

Company Engagement with First Nations People

A research report on the relationships between
companies and First Nations people

December 2021



Acknowledgement of Country

We acknowledge and respect the traditional lands and cultures of First Nations people in Australia and globally.

We pay our respects to Elders past and present and recognise First Nations peoples' longstanding and ongoing spiritual connections to land, sea, community and Country.

Appreciation and respect for the rights and cultural heritage of First Nations people is essential to the advancement of our societies and our common humanity.

About ACSI

Established in 2001, the Australian Council of Superannuation Investors (ACSI) exists to provide a strong voice on financially material environmental, social and governance (ESG) issues.

Our members include 34 Australian and international asset owners and institutional investors with over \$1 trillion in funds under management.

Through research, engagement, advocacy and voting recommendations, ACSI supports members in exercising active ownership to strengthen investment outcomes. Active ownership allows institutional investors to enhance the long-term value of retirement savings entrusted to them to manage.

ACSI members can achieve financial outcomes for their beneficiaries through genuine and permanent improvements to the environment, social and governance (ESG) practices of the companies in which they invest.



34 Australian and international investors



Leading voice on ESG issues



ACSI members manage \$1 trillion in funds

The Working Group on Rights and Cultural Heritage Risk Management

In order to better understand the investment risks involved in company engagement with First Nations people, ACSI and its members established a Working Group on Rights and Cultural Heritage Risk Management ('the Working Group'). The Working Group is facilitated by ACSI and includes 7 of its members. The Group is also working closely with the National Native Title Council and other relevant experts in Australia.

As institutional investors, ACSI's members want to see the risks of harm to cultural heritage and communities effectively mitigated and managed through principled and constructive engagement between companies and First Nations people.

Mismanagement of relationships, and the consequent harm, can carry significant financial implications for companies. The Working Group builds on ACSI's existing work program related to the financial risks associated with social, environmental and governance issues.

The Working Group does not in any way claim to speak on behalf of First Nations people. We are focused on the concerns of investors about this issue and related financial risks, and aim to see effective management of this risk through improved company engagement with First Nations people. In order to improve standards, minimise the risk of harm, and ensure respect for the rights of First Nations people, we seek to build a solid understanding of the perspectives of First Nations people into our work.

Foreword

ACSI has long recognised that a company's long-term success is intrinsically linked to its ability to engage effectively with the stakeholders it impacts. This requires a thoughtful approach to engagement that considers the specific impacts that a company has on different stakeholder groups. For companies that interact with First Nations people, there are opportunities to shape engagement in a way that is constructive and mutually beneficial. Respecting and protecting the rights and cultural heritage of First Nations people is crucial to align markets and societies globally with international human rights standards.

With repeated examples of harm to First Nations communities, lands and cultural heritage, ACSI and its members acknowledge the significant financial risk of poor company engagement with First Nations people. To gain a better understanding of the relationships between investee companies and impacted First Nations people, and how to better mitigate risks, we felt it was important to delve deeply, listen to the experiences of First Nations people, companies and other stakeholders, and understand international standards of best practice. The conversations that we had across sectors were crucial in informing our role as investors, and to shape an approach that is comprehensive, legitimate and practical to implement.

This research paper is reflective of our work to date, but the work does not end here. Improving company engagement with First Nations people and respect for their rights, lands and cultural heritage will take time, but is fundamentally important.

Until we get this right, First Nations people will continue to face the risk of harm and further destruction of their cultural heritage, and investors will continue to face the associated risks. We are committed to engaging with companies on an ongoing basis to ensure that they are working in good faith to build constructive long-term relationships with First Nations people. At the same time, we will also continue to encourage legislative and policy reform to support Australian laws that reflect international standards and provide an important baseline for better practice.



A handwritten signature in black ink that reads "Louise Davidson".

Louise Davidson
Chief Executive Officer

Table of contents

1. Background	6
2. Research objectives and summary	7
3. Methodology	8
4. Investment risk	9
5. International standards of good practice	10
Global standards	10
Industry standards	11
Integration of international standards into local law	12
6. Current company practices	13
Good practice	13
Room for improvement	13
Policies, governance and risk management	15
7. Guidance to improve practices	16
Annex 1: further information on international standards	25
Annex 2: People and organisations consulted for this research	27

1. Background

In 2020, the destruction of significant sites in the Juukan Gorge in Western Australia caused irreversible loss of First Nations cultural heritage. This event had a devastating impact on First Nations people,¹ particularly the Puutu Kunti Kurrama and Pinikura people. The destruction represented a failure to respect the rights of the local First Nations people to protect their sacred sites and enjoy a deep and spiritual connection to their land. Not only was this an irreversible loss for First Nations people, it was also a loss for the world's cultural heritage. This event was not unique, nor the first of its kind. There are many examples of destruction of cultural heritage and contraventions of the rights of First Nations people globally and have been for many years.²

The potential for companies to impact First Nations people's lands, communities and cultural heritage presents an increasingly visible investment risk.³ There is growing global scrutiny of companies' interactions with First Nations people, and where company behaviour does not meet appropriate standards, the risk of significant investment loss is heightened. Recent events in Australia have shown that the legal landscape is maturing, which also informs our understanding of the risks.⁴ Increasingly, companies face the potential of significant costs, including legal damages stemming from destruction of heritage or unconscionable contracts, reputational harm, project disruptions, increased regulatory risk and other costs.

The rights of First Nations people are clearly established by international standards, including the [UN Guiding Principles on Business and Human Rights](#) and the [UN Declaration on the Rights of Indigenous Peoples](#) (UNDRIP). It is the right of First Nations people to protect and enjoy their own cultural heritage and lands.⁵

Many companies have operations that impact First Nations people and their lands, including through minerals extraction, agriculture, transport, infrastructure development and other impacts. The long-term success of such companies and their management of financial risk depends on constructive engagement with the First Nations people who are impacted.

2. Research objectives and summary

ACSI undertook this research to:

- **better understand** current company practices in engagement with First Nations people
- **identify the investment risks** that exist as a result of mismanagement of relationships
- **identify 'good practice' in engagement** with First Nations people as stated in standards and frameworks globally; and
- **provide companies and investors with an overview** of some risks in current company operations, as well as the opportunities to improve practices and standards.

The intention of this research is not to replicate existing tools and frameworks that already provide useful guidance on company engagement with First Nations people. The objective is to provide companies and investors with a snapshot of risks they may currently face and how better practice can help to mitigate those risks.

While this research draws heavily from experiences in the Australian context, it is intended to be useful to investors and companies globally. Poor company engagement with First Nations people is certainly not an issue that is unique to Australia - it is a systemic issue that challenges companies and communities across the world.

This paper covers the following areas:



Investment risk

[Section 4](#) outlines the financially material risk that companies and investors face when relationships and engagement with First Nations people are poor.



International standards of best practice

[Section 5](#) provides a brief summary of existing international standards related to engagement with First Nations people.



Current company practices

[Section 6](#) explores the gaps between better practices and current company activities, as well as the wide divergences in quality of company disclosures on engagement with First Nations people.



Guidance to improve practices

[Section 7](#) provides guidance for both companies and investors to better identify and manage the risks of poor or inadequate engagement with First Nations people.

3. Methodology

In developing its research, ACSI consulted with a variety of stakeholders, including investors, First Nations people, companies, academics and non-governmental organisations. This included semi-structured interviews with 7 stakeholders, written feedback from 22 stakeholders, and multiple rounds of feedback from ACSI's members.

The aim of this consultation process was to develop an understanding of best practices that are comprehensive, legitimate and feasible to implement. Throughout this process, the National Native Title Council provided ACSI with invaluable guidance.

ACSI also partnered with the Church of England Pensions Board, which is also working to better understand and address the investment risks in company engagement with First Nations people globally. In 2020, ACSI, the Church of England Pensions Board and 64 institutional investors co-signed a letter that was sent to 78 mining companies globally, requesting information on how they were managing risk and protecting cultural heritage. This research paper also draws upon data that was gathered from company responses to the letter.⁶

We thank all those that have contributed their time and expertise to this paper.

Stakeholder groups consulted for this report



4. Investment risk

Approximately 46% of global extractive companies' reserves lie on land inhabited by First Nations people.⁷ The material financial risk of poor company engagement with First Nations people is clear.⁸ For example, after the Juukan Gorge incident, Rio Tinto decided not to operate on certain areas where it already had regulatory approval, and not to seek regulatory approval for other areas, due to cultural heritage risks. The removal of 54 million dry tonnes from Rio Tinto's mineral reserves, at a potential cost of approximately \$US8.9 billion, has been linked to the Juukan Gorge incident.⁹

As First Nations people increasingly criticise company activities that are inconsistent with UN standards of free, prior and informed consent ('FPIC', discussed further below), this is also contributing to increased project delays. For example, globally, it is now taking double the amount of time to get oil projects off the ground compared with a decade ago, and more than half of delays are caused by non-technical problems, including opposition from local communities.¹⁰ One study found that community conflict has led to costs of more than USD \$100million per year for some mining companies.¹¹ One of the companies analysed by the study incurred added costs of USD\$750 million due to delays caused by community unrest.¹² The study also found that there were significant costs beyond direct delays, for example the *'indirect costs arising from staff time being diverted to managing conflict, especially at the senior management level'*.¹³

Likewise, legal costs from disagreements can be significant. For example, in 2020 Fortescue Metals Group lost a long legal battle against the Yindjibarndi people in the Pilbara region of Australia, which recognised the Yindjibarndi people as Native Title holders.

Fortescue now faces a compensation claim or settlement with the Yindjibarndi people.¹⁴ Commentators have estimated that this likely to be a multi-million dollar payout for economic loss and spiritual harm.¹⁵ The legal landscape is developing, meaning the potential for litigation could increase. For example, the High Court of Australia recently awarded Native Title holders damages for *'spiritual harm'* suffered, which established a new precedent.¹⁶ Law firm Ashurst has warned company clients to *'consider the potential exposure of your business to native title compensation. With test cases on the horizon, the theoretical risk is becoming more real.'*¹⁷

In addition to the potential harm to First Nations people, investors bear financial risks. Investment risk can arise if a company's approach to engagement with First Nations people is inadequate, misaligned with societal expectations, or where there is a gap between a company's stated approach and its activities in practice.

Despite this clear risk, in annual reporting from ASX200 companies in 2020, only 38% of companies disclosed information related to their interactions with First Nations people, or their approach to managing the risks.¹⁸ To effectively assess material financial risk, clear information should be provided by companies about their approach to engagement with First Nations people, including the standards they apply and their performance against those standards. Institutional investors are bound by law to uphold a fiduciary duty of acting in the best financial interests of their beneficiaries.¹⁹ This means that all activities of an institutional investor must be guided by an assessment of material financial risk, including the financial risks that arise from poor company engagement with First Nations people.

5. International standards of good practice

International and domestic frameworks set well recognised standards for good practice in effectively respecting the rights of First Nations people and constructive engagement. This includes the [UN Guiding Principles on Business and Human Rights](#), the [UN Declaration on the Rights of Indigenous Peoples](#) and the [International Finance Corporation \(IFC\) Performance Standards](#).²⁰

Companies in Australia are not bound directly by any of these standards, but they may voluntarily adopt them.²¹ It is considered good practice to do so. ACSI has found that in many cases, companies that communicate policies clearly referencing international standards often perform better in their risk management.²²

Global standards

The rights of First Nations people are set out in [the UN Declaration on the Rights of Indigenous People](#) (UNDRIP). UNDRIP recognises rights to the protection of First Nations cultures,²³ including archaeological and historical sites, artefacts, designs, ceremonies, technologies, visual and performing arts, literature,²⁴ religious and cultural sites, and ceremonial objects.²⁵ UNDRIP also enshrines the notion of self-determination,²⁶ and states that First Nations people have *'the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources'*.²⁷

According to the Australian Human Rights Commission, self-determination means an *'ongoing process of choice to ensure that First Nations people are able to meet their social, cultural and economic needs'*.²⁸ The Australian Government announced its support for UNDRIP in 2009, acknowledging it as a framework to better protect the rights of First Nations Australians.²⁹

UNDRIP focuses on the obligations of States to protect the rights of First Nations people, however it is widely accepted that companies should also respect the human rights of individuals and groups that are likely to be adversely impacted by their activities.³⁰ This is established in the [UN Guiding Principles on Business and Human Rights](#) (UNGPs).³¹

According to UN-endorsed frameworks, the minimum standard expected of companies is that they:

- ▶ recognise the specific challenges that may be faced by First Nations people³²
- ▶ understand and avoid causing or contributing to adverse human rights impacts through their activities³³; and
- ▶ address adverse human rights impacts with which they are involved.³⁴

Free, Prior and Informed Consent for Projects

UNDRIP enshrines the need for *'free and informed consent prior to the approval of any project affecting ...[Indigenous] lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources'*³⁵. The UN provides [guidance](#) on how to ensure free, prior, and informed consent (FPIC)³⁶:

- **Free** refers to a consent given voluntarily and without coercion, intimidation or manipulation. It also refers to a process that is self-directed by the community from whom consent is being sought.
- **Prior** means that consent is sought sufficiently in advance of any authorisation or commencement of activities, at the early stages of a development or investment plan.
- **Informed** refers to the type of information that should be provided prior to seeking consent, and also as part of the ongoing consent process.
- **Consent** refers to the collective decision made by the rights-holders and reached through the customary decision-making processes of the affected First Nations people. Consent must be sought and granted or withheld according to the unique formal or informal political-administrative dynamic of each community. First Nations people and local communities must be able to participate through their own freely chosen representatives.

FPIC requires companies to establish a robust process to ensure that any consent that is given by First Nations people for a project, or an aspect of a project, is genuine consent. It is focused on both the process and the outcome – consent without a proper process is insufficient, and vice versa.³⁷

FPIC can help mitigate the power imbalances that are often present in negotiations between large companies and First Nations communities, by establishing baseline standards for negotiation. Embedding FPIC into engagement processes enables First Nations people to exercise their right to self-determination, to freely pursue their economic, social and cultural development.³⁸

Industry standards

A number of industry standards have been developed, which operationalise the concept of FPIC set out in UNDRIP. The IFC's [Environmental and Social Performance Standards](#)³⁹ are a framework that help companies better understand and manage risk, including in their engagement with First Nations people. It is good practice for companies to align their policies and practices with the IFC Performance Standards, as a complement to UNDRIP and the UNGPs.

The Performance Standards:

- state that *'FPIC...will be established through good faith negotiation between the client and the Affected Communities of Indigenous Peoples'*
- provide that adverse impacts on affected communities should be avoided where possible. *'Where alternatives have been explored and adverse impacts are unavoidable, minimisation, restoration, and/or compensation is required, in a culturally appropriate manner commensurate with the nature and scale of impacts and vulnerability of the affected community'*; and
- recognise the importance of protecting critical cultural heritage and ensuring that *'priority will be given to the avoidance of such impacts'*. Where impacts are unavoidable, FPIC from First Nations people must be sought.

The IFC Performance Standards have been integrated into the [Equator Principles](#), which are a financial industry risk management framework for determining, assessing and managing environmental and social risk in projects.

For further guidance on standards for good practice, the following are also useful resources:

- [UN Guidance on free, prior and informed consent](#)
- [Initiative for Responsible Mining Assurance \(IRMA\)'s FPIC Standard](#)
- [Best Practice Standards in Indigenous Cultural Heritage Management and Legislation](#) published by the Heritage Chairs and Officials of Australian and New Zealand
- [OECD Due Diligence Guidance for Stakeholder Engagement in the Extractive Sector](#)
- [UN Global Compact's Business Reference Guide on the UN Declaration on the Rights of Indigenous Peoples](#)
- [The Responsible Investment Association Australasia's Investor Toolkit: An Investor Focus on Indigenous Peoples' Rights and Cultural Heritage Protection](#)

Further information on other international and domestic frameworks can also be found in the [Annex of this paper](#).

Integration of international standards into local law

Poor practice is often dealt with on a case-by-case basis, rather than through a systematic application of appropriate standards. For investors, it is important to have a legal framework that will improve engagement between companies and First Peoples.

In Australia and other jurisdictions, significant progress is needed to ensure that legislation sets solid standards for the protection of First Nations people's rights and cultural heritage.⁴⁰ Some elements of the legislative framework in Australia promote engagement between companies and First Nations people, but Australian law falls short of fully enshrining FPIC.⁴¹ UNDRIP has not been incorporated into Australian law.⁴² The shortcomings of Australia's legal frameworks in protecting First Nations people's rights and cultural heritage are well acknowledged,⁴³ and some laws are already under review.⁴⁴ A Parliamentary Inquiry into the destruction at Juukan Gorge sent a clear message on the need for legislative reform, and established a set of strong recommendations.⁴⁵ In another positive step, the Australian Government signed a partnership with the First Nations Heritage Protection Alliance (representing over thirty First Nations groups), to work jointly on law reform and ensure that First Nations Australians are at the centre of the reform process.⁴⁶

Legislative review must move ahead, but reform often lags behind community expectations. Meanwhile, companies should not wait for legislative change in order to implement better standards of engagement with First Nations people and effectively mitigate risks.

6. Current company practices

Corporate management of relations with First Nations people is mixed. ACSI's research and discussions with stakeholders identified positive examples of company engagement with First Nations people as well as opportunities for improvement.

Good practice

A number of companies, both in Australia and globally, are working to improve their risk management frameworks and relationships with First Nations people. Some companies with better practice are making the following improvements (among others)⁴⁷:

- **Aligning policies and practices** with international standards and investing resources in robust FPIC processes.
- **Increasing transparency and accountability**, for example by committing to share agreements publicly with the approval of the signatory First Nations people.
- **Committing to avoid the use of confidentiality clauses** in agreements that prevent First Nations people from speaking publicly.
- **Reviewing agreements** with First Nations people to ensure they are up-to-date and reflect the positions of both parties.
- **Training staff** and ensuring that they understand the business case for constructive engagement with First Nations people.
- **Ensuring that the board has oversight and ultimate accountability** for engagement with First Nations people.

Room for improvement

However, there is still significant room for improvement. There remain many common gaps between better practices, as outlined in the international standards, and companies' policies and practices on the ground. The process of improving relationships with First Nations people, better protecting rights, and managing risk requires ongoing learning, regardless of how advanced a company already is.

Listed below are some practices that give cause for concern about companies' effective management of risk. The following examples come from ACSI's consultation with stakeholders both in Australia and internationally, and broader research. They are categorised according to the FPIC framework:

- ▶ Free
- ▶ Prior
- ▶ Informed
- ▶ Consent

► Free

- **Confidentiality clauses:** A number of stakeholders that ACSI consulted expressed concern that agreements between companies and First Nations people sometimes include confidentiality or ‘gag’ clauses that prevent First Nations people from publicly objecting to projects.⁴⁸ Confidentiality clauses may be expressed in a way that prevents First Nations people from critiquing company operations, or sometimes establish a requirement that First Nations people obtain company consent before speaking out. This can undermine relationships and increase risk for communities, companies and investors.

► Prior

- **Assuming consent is ongoing:** Companies often obtain consent at the start of a project, and then assume that this consent is ongoing for many years, despite changes to the project plan or other changes to the situation over time. Companies sometimes fail to engage on an ongoing basis or obtain agreement for new elements of projects that arise.⁴⁹
- **Late engagement:** Companies sometimes commence engagement with First Nations people at a late stage, once all other approvals are in place and the project is ready to commence.⁵⁰ This can impose pressure on First Nations communities, because of a perception that they are holding up the process.

► Informed

- **Incomplete information:** Companies do not always provide First Nations people with sufficient information about all relevant aspects of a project, in order for them to make a fully informed decision. For example, companies do not always discuss with communities the range of possible environmental and social impacts.⁵¹ This was one of the criticisms of Rio Tinto in relation to Juukan Gorge.⁵²
- **Language barriers:** First Nations people do not always speak the dominant or official language as their first language, and companies do not always translate all information into local languages.⁵³ This means that the community is unable to give informed consent because they have not received all information in a format that they can understand.
- **Power imbalances:** A number of interviewees, across sectors, stated that there is often a clear power imbalance between companies and First Nations people because of stark inequalities in resources. This is particularly the case when First Nations groups are resource-constrained and under-funded, which limits their ability to pay for independent legal advice or representation, conduct due diligence to ensure they are fully informed, or to establish strong governance and representative structures.⁵⁴

► Consent

- **Consent undermined:** Given the possibility under Australian law for negotiation processes to be deferred to the Native Title Tribunal,⁵⁵ the right of First Nations people to truly give their consent can be undermined. Where First Nations people decide not to consent to a project, their decisions have rarely been upheld by the Native Title Tribunal. Since 1994, in cases where native title holders have not provided consent and the matter has proceeded to determination before the Native Title Tribunal, the Tribunal has determined in 98% of cases that the company can proceed (sometimes subject to conditions), regardless of the opposition from Native Title holders.⁵⁶
- **Weaker standards for consent:** A number of companies have adopted standards that only require them to 'seek consent' rather than actually obtaining it. For example, the International Council on Mining and Metals (ICMM) has developed a [Position Statement on Indigenous Peoples](#), which states that companies should 'work to obtain the consent of Indigenous communities' [emphasis added] rather than 'obtaining consent.'⁵⁷
- **Not obtaining specific consent:** Sometimes a company might obtain consent for a project overall, but the consent does not cover all aspects of the project. For example, there is a difference between First Nations people consenting to a project overall and consenting to destruction of a specific aspect of their cultural heritage.⁵⁸
- **Recognised representatives of the community:** Companies do not always identify and obtain consent from the recognised representatives of a First Nations community.⁵⁹ Varied opinions among communities are common, and companies sometimes inappropriately use divergences of opinion to their advantage. In some cases, there are reports of companies obtaining consent from certain individuals or sub-groups and ignoring the representatives of the broader group. In other cases, it can be very difficult to determine the recognised or appointed representatives of a First Nations community because of divisions within the group. This can pose challenges and risks that companies should be aware of and seek to manage.

Policies, governance and risk management

We have also seen room for improvement in companies' policies and risk management:

- **Clear policies:** In many cases, companies that do not communicate clear policies also underperform in their risk management practices.⁶⁰ Publicly available policies are a foundation of good governance and of processes that are important for the robust management of risk. Of 250 large-cap companies worldwide that have been identified as having exposure to risks related to engagement with First Nations people, only 19% have an enterprise-wide First Nations people rights policy.⁶¹
- **Reference to international standards:** A number of companies lack clear policies that reference international standards. Of the companies that responded to a letter sent by investors, only 41% referenced the need for free, prior and informed consent (FPIC) in exploring or developing a site.⁶²
- **Applying standards to joint ventures:** Joint ventures are not always covered by appropriate policies, risk management processes and levels of governance. In some cases, companies directly exclude joint ventures in policy coverage.⁶³

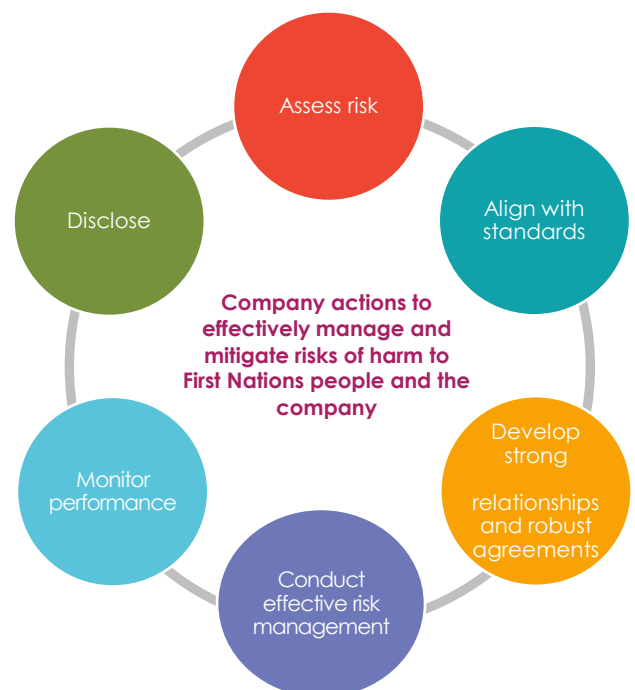
7. Guidance to improve practices

Both companies and First Nations people can benefit from constructive relationships over the long-term. We recognise that certainty is important to companies in planning and developing projects with long lead-times and project lives, sometimes requiring multi-generational relationships with First Nations people. Processes of engagement with First Nations people that are carefully planned from the outset, transparent, and consistent with the standards of FPIC will promote certainty for all.

Companies should engage with First Nations people in a way that reflects mutual objectives of all parties and robust cultural stewardship. This includes respecting the crucial role of First Nations people in protecting cultural heritage and lands that are valuable not only for their own communities, but also for future generations that will become custodians of their lands and for the world.

Companies are inherently different, so company practice will vary. A company's management of risk should reflect its particular operating context and be commensurate to the level of exposure to risk in its operations. Improving practices can be challenging and will require investment of time and resources by companies. However, these costs are likely to be outweighed in the long-term by the benefits derived from more robust relationships between companies and First Nations people.

It is important that companies establish high standards in their policies and processes across all operations, including subsidiaries and joint ventures, as far as possible.



Our research and engagement highlighted that the following 6 overarching actions are important to effectively manage and mitigate the risks of harm to First Nations people and the financial risk to a company:

1.

Assess risk: companies should conduct robust assessments of the relevant risks and impacts both to the company and First Nations people – including their lands, communities and cultural heritage. Risk assessment should be integrated into the company's risk processes and should integrate First Nations people's own assessment of risk.

2.

Align with standards: policies and practices should be aligned with international standards, as set out in the [UN Guiding Principles on Business and Human Rights](#) and the [UN Declaration on the Rights of Indigenous Peoples](#). Additional guidance can also be found in the [IFC Performance Standards](#). Companies should also be guided by the [Best Practice Standards in Indigenous Cultural Heritage Management and Legislation](#) published by the Heritage Chairs and Officials of Australian and New Zealand.

Companies should adopt a human rights-based approach to engagement with First Nations people, conducting robust due diligence to identify, prevent, mitigate, and account for the human rights risks associated with their operations and supply chains.⁶⁴ Companies should respect the right of First Nations people to self-determination.⁶⁵

3.

Develop strong relationships and robust agreements: companies must engage in good faith and work to build constructive long-term relationships with First Nations people. This includes obtaining and maintaining free, prior and informed consent (FPIC) from First Nations people before commencing operations that will impact them, and on an ongoing basis throughout the life of a project.

Agreements should be established with First Nations people to cover all phases of operations (including exploration) and should aim to support impacted communities over the long-term through reasonable benefit-sharing provisions.

Companies must understand and mitigate power imbalances. If First Nations people are not sufficiently resourced to effectively negotiate agreements or do not have access to independent legal and technical advice, this is likely to lead to a power imbalance that undermines free, prior and informed consent.

4.

Conduct effective risk management: ongoing engagement with First Nations people should be built into policies and risk management frameworks. This should include appropriate board oversight and accountability mechanisms for the board, management and staff responsible for engagement with First Nations people.

Processes should also be established to assess the effectiveness of the company's risk management. Companies should establish dispute resolution and grievance mechanisms, and remedy any adverse impacts that the company has caused or contributed to.

5.

Monitor performance: companies should set transparent targets and KPIs that reflect international standards and establish accountability mechanisms when KPIs are not met. Performance against KPIs and the terms of agreements with First Nations groups should be overseen by the board, who should be satisfied that assessment is appropriately independent. It is also important that First Nations people are involved in the monitoring process.

A company should also evaluate how it learns from past mistakes and improves its practices on an ongoing basis, including through regular staff training.

6.

Disclose: companies should provide sufficient information to enable investors to assess the quality of a company's engagement with First Nations people. Disclosure should provide a genuine explanation of a company's risks and approach (including the factors listed above), and how its policies are implemented in practice. This should include the system in place to enable the board to assess risk, as well as targets and performance over time.

Disclosure should also include the nature and scope of agreements, timelines, and any key challenges. Where a company has relied on government approval or a dispute resolution determination that does not reflect the position of First Nations people, this should be disclosed.

The following table elaborates on the core principles expressed above and provides further guidance on good practices that company boards and directors should consider implementing. The following good practices have been compiled based on ACSI's consultation and research.

Better practices

Establish processes that embed FPIC and obtain genuine consent from First Nations people for a project/use of land: Establishing a robust process helps to diminish power imbalances and enables constructive dialogue. This is necessary to ensure that any consent provided by First Nations people is genuine (free, prior and informed), and not coerced.

Early and regular engagement

- Engage with First Nations people at as early a stage as possible (before the commencement of a project), allowing ample time for consultation and community decision-making throughout the process. Project planning should integrate the perspectives of First Nations people from the outset.
- Engage regularly with First Nations people to ensure ongoing dialogue throughout the life of company operations. It is good practice to have engagement between the leaders of the company and First Nations community.

Recognised representatives of the community

- Engage with all First Nations groups that are impacted by the company's operations.
- Identify and engage with the formally recognised representatives of the First Nations groups. In some cases, this may require investment by the company to identify the appropriate representatives with the help of relevant experts.
- First Nations groups must be able to appoint their representatives and make decisions according to their own customs and traditions, or in accordance with a decision-making process that has been agreed to and adopted by them.
- Companies should obtain confirmation in writing that representatives of First Nations groups are lawfully and duly authorised by the group(s) concerned, as well as the terms/scope of the authority. This authority to represent groups should be reviewed on an ongoing basis.
- Where the formal authority of recognised representatives is clear, companies should respect this and deal with the representatives consistently with the terms of the group's authorisation.
- Where there is a lack of clarity as to who the formally recognised representatives are, companies should exercise the utmost caution and seek clarity about representation.
- It is important to be aware of divergent voices among First Nations communities, where these exist. Companies should not interfere in the internal business of First Nations groups, encourage disputes, provide support to dissenting groups, or take any other steps that could inappropriately interfere with group decision-making processes.
- In situations where various communities or groups are represented by one organisation, the company should seek assurance that the representative organisation is engaging with all groups and obtaining FPIC through appropriate process.

Information-sharing with First Nations people

- Share all relevant information⁶⁶ transparently with First Nations people, on an ongoing basis throughout the lifetime of the project.
- Integrate feedback from First Nations people into core operational decision-making on an ongoing basis.
- Provide timely responses to any enquiries from First Nations people.
- Translate all information into the language of the First Nations people if this is necessary for all members of the community to understand (including any community members with lower literacy levels).
- Deliver all information in culturally-appropriate formats, accessible to First Nations communities.
- Cultural and language translation should go both ways – ensure that the company representatives also fully understand what is being communicated by First Nations people.
- Provide information objectively, covering both positive and negative potential impacts.

Agreements and ongoing review

- Agreements between companies and First Nations people should clearly outline the terms and scope of consent provided by First Nations people. Importantly, consent for a project overall does not equate to consent for destruction of cultural heritage or other impacts that were not identified during the consent process for the project.
- Agreements should be established for defined time periods (rather than open-ended) and contain review clauses to ensure they are up-to-date and re-negotiated as necessary. The scope of review should be agreed with First Nations people and set out in the agreement.
- Consent should be reviewed across the various stages of a project cycle, including when there is a significant change in project plans or a material risk arises and could cause impacts on First Nations people.
- Provisions of agreements should be clearly enforceable.
- Ensure that agreements include arrangements for ongoing monitoring of the agreed terms, including jointly with First Nations people if this is agreed.
- Agreements should also include provisions for transparent reporting of results. For particularly sensitive projects, multi-stakeholder audits may be required.
- Ensure that agreements are easily accessible to all members of the First Nations group that has signed an agreement. This may require additional support for community-level capacity to compile, store, and maintain key documents.
- It is generally accepted as better practice to share agreements publicly, although this must be subject to permission from the First Nations signatories as well as any issues of commercial sensitivity.
- Comply with the terms of the agreement, including treatment of land and cultural heritage, and timely payment of any agreed compensation (which should be fair and reviewed over time).

Mitigate power imbalances and ensure there is no pressure or coercion in negotiation with First Nations people

Empowerment and co-developing the process

- Recognise power dynamics and acknowledge historic and present situations that might put parties at a disadvantage.
- Take action to mitigate power imbalances and ensure that First Nations people are empowered and resourced to voice and defend their interests. This includes mitigation of imbalances in funding (see below) and in decision-making power throughout the process.
- From the outset, jointly define the scope of the project being discussed. First Nations people should be able to influence the design of projects that will impact their lands.
- Once there is shared agreement with First Nations people on the definition of the project, jointly define the negotiation and agreement process. The process should be appropriate to the context and preferences of all parties. Agreement should be reached on protocols for communication and decision-making; what data is available and needed for the negotiation process; who will participate in the process; reasonable time periods for each stage of the negotiation; capacity constraints and support needed for technical and legal issues.
- Allow adequate time (outside of the negotiation process) for First Nations people to properly consider and formulate engagement outcomes and objectives.
- Conduct meetings at locations and times that are reasonable for First Peoples.
- Build strong feedback mechanisms into the engagement process to ensure that changes can be made to the process if necessary.
- Document the jointly agreed-upon negotiation process.

Funding

- The negotiation of agreements and management of long-term relationships with companies can impose a significant financial burden on First Nations groups. From the very start of engagement, discuss with the First Nations group(s) to understand whether they have sufficient resources to service the relationship over the long-term, and for the negotiation process to be fully informed and balanced.
- Ensure that the First Nations groups have access to sound and independent legal advice, technical support (eg. to ensure full understanding of the technical details of a project) and representation.
- The costs of engagement with a company should not detract from the capacity of First Nations people to invest in other necessities for their communities.
- Where necessary, financial support should extend to the process of identifying cultural heritage and determining appropriate protection and management actions.
- If consent is provided on the condition of certain cultural heritage or land management activities, these activities should be fully funded by the company.

Risk assessment and risk management: Engagement with First Nations people should be a core element of relevant companies' risk management systems.

Human rights due diligence and impact assessments

- Conduct rigorous impact assessments and human rights due diligence⁶⁷ prior to the commencement of a project to identify the First Nations people who may be impacted, as well as the nature and extent of potential impacts.
- It is good practice to involve independent experts in the assessment of risk.
- Impact assessments should be gender sensitive. They should help companies understand the different impacts on women and other vulnerable or marginalised groups.
- As part of the impact assessment process, First Nations people should have the opportunity to define their tangible and intangible cultural heritage and express concerns about impacts on this cultural heritage. Companies and First Nations people should then develop a formal agreement about how cultural heritage should be protected and managed.
- Ensure that the First Nations people have sufficient resources to engage in the impact assessment process.
- Integrate the findings of assessments into action plans and monitor performance. Action plans should be adequately resourced and have director oversight.
- Publicly disclose the key findings of due diligence assessments, unless First Nations people request otherwise.
- Review the impact assessments and cultural heritage management plan on a regular basis and update them when elements change.

Risk management systems

- Have a clear risk management system and escalation process. Effective data management also helps ensure that risks are managed at all stages of project planning.
- Clearly communicate to First Nations people and investors how issues are being addressed.
- Companies should be particularly sensitive to human rights risks and impacts when operating in countries where domestic legal frameworks do not comprehensively enshrine human rights protections.

Grievance mechanisms, dispute resolution and remediation

- Establish effective and transparent whistleblower and grievance mechanisms to respond to any concerns from First Nations people and staff. Grievance mechanisms should be aligned with standards in the UN Guiding Principles on Business and Human Rights.⁶⁸
- Integrate dispute resolution mechanisms into agreements. Where dispute resolution processes have been the subject of fair negotiation and are mutually agreed, both parties should seek to adhere to the process.
- Ensure that the relevant grievance mechanisms and dispute resolution processes are accessible and appropriate to the context (including access in the local language where relevant).
- Involve First Nations representatives/advisors in the grievance mechanism process to ensure that the perspective of First Nations people is fully understood.
- If problems arise, address them transparently and genuinely, engaging with First Nations people to remedy harm and re-establish trust.
- Agreements should not limit rights, including appeal or judicial review rights or third-party enforcement.

- Agreements that prevent parties from speaking publicly can undermine relationships and increase risk for both communities and companies, so strong caution should be exercised.
- If all mutually agreed communication and dispute resolution mechanisms have been exhausted, agreements should not inhibit the rights of First Nations people to speak publicly about a project if they seek to do so.
- Ensure access to appropriate remedy when there are adverse impacts that the company has caused or contributed to (including through contractors or suppliers).
- It is good practice to involve First Nations people in the development of remedies.
- Annually disclose grievance information, including type and how they were resolved.

Oversight and accountability

- Ensure robust board oversight of policies and practices related to engagement with First Nations people.
- Ensure sufficient expertise on the board, or access to expertise (eg at management level and through independent advisors), to understand the perspectives of First Nations people and properly manage relevant risks.
- Ensure the board is trained in First Nations people's rights, cultural heritage and cultural awareness.
- Build effective engagement and respect for First Nations people's rights into the objectives, performance targets (KPIs), and incentives for staff engaging with First Nations people.
- Establish accountability mechanisms throughout the company - from line managers to the board.
- Establish a direct and regular line of communication between First Nations people and senior management or the board. Meetings should take place at a location chosen by the First Nations people.

Completion of operations

- Ensure that agreements with First Nations people include provisions for responsible closure/completion of operations, which should be agreed with First Nations people and with the input of independent technical experts. In addition to any applicable regulatory requirements, this should include necessary disposal of waste, rehabilitation of lands and any other commitments mutually agreed.

Company Culture: Corporate culture that embeds respect for First Nations people's rights and cultural heritage can reduce the risk of misconduct and damage across a company's operations. Constructive engagement with First Nations people should be a collective responsibility of company leadership and all staff.

Setting the tone

- Develop a robust understanding of the context and situation of First Nations people, including their heritage and what is important to them.
- Build a company culture of respect for First Nations people's rights and cultural heritage. The tone should be set from the leadership of the company.
- Set clear expectations for all staff to demonstrate respect. There should not be any 'silos' or teams that have an unconstructive approach.
- Ensure that the business case for positive engagement with First Nations people is clearly developed and understood internally. It is helpful for this to be discussed regularly, given staff turnover.
- Companies can also demonstrate leadership by having directors speak to the media and/or at public events on the company's approach to engagement with First Nations people.

Policies

- Establish group-wide policies that commit the company to respect human rights and First Nations people's rights and cultural heritage, in line with international standards.⁶⁹
- Demonstrate how staff apply these policies in their activities.
- Ensure that KPIs (eg. related to cost, deadlines etc) do not undermine staff's ability to engage properly with First Nations people.
- Develop First Nations procurement and employment policies, as well as policies related to other impacts on First Nations communities as a result of company operations (eg health, safety).

Training

- Provide all staff with robust and regular training on First Nations people's rights, cultural heritage and cultural awareness.
- Ensure that governance at site-level is conducive to constructive engagement with First Nations people.

First Nations people's expertise⁷⁰

- Ensure that the management roles and teams that are responsible for engagement with First Nations people are staffed with credible and trusted experts on First Nations issues.
- Where there is insufficient expertise internally, partner with an appropriate external First Nations organisation. This can help ensure that company policies and practices are appropriate for the local context and help company management to better understand the perspectives of First Nations people.
- Encourage the recruitment of First Nations people staff and strong career development pathways throughout their employment.

Whistleblowing

- Establish adequate whistleblowing procedures and protections for staff who speak out about poor company culture in relation to engagement with First Nations people.

Supply chain

- Use the company's influence across the supply chain, where possible, to ensure that suppliers and contractors have measures in place to respect the rights of First Nations people and align with the company's policies.

Benefit-sharing: Companies are often able to develop stronger long-term relationships with First Nations people when companies support their long-term progress and well-being.⁷¹

Benefit-sharing agreements and compensation

- Develop agreements with First Nations people that support the social and economic priorities of communities over the long-term and compensate for any land and resources lost to the communities as a result of company activities.
- Respect the right of First Nations people to determine how benefits are accessed and spent.
- Support First Nations people to set up robust governance structures that ensure agreements continue to operate in the best interests of the community over the long-term. For example, this could include funding independent support to help establish governance and trustee structures.
- Invest in long-term community wellbeing and development as opposed to short-term benefits.
- Partner with civil society and First Nations representative organisations to ensure that social and economic development and benefit-sharing agreements are in the best interests of the communities over the long-term.
- Establish clear board accountability for compliance with benefit-sharing agreements.

Lobbying and advocacy: When companies seek to influence legal change, they should do so in a way that is aligned with the above standards.

Advocacy in alignment with policies and best practice standards

- Ensure that any lobbying and advocacy on engagement with First Nations people is aligned with best practice standards to protect First Nations people's rights and cultural heritage.
- Any advocacy should be undertaken in consultation with First Nations representatives.
- Where a company is a member of industry associations, advocate for the industry associations to align their policies with best practice standards to protect First Nations people's rights and cultural heritage (if not already the case).
- Disclose any discrepancies between the company's policies and those of its industry associations.

Annex 1: further information on international standards

As stated in the body of this paper, it is good practice for companies to align their policies and practices with the [UN Guiding Principles on Business and Human Rights](#) and the [UN Declaration on the Rights of Indigenous Peoples](#). The [IFC Performance Standards](#) also provide useful complementary guidance.

The following frameworks provide further background and guidance on respecting the rights and cultural heritage of First Nations people.

State duties and global standards

The [International Covenant on Civil and Political Rights \(ICCPR\)](#) upholds the right for all peoples to self-determination, and to 'freely pursue their economic, social and cultural development'.⁷² The ICCPR imposes binding obligations on states that have ratified the treaty, including Australia.⁷³ Likewise, the [ILO Convention 169](#) also established foundational rights for First Nations people.

Industry standards

There are a number of industry-specific protocols that have been developed, which incorporate the UN standards to varying degrees.

The Initiative for Responsible Mining Assurance (IRMA) developed a [Standard related to the social and environmental performance of mining operations](#). Companies are assessed against the Standard by independent auditors in order to receive IRMA's Certification.

To be certified, companies must implement various good practices, including obtaining FPIC, conducting human rights due diligence and establishing effective grievance mechanisms. Certified companies can be found [here](#).

The International Council on Mining and Metals (ICMM) has developed a [Position Statement on Indigenous Peoples](#). The recommendations in the ICMM Position Statement recognise that the process for obtaining consent must be carefully designed to ensure there is no coercion, that sufficient time is allowed, and that full information is provided. ICMM states that engagement should also ensure the 'meaningful participation of indigenous communities in decision making, through a process that is consistent with their traditional decision-making processes and is based on good faith negotiation' (p1). It is important to note, however, that there are some differences between the ICMM Position Statement and the UN frameworks. For example, ICMM expects companies (that commit to the ICMM's Position) to 'work to obtain the consent of Indigenous communities' [emphasis added] rather than 'obtaining consent'.⁷⁴

The Minerals Council of Australia (MCA) has recently committed to adopt an accountability and measurement framework - *Towards Sustainable Mining (TSM)* - originally developed by the Mining Association of Canada.⁷⁵

The Framework will be adapted to the Australian context and will apply to the MCA's member companies. It will include protocols against which companies can be measured to assess the quality of their engagement with First Nations people. These protocols are currently being developed, and the MCA expects all members to adopt the framework by 2025.⁷⁶

The [Australian Sustainable Finance \(ASFI\) Roadmap](#) also includes a recommendation to codify FPIC into decisions made by financial institutions, so this is currently being developed through the ASFI Action Plan.⁷⁷

Best practice in cultural heritage protection in Australia

The Heritage Chairs and Officials of Australia and New Zealand published *Best Practice Standards in Indigenous Cultural Heritage Management and Legislation* in September 2020.⁷⁸ These standards set out a vision for Indigenous heritage protection and have gained widespread endorsement from a range of stakeholders in Australia.⁷⁹ The Standards outline elements that the Heritage Chairs recommend for integration into legislation in Australia. While the target audience is Australian legislators, the Standards are nonetheless useful for companies, to better understand what First Nations people in Australia consider best practice in cultural heritage protection.

Key elements of the Standards include:

- **Indigenous self-determination:** emphasising that the Indigenous community itself should be the ultimate arbiter of the management of the Indigenous cultural heritage aspect of any proposal that will affect that heritage.
- **Resourcing:** First Nations people representative organisations must be appropriately resourced and should not be forced to subsidise statutory obligations from their own resources.
- **Representation:** legislation should include mechanisms for the identification and appointment of a legitimate representative, noting that 'It is for the Indigenous community to decide who represents them'.
- **Intangible cultural heritage:** that legislation should protect the intangible aspects of cultural heritage.

Annex 2: People and organisations consulted for this research

We are grateful to a number of organisations and individuals who were consulted in the development of this research on company engagement with First Nations people.

This included (among others):

- BHP
- First Nations Heritage Protection Alliance
- Karrina Nolan and James Fitzgerald, Original Power
- Jennifer Coulson, BCI
- Kara Keys, KTL Collective
- Lisa Caripis, Transparency International Accountable Mining Programme
- Matthew Storey
- Minerals Council of Australia
- National Australia Bank Limited
- National Native Title Council (NNTC)
- Olga Hancock, Church Commissioners for England
- Principles for Responsible Investment
- Professor Dr Marcia Langton AO
- Professor Gordon L. Clark, University of Oxford
- Responsible Investment Association Australasia (RIAA)
- Rio Tinto
- Scott Sellwood and Emily Greenspan, Oxfam America
- Simon Nish, Origin Energy
- South32
- The Church of England Pensions Board
- Tony Bevan, Wintawari Guruma Aboriginal Corporation
- Yamatji Marlpa Aboriginal Corporation

Feedback provided by the people we consulted is not considered an endorsement of the content of this report, nor are stakeholders responsible for any opinions or judgments it contains.

In addition to those listed, we also received feedback from other organisations and individuals, including First Nations representative organisations, investors, companies, industry associations, academics and NGOs, both in Australia and internationally.

Endnotes

- 1 Throughout this document, we use the term First Nations people. Our intention is to refer to First Nations people and Indigenous Peoples in all contexts around the world, in an inclusive way. We recognise that definitions and terminology vary around the world, and we use the terms for efficacy, with no intention to exclude unnamed groups. We intend to refer to all people who hold rights under the United Nations Declaration on the Rights of Indigenous Peoples, and to whom FPIC applies (which is further outlined, for example, in ILO Convention 169 on Indigenous and Tribal Peoples).
- 2 See examples on the Business and Human Rights Resource Centre [website](#).
- 3 United Nations Global Compact, KPMG and University of Technology Sydney, '[The Australian Business Guide to implementing the UN Declaration on the Rights of Indigenous Peoples](#)', November 2020.
- 4 For example, in the case of Northern Territory v Griffiths (Deceased) and Jones on behalf of the Ngaliwuru and Nungali Peoples [2019] HCA 7 (commonly known as 'the Griffiths case'), the High Court of Australia awarded Native Title holders damages, partly for 'spiritual harm' they had suffered.
- 5 UNDRIP states that First Nations people have 'the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources' (Article 32)
- 6 For more information on the letter and group of investors, see [here](#).
- 7 Federated Hermes, '[When companies and Indigenous Peoples collide](#)', January 2018.
- 8 While ACSI's mandate is to focus on material ESG risks for listed companies, the issues discussed in this paper may have broader application to other assets (eg. unlisted assets).
- 9 Rio Tinto, '[Annual Report 2020](#)', p344; Marcia Langton, '[Rio Tinto is always deaf to change](#)', Australian Financial Review, 3 March 2021. Likewise, studies have pointed to the impact of operations and poor disclosure on share prices and company value – see JCAP, '[Empirical data on how investors are harmed when companies do not disclose information about violence and lack of Indigenous consent](#)', September 2020.
- 10 Human Rights Council Report, A/HRC/14/27, '[Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie](#)', April 2010, p15.
- 11 Davis, R. and Franks, D., '[Costs of Company-Community Conflict in the Extractives Sector](#)', 2014, CSR Initiative at the Harvard Kennedy School, p19.
- 12 Ibid.
- 13 Davis, R. and Franks, D. (see above), p20.
- 14 Fortescue Metals Group Ltd & Ors v Warrie & Ors [2020] HCATrans 65.
- 15 The mine is estimated to contain \$218bn of iron ore, a significant proportion of Fortescue's total annual output. See Federated Hermes, '[When companies and Indigenous Peoples collide](#)', January 2018. Also Ashurst, '[High Court dismisses FMG's special leave application in Yindjibarndi proceedings - exclusive native title over Solomon Hub re-affirmed](#)', 1 April 2021.
- 16 Northern Territory v Griffiths (Deceased) and Jones on behalf of the Ngaliwuru and Nungali Peoples [2019] HCA 7 (commonly known as 'the Griffiths case'). While the sum of damages in this case was not overly significant (AUD\$2.5 million), this was a landmark judgment that could pave the way for more companies to be held liable to pay compensation for spiritual loss in the future.
- 17 Ashurst, '[High Court dismisses FMG's special leave application in Yindjibarndi proceedings - exclusive native title over Solomon Hub re-affirmed](#)', 1 April 2021.
- 18 This refers to disclosure of any type of engagement with First Nations people, including policies related to First Nations people, employment and procurement practices, impacts on land, cultural heritage management etc.
- 19 This requirement is mandated by law: [Treasury Laws Amendment \(Your Future, Your Super\) Act 2021, Schedule 3](#).
- 20 Which are also integrated into the [Equator Principles](#).
- 21 For example, [United Nations Global Compact, KPMG and University of Technology Sydney](#) (see above).
- 22 In analysing responses to a letter co-signed by [a group of investors](#) globally and sent to companies in the extractives sector, it was found that the companies that had clear policies for engagement with First Nations people often had better practices of risk management than those that did not have clear policies.
- 23 [United Nations Declaration on the Rights of Indigenous Peoples](#) (UNDRIP), Article 8.
- 24 UNDRIP Article 11.
- 25 UNDRIP Article 12.
- 26 United Nations Global Compact, KPMG and University of Technology Sydney, '[The Australian Business Guide to implementing the UN Declaration on the Rights of Indigenous Peoples](#)', November 2020.
- 27 UNDRIP Article 32.
- 28 Australian Human Rights Commission, '[Right to Self-Determination](#)'.
- 29 Australian Human Rights Commission, '[UN Declaration on the Rights of Indigenous Peoples](#)', 14 Sept 2007; United Nations Global Compact, KPMG and University of Technology Sydney, '[The Australian Business Guide to implementing the UN Declaration on the Rights of Indigenous Peoples](#)', November 2020.
- 30 [United Nations Global Compact, KPMG and University of Technology Sydney](#) (see above), p11
- 31 [United Nations Guiding Principles on Business and Human Rights](#), p14.
- 32 Ibid.
- 33 [United Nations Guiding Principles on Business and Human Rights](#).
- 34 Ibid.
- 35 UNDRIP Article 32.

- 36 FPIC has also been recognised in other international instruments, such as the ILO Convention 169 on Indigenous and Tribal Peoples, as well as by bodies such as the Inter-American Court of Human Rights ("IACtHR") and the ILO Committee of Experts on the Application of Conventions and Recommendations ("CEACR"). For more detail, see Simmons & Simmons, '[Human Rights Defenders' Toolbox](#)', p36.
- 37 [United Nations Global Compact. KPMG and University of Technology Sydney](#) (see above), p23.
- 38 Ibid, p10.
- 39 IFC Standard 7 relates to the rights of Indigenous Peoples. The IFC Standards were extensively referenced in Rio Tinto's Board review of the destruction of the Juukan Gorge caves. International Finance Corporation, '[2012 Performance Standards](#)'; Rio Tinto, '[Board Review of Cultural Heritage Management](#)', 23 Aug 2020.
- 40 Shortcomings in Australia's state laws have been outlined in various reviews, including the [Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#) and the [review of the Western Australian Aboriginal Cultural Heritage Act 1972](#). See also the Interim and Final Reports of the Parliamentary Committee into the destruction of the Juukan Gorge: '[Never Again](#)' and '[A Way Forward](#)'.
- 41 Australia's legal framework on the protection of Indigenous rights and cultural heritage is made up of Federal and State laws, including the Environmental Protection and Biodiversity Conservation Act 1999 (Cth), the Protection of Movable Cultural Heritage Act 1986 (Cth), the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), the Native Title Act 1993 (Cth) and the Underwater Cultural Heritage Act 2018 (Cth). Other State laws provide varying standards of protection. Under the Native Title Act 1993 (Cth), the 'native title regime provides a mechanism for engagement on land-related matters, where a native title claim has been registered or recognised'. However, there remain a number of limitations in the legal framework that cause challenges in practice. See: Parliament of Australia, '[Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia - Interim Report](#)', December 2020; Parliament of Australia, '[A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge](#)', October 2021; Australian Government, '[Engaging with Indigenous Australia - exploring the conditions for effective relationships with Aboriginal and Torres Strait Islander communities](#)', Issue Paper no.5, October 2013; RMIT University, '[First Nations people and Land Justice Issues in Australia: Addressing Deficits in Corporate Accountability](#)', 2021, p8.
- 42 RMIT University, '[First Nations people and Land Justice Issues in Australia: Addressing Deficits in Corporate Accountability](#)', 2021, p10.
- 43 Parliament of Australia, '[Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia - Interim Report](#)', December 2020.
- 44 At the time of writing, the Aboriginal Cultural Heritage Act 1972 (WA) is currently under review (WA Aboriginal Cultural Heritage Bill 2021). Many consider that the proposed Bill falls short of FPIC and the Best Practice Standards of the Heritage Chairs and Officials of Australian and New Zealand. See, for example, National Indigenous Times, '[Breaking: WA Aboriginal Cultural Heritage Bill made public, to be tabled Wednesday despite serious concerns](#)', 16 November 2021.
- 45 Parliament of Australia, '[A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge](#)', October 2021.
- 46 The Hon Sussan Ley MP, '[Joint media release: Government signs First Nations alliance partnership](#)', 29 November 2021; NITV, '[Partnership to protect First Nations heritage](#)', 29 November 2021.
- 47 These examples are based on discussions with companies as well as responses to a letter co-signed by [a group of investors](#) globally and sent to companies in the extractives sector, more than half the responding companies with relevant operations had begun the process of reviewing agreements drawn up with local communities. We have also drawn upon desk research, for examples see RMIT University, '[First Nations people and Land Justice Issues in Australia: Addressing Deficits in Corporate Accountability](#)', 2021; Interim and Final Reports of the Parliamentary Committee into the destruction of the Juukan Gorge: '[Never Again](#)' and '[A Way Forward](#)'.
- 48 As discussed in the Interim Report of the Parliamentary Committee into the destruction of the Juukan Gorge: '[Never Again](#)'.
- 49 Oxfam, '[Community Consent Index 2015](#)', 207 Oxfam briefing paper, 23 July 2015, p31.
- 50 Columbia Center on Sustainable Investment, '[Free, prior and informed consent: Addressing political realities to improve impact](#)', Oct 2020, p19.
- 51 [RMIT University](#) (see above), p17; Columbia Center on Sustainable Investment, '[Free, prior and informed consent: Addressing political realities to improve impact](#)', Oct 2020, p30.
- 52 As discussed in the Interim Report of the Parliamentary Committee into the destruction of the Juukan Gorge: '[Never Again](#)'.
- 53 Ibid, p18.
- 54 [United Nations Global Compact. KPMG and University of Technology Sydney](#) (see above).
- 55 Under the Native Title Act 1993 (Cth).
- 56 As outlined by the Interim Report of the Parliamentary Committee into the destruction of the Juukan Gorge: '[Never Again](#)' p15.
- 57 International Council on Mining & Metals, '[Indigenous Peoples and Mining: Position Statement](#)', 2013, p1.
- 58 This was the case in relation to Juukan Gorge, where the Native Title Holders had an agreement with Rio Tinto for Rio to operate on their lands, but this did not mean that they consented to the destruction of their cultural heritage in the caves. Interim Report of the Parliamentary Committee into the destruction of the Juukan Gorge: '[Never Again](#)'.
- 59 As discussed Columbia Center on Sustainable Investment, '[Free, prior and informed consent: Addressing political realities to improve impact](#)', Oct 2020, p29.
- 60 In analysing responses to a letter co-signed by [a group of investors](#) globally and sent to companies in the extractives sector, it was found that the companies that had clear policies for engagement with First Nations people often had better practices of risk management than those that did not have clear policies.
- 61 Federated Hermes, '[When companies and Indigenous Peoples collide](#)', January 2018.
- 62 Responses to the letter co-signed by [a group of investors](#) (see above).

- 63 Ibid.
- 64 [United Nations Global Compact, KPMG and University of Technology Sydney](#) (see above).
- 65 UNDRIP Article 32.
- 66 Relevant information can include 'the nature, size, pace, reversibility and scope of any proposed project or activity; the purpose of the project as well as its duration; locality and areas affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks; personnel likely to be involved in the execution of the project; and procedures the project may entail.' OHCHR, '[Free, Prior and Informed Consent of Indigenous Peoples](#)', Sept 2013.
- 67 For more information on how to conduct human rights due diligence, see [United Nations Global Compact, KPMG and University of Technology Sydney](#) (see above).
- 68 [United Nations Guiding Principles on Business and Human Rights](#).
- 69 For more guidance on how to set up a strong policy, see [United Nations Global Compact, KPMG and University of Technology Sydney](#) (see above).
- 70 It should be noted that in Australia there is currently a [Parliamentary Inquiry into Pathways and Participation Opportunities for Indigenous Australians in Employment and Business](#). The Inquiry report will be released on 31 May 2021, which will provide further guidance and best practice on strengthening opportunities for First Nations people to share their expertise within companies through employment.
- 71 Nyunggai Warren Mundine AO and Elizabeth Henderson, '[Crafting the future: Minerals industry engagement with Indigenous Australia](#)', Oct 2017.
- 72 [International Covenant on Civil and Political Rights](#) (ICCPR), Article 1.
- 73 United Nations Office of the High Commissioner of Human Rights, '[Status of ratification interactive dashboard](#)'.
- 74 International Council on Mining & Metals, '[Indigenous Peoples and Mining: Position Statement](#)', 2013, p1.
- 75 The Mining Association of Canada, '[Towards Sustainable Mining](#)'.
- 76 Minerals Council of Australia, '[Towards Sustainable Mining: taking ESG accountability to a new level](#)'.
- 77 Responsible Investment Association Australasia, '[Australian Sustainable Finance Roadmap](#)', November 2020.
- 78 Australian Department on Agriculture, Water and the Environment, '[Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation](#)', 2020.
- 79 Ibid.

Australian Council of Superannuation Investors
Level 23
150 Lonsdale Street
Melbourne VIC 3000
Australia

P: +61 (03) 8677 3890
E: info@acsi.org.au
W: www.acsi.org.au

