

Joint Standing Committee on Northern Australia

Submission by the Australasian Centre for Corporate Responsibility (ACCR) to the Parliamentary Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia

By email: jscna@aph.gov.au

Date: 31 July 2020

Key contacts:

Brynn O'Brien, Executive Director, ACCR, brynn@accr.org.au

James Fitzgerald, Counsel and Strategy Lead, ACCR, james@accr.org.au

About ACCR

The [Australasian Centre for Corporate Responsibility](#) is a philanthropically-funded NGO that monitors the environmental, social and governance (**ESG**) practices and performance of Australian-listed companies. We undertake research and highlight emerging areas of business risk through private and public engagement, including the filing of shareholder resolutions. ACCR is a shareholder in, and has a longstanding engagement with, Rio Tinto.

Paragraphs of terms of reference addressed in this submission

This submission relates to the following paragraphs of the Committee's terms of reference:

- (b) the consultation that Rio Tinto engaged in prior to the destruction of the caves with Indigenous peoples;
- (c) the sequence of events and decision-making process undertaken by Rio Tinto that led to the destruction;
- (j) any other related matters.

The 'other related matters' this submission addresses are the risks to mining businesses operating in Australia and their shareholders posed by insufficient cultural heritage protections.

Overview

Rio Tinto recently detonated a 46,000 year old site known as the Juukan Gorge rock shelters, to facilitate the expansion of the company's Brockman 4 iron ore mine in the Western Pilbara. Rio Tinto has come under intense scrutiny from the Traditional Owners of the site, the public, the media and investors over the destruction of the site. While there is no suggestion that in destroying the site Rio Tinto did not comply with the letter of state Western Australian law, the company's assertion that it was unaware of the Traditional Owners' wishes for the site to be preserved following the discovery of artefacts is strongly disputed.

Juukan Gorge blast

The Traditional Owners of this land are the Puutu Kunti Kurrama and Pinikura (**PKKP**) people. The Puutu Kunti Kurrama and Pinikura Aboriginal Corporation (**PKKP Corporation**)¹ administers native title on behalf of the Puutu Kunti Kurrama and Pinikura people.²

Rio Tinto secured full legal approval in 2013 to blast the site under the Western Australia Aboriginal Heritage Act (1972) (**the Act**). In 2014, salvage excavations led by archeologist Dr Michael Slack confirmed that the site was more than twice as old as previously thought, and home to over 7,000 artefacts including sacred objects.³ The Act provides no possibility for Traditional Owners to seek review once legal approval is granted.

Questions have arisen about the circumstances in which the site was blasted, including about the reported irreversibility of the detonation process. The Committee should expect answers to these questions from Rio Tinto's board and executives.

(b) the consultation that Rio Tinto engaged in prior to the destruction of the caves with Indigenous peoples; (c) the sequence of events and decision-making process undertaken by Rio Tinto that led to the destruction;

ACCR cannot comment on the extent to which Rio Tinto engaged in actual consultation in relation to this site, nor on its actual decision-making process.

ACCR notes, however, the commitments that Rio Tinto has made, to the public and to its investors, in relation to the international standards and principles it brings to its relationship with Indigenous communities. These commitments should have informed Rio Tinto decision-making.

Wilful non-application of disclosed commitments is a matter of concern for investors and society at large, and may raise questions of corporations and consumer law. In ACCR's assessment, even the basic application of the standards to which Rio Tinto has committed, to decision-making around Juukan Gorge, would have raised significant red flags. These warning signs should have triggered a robust risk management approach.

The Committee may wish to inquire to what extent Rio Tinto applied these commitments. Rio Tinto's egregious non-adherence to the relevant standards suggests that they were not applied in the decision-making process. This demonstrates the manifest insufficiency of corporate self regulation in ensuring that human rights are upheld.

UN Guiding Principles on Business and Human Rights

Rio Tinto has committed to implementing the UN Guiding Principles on Business and Human Rights (UNGPs) throughout its operations⁴. Such a commitment involves going beyond minimum legal standards in each jurisdiction in which the company operates. Discharging its responsibility under Principle 13(a) of the UNGPs requires Rio Tinto to "avoid causing or contributing to adverse human rights impacts through [its] own activities, and address such impacts when they occur."⁵ Principle 17 requires companies to carry out human rights due diligence. This process is the operational essence of the UNGPs.

¹ <https://pkkp.org.au/>

² <https://pkkp.org.au/country-and-region/>

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<https://www.theguardian.com/australia-news/2020/may/26/rio-tinto-blasts-46000-year-old-aboriginal-site-to-expand-iron-ore-mine>

⁴ <https://www.riotinto.com/en/sustainability/human-rights>

⁵ https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf

Human rights due diligence “is a way for enterprises to proactively manage potential and actual adverse human rights impacts with which they are involved. It involves four core components: (a) *Identifying and assessing actual or potential adverse human rights impacts* that the enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships; (b) *Integrating findings from impact assessments across relevant company processes* and taking appropriate action according to its involvement in the impact; (c) *Tracking the effectiveness of measures* and processes to address adverse human rights impacts in order to know if they are working; (d) *Communicating on how impacts are being addressed* and showing stakeholders – in particular affected stakeholders – that there are adequate policies and processes in place.”⁶

UN Declaration on the Rights of Indigenous Peoples

The range of human rights recognised by the UNGPs includes enjoyment of cultural rights as per the International Covenant on Economic, Social and Cultural Rights, and, with respect to First Nations peoples, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Rio Tinto has also committed, separately, to operating consistently with UNDRIP throughout its operations⁷.

Relevant articles of UNDRIP include:

- 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.

(j) ‘other related matters’: risks to mining businesses operating in Australia and their shareholders posed by insufficient cultural heritage protections

Gaps between local laws and international standards can create risk for companies operating in the jurisdiction of regulatory insufficiency. Australian laws are plainly insufficient, in general, in upholding the cultural heritage-related rights contained in the UNDRIP.

The WA Aboriginal Heritage Act (1972) has been slated for review since 2012⁸. The responsible West Australian Minister (the Hon. Ben Wyatt) has acknowledged that the Act is inadequate and overdue for amendment. Writing in The Australian newspaper on 9 June 2020, Minister Wyatt said:

⁶ <https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx>

⁷ <https://www.riotinto.com/en/sustainability/communities/cultural-heritage>

⁸ Brief overview here

<https://www.theguardian.com/australia-news/2020/may/26/rio-tinto-blasts-46000-year-old-aboriginal-site-to-expand-iron-ore-mine>

“The current system does not reflect the broader scope of Aboriginal heritage, contemporary cultural life and agreement-making in our modern society, where an understanding and appreciation of this heritage has become the norm rather than the exception. It does not provide a useful supporting framework to promote and encourage good relationships between traditional owners, resource companies and other land users... Most significantly, it does not give a sufficient voice to Aboriginal communities in managing their own heritage sites.”⁹

Minister Wyatt also described a lengthy review and consultation process, and said that a new Bill “is now in its final stages of drafting and will be released soon for final consultation.”

The delays in reviewing and modernising these laws to better protect Aboriginal cultural heritage and in particular the human rights standards contained in the UNDRIP, has posed, and continues to pose, significant risks to mining companies operating in Australia.

Non-observance of human rights standards is a widely recognised ‘ESG’ risk. ESG refers to Environmental, Social and Governance standards, the failure to meet which can result in negative impacts on a company’s reputation and on shareholder value over time.

Rio Tinto’s actions at Juukan Gorge are a ‘textbook case’ of the materialising of serious ESG risk. Human rights abuses are generally classified as ‘S’ risk, and failures of leadership or non-application of company commitments are generally classified as ‘G’ risk. This case has both elements.

News of the blast was met with immediate, near universal public condemnation. It is difficult to imagine more compelling evidence of severe corporate reputational damage than being compared to the Taliban, as Rio Tinto was by multiple commentators,¹⁰ and on social media, following the blast.

Proactive interest from global **institutional investors** in Rio Tinto’s actions at Juukan Gorge has been overwhelming, and in ACCR’s experience, unprecedented. Since the blast took place ACCR and its partner organisations have been involved in briefing institutional investors accounting for well over \$20trillion in assets under management. We understand that many investors have expressed their anger directly to Rio Tinto’s CEO and Board. Rio Tinto’s approach to ESG was labelled as a ‘colossal’ failure in Investor Daily magazine.¹¹

Reconciliation Australia, the lead independent body for facilitating reconciliation “by building relationships, respect and trust between the wider Australian community and Aboriginal and Torres Strait Islander people in Australia”, suspended Rio Tinto from their Reconciliation Action Plan program on 9 June 2020.¹²

On 8 July 2020, a **coalition of Indigenous and human rights organisations** wrote to the Netherlands-based Corporate Human Rights benchmark (CHRB), in terms including the following:

Rio Tinto’s actions at Juukan Gorge and elsewhere evince a profound lack of regard for its human rights obligations under both the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. Yet based on the 2019 CHRB rankings, Rio Tinto is still currently listed on your website as the

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<https://www.theaustralian.com.au/commentary/a-stronger-shelter-for-indigenous-heritage/news-story/68dff4f78a7fc6b6088fd8b0d2e547bf>

¹⁰

<https://www.abc.net.au/radionational/programs/scienceshow/destruction-of-indigenous-archaeological-site-in-wa-on-par-with/12462982>

¹¹ <https://www.investordaily.com.au/analysis/47540-rio-tinto-s-esg-report-card-is-a-colossal-fail>

¹² <https://www.reconciliation.org.au/statement-on-rio-tinto/>

highest ranked extractives company globally on human rights issues, with a score within the second-highest possible band.

This ranking is, in our view, misleading to investors and other stakeholders who rely on the CHRB to provide robust and credible information on companies' human rights record as well as being disrespectful to the communities whose rights have been so profoundly impacted by Rio Tinto's actions.

We strongly urge the CHRB to take immediate steps to suspend Rio Tinto and remove its scores from the benchmark pending the upcoming review of the CHRB's ranking methodology.

In response, on 9 July 2020, **the CHRB and the World Benchmarking Alliance (WBA)** appended a statement to Rio Tinto's recent CHRB results, condemning 'the destruction of invaluable cultural heritage at Juukan Gorge' and urging the company to conduct an independent investigation¹³. The statement describes Rio Tinto's destruction of the site as being 'in stark contradiction' with the company's typically high Benchmark scores, and 'an extremely concerning departure from the company's public commitment to respect human rights'. CHRB and WBA also state that the incident raises reasonable questions about the Benchmark's methodology, given the possibility of a 'disconnect' between the company's publicly-disclosed commitments and procedures and its 'actual decisions and impacts':

The severity of the impact and the context in which it took place, including the process that led to it and allegations of other similar impacts involving the company, raise concerns that go beyond this specific incident and point to possibly more systemic weaknesses in the company's approach to human rights.¹⁴

ACCR representatives would be happy to provide further detail on any of the matters contained in this submission to the Committee.

¹³

<https://www.corporatebenchmark.org/sites/default/files/CHRB%20response%20to%20Rio%20Tinto%20destruction%20of%20Aboriginal%20site%20at%20Juukan%20Gorge%20-%202009July2020.pdf>

¹⁴ <https://www.hrlc.org.au/rio-tinto-deadly-legacy>, cited by CHRB and WBA,

<https://www.corporatebenchmark.org/sites/default/files/CHRB%20response%20to%20Rio%20Tinto%20destruction%20of%20Aboriginal%20site%20at%20Juukan%20Gorge%20-%202009July2020.pdf>