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Yamatji Marlpa Aboriginal Corporation

Statement for 13 October 2020 Committee Hearing for the Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia

The following contains the opening statement plus additional information provided to the Joint Standing Committee on Northern Australia by YMAC on 13 October 2020.

Good Morning Mr Chair and Members

Thank you for the opportunity to appear before the Committee, and to contribute to this Inquiry.

Firstly, I would like to acknowledge the Traditional Owners and custodians of Country throughout Australia and their continuing connection to land, waters and community.

Yamatji Marlpa Aboriginal Corporation (YMAC) also wants to acknowledge the PKKP Traditional Owners, and the harm that has come to them through the destruction of the Juukan Rock Shelters.

YMAC has reached out to the PKKP people to offer assistance where it can.

YMAC will be happy to share relevant documents with the Inquiry but will need to do this with the permission of PKKP Aboriginal Corporation.

There has been clear sentiment expressed by the Australian public and world community about the destruction of Aboriginal heritage.

I (Simon Hawkins CEO) will now make the following preliminary comments, to assist the Committee with its deliberations.

1) Non- Objection Clauses

The issue of the non-objection clauses was tackled on several occasions throughout the negotiation with Rio Tinto, commencing in 2002 and through to authorisation in 2010:



- YMAC raised Traditional Owners' concerns with Rio Tinto about the 'no objection clauses' on several occasions.
- Professor Marcia Langton and Professor Ciaran O'Faircheallaigh raised the no objection issue with the Rio Tinto negotiation team, Marnda Mia, CNC, and the PNTS. This report was also presented internally to Rio Tinto, which included what Rio describes as the 'Wise Heads' group of executives.
- Finally, following the completion of the due diligence process conducted by Arnold Bloch Leibler, the issue of 'no objection clauses' was again raised with RTIO executives in Melbourne on 21 June 2010. These executives were outside of the RTIO negotiation team and were reluctant to challenge company policy.

2) Free, Prior and Informed Consent

The aspiration of **Free** Consent is not possible, because of the way Section 35 (of the *Native Title Act*) applications operate. You can achieve **Prior** and **Informed** Consent, but not Free.

For example, mining tenements can and are granted tenure without native title party consent.

Page 93 of the PKKP submission – under Free - refers to “a commitment not to pursue the project without consent”. This is not possible under current legislation.

YMAC undertook consultation and sought instructions from the group on the agreements over a nine-year period. This included several different meetings structures and a range of documents including Plain English Guides detailing the Claim Wide Participation Agreement and the Regional Framework Deed.

- Distribution of Meeting Agendas prior to meetings
- Claim Group, Working Groups and Community meetings
- Aboriginal Liaison Officers (ALO) employed by YMAC to explain issues to the groups in the region, who would as part of their role liaise with Traditional owners from the various groups in between meetings.
- Newsletters
- Copies of the Plain English guides.



The Plain English guides, covered the following areas:

Claim-Wide Participation Agreement:

1. An introduction to the native title agreement between your group and Rio Tinto Iron Ore
2. Benefits Management Structure
3. Cultural heritage – Local Agreement
4. Your Local Aboriginal Corporation and Local Implementation Committee.
5. An introduction to the Local Agreement between your native title group and Rio Tinto Iron Ore.

Regional Framework Deed

6. An introduction to the Regional Agreement between your native title group and Rio Tinto Iron Ore.
7. Contracting and business development
8. Cultural Awareness Training
9. Employment and Training
10. Environmental Management
11. Cultural Heritage – Regional Agreement
12. Going on Country – Land Access
13. The Regional Aboriginal Corporation and Regional Implementation Committee

These documents were provided to PKKP people at a pre-authorisation meeting one month prior to the authorisation meeting.

3) The Authorisation Meeting - on 5, 6, 7 November 2010.

The authorisation meeting on 5th, 6th and 7th November was to bring together PKKP people to decide on whether they approve the agreement.

A three-day meeting in 2010 followed the pre-authorisation meeting one month earlier, to allow for adequate time for Traditional Owners to consider and seek advice.

At the pre-authorisation meeting, all the attendees were presented with copies of the Plain English guides. of the CWPA and Regional Framework Deed (as mentioned).

A Community Engagement Consultant presented on the guides at both the pre-authorisation meeting and the authorisation meeting.

At the authorisation meeting, Philip Hunter, Lead Negotiator from HWL Ebsworth gave a sixty-seven-slide Powerpoint presentation. It described the benefits of the agreement, as well as difficult issues such as the non-objection clauses.

The PKKP were also advised of the recommendations from the internal, external and Due Diligence legal advice, recommending that they should approve the agreement in current form.

YMAC also advised the group at this meeting that if they chose not to proceed, as their Land Council, YMAC would support them in their decision.

The group overwhelmingly supported the agreement and the Chairperson at the time signed the resolutions.

4) Agreements, limitations and Implementation challenges

The negotiation process was well-resourced with highly competent people who were working within the legal framework and the limits of legislation available at the time.

An agreement is only as good as its implementation and the commitment of the involved parties.

The Rio Tinto and PKKP agreements provide for issues to be raised and addressed between the parties. This is primarily done via Local Implementation Committee (LIC) meetings, which occur twice a year.

Consultation on issues such as section 18s are conducted through the individual groups' LIC meetings. They are referred to as Key Approvals.

These meetings are a joint responsibility of RTIO and PKKPAC. The agreements contain clauses that state that Rio Tinto must consult with the PKKP on Section 18s through the LIC.

YMAC recommends that a review is done of the implementation process of agreements.

The agreements contain a 5-year review provision.

The first review would have been due around 2016. As YMAC did not represent PKKPAC in relation to Rio Tinto implementation at this time, YMAC is unaware of whether this review took place.

The next five-year review would be due 2021.



By 2016, it was known that the rock shelters were significant sites, one being at least 32,000 years old.

YMAC became aware of Rio Tinto's four mine option for Brockman 4 operation, through reading Rio Tinto's submission to the Inquiry.

5) Section 18s under the *Aboriginal Heritage Act (1972)*

If Government really wants to see change, it needs to reform legislation.

The Committee has now heard on several occasions that it is extremely rare for Section 18s to be refused.

Traditional Owners negotiating with developers are fully aware of this issue and are left with limited option to accept the inevitability of their sacred sites being disturbed or destroyed.

In WA, the state of the law is this. Under AHA, there are:

- No obligations on developers to conduct cultural heritage surveys
- No rights to notification of Traditional Owners
- No rights to consultation with Traditional Owners
- No rights to objections by Traditional Owners
- No rights to appeal decisions by Traditional Owners
- No rights to receive copies of the consent documents.

6) The Department of Indigenous Affairs and Section 18s at the time it was approved for Rio Tinto

On New Year's Eve in 2013 the section 18 consent was given to Rio Tinto by the Minister for Aboriginal Affairs.

In the lead up to this decision the culture of the WA Department of Indigenous Affairs appears focussed on economic outcomes at the expense of Aboriginal heritage. This is evidenced in the Annual Report.

The DIA Annual Report 2011-2012, Agency performance, Aboriginal Heritage included this quote from Hon. Gavin Fielding AM Chair Aboriginal Cultural Material Committee:

As the Department of Indigenous Affairs recently released Strategic Framework 2012-14 suggests, there is tension between the statutory heritage responsibilities



and economic priorities. This is especially the case at this time, with significant activity in the mining and resource sectors of the economy. As the framework indicates, this tension is “exacerbating uncertainty and conflict for industry and community”. One way of dealing with this tension is to make conditional recommendations which permit development whilst, as far as is practical, preserving Aboriginal heritage. In doing so, the ACMC endeavours to recommend conditions that are clear and precise, confined to protection of heritage and limited to the circumstances of the case. No one can argue rationally that there is not a need to protect Aboriginal heritage. As well as being of significance to Aboriginal people, that heritage is an important aspect of the history of this State. Whether this need necessitates an industry of the kind that has developed out of the process set up by the Parliament to protect Aboriginal heritage is open to question. In particular, I question whether it was ever the intention of the Parliament that the processes associated with the function of the ACMC should involve costly consultations, voluminous heritage reports and a requirement for costly monitoring of projects affecting Aboriginal heritage.

YMAC believes that the new Heritage legislation should mandate further consultation with Traditional Owners and the reconsideration of ‘Section 18s’ if new information about the significance of a site comes to light.

Due to inadequate legislation, the system of agreement-making has emerged as the primary regime for Aboriginal heritage protection in Western Australia.

Agreements are limited by what the legislation allows, but do offer economic opportunities, participation in decision-making, and greater heritage protection than what is currently afforded under WA's heritage and mining legislation.

As illustrated by Juukan Gorge, YMAC is concerned the proposed new heritage Act is not mandating for ethnographic and archaeological surveys to occur.

7) Right to negotiate process is flawed

The Juukan Rock Shelters are situated on tenure granted in the mid 1960s, prior to the *Native Title Act*. There was no right to negotiate in relation to the mineral lease.

In relation to future acts, if government is genuine in its intent to address the power imbalance, it must change legislation.



The right to negotiate process is flawed. There are very weak provisions for Traditional Owners in the *Native Title Act*. It leaves them vulnerable.

YMAC has been advocating for over a decade for improving good faith provisions and the *Native Title Act* currently does not ensure the negotiation process is fair for all parties.

Section 35 of the *Native Title Act* allows a negotiation party to apply to the **National Native Title Tribunal** for a determination in relation to the **future act** following a minimum period of six months of good faith negotiation.

1. For example, YMAC raised concerns about the current provision of the *Native Title Act (1993)* following the Full Court judgement in *FMG Pilbara Pty Ltd v Cox's* overturned a decision by the National Native Title Tribunal in relation to good faith provisions.
2. The Federal Court found there is no requirements for negotiations to have reached any particular stage by the end of the negotiations period of 6 months. YMAC represented PKKP on this matter as PKKP instructed YMAC to pursue a project only agreement rather than claim wide agreement. The tenement was subsequently granted to FMG, and a claim wide agreement was reached.

8) YMAC's Roadmap to Reform

I'd like to conclude this opening statement by outlining YMAC's roadmap to reform. To address the current power imbalance and inequity in agreement making and heritage protection for Traditional Owners, Governments must:

1. Introduce comprehensive Federal and State laws that, embody heritage protection across a range of legislations and ensure successful implementation of agreed reform. These include the *Native Title Act (1993)*, the *Mining Act (1978)*, *Local Government Act (1995)*.
2. Legislate consultation rights and the need for Aboriginal heritage to be considered early in a development process and continue to be considered as new information comes to light, both before and after agreements have been made.
3. Mandate cultural heritage plans including ethnographic and archaeological surveys with the involvement of Traditional Owners, legislate a clear regulatory framework surrounding agreement-making, heritage decisions and project approvals.



4. Ensure Traditional Owners have a greater voice in the management and mining of their land during negotiations and throughout the entire lifecycle of a project, including the right of veto.
5. Introduce an independent appeal mechanism for all parties and a more equitable and significantly more rigorous Section 18 equivalent in the proposed *Aboriginal Cultural Heritage Act*.
6. Provide appropriate funding and training to ensure Prescribed Bodies Corporate (PBCs) are properly resourced to undertake the necessary work to participate in the new heritage regime in Western Australia.
7. And finally, promote the global significance of Aboriginal heritage as an original and irreplaceable part of Australia's collective cultural heritage and create a clear distinction between heritage protection and the mining approval process.

All quotes to be attributed to Mr Simon Hawkins, CEO Yamatji Marlpa Aboriginal Corporation.

About Yamatji Marlpa Aboriginal Corporation

Yamatji Marlpa Aboriginal Corporation (YMAC) is the Native Title Representative Body (NTRB) for what are described as the Pilbara and Geraldton regions of Western Australia. YMAC is run by an Aboriginal Board of Directors, representing several native title groups (each of whom have their own language, culture, traditions and protocols). YMAC provides a range of services, including native title claim and future act representation, heritage services, community and economic development assistance, and natural resource management support.

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