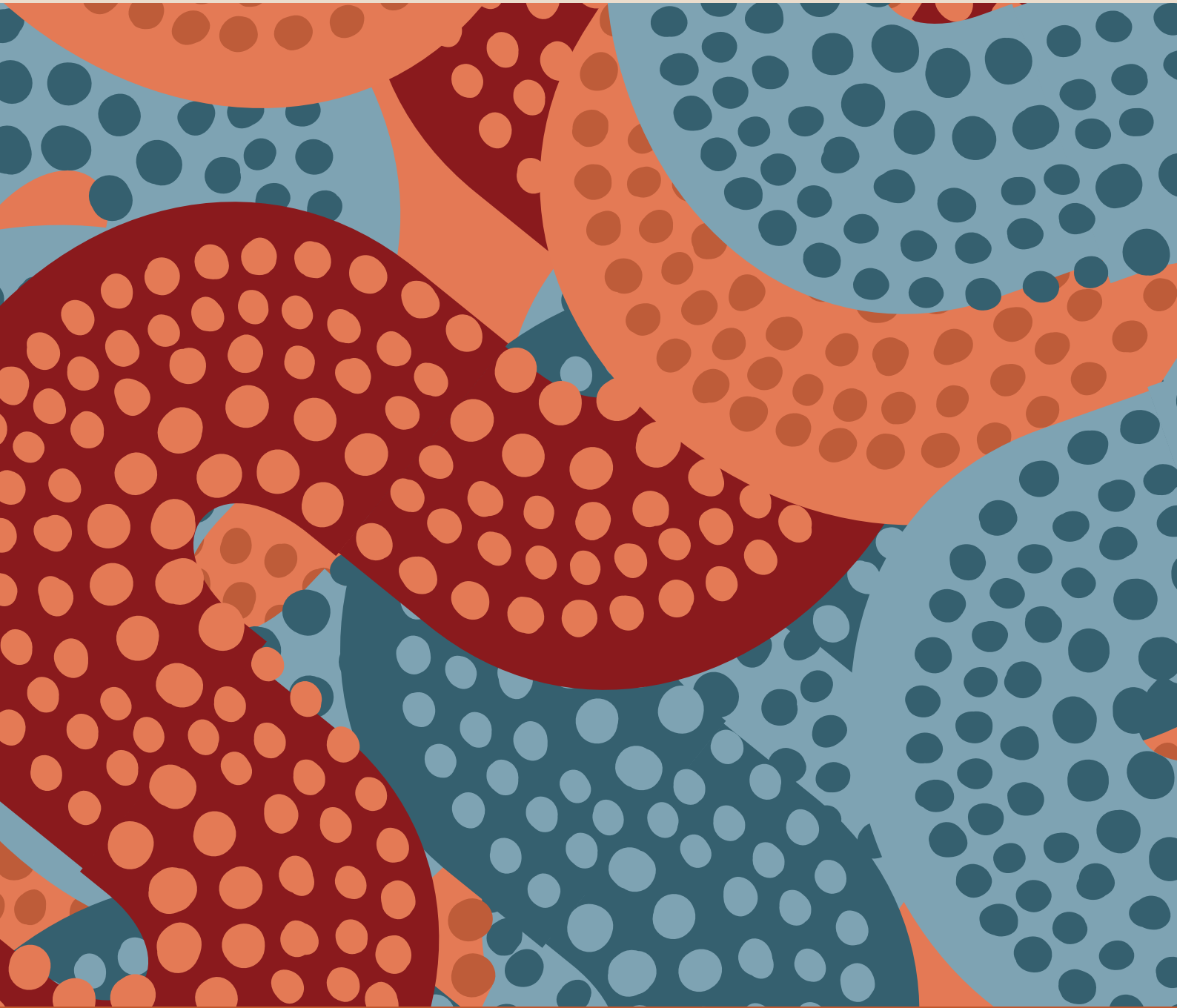




**Dhawura Ngilan**

BUSINESS & INVESTOR INITIATIVE



**A GUIDE FOR BUSINESSES AND INVESTORS**

Dhawura Ngilan (Remembering Country):  
A Vision for Aboriginal and Torres Strait Islander Heritage



# Dhawura Ngilan

BUSINESS & INVESTOR INITIATIVE

**PREPARED BY**

Terri Janke and Company Pty Ltd



**DHAWURA NGILAN BUSINESS AND INVESTOR INITIATIVE**

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## ABBREVIATIONS AND ACRONYMS

<b>ESG</b>	Environmental, Social, and Corporate Governance
<b>FPIC</b>	Free, Prior and Informed Consent
<b>ICH</b>	Indigenous Cultural Heritage
<b>ICIP</b>	Indigenous Cultural and Intellectual Property
<b>ICMM</b>	International Council on Mining and Metals
<b>IDS</b>	Indigenous Data Sovereignty
<b>IFC</b>	International Finance Corporation
<b>IJV</b>	Indigenous Joint Venture
<b>IPAs</b>	Indigenous Protected Areas
<b>NAIDOC</b>	National Aborigines and Islanders Day Observance Committee
<b>RAP</b>	Reconciliation Action Plan
<b>TCE(s)</b>	Traditional Cultural Expression(s)
<b>TK</b>	Traditional Knowledge
<b>UNDRIP</b>	United Nations Declaration on the Rights of Indigenous Peoples
<b>UNGPs</b>	United Nations Guiding Principles on Business and Human Rights

## ABOUT THE GUIDANCE

This guide was prepared by Terri Janke and Company – Dr Terri Janke, Founder and Solicitor Director, and Laura Melrose, Solicitor. Dr Janke is a Wuthathi, Yadhaigana and Meriam woman and an international authority on Indigenous Cultural and Intellectual Property (ICIP). Terri Janke and Company is a 100% Indigenous owned and run law and consulting firm that empowers clients to achieve success in business and innovation. Terri Janke and Company is a multi-award-winning firm and a Certified Indigenous Supplier with Supply Nation.

Various stakeholders across the First Nations, business and investor environment provided input into the development of this guide. Oversight was provided by the Steering Committee of the Dhawura Ngilan Business and Investor Initiative. The committee is chaired by Cath Brokenborough (Executive Lead, First Nations Engagement and Reconciliation, Lendlease), and composed of the Initiative's core partners (First Nations Heritage Protection Alliance, Responsible Investment Association Australasia, UN Global Compact Network Australia, National Native Title Council (Secretariat)).

Review and feedback for the investor content of this guide were coordinated by: Mel Sutton (Director, KPMG Banarra), Sofia Anagnostaras (Manager, KPMG Banarra), and Amy Coney (Consultant, KPMG Banarra). The following people also contributed to the investor content: Claire Heeps (Responsible Investment Manager, HESTA), Nina Haysler (Associate Portfolio

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## INTRODUCTION AND CONTEXT

First Nations heritage is a holistic living heritage. First Nations peoples have lived in Australia since time immemorial. They have continued to practice culture despite the ongoing impacts of colonisation. They continue to affirm their identity.



The practice of managing and caring for culture is a key responsibility of First Nations cultural practice. It includes caring for Country, protecting sacred sites and rock art sites, caring for plants and animals, caring for objects, upholding stories and passing on knowledge.

There are many ancient places in our Country – its landscapes and waterscapes. There are also places of First Nations cultural significance in urban areas including missions, and protest sites. Many of these places carry connected stories, song lines and other aspects of intangible heritage.

First Nations cultures are an integral part of the rich tapestry of Australia's history and identity. They must not only be protected but valued and celebrated. All Australians – businesses and investors, governments, and individuals – share the responsibility of caring for the rich and diverse cultural heritage in our country.

The Dhawura Ngilan Business and Investor Guide is the first iteration of the only First Nations-led guidance document designed to support businesses and investors to protect Indigenous cultural heritage in our region. This Guide operationalises the Dhawura Ngilan Principles for Businesses and Investors and should be read together with that document (**Dhawura Ngilan Principles**).

It has been developed at a time when businesses and investors are seeking to learn, and put into practice, actions and policies that contribute to the protection of First Nations cultural heritage, led by First Nations views. This is a nascent area, both in terms of knowledge and the relationships, resources and supporting infrastructure needed to put into practice the full vision of the Dhawura Ngilan Business and Investor Initiative – that is, that Free, Prior and Informed Consent (**FPIC**) truly becomes “business-as-usual”.

## I. The Dhawura Ngilan Vision

*Dhawura Ngilan (Remembering Country): A vision for Aboriginal and Torres Strait Islander heritage in Australia (Dhawura Ngilan or the Vision)* embodies the long-held aspirations of First Nations peoples for their heritage.<sup>1</sup> It is endorsed by the Heritage Chairs of Australia and New Zealand, following extensive consultations with First Nations stakeholders and peak representative bodies, advisory councils, and committees. The Vision aims to inform policy, underpin legislative change and inspire action to protect and conserve Indigenous Cultural Heritage (**ICH**).<sup>2</sup>

The *Dhawura Ngilan* Vision has four vision statements:

- 1) Aboriginal and Torres Strait Islander people are the Custodians of their heritage. It is protected and celebrated for its intrinsic worth, cultural benefits and the wellbeing of current and future generations of Australians.
- 2) Aboriginal and Torres Strait Islander heritage is acknowledged and valued as central to Australia's national heritage.
- 3) Aboriginal and Torres Strait Islander heritage is managed consistently across jurisdictions according to community ownership in a way that unites, connects and aligns practice.
- 4) Aboriginal and Torres Strait Islander heritage is recognised for its global significance.

Central to achieving these aims is ensuring that the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) are acknowledged, respected and followed.<sup>3</sup> The United Nations Guiding Principles on Business and Human Rights (**UNGPs**)<sup>4</sup> and the Organisation for Economic Cooperation and Development (**OECD**) Guidelines for Multinational Enterprises on Responsible Business Conduct<sup>5</sup> clarify the responsibility of businesses and investors to respect all internationally recognised human rights. This includes human rights set out under the International Bill of Human Rights, the International Labour Organization Core Conventions and other human rights instruments protecting certain groups and individuals such as the UNDRIP.

The Dhawura Ngilan Vision supports Aboriginal and Torres Strait Islander people to share the stories they want to tell, in ways they want to tell them, and for any decisions which affect them to be made only with their FPIC.

## A new standard of Best Practice

"...there are serious deficiencies across Australia's Aboriginal and Torres Strait Islander cultural heritage legislative framework, in all state and territories and the Commonwealth."<sup>6</sup>

ICH in Australia is governed under a complex web of national and state and territory laws. Current laws and policies in Australia are, for the most part, unfit for the purpose of protecting and conserving ICH.<sup>7</sup> This is true for several reasons:

- Frameworks often focus more on applications and consent to destroy heritage, rather than actively protecting cultural heritage;<sup>8</sup>
- Laws empower ministers and government officials as the decision-makers, requiring little to no consultation with First Nations custodians of cultural heritage;
- Laws focus predominantly on physical aspects of heritage (sites, objects and ancestral remains) and fail to recognise and protect intangible heritage;
- State and territory laws offer varying and limited levels of protection across different jurisdictions;
- Federal protections are only accessible once state and territory legislative mechanisms have been exhausted, which is often too late.

Due to the deficiencies in these laws, it is incumbent on businesses and investors to reach beyond legislative standards and implement leading practice for cultural heritage as defined by First Nations peoples.

The responsibility of businesses and investors to respect human rights exists independently of state laws and protection through the UNGPs and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. Businesses that have joined the United Nations Global Compact (**UNGC**) have also committed to supporting and respecting the protection of internationally proclaimed human rights and making sure they are not complicit in human rights abuses, through a commitment to the UNGC Ten Principles.<sup>9</sup>

The Dhawura Ngilan Vision sets out a series of Best Practice Standards in Indigenous Cultural Heritage management and legislation.

"The objective of the Standards is to achieve the aspirations identified above; that is to facilitate ICH Legislation and policy across the country that is consistently of the highest standards."<sup>10</sup>

These Standards provide an opportunity for jurisdictions to collectively work with First Nations peoples to identify, protect, conserve, present and transmit for future generations the unique heritage of Australia.<sup>11</sup>

## II. Purpose of adapting the Dhawura Ngilan Vision for businesses

Dhawura Ngilan offers a Vision of Australian cultural heritage that is protected and celebrated by all. As a policy document, it sets out the high-level goals and ambitions for legislative reform and systemic change. The Best Practice Standards detailed in Part C of the Vision document guide government and legislators in cultural heritage management across jurisdictions. Taking the next step, the purpose of adapting the Dhawura Ngilan Vision for businesses is to operationalise the standards for the private sector, and to achieve the aspirations identified in the Vision.

This Guide assists companies across all sectors to work alongside First Nations peoples in the protection and celebration of cultural heritage in alignment with culturally appropriate expectations and best practice standards. It provides practical and First Nations-led advice to both Australian and international companies on how to manage their businesses in a way that enables and supports First Nations people to manage and protect their heritage and Country in accordance with their right to FPIC.

## III. Purpose of adapting the Dhawura Ngilan Vision for investors

Guidance included in this document is also designed to assist investors to ensure investments align with culturally appropriate expectations and support best practice First Nations cultural heritage management both in Australia and internationally. It also provides useful guidance to other organisations with similar functions, such as grant funders and philanthropists, to assess potential applicants for funding against cultural heritage standards.

There is substantial and growing expectation from industry, governments, civil society, and investors that companies should respect all human rights, including the rights of First Nations people and communities. Importantly, the Office of the UN High Commissioner for Human Rights clarified that the responsibility to respect human rights extends to institutional investors.<sup>12</sup> The OECD has also developed guidance specifically for institutional investors.<sup>13</sup> These authoritative frameworks are important for investment organisations in terms of how they manage risks and impacts in their investment activities, but also for their investee companies.

The Responsible Investment Association Australasia (**RIAA**) has identified three key areas of direct and indirect risk to investors that may arise as a result of poor cultural heritage management. To be clear, these risks manifest because actions, such as the destruction of tangible or intangible heritage, have significant social costs.

<sup>1</sup>Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 4 <<https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>.

<sup>2</sup>Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 4 <<https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>.

<sup>3</sup>*United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('UNDRIP').

<sup>4</sup>United Nations Human Rights Office of the High Commissioner (2011). *Guiding principles on business and human rights – Implementing the United Nations "Protect, Respect and Remedy" Framework*. New York and Geneva: United Nations. [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>5</sup>United Nations Human Rights Office of the High Commissioner (2011). *Guiding principles on business and human rights – Implementing the United Nations "Protect, Respect and Remedy" Framework*. New York and Geneva: United Nations. [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>6</sup>Joint Standing Committee on Northern Australia, Parliament of the Commonwealth of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge*, (Report, October 2021) xi.

<sup>7</sup>First Nations Heritage Protection Alliance, *First Nations Peoples' Cultural Heritage is Australia's Cultural Heritage* <<https://culturalheritage.org.au/>>.

<sup>8</sup>First Nations Heritage Protection Alliance, *First Nations Peoples' Cultural Heritage is Australia's Cultural Heritage* <<https://culturalheritage.org.au/>>.

<sup>9</sup>United Nations Global Compact, *The Ten Principles of the UN Global Compact* (2000), <<https://unglobalcompact.org/what-is-gc/mission/principles>>

<sup>10</sup>Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 32.

<sup>11</sup>Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 13.

<sup>12</sup>UN Working Group on Business and Human Rights, *Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights* (2021) <<https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNGPs10/Stocktaking-investor-implementation.pdf>>

<sup>13</sup>Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (2023), <https://doi.org/10.1787/81f92357-en>



These are extracted below.

## RISKS ASSOCIATED WITH POOR CULTURAL HERITAGE MANAGEMENT

### LITIGATION RISK

- Risks linked to future permitting – stakeholders including communities or governments may be less inclined to support or approve permits because of past actions.
- Legal risks in agreements when legally tenuous clauses are included/uncovered with communities due to a significant power imbalance between parties at the time of negotiation.

### REPUTATIONAL RISK

- Risk of decreased standing in the community arising from a loss of Reconciliation Action Plan (RAP) status.
- Risk of losing shareholders, particularly those that operate with a norms-based screening process or other strict (ESG) criteria.
- Loss of trust and willingness to engage from First Nations communities which can lead to project or permitting delays.
- Ripple effect related to reputational fallout (both for the company as well as the investor), such as difficulty retaining or attracting staff, trust with suppliers, mistrust among other communities which leads to other difficulties in operations/expansions.

### OPERATIONAL RISK

- Unforeseen or unaccounted reparations, including monetary payments, land-based compensation, etc.
- Loss of ability to operate on specific areas of land as a result of an incident which could have been prevented by improved stakeholder engagement, trust and respect.
- Human capital risks related to retention – voluntary exits by long-serving management and senior management due to dissatisfaction with company practices could lead to loss of corporate memory, which has implications beyond cultural heritage management, extending to many aspects of operations.
- Forced resignations also impact corporate memory, particularly if they occur amongst long serving staff. In the context of minimal controls around data and information as a source of corporate memory, losing personnel can have great consequences including repeating recent events.
- Significant investment in board and management time as a result of major issues.

Source: Responsible Investment Association Australasia, *Investor Toolkit: An Investor Focus on Indigenous Peoples' Rights and Cultural Heritage Protection (2021)*

This Investor Guide proposes an addition to this approach, and a shift to a way of thinking that focuses more on human rights. Unlike investors' conventional risk management systems, centring on business risk, operational risk or financial risk, the key factor in cultural heritage management is the risk of negative outcomes for people.<sup>14</sup>

This Guide provides practical and First Nations-led advice to both Australian and international investors on how to manage their portfolios in a way that will identify and eliminate or mitigate negative impacts on Country, heritage sites, knowledge and places as agreed by First Nations communities through a process of FPIC. Investors aligning with this Guide will contribute to a new standard of First Nations-led best practice for cultural heritage management in Australia.

## IV. What can businesses do?

Businesses are uniquely placed to drive the shift toward best practice cultural heritage management. There is substantial and growing expectation from industry, governments, civil society and investors that companies must respect all human rights, and First Nations rights in particular. This comes in the context of changing conversations around issues such as decolonisation, reconciliation, racial injustice and inequality, and a growing public expectation that companies will adopt ESG considerations in its operations and corporate strategy.

Companies' responsibility to respect human rights includes the responsibility to assess and address their human rights impacts on First Nations people. To ensure First Nations cultural heritage is protected, companies must be transparent and accountable. They must respect and uphold First Nations people's rights to FPIC.

*'Businesses have a crucial role to play in ensuring that they respect Indigenous rights throughout their strategies, operations and business relationships.'*<sup>15</sup>

Investors are increasingly calling for companies to align with international leading practice and meet broader stakeholder expectations with respect to cultural heritage. Further, there is increasing pressure for companies to ensure they are aware of and comply with changes happening internationally and within their local jurisdictions.

## V. Business drivers

In addition to the ethical imperative to respect First Nations' human rights, UN Global Compact Network Australia, KPMG and University of Technology Sydney identified several key business case considerations, including:<sup>16</sup>

- **Meeting emerging regulatory and legal frameworks:** Many businesses operating in and around Australia enter and sell into various markets that are experiencing a significant amount of regulatory change relating to due diligence requirements. Investing in effective human rights due diligence processes based on international standards such as the UNGPs and OECD Guidelines for Multinational Enterprises on Responsible Business Conduct can serve to future proof these arrangements.
- **Reputational and legal risks:** Failure to conduct an appropriate level of human rights due diligence can open the business up to significant reputational and legal risks leading to fines, loss of reputational standing in the community arising from the loss of a Reconciliation Action Plan (RAP) status, loss of trust and potential divestment by key shareholders,
- **Operational risk:** Unforeseen disruption to business activity, including loss of ability to operate on specific areas of land due to preventable incidents, human capital risks including loss of staff morale and retention, significant investment in senior executive or board member time.

By aligning their business operations and strategy with the Dhawura Ngilan principles, businesses with operations in Australia are demonstrating a positive intent and commitment to supporting First Nations-led standards for cultural heritage management in Australia.

## VI. What can investors do?

As stewards of capital, investors can decide where they are invested and to influence corporate behaviour for their clients or beneficiaries' best financial interests.

Investors have different investment approaches to applying a responsible or sustainable lens to their investment activities. This can range from considering ESG factors to assess risks in the investment process to investing to seek positive social or environmental outcomes. The impacts on First Nations cultural heritage, and opportunities for best practice implementation, can be considered as part of these approaches to assess and manage risk for an investment holding or where investors are seeking to influence social outcomes on behalf of their clients. Globally, First Nations rights to maintain, control, protect and develop their cultural heritage are recognised as a human rights issue.<sup>17</sup> In Australia, recognition of First Nations rights is in the spotlight following the tragic destruction of 46,000-year-old rock shelters at Juukan Gorge. As a result, many investors are motivated to understand, analyse, and assess engagement and company relationships with First Nations communities.

The following sections provide tailored guidance to assist investors to integrate cultural heritage considerations into decision-making, including during due diligence, assessing disclosures, corporate engagement, stewardship and whether to buy, hold or sell an investment holding.

## VII. What do First Nations groups want to know about corporate partners?

Engagement with First Nations groups in the development of this Guide raised several material issues for First Nations groups to consider when partnering with companies. These include:

- Understanding who they are dealing with – what the company is about, its values, track record of working with First Nations communities, any previous partners, any references from previous engagement with First Nations groups etc.
- The company's financial position – its financial reporting, surety, and viability.
- The company's intention – whether they will manage the project long-term, any plans to on-sell, whether they will put the project in a Special Purpose Vehicle etc.
- Where the authority is – who is approaching the First Nations group, whether they are the decision maker, the corporate structure (subsidiaries, whether it is the publicly listed company or the proprietary company doing the project, etc.).
- Whether the company is ASX listed – First Nations

<sup>14</sup> 'Why and How Investors Should Act on Human Rights', Principles for Responsible Investment (Web Page, 22 October 2020) <<https://www.unpri.org/human-rights/why-and-how-investors-should-act-on-human-rights/6636.article>>.

<sup>15</sup> UN Global Compact Network Australia, KPMG Australia and the University of Technology Sydney, *The Australian business guide to implementing the UN Declaration on the Rights of Indigenous Peoples* (Report, 12 November 2020) 4 <[https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People\\_FINAL.pdf](https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People_FINAL.pdf)>.

<sup>16</sup> UN Global Compact Network Australia, KPMG Australia and the University of Technology Sydney, *The Australian business guide to implementing the UN Declaration on the Rights of Indigenous Peoples* (Report, 12 November 2020) 14 <[https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People\\_FINAL.pdf](https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People_FINAL.pdf)>.

<sup>17</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 31.

groups may request or require that an ASX listed company be the contract party, or guarantees the project, as they must report back to shareholders on how they manage FPIC, conduct, good practice, etc.

- Details of the project e.g., size and scale of the project, duration of the project, for mining – quality of the mineral to inform expert advice on assessing the value of the project.
- How the company intends to approach negotiations with First Nations rightsholders.
- How First Nations communities would like to interface with the company including complaint mechanisms.
- For land-based projects, where the proposed activity is, and whether the First Nations groups are able to flag any cultural heritage issues from the beginning.

Investors can also consider these issues to help in assessing potential investments, and in supporting First Nations groups to drive best practice in cultural heritage management.

### VIII. Materiality

Materiality is the term used to describe issues that are reasonably likely to impact the operating performance or financial condition of a company. Companies aspiring to best practice will ascribe to the perspective of double materiality. This requires that a company consider not only issues that will affect its business, but also, how its business activities will impact people and the environment.

Investors assessing potential investees should look for cognisance of double materiality in company activities and reporting, including ESG and sustainability factors. The RIAA Investor Toolkit – *An Investor Focus on Indigenous Peoples Rights and Cultural Heritage Protection* (RIAA Toolkit) notes as a red flag for investors:

*“Failure to recognise Indigenous Peoples as a key stakeholder in the materiality section of a sustainability report or failure to acknowledge Indigenous Peoples at all.”<sup>18</sup>*

This is important for all companies, but especially important for sectors and companies where First Nations cultural heritage could be adversely impacted or severely harmed by the core operations of that business. Materiality is proportionate to the severity of the potential impact or harm.

### IX. High risks for severe harm

While all companies can enact best practice cultural heritage measures in their business (such as implementing policies, educating staff, and embedding First Nations perspectives in their daily operations), there are several sectors and industries that present a higher risk of mismanaging or causing harm to First Nations cultural heritage.

Those companies and sectors must demonstrate a high level of responsibility and care in assessing their potential for causing serious harm, and ensuring they mitigate that risk. Investors, in turn, have a proportionate responsibility to act in relation to actions or potential activities which may cause serious harm to cultural heritage.

Serious harm to cultural heritage may be measured by:

- **Nature of the harm**
  - o A high number of First Nations people, or several communities, families or language groups are affected;
  - o Affecting a large geographical area; and
  - o Impacts last a long time or are consistently repeated over several years despite efforts by affected people to stop the harm.
- **Scale of the harm**
  - o Heritage is highly significant according to:
    - First Nations cultural values;
    - Archaeological or historical perspective; and/or
    - National and international heritage standards and listings.
  - o Age of the heritage;
  - o Uniqueness of the heritage; and
  - o Irreversibility of the harm.

The seriousness of harm or potential harm may also depend on the public response. In some cases, a company’s behaviour may be so offensive to public opinion that investors must act in response to it. An example of highly serious harm is:

- destruction of cultural heritage, such as destroying a sacred site in the course of a development project; and
- theft of cultural heritage, such as a research company seeking plant knowledge from a First Nations community, developing a commercial product based on that knowledge, and then registering an exclusive patent over the product.

Other misuses may be harmful but slightly less severe, such as a company using a First Nations language word without seeking consent or benefit sharing.

### X. Key Concepts used in this Document

#### COUNTRY

Country is land, sea and sky Country, but it is more than the physical land, waterways, skies and seas, it includes all living things on land and in waters and seas, and sky. The word ‘Country’ also reflects the values, stories, resources, the laws, responsibilities, ancestral heritage, and language all related to a place. For First Nations people, the relationship to Country is symbiotic. Country is language, ancestry, and spirit. It forms the identity of First Nations peoples.

#### CUSTODIAN

First Nations peoples are connected to Country and culture. They are responsible for taking care of it, and for ensuring its ongoing health and endurance. They are not owners of culture or Country, in the way that Western society views ownership, but rather are Custodians or caretakers in line with cultural practice.

#### CULTURE

Culture refers to the holistic ways of living, knowing and being of Aboriginal and Torres Strait Islander people, their ideas, customs, and values as practised and refined by people and communicated from generation to generation.

#### CARING FOR COUNTRY

Caring for Country is a cultural obligation placed on First Nations peoples as custodians and carers of the land. In caring for Country, First Nations peoples draw on laws, knowledge, and customs that have been inherited from ancestors and ancestral beings. The capacity for First Nations peoples to care for Country means that First Nations knowledge systems can continuously evolve and be passed on through the generations.

#### CULTURAL HERITAGE

ICH is not just restricted to physical sites, landscapes and objects but includes intangible heritage too. It refers to knowledge, lore, practices, people, objects, and places that are meaningfully connected to identity and Country. ICH is fundamental to all aspects of First Nations cultures; it has historical, social, cultural, and spiritual value. To First Nations peoples, cultural heritage does not just reside in the past, it is living and dynamic, and forms a vital aspect of the lives and cultures of Australia’s First Nations peoples today.<sup>19</sup>

#### HOLISTIC

Holistic is a term used throughout this guide and it describes the interconnectedness of Country, culture, heritage and the health and wellbeing of First Nations peoples. People are healthier when Country and culture are safe, cared for and revitalised.

#### CULTURAL SAFETY

Cultural safety means creating an ‘environment that is safe for people: where there is no assault, challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge, and experience of learning, living and working together with dignity and truly listening.’<sup>20</sup> Cultural safety is an experience felt by First Nations peoples; not a standard of competence to be attained by non-First Nations people.

Cultural safety is critical to the holistic health and wellbeing of First Nations Australians. It requires a solid foundation of cultural awareness and must incorporate the principles of self-determination to ensure meaningful and genuine interactions. Culturally safe practice, behaviours, and attitudes, work symbiotically with self-determination and are underpinned by a foundation of cultural awareness, respect, and sensitivity.

#### INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY, OR ICIP

First Nations peoples have the right to maintain, control and protect their cultural knowledge, practices, and knowledge systems.<sup>21</sup> This is at the heart of First Nations identity. Indigenous Cultural and Intellectual Property (‘ICIP’) is all encompassing. It includes traditional cultural expression such as songs, dance, and languages, as well as traditional knowledge such as medicinal and ecological knowledge. This right is interconnected with the First Nations right to self-determination. See section 3.3 for more detail.

#### SELF DETERMINATION

Under the UNDRIP, the right to self-determination is a central pillar to ensuring that First Nations peoples are able to preserve their unique identities and cultures. Self-determination means that First Nations peoples have the right to have autonomy and control over their own lives and futures, and their community’s place in the world. In Australia, this also means having the freedom to govern themselves in matters related to their own internal or local affairs.

<sup>18</sup> Responsible Investment Association Australia, *Investor Toolkit – An Investor Focus on Indigenous Peoples’ Rights and Cultural Heritage Protection* (Report, October 2021) <<https://www.ausbil.com.au/Ausbil/media/Documents/Research%20and%20Insights/2111-Investor-Toolkit-An-Investor-Focus-on-Indigenous-Peoples-Rights-and-Cultural-Heritage-Protection.pdf>>.

<sup>19</sup> Ian Cresswell, Terri Janke and Emma L Johnston, *Australia State of the Environment 2021: Overview* (Report, July, 2022) 77 <<https://soe.dcccew.gov.au/sites/default/files/2022-07/soe2021-overview.pdf>>.

<sup>20</sup> Robyn Williams, ‘Cultural Safety: what does it mean for our work practice?’ (1999) 23(2) *Australian and New Zealand Journal of Public Health*.

<sup>21</sup> United Nations *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) Art 31 (‘UNDRIP’).



Figure 1. Dhawura Ngilan Principles and Actions

**RESPECT & SELF DETERMINATION**

- Recognising rights: UNDRIP
- Celebration of culture
- First Nations Custodianship
- Indigenous Data Sovereignty
- Respect for sacred culture
- Culture safety and competency

**COLLABORATION & CONSENT**

- FPIC
- First Nations empowerment in decision-making
- Agreement-making
- Cultural Safety
- Grievance mechanisms
- Community ownership and control

**TRUTH & HOLISTIC HERITAGE**

- Cultural wellbeing
- Intangible cultural heritage and ICP
- Language
- Dual and sole naming
- Cultural maintenance e.g Digitisation projects
- Support knowledge systems and transfer
- Support truth in research e.g research massacre maps
- Telling a global story

**CARING FOR COUNTRY AND CULTURE**

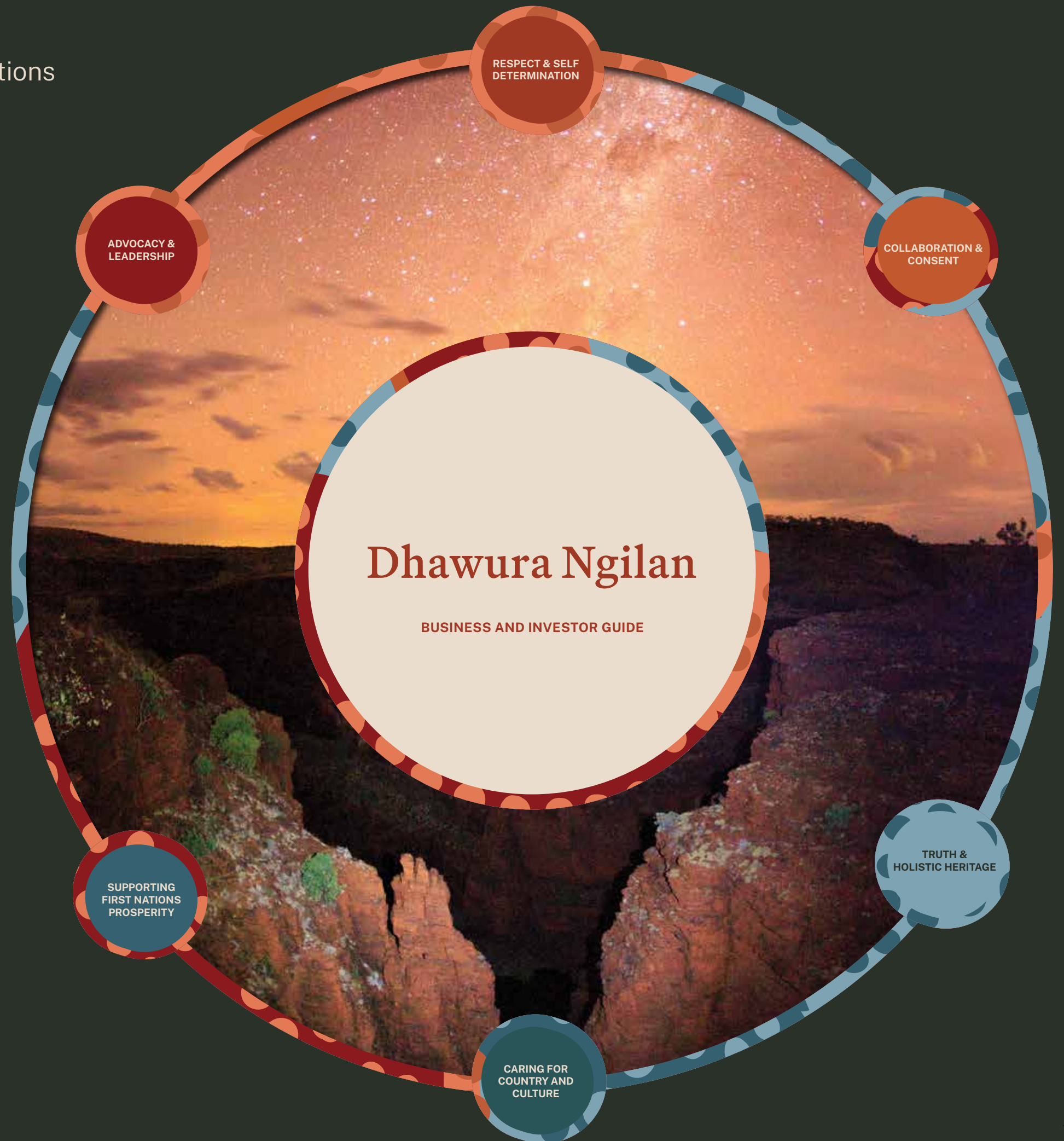
- Connection between people, land and culture
- Access to Country
- Biodiversity, protecting culturally significant species
- Caring for cultural objects and material
- Keeping places and Resting Places
- Repatriating ancestral remains and Secret/Sacred materials.

**SUPPORTING FIRST NATIONS PROSPERITY**

- First Nations workforce, employment, procurement
- Engaging First Nations cultural heritage consultants
- Resourcing First Nations communities for cultural heritage functions
- Promoting First Nations business development
- First Nations-led Joint Ventures

**ADVOCACY & LEADERSHIP**

- First Nations legislative reform
- Representation on boards and executive levels
- Industry led responses (regional approaches and understanding cumulative impact)
- Support for heritage listings, incl. intangible
- Education, promoting heritage in curriculum





**INTEGRATING THE DHAWURA NGILAN PRINCIPLES  
WITHIN BUSINESS AND INVESTMENT**

This implementation guide outlines the practical steps that businesses and investors can take to align their operations and strategy with each of the Principles outlined above.





## I. How businesses can use this Guide

Recognising that different types of business operations can impact human rights in different ways, each of the six sections below outlines a series of Key Actions associated with each Dhawura Ngilan Principle. For ease of reference, companies and their respective industries have been categorised under the following categories.

- Companies with **land, sky, water, and sea-based** activities, including mining and extractives, agriculture, construction, infrastructure, telecommunications or utility providers, real estate, etc.
- Companies with **knowledge and research-based** activities, including universities, collecting institutions like museums and galleries, think tanks, technology and R&D companies, law firms, consultancies, etc.
- Companies with **design and creative** outputs, including arts and culture, musicians, theatre companies, design firms, architecture companies, marketing and advertising firms, manufacturing, retail, etc.
- Companies that **work directly** with First Nations partners, culture or knowledge, including project proponents, research partners, health and social enterprises, etc.
- Companies who do not work directly with First Nations partners, culture or knowledge, but who **have third party relationships or value chains** which impact cultural heritage, including banks, joint venture companies, parent companies, international partners, not-for-profits, philanthropists, etc.

These categories are not mutually exclusive. For instance, a tourism company running a bus tour may have land-based activities relating to its tour route, knowledge-based activities in the information it shares with its customers, and creative outputs from its marketing materials and the design printed on the side of the bus. In such a case, that company should seek to apply the Key Actions from all three relevant sections. Companies aligning with the Key Actions in this Guide will be able to demonstrate leading practice with respect to management and protection of First Nations cultural heritage.

This Guide also serves as a useful tool for government agencies, both as a standard setting document, and also to guide their activities as proponents or project funders in relation to cultural heritage.

Importantly, this Guide will be a useful resource for First Nations communities as a tool to assess the actions of businesses and hold them to their commitments with respect to management and protection of First Nations cultural heritage.

## II. How investors can use this Guide

Investors can use this Guide as an accountability tool for companies in which they invest, as well as adhering to the Principles in their own operation as businesses.

Investors may be linked to cultural heritage outcomes, either positive or negative, in several ways. They may be linked to cultural heritage impacts due to their level of influence or shareholding of a particular asset or company. Additionally, linkages may come through the investor having knowledge of an adverse impact, even where their contribution or decision-making capacity in the process was minimal.

It is noted that different types of investors have specific obligations relating to responsible investment. Investors are encouraged to consider the principles holistically and apply the guidance as comprehensively as possible, and as appropriate to their role, obligations, and organisation. Investors may wish to incorporate this guide as part of their human rights due diligence.

Investors looking to be leaders should explore how they can implement the Dhawura Ngilan Principles in each context and process across their activities and in all other business and operations, such as:

- **Incorporating cultural heritage considerations into a range of responsible investment approaches** – how different responsible investment approaches could consider impacts on cultural heritage, including in the case of selling direct unlisted assets, investors should consider the management of relationships, publicity, and other concerns.
- **Stewardship** – how investors can consider and incorporate cultural heritage as part of engagement and voting, on behalf of their clients and beneficiaries, to monitor performance and hold investee companies accountable for their public commitments, as well as a basis on which to engage in public policy advocacy in support of cultural heritage protection and ensuring FPIC under Commonwealth law.
- **Appointing fund managers or assessing specific investments** – how to consider whether a manager, asset or company is managing cultural heritage in line with the Dhawura Ngilan Principles for the private sector.
- **Governance** – how boards and management teams have oversight and commitment to the upholding of human rights including UNDRIP supporting interactions between companies, suppliers, investors and asset owners.
- **Monitoring and reporting** – how investors can incorporate monitoring of fund managers, companies or assets and reporting on cultural heritage into existing monitoring and reporting to ensure both efficiency and transparency.

The Principles for Responsible Investment categorise three levels for how institutional investors may be connected to human rights outcomes: cause, contribution, and direct link.

This Guide places a cultural heritage lens over those levels of impact:

- **Cause** – an investor may **cause cultural heritage impacts** through its own business activities, either by its own operational activity (e.g., using a First Nations language word in its business without permission);
- **Contribution** – an investor may **contribute to a cultural heritage impact**, such as through a business relationship or investment activity that generates a result from an investee company or project (e.g., funding a pharmaceutical company which uses First Nations knowledge in its product development process, without attribution or benefit sharing). This could result from the investor holding a controlling stake or material holding in the investee, creating a reasonable expectation that they would know about and prevent activities that may cause harm; or
- **Direct link** – an investor may be **linked to cultural heritage impacts** simply by funding a company which impacts cultural heritage via their activities, products, or services (e.g., investing in a mining company).<sup>22</sup>

The ways in which these linkages may occur will change depending on the asset classes, size of investment, the type of ownership, the rights afforded to the investor, etc. This Guide does not purport to analyse every circumstance, but provides tools for investors to do their own critical analysis.

Common thought may be that it is unlikely for investors to cause damage to cultural heritage due to their not having a significant operational footprint, but this takes a narrow view of cultural heritage. Every actor in Australia has the capacity to impact cultural heritage. Investors interact with tangible and intangible cultural heritage in their work relating to First Nations rights, languages, stories, engagements, and their broad participation in Australian society. It is important to think comprehensively about cultural heritage.

It is also important to note that a link between an investor and a company which causes negative impacts to First Nations cultural heritage does not absolve the company of their own responsibility. However, this means that investors are faced with unknown risk when they are linked with companies whose actions they are not sure of, or which they do not control.

Investors are expected to use their decision-making power, influence, disclosure procedures, and other connections to mitigate potential negative cultural heritage impacts and drive positive change in the protection and management of First Nations cultural heritage. This Guide will equip investors to understand these actions, mitigate risk, and drive good practice.

*Influencing policy, advocacy, and leadership*

Advocating for cultural heritage policy is key to elevating practices and embedding best practice within industry.<sup>23</sup>

Some members of the investor community demonstrated corporate influence in how they individually and collectively responded to Juukan Gorge. There is a need for greater dialogue with policy makers and other stakeholders to raise the legal standards and companies' accountabilities in order to prevent another incident such as this.

Investors can work with others (e.g., policy makers, regulators, multilateral organisations and stock exchanges) to develop or influence market and industry standards that foster an enabling environment for investment that respects human rights. Responsibilities also include refraining from lobbying against positions or legislation seeking to improve protection of human rights.

As noted in the RIAA Toolkit, it is expected that companies that commit to high standards such as those articulated in UNDRIP will seek to advocate for change in the policy space more generally, or at least will not actively or indirectly promote policy that goes against industry or international standards.<sup>24</sup>

Whilst the focus on First Nations heritage provides a new set of risks for investors to consider, it also presents investors with a significant opportunity.

Evolving societal and stakeholder expectations require a step change in relationships with First Nations peoples. Industry, governments, and civil society are increasingly calling for companies to position themselves as international leading practice and complying with conventions, frameworks, and standards for cultural heritage. Further, there is increasing pressure for companies to ensure they are aware of and comply with changes happening both internationally and within their local jurisdictions.

Investors have a unique role to play in supporting this change, investing in the companies that are driving and exhibiting best practice, and using their place in the supply chain to educate, act and influence.

Investors have the opportunity to among other things:

- Increase recognition of First Nations rights in the context of wider expectations in civil society around such issues as decolonisation, reconciliation, racial injustice, and inequality; and
- Drive industry adherence and respect for FPIC, as various countries around the world are raising the legal status of First Nations rights.

Investors should be engaged in discourse and continually seek opportunities to drive positive change for cultural heritage.

Employing First Nations staff and consultants is a way in which institutional investors can develop a First Nations lens on companies in their investment portfolio.

There are a growing number of First Nations people with skills in the investment sector and their participation and promotion in the sector should continue to be supported.

<sup>22</sup> 'Why and How Investors Should Act on Human Rights', *Principles for Responsible Investment* (Web Page, 22 October 2020) <<https://www.unpri.org/human-rights/why-and-how-investors-should-act-on-human-rights/6636.article>>.

<sup>23</sup> *Responsible Investment Association Australia, Investor Toolkit – An Investor Focus on Indigenous Peoples' Rights and Cultural Heritage Protection* (Report, October 2021) 21 <<https://www.ausbil.com.au/Ausbil/media/Documents/Research%20and%20Insights/2111-Investor-Toolkit-An-Investor-Focus-on-Indigenous-Peoples-Rights-and-Cultural-Heritage-Protection.pdf>>.

<sup>24</sup> *Responsible Investment Association Australia, Investor Toolkit – An Investor Focus on Indigenous Peoples' Rights and Cultural Heritage Protection* (Report, October 2021) 21 <<https://www.ausbil.com.au/Ausbil/media/Documents/Research%20and%20Insights/2111-Investor-Toolkit-An-Investor-Focus-on-Indigenous-Peoples-Rights-and-Cultural-Heritage-Protection.pdf>>.



### Appointing fund managers

Fund managers often determine how funds are invested on behalf of their clients and should therefore have adequate policies and procedures in place that align with the client's values and preferences. Inside an organisation, directors, portfolio managers and responsible fund managers (and potentially others in the ecosystem) need adequate understanding of cultural heritage considerations and First Nations rights and issues to appropriately make decisions.

The purpose of the manager appointment process is to transfer the mandate requirements into practice and documentation. When selecting a fund manager, consider the following questions:

- Does the fund manager consider the impacts of corporate practices on First Nations communities, lands and waters, and heritage as part of their decision-making?
- Has the fund manager advanced their awareness of First Nations history, culture and aspirations of First Nations people in the finance and investment sector?
- Does the fund manager take advice from First Nations people in making decisions? Have they employed First Nations people in decision making roles?
- Does the fund manager have a public commitment with Board or management oversight to respect human rights – including Indigenous Peoples' rights – in their investment activities?

Once the beneficiary or asset owner and fund manager have agreed on an approach, both parties should put measures in place for ongoing reporting and monitoring. This may align with the process of determining suitable responsible investment practices to create an investor management agreement.<sup>25</sup>

The legal review phase is when the asset owner completes due diligence checks before the final agreement is drawn up, such as third-party verification or internal review cycles to ensure the agreement specifies fund manager's authority and duties, and the agreement adheres to relevant laws. The review phase should also ensure the fund manager can fulfil the mandate requirements, including the cultural heritage management requirements that have been determined.<sup>26</sup>

### Monitoring

Investors need to be conducting human rights due diligence in order to understand whether they or their business relationships may be involved in any adverse human rights impacts, including those relevant to First Nations cultural heritage. For publicly listed companies, it is important for investors to articulate their expectations of cultural heritage management in meetings with the board and/or management. For direct unlisted transactions, investors should seek to set clear intentions about the expectations of cultural heritage management before finalising a transaction.

These expectations might include signing up to industry frameworks including best practice principles like the Dhawura Ngilan Principles or aligning with other international guides and standards like the UNGPs. Once these parameters are set, the investor can continue to monitor the company's behaviour against these agreed-upon standards.

Companies should already be setting transparent targets and KPIs for their activities. Investors can communicate their expectations of these targets and actions in relation to cultural heritage management and seek accountability from the company when actions are not met.

Investors can also use their influence and advocate for companies to disclose this information and publicly report on any activities that have the potential to impact First Nations cultural heritage, however ultimately decisions around reporting rest with the company. Any reported information can be analysed by investors however, using the due diligence questions outlined in the following sections of this Guide.

As with all human rights due diligence processes, engagement with potentially affected rightsholders and stakeholders should be ongoing and First Nations people should be involved in the investment monitoring process. Investors should engage First Nations staff and consultants to assist with and add a First Nations lens to monitoring investments, the development of evaluation criteria, the review process, and the First Nations community engagement, consultation, consent, and remuneration practices.

Where investment management is outsourced, appropriate monitoring and reporting should be in place. Investors should select fund managers and allocate other significant roles to people and entities whose approaches and principles align with best practice, and

with the Dhawura Ngilan Vision. However, this alignment needs to be fact checked and asset owners should not only consider the policy position of fund managers but examine how they put those policies into practice. Where fund managers invest in companies with poor human rights records investors should engage with the manager to remediate adverse human rights records and ensure preventative and restorative remedy.

If an investor or asset owner discovers that the fund manager in charge of their capital is investing in companies known to be involved in adverse human rights impacts in connection with First Nations cultural heritage, they should step in. Investors need to be able to identify and monitor companies with a high-risk exposure, or ongoing poor performance.

There are several ways an investor can respond:

- **Internal management** – if responsible investment advocates within an investing entity notice poor behaviour in relation to First Nations cultural heritage, they can call an internal meeting and discuss this behaviour with the staff or teams in charge of equity and trading. They may also keep a running list of companies and fund managers who do the wrong thing and make recommendations to investing staff about who to avoid.
- **Direct engagement with the company** – often, asset owners are clients of fund managers. Direct engagement with the company to establish the parameters and options for their engagement, and to be 'hands on' when the situation demands it.
- **Collaborative engagement** - a common and powerful stewardship activity among investors where a group of institutional investors come together to engage in dialogue with companies and align the engagement 'asks' of investee companies, for example, through the Australian Council of Superannuation Investors (ACSI).<sup>27</sup>
- **Shareholder action** – stewardship activities such as raising shareholder resolutions and proxy voting. Similarly, investors may vote against directors and against remuneration reports that have sustainability or cultural heritage responsibilities but have failed to uphold First Nations expectations in alignment with the Dhawura Ngilan Principles. The greatest ability that an investor has to influence corporate behaviour is through direct relationship with companies.

### Reporting

Companies should provide relevant information to investors to enable them to assess the quality of the company's engagement with First Nations people, and their compliance with the Dhawura Ngilan Principles. For example, the Australian Council of Superannuation Investors (ACSI) policy on Company engagement with First Nations People suggests companies should provide a genuine explanation of their risks and approach, and how its policies are implemented in practice. This should include a system for boards to assess risk, targets, and performance over a period of time and disclosure should also cover the nature and scope of agreements, timelines and 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.<sup>28</sup>

The guiding questions to support investor due diligence outlined in the sections below will assist investors to ascertain whether a company is complying with the Dhawura Ngilan Principles and giving life to the Dhawura Ngilan Vision.

Investors should include cultural heritage considerations in reporting systems for accounting to beneficiaries and shareholders. During sustainability and ESG annual reporting, disclosure, materiality assessments and other reports, investors should include an assessment of cultural heritage factors and how best practice has been implemented. Investors should be able to answer how the portfolio they are investing in is meeting the Dhawura Ngilan Principles, and adequately respond to any concerns or questions. Companies and investors are increasingly being required to report on sustainability metrics that relate to ESG issues.<sup>29</sup>

The challenge for investors is the inconsistency of reporting in the cultural heritage space, due to a lack of regulatory standards. This Guide sets out a relevant and consistent set of reporting expectations that investors could seek from the companies in which they are invested.

<sup>25</sup> Principles for Responsible Investment, *Investment Manager Appointment Guide* (Report, 2020) 7 <<https://www.unpri.org/download?ac=11970>>.

<sup>26</sup> Principles for Responsible Investment, *Investment Manager Appointment Guide* (Report, 2020) 11 <<https://www.unpri.org/download?ac=11970>>.

<sup>27</sup> 728RIAA\_ Stewardship-Report\_FINAL.pdf (responsibleinvestment.org) & Overview of collaborative engagement | Engagement guide | PRI (unpri.org)

<sup>28</sup> ACSI, ACSI Policy on Company Engagement with First Nations People (Report, December 2021), 4 <https://acsi.org.au/wp-content/uploads/2021/12/ACSI-Policy-on-Company-Engagement-with-First-Nations-People.Dec21.pdf>

<sup>29</sup> See *Mark McVeigh v Retail Employees Superannuation Pty Ltd* (2018) FCA NSD1333/2018 (Amended Concise Statement).



## DHAWURA NGILAN PRINCIPLES

### Respect and self-determination

1. *The company respects, values and celebrates First Nations cultural heritage.*
2. *The company empowers First Nations leadership and respects First Nations peoples' right to self-determination.*
3. *The company recognises the rights of First Nations people as Custodians of their cultural heritage.<sup>30</sup>*
4. *The company respects First Nations cultural heritage as living heritage.*

<sup>30</sup> Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 14 <<https://www.dceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>. 'Custodians' is written here with a capital 'C' to reflect the language used in the Vision.

The *Dhawura Ngilan* Vision is for First Nations heritage to be “protected and celebrated for its intrinsic worth, cultural benefits and the wellbeing of current and future generations of Australians.”<sup>31</sup>

This vision requires that people and organisations go beyond what the law requires of them, reach for higher standards, and continually strive to **celebrate** culture. First Nations heritage is valued as central to Australia’s national heritage,<sup>32</sup> rather than seen as a hurdle or obstacle for projects and development.

### 1.1. Creating a rights-based approach

The UNDRIP contains a comprehensive set of human rights recognised for the survival, dignity and wellbeing of Indigenous Peoples, and sets the international standard for respecting and protecting First Nations human rights across the world.

*Indigenous peoples have the right to maintain, control, protect and develop their **cultural heritage, traditional knowledge and traditional cultural expressions**, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to **maintain, control, protect and develop their intellectual property** over such cultural heritage, traditional knowledge, and traditional cultural expressions.*<sup>33</sup>

Companies should seek to adopt a human rights-based approach to cultural heritage management, founded in a culture of respect for First Nations self-determination.

The UNGPs are the universally accepted international framework for integrating respect for human rights within business. Among other things, it expects that businesses:<sup>34</sup>

- Establish a policy commitment: The company should ensure that respect for the human rights of all First Nations stakeholders is incorporated within its company human rights policy.
- Conduct human rights due diligence: It should also ensure that human rights due diligence is undertaken to adequately identify, prevent, mitigate, and account for any human rights risks to people or impacts associated with company operations and supply chains.<sup>35</sup> In identifying and assessing its human rights issues, a company should consider the severity and likelihood of any adverse impact on First Nations’ human rights:<sup>36</sup>

- *Severity: To assess the severity of a particular human rights issue, the company should consider the potential scale (gravity of the impact), scope (the number of individuals impacted) and irremediability of the impact (the degree to which those who are impacted could be restored to their prior enjoyment of the right).*
- *Likelihood: Consider whether the impact is more or less likely to occur, by assessing the effectiveness of company controls and risk management systems in mitigating and preventing any impact on the enjoyment of First Nations’ human rights.*
- Establish a grievance mechanism: The company should also establish an accessible and culturally appropriate grievance mechanism, to allow for First Nations stakeholders to seek effective remedy from the company where their rights have been violated.<sup>37</sup>

These responsibilities under the UNGPs are proportionate to the size and influence of the company. Smaller enterprises may have less capacity and more informal due diligence structures than larger companies, however their responsibility will also be measured against the severity of their human rights impacts.<sup>38</sup> The underlying principle remains in any case – companies are fully and equally responsible for respecting cultural heritage as part of human rights due diligence.

In practice, this means ensuring broad understanding of the human rights of First Nations peoples is consistently held across the organisation. It means always considering the impact that projects may have on First Nations peoples and their lands, water, and resources. It means recognising that First Nations peoples are the Custodians and carers of all the lands, waters, and skies in Australia, regardless of whether the domestic legal system has recognised any definable rights.

In order to establish this organisational understanding, companies need to invest time and resources into educating their staff, contractors, partners and clients. This will require a shift in mindset and corporate culture.

### 1.2. First Nations leadership

First Nations peoples have the right to self-determination. Many of the Principles and Key Actions in this Guide specifically require that companies ‘support First Nations-led’ activities such as truth telling, education, or remediation of Country. Even where this is not explicit, companies implementing the *Dhawura Ngilan* Business and Investor Guide must seek to meaningfully involve First Nations peoples in all actions in relation to First Nations heritage.

Any decisions or activities which relate to First Nations peoples or culture should only proceed with their meaningful consultation and involvement.

It is a vital element of this right that First Nations peoples are empowered to make any decision in relation to their cultural heritage. Within the scope of legislative instruments, First Nations peoples may wish to make decisions contrary to the protection of heritage, in the interests of achieving other benefits for community. Where possible, options to achieve both outcomes should be explored – heritage protection and community benefit. But it is also available to a First Nations group to allow for heritage to be impacted.

The central point to this guidance is the **right of First Nations peoples to choose**. This is self-determination in action.

### 1.3. Custodianship of a living culture

Custodianship means a responsibility to care for Country and Culture. First Nations peoples are diverse, but all have the obligation to continue to look after Country and heritage and continue to nurture cultural practice.

First Nations peoples are the Custodians and primary interpreters of Culture, and this relationship and responsibility must be respected. Companies can work towards upholding these rights by supporting keeping places, and long-term First Nations ownership and care of cultural objects.

<sup>31</sup> Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 7 <<https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>.

<sup>32</sup> Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 7 <<https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>.

<sup>33</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) Art 31.

<sup>34</sup> United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* (Report, 2011) 15; 16. <[https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf)>

<sup>35</sup> Australian Council of Superannuation Investors, *ACSI Policy on Company Engagement With First Nations People*, (Report, December 2021) <<https://acsi.org.au/wp-content/uploads/2021/12/ACSI-Policy-on-Company-Engagement-with-First-Nations-People.Dec21.pdf>>.

<sup>36</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) Art 23; 32.

<sup>37</sup> UN Global Compact Network Australia & Pillar Two, *Business integration of human rights due diligence in Australia: Modern Slavery and Beyond* (2023) 26 <[https://unglobalcompact.org.au/ung\\_publications/business-integration-of-human-rights-due-diligence-in-australia-modern-slavery-and-beyond/](https://unglobalcompact.org.au/ung_publications/business-integration-of-human-rights-due-diligence-in-australia-modern-slavery-and-beyond/)>

<sup>38</sup> United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* (Report, 2011) 22; 29. <[https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf)>



#### 1.4. What businesses can do

What all companies can do:

PRINCIPLE	KEY ACTIONS
Respecting, valuing and celebrating First Nations cultural heritage	<p>Celebrate First Nations events and significant dates such as NAIDOC</p> <hr/> <p>Staff undergo cultural competency training at all levels of the organisation</p> <hr/> <p>Seek opportunities to engage First Nations artists, service providers, consultants and others for the needs of the business</p> <hr/> <p>Ensure that the company operational-level grievance mechanism is sensitive to issues relating to the protection of cultural heritage</p>
Empowering First Nations leadership	<p>Support First Nations people to advance within your organisation, as managers, leaders, executive and board members</p>
Respecting First Nations rights, including the right to self-determination	<p>Build relationships with local First Nations communities, and seek to understand their aspirations and how you can work together to assist them</p> <hr/> <p>Adopt a company-wide human rights policy and associated implementation framework that reflects the company's commitment to respecting human rights, including those outlined in the UNDRIP</p> <hr/> <p>Educate staff about the meaning and significance of the UNDRIP</p> <hr/> <p>Exploring opportunities to share any First Nations-relevant knowledge or data held by the company with community</p>
Recognising First Nations custodianship of culture	<p>Support for local, regional and national Keeping Places (for knowledge or cultural materials) or Resting Places (for ancestral remains). Support may mean:</p> <ul style="list-style-type: none"> <li>- Funding and resourcing</li> <li>- Offering capacity building opportunities</li> <li>- Holding materials until adequate care facilities can be established (i.e. climate controlled environment; two-factor authentication system, etc)</li> <li>- Supporting or using existing Keeping Places like Ara Iritja or Mukurtu CMS</li> <li>- Identifying cultural material in any records or collections held by the company, and then making it accessible or repatriating it to community</li> </ul> <hr/> <p>Empowering First Nations communities to accept repatriated materials, including by assisting them with making applications, dealing with legislative processes, or by resourcing them to develop adequate facilities to accept custodianship of sensitive materials.</p>
Respecting the living and ongoing nature of First Nations heritage	<p>Acknowledge First Nations traditional custodians before commencing meetings, or for larger events or meetings, engage and pay a local traditional custodian or cultural authority to give a Welcome to Country</p>

What companies that work directly with First Nations partners, culture or knowledge can do:

PRINCIPLE	KEY ACTIONS
Respecting, valuing and celebrating First Nations cultural heritage	<p>Attributing and acknowledging First Nations contributions to projects and products, including knowledge, consultation, design techniques, bush foods or medicines, knowledge of Country, or other contributions</p>
Empowering First Nations leadership	<p>Engaging local First Nations consultants and experts to advise on projects relating to their Country</p> <hr/> <p>Look to opportunities for First Nations collaborators to step into leadership positions on projects</p>
Respecting First Nations rights, including the right to self-determination	<p>Respecting cultural decision-making processes during engagements and consultation, including allowing sufficient time for deliberation</p>
Recognising First Nations custodianship of culture	<p>Explore creative ways to enable First Nations people to describe and represent their cultures.</p>

What companies with land, water or sea-based activities can do:

PRINCIPLE	KEY ACTIONS
Respecting, valuing and celebrating First Nations cultural heritage	<p>Ensure Cultural Heritage Management Plans (or equivalent) contain details of community aspirations, and how the plan will address them</p> <hr/> <p>Ensure signage on project sites and in relation to cultural heritage areas detail the significance for the local community (should only be done in collaboration with the community)</p>
Respecting First Nations rights, including the right to self-determination	<p>Supporting First Nations groups' aspirations for listing heritage places, and only making listing applications in alignment with First Nations wishes</p>
Recognising First Nations custodianship of culture	<p>Facilitating First Nations access to sites and Country before, during and after projects (where safe and practicable)</p> <hr/> <p>Repatriate cultural material found on project sites to the rightful traditional custodians of the relevant Country, or to Keeping Places as instructed by the traditional custodians</p>

## 1.5. What investors can do

PRINCIPLE	KEY DUE DILIGENCE QUESTIONS
The company respects, values, and celebrates First Nations cultural heritage	<ul style="list-style-type: none"> <li>Do you have a human rights policy that commits to respecting all internationally recognised <b>human rights</b>, including those in the UNDRIP?</li> <li>How has your company embedded human rights throughout the organisation? How is this reflected in governance, due diligence, and remediation systems? Do you have <b>any other policy</b> for First Nations engagement? Is it embedded at a high level and throughout the practice and business of the organisation?</li> <li>Are First Nations rights included in your <b>ethics framework, statement of values or similar?</b></li> <li>Do you have a <b>Reconciliation Action Plan (RAP)</b> or a similar First Nations engagement strategy?</li> <li>Are First Nations outcomes a regular item on the agenda during <b>Board and executive meetings?</b></li> <li>Do you <b>report on First Nations outcomes to shareholders</b> and other stakeholders e.g., in ESG or sustainability reporting?</li> <li>How do you ensure First Nations peoples' rights are discussed at the <b>Investment Committee/Leadership Forums?</b></li> <li>Have you established an <b>inclusive and detailed engagement process?</b> Have you established <b>methods</b> to measure engagement such as a due diligence checklist? Do you develop <b>due diligence checklists</b>, which includes criteria related to the Dhawura Ngilan Principles?</li> <li>Do you <b>assess fund managers</b> on their approach to First Nations Rights?</li> <li>Have your staff undertaken <b>cultural competency</b> training?</li> <li>Do you have any <b>community investments and supported projects?</b> How are First Nations outcomes considered in these projects?</li> </ul>
The company empowers First Nations leadership and respects First Nations peoples' right to self-determination	<ul style="list-style-type: none"> <li>Do your staff give <b>acknowledgments of Country</b> at meetings and events? Where appropriate, does the Company organise a <b>Welcome to Country</b> at meetings and events?</li> <li>Do you have detailed, long-term plans for <b>partnerships</b> with First Nations people?</li> <li>Do you have a company <b>FPIC/ Cultural Heritage Framework</b>, or documented process?</li> <li>What is your company position on investee companies <b>seeking consent</b> from First Nations people?</li> </ul>
The company recognises the rights of First Nations people as Custodians of their cultural heritage	<ul style="list-style-type: none"> <li>Do you work closely with a First Nations <b>representative organisation?</b></li> <li>How do you learn about and incorporate First Nations community aspirations and interests in your projects and activities?</li> <li>Do you employ First Nations <b>staff in key project roles</b>, such as managers?</li> <li>Do you employ First Nations <b>staff in executive roles</b>, such as officers or directors?</li> <li>Do you have a First Nations <b>Board member?</b></li> <li>Do you have a First Nations <b>Advisory Group?</b></li> </ul>
The company respects First Nations cultural heritage as living heritage	<ul style="list-style-type: none"> <li>Do you support the <b>listing of heritage places</b>, as requested by local communities? (National and international heritage standards and listings).</li> <li>Do your agreements respect <b>First Nations cultural heritage as living heritage?</b></li> </ul>

## Red flags

PRINCIPLE	RED FLAGS
The company respects, values and celebrates First Nations cultural heritage	<ul style="list-style-type: none"> <li>Companies that have a First Nations Rights Policy that <b>does not refer to globally recognised conventions.</b></li> <li>Companies that use <b>opaque language</b> in policies.</li> </ul>
The company empowers First Nations leadership and respects First Nations peoples' right to self-determination	<ul style="list-style-type: none"> <li>Companies that <b>do not have any detailed, long-term plans for partnerships</b> with First Nations people.</li> <li>Companies that only <b>hire non-First Nations organisations to do Cultural Heritage assessment</b>, where that is not the preference of the Traditional Owners.</li> </ul>
The company recognises the rights of First Nations people as Custodians of their cultural heritage	<ul style="list-style-type: none"> <li>Companies that <b>do not refer to the impact</b> that their activities may have on living cultural heritage practices and First Nations health and wellbeing.</li> </ul>
The company respects First Nations cultural heritage as living heritage	<ul style="list-style-type: none"> <li>Companies that have <b>no evidence to show how they respect cultural heritage as living heritage.</b></li> <li>Companies that have no evidence to demonstrate how they support and understand <b>intangible cultural heritage.</b></li> <li>Companies that do not recognise their <b>impacts on spiritual connection.</b></li> <li>Companies that frame <b>First Nations culture or peoples historically, without appropriate recognition that First Nations culture is a living culture and may change over time.</b></li> </ul>

## DHAWURA NGILAN PRINCIPLES

### Collaboration and consent

5. *The company engages early and widely with interested First Nations parties on cultural heritage matters.*
6. *The company has culturally appropriate engagement processes.*
7. *The company holistically applies FPIC in cultural heritage matters.*
8. *The company engages in agreement-making on equal terms with First Nations people in relation to cultural heritage decisions.*
9. *The company has effective feedback processes and grievance mechanisms.*

#### 2.1. Due diligence

The UNGPs expect businesses to carry out human rights due diligence to ensure they assess and address adverse human rights impacts:

*"In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."*<sup>39</sup>

To conduct effective due diligence, companies need to establish and build meaningful and trusted relationships with local communities who may be affected by their activities. Responsible due diligence in the context of human rights related to cultural heritage refers to:

- Engaging early with First Nations communities and consulting on the project proposal to assess any potential impacts for cultural heritage
- Considering cultural events, seasonal changes and sorry business when setting consultation and project timeframes
- Taking feedback from consultation into account and adapting the project plan as required to address any risks of negative impacts
- Staying in contact with First Nations communities throughout the project process and providing meaningful updates

#### 2.2. Engaging early and building relationships

First Nations peoples place significant value on trust and respect. Trust cannot exist without a relationship, and relationship building requires time, dedication, and adequate resourcing.

In order to build enduring relationships, companies must understand their local context from a political, legal and cultural perspective. Companies who have spent time getting to know the First Nations people and groups who have interests in their areas of operation are more likely to achieve positive and mutually beneficial outcomes relating to cultural heritage.<sup>40</sup>

Companies should seek to understand:

- Community priorities or aspirations
- Roles and responsibilities of different members of the community, and the relationships between them
- Any traditional decision-making or governance processes
- The surrounding Country, local species, lands and waters, and local communities

Companies must also be aware of their own organisation's historical interactions with First Nations peoples, and conscious of any ongoing hurt or intergenerational trauma that may exist. Companies should own their histories and seek to meaningfully understand the impacts of their activities on First Nations people. Companies should use past blunders as opportunities for learning and growth.

Importantly, companies should also seek to understand existing power imbalances that exist between First Nations and non-First Nations people and engage with an appreciation of this power imbalance in mind. Companies should work to mitigate this imbalance wherever possible – often accompanied by truth telling (see section 3.1 below).

#### 2.3. What is culturally appropriate consultation?

Companies need to work with First Nations peoples on a variety of matters and projects. Often, non-First Nations people are nervous to consult with First Nations peoples, for fear of doing the wrong thing and causing offence.

There are many existing resources and guidelines on this topic, with varying modes of application that are context specific. Nevertheless, there are some simple, foundational rules that companies should remember when communicating and working with First Nations peoples to ensure that engagements are respectful and productive.

<sup>39</sup> United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (Report 2011) 17. <[https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf)>.

<sup>40</sup> UN Global Compact Network Australia, KPMG Australia and the University of Technology Sydney, *The Australian business guide to implementing the UN Declaration on the Rights of Indigenous Peoples* (Report, 12 November 2020) 17 <[https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People\\_FINAL.pdf](https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People_FINAL.pdf)>.



## WHEN TO ENGAGE?

Engagement with First Nations communities regarding projects or activities that may affect them is conducted in the project planning phase.

Dhawura Ngilan states that during assessments of development proposals, management of cultural heritage should not be left as the last consecutive approval required in the process. The same approach applies for all projects by companies in the private sector. Cultural heritage management needs to be addressed as a key part of the planning process, where engagement, timeframes, agreements, research surveys and budgets are considered in the early stages.

Early engagement ensures both adequate time for the First Nations group to consider a proposal and that ICH considerations are not perceived as the 'last impediment' to project sign off.<sup>41</sup>

## WHO TO SPEAK TO?

**Cultural authority:** Companies should ensure they are consulting with First Nations people who have the cultural right to speak for Country.

*"Often it is the senior Custodians who have the authority to speak for country in their role as repositories of knowledge about places."*<sup>42</sup>

The right to speak for Country may only be determined by First Nations peoples themselves. There may also be a diverse range of people with the right to speak for Country, particularly in contexts of large regions, contested borders, or projects or activities that cover multiple areas.

Companies should conduct background research on the relevant community or area. Identify who the potential Traditional Owners are, and if they have a representative institution. Utilise First Nations peak bodies for the relevant area, such as native title service providers, healthcare providers, or land councils, to ascertain the relevant Traditional Owner Representative Institution.

With respect to a project on land or waters subject to a native title claim or determination, the Prescribed Body Corporate (PBC) under the Native Title Act 1993 (Cth) most likely has cultural authority. In some cases, statutory land councils, where the basis of the statutory regime is recognition of Traditional Ownership, will likely have cultural authority in relation to land held under the statutory regime. Lands held under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) and the Anangu Pitjantjatjara Yankunytjara Land Rights Act 1981 (SA) will satisfy this definition.

Sometimes, the simplest way to ascertain the right people to speak for Country is to ask. Companies may ask people within their staff or networks who have relationships with the community for advice, ask a representative organisation, or ask the community directly.<sup>43</sup> Legal or anthropological advice may also assist.

It is good practice to ask, when consulting with First Nations people, "Is there anyone else we should speak to?"

**Interested parties:** Companies must also ensure they are consulting with all First Nations people, groups or organisations who have an interest in or may be affected by the proposed work or decision.

## WHERE TO ENGAGE?

Companies should make the effort to visit First Nations communities, if invited. Taking the time to visit Country and understand the cultures and ways of life of local First Nations groups can go a long way toward building meaningful and positive relationships. It demonstrates a willingness to work with First Nations people in a collaborative manner on equal terms.

## HOW TO ENGAGE?

- Companies should engage with First Nations communities in good faith and with a rights-approach with the goal of ensuring mutually beneficial outcomes.<sup>45</sup> Outcomes categorised as benefitting First Nations peoples should be defined by First Nations peoples.
- Companies should be sensitive to First Nations styles of communication and traditional decision-making processes.<sup>46</sup>
- Engagements should occur on equal terms, and with acknowledgment and mitigation of any power imbalances.<sup>47</sup>
- Companies should stay connected to communities regarding projects, sites, use of ICIP and heritage like language and stories etc. Ongoing engagement supports relationship building and trust.
- Consultation and engagement should be ongoing. Companies should listen frequently to First Nations communities and offer opportunities for feedback.

## CASE STUDY: CONSULTING ALL INTERESTED PARTIES

### Example

A company was seeking consent for a land-based project on the traditional Country of an Aboriginal group. They engaged with and obtained consent from the representative Aboriginal Corporation for the land, but not from another Aboriginal group whose songlines travelled over the relevant area.

**What should they have done?** The company should have engaged with all Aboriginal groups with interests in the area relevant to the project, including those who do not reside directly on the land affected, but who might be impacted from impacts to songlines, or physical elements such as animal movements, waters and streams.

**Key takeaway:** Engagement is not sufficient if consent is only obtained from one impacted group. Leading practice consultation and FPIC means seeking consent from all impacted groups.

From a legal viewpoint, the definition of an 'interested party' may be construed broadly.

### Tipakalippa and the sea country drilling project <sup>44</sup>

Munupi Elder Dennis Tipakalippa successfully challenged an application by Santos to expand their gas drilling project off the Tiwi Islands, on the grounds of insufficient consultation with traditional owners. Consultation with the Tiwi Land Council and the Northern Land Council were found to be not enough, as those bodies did not represent interests in sea country.

Santos' argument that it was 'unworkable' for companies to identify and consult with a large group of individuals instead of representative bodies was rejected. The Court also noted that it should not be assumed that sending an email with an information package (even if followed up with another email) constitutes adequate consultation.

**Key takeaway:** Consultation processes must be robust, comprehensive and adaptable. Simply because a process is difficult or time- or resource-intensive is not an acceptable reason for it not happening.

<sup>41</sup> Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 36 <<https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>.

<sup>42</sup> Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 9 <<https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>.

<sup>43</sup> Bradley Moggridge, *Indigenous Engagement Protocols for Threatened Species Researchers*, (Report, 9 August 2020) 10 <<https://www.nespthreatenedspecies.edu.au/publications-and-tools/indigenous-engagement-protocols-for-threatened-species-researchers>>.

<sup>44</sup> See also *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority* (No 2) [2022] FCA 1121 <<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2022/2022fca1121>>.

<sup>45</sup> UN Global Compact Network Australia, KPMG Australia and the University of Technology Sydney, *The Australian business guide to implementing the UN Declaration on the Rights of Indigenous Peoples* (Report, 12 November 2020) 21 <[https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People\\_FINAL.pdf](https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People_FINAL.pdf)>.

<sup>46</sup> UN Global Compact Network Australia, KPMG Australia and the University of Technology Sydney, *The Australian business guide to implementing the UN Declaration on the Rights of Indigenous Peoples* (Report, 12 November 2020) 21 <[https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People\\_FINAL.pdf](https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People_FINAL.pdf)>.

<sup>47</sup> UN Global Compact Network Australia, KPMG Australia and the University of Technology Sydney, *The Australian business guide to implementing the UN Declaration on the Rights of Indigenous Peoples* (Report, 12 November 2020) 17 <[https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People\\_FINAL.pdf](https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People_FINAL.pdf)>.

## 2.4. FPIC in practice

Free, Prior and Informed Consent, or FPIC, is the international standard set by the UNDRIP for projects that affect the rights of First Nations peoples.

Australia is a unique country. The *Uluru Statement from the Heart* refers to First Nations people who ‘walk in two worlds’.<sup>48</sup> Being a responsible company in Australia means respecting these two worlds. Companies should seek to understand the cultural and historical significance of where they operate, and to respect and advance the value of this land we now share. By respecting human rights, companies can demonstrate a willingness to accept the invitation to walk with First Nations “in a movement of the Australian people for a better future.”<sup>49</sup>

In practice, companies should consider whether their First Nations engagement frameworks align with leading practice, with a particular focus on assessing how expectations regarding FPIC are reflected within these processes. This should be done both by introducing systems and also training. For instance, companies should work to ensure that the requirement of FPIC is well understood throughout (by delivering training on FPIC), but they should also build FPIC considerations into the company project lifecycle (e.g. by setting and embedding expectations about when and how FPIC should be obtained throughout a project’s lifecycle, from exploration through to decommissioning and closure).

By embedding a hard requirement for the organisation to obtain the FPIC of relevant First Nations stakeholders, companies can demonstrate respect for First Nations rights, set a strong foundation for meaningful and mutually beneficial partnerships, and avoid risks associated with financing, operations, social licence, and reputation.<sup>50</sup>

### What does FPIC look like?

**Acknowledging power imbalances and avoiding coercion.** Large businesses and corporate processes can be intimidating, even unintentionally. Companies should make efforts to acknowledge and mitigate this, by conducting meetings in informal settings, giving First Nations groups space to consider proposals, and being flexible to requests from First Nations peoples.

### **Empowering First Nations participation.**

First Nations groups are highly sought after for consultation, partnerships and other opportunities. They also often have duties under statutory regimes including native title and cultural heritage management which are not adequately funded. Companies seeking consultation and consent with First Nations groups should resource them for their time and labour in considering the project.<sup>51</sup>

### **Providing clear, concise and comprehensive information about the project, risks and benefits.**

Ensure information is accessible and contains all necessary details. Companies should ask First Nations groups if there is anything else they may wish to know, and keep lines of communication open.

**Re-seeking new consent for changes to the project plan.** FPIC is not a one-stop shop, but rather an ongoing process. Companies should maintain relationships and communication channels with First Nations groups to ensure consent throughout the lifecycle of the project.

**Allowing sufficient time for First Nations groups to consider the proposal.** Traditional decision making and governance processes take time. They often require consultation with community authorities and Elders and cannot be rushed. Companies should engage in consultation early and have well thought out processes that are inclusive and transparent.

*“A central component of the principle of Free, Prior and Informed Consent under UNDRIP is that the affected Indigenous community has adequate information and adequate time to consider that information in making any decision that may affect their ICH [Indigenous Cultural Heritage].”<sup>52</sup>*

**Flexibility in project design and outcomes.** First Nations groups may not agree with a project as proposed, but they may agree to a modified version of a project. Companies should implement First Nations feedback and proposed changes as far as possible to give effect to First Nations control and co-design.

**Collaborating on closure planning.** Consent differs at various stages of the project lifecycle. Ongoing consent means collaborating at every stage, even at the very end as the project is being concluded. Consider how activities will be wrapped up, what measures will be implemented post-project, can any resources or documentation be useful to support continuing cultural practice, how ongoing communications will be managed, etc.

**Taking ‘no’ for an answer.** Consent means allowing First Nations groups to withhold consent. FPIC requires that project proponents respect First Nations groups’ right to say no.

*“...the ultimate decision regarding whether interference with ICH is acceptable or not, must rest with the affected Indigenous community.”<sup>53</sup>*

Figure 2. FPIC in practice

FPIC IS :	FPIC IS NOT:
✓ a dynamic and ongoing process	✗ a one-off authorisation
✓ co-design – equal decision-making roles, listening and implementing feedback	✗ only consultation, or consultation as a ‘tick box’ process
✓ sensitive to the context of the project; communities and histories	✗ viewed narrowly
✓ allowing time for all parties to properly consider	✗ rushed to meet deadlines
✓ may require multiple consents from interested parties	✗ consent from one person
✓ open lines of communication and regular updates between First Nations groups and partners	✗ only reaching out when you have deadlines
✓ having policies and processes established to stand the test of time	✗ relationships rely on individuals without a succession plan
✓ working creatively to make projects be mutually beneficial	✗ only identifying the needs of the project proponent
✓ recorded in agreements	✗ verified only by verbal means
✓ <b>the project only goes ahead with the agreement of the impacted First Nations community/ies</b>	✗ consultation feedback is considered, but ultimately the project proceeds with or without community consent

## Case Study

### Heritage Protection Agreements in the Kimberley

There are currently about 140 companies with mining exploration tenements in the Kimberley Land Council area that have signed heritage protection agreements. While these agreements themselves are confidential, they generally include a clause that the company will not apply for a section 18 approval under the WA Aboriginal Heritage Act 1972 without the consent of the relevant PBC or native title claim group.

<sup>48</sup> *Uluru Statement from the Heart* (Web Page, May 2017) <<https://ulurustatement.org/the-statement/view-the-statement/>>.

<sup>49</sup> *Uluru Statement from the Heart* (Web Page, May 2017) <<https://ulurustatement.org/the-statement/view-the-statement/>>.

<sup>50</sup> UN Global Compact Network Australia, KPMG Australia and the University of Technology Sydney, *The Australian business guide to implementing the UN Declaration on the Rights of Indigenous Peoples* (Report, 12 November 2020) 22 <[https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People\\_FINAL.pdf](https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People_FINAL.pdf)>.

<sup>51</sup> Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 36 <<https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>.

<sup>52</sup> Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 36 <<https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>.

<sup>53</sup> Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 36 <<https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>.

Figure 3. FPIC in existing industry standards

Dhawura Ngilan Vision and Best Practice Standards	International Council on Mining and Metals – Indigenous Peoples and Mining: Position Statement and Good Practice Guide	International Finance Corporation – Performance Standard 7: Indigenous Peoples
Australia Focused	International Standard	International Standard
Focuses on working towards best practice standards and recognises the importance and centrality of FPIC	Focuses on working towards best practice standards and recognises the importance and centrality of FPIC	Focuses on working towards best practice standards and recognises the importance and centrality of FPIC
States that FPIC is crucial and that Indigenous people have the ‘ultimate decision’ in relation to ICH	<b>States have the right to make decisions according to applicable national laws. FPIC should be regarded as a ‘principle to be respected to the greatest degree possible’</b>	<b>First considers Indigenous rights under national law, nature of commercial projects and their potential consequences and then works to obtain FPIC. Document outlines specific circumstances requiring FPIC</b>
Focuses on all kinds of cultural heritage, including place based traditional knowledge and intangible heritage	Focuses on the specific impact of mining and metal projects, however recognises the wide range of interests of Indigenous people in relation to the land	Focuses on sustainable development and risk management related to environmental and social sustainability
Mentions and emphasizes UNDRIP as an important foundational guideline, but one that is not fully comprehensive or without limitations	Mentions and emphasizes UNDRIP as an important foundational guideline, but not one that is fully comprehensive or without limitations	Mentions The World Bank Group Environmental, Health and Safety Guidelines (EHS Guidelines) as their technical reference documents for international industry practice
Focuses on truth telling, history and, on the ongoing manifestation of colonisation More principle based rather than process based	Principle based but also more pragmatic in approach, largely centred on how their specific projects affect Indigenous people and outline comprehensive consultation and decision making processes	Much more pragmatic in approach, sets out performance standards but largely centred on how their specific projects affect Indigenous people Outlines comprehensive consultation and decision making processes and provides actionable tips
Points out need for appropriate and effective collaboration with states, government departments and authorities	Points out need for appropriate and effective collaboration with states, government departments and authorities	Points out need for appropriate and effective collaboration with states, government departments and authorities
<b>Ultimate decision maker is the First Nations community</b>	<b>Ultimate decision maker is the company</b>	<b>Ultimate decision maker is the company</b>

## 2.5. Managing any disputes with cultural safety

The UNGPs expect companies to implement culturally appropriate and accessible grievance mechanisms designed to allow human rights defenders to seek remediation of adverse human rights impacts that the business may be involved in.

*“Principle 29. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.”<sup>54</sup>*

First Nations communities and organisations may use this Guide to measure and hold accountable those companies with whom they are partnering, or who are working on their Country. Disputes and grievances relating to cultural heritage need to be managed with cultural safety, care, and respect. This may include:

**Avoiding large scale disputes with ‘check ins’ and early intervention.** Prompt responses can go a long way to de-escalate conflict. The company strives to anticipate the wishes of each party, identify the foreseeable conflicts, and consider how they might be resolved. It also has effective systems for regular engagement and checking in with First Nations partners, to identify and manage potential problems before they arise.

**An effective method by which First Nations people can register complaints or grievances.**

The company is easily contactable and has a person or team responsible for managing relationships and responding to contact enquiries. Be conscious that First Nations communities may be hesitant to raise complaints. Ensure the process is accessible, responsive, respectful, and safe. Where possible, ensure that grievances from First Nations groups are heard by a representative from the company who is First Nations, provided that this fits within their role and responsibilities.

## Efficient and flexible complaints management procedures.

The company responds to complaints in reasonable time, but appropriate allowance is made for cultural decision making and adaptable timeframes if needed by the First Nations parties.

## Engaging First Nations facilitators for third-party dispute resolution.

Mediation or other forms of alternative dispute resolution by third party facilitators should be led by First Nations people. Processes must reflect local needs, be community driven and recognise local culture, law, and language.

## Issues and solutions are documented where appropriate.

The company has clear systems and processes for documenting disputes and challenges, as well as the actions taken and outcomes achieved. This is secondary to respecting the **confidentiality** of the parties involved, or if the issue is culturally sensitive.

**Evaluation and reflection.** The company has periodic reviews of past issues and disputes to reflect on successes and learnings. Information is communicated across the organisation to prevent similar mistakes or disputes arising in future.

For any environment, be it the workplace or an accessible service, cultural safety must be at the forefront of all interactions with First Nations peoples.

<sup>54</sup> United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* (Report, 2011) 31 <[https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)>.



## 2.6. What businesses can do

What companies that work directly with First Nations partners, culture or knowledge can do:

PRINCIPLE	KEY ACTIONS
Engage early and widely on cultural heritage matters	<p>Build relationships with local First Nations groups, even where there is not an immediate project relevance.</p> <p>When considering a new project which may involve First Nations people, Country or Culture, make contact with the relevant First Nations groups at the very start of the project. Take a broad approach. Contact all groups who may have interests, whether direct or indirect – do not limit consultation to land councils and determined native title holders.</p> <p>Ask who are the right people to speak for the Country or subject matter for your project. Be sure to engage broadly with all relevant people and communities.</p>
Culturally appropriate engagement processes	<p>Begin by asking the community how they wish to be engaged with, and developing a collaborative plan for communicating before, during and after the project.</p> <p>Seek specialist advice if needed to guide the project, particularly if there is risk from situations where there might be contested boundaries or cultural authority.</p> <p>Visit Country for engagements and negotiations, if invited.</p> <p>Engage a First Nations liaison or facilitator to manage engagements and ensure culturally safe communications.</p> <p>Stay connected and maintain relationships following project conclusions – don't just reach out when you want something and then disappear once you've got it.</p>
Holistic application of FPIC	<p>Ensure that First Nations communities are fully informed of their rights, as well as any potential risks, impacts or benefits from the project. Larger companies may consider funding independent legal advice for the First Nations community to ensure their understanding.</p> <p>Develop detailed company policies for leading practice application of FPIC, that allow for First Nations groups to say no.</p> <p>Be respectful of timelines for engagement, consultation and decision-making. Deliberation and approval processes for First Nations groups and communities do not run at the same pace as corporate entities.</p> <p>Seek consent as both a process and an outcome; as the result of fair negotiated agreement, not a tick-box consultation.</p> <p>Not falling back on legal mechanisms, such as getting Cultural Heritage Management Plans approved by the Minister instead of in collaboration with local First Nations communities.</p>
Agreement-making on equal terms	<p>Be flexible in project design and accept proposed changes and feedback from First Nations partners as much as possible.</p> <p>Use consent forms and agreements to record permissions.</p>
Effective feedback processes and grievance mechanisms	<p>Support First Nations communities to provide feedback, i.e. resource them to attend project progress check-in meetings.</p> <p>Be responsive to feedback and requests from First Nations communities and partners, and implement feedback in project plans and processes.</p>

Other companies may not have direct relationships with First Nations people or cultural heritage but may be otherwise linked. Companies funding community support projects may not interact with First Nations communities directly, but still have a responsibility to ensure that the organisation(s) it funds are exhibiting best practice cultural heritage management in alignment with this Guide.

These companies – including banks, not-for-profit organisations, charities, missions, philanthropists, grant funds, parent companies where a subsidiary is directly engaging, and many others – serve a support function for companies that are directly engaging with First Nations people and cultural heritage.

What companies whose value chains impact First Nations communities or cultural heritage can do:

PRINCIPLE	KEY ACTIONS
Engage early and widely on cultural heritage matters	Build relationships with local First Nations groups, even where there is not an immediate project relevance. Facilitate relationship and open communications where the business has existing relationships that may assist the directly-engaging company.
Culturally appropriate engagement processes	Set clear standards for engagement, FPIC and agreement making and ensure the directly engaging company understands their obligations and responsibilities.
Holistic application of FPIC	Be seen to be at the forefront of positive First Nations engagement by implementing the other Key Actions included in this Guide – being a public advocate for First Nations rights, implementing staff cultural competency training and organisation-wide policies for respecting human rights and ICIP Protocols.
Agreement-making on equal terms	Support the directly engaging company by providing best practice policies, training, contracts and other templates, and other useful tools to assist their engagement.
Effective feedback processes and grievance mechanisms	If FPIC or other best practice engagement standards are not met, consider opportunities to educate and correct their processes.

## 2.7. What investors can do

PRINCIPLE	KEY DUE DILIGENCE QUESTIONS
The company engages early and widely on cultural heritage matters	<ul style="list-style-type: none"> <li>How do you <b>identify appropriate First Nations stakeholders</b> for engagement, including but not limited to legitimate tenure rights holders?</li> <li>Have you <b>conducted background research</b> into all the First Nations groups who may be interested in your activities?</li> <li><b>At what point in your project process</b> do you consider First Nations communities?</li> <li>How do you build relationships with local First Nations communities?</li> </ul>
The company has culturally appropriate engagement processes	<ul style="list-style-type: none"> <li>Do you have a <b>co-designed engagement plan</b> with your First Nations project partners?</li> <li>Does your engagement <b>consider the community's cultural and social obligations</b>, including dates of celebration, sorry business, etc.?</li> <li>Is the language in your correspondence and documentation <b>accessible and understandable</b>?</li> <li>Are there First Nations people on your <b>project teams</b>?</li> <li>How do you communicate with your First Nations partners?</li> <li>Do you <b>communicate</b> on updates and impacts? How regularly?</li> <li>Do you visit the community on Country when invited?</li> <li>Do you have a <b>dedicated project team member who has a relationship</b> with the First Nations partner?</li> </ul>
The company holistically applies Free, Prior and Informed Consent (FPIC)	<ul style="list-style-type: none"> <li>Does the company have clear processes for implementing FPIC? What is your <b>company position on seeking consent</b>?</li> <li>If First Nations people <b>refuse their consent</b>, what do you do?</li> <li>Have you ever <b>sought a determination on a project approval from a court or tribunal</b>, rather than seeking agreement from the relevant First Nations group?</li> </ul>
The company engages in agreement-making on equal terms with First Nations people/s	<ul style="list-style-type: none"> <li>Are your agreements with First Nations partners <b>drafted clearly and simply</b>, in plain English?</li> <li>Are First Nations <b>rights and Indigenous Cultural and Intellectual Property (ICIP) clauses included in agreements</b>? Do agreements attach an ICIP protocol?</li> <li>Do your agreements or contracts <b>include any clauses which unreasonably limit the rights of First Nations partners to natural justice or procedural fairness</b>? (e.g., confidentiality or gag clauses)?</li> <li>Do your agreements or contracts have a <b>review mechanism</b>? How often are your project agreements or contracts reviewed in relation to specific projects? When was the last time?</li> <li>What is the process for review?</li> <li>Who has <b>control of the agenda</b> in agreement review meetings?</li> <li>Does your company <b>resource its agreements with First Nations people, including resourcing for First Nations partners to service the agreement</b>?</li> <li>Do your agreements include <b>terms for benefit sharing</b>? How are they negotiated?</li> <li>How do you <b>ensure Traditional Owners and/or First Nations communities understand</b> the terms of the agreement or contract?</li> </ul>
The company has effective feedback processes and grievance mechanisms	<ul style="list-style-type: none"> <li>Do you hold internal <b>debriefs following engagements</b>?</li> <li>How do you <b>seek feedback</b> from your First Nations stakeholders and project partners? E.g., Written feedback? Project check in meetings? If meetings –how often? Who has control of the agenda?</li> <li>What is the <b>grievance mechanism</b> for making cultural heritage/human rights related concerns to the Company?</li> <li>Do you regularly review grievance mechanisms?</li> <li>Was your <b>grievance mechanism designed in collaboration</b> with First Nations peoples?</li> <li>Do you have <b>First Nations staff or consultants employed</b> to liaise with First Nations partners and manage disputes?</li> <li>Do you <b>employ independent First Nations mediators and independent investigators</b> to manage disputes?</li> <li>How do you <b>ensure your agreements are reviewed and updated</b>? E.g., Can you provide evidence of changes to agreements following reviews?</li> </ul>

## Red flags

PRINCIPLE	RED FLAGS
The company engages early and widely on cultural heritage matters	<ul style="list-style-type: none"> <li><b>Companies with a history of legal battles</b> or public issues with First Nations people.</li> <li><b>Media articles</b> in which First Nations people offer critical opinions of a company's behaviour or practices.</li> <li>Companies that do not <b>allow flexibility in time</b> for First Nations groups to consider proposals.</li> </ul>
The company has culturally appropriate engagement processes	<ul style="list-style-type: none"> <li>Companies that <b>do not offer face-to-face engagement</b> with First Nations communities.</li> <li><b>Companies that design their engagement plans without input</b> from affected First Nations stakeholders.</li> </ul>
The company holistically applies Free, Prior and Informed Consent (FPIC)	<ul style="list-style-type: none"> <li><b>Companies that rely on their legal position</b> and circumvent the rights of First Nations communities by applying directly to the relevant court or tribunal (i.e., a state land and environment court, or the National Native Title Tribunal) for a project approval or decision.</li> <li>Companies that <b>do not allow First Nations groups enough time</b> to consider proposals.</li> <li>Companies that have <b>fixed project design times</b> and are not flexible in their approach.</li> <li>Companies that <b>use a high prospective workload or significant undertaking of time and resources as a sufficient reason to forgo FPIC</b>. Companies should allow First Nations groups enough time to consider proposals and must be flexible in project design and outcomes until an agreed approach can be reached. Avoiding this process by seeking a legal decision is not FPIC.</li> <li><b>Companies that take shortcuts</b>. Companies that commence or take on a project with the intention to on-sell, may be more inclined to take short cuts in cultural heritage management. Investors should consider company approaches to projects, including how they manage agreements or contracts, engagement, project review, benefit sharing, and other key matters that impact First Nations rightsholders.</li> </ul>
The company engages in agreement-making on equal terms with First Nations people	<ul style="list-style-type: none"> <li>Companies that develop agreements or contracts that include clauses to <b>unreasonably limit the rights of First Nations partners to natural justice or procedural fairness</b> (e.g. by preventing the First Nations groups from disparaging the company, or from speaking publicly about the project at all).</li> <li>Companies that <b>do not protect</b> human rights defenders or employees, contractors and community members who raise grievances.</li> </ul>
The company has effective feedback processes and grievance mechanisms	<ul style="list-style-type: none"> <li>Companies that only have a <b>third-party grievance hotline</b>.</li> <li>Companies that <b>do not seek feedback from First Nations</b> stakeholders and project partners.</li> <li>Companies that <b>undermine First Nations voices or perspectives in the media and public eye</b>. This behaviour may be hard to identify. Investors should consider any lobbying or influence that is asserted by companies, and what their positions are in relation to First Nations.</li> </ul>







## DHAWURA NGILAN PRINCIPLES

### Truth and holistic heritage

10. *The company actively supports First Nations people engaging in truth telling about heritage.*
11. *The company recognises and values intangible cultural heritage and upholds Indigenous Cultural and Intellectual Property rights.*
12. *The company supports First Nations people to maintain and ensure the endurance of First Nations cultural heritage.*
13. *The company respects Indigenous Data Sovereignty.*

#### 3.1. What is Truth Telling?

Truth telling about Australia's past is an important step to changing rights for First Nations Australians, and reconciling the relationship between First Nations and non-First Nations peoples. Truth telling involves marking previously untold and unrecognised parts of history to develop a shared understanding of our history and the contemporary impacts of colonisation and dispossession.<sup>55</sup> Understanding the truths of the past can help address trauma experienced by First Nations peoples and to ensure that the same mistakes are not repeated.<sup>56</sup> This is why it is a key component of healing and reconciliation.

Reconciliation Australia's *State of Reconciliation in Australia* report describes 'historical acceptance' as one of five interrelated dimensions that represent a holistic picture of reconciliation.<sup>57</sup> This is included alongside with race relations, equality and equity, unity, and institutional integrity. The Yoorrook Justice Commission in Victoria is embarking on a state-wide initiative of truth telling, and has outlined the importance of protecting heritage and in creating self-determined cultural centres and Keeping Places.<sup>58</sup>

Understanding First Nations history can assist companies engage better with First Nations people. It can also equip the team with greater knowledge of First Nations issues, local and national, which may impact how decisions are made.

#### 3.2. Beyond Reconciliation

Rather than reconciliation being a 'tick the box' exercise, corporations should apply the reconciliation framework to policies and operational activities that are related to First Nations peoples, land, waters, knowledge and resources. Given the influence that businesses have in society, there is a moral and economic imperative to ensure that business operations are fit-for-purpose in a reconciled Australia.<sup>59</sup>

Business reconciliation considers a shared vision, strategic cooperation and leading practices that support and uplift the broader First Nations community. This can first start with self-education, then training and educating staff and non-First Nations partners.

Businesses should educate board members, management and staff, subcontractors and others in their sphere of influence on the history of First Nations peoples, including the history and ongoing trauma of massacres, displacement from country and alienation of rights as well as the Stolen Generations. Education includes analysing and understanding the culture within businesses.

#### **Ask: How does your business perpetuate systemic bias?**

Businesses should also raise awareness within their organisations of the UNDRIP, the developments in Treaty-making within Australia, and leading practice Indigenous engagement protocols, like True Tracks® ICIP Protocols.

<sup>55</sup> Reconciliation Australia, *Truth Telling Symposium Report* (Report, 5-8 October 2018) 6 <<https://www.reconciliation.org.au/wp-content/uploads/2021/09/Truth-telling-symposium-report-2018-web.pdf>>.

<sup>56</sup> Reconciliation Australia, *Truth Telling Symposium Report* (Report, 5-8 October 2018) 6 <<https://www.reconciliation.org.au/wp-content/uploads/2021/09/Truth-telling-symposium-report-2018-web.pdf>>.

<sup>57</sup> Reconciliation Australia, *The State of Reconciliation in Australia* (Report, February 2016) 7 <[https://www.reconciliation.org.au/wp-content/uploads/2021/03/State-of-Reconciliation-Report\\_FULL.pdf](https://www.reconciliation.org.au/wp-content/uploads/2021/03/State-of-Reconciliation-Report_FULL.pdf)>.

<sup>58</sup> Yoorrook Justice Commission, *Yoorrook with Purpose: Interim Report* (Interim Report, 2022) 51 <<https://yoorrookjusticecommission.org.au/wp-content/uploads/2022/06/Yoorrook-Justice-Commission-Interim-Report.pdf>>.

<sup>59</sup> Canadian Council for Aboriginal Business, *Canadian Council for Aboriginal Business: Business Reconciliation in Canada* (Guidebook, September 2019) 10 <[https://www.ccab.com/wp-content/uploads/2019/09/Business-reconciliation-in-canada\\_WEB-final\\_AA.pdf](https://www.ccab.com/wp-content/uploads/2019/09/Business-reconciliation-in-canada_WEB-final_AA.pdf)>

# Case Study – ICIP True Tracks® Protocols

Indigenous Cultural and Intellectual Property (ICIP) rights are First Nations peoples' rights to their cultural heritage. These rights are drawn from Art 31(1) of the UN Declaration on the Rights of Indigenous Peoples, which states that 'Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions...' <sup>60</sup> Since Australia has not adopted or ratified the declaration into domestic legislation, it is not legally binding. Terri Janke and Company developed the True Tracks® Protocols as an alternate way of protecting ICIP and to guide people to creating meaningful relationships and connections with First Nations peoples and their knowledge.

The True Tracks Principles are 10 principles that businesses may use to think through issues that may arise for projects involving ICIP. Although they may appear in a sequential line, and separate from each other, they are deeply interconnected and dependent on each other. Their strength lies in how they work in combination.

1. **Respect:** respect for the custodianship of First Nations peoples over their ICIP.
2. **Self-Determination:** empower First Nations peoples in decision making and create First Nations-led projects.
3. **Consent and Consultation:** acknowledge the need for ongoing consultation, collaboration and free prior and informed consent from First Nations peoples.
4. **Interpretation:** consider how the voices of First Nations peoples can be heard, represented and involved in the interpretation of our culture. Support the right of First Nations peoples to be the primary guardians and interpreters of our culture.
5. **Cultural Integrity:** respect First Nations cultural heritage and ensure that when using ICIP that the use or the context is not harmful or inappropriate.
6. **Secrecy and Privacy:** respect the secrecy and privacy of First Nations sacred and ritual knowledge in accordance with customary laws.
7. **Attribution:** ensure First Nations people are attributed as the owners of ICIP, and this is in addition to copyright attribution.
8. **Benefit Sharing:** share benefits from the use of ICIP, especially for commercial use. Benefits can be monetary and non-monetary.
9. **Maintaining First Nations Culture:** consider how a proposed use might impact on the future use by others who are entitled to inherit the cultural heritage.
10. **Recognition and Protection:** use the laws, policies and practices in place at organisations to recognise these rights. Protection can be achieved by using laws, protocols and contracts to help ensure the recognition of ICIP. These rights must be recognised as ongoing, which means that engagement must also be ongoing.

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## 3.3. Valuing intangible heritage and ICIP

Both within Australia and throughout the world, notions of heritage are dominated by sites and objects. These tangible aspects of heritage, while important, do not make up the whole picture.

First Nations heritage is made up of inseparable components of both tangible and intangible heritage. It includes places and objects, as well as songs, stories, songlines, ceremonies, cultural practices, languages, kinship ties, knowledge and other cultural values connected to those places and objects.

Companies should take a holistic view of cultural heritage, including placing adequate value on both the tangible and intangible. Companies should support First Nations people to control the recording and digitisation of place-based traditional knowledge like place names and songlines, along with information and stories about tangible sites and objects.<sup>61</sup>

*What is ICIP?*

ICIP, or Indigenous Cultural and Intellectual Property, refers to First Nations people's rights to their cultural heritage. ICIP incorporates all types of tangible and intangible heritage, including:

- Traditional knowledge (TK) (including scientific, agricultural, technical, and ecological knowledge, ritual knowledge),
- Traditional cultural expressions (TCEs) (including stories, artworks, designs and symbols, literature, and languages),
- Literary, performing and artistic works,
- Performances (ceremonies, dance, and song),
- Cultural objects (including, but not limited to arts, crafts, ceramics, jewellery, weapons, tools, visual arts, photographs, textiles, contemporary art practices),
- Sites, places, cultural landscapes and waterscapes and the knowledge associated with them
- Ancestral remains (human remains, tissues and genetic material),
- Cultural environment resources (including minerals and species),
- Secret and sacred material and information (including sacred/historically significant sites and burial grounds), and
- Documentation of First Nations peoples' heritage in all forms of media such as films, photographs, books, reports, and records taken by others, sound recordings and digital databases.<sup>62</sup>

ICIP incorporates both tangible (sites, objects) and intangible (knowledge, oral stories, performances) elements.

Understanding ICIP requires respect for cultural protocols around knowledge holding, cultural authority, permissions, and communal ownership. First Nations cultural heritage is a dynamic, living heritage that is handed down from generation to generation, which means that modern and emerging knowledges that have been developed by First Nations people based on history and culture can also be classified as ICIP.

Under the UNDRIP, First Nations people have the rights to:<sup>63</sup>

- own, control, maintain and expand their ICIP;
- ensure that any means of protecting ICIP is based on the principle of self-determination;
- be recognised as the primary guardians and interpreters of their cultures;
- authorise or refuse to authorise the commercial use of ICIP according to First Nations customary laws;
- maintain the secrecy of First Nations knowledge and other cultural practices;
- guard the cultural integrity of their ICIP;
- be given full and proper attribution for sharing their cultural heritage; and
- control the recording of cultural customs and expressions and the particular language which may be intrinsic to cultural identity, knowledge, skill and teaching of culture.

Companies will note that many of the Dhawura Ngilan Principles reflect and resemble these ICIP rights.

### 3.3.1. Storytelling

Storytelling is central to First Nations culture. Companies should support First Nations storytelling, and this involves listening to stories to gain greater insight, and also amplifying these stories to support Australia's heritage narrative as one of survival and cultural achievement.<sup>64</sup>

First Nations people value storytelling as a means of connecting, understanding history and imparting. This intergenerational practice is handed down through families and communities. Stories come from people, and Country. The right to tell a story is part of a person's cultural identity and connection. This is also true for a person's life story. Care must be particularly taken when recording, using, and publishing cultural stories from First Nations people.

In the context of business, corporations may capture stories of people for understanding culture, but also for promoting their work. Cultural protocols around who can speak for Country, who can share stories should be considered. Companies should follow ICIP Protocols.

<sup>61</sup> Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 16 <<https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>.

<sup>62</sup> Terri Janke, Michael Frankel and Company, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report, 1998) <[https://www.terrijanke.com.au/\\_files/ugd/7bf9b4\\_2740d8cff7d24320b70f8a34015f9a53.pdf](https://www.terrijanke.com.au/_files/ugd/7bf9b4_2740d8cff7d24320b70f8a34015f9a53.pdf)>.

<sup>63</sup> Terri Janke, Michael Frankel and Company, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report, 1998) <[https://www.terrijanke.com.au/\\_files/ugd/7bf9b4\\_2740d8cff7d24320b70f8a34015f9a53.pdf](https://www.terrijanke.com.au/_files/ugd/7bf9b4_2740d8cff7d24320b70f8a34015f9a53.pdf)>.

<sup>64</sup> Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 19 <<https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>.

### 3.4. Indigenous Data Sovereignty

Indigenous Data Sovereignty (IDS) arose in response to the treatment of First Nations peoples and communities across the world by conventional and colonial data collection and management practices. IDS challenges conventions of traditional data collection that does not allow First Nations people to have agency over what data is collected, by whom and for what purpose.

The origins of IDS came from Canadian First Nations communities in 1998 by developing the OCAP® (Ownership, Control, Access and Possession) principles. These principles applied self-determination to data practices and recognised community rights and interests in the information collected. Following this, national First Nations data networks and collectives in Australia, New Zealand, the USA and elsewhere have developed principles, and advocated for the self-determination of First Nations peoples in relation to data.

Companies must be aware of IDS across all decision-making around the collection, use, storage, and management of Indigenous Data.

Companies can determine if IDS applies in any context by asking:

- Is this information about First Nations people?
- Was it collected from First Nations people?
- Does it impact First Nations people?

If the answer to any of the above is yes, then the information is Indigenous Data.

Many companies will hold different kinds of Indigenous Data. Banks may hold customer data for First Nations people or businesses. Research companies may hold field notes or interview recordings from First Nations people talking about bush foods or bush medicines. Mining companies may hold geospatial data with information on the location of heritage places or sacred sites. Universities may hold data about First Nations student numbers or related analytics. All these examples are different kinds of Indigenous Data and may be significant or useful to First Nations communities.

Companies should consider the importance of IDS in projects that involve digitising and recording projects. As it often involves digital repatriation and data that directly impacts First Nations peoples and communities, IDS should be applied to these projects.

For more guidance on the principles and application of Indigenous Data Sovereignty, refer to current domestic and international standards:

- *Maiam Nayri Wingara Indigenous Data Sovereignty Collective Principles*<sup>65</sup>
- Global Indigenous Data Alliance, *CARE Principles for Indigenous Data Governance*<sup>66</sup>
- Tahu Kukutai and John Taylor (eds), *Indigenous Data Sovereignty: Towards an Agenda*<sup>67</sup>

### 3.5. Reimagining and restoring Aboriginal place names

Place names have cultural significance for First Nations people. By naming places with First Nations language names or by adopting dual naming, places are reimagined, and Australians are made aware of the deep heritage of this nation.<sup>68</sup> Restoring Aboriginal place names celebrates and recognises the culture and heritage of the region and reinstates its importance across time.<sup>69</sup> Companies should support the naming of places, geographic features, sites and areas with First Nations languages. This could also include naming buildings and projects.

However, it is important that adequate consultation is undertaken and that consent is obtained from Traditional Owners before undergoing such changes. Companies should be especially careful to consult with First Nations people before seeking to trademark any First Nations language words, as this takes the control of language away from First Nations people.

Companies should be guided by the National Policy Principles for the Use of Aboriginal and Torres Strait Islander Place Names,<sup>70</sup> which was developed to recognise the close relationship First Nations people have with the land. First Nations people have the right to decide on the use of names, and consultation and consent processes will need to be followed.

### 3.6. Languages

Traditional languages are a vital part of First Nations identity and are fundamentally embedded in First Nations cultural practices. Language is more than simply a means of communication, but also a major component of intangible cultural heritage which carries meaning beyond the individual words. Language provides a path for the transmission of cultural knowledge and heritage, such as through storytelling.

The practice of speaking and learning first languages has been associated with a greater sense of belonging and empowerment, as well as being interwoven with participation in other forms of cultural heritage. There has been a history of culturally damaging policies, which have threatened the loss of many First Nations languages and harmed First Nations people's connection to culture, ancestors and spirit. This disconnection can be incredibly damaging to First Nations sense of cultural identity.

Businesses can support in revitalising the transmission of cultural knowledge and heritage by correctly using and seeking permission to use First Nations language words. Businesses can also support the creation of language resources and databases to support education around cultural heritage. See section 6.5 below.

### 3.7. Health, Wellbeing and Heritage

The protection of culture is linked to the health and well-being of First Nations people. Many First Nations people suffer cultural harm by not having access to sites, or to see the destruction of their ancient rock art sites destroyed. The cultural harm and psychological hurt that occurs with First Nations peoples' heritage being lost or threatened is in violation of internationally recognised human rights.

Companies should recognise that due to First Nations peoples' role as custodians of heritage, not having access to sites or seeing the destruction of cultural heritage takes a toll on the health and wellbeing of First Nations people. When First Nations communities cannot connect with Country, they are severely impacted and have worse health outcomes, lower life expectancy and complex social circumstances impeding their ability to practice culture.<sup>71</sup>

The poor health of First Nations people can be improved with greater understanding of the interwoven nature of culture and Country, facilitating access to Country, and greater respect of First Nations cultural heritage.

### 3.8. Supporting cultural strength and maintenance

Companies should seek to participate and support projects and initiatives that expand and maintain culture. These programs must be First Nations-led but could be aimed at sharing culture either within First Nations communities or with non-First Nations people more broadly, both domestically and internationally.

#### 3.8.1. Digitising and recording projects

First Nations cultural heritage has suffered through centuries of dispossession, gradual decline and loss. Place-based traditional knowledge is traditionally passed down through kinship ties and generations, relying on verbal communication and relationships of trust and cultural connection.

Throughout colonial history, historians and anthropologists have disrupted this traditional process with non-First Nations styles of recording information. However, in the context of cultural loss and dispossession, records of cultural knowledge can now be valuable resources to First Nations communities seeking to revitalise culture.

For many decades, repositories of information on First Nations culture and history have been collected and placed in the archives of resource companies, government agencies and academic institutions. These places are often inaccessible to First Nations communities. Being kept inaccessible and separate from First Nations communities prevents the transmission of knowledge for future generations.

First Nations communities have been seeking greater access to and control over their cultural material and knowledge. Access, safe protection and preservation of culture, ancestral knowledge, artefacts, cultural heritage sites and landscapes is vital to the future of First Nations communities. Digitisation and record keeping projects provide a safe space for cultural knowledge and material to be safely stored and returned to First Nations groups.

Businesses can support by assisting in projects that promote the digitisation, mapping and community record keeping of First Nations cultural knowledge and material.

There is an opportunity for companies to return copies of heritage information and cultural material through digital repatriation. For example, mining companies with operations in WA returned cultural heritage survey information to traditional owner groups by creating a digital Keeping Place to be owned and controlled by the traditional owner organisation.

Another way companies can assist First Nations groups in heritage is to assist with capacity building. Drone technology, for example, is a way to exchange technological skills.

#### 3.8.2. Supporting research and reform

Historically, museums and galleries collect and display First Nations cultural material with a colonial and aesthetic lens, with little acknowledgement of the living culture that connects to this heritage.<sup>72</sup> Over the past 40 years, there has been an increasing move towards changing the relationship and dynamics between these cultural institutions and First Nations people, with the aim to empower First Nations communities to determine how their cultural material is managed and represented.<sup>73</sup>

Businesses can support cultural strength and maintenance by funding museums and galleries in researching and implementing these changes

<sup>65</sup> Maiam Nayri Wingara & Australian Indigenous Governance Institute, *Indigenous Data Sovereignty* (Communique, 20 June 2018) <<https://www.maiamnayriwingara.org/mnw-principles>>.

<sup>66</sup> Stephanie Carroll et al, 'The CARE Principles for Indigenous Data Governance' (2020) 19(XX) *Data Science Journal* 1 <<https://doi.org/10.5334/dsj-2020-042>>.

<sup>67</sup> Kukutai, Tahu and John Taylor (eds), *Indigenous Data Sovereignty: Towards an Agenda*, ANU press, 2016) 34 <<https://press.anu.edu.au/publications/series/caepri/indigenous-data-sovereignty>>.

<sup>68</sup> Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 19 <https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>.

<sup>69</sup> NSW Department of Planning and Environment, *Renaming Ben Boyd National Park* (Report, 29 September 2022) <<https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Parks-reserves-and-protected-areas/Parks-management-other/renaming-ben-boyd-national-park.pdf>>.

<sup>70</sup> Committee for Geographical Names in Australasia, Policy guidelines for the recording and use of Aboriginal and Torres Strait Islander Place Names (Guidelines, October 1992). <[https://www.icsm.gov.au/sites/default/files/aboriginal\\_names\\_0.pdf](https://www.icsm.gov.au/sites/default/files/aboriginal_names_0.pdf)>.

<sup>71</sup> Outlook and Impact' *Australia State of the Environment* (Web Page, 2021) <<https://soe.dcceew.gov.au/indigenous/outlook-and-impact>>.

<sup>72</sup> Terri Janke and Company, *First Peoples and Australian Museums and Galleries: A Report on the Engagement of Indigenous Australians in the Museums and Galleries Sector, written for the Australian Museums and Galleries Association*, 2018 (Report, September 2018) 1 <[https://www.amaga-indigenous.org.au/\\_files/ugd/f76062\\_c3d1135f79aa49a0aab72ebc59f7c355.pdf](https://www.amaga-indigenous.org.au/_files/ugd/f76062_c3d1135f79aa49a0aab72ebc59f7c355.pdf)>.

<sup>73</sup> Terri Janke and Company, *First Peoples and Australian Museums and Galleries: A Report on the Engagement of Indigenous Australians in the Museums and Galleries Sector, written for the Australian Museums and Galleries Association*, 2018 (Report, September 2018) 1 <[https://www.amaga-indigenous.org.au/\\_files/ugd/f76062\\_c3d1135f79aa49a0aab72ebc59f7c355.pdf](https://www.amaga-indigenous.org.au/_files/ugd/f76062_c3d1135f79aa49a0aab72ebc59f7c355.pdf)>.



### 3.9. What businesses can do

What all companies can do:

PRINCIPLE	KEY ACTIONS
Supporting First Nations people in truth telling	<p>Explore opportunities for how the business can recognise, understand, and accept the wrongs of the past and the impact of these wrongs on First Nations peoples</p> <p>Develop an internal or external statement outlining the business' position and advocacy in relation to truth telling, or include truth telling in the business' RAP targets</p> <p>Host events both internally and externally that empower truth telling about heritage, including ceremonies, memorials and public art displays.<sup>74</sup></p> <p>Connecting with key First Nations organisations and inviting them to speak at events with paid fees</p> <p>Support establishment of cultural or educational healing centres and institutions<sup>75</sup></p> <p>Explore opportunities to support First Nations people to share stories of resistance, resilience and contribution<sup>76</sup></p>
Recognition of the holistic scope of heritage – the interconnection between tangible and intangible cultural heritage	<p>Seek permission from relevant First Nations people before using language words, and pay Traditional Owners and/or language and culture experts both for their services and for a licence or right to use the word(s)</p> <p>Supporting First Nations-led initiatives for recording and digitisation of traditional knowledge</p> <p>Support First Nations campaigns for re-naming of rivers, creeks, places, sites, areas</p> <p>Appoint or create a role for a Heritage Officer within the organisation</p> <p>Assist First Nations people to undertake their own cultural mapping projects</p>
Upholding ICIP rights	<p>Offer cultural awareness and cultural competency training for staff, including ensuring understanding of tangible and intangible heritage</p> <p>Develop and implement a company-wide ICIP Protocol for managing traditional knowledge, cultural heritage and any other forms of ICIP. An ICIP Protocol can be as comprehensive or concise as the company needs to suit its work, but it is useful to any company to demonstrate best practice First Nations engagement.</p> <p>Educate and raise awareness of the Australian Business Guide to the UN Declaration on the Rights of Indigenous People and about First Nations peoples' rights, culture and history; and the legacy of colonialism and the Stolen Generation</p> <p>Include ICIP clauses and leading practice obligations in contracts with third parties</p>
Supporting cultural maintenance	<p>Support First Nations people to revitalise language and create resources to educate and share</p> <p>Support in the renaming of places<sup>77</sup> and creating self-determined cultural centres and Keeping Places<sup>78</sup></p>
Respecting Indigenous Data Sovereignty	<p>When recording any information about or relating to First Nations people (i.e. photographing First Nations people at an event, surveying Country, etc.) seek consent for the recording, and ask the relevant people how they would like the information to be stored, used and managed</p> <p>When using any information relating to First Nations people, ensure that data reflects the real lived experiences and perspectives of First Nations peoples and communities. Data should not exclusively focus on deficits or disadvantage</p>

<sup>74</sup> 'Reconciliation and Truth-Telling', *Reconciliation Australia*, (Web Page) <<https://www.reconciliation.org.au/our-work/truth-telling/>>.

<sup>75</sup> *Reconciliation Australia, Truth Telling Symposium Report* (Report, Reconciliation Australia, 5-8 October 2018) 6 <<https://www.reconciliation.org.au/wp-content/uploads/2021/09/Truth-telling-symposium-report-2018-web.pdf>>.

<sup>76</sup> *Heritage Chairs of Australia and New Zealand, 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* (Report, 16 September 2020) 19 <<https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>.

<sup>77</sup> *Reconciliation Australia, Truth-telling*, (Web Page) <<https://www.reconciliation.org.au/our-work/truth-telling/>>.

<sup>78</sup> *Yoorrook Justice Commission, Yoorrook with Purpose: Interim Report* (Interim Report, 2022) 51 <<https://yoorrookjusticecommission.org.au/wp-content/uploads/2022/06/Yoorrook-Justice-Commission-Interim-Report.pdf>>.

### PLUS:

What any company working with First Nations partners, culture or knowledge can do:

PRINCIPLE	KEY ACTIONS
Supporting First Nations people in truth-telling	Make space for First Nations accounts and experiences in conversations and engagements. Ensure that people's opinions are heard and respected
Upholding ICIP rights	<b>Design and creative:</b> Ensure that any use of First Nations designs or techniques is only done with consent and attribution (i.e. not selling or producing fake First Nations art or cultural material, like boomerangs or clap sticks)
Supporting cultural maintenance	<p>Recognise the interconnected nature of cultural heritage and health and wellbeing by working to protect culture</p> <p><b>Land, water and sea-based:</b> Facilitating access to sites and Country within project parameters (where it is safe to do so)</p>
Respecting Indigenous Data Sovereignty	<p>Seek consent from First Nations communities before collecting and using data that contains cultural knowledge</p> <p>Consult with the relevant First Nations communities about how data is stored, used and managed</p> <p>Share records of data and knowledge with First Nations people who are represented in it</p> <p>Engage First Nations experts to interpret First Nations data</p> <p>Engage First Nations people to lead projects, facilitate consultations, and collaborate on initiatives relating to First Nations</p>

What companies with knowledge or research-based activities can do:

PRINCIPLE	KEY ACTIONS
Supporting First Nations people in truth telling	Offer opportunities to First Nations people to respond to colonial accounts or outdated/offensive recorded material
Upholding ICIP rights	Create a care and interpretation policy for work with First Nations cultural material
Supporting cultural maintenance	<p>Support First Nations led projects in museums, galleries, public art, film, television, internet and in the media</p> <p>Support research and preservation projects, such as the Colonial Frontier Massacres map, and First Nations-led exhibitions in museums and galleries<sup>79,80</sup></p>
Respecting Indigenous Data Sovereignty	Ensure that First Nations communities have access to information and data, such as project outcomes, research outputs, etc

<sup>79</sup> Terri Janke and Company, *First Peoples: A Roadmap for Enhancing Indigenous Engagement in Museums and Galleries*, (Report, 2018) <[https://www.amaga-indigenous.org.au/\\_files/ugd/f76062\\_c67539d5b2e2433181f66b15ec499d89.pdf](https://www.amaga-indigenous.org.au/_files/ugd/f76062_c67539d5b2e2433181f66b15ec499d89.pdf)>.

<sup>80</sup> University of Newcastle, 'Colonial Frontier Massacres, Australia, 1780 to 1930, V3' *Centre for 21st Century Humanities* (Interactive Map) <<https://c21ch.newcastle.edu.au/colonialmassacres/map.php>>.

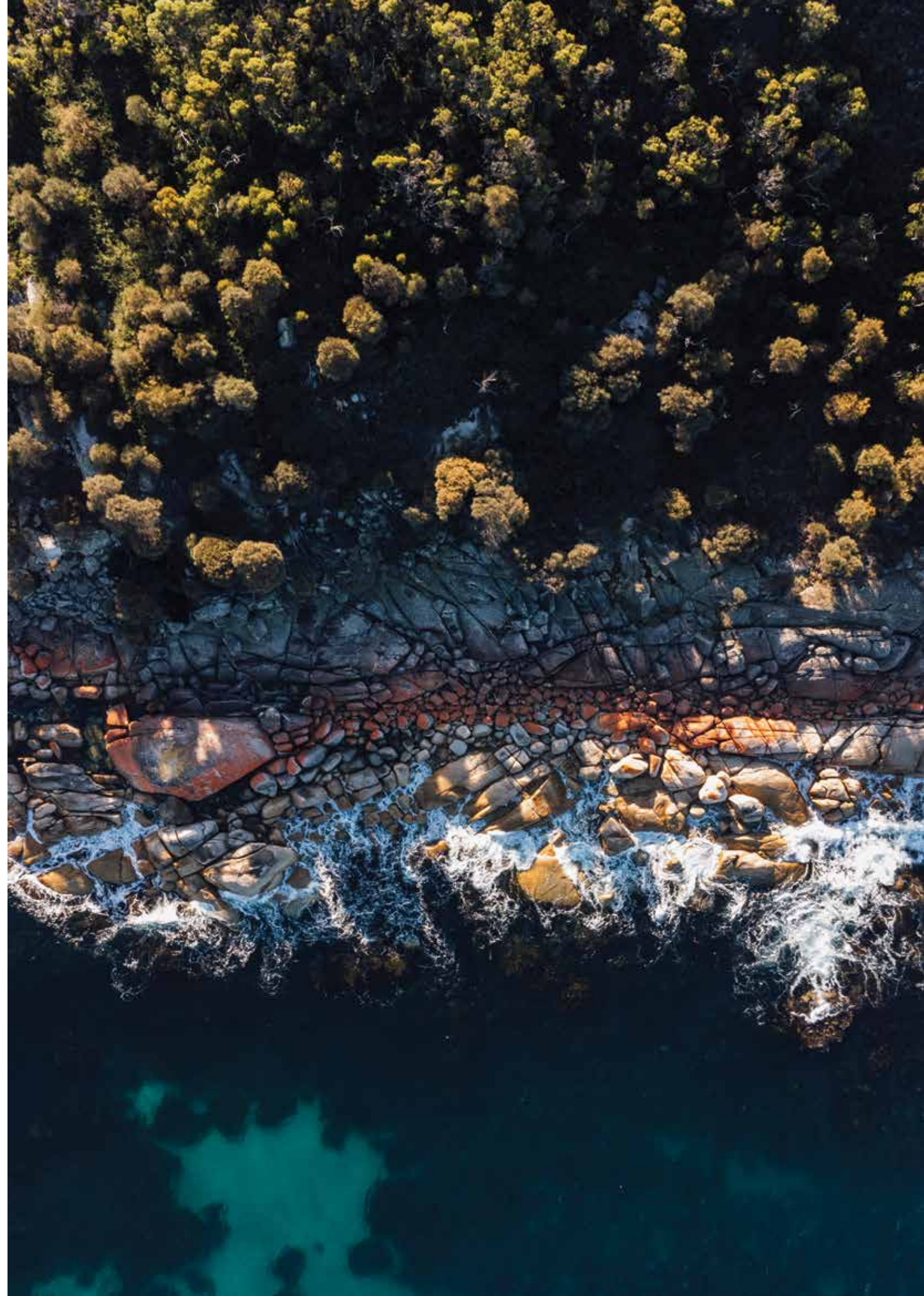


### 3.10. What investors can do

PRINCIPLE	KEY DUE DILIGENCE QUESTIONS
The company actively supports First Nations people engaging in truth telling	<ul style="list-style-type: none"> <li>Have you developed a <b>position statement on truth telling</b>?</li> <li>Do you <b>host events and facilitate</b> debate with First Nations participants?</li> </ul>
The company recognises and values intangible cultural heritage and upholds First Nations Cultural and Intellectual Property rights	<ul style="list-style-type: none"> <li>How do you <b>use First Nations knowledge</b> in your business?</li> <li>Do you use any First Nations <b>languages</b> in your business (e.g., naming of rooms or programs etc)?</li> <li>What is your process for how you use those words? Did you seek permission? Do you <b>share benefits with the language custodians</b>?</li> <li><b>Who is responsible</b> for heritage in your organisation? What is their role description?</li> </ul>
The company supports First Nations people to maintain and ensure the endurance of First Nations cultural heritage	<ul style="list-style-type: none"> <li>Do you have an <b>Indigenous Data Sovereignty (IDS) policy</b>?</li> <li>How can First Nations people <b>access</b> the knowledge or information you hold?</li> <li>How is your data <b>stored</b>?</li> <li>Do you use <b>cultural knowledge tags</b> or other systems for First Nations data governance?</li> <li>Do you use Indigenous Cultural &amp; Intellectual Property (<b>ICIP</b>) <b>consent forms</b> when consulting with communities?</li> <li>How do you apply the data you hold to <b>benefit</b> First Nations? What do you do with it that has a positive impact?</li> <li>Is <b>safeguarding</b> First Nations cultural heritage embedded into the company's risk identification and management approaches (including strategic planning)?</li> </ul>
The company respects First Nations Data Sovereignty	<ul style="list-style-type: none"> <li>Do you <b>seek consent</b> before collecting and using First Nations data? If so, how do you seek consent?</li> <li>Do you consult on how First Nations data is <b>stored, used and managed</b>?</li> <li>Do you <b>share First Nations data</b> with the First Nations people it was collected about?</li> <li>Do you engage First Nations people to <b>interpret data</b>?</li> <li>Do you have an <b>Indigenous Data Sovereignty clause</b> in your contracts?</li> </ul>

#### Red flags

PRINCIPLE	RED FLAGS
The company actively supports First Nations people engaging in truth telling	<ul style="list-style-type: none"> <li>Companies that have a truth telling process with <b>no evidence of engagement</b> with First Nations people or is not First Nations led.</li> </ul>
The company recognises and values intangible cultural heritage and upholds First Nations Cultural and Intellectual Property rights	<ul style="list-style-type: none"> <li>Companies that have <b>no evidence of engagement/consent to use language</b> and cultural knowledge/practices, no attribution, no explanation for use of terminology.</li> </ul>
The company supports First Nations people to maintain and ensure the endurance of First Nations cultural heritage	<ul style="list-style-type: none"> <li>Companies with <b>no evidence of input/engagement of how cultural heritage is recorded</b>, communicated, and preserved, resulting in potential to misrepresent culture e.g., done through someone else's eyes/voice, simplifying, cultural knowledge is not accurate.</li> </ul>
The company respects Indigenous Data Sovereignty	<ul style="list-style-type: none"> <li>Companies that are at high risk of holding ICIP data and are <b>unaware of sensitivities and needs around access and storage</b>.</li> </ul>





## Caring for Country and Culture

14. *The company empowers First Nations people to care for Country.*
15. *The company engages in First Nations-led remediation of Country affected by land-use activities and projects.*
16. *The company cares for cultural material and supports repatriation of Secret/Sacred material and ancestral remains, as advised by First Nations cultural authorities.*

### 4.1. Caring for Country and biodiversity

*Care for country and it will care for you.*

The First Nations worldview, begins and ends with Country. First Nations communities have successfully nurtured, cared for and been sustained by their lands for millennia before and during colonisation by centring their relationships with Country on reciprocity, mutuality, and interdependence. First Nations people recognise that the environment is crucial for health and wellbeing and that the natural world is not distinct to or separate from human beings.<sup>81</sup> As a source of food, water, air, and raw material, it is directly intertwined with culture and survival.

'Caring for Country' embodies responsibility, it is the cultural obligation placed on First Nations people as carers and custodians of the land. It draws on laws, knowledge and customs that have been inherited from ancestors, and means that First Nations knowledge systems can continuously evolve and be passed on through the generations. Businesses and corporations have the opportunity to take part in this unique relationship by supporting First Nations people to care for Country and reconciling past harms by positive actions for the future.

European colonisation resulted in the devastation of cultural practices and the ongoing manifestation of colonialism in laws and policies disempower First Nations environmental management practices.<sup>82</sup> Many environmental programs fail to consider, incorporate, or pay attention to traditional obligations, customary activities, and access to Country. Standards for environmental surveys in land management projects may not adequately consider First Nations rights and interests. Companies need to be able to identify these gaps in order to adequately account for cultural heritage management in their operations.

First Nations knowledge provides valuable insight into caring for the environment for all Australians. First Nations Australians are the first scientists, technologists, engineers and mathematicians and respectful collaborations with other scientists are vital in shaping the country's future.<sup>83</sup>

First Nations-led Caring for Country is critical and First Nations cultural principles must be prioritised over economic interests in environmental management and development approvals.<sup>84</sup> First Nations heritage laws are not sufficiently grounded in these principles, which means that mainstream management and inadequate consent processes fail to protect Country and enable harm and disconnection.<sup>85</sup> This places the ethical responsibility on private sector actors to go the extra mile.

Businesses have a responsibility to remediate and rehabilitate land sites that have been used for activities or projects, such as resource extraction. Any remediation activities should be done in collaboration with the local traditional custodians, to ensure that Country is adequately cared for. Businesses can also support First Nations-led Caring for Country practices more widely such as cultural fire management, First Nations ranger activities and allowing access to sites. Businesses can support First Nations communities through the recognition and protection of culturally significant species, consulting them in relation to remediation of land previously used for projects, and supporting cultural practices such as the traditional and sustainable use of resources, fishing, hunting, and other customary resource take. Colonisation has meant that First Nations people have been torn from Country, the path to their collective healing must see them back on Country.

### 4.2. Caring for knowledge

First Nations cultures share knowledge through oral tradition as an ongoing cultural practice. However, the recording and storage of knowledge transmitted orally is often without FPIC being obtained, and no cultural protocols being understood and put in place.<sup>86</sup>

Recording knowledge can have copyright implications. Taking photographs, video, or sound recordings, or writing down a story which is being shared verbally, all create copyright works which are then owned by the creator of the recording. This is out of alignment with cultural best practice, whereby First Nations knowledge and ICIP should always remain owned by the First Nations Custodians.

The inappropriate recording of cultural knowledge and heritage creates distress for First Nations peoples and communities or can even pose a danger for communities and First Nations who handle or view Secret/Sacred knowledge or ancestral remains. However, recorded heritage, even when recorded inappropriately, can still help to strengthen, maintain, protect, and illuminate First Nations heritage.<sup>87</sup>

Strengthening the agency of First Nations peoples and communities through facilitating First Nations control of recorded heritage is an important vehicle for healing and justice.<sup>88</sup>

<sup>81</sup>'Outlook and Impact' *Australia State of the Environment* (Web Page, 2021) <<https://soe.dccceew.gov.au/indigenous/outlook-and-impact>>.

<sup>82</sup>'Outlook and Impact' *Australia State of the Environment* (Web Page, 2021) <<https://soe.dccceew.gov.au/indigenous/outlook-and-impact>>.

<sup>83</sup>'Outlook and Impact' *Australia State of the Environment* (Web Page, 2021) <<https://soe.dccceew.gov.au/indigenous/outlook-and-impact>>.

<sup>84</sup>'Outlook and Impact' *Australia State of the Environment* (Web Page, 2021) <<https://soe.dccceew.gov.au/indigenous/outlook-and-impact>>.

<sup>85</sup>'Outlook and Impact' *Australia State of the Environment* (Web Page, 2021) <<https://soe.dccceew.gov.au/indigenous/outlook-and-impact>>.

<sup>86</sup>Anne McConnell et al, *Australia State of the Environment 2021: Heritage* (Report, 2021). 25 <https://soe.dccceew.gov.au/heritage/introduction>.

<sup>87</sup>Anne McConnell et al, *Australia State of the Environment 2021: Heritage* (Report, 2021). 25 <https://soe.dccceew.gov.au/heritage/introduction>.

<sup>88</sup> Australian Government Department of Communications and the Arts, *Australian Government Policy on Indigenous Repatriation* (Report, September 2016) 4 <[https://www.arts.gov.au/sites/default/files/documents/australian\\_government\\_policy\\_on\\_indigenous\\_repatriation.pdf](https://www.arts.gov.au/sites/default/files/documents/australian_government_policy_on_indigenous_repatriation.pdf)>.



### 4.3. Care of objects and cultural material

Often, companies and organisations hold cultural collections of materials, items, artworks, or other culturally significant objects.

Often, historical displacement of First Nations communities and stealing of cultural material has resulted in unprovenanced material existing in collections. There is a risk that First Nations communities might have forgotten that piece of culture, and without access to it, might never revitalise it.

Sometimes, these artworks or cultural objects may contain secret or sacred knowledge.

Objects and materials held in collections must be adequately cared for, in collaboration with First Nations traditional custodians and in line with their wishes.

The AMaGA Roadmap is a resource published by the Australian Museums and Galleries Association.<sup>89</sup> Though aimed at museums and galleries, the principles and expectations outlined in this guide are likewise applicable to other organisations holding private collections.

### 4.4. Repatriation

It is harmful and distressing when ancestral remains and Secret/Sacred material are removed from Country or from their Custodians. The appropriation of heritage has been done by both Australian and overseas institutions. Repatriation promotes the broader respect and understanding of First Nations cultures and recognises the dignity of First Nations peoples and communities.<sup>90</sup>

Secret/Sacred material can also include knowledge, information, stories, photographs, recordings, or other elements of tangible or intangible heritage.

The return of First Nations ancestral remains and Secret/Sacred material are important to preserve, revitalise and strengthen First Nations communities.<sup>91</sup>

It is important for ancestral remains to be treated with dignity, by being returned to their rightful place on Country in a way that respects cultural protocols.<sup>92</sup>

Within the many cultures of First Nations communities in Australia, it is known that ancestors cannot rest when

they are far from their own Country.<sup>93</sup> The repatriation of ancestors respects the wishes of First Nations communities to care for their ancestors on Country.<sup>94</sup>

In line with Dhawura Ngilan's leading-practice standards, companies can support the return of ancestral remains in a coordinated way. Companies should collaborate with heritage agencies and the First Nations communities connected to the ancestors they seek to repatriate, to develop a plan that identifies the collections which include their ancestors and how repatriation should be undertaken. A repatriation plan that is informed by consultation with the community recognises that First Nations peoples and communities are the rightful custodians of their ancestral remains.<sup>95</sup>

Secret/Sacred material should also be returned to First Nations peoples and communities. Similar to the repatriation of ancestral remains, the return of Secret/Sacred material respects the dignity of First Nations peoples and communities, and recognises the cultural context and protocol attached to those objects. Companies can support First Nations communities seeking to have Secret/Sacred material returned by collaborating to develop an appropriate plan for repatriation. This may mean funding, resourcing, training, or capacity building to accept care of the material (i.e. climate controlled archival facilities, secure data management systems, etc.). Companies must ensure that First Nations communities who wish to care for Secret/Sacred material on Country are empowered and resourced to do so.<sup>96</sup>

### 4.5. What businesses can do

What all companies can do:

PRINCIPLE	KEY ACTIONS
Empower First Nations in caring for Country	<p>Support ranger programs and other First-Nations led initiatives for caring for Country.</p> <hr/> <p>Advocate for First Nations voices in land management debates, such as cultural fire projects.</p> <hr/> <p>Consider 'downstream' and indirect impacts of company activities on biodiversity and culturally significant species.</p> <hr/> <p>Support First Nations groups in efforts to seek protection via legislative mechanisms for culturally significant species.</p>
Cares for cultural material	<p>Educate staff, contractors and partners about the significance of First Nations cultural heritage and how it must be respected and protected.</p>
Supports repatriation of Secret/Sacred material and ancestral remains	<p>Support for local, regional and national Keeping Places (for knowledge or cultural materials) or Resting Places (for ancestral remains). Support may mean:</p> <ul style="list-style-type: none"> <li>- Funding and resourcing</li> <li>- Offering capacity building opportunities</li> <li>- Holding materials until adequate care facilities can be established (i.e. climate controlled environment; two-factor authentication system, etc.)</li> <li>- Supporting or using existing Keeping Places like Ara Iritja or Mukurtu CMS</li> </ul> <p>Identifying cultural material in any records or collections held by the company, and then making it accessible or repatriating it to community.</p> <hr/> <p>Empowering First Nations communities to accept repatriated materials, including by assisting them with making applications, dealing with legislative processes, or by resourcing them to develop adequate facilities to accept custodianship of sensitive materials.</p>

<sup>89</sup> Terri Janke and Company, *First Peoples: A Roadmap for Enhancing Indigenous Engagement in Museums and Galleries*, (Report, 2018) <[https://www.amaga-indigenous.org.au/\\_files/ugd/f76062\\_c67539d5b2e2433181f66b15ec499d89.pdf](https://www.amaga-indigenous.org.au/_files/ugd/f76062_c67539d5b2e2433181f66b15ec499d89.pdf)>.

<sup>90</sup> Australian Government Department of Communications and the Arts, *Australian Government Policy on Indigenous Repatriation* (Report, September 2016) 4 <[https://www.arts.gov.au/sites/default/files/documents/australian\\_government\\_policy\\_on\\_indigenous\\_repatriation.pdf](https://www.arts.gov.au/sites/default/files/documents/australian_government_policy_on_indigenous_repatriation.pdf)>.

<sup>91</sup> Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) <<https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>.

<sup>92</sup> Australian Government Department of Communications and the Arts, *Australian Government Policy on Indigenous Repatriation* (Report, September 2016) 4 <[https://www.arts.gov.au/sites/default/files/documents/australian\\_government\\_policy\\_on\\_indigenous\\_repatriation.pdf](https://www.arts.gov.au/sites/default/files/documents/australian_government_policy_on_indigenous_repatriation.pdf)>.

<sup>93</sup> Anne McConnell et al, *Australia State of the Environment 2021: Heritage* (Report, 2021). 25 <https://soe.dcceew.gov.au/heritage/introduction..>

<sup>94</sup> Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 23 <<https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>.

<sup>95</sup> Australian Government Department of Communications and the Arts, *Australian Government Policy on Indigenous Repatriation* (Report, September 2016) 5 <[https://www.arts.gov.au/sites/default/files/documents/australian\\_government\\_policy\\_on\\_indigenous\\_repatriation.pdf](https://www.arts.gov.au/sites/default/files/documents/australian_government_policy_on_indigenous_repatriation.pdf)>.

<sup>96</sup> Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 24 <<https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>.

**PLUS:**

What companies with land, water or sea-based activities can do:

PRINCIPLE	KEY ACTIONS
Empowers First Nations in caring for Country	Engage First Nations people on projects with land or sea Country relevance  Work with local First Nations communities to understand their priorities and concerns for the local area, and build their input into project plans
Facilitates First Nations-led remediation of Country	Rehabilitate and remediate sites used for land-based activities (such as mines) in collaboration with First Nations people  Seek opportunities to remediate or repurpose decommissioned sites for the benefit of First Nations communities, i.e. using former mine accommodations for community housing, etc
Cares for cultural material	Document efforts to avoid and otherwise minimise impacts on cultural heritage and areas of importance to First Nations people  Implement clear policies and training across the company to support staff to identify and respond to situations where cultural material is found on site, i.e. artefacts, ancestral remains, etc
Supports repatriation of Secret/Sacred material and ancestral remains	Have strong relationships with local communities and keep communication lines open in relation to material found on project sites  Ensure comprehensive and up-to-date understanding of legal obligations in relation to cultural heritage in relevant State/Territory  As far as permitted by local laws, act in alignment with the wishes of the relevant First Nations community in relation to material found on project sites

What companies with knowledge or research-based activities can do:

PRINCIPLE	KEY ACTIONS
Cares for cultural material	Build relationships with local communities to understand history and significance of items in cultural collections  Conduct an audit of First Nations material in collections and make this information available to First Nations people  Assist and train First Nations communities in managing collections, using resources, repatriation  Research unprovenanced material in collections and seek to find out its origins, and how it may be reconnected with its living Custodians  Look at options for working with First Nations communities to develop collaborative agreements around the care of their cultural material. This might mean the community is recognised as the owner or custodian, but the organisation holds and cares for the heritage
Supports repatriation of Secret/Sacred material and ancestral remains	Educate staff to recognise signifiers of Secret/Sacred material in collections, i.e. <ul style="list-style-type: none"> <li>- Old photos or recordings depicting people who are likely deceased</li> <li>- Recorded accounts of cultural stories or songlines</li> <li>- Descriptions of cultural practices as ‘men’s business’ or ‘women’s business’</li> <li>- Descriptions of scarification, birthing, or other ceremonial practices</li> </ul> Facilitate and support repatriation of cultural material where requested by the First Nations community <sup>97</sup>

**4.6. What investors can do**

PRINCIPLE	KEY DUE DILIGENCE QUESTIONS
The company empowers First Nations people to care for Country	<ul style="list-style-type: none"> <li>• How do you <b>support First Nations community initiatives?</b></li> <li>• Do you <b>engage with First Nations project partners</b> and seek feedback on the company’s engagements with them?</li> </ul>
The company cares for cultural material and supports repatriation of Secret/Sacred material and ancestral remains, as advised by First Nations cultural authorities	<ul style="list-style-type: none"> <li>• Do you support <b>local, regional, and national Keeping Places</b> (for knowledge or cultural materials) or Resting Places (for ancestral remains)?</li> <li>• What is your process for dealing with <b>secret/sacred material</b>, or ancestral remains?</li> <li>• Do your project staff take relevant <b>cultural awareness</b> training?</li> </ul>
The company engages in First Nations-led remediation of Country affected by land-use activities and projects	<ul style="list-style-type: none"> <li>• Do you <b>seek opportunities to remediate or repurpose decommissioned sites</b> for the benefit of First Nations communities?</li> <li>• What is your <b>process for remediating</b> sites? Do you seek input from affected First Nations communities?</li> <li>• How do you work to <b>minimise your impacts on Country and the environment?</b></li> <li>• Do your project staff take relevant <b>cultural awareness</b> training?</li> </ul>

**Red flags**

PRINCIPLE	RED FLAGS
The company empowers First Nations people to care for Country	<ul style="list-style-type: none"> <li>• Companies that are <b>not engaging</b> with local First Nations experts/leaders.</li> <li>• Companies that <b>do not seek to understand how local communities use the land</b> and give no consideration to cultural knowledge and practices around land use.</li> </ul>
The company cares for cultural material and supports repatriation of Secret/Sacred material and ancestral remains, as advised by First Nations cultural authorities	<ul style="list-style-type: none"> <li>• Companies that are <b>impacting sacred sites and have no evidence of engagement</b>, nor any awareness of cultural protocols about the site.</li> <li>• <b>Traditional Owners have no control/ownership of the process.</b></li> <li>• Companies that seek <b>no specialist First Nations advice</b> about repatriation of material.</li> </ul>
The company engages in First Nations-led remediation of Country affected by land-use activities and projects	<ul style="list-style-type: none"> <li>• Companies that are <b>not engaging with local First Nations communities</b> impacted by a particular project on how the site will be remediated.</li> <li>• Companies with <b>no transparency on their First Nations engagement processes</b> and no feed back into community decision making processes.</li> </ul>

<sup>97</sup> Terri Janke and Company, *First Peoples and Australian Museums and Galleries: A Report on the Engagement of Indigenous Australians in the Museums and Galleries Sector*, Written for the Australian Museums and Galleries Association, 2018 (Report, September 2018) 45 <[https://www.amaga-indigenous.org.au/\\_files/ugd/f76062\\_c3d1135f79aa49a0aab72ebc59f7c355.pdf](https://www.amaga-indigenous.org.au/_files/ugd/f76062_c3d1135f79aa49a0aab72ebc59f7c355.pdf)>

## Supporting First Nations prosperity

17. *The company enters into benefit sharing agreements with First Nations people for use of their knowledge, heritage, resources and assets.*
18. *The company supports First Nations economic advancement in relation to cultural heritage.*

### 5.1. What does prosperity mean through a First Nations heritage lens?

Prosperity means improving First Nations economic wellbeing by giving opportunities to participate in education, employment, and enterprise. The Business Council of Australia's Raising the Bar policy encourages Australian companies to work with First Nations communities and government to create jobs, First Nations businesses and the right conditions that can improve outcomes for First Nations peoples.<sup>98</sup>

Already many corporates have Reconciliation Action Plans with targets around employment and procurement.

### 5.2. Benefit sharing

First Nations people have the right to share in the benefits from any use of their culture or traditional knowledge, but especially for commercial use. When businesses are engaging with First Nations groups, such as in projects using cultural heritage for commercial purposes, a consideration should be made about how these groups and the rest of the community can have a share in the benefits of the project.

Businesses can enter into access and benefit-sharing agreements with First Nations land and knowledge owners. The Nagoya Protocol, which Australia is a signatory to, states that benefits can be monetary, in the form of up-front or milestone payments, royalties, licence fees when commercialising work, and salaries.<sup>99</sup>

However, the benefits don't always need to be monetary. Some non-monetary benefits that businesses may consider include giving First Nations groups access to research outcomes, giving employment or procurement opportunities, and providing copies of materials such as ownership or licencing of any copyright material produced. Ultimately, these benefits need to be negotiated with the individual or community sharing the cultural heritage.

### 5.3. Supporting First Nations businesses and entrepreneurship

Companies should support the growth of First Nations prosperity in the regions where the work has impact. Companies should recognise that First Nations people may be represented in remote areas. Opportunities for First Nations communities may be difficult to find where many First Nations communities are in remote communities where companies may interact. There is also a need to provide opportunities in urban areas.

Whilst the growth of the First Nations business sector has been strong in the past 10 years, many First Nations entrepreneurs lack access to capital and business mentors. Companies should support the development of First Nations entrepreneurial skills. There are a range of ways this can be accomplished including assisting with funding and loans, creating inclusive recruitment policies that are adapted to account for cultural differences,

providing First Nations employees with ongoing training and support, permitting flexible arrangements to allow them to meet family and community obligations, sufficiently remunerating them for their labour, engaging with local First Nations community organisations and integrating First Nations businesses in their supply chain. However, it is important to note that while approaches that enable businesses to be a part of the supply chain are good, companies need to address succession by enabling businesses to be sustainable after a mine closes for example. The aim should be to leave a positive business legacy so that First Nations affected communities are resilient and sustainable.<sup>100</sup>

### 5.4. Economic partnerships

Companies should also develop economic partnerships with First Nations communities whose lands and culture are significantly impacted by cultural heritage. Companies should consult and develop relationships so that they understand what First Nations communities and businesses want out of an economic partnership.

#### 5.4.1. Indigenous joint ventures

Companies should partner with First Nations businesses in a transparent and fair manner. Enabling procurement opportunities with First Nations business often includes the creation or use of Indigenous JVs.

A concern in the First Nations business sector is black cladding. This occurs when a non-First Nations organisation uses a First Nations organisation as a front or pass through. Black-clad JV arrangements often feature the bulk of the benefits going to the non-First Nations partner and disadvantage or detriment to the First Nations business, and/or do not represent a genuine demonstrated level of equitable partnership and benefit.<sup>101</sup>

Supply Nation is an organisation that works for First Nations advancement in business and industry. They have a robust process for verifying, monitoring, and auditing the First Nations bona fides of businesses.

Companies wishing to partner and work with First Nations people and businesses can seek legitimate organisations through Supply Nation.

#### 5.4.2. Procurement policies

Businesses have the choice about what to buy and where to buy their supplies from. Procurement policies and initiatives can help create jobs and opportunities for First Nations businesses and communities. Businesses can increase their spend with First Nations businesses across Australia by getting involved with organisations like Supply Nation, a leading national database of verified First Nations businesses, by seeking services through the Indigenous Chamber of Commerce in their state or territory, or by researching other First Nations business networks and forums.

<sup>98</sup> 'Raising the Bar to Give Indigenous Australians Greater Opportunities', *Business Council of Australia* (Media Release, 05 August 2021) <[https://www.bca.com.au/raising\\_the\\_bar\\_to\\_give\\_indigenous\\_australians\\_greater\\_opportunities](https://www.bca.com.au/raising_the_bar_to_give_indigenous_australians_greater_opportunities)>.

<sup>99</sup> United Nations Convention on Biological Diversity (UNCBD), *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (Report, 2011) <<https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>>.

<sup>100</sup> Department of Industry and Department of Foreign Affairs and Trade, *Working with Indigenous Communities: Leading Practice Sustainable Development Program for the Mining Industry* (Report, September 2016) 29 <<https://www.industry.gov.au/sites/default/files/2019-04/lpsdp-working-with-indigenous-communities-handbook-english.pdf>>.

<sup>101</sup> Supply Nation, 'Black cladding', *Frequently Asked Questions for Indigenous Suppliers* (Web Page) <<https://supplynation.org.au/about-us/black-cladding/>>.



## 5.5. First Nations natural resource management

First Nations people taking control of caring for Country is essential to any vision for the future.<sup>102</sup> It is crucial to strengthening First Nations people and culture. This can mean entering into collaborative relationships with Traditional Owners, in which the Traditional Owners take a leadership role in heritage maintenance contexts.

Businesses can assist in building employment opportunities for First Nations people by providing funding and support to cultural ranger programs that employ and train rangers to manage and care for Country. First Nations ranger programs can play a large role in managing land and sea Country to achieve large-scale outcomes, especially in Indigenous Protected Areas (IPAs).<sup>103</sup>

## 5.6. What businesses can do

What all companies can do:

PRINCIPLE	KEY ACTIONS
Benefit sharing with First Nations communities	<p>Work with First Nations businesses, not-for-profits and communities to achieve community aspirations, even where they are not directly connected to your business</p> <p>Sponsor or participate in local First Nations events and ceremonies</p>
Supporting First Nations economic advancement and 'closing the gap'	<p>Employ First Nations staff and provide them with the necessary support, training, and resources</p> <p>Provide mentorship and networking opportunities for First Nations employees</p> <p>Embed culture and First Nations ways of thinking, being and doing in business practices and operations</p> <p>Use community development approaches</p>
Economic support for First Nations businesses	<p>Become members of Supply Nation, connecting with Indigenous business organisations and forums, and committing to procurement opportunities for First Nations businesses</p> <p>Integrate First Nations businesses in supply chains and consider succession and long-term sustainability</p> <p>Engage in partnerships and joint ventures with First Nations organisations</p>
Self-determined First Nations entrepreneurship	<p>When partnering on projects or with First Nations businesses, harness existing community capacity and its leaders, and facilitate community ownership and control</p> <p>Implement good governance and establish trusting partnerships</p> <p>Support First Nations organisation to apply for grants and other business development opportunities via education and training, resourcing, secondments, or other measures</p>

<sup>102</sup> Victorian Aboriginal Heritage Council, *State of Victoria's Aboriginal Cultural Heritage Report 2016-2021* (Report, October 2021) 122 <<https://www.aboriginalheritagecouncil.vic.gov.au/sites/default/files/2022-09/VAHC-State-of-Victorias-Aboriginal-Cultural-Heritage-Report-2016-2021.pdf>>.

<sup>103</sup> Cresswell et al, *Australia State of the Environment: Overview* (Report, 2021) 143 <<https://soe.dcceew.gov.au/sites/default/files/2022-07/soe2021-overview.pdf>>; Social Ventures Australia Consulting, *Social Return on Investment – Consolidated report on Indigenous Protected Areas* (Report, 6 May 2021) <<https://www.niaa.gov.au/resource-centre/indigenous-affairs/social-return-investment-%E2%80%93-consolidated-report-indigenous-protected-areas>>.

## PLUS:

What any company working directly with First Nations partners, culture or knowledge can do:

PRINCIPLE	KEY ACTIONS
Benefit sharing with First Nations communities	<p>Offer First Nations groups compensation and due process in the case of commercial development of their contributed knowledge, ICIP, land or natural resources, together with culturally appropriate sustainable development opportunities</p> <p>Ensure fair and equitable sharing of benefits associated with project usage of natural resources and ICIP</p> <p>Explore options for how funds are given and shared, such as using trusts as seed funds for business development. E.g. through direct cash contributions, or towards community development</p> <p><b>Design and creative:</b> Making royalty payments for sales of products made using the contributed ICIP</p> <p><b>Knowledge and research:</b> Provide First Nations communities with access to research outcomes and materials, project reports and other useful information for the community to freely use for their own purposes (links to 3.4 Indigenous Data Sovereignty)</p>
Economic support for First Nations businesses	Supporting First Nations businesses at a local level, where the company is working near the location to heritage
Self-determined First Nations entrepreneurship	When partnering on projects or with First Nations businesses, facilitate community ownership and control

What companies with land, water or sea-based activities can do:

PRINCIPLE	KEY ACTIONS
Benefit sharing with First Nations communities	<p>Ensuring continued access to natural resources, identifying the equivalent replacement resources, or, as a last option, providing compensation and identifying alternative livelihoods if project development results in the loss of access to and the loss of natural resources independent of project land acquisition</p> <p>Providing First Nations communities with access, usage, and transit on land it is developing subject to overriding health, safety, and security considerations<sup>104</sup></p>
Supporting First Nations economic advancement and 'closing the gap'	Provide funding opportunities and initiatives to support the demand for, and growth in Indigenous Protected Areas, as well as the increasing value placed on traditional knowledge and engagement in biodiversity conservation, land management and research <sup>105</sup>
Self-determined First Nations entrepreneurship	Enabling ranger groups, or supporting First Nations organisations to employ and train rangers to manage Country <sup>106</sup>

<sup>104</sup> International Finance Corporation World Bank Group, 'Performance Standards on Environmental and Social Sustainability' (1 January 2012) 4 <[https://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards](https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards)>.

<sup>105</sup> Cresswell et al, *Australia State of the Environment: Overview* (Report, 2021) 190 <<https://soe.dcceew.gov.au/sites/default/files/2022-07/soe2021-overview.pdf>>.

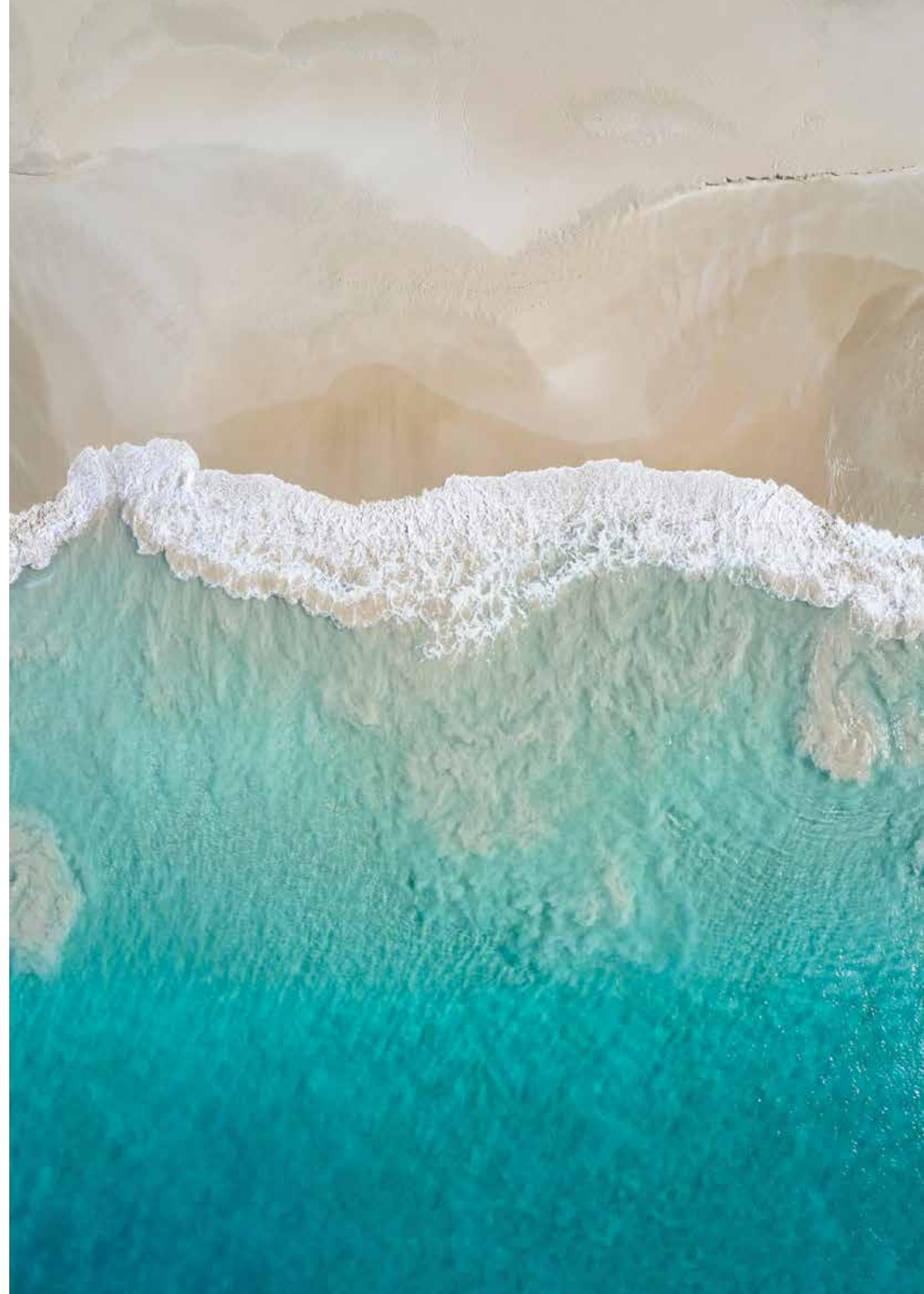
<sup>106</sup> Cresswell et al, *Australia State of the Environment: Overview* (Report, 2021) 190 <<https://soe.dcceew.gov.au/sites/default/files/2022-07/soe2021-overview.pdf>>.

## 5.7. What investors can do

PRINCIPLE	KEY DUE DILIGENCE QUESTIONS
The company enters into benefit sharing agreements with First Nations people for use of their knowledge, heritage, resources and assets	<ul style="list-style-type: none"> <li>Do you <b>compensate</b> First Nations people and organisations for their time, knowledge, and resources?</li> <li>Do your project agreements or contracts include <b>benefit sharing terms and an ICIP licence arrangement</b> (for knowledge and art)?</li> </ul>
The company supports First Nations economic advancement	<ul style="list-style-type: none"> <li>How many First Nations <b>businesses</b> do you support <b>to work on Country</b>?</li> <li>How do you undertake First Nations <b>community investment</b>? Is the approach to community investment co-designed with the community? (Note: this is different to procuring services or paying royalties).</li> <li>Do you run <b>awards, sponsorships, fellowships, internships</b>, etc that target First Nations communities?</li> <li>Which <b>programs</b> do you support that are geared toward First Nations community outcomes?</li> <li>Do your project agreements or contracts include <b>benefit sharing or social investment terms</b>?</li> </ul>

### Red flags

PRINCIPLE	RED FLAGS
The company enters into benefit sharing agreements with First Nations people for use of their knowledge, heritage, resources and assets	<ul style="list-style-type: none"> <li>Companies that <b>do not compensate</b> First Nations people for the time, knowledge, and resources.</li> <li>Companies <b>do not have benefit sharing agreements or licence arrangements</b> (for knowledge and art) with First Nations rights holders.</li> </ul>
The company supports First Nations economic advancement	<ul style="list-style-type: none"> <li>Companies that <b>do not engage First Nations businesses in cultural heritage management or to work on Country</b>.</li> <li>Companies that enter project agreements or contracts that <b>do not include benefit sharing terms</b> with First Nations rights holders.</li> </ul>





19. *The company is involved in industry-based solutions for working with First Nations cultural heritage.*

20. *The company promotes and supports First Nations-led education about cultural heritage in Australia and internationally.*

### 6.1. What is advocacy from a First Nations heritage lens?

Being an advocate means using your voice and influence to advance the recognition of heritage rights and taking action where possible towards this. Advocacy through a First Nations heritage lens means advocating for the recognition of holistic heritage rights, and acknowledging the connections that First Nations people have to physical places, land, seas, waters, and skies, knowledge, cultural practices, stories, songs, and art. These are all connected to the place and landscapes, that companies work on.

It is important to acknowledge that cultural heritage exists also in urban areas, as there is a tendency for companies to focus on remote areas.

Advocacy means supporting and facilitating forums for people to speak and debate issues. This links to truth telling (Section 3) and fostering an environment for shared knowledge and collective learning and healing.

Companies should strive to be allies and enable First Nations peoples to be the ones to lead solutions. This means speaking to the right First Nations advocacy bodies, such as the First Nations Heritage Protection Alliance.

Companies should encourage staff to be allies for First Nations people – speaking up about heritage rights and being an advocate for anti-racism.

### 6.2. Acknowledging First Nations rights

Companies that engage with First Nations peoples should advocate for First Nations rights and their recognition. Companies can begin by making a public policy commitment to respecting all internationally recognised human rights, including the human rights of First Nations Australians enshrined in the UNDRIP.

As the conversation matures, companies should live this commitment by engaging in the public policy and relevant legislative agenda as it pertains to the human rights of First Nations Australians. Leading Australian companies who are strong advocates of First Nations rights also support national First Nations rights movements including Closing the Gap, constitutional change, recognition of a First Nations Voice to Parliament and ultimately a Treaty.

The Reconciliation Action Plan (RAP) framework is a key way that companies have engaged in the past, and Reconciliation Australia has important documents that can assist businesses be advocates for change in First Nations rights.

### 6.3. Being an industry leader

Companies should use their position and privilege within the economy to advocate for building a more just and sustainable local economy that also allows First Nations Australians to share in economic advancement. They should then scale this advocacy to venture partners, suppliers, and customers through contractually binding service arrangements.

Setting an example by signing on to industry standards and guides (such as this Dhawura Ngilan Guide), celebrating culture at First Nations events, and lending a platform to First Nations voices on current issues are all ways by which companies can be industry leaders in cultural heritage management.

Companies engaging in First Nations-supported practices (i.e. remediation of sites used for land-based activities, engaging in biodiversity work, returning land to First Nations ownership or control, etc) set a positive example for other members of the industry for how reconciliation can be attained in Australia.

### 6.4. The role of boards and executives

A company's board has the responsibility of ensuring that the company respects the rights of First Nations peoples, and that there is compliance with this standard throughout all levels of operation. The board sets the tone and priorities that govern the company practice, and so, significant investment in board time should be allocated to understanding First Nations issues. This knowledge should be communicated with other members of the company. As the senior leadership of a company, there should be regular engagement with First Nations communities to ensure that First Nations peoples' concerns about cultural heritage are heard.<sup>107</sup>

### 6.5. Teaching about heritage

Embedding education about First Nations cultural heritage in the curriculum is an important step to support truth-telling and to ensure that the truths of colonisation is told from a First Nations perspective.<sup>108</sup> Such inclusion in the curriculum can influence broader community understanding and appreciation of First Nations history, culture and traditions that diverts from the Eurocentric view of history. It is important that businesses help to support First Nations involvement in these education programs for truth telling and self-determination. Any education or curriculum development about or in relation to First Nations heritage **must** be led by First Nations people.

### 6.6. Ensuring a global audience

An essential part of the Dhawura Ngilan Vision for leading practice management of First Nations cultural heritage involves ensuring that a global audience hears and appreciates these stories.<sup>109</sup> This includes amplifying First Nations stories and heritage values, for greater understanding and respect for these places and for people to respect culture and to guard it from harm.

<sup>107</sup> Australian Council of Superannuation Investors, *ACSI Policy on Company Engagement with First Nations People* (Report, December 2021), 3 <<https://acsi.org.au/wp-content/uploads/2021/12/ACSI-Policy-on-Company-Engagement-with-First-Nations-People.Dec21.pdf>>.

<sup>108</sup> Victorian Aboriginal Heritage Council, *State of Victoria's Aboriginal Cultural Heritage Report 2016-2021* (Report, October 2021) 151 <<https://www.aboriginalheritagecouncil.vic.gov.au/sites/default/files/2022-09/VAHC-State-of-Victorias-Aboriginal-Cultural-Heritage-Report-2016-2021.pdf>>.

<sup>109</sup> Heritage Chairs of Australia and New Zealand, *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* (Report, 16 September 2020) 19 <<https://www.dceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>.



## 6.7. What businesses can do

What all companies can do:

PRINCIPLE	KEY ACTIONS
Being an industry leader, and involvement with collective and industry-based solutions	Publicly align with best practice standards, such as the Dhawura Ngilan Business and Investor Guide
	Host events for companies within a sector or industry to develop solutions that can effectively promote or deliver the goals of the Dhawura Ngilan Principles
	Observe special dates commemorating and celebrating First Nations history and culture
	Lead solutions and approaches from an industry wide perspective by collaborating with other companies, and establishing acceptable norms in approaches for working with First Nations heritage
	Commission white papers and thought leadership, and films, documentary and discussion papers which are aimed at furthering industry understanding of the Dhawura Ngilan Principles
	Ensure that leading practice First Nations agreement making standards are established within relevant industries
	Develop monitoring and evaluation mechanisms across industry – support projects and collaborations that enable companies to better manage and reduce the accumulated impacts of a project or practice
Being an advocate for First Nations rights and heritage protection	Develop community of practices for shared knowledge in FPIC and other approaches to the Dhawura Ngilan Principles
	Establish grievance mechanisms, dispute resolution models, standards for damages and other practices that can assist better management of heritage
	Advocate for the recognition in law and policy of the UNDRIP and ensure company compliance with these laws and policies
	Support recognition of holistic living heritage, that incorporates cultural landscapes, species and connected traditions, knowledge, and people. e.g. supporting Caring for Country as an understood concept within industry, and recognising the rights of First Nations custodians to care for their land, seas and waters, and associated knowledge
Support First Nations-led education about cultural heritage	Support projects that raise awareness of the issues that First Nations people face and their call for rights in heritage, native title, closing the gap, environment and constitutional rights
	Ensure the Board and senior management exercise their influence to promote First Nations rights
	Support the wider community to understand the holistic nature of First Nations heritage. All Australians have a responsibility to respect and protect First Nations heritage
Support First Nations-led education about cultural heritage	Engage First Nations consultants to provide cultural sensitivity training and education to all members of the value chain
	Fund the development of education resources (i.e. textbooks, information packets, video lessons, etc.) by First Nations people to share culture and knowledge about cultural protection
	Attend First Nations spaces where there is discussion in the localities that the company has activities, and the national First Nations spaces where national First Nations rights are discussed, such as the Garma Festival

## PLUS:

What any company working directly with First Nations partners, culture or knowledge can do:

PRINCIPLE	KEY ACTIONS
Support First Nations-led education about cultural heritage	Support First Nations histories and knowledge to be accessible and engaging for school students and youth. Work with national and state curriculum agencies and schools to support this objective
	Assist to fill the gap between non-First Nations and First Nations understanding of heritage

## 6.8. What investors can do

PRINCIPLE	KEY DUE DILIGENCE QUESTIONS
Being an advocate for First Nations rights and heritage protection	<ul style="list-style-type: none"> <li>• <b>Engage in public discourse</b> and continually seek opportunities to drive positive change for cultural heritage.</li> <li>• Employ First Nations staff and consultants to <b>enable First Nation's decision making about investments</b>, and to provide a First Nations lens.</li> <li>• Work with First Nations organisations to <b>promote investment activities and approaches that are First Nations led</b>, so that First Nations voices are amplified.</li> <li>• When <b>appointing fund managers or portfolio managers</b>, consider: <ul style="list-style-type: none"> <li>o Do they <b>consider the impacts</b> of corporate practices <b>on First Nations communities, lands and waters and heritage</b> as part of their decision-making?</li> <li>o Have they <b>advanced their awareness of First Nations history, culture</b>, and the aspirations of First Nations people in the finance and investment sector?</li> <li>o Do they take <b>advice from First Nations people</b> in making decisions? Have they <b>employed First Nations people in decision making roles</b>?</li> <li>o What is their <b>investment approach</b>? Does it <b>align with the Dhawura Ngilan Principles</b>?</li> </ul> </li> <li>• Engage First Nations staff and consultants to <b>add a First Nations lens to investment monitoring</b>, including the development of evaluation criteria, and the review process.</li> <li>• <b>Embed the First Nations cultural heritage policy commitment into investment assessment frameworks</b> and governance and management systems.</li> <li>• <b>Develop an approach</b> for investment that takes First Nations cultural heritage protection mechanisms into account.</li> <li>• <b>Outline a process for disclosing information</b> which is clear, consistent, current, and comparable so that commitment and progress can be understood and measured.</li> </ul>
The company is involved in industry-based solutions for working with First Nations cultural heritage	<ul style="list-style-type: none"> <li>• Do you have a member organisation that has <b>advocated on behalf of members supporting legislative cultural heritage changes</b>? What was the position of the member organisations?</li> <li>• Is the member organisation's <b>advocacy in line with what the company states in their public policy position</b>?</li> </ul>
Being an advocate for First Nations rights and heritage protection	<ul style="list-style-type: none"> <li>• Do you <b>publicly support</b> First Nations led objectives and initiatives, such as Closing the Gap, the Uluru Statement from the Heart, etc. Can you provide evidence of this?</li> <li>• Do you <b>facilitate debate</b> and amplify the voices of First Nations people on significant issues? E.g., by sharing the work of First Nations thought leaders, supporting forums for discussion, hosting events and speakers' series, etc.</li> <li>• What <b>public policy position</b> has your company taken regarding key cultural heritage legislation changes relevant to where you are operating?</li> </ul>
The company promotes and supports First Nations-led education about cultural heritage in Australia and internationally	<ul style="list-style-type: none"> <li>• Is the company advocating for general education about importance and value of First Nations heritage?</li> <li>• Does the company provide cultural competency training to its employees? Is this training <b>First Nations developed and led</b>?</li> </ul>

## Red flags

PRINCIPLE	RED FLAGS
The company is involved in industry-based solutions for working with First Nations cultural heritage	<ul style="list-style-type: none"> <li>• Companies that <b>do not have an available position statement or public policy</b> on First Nations issues.</li> <li>• Companies that are part of <b>industry associations that lobby for reduced cultural heritage protections</b>.</li> </ul>
Being an advocate for First Nations rights and heritage protection	<ul style="list-style-type: none"> <li>• Companies that <b>do not publicly denounce public policy reforms that reduce cultural heritage protections</b>.</li> </ul>
The company promotes and supports First Nations-led education about cultural heritage in Australia and internationally	<ul style="list-style-type: none"> <li>• Companies that <b>do not engage First Nations communities or incorporate cultural protocols</b> in any educational content they are providing about cultural heritage in their operating context.</li> </ul>



**About the Dhawura Ngilan Business and Investor Initiative**

The Dhawura Ngilan Business and Investor Initiative is a First-Nations led project that brings together First Nations, business and investor communities to create a shared vision for strengthening Australia's Aboriginal and Torres Strait Islander heritage laws and standards for the private sector in line with international agreements and community expectations.

Dhawura Ngilan (Remembering Country) is a vision that embodies the long-held aspirations of Aboriginal and Torres Strait Islander people for their heritage.

Led by the First Nations Heritage Protection Alliance, and in partnership with Responsible Investment Association Australasia and the UN Global Compact Network Australia, the Initiative is working to provide practical guidance to businesses and investors on how to ensure that their actions and policies contribute to the protection of First Nations' cultural heritage in a way that upholds the right to self-determination and free, prior and informed consent.

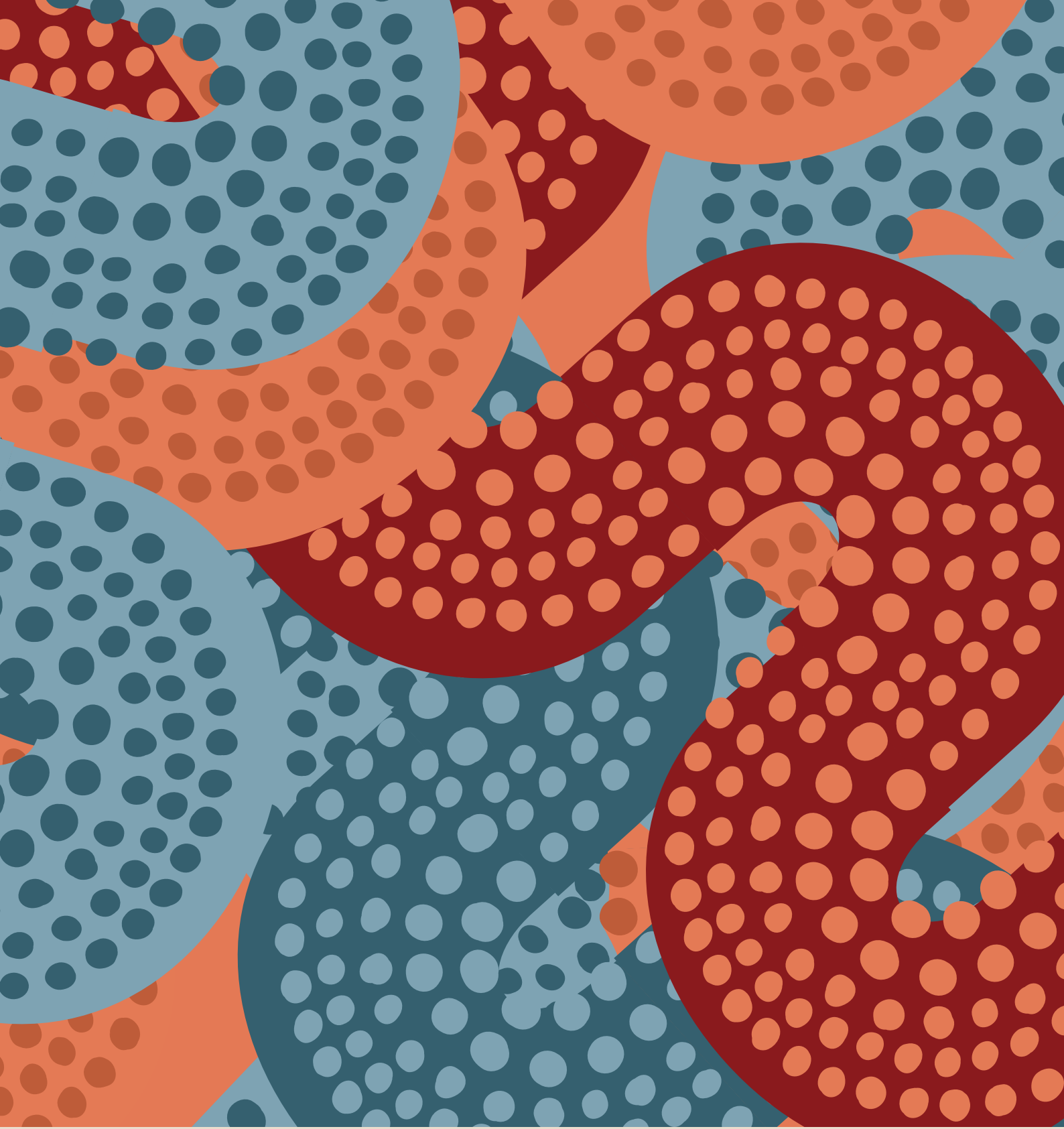
See the Initiative's website for more information:

<https://culturalheritage.org.au/dhawura-ngilan-business-investor-initiative-2023/>



**First Nations  
HERITAGE PROTECTION  
ALLIANCE**





# Dhawura Ngilan

BUSINESS & INVESTOR INITIATIVE