



14 August 2020

Hon Warren Entsch MP
Chair
The Joint Standing Committee on Northern Australia
PO Box 6021
Parliament House
Canberra ACT, 2600

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

Submission of Banjima Native Title Aboriginal Corporation (BNTAC) RNTBC ICN 7971

Dear Chair,

We, the Banjima People, stand with all Aboriginal traditional owners and particularly our Pilbara brothers and sisters, the Puutu Kuntj Kurrama and Pinikura, in our abhorrence at the destruction of the Juukan Gorge rock shelters, and those suffering the threat of or having recently experienced similar site destruction.

The engine room of the Australian resources industry is located on and around the traditional lands of the Banjima People and neighbouring Aboriginal nations across the Pilbara. Intense and continuous mining industry activity on Banjima Country has delivered decades of uninterrupted economic growth for Australians.

Banjima People have a long and sometimes difficult relationship with mining companies on our lands, and the cumulative destruction of our country is something which sits uneasily with our people.

As such, the Banjima People have made a significant and generational contribution to the prosperity of this nation. We believe this contribution is under-recognised, and it is time that the role of traditional owner groups as valuable partners to the resource industry is more widely acknowledged and appreciated.

Operations on our lands include the following mining operations:

- Rio Tinto Hope Downs;
- Rio Tinto Yandi;
- BHP Yandi;
- BHP Area C;
- BHP South Flank;
- Rio Tinto Koodaideri development;
- Hancock Mulga Downs development;
- Numerous smaller mines and developments;
- Hundreds of active exploration tenements; and,
- Hundreds of kilometres of rail line.

We are resolute in our position that the events at Juukan Gorge, the subject of this inquiry, and the destruction of Aboriginal heritage generally (without due regard to the cultural custodians of that heritage) must not be repeated, nor should it continue.



We provide the following brief commentary on the focus areas listed in the Inquiry:

<p><u>(a) the operation of the Aboriginal Heritage Act 1972 (WA) and approvals provided under the Act;</u></p>	<p>Commentary on the operation of the Aboriginal Heritage Act 1972 (WA) (<i>AHA</i>) is provided below. It is noted also that the WA Government is currently reviewing and redrafting the <i>AHA</i>. In view of this Juukan Inquiry, it is appropriate that any moves to amend the <i>AHA</i> are halted until such time that the Inquiry report is completed and reviewed. Further, the Banjima People are of the view that significantly more consultation is required to be undertaken between the Department of Planning, Lands and Heritage (DPLH) and Traditional Owner groups before changes to the <i>AHA</i> can be progressed.</p>
<p><u>(b) the consultation that Rio Tinto engaged in prior to the destruction of the caves with Indigenous peoples;</u></p>	<p>The Banjima People have read the submission and evidence supplied by Rio Tinto regarding this matter with great sadness and offer no further comment.</p>
<p><u>(c) the sequence of events and decision-making process undertaken by Rio Tinto that led to the destruction;</u></p>	<p>The Banjima People have read the submission and evidence supplied by Rio Tinto regarding this matter with great sadness and offer no further comment.</p>
<p><u>(d) the loss or damage to the Traditional Owners, Puutu, Kunti Kurrama and Pinikura people, from the destruction of the site;</u></p>	<p>The Banjima People provide supporting commentary on the loss of cultural and scientific values experienced by the PKKP People in this case.</p>
<p><u>(e) the heritage and preservation work that has been conducted at the site;</u></p>	<p>The Banjima People have read the submission and evidence supplied by Rio Tinto regarding this matter with great sadness but offer no further comment.</p>
<p><u>(f) the interaction, of state indigenous heritage regulations with Commonwealth laws;</u></p>	<p>We note that currently the role of heritage protection is spread across the Department of Biodiversity, Conservation and Attractions (DBCA), the DPLH, the Western Australian Museum, the National Trust of Western Australia, and the Heritage Council. This is clearly an inefficient arrangement and the lines of responsibility are unclear.</p> <p>Aboriginal heritage appears to be valued less than historic heritage buildings and sites. This contributes to a lack of understanding of the value of Aboriginal heritage.</p>



<p><u>(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;</u></p>	<p>The Banjima People offer some commentary on the processes of the National Native Title Tribunal, as they interact with the <i>Mining Act 1978</i> (WA).</p>
<p><u>(h) how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites;</u></p>	<p>See comments on the <i>AHA</i>, below.</p>
<p><u>(i) opportunities to improve Indigenous heritage protection through the Environment Protection and Biodiversity Conservation Act 1999; and</u></p>	<p>The Banjima People have a strong desire for opportunities to live and work on Banjima Country. Such opportunities are currently limited. If we as a nation truly value our Aboriginal heritage and wish to see it protected, the Banjima People should be empowered and funded to manage the protection of heritage sites through fee-for-service work funded by government. The DBCA and the Banjima People could work together in a more coordinated fashion to achieve this.</p>
<p><u>(j) any other related matters.</u></p>	<p>“Claim Wide Agreements” that are negotiated between Traditional Owners and miners, have historically been negotiated in an environment of an extreme imbalance of power, affecting issues of consent and voluntariness. These agreements enforce a strict regime of non-objection to the destruction of cultural and heritage sites, and no power for TO’s to speak to <i>any</i> third party, including Government bodies.</p>

As noted above, the Banjima People have a long history of interaction with the mining industry on our Country, and this experience has not always been positive. The Banjima People have fought hard over many years to protect our culture and heritage, while simultaneously attempting to achieve autonomy and self-determination in our Country as we strive to provide a better future for our people.

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

Aboriginal Heritage Act 1972 (WA).

The *Aboriginal Heritage Act 1972* (WA) is the main legislative instrument charged with the management and protection of Aboriginal cultural heritage in Western Australia.



The Act is now almost 50 years old, is consequently out of step with all contemporary pieces of legislation, and is almost at odds with all modern cultural heritage management practice in Australia.

The main issues with the *Aboriginal Heritage Act 1972 (WA)* and the way it is administered are:

1. If a Section 18 consent is granted by the Minister of Aboriginal Affairs, there is no right of appeal for the Traditional Owners to contest the decision nor to introduce new information which may change the interpretation (and significance) of a place. This appears to be the precise issue with the Juukan Gorge matter, where new information about the importance of the place came to light after the approval but could not be considered by the Minister.

The administration of *Section 5(a)* of *the Act* has been variable and inconsistent over many years. The former Department of Indigenous Affairs (DIA), Department of Aboriginal Affairs (DAA) and now the Department of Planning, Lands and Heritage (DPLH) have utilised a variable and often opaque interpretation of what constitutes 'place' under *Section 5(a)* of *the Act*. Of late, DPLH have favoured an interpretation of this section which has resulted in huge number of places having no legal protection.

The interpretation of what constitutes an Aboriginal 'place' in the current legislation is narrow. An Aboriginal place is deemed only to be one:

"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".

(*Aboriginal Heritage Act 1972 (WA)*, s5(a)).

DPLH personnel are currently tasked with determining what an 'important' or 'significant' place, often without regard to the wishes of Traditional Owners.

This is at odds with all modern cultural heritage management practices, where any evidence of the Aboriginal occupation of a location (typically pre-European colonisation) is indeed a 'place' and needs to be considered within the context of a wider cultural and archaeological landscape. It is the subsequent assessment of the cultural and scientific significance of the nature and extent of that place which should then determine the preservation or mitigation activities thereafter.

2. There is currently no role for Traditional Owners in the assessment and approval of any Section 18 application. The Aboriginal Cultural Materials Committee (ACMC), which meets to consider applications under *the Act* and provide non-binding advice to the Minister. The ACMC has no cultural authority or connection with the Banjima People and is not considered representative of the Banjima People.
3. ACMC members must be free of conflicts of interest. We seek transparency around declarations and the management of such. Any situation which has potential for an ACMC member to adjudicate on material, whilst also providing services for Section 18 applications, must be avoided.



4. Many (if not all) Pilbara Traditional Owner groups are signatories to “Claim Wide Agreements” which dictate the manner in which the *Aboriginal Heritage Act 1972* (WA) is to be applied and administered by the relevant mining company within the subject agreement area(s). Of greatest concern to the Banjima People is that these agreements effectively ‘gag’ the signatory, who is prevented from (a) objecting to any Section 18 application within the subject area or (b) commenting to the department (DPLH), or indeed any third party without the written permission of the proponent. Clearly, these restrictions are at odds with any notion of Banjima People’s right to self-determination. Such silencing clauses affect the notion of free, prior, and informed consent in relation to Section 18 matters, preventing the Banjima People from fulfilling their cultural obligations on, and to country.
5. Such clauses, as noted above and in (j) are negotiated in the context of an imbalance of power. Whilst the Banjima People are strong and experienced in negotiations of this type, it should be recognised that a major global mining corporation negotiating with Traditional Owner groups is not usually conducive to an agreement in which Aboriginal culture and heritage are protected consistent with cultural obligations. The reality is that in the past, Traditional Owners negotiating these contracts had no real choice but to take the deals that were offered or take nothing. The result is that Traditional Owners are now constrained and controlled by legal contracts and legislation that continue to minimise and mitigate the Banjima People and other Traditional Owners’ views on culture, heritage, and land management.
6. We note that the *Aboriginal Heritage Act 1972* (WA) has been under review for several years. The Juukan Gorge incident must surely give added impetus to releasing the draft legislation for public comment. It is the Banjima People’s view that any new legislation must reflect best practice cultural heritage management processes and outcomes, whilst giving the voices of Traditional Owners a **central place in any decision-making processes. Particularly essential is greater consultation with Traditional Owner groups regarding the Draft of this Bill as a matter of priority.**
7. The Banjima People also note that under the *Mining Act 1978* (WA), Future Act matters (defined under the *Native Title Act 1993* (cth)) such as applications for Exploration tenements enter the *Expedited Procedure* regime. The basis of this regime is that such tenements are *presumed* to not interfere with native title interests, placing the onus on the native title party or Traditional Owners to rebut that presumption (in what can be an expensive and traumatic exercise). Due to this interplay of legislation, the Banjima People and respective other Traditional Owners are forced to prove and re-prove their connection to Country. Such a presumption over country where there is a Native Title determination by the Federal Court that Native Title indeed exists surely has no place in a contemporary society.
8. The effect of this presumption is that it places Traditional Owners at a disadvantage during negotiations, as the protection of Heritage values are negotiated from the very low standard of the current *Aboriginal Heritage Act 1972* (WA). Further to this, if Traditional Owners object to a tenement being included in the *Expedited Procedure* regime, the native title party has four (4) weeks to provide submissions that support that objection. This is an onerous and brutal schedule, and if the native title party fails to rebut the presumption, the tenement is granted regardless of Traditional Owner wishes. This is further dispossession and the continuance of a historical wrong against Aboriginal people, supported by a complex interplay of the *Mining Act 1978* (WA), the *Aboriginal Heritage Act 1972* (WA) and a subversion of the intent of the *Native Title Act 1993* (cth).



Going Forward

Both major miners with whom the Banjima People have claim wide agreements are currently working with the Banjima People to ensure a situation like Juukan Gorge is not repeated. We are working together in what we hope continues to be the spirit of a true partnership.

The Banjima People look forward to a future legislative environment that supports improved protection of Aboriginal culture and heritage. Protection of such sites is not only of incalculable value to Traditional Owners and Aboriginal people more broadly but is also the cultural inheritance of all humanity.

The Banjima People sincerely thank the Joint Standing Committee on Northern Australia for the opportunity to lodge this submission.

Sincerely yours

Maitland Parker

Chairman

BANJIMA NATIVE TITLE ABORIGINAL CORPORATION RNTBC