

Juukan Gorge: Rio Tinto blasting of Aboriginal site prompts calls to change antiquated laws

Conflict between mining and Aboriginal heritage in WA has spawned a system of suffocating bureaucracy and lopsided agreement-making



Juukan Gorge, in Western Australia, one of the earliest known sites occupied by Indigenous Australians, which the Anglo-Australian mining giant Rio Tinto has admitted damaging. Photograph: PKKP Aboriginal Corporation/AFP/Getty Images

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A 46,000-year-old Aboriginal heritage site destroyed by Rio Tinto this month is one of more than 463 sites that mining companies operating in Western Australia have applied for permission to destroy or disturb since 2010.

None of those applications have been refused. And under the state's 48-year-old Aboriginal heritage laws, only the land- or leaseholder has the right to appeal – traditional owners do not.

The figures show that the shocking destruction of the sites in the Juukan Gorge in the western Pilbara was not unique.

The conflict between mining companies and Aboriginal heritage, particularly in mineral-rich areas such as the iron ore-rich Hamersley range of the Pilbara, has spawned a system of suffocating bureaucracy and lopsided agreement-making that privileges development over protecting sacred

spaces and leaves traditional owners with no legislative power, and very little institutional power, to fight back.

The Juukan one and two sites are listed on WA's Aboriginal heritage register as Brock-20 and Brock-21. They sit a short distance apart in Juukan Gorge, about 60km from the mining town of Tom Price, on the edge of the multibillion-dollar Brockman 4 iron ore mine.

Juukan two is one of the only sites on the Pilbara to show continual human occupation through the last ice age, and archeological records, including bone pits that catalogued changing fauna, dated back 46,000 years.

The sites were drilled and set with explosives last week. Traditional owners the Puutu Kunti Kurrama and Pinikura (PKKP) peoples don't yet know the full extent of the damage.

The operation had been discussed at meetings with Rio Tinto over a number of years, but Burchell Hayes, one of the directors of the PKKP Aboriginal Corporation, says those meetings often conveyed technical information which PKKP elders found hard to interpret. He says the "blunt details" that would have helped them understand exactly what was being proposed, and when, was lacking.

"The sadness and the loss of our country has been very distressing," Hayes said.

Rio Tinto says the "mining activity" conducted this month was "undertaken in accordance with all necessary approvals", which had been obtained following a decade of "detailed consultation" with the PKKP.

"We are sorry that the recently expressed concerns of the PKKP did not arise through the engagements that have taken place over many years under the agreement that governs our operations on their country," a company statement says.

The PKKP Aboriginal Corporation rejected that statement on Saturday, saying they had told Rio Tinto of the importance of the site on a number of occasions since 2013, the last as recently as March.

Hayes said the mining company did not advise the PKKP of its intention to blast, and they only found out "by default" on 15 May "when we sought access to the area for Naidoc Week in July".

On a site visit in October 2019, Hayes said, their cultural and heritage manager, Dr Heather Bulth, told a senior manager from the mine that the rock shelters were significant.

“[He] advised Dr Builtth that there were no plans to extend the mine and Rio Tinto had been monitoring Juukan Gorge for vibration effects of local blasting,” Hayes said.

“At all times the PKK PAC has been direct and explicit in the archaeological and ethnographic significance of these rock shelters and the importance that they be preserved. For Rio Tinto to suggest otherwise is incorrect.

“We believe Rio Tinto’s outrageous statement is a bid to minimise the adverse public reaction and community outrage about Sunday’s blast at Juukan Gorge; and the distress and upset caused to the Puutu Kunti Kurrama people.”

The WA Aboriginal affairs minister, Ben Wyatt, says he is normally “contacted pretty rapidly by the relevant Aboriginal organisation” when a heritage site is under imminent threat, but was not called in this case.

“The first I heard about this was after the explosion,” Wyatt told reporters in Perth.

The federal Indigenous affairs minister, Ken Wyatt, says he received an 11th hour call from lawyers for the PKK advising him of the risk and asking for advice, and that he advised them to seek an injunction under federal heritage legislation.

He did not take it further or intervene, but said in a statement after the blast that the “destruction should not have occurred”.

Even if Ben Wyatt had known, there are no legal levers under the current legislation that allow for ministerial intervention. Wyatt has promised to reform the laws but consultation on that reform has been slow and was put off again last month due to the coronavirus.

It is now highly unlikely the WA government will have those new laws drafted and through parliament before the state election next March.

Robin Chapple, a Greens MP who campaigned alongside Wyatt to reform the legislation when Labor was in opposition, says Wyatt has “found himself to be incredibly compromised” by the conflicting responsibilities of protecting Aboriginal heritage, as Aboriginal affairs minister, and supporting its most significant industry as the state’s treasurer.

“You cannot have one person who is pushing the state in the pursuit of mining ... being the same person that has to represent the interests of Aboriginal people to protect the excesses of the mining industry from destroying their sites,” Chapple says.

In response, Wyatt says he acts “in the interests of all Western Australians when carrying out my ministerial responsibilities” and that his dual portfolios “only elevates the significance of Aboriginal affairs within this government”.

Negotiations over the protection of Juukan Gorge began in 2003. In 2005, Hamersley Iron, a wholly-owned subsidiary of Rio Tinto, applied for environmental approval to build a new iron ore mine dubbed Brockman 4.

Documents submitted as part of that assessment process said it had found 27 archaeological sites within the project area: mostly rock shelters with some artefact scatters, water sources and scarred trees.

It said that identified Aboriginal heritage sites “may need to be either disturbed or actively managed” for the mine to proceed but that “it is not anticipated that the project will adversely impact on any areas of ethnographic significance”.

In 2008, the archaeologist Dr Michael Slack was engaged to conduct a test dig in the large rock shelter known as Juukan two, and concluded it was a “quite significant” site that was about 20,000 years old.

In 2013, Rio Tinto applied for and was granted ministerial consent under section 18 of the Aboriginal Heritage Act 1972 to destroy Juukan one and two, as part of the expansion of its proposed Brockman 4 mine, which had become operational three years earlier.

The minister who provided that consent was Peter Collier, a member of the Barnett Liberal government that was in power at the time. But it’s unlikely he knew the details of what he signed off on, Chapple says.

All applications are assessed by the Aboriginal Cultural Heritage Committee, which then provides a recommendation with scant detail to the minister.

There is no legislated requirement for the ACHC to consult traditional owners. In 2015, the committee was chastised by the supreme court for using an invalid definition of sacred sites that explicitly excluded sites that were part of songlines.

In 2014, after permission to destroy the site had been granted, a salvage mission dated the Juukan two site at 46,000 years old and of very high archaeological and cultural significance. One year later the Puutu Kunti Kurrama and Pinikura were granted native title over the area, and a 10,888sq km patch of the Hamersley range.

That gave them the right to negotiate over any new developments, and to make financial agreements with mining companies profiting from their land.

But it did not confer any legal ability to protect heritage sites, unless negotiated as part of a land use agreement.

Those land use agreements are designed to foster closer relationships between industry and Aboriginal peoples, like the relationship that Rio says it has with the PKKP. The relationship is both financial and institutional, and can make it difficult to take a disagreement over a matter like the protection of a heritage site into a public arena.

But because of the lack of power granted to traditional owners under the WA Aboriginal Heritage Act, a public fight is the only mechanism left to traditional owners to defend heritage if negotiation fails.

Chapple says the financial ties between traditional owner corporations and the mining companies that threaten their heritage are well known, but rarely discussed.

“I don’t think it’s particularly corrupt, I just think we need to know that there are relationships that can be used to the benefit of the mining companies,” Chapple says. “You get this in small communities, and Western Australia is a small community.”

The Aboriginal Heritage Act 1972 has been relatively unchanged for almost 50 years and does not give traditional owners any formal right of consultation or appeal.

In his second reading speech in April 1972, the then minister for community welfare, Bill Willessee, said the legislation had been drafted because “the preservation of sites and objects of Aboriginal origin is now recognised throughout Australia as an important aspect of providing Aboriginal citizens with the social environment that they need when they still retain partly or wholly their traditional beliefs”.

This speech proved more enlightened than the resulting legislation, says Greg McIntyre SC, a leading expert on Aboriginal heritage cases.

He says that had the legislation included a strong emphasis on spiritual value as a basis for heritage protection, he would be “reasonably happy”.

“The problem is that the legislation doesn’t even do that,” he says.

Under the current legislation, McIntyre says, the only legal option for traditional owners who oppose a decision allowing the destruction of their heritage lies in administrative law, an argument that due process has not been followed. That does not in itself halt a development, but it does cause delays.

“Administrative relief is like guerrilla warfare in that you hope it will slow people down and they will be forced to rethink it, but it doesn’t really get to the key issues of whether it’s affecting Aboriginal heritage or the environment,” McIntyre says.

Even if the act is reformed, McIntyre says, the economic importance of the mining industry made it likely that the focus would remain on finding a compromise between heritage and industry.

“The best legislation I think we’re likely to get is legislation that has a heavy emphasis on involving Aboriginal people in the decision making, but with the understanding that ultimately they will be expected at best to go into partnership with those that wish to extract minerals rather than prevent that from happening,” he says.