Constitutional Review, Volume 11, Number 2, December 2025
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev1123

Free, Prior, and Informed Consent in Indigenous Rights: the Juukan Gorge Debacle

Bertus de Villiers*
University of Johannesburg Law School
bertus.devilliers@justice.wa.gov.au

Received: 19 March 2025| Last Revised: 3 November 2025 | Accepted: 5 November 2025

Abstract

The Juukan Gorge case study is perhaps the most relevant contemporary example of how what seems right as far as accessing indigenous lands can easily turn out to be wrong. It highlights the complexity of regulatory processes and how formal processes interact, or fail to interact, with indigenous customary processes. This article reflects on the way in which approvals processes affecting the customary lands of Indigenous People may become convoluted and complex due to multiple levels of authorities being responsible to consider proposals. When indigenous, public, and private interests intersect the ideal of a consent outcome is not always possible. The reality is that public interest in economic development is often in direct conflict with protection of an indigenous site. As is show in the article, FPIC reflects the assumption, demand and aspiration of Indigenous People to be consulted about what happens on their traditional lands. FPIC as it appears in UNDRIP is often presented, erroneously, as giving to Indigenous People the final control over what happens on their ancestral lands. Whilst FPIC strives towards reaching consensus, FPIC does not mandate consensus. This article uses the Juukan Gorge debacle to draw lessons and insights from the complexity and uncertainty of regulatory approval processes on the lands of Indigenous People. The risks to Indigenous People and developers are palatable with Indigenous People fearing their rights may be encroached, whilst developers being concerned that the approvals they receive from the state may be challenged by Indigenous People.

Keywords: Free, Prior, and Informed Consent; Juukan Gorge; UNDRIP; Indigenous Rights

* Visiting Professor of University of Johannesburg Law School (South Africa).

I. INTRODUCTION

The mention of 'Juukan Gorge' raises an image of the complexities and nuances of free, prior and informed consent (FPIC).[1] FPIC reflects the assumption, demand and aspiration of Indigenous People to be consulted about what happens on their traditional lands.[2] Juukan Gorge is an example of how things can go wrong even if the state had granted approval for a project to proceed. The destruction and damage on 24 May 2020 of 2 Aboriginal sites, 1 with a dated history of around 46 000 years, highlights how much remains to be done to secure and protect indigenous sites and dreaming story lines of national and international importance. Juukan Gorge in general and the rock shelters in particular, are more than a site. They represent evidence of the dynamic living of the oldest uninterrupted culture in the world. It links human occupation in that area to the ice age.[3] The word 'irreplaceable' does not get close to explain its loss. And yet, mining company Rio Tinto lawfully destroyed 1 site and damaged another site regardless of expert reports that described their unique status, and despite the strenuous objections of the traditional owners of the land. It is unfathomable that so much was known about the Gorge - scientifically, anthropologically, culturally, and managerially - and so many people had a concern about the preservation of the sites, and yet the blasting took place like a Greek tragedy with a foreseeable yet uncontrollable outcome.[4]

---

1 The Juukan Gorge is located in the Pilbara region of the state of Western Australia. The Gorge is about 400m long and 70m wide and includes several rock shelters and a rock pool. These sites are regarded as sacred by the traditional Aboriginal custodians. For example, the sighting in 2020 of a python in the snake pool is proof to them of the ongoing spirituality and sacredness of the Gorge in general and the pool specifically.

2 Article 19 of the Universal Declaration on the Rights of Indigenous People (UNDRIP) provides as follows: 'States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.' The declaration is not legally binding, but it reflects a widely held international consensus about how the traditional lands of Indigenous People should be respected. See See B ertus De Villiers, "Right to Be Consulted, but the Frustration of Being Ignored: The Ongoing Efforts in International Law to Give Practical Meaning to Free, Prior, and Informed Consent," in *Indigenous Rights in the Modern Era: Regaining What Has Been Lost* (Leiden: Brill, 2023), 125.

3 M. Slack et al., "Aboriginal Settlement during the LGM at Brockman, Pilbara Region, Western Australia," *Archaeology in Oceania* 44 (2009): 32–39; M. Slack et al., "The Early Occupation of the Eastern Pilbara Revisited: New Radiometric Chronologies and Archaeological Results from Newman Rockshelter and Newman Orebody XXIX," *Quaternary Science Reviews* 236 (2020).

4 The parliamentary report explains in some detail the efforts made to prevent the blasts; the risks to remove explosives that had already been loaded; and ultimately the inevitability of the blasts on 24 May 2020. See Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021), 303-4.

If the destruction of Juukan Gorge had happened a century ago one would have shaken your head in disbelief. But for it to have happened in 2020 leaves one speechless. Furious. Distraught. Especially because the damage was caused by a mining giant that prides itself on its constructive and positive working relationship with Indigenous People, its high internal standards for indigenous consultation, its support for native title and reconciliation, and its respect for indigenous culture. Particularly poignant is that the company acted with lawful authority of the state of Western Australia and hence no prosecution arose from the wiping out of an irreplaceable link to pre-ancient history.

The events leading to the Juukan Gorge destruction reflects a culmination of all the facets of FPIC, for example: the meaning of FPIC; the ongoing nature of FPIC in the case of major projects; the legal status of UNDRIP; corporate culture to consult with Indigenous People; industry self-regulation; social licence to operate; country-based legislative and administrative standards; interaction between public and indigenous interests; intra-indigenous cooperation and sharing of information; who speaks for country; the regulatory authority of the state, and, perhaps most importantly, what happens in the legal vacuum between consultation and consent. From that gap may arise actions that are 'lawful but awful'.[5]

In this article I reflect on the events at Juukan Gorge considering the different facets of FPIC and I draw conclusions that may assist with the implementation of FPIC on a wider scale. I highlight the complexity of contemporary regulatory processes where the state may grant approval for a measure, whilst an indigenous community may object. The reports produced by the Australian parliamentary committee that investigated the events, provides a detailed factual overview of what had happened before and after the destruction.[6] I will discuss the destruction of Juukan Gorge under the following sub-headings: essential facts; statutory framework; and elements of FPIC as those are relevant to the Juukan

[5] N. Passas, 'Lawful but Awful: "Legal Corporate Crimes"', *Journal of Behavioural and Experimental Economics* 34 (2005): 771–86.

[6] Parliament of Australia, "Juukan Gorge Inquiry to Question Rio Tinto," *About the House News* (Canberra, 2020); Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021).

events. I conclude with insights that can be gained in the wider application of FPIC.

The Juukan Gorge case study is perhaps the most relevant contemporary example of how what seems right in statutory approvals can easily turn out to be wrong in community disapproval. It also highlights the complexity of regulatory processes and how formal processes interact, or fail to interact, with indigenous processes. When indigenous, public, and private interests intersect the ideal of a consent outcome is not always possible. The reality is that public interest in economic development is often in conflict with protection of an indigenous site.[7] Which interest prevails if there is an irreconcilable conflict? Importantly, who carries the burden of a final decision? And how legally secure is a final approval. There is no simple answer – if government has the final approval, it means important indigenous sites can lawfully be destroyed, whilst if an indigenous community has a veto, it means that important socio-economic developments may grind to a halt, or unreasonable conditions may be imposed on a developer.

FPIC as it appears in UNDRIP is often presented, erroneously, as giving to Indigenous People the final control over what happens on their ancestral lands. Whilst FPIC strives towards reaching consensus, FPIC does not mandate consensus. Neither does FPIC grant a legal veto to Indigenous People. The Indigenous People can refuse to consent to a development, but that does not equate to a legal veto.[8] The final decision remains that of the regulating authority, which may consider the refusal by the indigenous community but without being bound by it.[9] Agreement by consent remains the ideal, but what if agreement is not reached? Being a final decision-maker is not simple. The legal position

[7] See as an example the Forrest case in Western Australia which a decision had to be made about retaining the physical integrity of a river in which the local Aboriginal people believe a mythological snake resides, or allowing concrete weirs to be built for purposes irrigation for purposes of economic development. The case highlighted how agreement cannot always be reached; how the interest of one party may be irreconcilable with the interest of the other party; and how reverting to the public interest is not always helpful since the public interest supports economic development as well as protection of Aboriginal heritage. See *Forrest and Forrest Pty Ltd v Minister of Aboriginal Affairs* [2024] WASCA 96 (Supreme Court of Western Australia, Court of Appeal, 2024).

[8] Australian Human Rights Commission, *Study on Free, Prior and Informed Consent: Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia* (Sydney: Australian Human Rights Commission, 2018).

[9] A. Tomaselli, "The Right to Political Participation of Indigenous Peoples: A Holistic Approach," *International Journal on Minority and Group Rights* 24 (2017): 390-427.

explained by the Law Society of Western Australia in respect to Juukan Gorge is likely to be similar in other jurisdictions, namely:

There is no legislative regime at a State or Commonwealth level which is effective to *guarantee* the protection of culturally and historically significant sites such as caves at Juukan Gorge. (emphasis added)[10]

FPIC is not a justiciable legal right in international law or customary international law;[11] the 'consent' in FPIC does not constitute a legal veto to be exercised by Indigenous People (unless a domestic statute grants a right of veto as in the case of Baleni in South Africa [12]);[13] the withholding of consent does not imply a proposal is legally rejected; courts consider the *process* rather than the outcome of consultation; the obligations of FPIC may be met even if a development goes ahead; the final regulatory and approval authority of the state is not disturbed by FPIC; industry continues in its attempts through self-regulation to improve its interaction with Indigenous People; and FPIC has given new meaning and application to good faith consultation.[14] Juukan shows however how easily good intentions can be derailed, how weak domestic legal arrangements about consultation can be exploited; how scientific knowledge may be buried in bureaucracy and poor management; and how poor communications and the human element present an ongoing risk of poor outcomes.

---

[10] Law Society of Western Australia, "Submission to the Inquiry into the Destruction of 46,000 Year Old Caves-Juukan Gorge, Western Australia," July 20, 2020, 28.

[11] The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) expresses the opinion in response to the Juukan Gorge event that 'Indigenous People should have the right to give or withhold consent to any project on their land. This is the principle of free, prior, and informed consent.'
See Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Inquiry into the Destruction of the 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia* (Canberra: AIATSIS, July 31, 2020), 3; A. Nagar, "The Juukan Gorge Incident: Key Lessons on Free, Prior and Informed Consent," *Business and Human Rights Journal* 6 (2021): 378. Nagar also refers to ILO 169 and says that the 'consent requirement' is 'enshrined' therein, but without mentioning that ILO 169 is only binding on treaty partners (Australia is not a signatory) and the scope of FPIC in ILO 160 does not apply to general land access disputes. This reflects the common misunderstanding of the meaning and effect of FPIC. Advocates often present FPIC as a justiciable and enforceable right, leaving Indigenous People disillusioned when they realise it is a relational right rather than a justiciable veto.

[12] *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP) (High Court of South Africa, Gauteng Division, Pretoria, 2019).

[13] *Baleni v Minister of Mineral Resources* 2019.

[14] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14, assented to June 21, 2021 (Canada).

II. ESSENTIAL FACTS OF JUUKAN GEORGE DESTRUCTION

On 24 May 2020 mining company Rio Tinto caused 2 Aboriginal rock shelters (sites) in the Juukan Gorge to be damaged or destroyed as part of an expansion of the Brockman iron ore mine in the state of Western Australia.[15] The destruction was a permitted act under the Aboriginal Heritage Act of the state of Western Australia.[16] Ministerial approval had been given some 6 years earlier for the sites to be destroyed.[17] It had been known since 2003 that the sites had 'moderate to high degree of archaeological significance.'[18] In a 2014 expert report the one site was described as of the highest archaeological significance in Australia.

The sites contained evidence of Aboriginal occupation and use of at least 46 000 years.[19] The local Aboriginal people, traditional owners of the land, and custodians of the sites, the Puutu Kunti Kurrama and Pinikura peoples (PKKP people), held the sites in high regard for its cultural, ethnographic, and archaeological importance. The PKKP people knew the sites, adhered to their connection to ancestors who utilised the sites, and saw the sites as part of their ongoing living culture. Extensive scientific knowledge existed prior to the destruction of the cultural, ethnographical, archaeological, and historic value of the sites. In a 2014 report by archaeologist Dr Michael Slack submitted to Rio Tinto he observed that one of the sites contained artefacts 'of the highest archaeological significance in Australia.'[20] This information about the high value

[15] For a chronology of events leading up to the destruction refer to the summary of the parliamentary report. See Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021), 293-303.

[16] *Aboriginal Heritage Act* 1972 (WA), s. 18(3).

[17] The approval given to Rio Tinto was to destroy or damage 12 rockshelters and 20 artefact scatters after salvage excavations had been done. It was during those subsequent salvage excavations that additional evidence about the significance of the two sites had been collated. The sites were not only important in respect of the salvageable artefacts, but also to the spiritual and physical connection between the PKKP people and their ancestors. Note that the discussion in this article and citation to the Aboriginal Heritage Act reflect the provisions of the Act as it was in 2020. Since then, there have been ongoing efforts to amend the Act. Those are not the subject of this article.

[18] Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021), 293.

[19] Slack et al., "The Early Occupation of the Eastern Pilbara Revisited.

[20] G. Borschmann, "Report Reveals Rio Tinto Knew the Significance of 46,000-Year-Old Rock Caves Six Years before It Blasted Them," *ABC News*, June 5, 2020.

of the sites was given to Rio Tinto *after* it had been given ministerial approval to destroy the sites, but some 6 years *prior* to the destruction of the sites. In a 2018 report by Scarp Archaeology it was reiterated that one of the sites had the 'highest archaeological significance in Australia'.[21]

The authority by which Rio Tinto destroyed the sites was issued by the Minister of Aboriginal Affairs on 31 December 2013 pursuant to section 18 of the Aboriginal Heritage Act. None of the research results of excavation of the sites that had been conducted *after* 2013, neither the opposition of the PKKP peoples to any damage being caused to the sites, were submitted to the Minister. There was, however, no legal obligation under the Aboriginal Heritage Act on Rio Tinto or any researcher to make the new information known to the Minster of Aboriginal Affairs. In any case, even if the Minster had been given the new information, the Minister had no legal power to rescind an approval after it had been granted. This meant that the approval for destruction of the sites given in 2013 retained its validity regardless of any findings of important Aboriginal sites or artefacts made after the issuing of the approval. This explains why, regardless of the public outcry, the actions taken by Rio Tinto were technically lawful. But right (at law) soon turned out to be very wrong (in public perception and stakeholder expectations).

Following the ministerial approval issued in 2013, experts retained by Rio Tinto undertook, in cooperation with the PKKP people, further excavation of the sites. They catalogued and preserved around 7000 artefacts. A detailed report pf the ethnographic findings and importance of the sites was provided to Rio Tinto. Rio Tinto conceded to the Parliamentary Committee that the additional information obtained after the 2013-approval provided an adequate basis for Rio Tinto to voluntarily re-assess the importance of the sites. (Final Report Juukan 2021, para. 2.62) However, an internal reassessment by Rio Tinto never occurred. The reason for the failure was, according to Rio Tinto, attributable to poor

[21] Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021), 297.

internal communication in the company. But the events also reflect the 'power imbalance' between mining companies and Indigenous People.[22]

Prior to the destruction of the sites, Rio Tinto had extensive involvement with the PKKP people, including knowledge about the importance of the sites, agreements with the PKKP people about exploration and mining in their traditional areas, and other cooperation, heritage protection, and commercial arrangements. Had it not been for the destruction of these sites and the public outcry that followed, the engagement between Rio Tinto and the PKKP people may have been presented by Rio Tinto as standard setting in the mining industry of Australia and beyond.[23] The relationship with the PKKP people had been in existence for at least 18 years prior to the destruction.

In the leadup to the blasting of the sites, communication between Rio Tinto and the PKKP people declined in quality. Rio Tinto, on reflection, accepted that it had suffered poor internal and external communication and that lines of communication within the company became 'blurred' and this in turn impacted on communication with the PKKP people. Essential staff skills had been lost for a variety of reasons. These staff movements contributed to the poor communication within the company as well as the PKKP people. For example, in the days prior to the blast, Rio Tinto failed to inform the PKKP people of the planned blast or the extent thereof. By the time the PKKP peoples became aware of the intended blasts it was too late to interrupt it, and to the extent that they communicated to Rio Tinto that the sites must not be destroyed, they believed Rio was taking appropriate steps to prevent the blasts or to mitigate the impacts. (Final Report Juukan 2021, para. 2.80-2.81) Investigation into the days prior to the blasts found, however, that it would be too risky for the explosives to be removed. Rio Tinto admitted as follows:

---

[22] A. Kaur et al., 'Being Left behind: Disclosure Strategies to Manage the Juukan Gorge Cave Blast', *Accounting, Auditing and Accountability Journal*, 2024, para. 6.1.

[23] The investigation into the Juukan Gorge destruction brought attention to the agreement-process between Rio Tinto and the PKKP people. For example, in one example a contract of around 740 pages had to be approved by the PKKP people, but it was said that plain English summaries were only handed out shortly before the meeting at which approval had to be given. See D. Kemp et al., "Critical Reflections on the Juukan Gorge Parliamentary Inquiry and Prospects for Industry Change," *Journal of Energy and Natural Resources Law* 41 (2023): 397; Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021).

> In allowing the destruction of the Juukan Gorge rock shelters to occur, we fell far short of our values as a company and breached the trust placed in us by the Traditional Owners of the lands on which we operate.[24]

A pertinent question that arose in the aftermath of the destruction is whether the PKKP people had since 2013 known about the intended blasts and if so, whether they had adequate opportunity to prevent it from happening. The Parliamentary Report heard detailed evidence about this issue. [25] With the benefit of hindsight and the actions being taken by Rio Tinto since the destruction, it is not controversial to conclude that the PKKP people did not know about all the options available to Rio Tinto prevent or mitigate damage to the sites;[26] that the PKKP people were not aware of the intended destruction of the sites; and that there was inadequate opportunity for the blasting to be stopped. It is also not controversial to say that the possible destruction of the sites had been on the agenda since approval had been given by the Minister of Aboriginal Affairs in December 2013, but legally the PKKP people had no right to appeal the approval granted by the minister. However, the actual destruction of the sites, in light of additional evidence that had been gained since the approval as well as the ongoing discussions between Rio Tinto and the PKKP peoples, came as a surprise to the PKKP peoples and scientists who had been exploring the sites.

Another pertinent question to be directed at Rio Tinto is whether it could have taken alternative steps to either prevent or to mitigate the damage to the sites? Although Rio Tinto had ministerial approval that authorised its actions, could their self-regulation and internal checks and balances have caused them to reconsider the scope of blasting? Again, with the benefit of hindsight and the actions undertaken by Rio Tinto, the answer to the question is affirmative. More could and should have been done to prevent the destruction or damage

[24] Rio Tinto, "Juukan Gorge," *Rio Tinto* (2025).

[25] Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021), paras. 2.6–2.25.

[26] In October 2012, Rio Tinto had produced an internal memorandum in which possible design options for the mine were considered. Of the 4 options identified, 3 avoided or limited impacts to the sites. These options were not disclosed to the PKKP people and the only option to them was presented as *fait accompli*. See Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021), 294.

of the sites or to mitigate the impact of the blasts. The Parliamentary Report found that as far back as 2013 when the approval had been granted, Rio Tinto 'failed to properly adhere' to the letter and spirit of agreements with the PKKP; failed in the application of their own internal standards; and failed to disclose to the PKKP people alternative design options for the expansion of the mine to mitigate or prevent damage to the sites.[27] Added to these contributory causes, Rio Tinto admitted that its management and communication systems had broken down. Furthermore, the 2013-notice in which Rio Tinto explicitly said that the sites will be impacted by the blasts, was not sent directly to the PKKP people, but to another Aboriginal corporation who, in turn, did not pass the notice on to the PKKP people. (Final Report Juukan 2021, para. 2.50, 2.105) Additionally, the initial approval granted by the minster in 2013 was based on incomplete and deficient information. For example, the information provided in support of the destruction failed to explain the ethnographic importance of the sites. In fact, an explicit recommendation by an expert that the sites be preserved, was omitted from the application to the Minister. Added thereto, Rio Tinto did not disclose to the PKKP people that there were alternative options available than the destruction of the sites. Notably, the Aboriginal Heritage Act did not make it an offence to present incomplete information to the Minister or to the Aboriginal people.

Although substantial additional ethnographic evidence had been obtained after the issuing of the 2013-notice of the importance of the sites, the new information was not submitted to the Minister of Aboriginal Affairs. It is noted, however, that the Aboriginal Heritage Act did not require later obtained research findings to be submitted to the Minster, but in the absence of a statutory requirement the question arises whether Rio Tinto should, pursuant to its corporate commitment, ethnics, and self-regulation, have volunteered the information to the Minister, or at least caused an internal reconsideration of the expansion of the mine. Although the report explaining the importance of

[27] Final Report Juukan, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, 2021), para. 2.40.

the sites was handed to Rio Tinto, the content of the report was not effectively communicated within Rio Tinto. The inadequacy of self-regulation was obvious.

In the next part we briefly reflect on the statutory arrangements that existed at the time approval was given for the sites to be destroyed.

III. STATUTORY FRAMEWORK GIVING RISE TO THE JUUKAN GORGE DESTRUCTION

The Aboriginal Heritage Act of the state of Western Australia was drafted at a time when there was, essentially, little or no legal, moral, or ethical obligation of any substance to consult with Indigenous People about their traditional lands, sites, or interests. The conventional wisdom at the time was that Australia regarded as terra nullius at time of settlement in 1788 and that no traditional native title rights and interests had survived settlement.[28] In the 1970s advocates for indigenous rights were barely heard internationally or in Australia. ILO 169 and UNDRIP had been on the far horizon. Importantly, the 'living' aspects of indigenous law, culture, and customs as those related to ongoing connection to land were not appreciated, with the emphasis falling on conservation of indigenous artifacts and stories recorded within museums.[29] The interaction between Indigenous People and their country, the ongoing breathing of their storylines, and their continued caring for country as a society with their unique laws and customs, had not yet been appreciated.[30] The Aboriginal Heritage Act predated the determination of native title in Australia by around two decades.[31]

The Aboriginal Heritage Act was in 2020 arguably one of the most outdated acts on the statute books in Australia. Ironically, although industry practices and self-regulation by private enterprise in their interaction with Indigenous

[28] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (Supreme Court of the Northern Territory, April 27, 1971)

[29] The emphasis on the display of artifacts in museums often ignored or underappreciated the ongoing spiritual and cultural connection of those artifacts with land and the traditional owners of the land. The destruction of Juukan Gorge therefore not only impacted on the artefacts that may not have been recovered, but also on the spiritual and physical connection to the land and the duty of the PKKP people to be proper custodians and protectors of the land. Kaur et al., 'Being Left behind: Disclosure Strategies to Manage the Juukan Gorge Cave Blast'. The PKKP people explained that the destruction affected the spirits, a phycological historic anchor, and special ceremonial places that linked them to their ancestors and provided a basis for their living culture.

[30] *Yorta Yorta v Victoria* [2002] HCA 58; (2002) 214 CLR 422 (High Court of Australia, 2002).

[31] *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 (High Court of Australia, 1992).

People had in 2020 been far advanced compared to the 1970's, Rio Tinto relied on the outdated legislation rather than on contemporary standards and practices to proceed with the destruction of the sites. One would have expected Rio Tinto to have engaged in an internal review about the appropriateness of the authorisation to destroy that had been granted some 7 years earlier, rather than to rely on legislation that was clearly outdated in comparison to contemporary international and industry standards. The OECD, World Bank, United Nations, and various international organisations had by 2020 made remarkable strides towards industry self-awareness and self-regulation in respect of their interaction with Indigenous People.[32] The agreements Rio Tinto had with the PKKP peoples were also advanced and set the standard to the industry in Australia. Added thereto, cultural training awareness of staff had become an industry standard and approaching Aboriginal culture as a living system of law had long been recognised. It is therefore even the more inconceivable that in 2020 Rio Tinto could have engaged in the actions it did in respect of Juukan Gorge.

Focusing on the relevant provisions of the Aboriginal Heritage Act: The two principal operative provisions of the Aboriginal Heritage Act of relevance to this article are sections 17 and 18. Section 17 determines that it is an offence to damage or destroy an Aboriginal site, unless authorisation is received from the minister pursuant to section 18. Section 18 provides that the relevant minister shall consider the recommendations of the advisory Aboriginal Cultural Materials Committee (ACMC) (s 28) as well as the general interests of the community before consenting or declining to approve an Aboriginal site being destroyed or damaged.[33]

[32] L. Achtouk-Spivak and R. Garden, "OECD National Contact Point Specific Instances: When 'Soft Law' Bites?," *Journal of International Dispute Resolution* 13 (2022): 608-42.

[33] In the Juukan Gorge case the ACMC did not properly scrutinise the section 18 application and did not identify any shortcomings or inconsistencies in the application. Importantly, the ACMC does not have powers to conduct its own investigations or to hear evidence. It is therefore open to the ACMC to recommend the destruction of a site without having detailed information about the site. In the case of the Juukan Gorge application the recommendations made by researchers Slack and Builth for the sites to be regarded as of high ethnographic importance, were not included in the application before the ACMC. In fact, the application was so deficient that under the heading dealing with the ethnographic significance of the sites, Rio Tinto replied with "N/A" (not applicable).

There are 5 notable aspects of the legislation for purposes of this article:

firstly, there is no national or state register of all Aboriginal sites in Australia or Western Australia,[34] which means a person may damage an Aboriginal site and then be prosecuted without knowing of the existence of the site. There is also no legal obligation on Indigenous People to make known their sites of importance;

secondly, the person applying for approval to destroy or damage an Aboriginal site may appeal the decision of the relevant minister not to grant approval, but the Aboriginal people who may oppose an approval that had been granted, did not have a right of appeal; (s 18(5))

thirdly, there was no obligation on any person or entity to bring to the attention of the Minister of Aboriginal Affairs any new information that had been obtained after approval for the destruction of site had been given;

fourthly, once the Minister had made the decision, there was no power for the Minister to revisit the decision. This meant that even if Rio Tinto or the researchers had made known to the Minister the importance of the sites, the Minister had no power to rescind or vary the approval given. The only entity that could reconsider, was Rio Tinto; and

fifthly, Rio Tinto could or rather should, in light of the evidence that had become available, self-initiated and adjusted the location of the mine, blasting holes, or adopted other steps to prevent or mitigate damage to the sites. But Rio Tinto had regardless of its endorsement of the UNDRIP principles, 'effectively neutralised these commitments in their front-line practices.'[35] Rio Tinto hence suffered the consequences of corporate reputational damage when legal compliance is fulfilled 'but in the absence of corporate ethics and community responsibilities.'[36]

---

[34] The reasons why Aboriginal sites are not recorded are varied, but one important consideration is that some sites are secret or sacred and hence cannot be disclosed to uninitiated persons. Juukan Government Response, 'Australian Government Response to the Joint Standing Committee on Northern Australia's A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge', Australian Government, 2022, 9. Furthermore, the Minster may also deregister Aboriginal sites, and such a decision cannot be appealed by the affected Aboriginal community. Traditional Owners - Nyiyaparli People and Minister of Health, Indigenous Affairs [2009] WASAT 71 (2009).

[35] Kemp et al., "Critical Reflections on the Juukan Gorge Parliamentary Inquiry and Prospects for Industry Change," 382.

[36] V. Oliveri et al., "The Juukan Gorge Destruction: A Case Study in Stakeholder-Driven and Shared Values Approach to Cultural Heritage Protection," *Journal of Cultural Heritage Management and Development* (2022).

IV. FPIC ITS APPLICATION AND SHORTCOMINGS IN JUUKAN GORGE

The Juukan Gorge incident highlights several aspects of FPIC of which the following are most pertinent:

4.1. Limitations of International Law

Although Australia subscribes to UNDRIP and to several other international instruments that seek to protect and promote the rights of Indigenous People, those international norms must, as in the case of Canada, be converted into domestic legislation to be of any legal and practical effect.[37] The gap between what is promised by international instruments and the protections on offer within domestic legislation, is often confusing and frustrating to Indigenous People. Added thereto, the assertion by advocates that the provisions of UNDRIP are enforceable legal norms in domestic law adds to expectations associated with FPIC that cannot legally be met in domestic law.[38] Although international legal and ethical developments are important, domestic regulatory arrangements are often slow to follow and, in some instances such as evidenced by Juukan Gorge, may be greatly inadequate for contemporary protections of indigenous rights. Centrally to this point is the proposition by advocates that FPIC implies a right of veto to indigenous communities with resultant loss of regulatory power by states, whilst states resist such a proposition and insist that final regulatory power about developments remains with the state.

4.2. Domestic Legislative Framework

The shortcomings in the domestic legislation of Western Australia are mainly to blame for the Juukan events. Some of the most noticeable lacunas in the legislation were: no requirement for applications to damage or destroy sites to disclose detailed and up to date information about the site and its scientific, cultural and historical importance; no requirement for new information about

[37] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14, assented to June 21, 2021 (Canada).

[38] UN Economic and Social Council (ECOSOC), *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples*, E/C.19/2005/3 (New York: United Nations, 2005).

a site to be submitted to the Minister; no ability of Aboriginal people to appeal an approval for a site to be damaged or destroyed; no ability of the Minister to rescind or amend a previously issued approval; lack of ongoing responsibility on the developer to share information and to continue consulting with Indigenous People; and lack of oversight by the regulating authority to ensure that provisions of the Act are adhered to. This also highlights, however, that industry self-regulation has its limits; that the absence of sanctions when Aboriginal sites are damaged may give rise to slackness within companies; and regardless of commitments by Rio Tinto to protect and promote Aboriginal culture, the absence of clearly established and enforceable legal responsibilities exposed the weaknesses of the legislative regime and self-regulating protocols.

4.3. Meaning of "Free' in FPIC

The meaning of 'free' is to be ascertained in the context of its use, but in the case of Juukan the lack of a freely made decision was obvious, for example: some of the legal material given to the PKKP people for their approval was so voluminous and extensive with little time to consider, that one cannot say that reasonably they had adequate opportunity to apply their mind and to consent to the provisions. Furthermore, the failure of Rio Tinto to disclose to the PKKP people the 4 options for location of the mine, whilst only presenting 1 option as if it that was the final and only option, clearly falls short of enabling them to freely make an informed decision. Finally, the absence of an appeal mechanism whereby the PKKP people could challenge the approval granted by the Minister and the failure to share with the PKKP people the blasting schedule, were inconsistent with the most basic elements of procedural fairness and natural justice. One cannot reasonably construe consideration of a proposal as 'free' if the information provided is not detailed and complete and the legislative regime protects the rights of the proponent of a development but not the rights of the indigenous custodians of the sites.[39]

[39] *Minister of Mineral Resources and Energy and Others v. Sustaining the Wild Coast NPC and Others* (Case Nos. 58/2023, 71/2023, 351/2023) [2024] ZASCA 84 (Supreme Court of Appeal of South Africa, June 3, 2024).

4.4. Meaning of 'Prior' in FPIC

The meaning of 'prior' is to be ascertained in the context of its use, but the most obvious plain English meaning is that Indigenous People should be consulted *before* any development occurs or before an approval for development is granted. Added thereto, the scope and scale of a project may require ongoing FPIC, for example as a mine expands.[40] In the Juukan Gorge case this standard was failed in several respects, but most importantly: the application for the destruction of the sites was not submitted to the PKKP people for comment; the legal arrangements entered into with Rio Tinto precluded the PKKP people from pursuing legal options outside the terms of the contract; the PKKP people could not appeal the ministerial approval to destroy the sites; the new ethnographic information collated by the researchers after approval for destruction had been granted could not be relied upon by the PKKP people to seek mitigation of damage or a redesign; and the approval by the Minster had enduring effect regardless of new research findings about the importance of the sites. The ongoing nature of FPIC was therefore denied and the blasts occurred without the adequate prior involvement or approval of the PKKP people.

4.5. Meaning of 'Informed' in FPIC

The meaning of 'informed' is to be ascertained in the context of its use, but plain English implies that all relevant information pertaining to the proposal under consideration must be made available to the indigenous community to enable it to make an informed decision, for them to take advice, and to propose mitigatory measures. This obligation does not necessarily imply commercial in confidence information, but it includes the nature and extent of access sought to traditional land; the timing and duration when access is sought; the duration of the project; the expected impacts of the project on land, environment and communities; mitigatory steps available to limit the impact; and arrangements for ongoing consultation as the project unfolds.[41] The Juukan Gorge project

[40] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 SCR 1069 (Supreme Court of Canada, 2017).

[41] *Kebaowek First Nation v Canadian Nuclear Laboratories* 2025 FC 319 (Federal Court of Canada, 2025).

failed in several material aspects in this obligation: Rio Tinto did not disclose to the PKKP people the 4 options available for the location or footprint of the mine as it expanded; Rio Tinto did not inform the PKKP people of the section 18 application and to the extent that it shared information the inadequacy of the application was not made known to the PKKP people; the possible options for mitigation of blasting were not disclosed to the PKKP people; the legal arrangements between Rio Tinto and the PKKP people restricted their right to seek alternative relief; and there was generally an absence of effort to secure the informed consent of the PKKP people for the damage to be caused to sites.

4.6. Meaning of 'Consent' in FPIC

The meaning of 'consent' does not imply a legal veto, but it does require a sincere and good faith effort to secure the approval of an indigenous community. Although the community has the right to withhold approval, it does not constitute a veto. The final decision making remains with the regulatory authority. In Canda this has been put as follows:

> While the FPIC standard is *not a veto*, it requires significant robust processes tailored to consider the impacted Indigenous Nations laws, knowledge, and practices and employs processes that are directed toward finding mutual agreement. In this case, the record demonstrates that the Commission and the CNSC were not prepared to modify or alter their processes to respond to Kebaowek's requests for accommodation. This was not reasonable and failed to consider the important added *contextual factors* of the UNDRIP, which must now be considered when assessing the adequacy of Crown consultation. (emphasis added) Kebaowek First Nation v Canadian Nuclear Laboratories 2025 FC 319 (2025), ¶ 183.

The process adopted by Rio Tinto to seeking consent was highly deficient and hence it is reasonable to conclude that Rio had failed in its obligations. The following are some of the major shortcomings that negated a good faith effort to achieve consent: lack of information provided to the PKKP people; legal arrangements that constricted the ability of the PKKP people to seek alternative legal remedies; failure to disclose essential information to the PKKP people; lack of time for the PKKP people to consider complex legal documents; lack of

consistent communication between Rio Tinto and the PKKP people; submitting an incomplete application to the Minister of Aboriginal Affairs for approval to destroy sites; failure to undertake internal self-assessment based on additional material that had been proved by experts; and failure to inform the PKKP people when and where blasts were to occur.

4.7. Disclosure of New and Additional Material

The Juukan Gorge event highlights the importance that FPIC may, depending on the nature and scale of a project, be of an ongoing nature. As the project unfolds new information about indigenous sites may become available; or new impacts that had not been anticipated may affect an indigenous community or the environment; or the scope and scale of the project may change. Some allowance should exist for approvals to be amended, for example, mitigatory steps may be required in respect of areas that had previously been regarded as suitable for operations. The Juukan Gorge experience where a ministerial approval was unconditional and impossible to rescind or amend is obviously untenable. The Juukan Gorge experience highlights the importance that staff within the company that seeks access to land should be specially trained to deal and liaise on an ongoing basis with Indigenous People; the staff should have their voice clearly heard in the company; the staff should have access to all relevant materials; and staff should be held to account for compliance with legislative, policy and self-regulatory standards. Juukan Gorge could have been prevented and the footprint of the mine could have been adjusted if Rio Tinto had done an internal review based on the post 2013-evidence it had received. Although self-regulation cannot be the sole avenue for FPIC, Juukan Gorge shows the importance of self-reflection and internal review to meet the requirements of social licence to operate.

4.8. Carrot and Stick

FPIC contains a carrot and stick element. On the one hand the benefits of good relationships with Indigenous People should give credit to a company in terms of social profile, investor support, and general social licence to operate.

On the other hand, poor relationships ought to attract a penalty and sanction. The deficiencies of the Aboriginal Heritage Act were glaring, for example: no obligation to submit detailed and complete information as part of the application; no obligation to communicate the application with the traditional custodians of the land; no penalty for failure to provide full disclosure; and no penalty to provide new research findings to the decision-maker. Additionally, Rio Tinto failed to comply with acceptable industry-practices. The statutory balance was clearly in favour of Rio Tinto. Rio furthermore failed to apply industry standards in self-regulation, and as a result, irreplaceable heritage was destroyed.

4.9. Who Makes the Final Decision?

A final decision must sometimes be made if no agreement is reached. Legally, FPIC as it arises under UNDRIP does not empower indigenous communities to become the final decision-maker.[42] The effort to reach consent cannot be equated with an obligation to reach consent. The right to withhold consent under UNDRIP cannot be construed as a right of veto. Government agencies are unlikely to divest themselves of decision-making in favour of indigenous groupings. This explains why UNDRIP is widely supported since it is not legally enforceable. The question is not who is responsible to make a final decision, since it is clear that the state retains its responsibilities. The question is what checks and balances apply to the exercise of the state's powers. Juukan Gorge highlights the limitations under the Aboriginal Heritage Act: the section 18 notice could not be legally challenged; the decision of the minister to grant approval to damage could not be legally reviewed; new information about the importance of the sites could not give rise to the decision of the minister being revisited; and the approval issued by the minster had ongoing duration. The answer to these shortcomings is not for decision-making to shift to the indigenous community, since a community may also act unreasonably and improperly. The answer is to ensure that due process is available to all parties before effect is given to a decision by the state.

[42] *Kebaowek First Nation v Canadian Nuclear Laboratories*.

V. CONCLUSION

This article has highlighted, by reference to the Juukan Gorge events in Australia, how complex the regulatory system has become in respect to FPIC when measures impact on indigenous traditional areas. Although Juukan Gorge is located in Australia, the issues arising from the inadequate consultation and regulatory process are relevant to other parts of the world. On the one hand FPIC often leaves Indigenous People disillusioned because it does not grant them a veto, whilst on the other hand proponents of a development may be frustrated if the approval granted to them by the state is legally challenged by Indigenous People.

It has been illustrated that states generally retain their regulatory authority regardless of their commitment to FPIC, but the implication is that approvals may be granted against the express wishes and interests of Indigenous People. The withholding of consent is not construed as a veto. It is simply one of the facts the state must consider when making a final decision. This leaves both sides at risk: On the one hand, Indigenous People may participate in FPIC and face a situation where regardless of their opposition to a measure, approval is given to it. On the other hand, a developer is at risk since they may suffer reputational damage by proceeding with a development regardless of opposition by the indigenous community. They may also face litigation from Indigenous People regardless of the approval that had been given by the state for a measure to proceed.

The article also highlighted the shortcomings of FPIC since its normative value is restricted by the absence of it being a legal norm in international law. FPIC as it appears in UNDRIP is not legally binding, FPIC is not a treaty-right, but that does not render FPIC without normative value. FPIC has contributed to greater awareness of the interests of Indigenous People in customary land. State regulation and private sector self-regulation view FPIC as part of the social licence to conduct business as a responsible citizen. Juukan Gorge illustrates however the risks FPIC holds to both Indigenous People and developer, and how complex it can be to find win-win solutions.

BIBLIOGRAPHY

Achtouk-Spivak, Leïla, and Rachael Garden. "OECD National Contact Point Specific Instances: When 'Soft Law' Bites?" *Journal of International Dispute Resolution* 13 (2022): 608–42.

AIATSIS. "Inquiry into the Destruction of the 46,000-Year-Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia." Canberra: AIATSIS, July 31, 2020.

Australian Government. "Australian Government Response to the Joint Standing Committee on Northern Australia's *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge*." Canberra: Australian Government, 2022.

Australian Human Rights Commission. *Study on Free, Prior and Informed Consent: Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia.* 2018.

Baleni v Minister of Mineral Resources, 2019 (2) SA 453 (GP) (2019).

Borschmann, Gregg. "Report Reveals Rio Tinto Knew the Significance of 46,000-Year-Old Rock Caves Six Years before It Blasted Them." *ABC News*, June 5, 2020. https://www.abc.net.au/news/2020-06-05/rio-tinto-knew-6-years-ago-about-46000yo-rock-caves-it-blasted/12319334.

Canada. *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (assented to June 21, 2021).

Clyde River (Hamlet) v. Petroleum Geo-Services Inc., 2017 SCC 40, [2017] 1 S.C.R. 1069 (2017). https://www.canlii.org/en/ca/scc/doc/2017/2017scc40/2017scc40.html.

De Villiers, Bertus. "Right to Be Consulted, but the Frustration of Being Ignored: The Ongoing Efforts in International Law to Give Practical Meaning to Free, Prior, and Informed Consent." In *Indigenous Rights in the Modern Era: Regaining What Has Been Lost*. Leiden: Brill, 2023.

Forrest and Forrest Pty Ltd v Minister of Aboriginal Affairs [2024] WASCA 96 (2024).

Joint Standing Committee on Northern Australia. *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge.* 2021. https://nativetitle.org.au/sites/default/files/2021-10/AWayForward.pdf.

Kaur, Amandeep, Sumit Lodhia, and Andrea Lesue. "Being Left Behind: Disclosure Strategies to Manage the Juukan Gorge Cave Blast." *Accounting, Auditing & Accountability Journal* (2024).*Kebaowek First Nation v Canadian Nuclear Laboratories* 2025 FC 319 (2025).

Kemp, Deanna, Karen Kochan, and John Burton. "Critical Reflections on the Juukan Gorge Parliamentary Inquiry and Prospects for Industry Change." *Journal of Energy and Natural Resources Law* 41 (2023): 379–402.

Mabo v Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1 (1992).

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141 (Supreme Court of the Northern Territory, April 27, 1971).

Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others (Case No 58/2023; 71/2023; 351/2023) [2024] ZASCA 84 (June 3, 2024).

Nagar, Anirudh. "The Juukan Gorge Incident: Key Lessons on Free, Prior and Informed Consent." *Business and Human Rights Journal* 6 (2021): 377–83.

Oliveri, Valentina, Gregory Porter, Claire Davies, and Peter James. "The Juukan Gorge Destruction: A Case Study in Stakeholder-Driven and Shared Values Approach to Cultural Heritage Protection." *Journal of Cultural Heritage Management and Development* (2022).

Parliament of Australia (House of Representatives). "Juukan Gorge Inquiry to Question Rio Tinto." Canberra, 2020. https://www.aph.gov.au/About_Parliament/House_of_Representatives/About_the_House_News/Media_Releases/Juukan_Gorge_inquiry_to_question_BHP.

Passas, Nikos. "Lawful but Awful: 'Legal Corporate Crimes'." *Journal of Behavioural and Experimental Economics* 34 (2005): 771–86.

Rio Tinto. "Juukan Gorge." 2025. https://www.riotinto.com/en/news/trending-topics/juukan-gorge.

Slack, M., M. Fillios, and R. Fullagar. "Aboriginal Settlement during the LGM at Brockman, Pilbara Region, Western Australia." *Archaeology in Oceania* 44 (2009): 32-39.

Slack, M., W. Law, and L. Gliganic. "The Early Occupation of the Eastern Pilbara Revisited: New Radiometric Chronologies and Archaeological Results from Newman Rockshelter and Newman Orebody XXIX." *Quaternary Science Reviews* 236 (2020): 106240. https://doi.org/10.1016/j.quascirev.2020.106240.

Tomaselli, Alexandra. "The Right to Political Participation of Indigenous Peoples: A Holistic Approach." *International Journal on Minority and Group Rights* 24 (2017): 390-427.

Traditional Owners-Nyiyaparli People and Minister of Health, Indigenous Affairs [2009] WASAT 71 (2009).

United Nations Economic and Social Council (ECOSOC). *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples* (E/C.19/2005/3). 2005. https://digitallibrary.un.org/record/544406?v=pdf.

Western Australia. *Aboriginal Heritage Act 1972 (WA).* 1972.

Yorta Yorta v Victoria [2002] HCA 58; (2002) 214 CLR 422 (2002).