



Our Ref: 20201113\_AddQ\_JuukanG  
Your Ref:  
Office: Perth  
Date: 13 November 2020

To: Committee Secretariat  
Joint Standing Committee on Northern Australia  
PO Box 6021  
Parliament House  
CANBERRA  
Canberra ACT 2600

Dear Committee

**REF: Response to Questions on Notice: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara Region of Western Australia**

Please find Yamatji Marlpa Aboriginal Corporation's response to the Joint Standing Committee's additional questions on notice, received 30 October 2020.

- 1. Can you provide the Committee with the plain English documents developed by YMAC as requested at the hearing on 13 October 2020? Or, if you are unable to provide them, an explanation as to why? (Note to Secretariat – please feel free not to include if these documents have been provided)**

The Plain English documents were provided to the Inquiry Secretary on 15 October 2020, following confirmation of permission from The PKKP Aboriginal Corporation RNTBC (**PKKPAC**). The documents were provided on a confidential basis at the request of PKKPAC.

- 2. In your opening statement to your evidence before the Committee, you said the process of negotiation with Rio Tinto was well resourced and involved “highly competent people”.**

**2a. What amount of funding did YMAC have available for the negotiations?**

For the period between from July 2003, to March 2007, YMAC received an estimated \$2,516,010 towards the costs of the negotiations across all groups assisted and/or represented by YMAC, for the Binding Initial Agreements (**BIAs**), including a contribution from the State Government of \$100,000.

For the period between from April 2007 to Dec 2011, YMAC received \$11,257,045 towards the costs of the negotiations across all groups assisted and/or represented by YMAC.

For the period between from January 2012 to June 2016, YMAC received \$4,821,982 towards the costs of the negotiations across all groups assisted and/or represented by YMAC.

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**2b. Where did that funding come from? How much of that was government funding? How much funding was provided by Rio Tinto?**

The funding was primarily received from Rio Tinto Iron Ore to the total value of \$18,495,037.

In 2005, \$100,000 was received from State Government.

**2c. What was the funding primarily spent on?**

The funding was primarily spent on the costs of Meetings (including payments of travel assistance for participants, participant fees, catering, venue hire etc.), external consultants and YMAC staff time, split approximately as follows:

**July 2003 to March 2007**

| <b>Purpose</b>                               | <b>Amount in \$</b> | <b>Percent</b> |
|--|---------------------|----------------|
| Meetings – Traditional Owners' participation | 1,811,508           | 72%            |
| Consultants                                  | 478,525             | 19%            |
| YMAC Staff                                   | 198,511             | 8%             |
| Other Admin Support                          | 27,466              | 1%             |
| <b>Total</b>                                 | <b>2,516,010</b>    | <b>100%</b>    |

**April 2007 to December 2011**

| <b>Purpose</b>                               | <b>Amount in \$</b> | <b>Percent</b> |
|--|---------------------|----------------|
| Consultants                                  | 3,141,095           | 28%            |
| Meetings – Traditional Owners' participation | 2,996,686           | 27%            |
| YMAC Staff                                   | 3,008,497           | 27%            |
| Other Admin Support                          | 2,110,767           | 18%            |
| <b>Total</b>                                 | <b>11,257,045</b>   | <b>100%</b>    |

**January 2012 to June 2016**

| <b>Purpose</b>                               | <b>Amount in \$</b> | <b>Percent</b> |
|--|---------------------|----------------|
| Consultants                                  | 1,667,596           | 35%            |
| Meetings – Traditional Owners' participation | 1,591,254           | 33%            |
| YMAC Staff                                   | 1,012,616           | 21%            |
| Other Admin Support                          | 550,516             | 11%            |
| <b>Total</b>                                 | <b>4,821,982</b>    | <b>100%</b>    |

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**2d. Can you describe the nature of legal representation the PKKP received during the negotiating process? Was all legal assistance provided by internal lawyers within YMAC or was external legal representation also engaged?**

A combination of in-house lawyers and external legal consultants advised the Puutu Kuntj Kurrama People and Pinikura People (**PKKP**) throughout the negotiations. YMAC also engaged an independent law firm to conduct a due diligence and provide advice on the final agreement prior to authorisation.

A further independent law firm was utilised during the establishment of the financial benefits management structures (**BMS**).

**2e. Did YMAC engage barristers to provide advice or representation to the PKKP during the negotiation process? If so, for the whole process or just at specific points?**

YMAC engaged Stephen Wright formerly of Wright Barristers & Solicitors to provide technical drafting advice during the negotiation process throughout 2008 and 2009 (including Participation Agreement; Regional Framework Opt-In Deed).

**2f. Can you provide details of the other consultants or advisors that were engaged to assist or advise the PKKP in the negotiations?**

**Negotiating the BIA**

- Lead Negotiator & Legal Consultant - James Fitzgerald formerly of Chalk & Fitzgerald
- Economic advice - Murray Meaton of Economics Consulting Services

**Negotiating Claim Wide Participation Agreement and Regional Framework Deed**

- Lead Negotiator & Legal consultant – Philip Hunter (Partner) of HWL Ebsworth (formerly Ebsworth & Ebsworth Lawyers)
- Legal Counsel - Stephen Wright formerly of Wright Barristers & Solicitors
- Community Development Advice - Graham Barrett (dec.) formerly of Community Matters
- Economic Advice – Murray Meaton of Economic Consulting Services
- Due Diligence – Peter Seidel (Partner) and Colleagues of Arnold Bloch Leibler
- Traditional Owner Cultural and Negotiation Advice - Darren Injie

**Financial Benefits Management Structure**

- Legal Consultant - Adam Levin (Partner) and colleagues from Jackson MacDonald
- Financial Management, Capacity Building & Governance Advice - Rosie Sandover and colleagues of RPM Project Management
- Consultant Anthropologist - David Martin of Anthropos Consulting Services Pty Ltd
- (Chartered Accountant) Business Advisor – Tony Manso of Manso Consulting Pty Ltd
- Legal Consultant (Taxation) – Peter Daley (Partner) of HWL Ebsworth

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**2g. In your evidence to the Committee you have said that Rio Tinto ceased to fund the negotiations following challenges made by PKKP and YMAC to Rio Tinto. Can you provide more detail about when and why this occurred?**

In 2005, Rio Tinto and the groups could not reach agreement on the formula for the calculation of financial benefits. Rio Tinto ceased funding the negotiations. The then State Government under Minister Ripper provided \$100,000 funding to enable the groups to continue to meet, in an attempt to keep the negotiations alive. Rio Tinto subsequently recommenced funding.

**3. Given YMAC's assertion that the process of negotiation was well-resourced, what explanation can you give for the unfair nature of the final agreement?**

This question can best be answered in two parts.

Firstly, the agreement was dealing with a mix of pre-*Native Title Act* (1993) (NTA) granted tenure (past acts) and future acts and the group had to make decisions based on the circumstances. The Juukan rock shelters are affected by tenure granted in the mid-1960s – there was no right to negotiate in relation to that mineral lease - to have them bring this tenure into the agreement, Rio Tinto required concessions to be made.

Secondly, 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 you to do, but ironically, can offer greater heritage protection, participation in decision-making and economic opportunities than what is currently afforded under WA's heritage and mining legislation and the NTA.

The right to negotiate process is flawed. For example, even where mining tenement applications are subject to the right to negotiate provisions of the NTA, the mining company or State Government can make an application to the National Native Title Tribunal (NNTT) for a determination that the act may be done (grant of the mining tenement), with or without conditions, without an agreement in place with the relevant native title claimants or holders if it can be proven that negotiations towards an agreement were conducted in "good faith". Notably, the NTA says that the NNTT must not determine a condition that has the effect that native title parties are to be entitled to payments worked out by reference to: the amount of profits made; any income derived; or any things produced by the mining company as a result of doing anything on the land and waters concerned after the mining tenement is granted.

Embodying protection across a range of legislation will result in more protective measures for areas of significance and give priority to recognising and protecting Aboriginal cultural heritage. Strengthening native title holders' rights across all legislation, including the *Aboriginal Heritage Act* (1972) (AHA), the *Mining Act* (1978) and NTA, will in turn empower native title holders to negotiate stronger agreements that enable them to decide how their heritage will be managed. YMAC is committed to advocating for ongoing legislative review to ensure a better balance of power in agreement-making, and legislative reform to support heritage protection now and in the future.

YMAC takes its responsibilities as an NTRB very seriously. YMAC and involved consultants accepted the responsibilities to assist Traditional Owners in this circumstance and made every effort to achieve the best agreement possible in the circumstances.

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YMAC advised the groups on the non-objection clauses and challenged these matters as far as possible with Rio Tinto, but the company was not prepared to change internal policy. At the agreement authorisation meeting, YMAC also advised that while the agreement had been through independent due diligence, as their land council YMAC would support them if they chose not to accept the terms of the agreement.

**4. When YMAC ceased to act for the PKKP in 2012, what efforts were made to provide a handover of the information and material up to that point of the negotiations to the new lawyers? In particular, what – if any – information was provided regarding the significance of the Juukan shelters?**

PKKPAC appointed Thomas Legal as its Legal Services provider in July 2012.

YMAC provided handover documents including the CWPA and RFD on 13 August 2012 with an offer to assist with any further enquiries to Thomas Legal (the appointed Legal Services Provider to PKKPAC including in its capacity as the Local Aboriginal Corporation under the CWPA and RFD). Mitchell Drage, PKKPAC Chair at the time, and Donna Meyer, PKKPAC Contact Person at the time, were also cc'd in to this same correspondence.

The CWPA identifies the Rights Reserved Areas nominated by PKKP and agreed to by Rio Tinto. The Juukan shelters were not nominated by PKKP to be included as a Rights Reserved Area.

YMAC continued to act for the PKKP in relation to their native title claim and related matters until PKKPAC was entered on the National Native Title Register as the PKKP Registered Native Title Body Corporate on 20 January 2016.

**5. What support, if any, was provided by YMAC to the PKKP in the process of setting up the PKKP Aboriginal Corporation?**

PKKPAC was registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act)* on 27 October 2011. One of the original Objectives of PKKPAC was to implement the Participation Agreement and perform the role of the LAC on behalf of the PKKP People.

YMAC received funding from Rio Tinto to assist the PKKP to establish the corporation and provide transitional assistance (including preparation of the constitution (Rule Book), facilitation of and attendance at the pre-incorporation meeting, and facilitation of and attendance at the inaugural board meeting).

**6. During the hearing on 13 October, YMAC was asked about its role as the PKKP's heritage service provider until 2019. What did this role entail?**

As PKKP's heritage service provider (HSP) YMAC:

- organised heritage surveys and monitoring in accordance with the instructions received from PKKP and later PKKPAC and the terms of the relevant heritage agreements;
- contacted PKKP nominators to organise PKKP survey and monitoring participants in accordance with instructions received from PKKP and later PKKPAC;

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- co-ordinated payments to PKKP Traditional Owners and heritage consultants in relation to heritage surveys and monitoring;
- received draft heritage survey reports from heritage consultants and proponents and provided technical feedback on these reports;
- undertook heritage surveys as the heritage consultant for PKKP and later PKKPC;
- attended meetings, including Heritage Sub-Committees and Land Committees when invited to do so by PKKP and later PKKPC; and
- assisted with responding to section 18, section 16 and procedural fairness notifications when instructed by PKKP and later PKKPC.

**6a. What, if any, advice or recommendations were provided to the PKKP about protecting the Juukan rock shelters?**

YMAC facilitated the conduct of several ethnographic heritage surveys in relation to the Juukan rock shelters. Recommendations arising from those ethnographic reports included further archaeological investigations (which subsequently took place) and a requirement for ongoing consultation with PKKP (amongst other things).

The CWPA and RFD provides a framework for the parties to consult in relation to cultural heritage management and approvals.

Consultation in relation to Section 18 notices under the *Aboriginal Heritage Act 1972 (WA)* are to be conducted through the Local Implementation Committee (LIC). YMAC did not attend the LIC meetings in 2013 where the Juukan Gorge Section 18 notice was discussed.

The only way the rock shelters could have been protected, was if Rio Tinto decided not to proceed; or the Minister did not give the Section 18 consent (noting that Traditional Owners do not have the right to appeal decisions); or an application was made for a protected area declaration under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* pursuant to the CWPA (in the case of the Juukan rock shelters, Rio Tinto's consent would have been required).

**6b. What, if any, regime did YMAC develop to protect the sites?**

See response to question 6.a above.

Additionally, YMAC introduced Rights Reserved Areas into the negotiations, which provided a better level of heritage protection in the final agreements that that afforded through the AHA. The agreements provide for the ability for PKKPC to conduct heritage surveys, consultations, notice and salvage, all of which is not provided for under the current AHA, and representing an improved position for Traditional Owners.

**6c. What was YMAC's role in managing disputes between Rio Tinto and PKKP about cultural heritage?**

YMAC provided legal representation to PKKP during the negotiations which culminated in the BIA and later the CWPA. PKKPC assumed the role of the LAC in July 2012 (following the receipt of independent legal advice). The CWPA contains dispute resolution clauses which may be activated by Rio Tinto or the LAC on behalf of PKKP.

YMAC did not receive any instructions from PKKPC to manage dispute resolution processes with respect to cultural heritage.

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**6d. In this role, was YMAC bound by the 'gag-clauses' in the PKKP agreement with Rio Tinto? Could it speak publicly about risks to cultural heritage?**

YMAC acted as PKKP's agents in the negotiations and in the provision of heritage services and therefore it would have been inappropriate to act in a way which was inconsistent with the obligations of the PKKP. Additionally, YMAC would not speak publicly about the matter unless in accordance with the wishes and instructions of the Traditional Owners.

Please do not hesitate to contact me, should you require further information.

Yours sincerely,

Simon Hawkins  
**Chief Executive Officer**

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