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Productivity Commission Inquiry into Resources Sector Regulation

WWF supplementary submission

A case study on the need for better regulatory protection – Juukan Gorge, WA

The destruction of the priceless Indigenous cultural heritage at Juukan Gorge, WA is a demonstration of regulatory failure and an illustration of the consequences of not following leading practices. This case study sets out key events and identifies leading practice against each.

As Rio Tinto stated in its submission to the Senate Inquiry into the destruction of the 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia: “during 2012 and 2013, Rio Tinto progressed its plans for Brockman 4, Pit 1 in the Juukan Gorge area and four pit options were considered. Three avoided the shelters to varying distances. The fourth option impacted the rockshelters in order to access higher volumes of high-grade ore, and was the option that was chosen by Rio Tinto”¹. Leading practice is to be guided by the Mitigation Hierarchy where planning seeks to avoid impact from activities as the first priority.

“Archaeologist Dr Michael Slack informed Rio Tinto that one of the rock shelters, Juukan 2, was of “the highest archaeological significance in Australia”. In his 2018 report, Dr Slack wrote that “the Juukan-2 rock shelter has the amazing potential to radically change our understanding of the earliest human behaviour in Australia”. To date there is no other site of this age with faunal remains in unequivocal association with stone tools. The significance of this cannot be overstated.” Leading practice is to revise plans where new information indicates that the impact of activities has greater significance than originally understood. Peter Stone, UNESCO’s chair in cultural property protection and peace, stated that “the archaeological destruction at Juukan Gorge was among the worst seen in recent history, likening it to the Taliban’s blowing of the Bamiyan Buddhas statues in Afghanistan and ISIS annihilating sites in the Syrian city of Palmyra”².

Media reports indicate that “Rio did not advise of its intention to blast the area and the Puutu Kunti Kurrama and Pinikura Aboriginal Corporation “only found out by default on May 15 when [they] sought access to the area for NAIDOC Week in July”³. Leading practice is to seek the free, prior and informed consent of Traditional Owners and Indigenous people with rights and interests, especially where a site has been found to have greater significance than originally known. As the WA Minister for Aboriginal Affairs and Lands, Minister Wyatt, has identified, “companies need to understand that agreements that they’ve entered into, particularly some of the older agreements, are living documents. They aren’t signed at a point in time and that’s the end of the matter; they need to be continually revisited”⁴.

¹ Page 3, Rio Tinto submission to Senate Inquiry on Juukan Gorge , see:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/CavesatJuukanGorge

² <https://www.9news.com.au/national/rio-tinto-juukan-gorge-explosion-wa-apology-indigenous-traditional-owners-mining-brockman-iron-ore/b638bd0b-34ef-4dd3-bdf7-673efca3d78c>

³ <https://www.9news.com.au/national/rio-tinto-juukan-gorge-explosion-wa-apology-indigenous-traditional-owners-mining-brockman-iron-ore/b638bd0b-34ef-4dd3-bdf7-673efca3d78c>

⁴ Hansard, 7/8/2020 hearing, Senate Inquiry on Juukan Gorge

In addition, confidentiality clauses of agreements may constrain Traditional Owners from talking publicly and WWF is concerned about this power imbalance between resource companies and Traditional Owners. WWF would also like to see the greater reflection of rights-based principles of participatory development and co-management reflected in partnerships between resource companies and Traditional Owners as leading practice.

Consistently responsible conduct enhances the value proposition of companies. As the Responsible Mining Foundation states, “companies that can demonstrate their investment decisions integrate socio-cultural and environmental risks as well as financial risks are more likely to be attractive prospects for investors who are increasingly concerned about asset-level [environmental, social and governance] ESG risks⁵.”

Rio Tinto’s conduct with respect to this incident has profoundly distressed the Traditional Owners, the Puutu Kunti Kurama and Pinikura Peoples. It has also caused serious reputational damage and investor concern⁶. As an example, “Ian Silk, the chief executive of AustralianSuper, said a report [...] by Rio Tinto’s board “highlights profound systemic, operational and governance failings”⁷.”

This incident also demonstrates regulatory failure which must be rectified for everyone’s benefit. The WA Aboriginal Heritage Act 1972 was not able to protect this cultural heritage. WA has a draft Aboriginal Cultural Heritage Bill 2020 and will resume on-country consultation with Traditional Owners once the Covid risks have passed⁸. This Bill is intended to “better protect Aboriginal heritage” and “place Traditional Owners at the centre of the heritage protection regime” and is intended to “deliver better outcomes in land use proposals for stakeholders, industry and the community”⁹. WWF hopes that this legislation is passed and effectively implemented so it strengthens Indigenous engagement obligations and cultural heritage protections to prevent an incident like this ever occurring again.

The Commonwealth Aboriginal and Torres Strait Islander Heritage Protection (ATSHP) Act 1984, the Act of ‘last resort’ (and itself badly in need of reform) for the protection of places of cultural significance, ancestral remains and moveable cultural heritage does provide a reactive measure to protect cultural heritage “if it appears that state or territory laws have not provided effective protection”¹⁰. It seems that inquiries were made about an ATSHP Act application on behalf of the Puutu Kunti Kurama and Pinikura Peoples but no application was submitted¹¹ and the Australian Government “cannot make a declaration unless an Indigenous person (or a person representing an Indigenous person) has requested it.”¹².

⁵ <https://www.responsibleminingfoundation.org/research/heritage2020/>

⁶ <https://thenewdaily.com.au/finance/finance-news/2020/08/07/rio-tinto-juukan-gorge-parliament/>

⁷ <https://www.theguardian.com/business/2020/aug/27/rio-tinto-response-to-juukan-gorge-caves-blast-not-good-enough-australiansuper-says>

⁸ <https://www.mediastatements.wa.gov.au/Pages/McGowan/2020/04/Timeframe-amended-for-new-Aboriginal-Cultural-Heritage-Bill-due-to-COVID-19.aspx>

⁹ <https://www.mediastatements.wa.gov.au/Pages/McGowan/2020/04/Timeframe-amended-for-new-Aboriginal-Cultural-Heritage-Bill-due-to-COVID-19.aspx>

¹⁰ <https://www.environment.gov.au/heritage/about/indigenous-heritage>

¹¹ Hansard, 7/8/2020 hearing, Senate Inquiry on Juukan Gorge

¹² Hansard, 7/8/2020 hearing, Senate Inquiry on Juukan Gorge

WWF considers that nationally, the overall level of (proactive) Indigenous cultural heritage identification, recognition and protection and consideration of the aspirations, rights and interests of Indigenous Australians is an urgent legal and implementation reform need and is pleased that support is being given to the case for reform by the Australian and Western Australian Governments with respect to this case and more broadly.

WWF recommends that the Productivity Commission takes into account the outcomes of the Senate Inquiry on Jurkan Gorge and the work to improve national cultural heritage protections under the EPBC review and in the process convened by Australian Government Ministers Ley and Wyatt in developing the Commission's final report.