

FOURTH SUPPLEMENTARY SUBMISSION OF THE PUUTU KUNTI KURRAMA PEOPLE AND PINIKURA PEOPLE (PKKP) – 9 APRIL 2021

1. This Supplementary Submission is made following the provision of answers by the WA Registrar of Aboriginal Sites, Tanya Butler, to questions put to her by Committee members in the course of her evidence given on 20 November 2020. These answers were not provided to the Committee until about 16 March 2021 and have been designated Submission 152 by the Committee.
2. In the course of considering Ms Butler's answers and her 20 November evidence PKKP also considered the evidence given by the WA Minister of Aboriginal Affairs Mr Ben Wyatt on related issues.
3. This Supplementary Submission primarily addresses matters raised by Ms Butler and Minister Wyatt in their evidence and other matters which have come to the attention of PKKP since it made its last submission to the Committee (Submission 129.3).

ASPECTS OF THE REGISTRAR'S AND THE MINISTER'S EVIDENCE TO THE COMMITTEE

A. What did the registrar and the ACMC know about the significance of Juukan 1 and Juukan 2 in December 2013

4. In her 20 November 2020 evidence Ms Butler was asked by the Chairperson whether, as the Registrar of Aboriginal Sites, there were no alarm bells about the imminent destruction of the Juukan rock shelters. Ms Butler said:¹

"The information about the significance of those places came out after the committee had assessed it. The place was assessed as an Aboriginal site at that [Dec 2013 ACMC] meeting but the information about the significance of the site came out after, as part of the s 16 work that was done."

The information that was [inaudible] to the committee at the 2013 meeting was the only information the ACMC had at the time when they were undertaking assessment."

5. The information before the ACMC (Aboriginal Cultural Materials Committee) at its December 2013 meeting, to which Ms Butler was referring, was the

¹ Transcript p 7

information provided to the Registrar by Rio Tinto in support of its s 18 applications in relation to the rock shelters.

6. PKKP understands that Rio Tinto has provided the Committee with all documents it forwarded to the Registrar in support of its s 18 application but on the basis that they are not made available to the public. PKKP understands that Rio Tinto has also provided all of these documents to PKKP.
7. Rio Tinto, in its s18 application attached the following:

Attachment 1 - Consultation Table for the Brockman 4 Mine development

Attachment 2 - EPA Ministerial Statement 717

Attachment 3 - A Certified copy of ML4SA

Attachment 4 - Section 16 permit #430

Map 1: Location map - Brockman 4 Pit One Project - Section 18

Map 2: The Land- Brockman 4 Pit One Project - Section 18

Map 3.1 A and B Brockman 4 Pit One Section 18

Map 4:1 A and B Previous Surveys- Brockman 4 Pit One - Section 18

A CD containing ESRI Shape files of the "Land" and heritage sites

The following heritage survey reports:

Slack, M. and Fillios, M. 2008 Brockman 4 Site Re-Recording and s16 Excavation Program.

Builth, H. 2013 Report for the PKKP Survey: Brockman 4 Pit 1 Ethnographic Site Identification Survey 2013 being YMAC PKK122-45/RTIO 51_B4 Pit1 s18_2013

8. Contrary to the assertion of the Registrar in her evidence, there was very clear information about the significance of the Juukan 1 and Juukan 2 rock shelters in, at least, the Slack and Builth reports provided by Rio Tinto to the Registrar in support of the s 18 application. That information can be summarised as follows.

The Slack Report (also referred to as the Scarp 2008 report)

9. The Scarp 2008 report (*Slack, M. and Fillios, M. 2008 Brockman 4 Site Re-Recording and s16 Excavation Program*) noted in relation to Juukan 1 (Brock 20) that:
- Probing during previous assessment noted that the depth of the deposit to be a minimum of 20 cm in the lower area, and that flaked stone artefacts were common (Scarp 2008).²
 - Given the extensive depth of deposit at this site and the similar nature of the stratigraphy to BROCK-21, three samples of charcoal were submitted for radiocarbon dating. The results of which are presented in Figure 37. The antiquity of the site is amongst the greatest in the region.³
 - The archaeological significance of BROCK-20 is directly related to the dates of the artefacts recovered, the lowest of which is at least 32,000 years old (Appendix 3). Although very few artefacts were recovered from the excavations, the age determinations, which pre-date the LGM and include a near basal date in the period of the first occupation increase the site's significance substantially.
 - Given the size of this site, and the age estimates for human occupation in the immediate valley, BROCK-20 has the potential to yield more information regarding human use of both the local Brockman landscape, and the greater Pilbara region.⁴
 - Brock 20 is assessed with reference to Section 5a of the *Aboriginal Heritage Act* (1972) and in regard of s39 (2c), on the basis of both research potential and representativeness as being of high archaeological significance.⁵
 - It is recommended that if this site is to be impacted in any way that further salvage excavations are completed prior to its destruction.⁶

² p 109

³ p 111

⁴ p 115

⁵ p 115

⁶ p 116

10. The same report noted in relation to Juukan 2 (Brock 21) that:

- A total of 272 flaked stone artefacts were recovered from the BROCK-21 test pit excavation. Artefacts were noted in all but spit 16 of the excavations with the lowest recorded in spit 18 (at a depth of 90 cm) below the lowest age determination of 22,000 years BP.⁷
- Brock 21 is assessed as being of high archaeological significance. Our excavations have indicated that the deposit is of great antiquity and has the potential to be even older. Although we have only presented some initial analysis in this report there is much more refinement that is needed to be done to the analysis of both stone and bone from BROCK-21. There is also the need for a greater sample size. At this early stage of analysis we can definitively show that the BROCK-21 site is assessed with reference to Section 5a of the *Aboriginal Heritage Act* (1972) and in regard of s39 (2c), on the basis of both research potential and representativeness as being of high archaeological significance.⁸
- Our recommendation is that the BROCK-21 site be protected, however if impacts to this area are unavoidable then the site is assessed as requiring extensive salvage excavation prior to any impacts.⁹

The Builth 2013 Report

11. The Builth 2013 report noted that:

- Some of the PKKP representatives who were present during Dr Builth's 2013 survey: Toby Smirke, Angie Cox, Corbett Ashburton, Harold Ashburton, Robert RJ McKay and Angelina Cox had also taken part in some of the previous surveys across this area, with the exception of the initial archaeological survey. They recommended further excavation of Brock 20 and Brock 21 (Juukan 1 and 2 rockshelters) to ascertain the extent of occupation here and the limit of the rock shelter use;¹⁰
- Discussion with the PKKP representatives during the survey and subsequently has verified the high significance of the *Purlikuti* and *Juukan* area here to the group, as supported by the longevity of the rockshelter

⁷ P112

⁸ P129

⁹ P129

¹⁰ Report p 4

occupation here. The proximity of these sites to the *Purlikuti* creek support their significance from an ethnographic perspective. *Purlikuti* is the corridor that people have walked for millennia in order to reach their significant art and archaeology places to the north and south of the range south of Boolgeeda River. Puutu Kunti Kurrama claim it is the very place from where they took their name;¹¹

- PKKP requests that further investigation take place in the form of excavation of the Rockshelter sites, Brock-20 and 21, to extend the existing knowledge of occupation here;¹²
- 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 across the area now proposed for development of a mine (see Map A-3) - it is recommended that further heritage survey take place in surrounding areas to record a number of previously unrecorded cultural material places; and
- That *Purlikuti* be recorded as an ethnographical place of high significance;¹³
- In relation to the seven sites within the present project area:
 - two of the three archaeological sites that are rated as being of “high archaeological significance” by Scarp (2008b) are Brock 20 and Brock 21;
 - four of the five rockshelters recommended for further salvage excavation by Scarp (2008b) are Brock 20, Brock 21 Brock 23 and Brock 24.¹⁴

12. In relation to Juukan 1 (Brock 20) Dr Builth noted:

- Brock-20 was initially recorded in 2003 (Jackson & Fry 2004) and assessed as having moderate to high degree of archaeological significance as it “contained a significant amount of cultural material and may have some potential to yield a stratified cultural deposit”.

¹¹ Report p 4

¹² Report p 4

¹³ Report p 5

¹⁴ Report p 17

- Further archaeological work in the form of salvage excavation was a conditional requirement under the Section 18 consent applied for by RTIO. It was subsequently excavated under a S16 permit by Scarp (2008b) producing a date of occupation extending back to 32,000 years BP. It has consequently been given a high archaeological significance rating and recommended for further excavation.
- The s16 excavation (Scarp 2008) purportedly did not reach bed rock only one 1m by 1m square was excavated within the rock shelter floor. Due to the area of the shelter floor and its capacity for further excavation, it is requested by PKKP that further excavation take place here to ascertain base dates and obtain as much information as is feasible about former occupation here by their ancestors from analysis of more material from this shelter. Salvaged material from this site is to go to Brock 25.

13. In relation to Juukan 2 (Brock 21) Dr Builth noted:

- Brock-21 was initially recorded in 2003 (Jackson & Fry 2004) and assessed as having moderate to high degree of archaeological significance as it “contained a significant amount of cultural material and may have some potential to yield a stratified cultural deposit”.
- Further archaeological work in the form of salvage excavation was a conditional requirement under the Section 18 consent applied for by RTIO. It was subsequently excavated under a S16 permit by Scarp (2008b) producing a date of occupation extending back to 22,000 years BP. It has consequently been given a high archaeological significance rating and recommended for further excavation.
- The s16 excavation (Scarp 2008) purportedly did not reach bed rock and excavated only one 1m by 1m square within the rockshelter floor. Due to the area of the shelter floor and its capacity for further excavation, it was requested by PKKP that further excavation take place to ascertain base dates and obtain as much information as is possible on former occupation here by analysing material from this shelter. Salvaged material from this site is to go to Brock 25.

- Table 6-1: Recommendations for Mitigation of Juukan Cultural Places

Site Name	Site Type	Archaeological Significance	Tested under S16 (Scarp 2008)	Archaeological Recommendations (Scarp 2008)	Ethnographic Recommendations (Builth 2013)
Brock-20	Rockshelter with Artefact Scatter	High	Yes, 1m x 1m test pit (dated to 32,000 years old)	Salvage Excavation	Further Excavation, research & Salvage
Brock-21	Rockshelter with Artefact Scatter	High	Yes, 1m x 1m test pit (dated to 22,000 years old)	Salvage Excavation	Further Excavation, research & Salvage ¹⁵

Purlykuti

14. Dr Builth, for the first time, reported on and explained the archaeological and mythological significance of the Purlykuti site complex to current PKKP traditional owners and how the Juukan 1 and Juukan 2 rockshelters are part of that mythology. She noted:

- The significant *Puutu Kunti Kurruma* location, *Purlykuti*, was identified by Maudie Dowton during the previous Site Identification survey by Williams (2008a:14). She stated unequivocally that *Purlykuti* is not a name for the Boolgeeda River, as stated in the Kurruma language dictionary (Burgman 2006). This is the larger creek that the smaller rocky creek of *Juukan* valley runs west into. This creek named *Purlykuti* runs north-south through the pass in the East-West range south of Boolgeeda. (And also is adjacent to other rock shelters with archaeological features, BS4-07-38, 39, 40, 31 and 42.) This creek was strategic and culturally extremely important for PKKP as it was the entrance to and corridor through the high rugged range called *Ngarlamiju*. The south of this range, which the corridor accesses, is the location of many important and culturally highly significant places (personal communication, H. Ashburton, T. Smirke and RJ McKay. This is where rare and important artworks in the form of engravings exist. This is where impressive blade manufacturing and reduction sites exist. This is the place of the “very very old people”. We

¹⁵ Report p 18

know this to be true from the dates obtained from the *Juukan* rockshelters. This corridor of Purlykuti connects these places to the engraving and art and archaeology of the range north of the Boolgeda (see Built Heritage Solutions 2012). It gives us an understanding and appreciation for the location of the large Artefact Scatter, Brock 25. However, it is much more than that and during our visit the significance of this place to the “old old people” was shared.¹⁶

- The true implication of the naming of the creek which runs through the valley adjacent to the highly significant rockshelters and artefact scatter, which are the subject of our visit, I believe has been underestimated in previous ethnographic surveys and reports. RJ McKay relaying the significance of this place from his nan, Maudie Dowton, told me that *Purlykuti* is so strategic a place, being the gateway to the important places of the old people, that it gave them their name: the *Puutu Kunti*. This information makes this location one of high significance to the PKKP Native Title claimants. The place includes the named creek, the pass, the artefact scatter and the Juukan rockshelters. This information adds to Williams 2008 findings. These revelations from Aunty Maudie Dowton give these archaeological sites a greater depth of meaning and add another cultural dimension to these cultural material places.¹⁷
- Juukan Valley Ethnographic support of the significance of the valley along which six of the seven archaeological sites are located was provided by the PKKP group representatives during our site visit on 13 June. They already knew of the existence of a particular pool and its meaning to them. This place has not previously been recorded as significant in the original archaeological survey (Jackson and Fry 2004) and the reason given was that the place was not visited by those Kurrama members then who knew its full significance. These same representatives lamented the fact that they were not involved in the original archaeological survey which it is claimed was not carried out with sufficient diligence to identify all of the cultural material places in the former project area surveyed in 2003. The pool was identified as a significant spiritual place that was created by a water snake, which still bares 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.¹⁸

¹⁶ Report p 26

¹⁷ Report p 27

¹⁸ Report pp27-28

- This PKKP request is for more extensive survey coverage to ensure that the area is properly assessed and all possible cultural heritage places recorded prior to the present landscape destruction during the proposed Brockman 4 Pit 1 excavation. This present concern has also been previously flagged as an outstanding issue by Stevens (2003:5). He realised that the archaeological and therefore the ethnographic survey coverage may not have been adequate and stated:

“It should be noted that there has not been a 100 percent archaeological survey of the area, and there may be unrecorded archaeological sites which also have ethnographic significance”.

If this recommendation for an additional survey is accepted PKKP would request that the “snake pool” and immediate associated area be recorded for DAA as an ethnographic site.¹⁹

- This information supports the stories that the Traditional Owners tell of this culturally important area, and also supports the need for an acknowledgement of the critical role that has been played by *Purlikuti* by providing not only a direct access route to Vivash Gorge but also providing water and other resources for staying in this place on the way through, as evidenced by Brock-25. Maps A-1 and A-2 show the juxtaposition of the *Purlikuti* creek to Brock-25, and also how it will be impacted by the proposed haul road from the new mine pit in Map A-2. For this reason 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 *Purlikuti* 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.²⁰

¹⁹ Report p-29

²⁰ Report pp29-30

- 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.²¹
 - PKKP requests that further investigation take place in the form of excavation of the Rockshelter sites, Brock-20 and 21, to extend the existing knowledge of occupation here.²²
15. This summary of the information and recommendations from the Scarp and Builth reports, which were provided to the ACMC before its December 2013 meeting, makes it clear that, contrary to the evidence of the Registrar, sufficient was known about the significance of the Juukan 1 and 2 rock shelters at the time the s18 application was considered.
16. However, what is now manifestly clear is that, despite receiving that information and the details of those recommendations, at no stage before the Minister gave his s18 consent to the Juukan rock shelters on 31 December 2013 did the Registrar or the ACMC give the consideration to the Slack and Builth reports which was due to them. Had they done so, the ACMC could not reasonably have recommended to the Minister that s 18 consent be given in relation to Juukan 1 and Juukan 2.

B. The meeting between the Department and PKKP on 19 May 2020.

17. In her evidence on 20 Nov 2020 Ms Butler said that she, with one of her other officers, attended a meeting with PKKP representatives on 19 May which was “about another matter” but there was a question raised by the PKKP representatives on the s 18 process.²³
18. There was no discussion in that meeting about the capacity to access Commonwealth relief and she could not recall any other meeting with PKKP.²⁴
19. In her answers to the questions on notice in March 2021 she said:²⁵

Question

Senator DODSON: Was there any other meeting that that was discussed at?

²¹ Report p 30

²² Report p 31

²³ Transcript p 6

²⁴ Transcript p 6

²⁵ Answer to question 8

Ms Butler: No. Not with me.
Senator DODSON: With anyone else?
Ms Butler: Not that I'm aware of.
Senator DODSON: Were there any other meetings held with the PKKP, outside of the ones that we're talking about?
Ms Butler: Not that I can recall.
Senator DODSON: You might want to take it on notice and just check the record, if you wouldn't mind.

Response

I can confirm that I have not attended any meetings with PKKP representatives other than the 19 May 2020.

20. In his evidence on 7 August Minister Wyatt said:²⁶

Q: Rio told us on 13 May, I think, that they had set those explosives in train, with, in their opinion, no ability to do anything but explode them. Given that the dates you've articulated seem to be around the 19th, or thereabouts, was there any contact with Rio, or indeed the PKKP's people, on this matter, prior to 13 May?

Mr Wyatt: No, we haven't—prior to the 13th, when I guess the detonators for the blast were placed, no, we had no contact from PKKP or, as far as I'm aware, Rio, around that time at all. It was really only well after the blasts were placed that obviously that meeting on 19 May then took place

21. In its first submission to the Committee (Submission 24) the Department said:²⁷

Department representatives met with PKKP advisers on 19 May 2020. No PKKP Traditional Owners were present. The meeting was requested by the advisers in relation to an unrelated matter. Shortly before the meeting, Department staff were informed by the advisers that they wished to also discuss a matter relating to the Brockman mine. At the end of the meeting, the PKKP advisers sought confirmation of their understanding of the Section 18 consent issued for the Brockman mine in 2013, including confirmation that such consents cannot be revoked. Department officers confirmed this was the case.

²⁶ Transcript p 39

²⁷ at p 3

22. In his evidence on 13 October 2020 Minister Wyatt said:²⁸

Senator DODSON: I'll go to the departmental meeting that the PKKP advisers had on 19 May 2020, which is on page 3, I think, of the department's submission. My question is: what advice, if any, was provided to the PKKP advisers about potential avenues to protect the caves at the meeting on 19 May?

Mr Wyatt: I don't have that right in front of me but, from memory, the meeting on 19 May was originally about an unrelated issue to Juukan. At the end of that meeting, a question was asked around what capacity there is to repeat or cancel the section 18. It was confirmed that there is none under the Act, as we know, and that was it. There was no conversation around the significance of a particular location—in this case, Juukan—as part of that question. From memory, the conversation never then went on to the details of the location being one that the PKK people were concerned about and other opportunities that might exist under any federal legislation. From memory, I think the submission pointed out that it wasn't that detailed a conversation.

Senator DODSON: And were there any further communications between the department and the PKKP representatives following that meeting on the 19th?

Mr Wyatt: Not that I'm aware of—not in relation to that issue. I think if there were, that certainly would have been part of that submission.

Senator DODSON: Were you informed of the meeting between the departmental representatives and the PKK advisers on 19 May?

Mr Wyatt: I was afterwards—after the sites were destroyed, when we tried to work out what had happened.

Senator DODSON: You were not informed about a meeting between the department and the PKK representatives that took place on the 19th until after the destruction of the sites? Is that right?

Mr Wyatt: That's right

²⁸ Transcript p 36

PKKP RESPONSE

23. The evidence of the Registrar and the Minister significantly downplays the magnitude of the concern and the urgency that the PKKP representatives brought to their 19 May meeting with the Department. The Registrar failed to advise the Committee that, just before the 19 May meeting took place, one of the PKKP representatives, Daniel Bruckner (PKKP contracted anthropologist), emailed her. In that email he drew attention to the significance of the rock shelters and attached a copy of a draft of Michael Slack's 2019 report which indicated that his excavation of Juukan 1 and 2 had uncovered cultural material dating back 47,000 years including bone tools and a hair belt.
24. The 19 May meeting was organised by Daniel Bruckner before PKKP became aware of the impending destruction of Juukan 1 and Juukan 2. Its original purpose was to discuss FMG's application for s18 consents over significant sites on PKKP land. PKKP had not had the opportunity to visit and access those sites (subject to FMG's s18 Application) due to Covid and wanted to discuss this with the Department before approval was granted to FMG.
25. Upon becoming aware of Rio Tinto's imminent plans to destroy the Juukan 1 and Juukan 2 rockshelters, Daniel Bruckner telephoned Matthew Franklin, the Assistant Registrar, in the morning on Monday, 18 May and requested that the meeting set down for 2pm Tuesday, 19 May, be brought forward urgently to deal with the information PKKP had just received from Rio Tinto the day before on Sunday, 17 May.
26. The Department declined to bring the meeting forward and advised PKKP that they could discuss this issue at their allotted time at 2pm Tuesday, 19 May, when they were to meet the Department to discuss the FMG application.
27. Just prior to the meeting, Daniel Bruckner emailed Tanya Butler and Matthew Franklin in the following terms.

Hi Tanya,

We have just very recently been made aware by RTIO that the company was in the process of blasting in very close proximity of two highly significant Rockshelter sites. We understand that RTIO have received conditional Ministerial Consent under S18 around 2013. One of the conditions was to undertake a salvage excavation at the 2 Sites. This salvage excavation has uncovered very significant cultural material dating back to 47000 including bone tools and a hair belt that was DNA analysed. The significance of the Shelters was not known at the time of the Ministerial Consent and PKKP wants these places protected. Attached is an early draft of Slack regarding the significance. He is currently drafting the final work for international publication.

We would like to discuss the matter further in our meeting later today to understand the options for protection going forward. We are under extreme time pressure since RTIO has stated that the blast will be progressing within the next 24hrs.

28. At 2pm on Tuesday, 19 May 2020 Daniel Bruckner and Dr Heather Builth met with Tanya Butler and Matthew Franklin via audio Zoom. Daniel Bruckner and Dr Builth discussed the issue of the impending blast at Juukan 1 and Juukan 2 when the meeting first commenced (not at the end as Tanya Butler and the Minister suggested). The imminent blasting of the rock shelters was the first and, by then, the most important item on the agenda and dominated the meeting. The FMG issue was discussed briefly at the end of the meeting.
29. At that meeting Daniel Bruckner and Heather Builth advised the Department that:
 - Rio Tinto had plans to blast the Juukan 1 and Juukan 2 rockshelters on Wednesday, 20 May 2020 and PKKP had 24 hours to attempt to convince Rio Tinto to hold the blast;
 - The rockshelters were 46,000 years old, and highly significant to the PKKP People.
 - Following the granting of the s18 consents in October 2013 there had been two salvage expeditions by Michael Slack involving two eight day excavations which revealed the huge significance of the rockshelters.
 - It was Michael Slack's view that there should be further excavations on the basis that there was every indication there would be considerable further important artefacts present and that he had not as yet had an opportunity to excavate the whole area.
30. Daniel Bruckner and Dr Builth enquired whether there was any possibility that the Department could reverse the s18 Consents and stop Rio Tinto from blasting.
31. The Department advised Daniel Bruckner and Dr Builth that there was no option for PKKP to reverse the s18 Consents and that the only way to stop the blast would be if Rio Tinto themselves re-considered their s18 application.

32. In response Daniel Bruckner and Dr Builth asked the Department to consider the following options to stop the blast:
- (a) the Department initiate a separate assessment of the rockshelters in order to maintain the hold on the blast:
 - (b) PKKP obtain a s16 permit for a mitigation salvage of the rockshelters on the basis that Michael Slack had not had an opportunity to excavate the full area and further excavation was necessary which would be likely to uncover further important materials and
 - (c) the Department reverse the s18 consent on the basis that the s18 Notice or consent are not applicable in terms of Land, Purpose or Conditions.
33. Daniel Bruckner and Dr Builth were advised that these avenues were not an option on the basis that once the s18 consent was granted it could not be reversed or reconsidered - even in circumstances where additional information subsequently became available showing the significance of the rock shelters.
34. At the end of the meeting Mr Bruckner and Dr Builth were again informed that the Department considered that nothing legally under the *Aboriginal Heritage Act 1972* (WA) could be done to support PKKP preventing the blast to the Juukan rockshelters and gorge. The meeting concluded with Tanya Butler offering to elevate the matter to the Rio Tinto Heritage Manager to discuss the situation. Mr Bruckner and Dr Builth provided the contact details of Rhiannon Burke as Heritage Manager of Rio Tinto.
35. PKKP now understands that later that afternoon Tanya Butler contacted Rhiannon Burke and discussed the impending blast of the highly significant rock shelters. PKKP was never informed of the outcome of this discussion by either party and did not find out that it took place until it read Rio Tinto's submissions to this Inquiry.
36. PKKP reject the Registrar's evidence that no substantial discussion took place in relation to the forthcoming blast of the Juukan rockshelters. Daniel Bruckner emailed the PKKP representatives at the conclusion of the meeting to report on the outcome as follows:

Hi All

DPLH meeting just finished up. Two key takeaways, in relation to RTIO Juukan Rockshelter, there is nothing in the Act or the Department that could stop RTIO from executing their project under a valid S18 Ministerial consent. Tanya Butler will nevertheless contact Rheanna from RTIO to see where they are at and will support any work towards protecting the sites. Once we have the S18 notice and the consent letter I will see if there are any other options to stop RTIO from

blowing things up. The only real options are that the notice or the consent are not applicable in terms of Land, Purpose or Conditions. In relation to FMG it was made very clear by the Registrar that State Government considers this project as significant and does not want the approvals process to interfere.

*Regards
Daniel*

C. “The procedural fairness process”

37. In her 20 Nov 2020 evidence Ms Butler said;

“We are limited with what we can do under the current Act The main role is to get input from the Aboriginal people through the only mechanism- which is the procedural fairness process. We encourage Aboriginal people to engage in that process and to provide direct comment to the APMC.”²⁹

Ms Butler was not asked what is or was “the procedural fairness process”.

38. PKKP submits that there was and is no “procedural fairness process” under the *WA Aboriginal Heritage Act 1972* for Aboriginal persons who have an interest in protecting a site.
39. Specifically, there is no statutory requirement on the APMC or the Minister to consult with interested Aboriginal people in relation to the damaging or destruction of a site.
40. This should be compared with s 13 of the South Australian *Aboriginal Heritage Act 1988* which requires the South Australian Minister to consult with specified Aboriginal people and groups who have an interest in a site before making a decision to authorise damaging or destroying that site.
41. Neither does an Aboriginal person or organisation have any right of appeal or review of a decision made by the Minister under s 18. By comparison, the land owner who seeks the Minister’s permission to damage or destroy a site under s 18 has a right of review by the State Administrative Tribunal, as well as a right to be notified if the Minister intends to proclaim the area as a protected area and to make further representations - pursuant to ss 18(5), 19 and 21 of the *WA Act*.
42. Any ‘procedural fairness process’ to which the Registrar was referring;

²⁹ Transcript p 9

- (a) was not in operation in relation to the Juukan Gorge s 18 application in 2013; and
- (b) is not created by the WA Act and is thus not able to be enforced or reviewed.
43. When the Registrar, her Department and the ACMC assessed the Rio Tinto s 18 application relating to Juukan Gorge in 2013 no attempt was made to apply a procedural fairness process. They were apparently satisfied with the representations made by Rio Tinto at pp 4-6 of the *Supporting Submission by Hamersley Iron Pty Ltd* which listed the traditional owners who had been involved in the archaeological and ethnographic surveys and also asserted that:
- 'Stakeholders consulted included*
- *Elders and members of the PKKP*
 - *Yamatji Marlpa Aboriginal Corporation*
 - *The Department of Aboriginal Affairs (DAA).'*
44. This is not a 'procedural fairness process'. Procedural fairness requires that a person who is likely to be affected by a decision be given the opportunity to properly present his or her case to the decision maker – not to the other party.
45. *The ACMC is required by s 18(2) of the Act to;*
- "..... form an opinion as to whether there is an 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..."*
46. The Minister in his letter of 31 December 2013, which provided his consent pursuant to s 18(3), indicated that his consent was based on the consideration of the s 18 notice by the ACMC and the ACMC recommendations made at its ordinary meeting on 18 December 2013.
47. The minutes of the meeting of the ACMC and its recommendations to the Minister provide insufficient detail of the ACMC's deliberations or of the Departmental advice to it to assist this Inquiry to form a view as to whether the ACMC performed its statutory function to 'evaluate the importance and

significance' of Juukan 1 and Juukan 2 or provide natural justice to the traditional owners – matters relevant to term of reference (a) of this Inquiry. The ACMC minutes record that its site assessments were based on, inter alia, Departmental advice. As far as PKKP is aware, that Departmental advice, which is of great relevance to term of reference (a,) has not been made available to this Committee.

D. The quality of the Registrar's responses to the questions on notice

48. In addition to the long delay in providing her answers, many of the Registrar's responses to the 21 questions were so brief, evasive and unforthcoming (eg to questions 2,3, 6,7, 11, 13 and 20) as to appear contemptuous of the Committee's questions.
49. In her written response to question 5 (relating to the cause of the change in policy in 2011 as to what constituted a site) the Registrar said '*I am unable to say specifically the reason for the change in policy if there was one*'.
50. It is common knowledge that the DAA changed its interpretation of what constitutes an Aboriginal site at about this time. This led to the ACMC adopting new guidelines in relation to s 5 of the Act, which included public release of a document entitled 'Section 5 of the Aboriginal Heritage Act 1972 (WA)' (s 5 Guidelines). The guidelines listed criteria to be taken into account when determining whether a place was a sacred, ritual or ceremonial site which were additional to the criteria specified in s 39 of the Act, including that '[f]or a place to be a sacred site requires that it is devoted to a religious use rather than a place subject to mythological story, song or belief'.
51. These guidelines were overturned by the Supreme Court in *Robinson v Fielding* [2015] WASC 108.
52. The Registrar's answer to question 19 – to the effect that since 2010 only two out of 511 s 18 applications associated with mining have been declined by the Minister – says it all. The WA Act and its administration has not protected Aboriginal heritage from mining operations. In fact it has done the opposite. However, the Registrar seems incapable of acknowledging this.

E. What the Registrar and the Minister did not address in their evidence or submissions

53. The Registrar did not address PKKP's criticisms of the Juukan Gorge s 18 application documents and the Department's process for assessing it – which are set out in paras 146-159 of our September submission to the Joint Committee.
54. As indicated in paras 8-16 above, there were clear statements on the high archaeological and ethnographic significance of the Juukan 1 and 2 rockshelters in the Scarp and Builth reports presented to the Registrar as part of Rio Tinto's s 18 Supporting Submission.
55. However, notwithstanding this, Rio Tinto asserted in that Supporting Submission that:
- (a) it is anticipated that all sites, including Brock 20 (Juukan 1) and Brock 21 (Juukan 2) would be destroyed;³⁰
 - (b) Brock 20 (Juukan 1) and Brock 21 (Juukan 2) are of high archaeological significance but of no ethnographic significance;³¹ and
 - (c) "No new ethnographic sites were recorded during the [Builth] ethnographic survey."³²
56. As we indicated in our first submission (at paras 146 -150):
- 146. In connection with the Juukan Gorge Section 18 applications, Rio Tinto prepared and submitted individual HISFs [Heritage Information Submission Forms] 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.*

³⁰ Rio Tinto Supporting Submission p 8

³¹ Rio Tinto Supporting Submission Table 1 p10 p 8

³² Rio Tinto Supporting Submission p 7

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’³³ 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’.³⁴ In its responses to questions on notice Rio Tinto has continued to downplay these errors, suggesting 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’.³⁵*
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.*
57. Neither the Registrar nor the Minister has responded to our criticisms in para 150 above – in evidence or submissions to this Committee or directly to PKKP.
58. There is no evidence that the Registrar, her Department or the ACMC considered or grasped the significance of the Builth report or made any attempt to investigate or resolve these very significant inconsistencies.
59. A process which did not rely on information from one party only would not have fallen into such grave error.
60. Similarly, the Registrar and the Minister have not made any effort to apologise to PKKP for failing to properly assess and protect the rock shelters or to give any indication that they have learnt anything from these criticisms with a view to developing best practice heritage management legislation and administrative practices in the future. The cursory and wholly unsatisfactory nature of the Registrar's response is a further demonstration of this.

³³ Rio Tinto Submission [133].

³⁴ 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.

³⁵ Rio Tinto Supplementary Submission, page 78.

F. FURTHER MATTERS

What additional information did Rio Tinto have about the significance of Juukan Gorge

61. PKKP draws the Committee's attention to a speech by Andrew Harding - the then Rio Tinto Head of Iron Ore - which is Attachment 1 to Rio Tinto's Submission 25.4 to this Committee.
62. The speech was delivered at the opening of the '2014 Colours of our Country' Pilbara Aboriginal art exhibition at the Central Park Building on 8 September 2014, which was attended by the WA Premier Colin Barnett.
63. In his speech, Mr Harding said:-

"It reminds me that Rio Tinto's presence in and relationship with the Pilbara is but a small moment in its incredible history.

For example, we are currently working with traditional owners to document heritage sites at an area known as the Juukan (sic) rock shelters.

At this most significant site, the evidence estimates Aboriginal occupation dating back some 43,000 years.

By collaborating to preserve heritage and culture, we have gained a better understanding and appreciation of the intrinsic link that Aboriginal people have to their traditional country.

And we have learnt that to maintain positive relationships, cultural heritage must be treated with the utmost respect."

64. Thus, in 2014 Rio Tinto demonstrated that it was well aware of the great significance of the Juukan Gorge rock shelters and was prepared to promote its association with them for other purposes.

Another significant 40,000 year old rock shelter identified on PKKP land

65. Further salvage excavation was a conditional requirement of the section 18 consents given to Rio Tinto in respect of Juukan 1 and 2. There were also section 16 permits issued in connection with the excavation work. As a result of the subsequent excavation, the rock shelters were found to have been occupied continuously for 46,000 years.

66. It is now apparent that the coincidence of a section 18 consent and a section 16 permit leading to findings of human occupation of a site on PKKP land for over 40,000 years is not unique to a Rio Tinto mining tenement.
67. In early 2020 (pre-the destruction of the Juukan rock shelters) another mining company was given section 18 consent (following an ACMC recommendation) to destroy a site on PKKP land.-A section 16 permit was concurrently issued to PKKP allowing for further excavation. As with Juukan, the results recently confirmed continuous occupation of a rock shelter for over 44,000 years. At this stage the mining company is not acting on its section 18 consent.
68. PKKP submits that it is contrary to the purposes of the Act and the Minister's duties pursuant to s 10;
 - for the Minister to consider giving a s18 consent to destroy a heritage site in the absence of full knowledge of the importance and significance of that site and
 - for the ACMC to concurrently recommend that a s18 consent be granted to a mining a company to destroy a site whilst at the same time approving a s16 application by the site's traditional owners to undertake further assessment and investigation of the area.