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Ethical Partners calls for ASX listed companies to publish a list of all the heritage sites of Traditional Owners impacted by mining and development*

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“Many of our operations are on or near land that is sacred to many, including Indigenous communities. We recognise the cultural, spiritual and physical connections that Indigenous people often have with land, water, flora and fauna. We are committed to working in a way that respects their rights and reflects their perspectives.”

Rio Tinto corporate website, 2020

It is sadly now well documented that on the 24th May 2020, Rio Tinto blasted rock caves known as the Juukan Gorge rock shelters in the Pilbara region of Western Australia to allow for the expansion and development of its Brockman 4 asset. We understand these rock caves were regarded as being of cultural and historical significance to the First Peoples. Archaeological testing at the site had determined they were approximately 46,000 years old and the Puutu Kunti Kurrama and Pinikura peoples (PKKP) are reported to have a deeply spiritual and emotional connection to their ancestral past through this land.

When we assess the timeline of how this deeply regrettable event unfolded we do believe that whilst Rio Tinto has followed the letter of the law with respect to ensuring consent (granted in 2013) and providing some limited site access to the PKKP in recent times, it does not appear to have abided by the UN Guiding Principles. Whilst the process of obtaining a Section 18 notice and the broader process of consent from the Traditional Owners is an issue that we are not experts in, we are confident that RIO’s commitment to operate in a manner which is consistent with UN Guiding Principles and UN Declaration on the Rights of Indigenous Peoples (UNDRIP), was not abided by in this case.

Specifically, we have read that key issues became evident in 2014, one year after consent was granted. At that time it became clear that the significance of the Sacred Site following further investigation was much greater than initially understood when consent was struck. It was determined that the site was at least twice as old as previously believed, the locations more numerate and a range of artifacts needed to be protected. We strongly feel this should have been a catalyst for Rio Tinto to reconsider the mine plan and re-engage with the PKKP peoples.

We note under Article 8 of the UNDRIP that actors “*shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing of them of their lands, territories or resources;*”. Furthermore, it is important to note that under the policy of Free, Prior and Informed Consent (FPIC), based on the UNDRIP and Rio Tinto’s own Human Rights Disclosures, gives the Indigenous Community the right to withdraw consent at any time, regardless of legislation.

These issues take on more significance given they occurred on the eve of Reconciliation week and immediately prior to the anniversary of National Sorry Day. We note that RIO has contradicted the philosophy behind its own commitment to the Uluru Statement from the Heart, and to this end, we have learned that Reconciliation Australia has suspended Rio Tinto from the Reconciliation Action Plan (RAP) program.

We acknowledge that this is a complicated issue and we are continuing to educate ourselves, but in our view that does not mean investors should shy away from advocating for change at the corporate and regulatory level to mitigate the chances of the mistakes of this magnitude being repeated. We await the findings of the flagged review of this event, but initially it appears to us that the missteps that lead to this horrific event are born from a breakdown in communication: communication within Rio Tinto, communication between Rio Tinto and the regulatory/government bodies, and most significantly, communication between Rio Tinto and the Traditional Owners (the PKKP in this instance). As a result, our suggestions are built around creating catalysts for improved communication and transparency to facilitate a better understanding for all stakeholders of the issues and to help prevent events of this nature in the future.

Further to the broad recommendations outlined below **we strongly encourage Rio Tinto to make public the findings from its announced review to show the accountability taken and also provide learnings to the broader industry.** We note with some disappointment that Rio Tinto is yet to make any formal public statement to the London or Australian Stock Exchanges, rather choosing to provide a link on their corporate website. It has also become clear over recent days that this is not a risk isolated to Rio Tinto, with Fortescue, BHP and Woodside all reported to be planning future destructive expansions in the same manner.

To that end, we call on Rio Tinto and the mining sector for:

1. Increased disclosure via the publishing (by every ASX listed company) of a Register of sites and places of Aboriginal and Torres Strait Islander heritage that will be impacted by intended works and development*: These will be in the form of Section 18 notices in Western Australia, Section 90 of the National Parks and Wildlife Act 1974 (NSW) and other relevant legislation for each State and Territory of Australia: We feel this may allow all stakeholders to be better educated on what current approvals exist and to assist in fostering a broader discussion on their applicability. In our view this is a relatively simple process that could be enacted swiftly and we will be encouraging companies to do this.
2. Regular Reviews of Consent(s) granted: We advocate for a company level policy to ensure each Section 18 notice (or equivalent in other States and Territories) is revisited on a regular basis to allow for submissions in the event there has been the discovery of material facts that would change the categorisation of a site. We understand there is informal structures in place at this time (post consent being granted) but we see implementing something more robust as moving ahead of where regulatory changes will likely go. It has struck us that if a mine plan had received approval under the Environmental Protection Act it would need to be reviewed every 5 years but there is no formal or required review under a site of potential cultural significance under the current Aboriginal Heritage Act, 1972. We acknowledge this would potentially slow down mine development and create inefficiencies, however we view that as insignificant when contrasted with the social impacts of a mistake like the blasting of the Juukan Gorge caves.
3. A wider review of sustainability and community advocacy processes at Rio Tinto: It has been suggested in recent industry discussions and the media that a factor in this event was the separation of Health, Safety and Environment responsibilities (HSE) and operational leadership at Rio Tinto. Further, there is a view currently that Rio Tinto has increasingly directed HSE management, specifically Community advocacy for example, to fall under a Corporate Affairs banner as opposed to operational control at the mine site where it has historically been centred. This is something we intend to better educate ourselves on with Rio Tinto, this could appear to be a potential factor in the events at play. This is even more relevant given other recent Human Rights issues that RIO faces which have received media focus.

4. Regulatory change: It looks apparent from recent expert analysis that the current legal framework for consents in Western Australia is inadequate and outdated. We note recent comments from Hon Ben Wyatt (WA Treasurer, Minister for Lands, Aboriginal Affairs and Finance) suggesting an expedited review of the legislation which we see as encouraging. We hope this updated legislation has improved in-built protections for the First Peoples, has a formal regular review structure and better encourages transparency in Section 18 disclosures.

We have raised these Issues with Rio Tinto's Chairman directly and will continue to engage with the company on these recommendations.

Unfortunately the ancient rock shelters cannot be rebuilt but it is our view, our hope, that lessons can be learned from this tragedy for the betterment of all stakeholders. As we continue to learn from this event we hope that the corporate players also take heed, especially those currently operating in the Pilbara, as they continue to operate in what Rio Tinto Chairman Simon Thompson refers to as an area with a "high density of heritage sites". This is a matter of not only significant importance but some urgency given mine expansion in the Pilbara is an on-going focus of the industry whilst the iron ore price remains at elevated levels.

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