and engagement of independent expert.
19 May 2020	Rio Tinto identifies that it does not have a section 18 consent over three additional heritage sites, but does not inform PKKPAC (RS 228).
20 May 2020	The solicitors for PKKP, Johnston Withers, make enquiries regarding seeking an emergency declaration pursuant to section 9 of the <i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i>

	(Cth).
20 May 2020	PKKP engage an independent mining safety expert to advise on possible options blast to save the ancient rockshelters.
20 May 2020	PKKP's expert seeks further information from Rio Tinto before providing PKKP with its concluded views.
20 May 2020	PKKP follows up Rio Tinto re PKKP's expert's request for further information.
20 May 2020	Rio Tinto agrees to defer the blast for 48 hours until <b>Friday 22 May 2020</b> but does not tell PKKP about the three additional heritage sites without Section 18 Consent.
21 May 2020	PKKP follow up Rio Tinto re PKKP's expert's request for further information.
21 May 2020	With no response from Rio Tinto, PKKP send a further urgent email to Rio Tinto requesting urgent advice on whether it was safe to remove the charges as a matter of urgency.
21 May 2020 (morning)	Rio Tinto engages an independent blast consultant to advise it on mitigation of the effect of blast on the three additional heritage sites without s 18 approval. PKKP is not informed (RS 235).
21 May 2020 (morning)	Rio Tinto's minutes of a meeting held at 10:30am on 21 May 2020 record that 'no preventable action was possible' to save the rockshelters and that solicitors are briefed to prepare for any injunction brought by PKKP to stop the blast.
21 May 2020 (afternoon)	Rio Tinto's independent blast consultant advises Rio Tinto on potential mitigation options to minimise the impact of the blast on the three additional heritage sites. PKKP is not informed of this.
21 May 2020 (afternoon)	Rio Tinto delay blast to <b>Saturday 23 May 2020</b> (RS 234). PKKP is not informed of the reason.
21 May 2020 (evening)	Rio Tinto asks its blast consultant to provide further advice in relation to unloading the entire blast site (RS 239).
22 May 2020	Rio Tinto says it concludes it is not feasible to remove the shot from the holes to protect Juukan 1 and Juukan 2 but that steps should be explored to unload the shot to protect the additional three heritage

	sites (RS 241, 242 and 243).
22 May 2020	Rio Tinto provides PKKP's expert with the answers to his requests and advises that the blast cannot be unloaded due to the unacceptable safety risk.
23 May 2020	Rio Tinto unloaded seven of the blast holes to mitigate the loss of the three additional heritage places (RS 244).  PKKPAC was not informed.
23 May 2020 (morning)	PKKPAC representatives and PKKPAC's C & H Manager met with Rio Tinto and were advised that work was being done to minimise the impact of the blast on the rockshelters.
24 May 2020	Rio fires the blast and destroys the rockshelters at Juukan 1 and Juukan 2.

## APPENDIX 2: SUMMARY OF ARCHAEOLOGICAL & ETHNOGRAPHIC INFORMATION AND SURVEYS<sup>161</sup>

	Report	Finding	Date
1	Gavin Jackson 2003 Preliminary archaeological advice	Recommendations include the acknowledgment of the existence of the rockshelters, and that these locations should be avoided	Received by Hamersley Iron Pty Ltd on 4 July 2003
2	Robin Stevens 2003 Ethnographic Report	'The majority of sites recorded...were rockshelters, containing...scatter of stone artefacts or associated grinding' 'Mr David McDonald assured survey team that all sites identified...would be avoided during the drilling program'	May 2003
3	Jackson and Fry 2004 Report	The rockshelter area divided and named by Rio Tinto as Brock 20 and Brock 21 are recommended to be avoided as they are 'assessed as having moderate to high degree' of archaeological significance	May 2004
4	David Howard 2007 Ethnographic Report	'If Hamersley Iron wish to disturb, or work in close proximity to, any of the sites within the surveyed area then further consultation should occur with the appropriate PKKP team' 'Pilbara Iron's Aboriginal Training and Liaison Department, on behalf of Hamersley Iron Pty Ltd, maintain[s] discussions with the PKKP claimant group regarding any further matters that may arise in relation to these areas, including any further proposed work or access to uncleared portions of the tenement'	March 2007
5	Scarp 2008 Archaeological report	'Grinding stones are common in rockshelters and provide evidence of food processing and other activities' 'The location of one wooden bowl in the immediate areas has been forwarded to Ed Clarke [RTIO Heritage Advisor]' 'It was not part of this brief to make recommendations about salvage of artefacts' 'Further recording for the rockshelters is required'	March 2008
6	Williams 2008 Preliminary Ethnographic advice	Rockshelters assessed as having 'moderate to high' archaeological significance, with a recommendation for further testing and consultation with the PKKP before a submission to the ACMC for a section 18	23 April 2008
7	Williams 2008 Report	'author had limited experience with PKKP and was provided with little to no time for prior research due to RTIO's restrictive time frames' 'Purlykuti ceremonial dancing and law ground' found close to creek, very significant to PKK but secret/sacred knowledge due to gender based knowledge 'insufficient information to make any further statements' due to the vague and secret nature of the Purlykuti site	September 2008

<sup>161</sup> Based on information currently available.

8	Scarp 2008 Report	<p>'all of the sites recorded in Gavin &amp; Fry 2007 report lie outside the present proposed mine and infrastructure footprint'</p> <p>The rockshelters in question are recorded as having high archaeological significance, with a myriad of artefacts including charcoal, bone and ironstone and chert materials.</p> <p>Carbon dating places the rockshelter site at 22,000 BP (before present years)</p>	October 2008
9	Williams 2008 Expansion of Project Report	<p>Report aimed at providing further information of the heritage sites now listed as within the designated mine pit and waste dump due to an expansion of the mine plan.</p> <p>It is worth noting that although limited results and information were available to Williams during her previous survey due to gender-based restrictions on sharing knowledge, RTIO and PNTS still selected her to compile more information about the sites. This report was the final consultation and advice for the section 18 process.</p>	December 2008
10	Builth 2013 Preliminary Ethnographic advice	<p>Further excavation requested for the rockshelters, with the Scarp 2008 report not reaching bed-rock and only excavating a 1m x 1m area within the cavernous rockshelter.</p> <p>Further requests by PKK for more surveys to take place as less than half of the proposed mine area within the Juukan valley had been surveyed. Builth notes a need to document other culturally relevant features including the 'snake rockhole'.</p>	24 June 2013
11	Builth 2013 Ethnographic report	<p>PKKP requested that more extensive survey coverage of the Juukan valley, and the rockshelters, be conducted and 'all possible cultural heritage places recorded prior to the present landscape destruction'. This was highlighted as a concern by Stevens in 2003, with there not having been a 100% survey of the area.</p>	30 July 2013
12	Geddes 2013 Heritage Report of PKKP Ethnographic work program clearance heritage survey	<p>'All DAA sites and RRA in the vicinity have been mapped by RTIO'</p> <p>'on the available information gathered during the survey...consultants did not identify any new ethnographic sites or heritage places'</p>	November 2013
13	Geddes 2014 Ethnographic site identification survey and section 18 consultation report	<p>The Purlykuti region has significance as a travel route and strategic gateway to PKK country, as stated in Builth's 2013 and Williams 2008 report. This 'makes the Purlykuti absolutely unique and of high significance'.</p> <p>'Purlykuti is of value to [Western Australian] state heritage in that it in multiple ways demonstrates the cultural heritage, religious practice, and land use patterns of Aboriginal people in the Pilbara'. This place</p>	February 2014



		reveals this Aboriginal community's 'intimate knowledge' of their country, and should be preserved.	
14	Scarp 2014 Preliminary Archaeological Advice	First Salvage (Juukan 2) Deposit at Juukan 2 was highly significant.	May-June 2014
15	Scarp 2014 Preliminary Archaeological Advice	Second salvage (Juukan 1 and Juukan 2) Brock-20: over 3000 flaked stone artefacts recorded, over 50 artefacts recovered below 'what we now interpret to be the start of LGM' 'it is possible with further excavations that the site may significantly challenge conventional interpretations of Pleistocene tool kits' 'also recovered ...was a backed artefact with the chord covered in spinifex resins'	July 2014
16	Scarp 2014 Preliminary Archaeological Advice	Brock -21: Over 2000 flaked stone artefacts recovered, and 240 artefacts recovered below the 22 000 BP level during excavations. Further excavation needed 'to attempt to recover any further hair specimens'	August 2014
17	Draft Cultural Heritage Management Plan (CHMP)	For Brockman 4. Provided to YMAC. Juukan 2 contained highly significant deposit and faunal remains that were outstanding and unprecedented.	November 2014
18	Poster summarising findings at Juukan 1 and Juukan 2 presented at conferences	Significance of Juukan 1 and Juukan 2. Juukan 2 dated 43,000 years.	December 2014
19	Vaughan & Geddes 2015 Ethnographic Report for section 18 consultation report	Evidence and testimony from PKKP consultants of the 'spiritual associations between the group and the group's ancestors, understood and manifested through Purlykuti as a result of the site's location, relationship to known travel routes, rich archaeology, and the associated community and cultural activities (past and present) undertaken [here]'	May 2015
20	Morgan 2017 Ethnographic Report	'it is advised that there were no ethnographic places or heritage values in the vicinity of the proposed mine development works AR-16-13773 & AR-15-13599B at Brockman 4'	March 2017
21	Morgan 2017 s 16 & 18 consultation report	'it is advised that the rockshelter...may satisfy s 5B of AHA' as it is surmised to be a place where meat was stored and consumed and there is evidence of an Aboriginal cultural practice of storing meat at a traditional storage place	March 2017
22	Version 1 of CHMP provided to PKKPAC	Juukan 2 dated 43,000 years. Juukan 2 is a key heritage site.	November 2017

23	Morgan 2018 ethnographic report for s 18 consent	Lists Purlykuti as not registered, after Builth's report requests that it be registered.	May 2018
24	Dr Slack presents Juukan 1 and Juukan 2 excavation findings to Southern Deserts Conference	Juukan 2 situated in culturally significant complex.	10 August 2018
25	Dr Slack presents Juukan 1 and Juukan 2 excavation findings to National Conference	Juukan 2 situated in culturally significant complex.	November 2018
26	Scarp 2018 Archaeological Report	Rockshelter complex dated to have been used from about 46,000 years ago, and used up until recent times, hair belt dated to about 4000 years ago, grinding stone dated to 30,000 years ago. This information was shared at LIC meetings in 2014.	31 December 2018
27	Bruckner first preliminary advice	Following survey for the purposes of environmental approvals conducted in late February and noting the high importance of Juukan 1 and Juukan 2 to PKK traditional owners.	March 2020
28	Bruckner second preliminary advice	Following survey for the purposes of environmental approvals conducted in late February and noting the high importance of Juukan 1 and Juukan 2 to PKK traditional owners.	April 2020
29	PKKP 2020 Implementation Plan	47,000 year old rock shelter	6 May 2020
30	Dr Builth Further Report	Extreme cultural and scientific significance of Juukan 1 and Juukan 2	18 May 2020

### APPENDIX 3: CASE STUDY – PURLYKUTI

#### ‘Protection’ of sites at Purlykuti – a case study

This case study demonstrates the deficiencies in the application of the *Aboriginal Heritage Act 1972* and an eagerness within government to accommodate the demands of the resource and mining industry.

Purlykuti is area of importance and significance to the Puutu Kunti Kurrama (PKK) people and has been identified in numerous surveys commissioned by Rio Tinto dating back to 2008. The site is a complex place with many elements present, including an ethno-geographical feature, named place and sacred, historical, archaeological and resource place and likely camp. The site is named after a creek where it passes through a Gorge forming a gap in the range that allows north to south access between important areas and travel routes in PKK country.

The boundary of the Purlykuti site was first delineated by Geddes in 2014. This survey report states that the boundary of the place is defined by the creek itself and the hills and Gorge on either side of the creek that form the pass through the range, and includes a camping area along the creek. The survey team stated that the Juukan rockshelters should also be considered a part of the Purlykuti site, however these had already subject to Section 18 consent in 2013. See **Figure 7** below.

The Geddes report states that ‘*Purlykuti meets the criteria for a site under Section 5 (a), 5(b) and 5(c) of the Act*’. However, it is ultimately the opinion of the ACMC which will inform an assessment as to whether an area is or is not a site for the purposes of the AHA.

The Purlykuti site was formally reported to the former Department of Aboriginal Affairs by Rio Tinto at 1.44pm on 14 August 2014. Less than 20 minutes later Rio Tinto submitted a Section 18 notice for exploration and mining purposes in respect of a discrete area on the eastern side of the site. In accordance with the established process of places subject to a s18 notice being prioritised for assessment, one would expect that the ACMC would have then undertaken such an exercise.

However, that is not what happened.

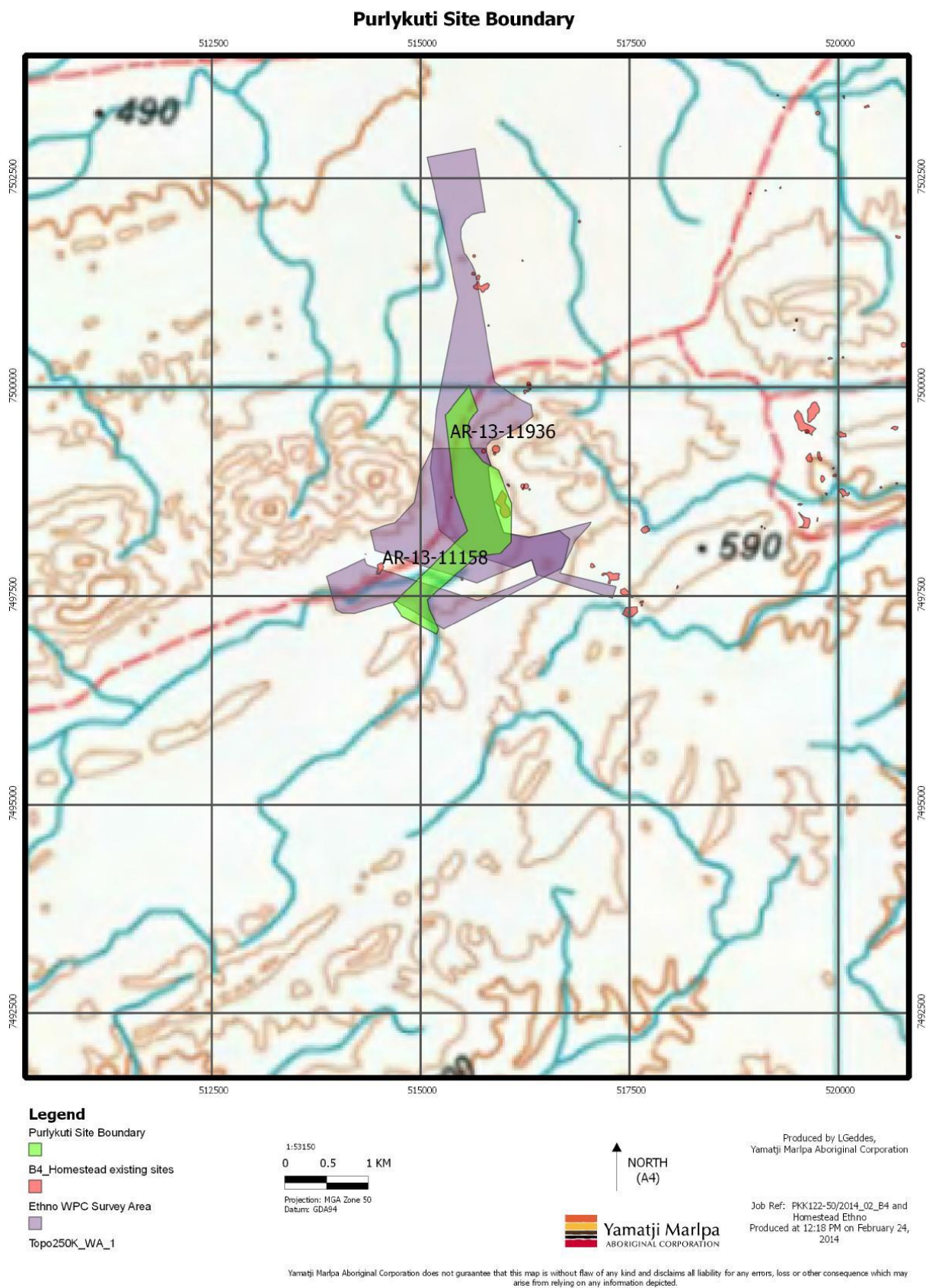
Inquiries with the DPLH since the Juukan incident have confirmed the existence of a previous but now redundant DAA policy whereby the ACMC would assess only the affected parts of Aboriginal places when considering a s18 notice. In other words, only discrete portions of potential heritage sites, as defined by the developer, would be assessed in isolation to determine whether they met the criteria for protection under the AHA. It is contended that such an approach is contrary to the objectives of the Act.

In accordance with this policy the eastern portion of the Purlykuti site subject to Rio Tinto's s18 notice was assessed by the ACMC in 2014 and determined to be 'Not a Site'. The remaining portion of Purlykuti was then later assessed in 2015 and determined to be a 'Registered Site'. Importantly these completely opposite conclusions were reached with reference to the same referral information.

The result of this policy, in respect of Purlykuti, is shown in **Figure 8** below.

Rio Tinto subsequently sought and received a number of s18 consents in relation to that portion of Purlykuti that the ACMC considered to be a 'Registered Site'.

The result is confusion and uncertainty for all parties. Whilst the former DAA policy of assessing site portions no longer applies, the effects of it do. Advice from the DPLH is that the Purlykuti situation is by no means an isolated incident.



**Figure 7: Purlykuti (area in green), as recorded by Geddes (2014)**



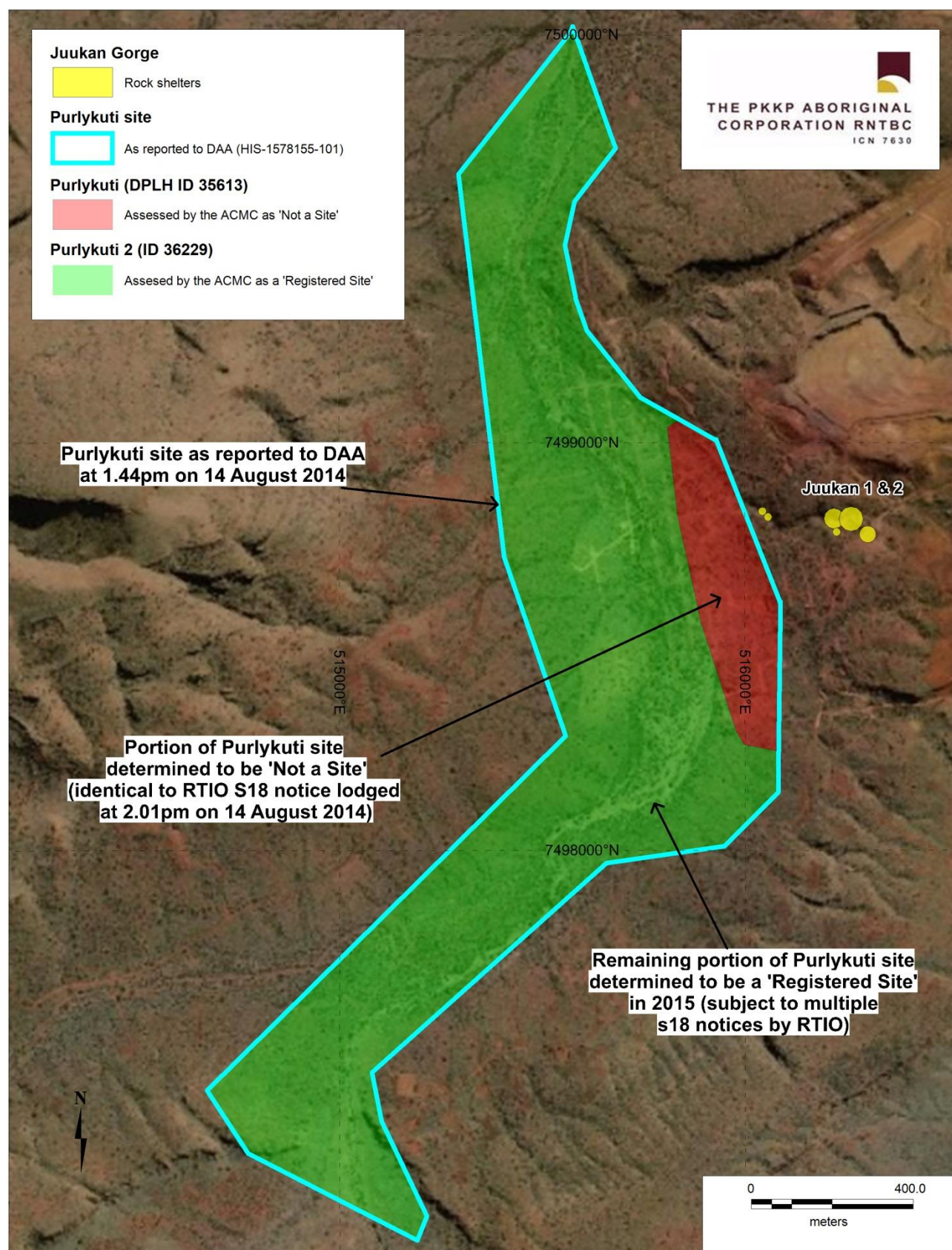


Figure 8: ACMC assessment of Purlykuti

#### APPENDIX 4: TABLE OF ADMISSIONS BY RIO TINTO

	Admission	Reference
1	Rio failed to meet own internal standards	Rio Tinto subs (4)
2	Various opportunities were missed to re-evaluate the mine plan in light of new material information	Rio Tinto subs (16)
3	From 2020, several opportunities were missed to assess whether agreed plan of <i>ex situ</i> preservation was sufficient	Rio Tinto subs (17)
4	Incorrect information provided in the Heritage Information Submission Form. Juukan 2 Heritage form included information about Juukan1 instead of correct information related to Juukan 2	Rio Tinto subs (133)
5	Land on which J 1 and J2 located fell outside the clearing footprint in MS 717 approval granted in 2006	Rio Tinto subs (158)
6	Rio could have communicated to PKKP the precise timing of the execution of the mine plan in Oct/Nov 2019	Rio Tinto subs (189)
7	No response was given to Dr Heather Builtth concerning mine plan and rockshelters after LIC in 28 Oct 2019	Rio Tinto subs (194)
8	In the case of the Juukan 1 and Juukan 2 rockshelters, processes and interactions designed to facilitate the preservation of heritage sites of exceptional archaeological and cultural significance failed to prevent their destruction	L'Estrange Review (4)
9	14 July 2014 LIC: Rio report that following a salvage excavation trip between 26 May 2014 and 5 June 2014, radiocarbon testing has been performed at Juukan 2 and came back with 43 000 years	L'Estrange Review, page 9
10	22 April 2020: Escalation by Rio Heritage officer to managers of potential operational implications of the findings regarding areas including Purlykuti, Juukan 1 and Juukan 2 in Social Surroundings report	L'Estrange Review, page 10
11	In May 2020, Rio failed to meet some of its own internal Standards and procedures in relation to the responsible management and protection of cultural heritage. Some decisions taken and judgements made at different points in time over a long period lacked contextual awareness. Linked-up decision-making was lacking at critical points. Some dimensions of governance and oversight needed more rigour. Aspects of inclusive work culture needed to be stronger. Means of escalating unresolved issues to more senior leaders were not always accessible or utilised. There was an inflexibility in processes and systems to accommodate material new information in appropriate ways	L'Estrange Review (21)

12	With more widely informed judgement and more consultation, the 2013 mine design for Pit 1 at Brockman 4 might have preserved the option to protect the Juukan 1 and Juukan 2 rock shelters, pending the further surveys undertaken in 2014 to establish more clearly the heritage significance of these sites.	L'Estrange Review
13	A review of that mine design decision should have been initiated taking into account a full risk assessment of heritage and social risks, including the risks associated with destruction of the Juukan rockshelters. It appears that such a review did not take place in ways that aligned with our standards and internal guidance, which suggests that heritage considerations were not accorded the priority they deserved in the mine planning decision process.	L'Estrange Review (28)
14	Furthermore, the advice given to the PKKP at the LIC meeting in March 2013, and thereafter, did not give the full context of the mine design options considered by Rio Tinto in relation to the Brockman 4 Pit 1 development and implications for the Juukan 1 and Juukan 2 rockshelters	L'Estrange Review (29)
15	From excavations by Dr Builth in July and September 2013, and the preliminary archaeological reports of Dr Slack in 2014, important new knowledge and understanding were gained about the Juukan Gorge area that was not available at the time that the decision in relation to the Brockman 4 Pit 1 mine design was made in early 2013. In particular, one of Dr Slack's preliminary reports in 2014 identified the Juukan 2 rockshelter as 'one of the most archaeologically significant sites in Australia	L'Estrange Review (30)
16	This material new information that came to light after the 2013 mine design decision was made should have led to a re-consideration and adjustment of the decision. It is deeply regrettable that this did not occur.	L'Estrange Review (31)
17	In addition, in early 2020 Dr Bruckner's Social Surroundings report added further knowledge about additional locations of high cultural significance in the Juukan Gorge.	L'Estrange Review (33)
18	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 rockshelters. It should have been co-ordinated at appropriately senior levels from areas within Rio Tinto responsible for communities, heritage, mine planning and mine operations	L'Estrange Review (34)



19	The fact that this did not occur reflects shortfalls in linked-up decision-making within the Rio Tinto organisation, and standards of governance and accountability, which call into question aspects of the work culture and priorities at Brockman 4. It also reflects shortfalls in the management of our partnership with the PKKP, including on issues related to Rio Tinto's goal (set out in its Communities and Social Performance Standard) to 'strive to achieve Free, Prior and Informed Consent ( <i>FPIC</i> ) of affected Indigenous Communities as defined in IFC PS7 on 'Indigenous peoples'.	Rio Heritage Review (35)
20	The impact of the Brockman 4 mine development on the Juukan Gorge area called for close interaction and responsiveness among those groups within Rio Tinto responsible for heritage and communities management and those engaged in mine planning and mine operations. At critical points following the granting of the section 18 consent in December 2013 and the salvage operations conducted at the Juukan 1 and Juukan 2 rockshelters in 2014, this interaction and responsiveness should have been more effective and cohesive. This included the period immediately leading up to the blasts that destroyed the Juukan 1 and Juukan 2 rockshelters in May 2020	L'Estrange Review (36)
21	In particular, there was insufficient flexibility in our operating procedures in terms of responding to material new information about the cultural heritage significance of the Juukan Gorge area reflected in the reports of Dr Builth in July and September 2013 and the preliminary archaeological reports of Dr Slack in 2014.	L'Estrange Review (37)
22	Nonetheless, after the section 18 consent had been granted in December 2013, and after confirmation had been received from the archaeologists working on the site in 2014 that, as agreed with the PKKP, all heritage artefacts had been salvaged at the Juukan 1 and Juukan 2 rockshelters, active management or assessment of the site from a cultural heritage perspective was no longer regarded as required. This view neglected the reality that cultural heritage sites for which required approvals had been granted and all agreed mitigation and salvage work completed are not necessarily 'low risk' and that there are situations in which cultural heritage issues evolve in ways that require them to be reassessed, as indeed was the case at the Juukan Gorge from 2014.	L'Estrange Review (38)
23	Over recent years, the Communities function (and Heritage in particular) have been challenged by the work demands placed upon them from business units; they have been too siloed in their operations; and they have been insufficiently integrated into Iron Ore's strategic planning and project management decision-making.	L'Estrange Review (39)
24	With changes in personnel over the years, knowledge and awareness of the location and significance of the Juukan rockshelters among operating and senior management were lost.	L'Estrange Review (40)

25	This defect in the information management system was symptomatic of a work culture that was more focused on ensuring that necessary approvals and consents were in place for ground disturbance of culturally significant sites, rather than also managing changing cultural heritage issues that could arise on sites where authorisation and consents for ground disturbance had previously been obtained	L'Estrange Review (41)
26	Aside from a mention of the significance of the sites made in a speech by the CEO of Rio Tinto Iron Ore in 2014, and a request for funding for further salvage of the sites directed to Rio Tinto Iron Ore senior management also in 2014, it does not appear that the material new information was escalated any higher than mine general manager level. The first escalation to members of the Rio Tinto Iron Ore Senior Leadership Team took place on 18 May 2020.	L'Estrange Review (45)
27	<p>In the months leading up to the blasts affecting the Juukan rockshelters in May 2020, the effectiveness of the engagement between Rio Tinto and the PKKP appeared to diminish.</p> <p>There were broader trends apparent over this period. Lines of communication became blurred. Flows of information were not always clear and timely. Informal interactions suggesting evolving views within the PKKP about the significance not only of the Juukan 1 and Juukan 2 rockshelters but other sites in the Juukan Gorge were not followed up in a formal way nor escalated to appropriately senior levels within the Rio Tinto organisation. Stronger indications of changing perceptions (as reflected in Dr Bruckner's Social Surroundings survey and reports in early 2020) were not assessed as a matter of urgency at the appropriate level of seniority within Rio Tinto in order to clarify the implications for the PKKP's attitude to the imminent impact of mine operations on the Juukan 1 and Juukan 2 rockshelters. Furthermore, although there was clearly an awareness within the PKKP that the impact was imminent, the precise timing of the blasting that would impact the Juukan 1 and Juukan 2 rockshelters was not conveyed to them with the clarity and advance notice that it warranted.</p>	L'Estrange Review (48)
28	A more explicit engagement by Rio Tinto with the PKKP on the implications of the new knowledge, especially in terms of its ongoing consent to the impacts on the Juukan 1 and Juukan 2 rockshelters that had been foreshadowed for a long time, would have resulted in better alignment with Rio Tinto's FPIC aspiration.	L'Estrange Review (51)
29	<p>There are additional initiatives on which we need to consult with the PKKP in terms of enhancing our relationship and restoring a situation in which the PKKP see themselves as genuine partners in the Brockman mine project.</p> <p>(i) We need to liaise actively with the PKKP on, and commit</p>	L'Estrange Review (55)

	<p>our practical support to, the establishment of a Keeping Place under PKKP control and on PKKP country for the remains, artefacts and other items salvaged from the Juukan 1 and Juukan 2 rockshelters.</p> <p>(ii) Rio Tinto needs to upgrade its engagement with the LIC that was established under the PA as a central point of interaction and co-operation</p> <p>(iii) Rio Tinto should also continue to explore new employment and business opportunities with the PKKP.</p>	
30	As part of re-building its partnership with the PKKP, Rio Tinto would welcome consultations with them on the terms of our 2011 PA in relation to consent	L'Estrange Review (56)
31	Rio Tinto would welcome discussions with the PKKP to introduce greater flexibility into the PA to respond better to material new information that may emerge about cultural heritage sites of exceptional archaeological and cultural significance.	L'Estrange Review (57)
32	It is critically important for Rio Tinto Iron Ore, and for Rio Tinto as an organisation, to learn the lessons from what happened over a long period of time in the lead-up to the destruction of the Juukan rockshelters in terms of strengthening a work culture that is inclusive and integrated, one that focuses as much on cultural heritage and the environment as it does on production, efficiency and safety.	L'Estrange Review (59)
33	Rio Tinto needs to fulfil both the letter and the spirit of the benchmarks and aspirations for cultural heritage management that it sets for itself.	L'Estrange Review (60)
34	<p>To achieve more rigorous Communities and Heritage risk assessments that are connected more seamlessly:</p> <p>(i) The layers of assurance within the Rio Tinto organisation in relation to heritage risk management need to be strengthened:</p> <ul style="list-style-type: none"> <li>• The first line of assurance at operational levels needs to be more attuned to the wider context of emerging risks as well as to compliance with established risk management processes</li> <li>• The second line of assurance on heritage risk management needs to be enhanced by ensuring that the new Social Performance function applies the same rigour in assuring conformance to Heritage Standards</li> </ul> <p>Salvage operations have been completed, ongoing review of that site's heritage status continues to be required, and will need to be elevated in decision-making as required.</p>	L'Estrange Review (66)

	The Communities function, and Heritage in particular, need more effective workforce management and better resourcing with enhanced in-house expertise and improved talent development, career-planning and recognition of Heritage professionals	
35	<p>First-line responsibility and accountability for Traditional Owner engagement and management of cultural heritage issues need to be more clearly defined and integrated with line management at operational sites, as well as at the Product Group CEO level. This should be reflected in the organisational design, and in particular in relation to the lines of reporting.</p> <p>The Heritage function, in particular, needs to be more empowered in Rio Tinto Iron Ore project decision-making. Its voice needs to be heard more clearly and its perspectives addressed more directly at senior levels of the Rio Tinto Iron Ore operating system and Executive management.</p>	L'Estrange Review (67)
36	<p>To achieve these objectives, change is needed in a range of areas:</p> <ul style="list-style-type: none"> <li>(i) The establishment of a Social Performance function, as described in paragraph 63, which will be aligned with Health, Safety and Environment to standardise auditing and assurance in relation to consistency</li> <li>(ii) Within the Product Groups, the Communities function (and Heritage especially) need to be more effectively embedded and integrated into business units generally</li> <li>(iii) Responsibility for the understanding and management of heritage and community priorities sits explicitly with the leadership of our assets and operations with a clear escalation path through to the Product Group CEO's as well as the head of Social Performance function</li> <li>(iv) General Managers, working closely with Communities and Heritage officers at mine sites, need to be deeply engaged with, and explicitly</li> <li>(v) Responsible for, the management of relationships with Traditional Owners on whose country they operate,</li> <li>(iv) Processes for escalating unresolved heritage issues to more senior decision-making levels need to be clearly established and facilitated by senior management</li> <li>(v) Heritage data needs to be more visible to mine planners and operators, including data relevant to heritage sites</li> </ul>	L'Estrange Review (68)
37	Since the destruction of the Juukan 1 and Juukan 2 rockshelters in	L'Estrange

	<p>May 2020, Rio Tinto Iron Ore has instituted an enhanced level of governance over the impact on sites of heritage significance</p> <p>All approvals to disturb sites directly or indirectly are being made on a risk-managed basis at Rio Tinto Iron Ore Chief Executive level or through the recently established Heritage Sub-Committee of the Rio Tinto Executive Committee.</p> <p>These are important governance changes that need to be complemented by others:</p> <ul style="list-style-type: none"> <li>(i) The governance of mine planning processes needs to be reviewed and clarified</li> <li>(ii) Threshold decisions on or changes to mine design, planning and operations affecting cultural heritage sites of high significance, irrespective of their status in terms of authorisation for ground disturbance, need to be referred to the Rio Tinto Iron Ore Senior Leadership Team.</li> </ul>	Review (69)
38	<p>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 ability to rebuild that trust and to move forward to implement the changes identified in the Board Review.</p>	Rio Tinto Media Release, 11 September 2020



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## MEDIA RELEASE

### APPENDIX 5: 25 MAY 2020 PRESS RELEASE

May 25, 2020

#### **Ancient deep-time rockshelters believed destroyed in Pilbara mining blast, calls for greater flexibility to retain sites**

Two ancient deep-time rockshelters dated with evidence of human occupation over 46,000 years ago are believed to have been decimated after a mining blast in the Pilbara – an act that has distressed the Puutu Kunti Kurrama and Pinikura people.

Yesterday, Rio Tinto detonated charges in an area of the Juukan Gorge, about 60km north west of Mt Tom Price, as part of its mining operations.

The tenements fall within a Native Title claim awarded in 2015.

Authorisation was granted by the Minister for Aboriginal Affairs in 2013 under Section 18 of the Aboriginal Heritage Act (1972) permitting Rio Tinto to conduct excavation, destruction or damage to these Aboriginal sites. The blast occurred as part of mining operations performed in accordance with these approvals and related consents.

But since the authorisation, archaeological research has revealed highly significant ancient artefacts found in two rockshelters at the site, with some known to date back 20,000 years before the last Ice Age. The sites are also of substantial ethnographic significance.

Preliminary testing was conducted on the site in 2008 and salvage excavations were undertaken in 2014, led by archaeologist Dr Michael Slack.

Of the seven sites identified in the project area, two of the three archaeological sites were rated as being of 'high archaeological significance' and four of the five rockshelters were recommended for further salvage excavations, which are yet to occur. Excavations were conducted at two rockshelters, including Juukan 2.

Juukan 2, which was part of the area blasted on Sunday along with Juukan 1, is an Aboriginal archaeological site in the west Hamersley Plateau, which research shows Aboriginal people first occupied more than 46,000 years ago. Few early dates for the plateau have exceeded 30,000 years.

During the 2014 excavation, several significant artefacts were uncovered, including grinding and pounding stones, which represent the earliest use of grindstone technology in the Pilbara and a macropod fibula believed to date back approximately 28,000 years ago. The bone had been sharpened into a pointed tool.

In addition, hair dating back 4000 years was recovered from the excavations. The plaited hair led experts to believe it was part of a 'hair belt' worn by the PKKP Traditional Owners.

Puutu Kunti Kurrama Land Committee Chair John Ashburton said the 2014 excavation, staged in three short trips, had uncovered artefacts of extreme importance, which put the area among the most significant research sites in the Australia.

'This is one of the earliest, if not the earliest, sites in the upland Pilbara and is part of a rich landscape of places in the area that have not been studied in depth,' Mr Ashburton said.

'There are less than a handful of known Aboriginal sites in Australia that are as old as this one and we know from archaeological studies that it is one of the earliest occupied locations not only on the western Hamersley Plateau, but also in the Pilbara and nationally. Its importance cannot be underestimated.'

Mr Ashburton said the PKKP people were frustrated by a rigid regulatory system that does not consider important new information, such as the archaeological finds in the Juukan Gorge, once a Section 18 notice is granted.

'We recognise that Rio Tinto has complied with its legal obligations, but we are gravely concerned at the inflexibility of the regulatory system which does not recognise the importance of such significant archaeological discoveries within the Juukan Gorge once the Minister has given consent.

'We are now working with Rio Tinto to safeguard the remaining rockshelters in the Juukan Gorge and ensure open communication between all stakeholders.'

The Puutu Kunti Kurrama and Pinikura Aboriginal Corporation, after requesting future access to the site, was first advised on May 15 of Rio Tinto's activities to blast the gorge in close proximity to the rockshelters;

and that explosive charges had already been laid. PKKPAC attempted to negotiate with the mining company to stop the blast, or at least limit damage to the rockshelters.



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Independent technical advice sought by the PKKPAC last week found the site was irretrievable because the charges could not safely be removed. Left unfired, it would be a safety risk.

‘Our people are deeply troubled and saddened by the destruction of these rockshelters and are grieving the loss of connection to our ancestors as well as our land,’ Mr Ashburton said.

‘Losing these rockshelters is a devastating blow to the PKKP Traditional Owners.’

Dr Slack, who undertook the 2014 excavation and is due to have a paper published internationally about Juukan 2 this year, said the significance of the Juukan Gorge could not be overstated.

‘The excavations at Juukan 2 provides new insights to the lifeways of the earliest human populations that inhabited the interior of the western Hamersley Plateau,’ the report by Slack et. al. 2020 (in prep) states.

‘The archaeological assemblage illustrates the diversity and complexity of late Pleistocene toolkits... The bone, charcoal, and other organics preserved in the deepest levels of the site have also changed our understanding of the use of early technologies, particularly of the timing of bone tool and grindstone technology in northwest Australia.

‘The site has also featured plaited human hair, identified as part of a human hair belt. It yielded DNA associated with the contemporary PKKP, further confirming this distinct culture.

‘The bone point appears to be one of the oldest examples of bone technology in Australia with ochre residues. Finally, the grinding stone is one of the oldest examples of this technology known in Australia and supports the arguments for early seed grinding established by Field et al. (2006) and Clarkson et al. (2017).’

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