



Submission to the Joint Standing Committee on Northern
Australia into the destruction of 46,000 year old caves at the
Juukan Gorge in the Pilbara region of Western Australia

14 August 2020

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Human Rights Law Centre

The Human Rights Law Centre (HRLC) is a not-for-profit legal centre which uses a combination of legal action, policy solutions and advocacy to promote and protect human rights in Australia and in Australian activities overseas.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the un-ceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation and demand justice for First Nations peoples.

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Note on language

The use of the term 'Aboriginal' in this submission refers to both Aboriginal and Torres Strait Islander people, children and young people. The terms 'First Nations' and 'Indigenous' are also used in particular contexts to reflect the language being used by Aboriginal organisations working in particular spaces.

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14 August 2020

Dear Committee Members,

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

Thank you for the opportunity to provide a submission into this important inquiry.

The Human Rights Law Centre (HRLC) is a not-for-profit legal centre which uses a combination of legal action, policy solutions and advocacy to promote and protect human rights in Australia and in Australian activities overseas. We work with Aboriginal and Torres Strait Islander partners to address racial injustice and uphold the rights of First Nations' people right to self-determination. We also seek to ensure that Australian companies respect and uphold human rights standards, both within Australia and in their overseas operations.

We have previously engaged with Rio Tinto about the company's human rights record, particularly in relation to serious, ongoing impacts on communities' health, safety and cultural heritage caused by pollution from the company's former Panguna mine in Bougainville, Papua New Guinea, and refer the Committee to the report we released about those impacts in March this year, just prior to the company's destruction of the Juukan Gorge caves.¹

Like many across Australia, we were appalled and deeply saddened to learn of the company's destruction of Juukan Gorge in May. The destruction of such an important site has been devastating in particular for the Puutu, Kunti Kurrama and Pinikura (PKKP) Traditional Land Owners and Aboriginal and Torres Strait Islander communities and has deprived the world of a uniquely valuable cultural heritage site. The destruction has rightly attracted international condemnation, and calls for a thorough examination of the company's actions and the broader legal and political framework that allowed this to happen.

The Human Rights Law Centre's submission relates to the following paragraphs of the Inquiry's terms of reference:

¹ Human Right Law Centre, 'After The Mine: Living with Rio Tinto's deadly legacy', (April 2020) available at <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5e7d7cce47c7f816da86005f/1585282297310/AfterTheMineRioTintoDeadlyLegacy.pdf>.

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(c) the sequence of events and decision-making process undertaken by Rio Tinto that led to the destruction;

(g) the effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions;

(h) how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites; and

(i) any other related matters.

(c) the sequence of events and decision-making process undertaken by Rio Tinto that led to the destruction

The Human Rights Law Centre cannot comment in any detail on the consultation process Rio Tinto engaged in with the PKKP in relation to the Juukan Gorge site or the internal company decisions which ultimately led to the detonation of the site.

We note, however, that based on the public evidence so far presented to this Inquiry, including by Rio Tinto's own senior executives, that there appear to have been serious failures by the company to apply the human rights standards to which it claims to be committed.

Rio Tinto holds itself out as a global leader on human rights and cultural heritage. It has publicly committed to abiding by the United Nations Guiding Principles on Business and Human Rights (UNGPs)² and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),³ and claims to apply these principles across every operation and throughout its business, irrespective of whether it is legally required to do so.⁴

The UNGPs require companies to respect human rights, to avoid causing or contributing to adverse human rights impacts and to addressing such impacts when they occur.⁵ They also require companies to proactively undertake due diligence to identify and assess actual or potential human rights impacts that could be caused by their activities and take appropriate action to prevent or mitigate those impacts.⁶

² Rio Tinto, 'Human Rights', available at <http://www.riotinto.com/ourcommitment/human-rights-24289.aspx>.

³ Rio Tinto, 'Why Human Rights Matter' (January 2013), available at: <https://www.riotinto.com/-/media/Content/Documents/Sustainability/Corporate-policies/RT-Why-human-rights-matter-EN.pdf> p 23.

⁴ Rio Tinto, 'Human Rights', available at <http://www.riotinto.com/ourcommitment/human-rights-24289.aspx>. In its guide, 'Why human rights matter', Rio Tinto acknowledges and claims, 'We seek to reach agreement with each community on how it wants to engage with us in the development and performance of our operations in their social landscape... We recognise that this sometimes means we cannot explore certain lands or develop some projects, even if legally permitted to do so...'. Rio Tinto, 'Why Human Rights Matter' (January 2013), available at: <https://www.riotinto.com/-/media/Content/Documents/Sustainability/Corporate-policies/RT-Why-human-rights-matter-EN.pdf> pp 23-24.

⁵ UNGP, Principle 13.

⁶ Ibid, Principle 17.

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The UNDRIP is the most comprehensive international instrument for the advancement of the collective and individual rights of Indigenous peoples. The key relevant provisions are set out below:

- Article 8 (1): Indigenous peoples and individuals have the right not to be subjected to forced assimilation or **destruction of their culture**.
- Article 11 (1): Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes **the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature**.
- Article 12(1): Indigenous peoples have **the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites**; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
- Article 25 (1): Indigenous peoples have the **right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard**.
- Article 31(1): Indigenous peoples have the right to **maintain, control, protect and develop their cultural heritage**.
- Article 32(2): States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to **obtain their free and informed consent** prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

These principles should have informed and guided Rio Tinto's decision making and engagement with Traditional Owners in respect of the Juukan Gorge site.

Based on the evidence presented to this Inquiry to date, however, it is apparent that they did not. The admission by Rio Tinto's CEO, Mr Jean-Sebastien Jacques in his evidence to the Inquiry on 7 August 2020 that there were, in fact, several other options for the development of the mine which could have safeguarded the site, but that the company only told the Traditional Owners about the option that included detonation, is particularly damning and indicates a profound disregard for the principle of Free, Prior and Informed Consent.⁷

⁷ Karen Michelmore, 'Rio Tinto didn't tell traditional owners there was options to save ancient Juukan Gorge rock shelters' ABC (online) 9 August 2020, <https://www.abc.net.au/news/2020-08-07/rio-tinto-had-options-to-save->

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Our own work with indigenous communities impacted by Rio Tinto's legacy of mine waste pollution on Bougainville, and evidence from human rights organisations monitoring the impacts of the company's operations elsewhere, suggests that the corporate failures that led to the destruction of Juukan Gorge were not an aberration. Internationally, Rio Tinto has in recent years been the subject of complaints relating community safety, human rights and environmental impacts associated with operations in Guinea, Mongolia, West Papua, Namibia, Madagascar and New Zealand.⁸

We understand that Rio Tinto is currently undertaking its own internal review into the Juukan Gorge destruction with "a focus on recommending improvement to the effectiveness of its internal processes and governance".⁹ While an internal review is clearly necessary, the manner in which it is being undertaken has been heavily criticised for its perceived lack of independence, transparency and involvement of Traditional Owners.¹⁰

In these circumstances, the work of this Inquiry in providing a public examination of the decisions and failures which led to the destruction of the site is critical and we urge the Committee to take a broad approach to its consideration of this issue that includes a focus on systemic and structural issues that may have underpinned the decisions that led to the destruction.

[juukan-gorge-rock-shelters/12534092](#); Calla Wahlquist, 'Rio Tinto did not tell traditional owners blowing up Juukan Gorge site was just one option for mine' *The Guardian* (online) 7 August 2020, <https://www.theguardian.com/australia-news/2020/aug/07/rio-tinto-did-not-tell-traditional-owners-blowing-up-juukan-gorge-site-was-just-one-option-for-mine>; Tom Stayner, 'Rio Tinto did not tell traditional owners alternatives to blowing up sacred Juukan Gorge' *SBS news* (online) 8 August 2020, <https://www.sbs.com.au/news/rio-tinto-did-not-tell-traditional-owners-alternatives-to-blowing-up-sacred-juukan-gorge>.

⁸ See, Human Rights Law Centre, 'After the mine: Living with Rio Tinto's deadly legacy' <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5e7d7c7f816da86005f/1585282297310/AfterTheMineRioTintoDeadlyLegacy.pdf>; London Mining Network, 'Cut and Run: How Britain's top two mining companies have wrecked ecosystems without being held to account' (February 2020) <https://londonminingnetwork.org/wp-content/uploads/2020/02/EMBARGOED-Cut-and-run.-How-Britains-top-two-mining-companies-have-wrecked-ecosystems.pdf>; SOMO, 'Undermining Mongolia: Corporate hold development trajectory' (February 2020) <https://www.somo.nl/wp-content/uploads/2020/02/Undermining-Mongolia-EN.pdf>; Dan Oakes, 'Mine joint-owned by Australian mining giant Rio Tinto is polluting community in Guinea, villagers say' *ABC News* (Online) 12 November 2019, <https://www.abc.net.au/news/2019-11-12/villagers-in-guinea-say-australian-part-owned-mine-polluting/11685412>; John Vidal, 'Uranium workers dying after time at Namibia mine, report warns' *The Guardian* (Online) 14 April 2014, <https://www.theguardian.com/environment/2014/apr/15/uranium-workers-dying-cancer-rio-tinto-namibia-mine>; Andrew Lees Trust, 'ALT UK's inquiry into the violation of an environmental buffer zone by Rio Tinto's QMM mine in southern Madagascar' (24 May 2019) <http://www.andrewleestrust.org/blog/?p=1395>; AAP, 'New Zealand threatens to sue Rio Tinto after floods threatened toxic waste' *The Guardian* (online) 13 February 2020, <https://www.theguardian.com/world/2020/feb/13/new-zealand-threatens-to-sue-rio-tinto-after-floods-threatened-toxic-waste>.

⁹ Rio Tinto, 'Rio Tinto announces details of board-led heritage process review' (Media Release) 19 June 2020, <https://www.riotinto.com/en/news/releases/2020/Rio-Tinto-announces-details-of-board-led-heritage-process-review>.

¹⁰ Professor Marcia Langton AO, who was approached by Rio Tinto to participate in the review but declined, later commented in an article in the *Australian Financial Review* on 22 July 2020 that "There was no clear commitment from them to involving the Aboriginal Traditional Owners in the inquiry. There was no clear commitment to transparency in the inquiry, no commitment to publishing the report. And I was not convinced from what they said to me that [they] would enable an independent reviewer to see all of the relevant documents – that is, I felt that there was too much evidence that [their] cultural heritage reports on significant Aboriginal sacred sites in the Pilbara have been buried, suppressed, never made public". Joe Aston, 'Marcia Langton eviscerates Rio Tinto' *Australian Financial Review* (online) 22 July 2020, <https://www.afr.com/rear-window/marcia-langton-eviscerates-rio-tinto-20200722-p55ehg>.

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(g) the effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions

The destruction of Juukan Gorge has also starkly highlighted the inadequacy of Australia's legal framework for the protection of cultural heritage rights.

In particular, the destruction has exposed serious problems with the operation of the *Aboriginal Heritage Act 1972 (WA)*. As noted in several submissions to this Inquiry (and acknowledged by the Western Australian Government which is shortly proposing to introduce new draft legislation),¹¹ the current Western Australian Act is seriously outdated and flawed in key respects. Particularly concerning is the fact that the Act does not require the participation of Traditional Owners in decisions relating to their own cultural heritage. Nor is there an avenue for appeal for Aboriginal people in relation to decisions about their cultural heritage (contrary to developers' rights of appeal).¹²

This has created a situation where, since July 2010, mining companies have reportedly submitted more than 460 applications to disturb or destroy sites of potential cultural significance in the region with only one application rejected.¹³ The consistent exercise of ministerial discretion in favour of mining companies in Western Australia suggests, as Original Power has noted, "a regulatory system that operates to facilitate mining, rather than to protect Aboriginal cultural heritage".¹⁴

Since the Juukan Gorge destruction, concerns have been raised about threats to a number of other highly significant cultural heritage sites which are currently the subject of Section 18 applications by mining companies, including the Weelumurra Caves near the Solomon iron ore hub operated by Fortescue Metals Group (FMG) and dozens of sites significant to the Banjima people close to BHP's South Flank Mine development.¹⁵

The Human Rights Law Centre **endorses** the position of the National Native Title Council (NNTC) and other Aboriginal and Torres Strait Islander organisations that the *Aboriginal Heritage Act 1972 (WA)* should be repealed and replaced with new, stronger cultural heritage protection legislation based on the principles of self-determination and Free, Prior and Informed Consent enshrined in the UNDRIP. We welcome the moves by the Western Australian Government to introduce new draft legislation

¹¹ Submission 034 pp 6-7; Submission 036 pp 8-9; Submission 087 p 14; Western Australian Department of Land and Heritage, 'Review of the Aboriginal Heritage Act 1972' <https://www.dplh.wa.gov.au/aha-review>.

¹² *Aboriginal Heritage Act 1972 (WA)* s 18(5). See also, Western Australia government, 'Review of the Aboriginal Heritage Act 1972 (WA): Proposals for new legislation to recognise, protect and celebrate Western Australia's Aboriginal Heritage (Discussion Paper, March 2019) accessed at <https://www.dplh.wa.gov.au/getmedia/ab8c0b4a-7941-4b31-aa89-658b74c976ad/AH-Review-AHA-discussion> p 6.

¹³ Melanie Burton and Jonathan Barrett, 'Mining Australia's sacred sites', *Reuters Graphics* (online) 9 July 2020, <https://graphics.reuters.com/AUSTRALIA-MINING/INDIGENOUS/oakpearaepr/>.

¹⁴ Submission 064, p 2.

¹⁵ Eliza Borrello and Emily Plesse, 'Fears of another Juukan Gorge as concerns raised over Pilbara rock caves near FMG mine' *ABC News* (online) 6 June 2020, <https://www.abc.net.au/news/2020-06-06/fears-another-juukan-gorge-at-pilbara-rock-caves-near-fmg-mine/12327778>; Brad Thompson, 'BHP under fire in new row over Aboriginal site destruction' *Australian Financial Review* (online) 11 June 2020, <https://www.afr.com/companies/mining/bhp-under-fire-in-new-row-over-aboriginal-site-destruction-20200611-p5511c>.

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shortly. Until that happens, we believe there should be a moratorium on approvals for the destruction of further cultural heritage sites by mining companies.¹⁶

This problem is not confined to Western Australia, however. The NSW Aboriginal Land Council notes, for example, in its submission that in the first half of 2020, the NSW Government approved approximately four Aboriginal Heritage Impact Permits (AHIPs) for the destruction of Aboriginal cultural heritage every week.¹⁷ The NNTC notes that this situation is repeated, to varying degrees, across all states and territories.¹⁸

There is a clear need for Australia's cultural heritage laws to be strengthened at the national level. As the NNTC has pointed out, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) currently only protects the very limited number of places or objects deemed of "national environmental significance" and listed on either the National Heritage List or the Commonwealth Heritage List, both of which impose extremely high thresholds.¹⁹

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act) operates as a protection of "last resort", enabling the Commonwealth Minister of Environment to make a declaration to protect a site from serious or immediate threats of damage, on application from a Aboriginal person, where there is no State or Territory law to protect that site or object.²⁰ Reviews of the ATSIHP Act have underscored that, here too, there are very low rates of protection, with a 2017 report noting that of 61 applications for protection made under the Act between 2011 and 2016, no declarations for protection were made.²¹

(h) how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites

We concur with the assessment of the NNTC and other Aboriginal organisations that have given evidence to this Inquiry that the current regulatory framework is failing Aboriginal and Torres Strait Islander communities and that there is a strong need for the development of a national framework for the protection of cultural heritage that incorporates the principles set out in the UNDRIP (most notably, the principles of self-determination and participation in decision-making based on free, prior and informed consent), as well as offering meaningful remedies where cultural heritage is damaged.

The Human Rights Law Centre **endorses** the NNTC's proposal that the Commonwealth Government create a national cultural heritage protection framework national cultural heritage protection

¹⁶ Although there were calls for the the Western Australia government to impose a moratorium on section 18 approvals, WA Aboriginal Affairs Minister Ben Wyatt rejected these calls, stating "We won't be doing a moratorium because I think that would simply cease activity, whether it be Main Roads activity, for example, that doesn't have any contention, or even just local governments putting in work around rivers and creeks." Hannah Sinclair and Karen Michelmore, *ABC News* (online) 4 June 2020, <https://www.abc.net.au/news/2020-06-04/wa-rules-out-further-protections-for-aboriginal-heritage-sites/12319768>.

¹⁷ Submission 041, p 4.

¹⁸ Submission 034, p 6.

¹⁹ Ibid pp 7-8; See also *Environment Protection and Biodiversity Conservation Act 1999* (Cth) pt 3 div 1.

²⁰ Ibid p 6.

²¹ Submission 034, p 8 citing Richard Mackay, *Australia State of the Environment 2016 – Heritage*, Commonwealth of Australia, Canberra 2017, 84.

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framework, based on the '*Best Practice National Standards in Indigenous Cultural Heritage Management and Legislation*' developed by Indigenous members for the Australian Heritage Council (AHC) and Heritage Chairs and Officials of Australian and New Zealand (HCOANZ), in consultation with the NNTC and the Victorian Aboriginal Heritage Council.²²

The Best Practice Standards, as the NNTC explains in its submission, seek to enshrine the principles of self-determination and free, prior and informed consent set out in the UNDRIP. The standards provide among other things, for blanket protections for indigenous cultural heritage subject only to authorisations granted with the consent of affected Indigenous communities, explicit recognition for the status of Traditional Owners and the requirement for indigenous cultural heritage to be integrated at the earliest stage of development processes to give affected indigenous communities adequate time and information to consider potential impacts to cultural heritage. In our view, a national framework based on these principles would help to ensure genuine representation, inclusion and empowerment of Traditional Owners in decisions and proposals that affect their cultural heritage.²³

(j) any other related matters

In addition to strengthening Australia's framework for the protection of cultural heritage, the Human Rights Law Centre also **recommends** that the Commonwealth Government considers the introduction of broader human rights due diligence obligations for large Australian companies, like mining companies, operating in high-risk sectors or locations, as has been introduced in a number of European jurisdictions.²⁴ Requiring companies to take proactive steps to identify potential human rights impacts early could prevent serious violations, such as those arising from the destruction of Juukan Gorge, from occurring in the first place.

It is already widely accepted that Australian companies should be required to undertake due diligence on the environmental impacts of their activities and submit environmental impact assessments outlining the likely impacts of a proposed project and identifying options to minimise environmental damage.²⁵

Human rights due diligence, similarly, would require companies to "know and show" what they are doing to prevent and mitigate potential human rights violations, including potential infringements of cultural heritage. It requires companies to take proactive steps to develop an ongoing process for assessing actual and potential human rights impacts arising from their activities and business

²² Submission 029, Appendix A.

²³ Submission 034, pp 11-13.

²⁴ See, eg, Duty of Vigilance in France; Legislative Decree no.231/2001 in Italy. We also note that on 29 April this year the European Commissioner for Justice announced that he will introduce legislation on mandatory environmental and human rights due diligence in 2021. Business and Human Rights Resource Centre, 'Towards Mandatory Human Rights Due Diligence' <https://www.business-humanrights.org/en/about-us/blog/towards-mandatory-human-rights-due-diligence>.

²⁵ For example, at the Federal level, under chapter 4 of the EPBC Act, a person who proposes to take an action that will have, or is likely to have, a significant impact on a matter of national environmental significance must refer that action to the minister for a decision on whether assessment or approval is needed under the Act. A referral requires the person proposing to take the action and includes a brief description of the proposal, the project location, the nature and extent of any potential impacts, and any proposed mitigation measures.

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relationships, to take action to mitigate those risks and to track and report publicly on the actions they are taking in response.

The Human Rights Law Centre would be pleased to provide further information to the Committee on request.