



INVESTOR TOOLKIT

An Investor Focus on Indigenous Peoples' Rights and Cultural Heritage Protection

An initiative of the Responsible Investment Association Australasia's member Human Rights Working Group and First Nations Peoples' Rights Working Group

2021

“The rights of Indigenous Peoples to self-determination and Free, Prior and Informed Consent in relation to the control of territories and natural resources, economic development and the practice of culture, are critical to achieving Indigenous Peoples’ autonomy, economic prosperity, cultural integrity and well-being as First Peoples of Country.”

Australian Sustainable Finance Initiative Roadmap (2020)

Tikanga principles need to be incorporated into a sustainable finance strategy. “In developing this strategy, it needs to be co-developed with iwi/Māori in order to begin to embed the principles and approaches from tikanga into the financial system. This also needs to be aligned with the principles of Te Tiriti o Waitangi.”

The Aoteaora Circle’s Sustainable Finance Forum Roadmap (2020)

ACKNOWLEDGEMENT OF COUNTRY

We acknowledge Aboriginal and Torres Strait Islander peoples as the Traditional Custodians and First Peoples of Australia and Māori as tangata whenua and Treaty of Waitangi partners in Aotearoa New Zealand.

We recognise their continuing connection to land, waters, species and culture. We pay our respects to Elders past, present and emerging. Our vision for reconciliation is a future where we are all united by our shared past, present, future and humanity.



Daen Sansbury-Smith is a Narungga and Trawoolwaway content producer, visual artist and founder of Adjadura Art (My peoples art in Narungga). Sansbury-Smith has produced countless art works over the past 15 years as a self exploratory process producing gifts to decorate family homes of reinterpreted culture stories. In 2020 Sansbury-Smith's debut solo Art Exhibition was a success despite Melbourne lockdowns, developing the 'Black Crow' Augmented Reality art series currently on tour at multiple galleries nationally. Sansbury-Smith original artworks utilise charcoals and ochre with his children, putting his cultural knowledge onto canvas, providing a safe space for them to watch and learn. Sansbury-Smith's art works are representations of Narungga and Palawa stories, art and culture. Sansbury-Smith maps Ancestral memory and connection to country, sharing stories of pre and post-contact Aboriginal history and culture. This mapping draws upon cultural design of huge importance to Sansbury-Smith.

FOREWORD

By the First Nations Heritage Protection Alliance

We live in a land occupied by the world’s oldest living cultures. First Nations cultures across Australia are as vibrant as they are ancient. It would be impossible to overstate the significance of the connection between people and place, between culture and the land on which we exist.

When Rio Tinto destroyed the 46,000-year-old Juukan Gorge cave site in May 2020 it struck a bitter blow at the heart of Aboriginal culture. Not only was an irreplaceable cultural site desecrated but it also served to highlight the near constant damage, disturbance and removal of cultural heritage that occurs almost routinely within Australia. Worst of all this destruction, likened by the UN to the Taliban’s demolition of the Bamiyam Buddhas, was entirely legal.

But out of this tragedy came a movement of people determined to ensure this kind of desecration doesn’t happen again. Aboriginal people came together to form the First Nations Heritage Protection Alliance to strive for industry and legislative reform.

What happened at Juukan also showed Aboriginal people that we are not alone. The broader community – including the finance and investment community – rallied behind us to hold Rio Tinto to account and help drive positive change.

This support is crucial, because unfortunately very little has changed since then and the flawed legislation that allowed the destruction of Juukan Gorge to happen is still in place today. Properly respecting and protecting First Nations cultural heritage cannot be left entirely to governments.

Investors have an extremely important role to play. Investors are the owners of the companies that build on, extract from and interact with land, cultural sites and the First Nations people who are custodians of country. Being the custodians of capital gives investors a great opportunity and a responsibility to ensure that they support responsible engagement with First Nations People. When companies fall short, investors have a role to play in holding them to account.

This toolkit will help investors to navigate the issues, to better understand the risks and to contribute to the protection of First Nations cultural heritage which is unique to this country and part of the common legacy of all Australians.

Kado Muir, Co-Chair

Anne Dennis, Co-Chair



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HERITAGE PROTECTION
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About this Investor Toolkit

This guide was prepared by the Responsible Investment Association Australasia's (RIAA) Human Rights Working Group (Corporate Engagement subgroup) and the First Nations Peoples' Rights Working Group, which is a collective of representatives from the Australian and Aotearoa New Zealand investment community.

Authors/Contributors

The following people contributed to this guide:

- Michelle Cameron – Refinitiv – Account Director and Sustainability lead – Pacific (Chair, Corporate engagement subgroup of Responsible Investment Association Australasia's Human Rights Working Group)
- Claire Heeps – HESTA – Senior Responsible Investment Adviser
- Sandra Silea – AustralianSuper – Senior Associate, ESG and Stewardship
- Danielle Welsh-Rose – abrdn – ESG Investment Director, Asia Pacific
- Rachel Tinkler – Milford Asset Management – Sustainable Investment Analyst
- Min Wah Voon – Responsible Investment Association Australasia – Program Manager
- Nicolette Boele – Responsible Investment Association Australasia – Executive, Policy and Standards
- Måns Carlsson – Ausbil – Head of ESG research (Chair, Responsible Investment Association Australasia's Human Rights Working Group)
- Abby Frank – Regnan – ESG Analyst
- Myrna Machuca-Sierra
- Nina Haysler – Point Advisory – Manager
- Alan Dayeh – Point Advisory – Managing Principal, NSW (Chair, Responsible Investment Association Australasia's First Nations Peoples' Rights Working Group)

Thanks to the following who provided valuable feedback:

- Andrew Niven – QIC – Indigenous Partnership Manager
- Staff of the Office of the Victorian Aboriginal Heritage Council
- Romy Faulkner – Australian Council of Superannuation Investors - Policy and Advocacy Analyst
- Christine Crispin and Mel Sutton

DISCLAIMER: The views expressed in this toolkit are those of the authors and not those of their organisations, nor that of RIAA. Investors, or any other party referring to, or using this toolkit in part or whole, should undertake their own research before commencing engagement with investee companies. All care has been taken in the preparation of this toolkit, but the contents of it cannot be relied upon.

Background

In May 2020, Rio Tinto destroyed significant cultural heritage at Juukan Gorge in the Pilbara in Western Australia. This tragic and avoidable incident put a spotlight on the cumulative failures at the company and legislative level to uphold the rights of Indigenous Peoples, as well as highlighting risks in the broader industry. It also showed the risks for companies and investors when companies have poor quality relationships with Indigenous partners and weak cultural heritage management processes.

In the case of Rio Tinto, we have witnessed the direct and indirect costs that accompany incidents when stakeholder relationships, in this case with Indigenous communities, are managed poorly by companies. As a result, the destruction of cultural heritage at Juukan Gorge has served as motivation for many investors to consider their understanding, analysis and engagement on the topic of company relationships with Indigenous communities. Despite this, many have expressed the difficulties still faced when trying to undertake this analysis and engagement.

While the catalyst for the creation of this toolkit was the destruction of significant cultural heritage by a specific company, the issues are systemic in nature and have been happening historically for hundreds of years. As such, it requires an informed response from investors to ensure long-term positive change.

Purpose

The purpose of this toolkit is multi-fold. It aims to:

- i) explain the importance of managing relationships with Indigenous stakeholders¹ and outline why and how this issue may impact investment from a long-term valuation perspective;
- ii) provide practical guidance to the investment community on appropriate engagement questions for use across multiple sectors, to inform investors' assessments of a company's management of cultural heritage and relationships with Indigenous partners more broadly. Ultimately these assessments may help guide investment decisions and/or stewardship activities;
- iii) assist investors in their integration activities through the development of a simple 'red-flag' guide. This summarises the key aspects investors can look for in disclosure and engagement to make an assessment of how well companies manage cultural heritage issues and relationships with Indigenous partners more broadly; and
- iv) magnify, respect, and support the rights of Indigenous Peoples by supporting investors to align their policies and practices to the UN Declaration on the Rights of Indigenous Peoples (Appendix 1). Magnifying, protecting, and upholding these rights will lead to strong stakeholder relationships which are a key factor in long-term sustainable value creation.

¹ Traditionally the term 'stakeholder' has been used within the investor context and is defined by the International Standard providing guidance on social responsibility (ISO26000) as an 'individual or group that has an interest in any decision or activity of an organisation'. For the purpose of this toolkit the term 'stakeholder' has been used and this includes Indigenous Peoples as 'Rights Holders' by being the original people of a land.

Scope

This toolkit is designed for investors and therefore considers issues through a financial lens. It seeks to help the investment community understand why Indigenous Peoples' rights relating to cultural heritage protection are investment issues, and appropriately engage with companies from any sector involved in any activity that could negatively impact the preservation of the rights of Indigenous Peoples, the protection of their cultural heritage and management of their Country. We acknowledge that because the majority of our collective experience is derived from engagement with the extractives sector, there is some bias in the toolkit towards extractive sector-specific issues. However, there are many parts of this toolkit that can be applied to any sector and we have included cross-sector examples in Appendix 3 that seek to highlight the numerous ways in which businesses fail to respect Indigenous Peoples' rights.

At the time of publication, the investment community is still learning how to appropriately and effectively put the voices and perspectives of Indigenous Peoples at the forefront of engagement with companies on the issue of Indigenous rights relating to cultural and heritage protection. As it does so, this toolkit will be updated and complemented by other guidance documents for the investment and private sector. This toolkit is part of an emerging body of work that is developing and will continue to strengthen investors' capacity in this area over time.²

We recognise that one size does not fit all for communities and companies alike. This toolkit is not intended to outline all the various violations that Indigenous communities face or have faced, nor is it in scope to improve or advise on financial decisions or returns. It is also acknowledged that the focus for the toolkit has been primarily on Indigenous Peoples in Australasia, however it could also be applied in a global or other regional context.

Structure of the toolkit

Investor context – this section explains how and why this topic is relevant to investors. For investors who are beginning to consider whether this topic might be relevant for them, this section will help contextualise and clarify the long-term valuation impacts of poor management of cultural heritage and relationships with Indigenous communities more broadly.

What to look for – this section highlights signals in disclosure or engagement that help indicate how well a company works with Indigenous communities.

Engaging more deeply – this section dives deeper into specific sub-topics related to the theme and provides guidance on more detailed points of engagement. This section is designed for investors with a specific interest in a sub-topic, those with sufficient resources to engage directly or those looking to provide greater direction to engage partners on the topic.

² The [Dhawura Ngilan Business and Investor Initiative](#) was launched in October 2021. Led by the First Nations Heritage Protection Alliance in partnership with the Global Compact Network Australia and RIAA, this Initiative sees protecting cultural heritage as the responsibility of all Australians, including the finance and business sectors. The Initiative is focused on strengthening Australia's First People's heritage laws and standards for the private sector to uphold the human rights of First Peoples. The Initiative will translate *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* for the private sector. The Australian Council of Superannuation Investors is also developing a policy statement that establishes the standard that investors expect of companies in their engagement with First Peoples.

Part 1:

Investor context

Investor context

Companies typically have many internal and external stakeholders: communities, suppliers, customers, employees and governments just to name a few. The importance of respectful stakeholder management and the link to value cannot be understated.

In an age where shareholder primacy is making way for stakeholder primacy, how companies engage, treat, and grow with stakeholders is a harbinger of their long-term sustainability and success. Indigenous rights relating to cultural heritage protection are acknowledged to be predominantly, and most urgently, human rights issues impacting either positively or negatively on the community. The voices of these 'rights-holders' must be valued and heard. This toolkit focuses on the broader investment risk associated with a company's failure to respect Indigenous rights and protect cultural heritage. It also aims to showcase and encourage positive examples of engagement and disclosure.

The relevance of this toolkit stems from the importance of stakeholder management in general but takes a specific look at the approach companies take in their management of relationships with the Indigenous community stakeholders whose countries they operate on or impact. Indigenous Peoples have special rights and relationships with the land which justifies a specific focus. Companies' relationships with the Indigenous Peoples and Traditional Owners of the lands on which they operate are amongst the most important and valuable they have. This should be reflected in the senior accountability assigned to the management of those relationships and their commitment to cultural respect.

Recent events and exposure arising from the extent, nature or lack of engagements have highlighted the power and/or resource imbalance between companies and Indigenous communities. There are minimal legal ramifications for companies who develop on or destroy ancestral land for a variety of purposes, not exclusive to mining. Traditional Owners are consulted sporadically, if at all, let alone engaged to the standard required of Free, Prior and Informed Consent (FPIC) (for more information see Appendix 2)

Findings from the Joint Parliamentary Inquiry interim report, *Never Again*, highlight the inability of the legislative environment to protect cultural heritage and, more broadly, the interests of Traditional Owners. The report includes criticism of the *Western Australian Aboriginal Heritage Act 1972*, the *Environment Protection and Biodiversity Conservation Act 1999*, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, and Native Title itself.³ Significantly, the destruction of Juukan Gorge occurred in accordance with the law in Australia and illustrates companies' convenient reliance on an inadequate legislative environment, despite frequent claims that company standards are guided by international principles and resolutions.

When a relationship with Indigenous Peoples is managed poorly and/or cultural heritage management is weak, it can lead to long-term financial risks for companies which could relate to one or a combination of the direct or indirect costs. To be clear, these long-term financial risks manifest because actions, such as the destruction of tangible or intangible heritage, have significant social costs. Various litigation, reputational and operational risks and how they lead to direct or indirect costs and impacts to companies are outlined below:

³ [A Way Forward: Final Report Into the destruction of Indigenous heritage sites at Juukan Gorge](#) from the Joint Standing Committee on Northern Australia was tabled in Commonwealth Parliament on 18 October, 2021. As this toolkit was launched on 22 October, 2021, it does not incorporate the inquiry's final recommendations. We note it builds upon the interim report recommendations with a set of extensive recommendations, including a call to the Commonwealth to legislate a new framework for Indigenous Cultural Heritage legislation co-designed with Aboriginal and Torres Strait Islander People.

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.
- Risks 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 Indigenous communities which can lead to project or permitting delays.
- Ripple effects 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 etc.

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.

Part 2:

What to look for

What to look for

As an investor, when assessing potential red flags, it is important to distinguish and separately consider the importance and impact of good practices in both disclosure and engagement. Disclosure practices refer to norms-based and international reporting standards, methodologies, and approaches. Engagement practices refer to how a company approaches engagement with communities, across all levels of that company, and evidences their ability to listen and appropriately respond to any concerns raised. Considerations also need to be made for the company size and profile, as current and historic benchmarking practices have, to date, not exposed areas that have since been discovered are of concern. We encourage investors to think about asking questions that try to go beyond policies and processes but acknowledge that the distance between shareholders and on-the-ground practice can make this difficult.

Red flags in disclosure practices

- Lack of commitment to the principles of Free, Prior and Informed Consent (FPIC).
- Disclosure that seeks to alter standards to fit a lower bar such as defining FPIC as ‘free, prior and informed consultation’.
- Lack of reference to international standards such as UN Declaration of the Rights of Indigenous Peoples (UNDRIP).
- Lack of engagement with relevant industry standards (e.g in the case of extractive companies, if the company is a member of the International Council on Mining and Metals (ICMM) and choosing to not sign onto the ICMM Principles).
- Lack of transparency in disclosure of company policies relating to stakeholder engagement, indigenous engagement or cultural and heritage protection.
- Disclosure which focuses solely on number of jobs for Indigenous Peoples and Indigenous procurement, or funds spent in procurement in the absence of disclosure regarding the quality and depth of relationships.
- Lack of reference to significant sector incidents and potential legislative/regulatory attention (i.e. parliamentary inquiries, penalties imposed etc.).
- Lack of transparency or acknowledgement of the Indigenous Peoples whom their business impacts and if there are agreements in place.
- 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.

Red flags in engagement practices

- Responsibility for relationships with Indigenous communities in an organisation should not just be on the corporate side but also on the operational side.
- Board or management cannot identify the last time they met face-to-face with Indigenous communities/have no upcoming plans to do so.
- Board is not in the habit of discussing the status of relationships and there is no standing agenda item related to stakeholders. It is accepted that the responsibility of engagements and risk

identification may sit within a different organisational team/hierarchy e.g. the sustainability or community team however, ultimate accountability and oversight should be at board level.

- Where significant issues have occurred within the sector in which the company operates, the board has not undertaken a review of their own internal practices and/or has not consulted the community as part of this review and/or cannot articulate changes that were made as part of a review.
- Lack of receptiveness to shareholder concerns i.e. special resolutions on Indigenous relations.
- Where royalty payments apply or could apply, a philosophical position that royalties are a 'hand out', a lack of conscientiousness in paying royalties, and/or a lack of understanding of the purpose/importance of royalties
- Any signals that paternalistic approaches to benefit sharing arrangements are entrenched. For instance, the company uses language which indicates it will not take a different perspective on benefit sharing despite industry best practices and investor concerns.
- Language usage which indicates lack of respect, understanding or reverence for Indigenous Peoples and their tangible and intangible heritage (for a brief overview of the difference see Section V).
- Purely legalistic approach taken, e.g. "we are complying with the current legislation, such as the Aboriginal Heritage Act in WA" without any further consideration over and beyond that.
- Unnecessary hiding behind confidentiality clauses.

What does good disclosure and engagement practice look like? Traits of leaders vs. laggards

Relationship cultivation with Indigenous communities is multidimensional. Defining what 'good' looks like can be difficult because communities each have different priorities and are looking for different things from their relationships with companies.

Consultation with representative and inclusive Traditional Owner groups is essential in ensuring that collective cultural rights are respected. Consistent with UNDRIP Article 32, companies should recognise the right for Indigenous Peoples to act through their own representative organisations and should have a transparent process to ensure that they identify the legitimate representative organisation. This process should also outline what companies do in instances where a representative body is not formally recognised or does not exist.

As such, what 'good' looks like in a company is best grounded in principles which can be applied no matter the diversity of priorities:

- Acknowledgement that 'one size doesn't fit all', finding ways to legitimately consider and build in the priorities of host communities.
- Disclosure which reflects the voice of Indigenous communities.
- Development of governance practices which allow the board to reconcile that what they are told is happening on the ground, is actually happening on the ground. This could include evidence of board site visits, board receipt of feedback surveys, external independent advisory visits, human rights impact assessments or any form of 'unfiltered' dialogue from Indigenous communities and/or company employees who are involved in or are witness to engagements on the ground.
- Signals that the company has respect for stakeholders and sees Indigenous Peoples as partners rather than a step or obstacle to get past on the way to approvals.

- Acknowledgement and evidence of a desire to mitigate the power imbalance that can exist between companies and Indigenous communities.
- Legitimate listening to community priorities, and a willingness to work together to recognise them.
- An organisational structure and embedded skillset which provide the company with a strong foundation to understand cultural differences and nuances.
- Internal standards, or commitments to international/industry standards, in relation to Indigenous rights relating to cultural heritage which are aligned with the lobbying activities that they or their industry bodies undertake in relation to cultural heritage legislation.
- Assurance that Indigenous Peoples have a final say before any action on previously obtained approvals go ahead. For example, this should include an acknowledgement of cultural heritage approvals, and the timing of section 18 approvals if appropriate.
- Commitments to have representation by Indigenous Peoples in key management or board positions or at the very least include alternate opportunities for significant Indigenous input at management level.
- An established (Reconciliation Action Plan) RAP in place that is effectively governed, monitored and assessed.
- An 'Indigenous Partnership Manager' (or similar) role in place or evidence of an intention to resource this.
- Evidence of incorporating recommendations from inquiries about improved practice. For example, following the Parliamentary Inquiry into the Juukan Gorge incident, the Inquiry recommended a stay on *'current Section 18 permissions until they are properly reviewed to ensure that Free, Prior and Informed Consent has been obtained from Traditional Owners and is current'*. Companies that have incorporated this recommendation into their processes suggest evidence of good practice.

Part 3:

Deeper Engagement

Deeper Engagement

The suggested engagement areas below should not be treated as fulsome but are generally key areas identified that can help investors make informed assessments about a company's style and approach to working with Indigenous communities. We recognise that the Indigenous communities with whom companies are working are diverse in their cultures, histories and aspirations. As such, the suggested engagement areas are principles-based and are not designed to be prescriptive about outcomes, to hold space for these differences.

Some of these points below can be raised at management/board level, while some of the detailed questions are best suited for sustainability and/or procurement professionals in the company due to their detailed nature. The questions serve as a guide only and significant discussion around the key points based on the described rationale is encouraged.

Suggested company engagement areas

I. Policy commitments

There are a variety of international policy standards in existence, some that are tailored for specific sectors. A company should state the international standards against which they hold their international operations. These standards should be based on a commitment to uphold the rights articulated in the UN Declaration of the Rights of Indigenous Peoples (UNDRIP) (Appendix 1). "The UNDRIP is widely understood by the world's Indigenous Peoples as articulating the minimum standards for the survival, dignity, security and well-being of Indigenous Peoples worldwide. Acceptance of the UNDRIP obligations is increasingly a requirement of the processes of many multi-national agencies and organisations. The International Finance Corporation, the Equator Principles, the International Council of Mines and Metals and the UN Guiding Principles on Business and Human Rights are merely some examples of this general acceptance." (Direct quote from *Dhawura Ngilan*).

The International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (ILO 169) is the most binding international convention concerning Indigenous Peoples. At the time of writing, only 24 countries have ratified ILO 169. Australia has not signed, nor ratified ILO 169. If a state chooses to ratify and 'become party' to a convention, that country is obliged to ensure its domestic legislation complies with the conventions provisions. Therefore, while doing country due diligence, investors could check whether the country has ratified the ILO 169 convention. When checking company policies, best practice policies also reference ILO 169.

While commitment to a specific standard does not indicate the extent to which a company adheres to that standard, it is an important first step for a company to demonstrate awareness and acknowledgement of the importance of human rights and the unique rights of Indigenous communities.

Topic related questions:

- To what extent are company internal policies and standards informed by relevant international standards and best practice?
- How does the board gain comfort that management decisions, and decisions throughout the organisation are consistent with these standards?
- Where does the company see any weaknesses in relation to these standards or opportunity for evolution in their practices?

II. Governance oversight and organisational team structure

Understanding how an organisation is structured to engage with Indigenous partners and how oversight of this function is managed is crucial. From an organisational structure perspective, there are several factors to consider:

1. The position of the team with primary responsibility for engaging with Indigenous communities within the organisation. This function should be considered an operational function, and this should be reflected in the organisational structure.
2. The size of the team relative to operations and the skillset of the team – investors should look for evidence that the company has relevant anthropological and archaeological skills and that these skills are employed in-house.
3. Company oversight of this function and where responsibility for the function sits at the executive and board/committee level. There should be a clear line of communication and responsibility throughout the organisation.
4. Whether the board is sufficiently equipped and educated to effectively oversee Indigenous engagement issues.
5. Whether there are any short or long-term incentives that either detract from or align or reward the successful implementation of Indigenous community endorsed policy commitments.

Topic related questions:

- If there is an issue identified at any level, how would this be raised through the organisation?
- How does the company manage and prioritise cultural heritage, safety and awareness?
- Are there appropriately resourced internal teams in place who have the required deep subject matter expertise and awareness of Indigenous rights and cultural heritage laws and practices to identify and act on identified risks?
- If they are appropriately resourced, who do those resources report to? If it is operational teams experienced with navigating business decisions, then this is preferable to a marketing/PR reporting line with no operational influence or authority.
- Can the board articulate how the views and perspectives of Indigenous communities are filtered to them?

III. Consultation, engagement and relationship with Traditional Owners/social performance

In addition to the governance approach to engagement with Indigenous stakeholders, it is important to form a view of the robustness of consultation and engagement in practice. There are a few areas that can inform this view. The first area is establishing the appropriate party to engage with. This is largely guided by the Indigenous communities and their acknowledgement of an inclusive and representative organisation as being able to discharge the community's rights and responsibilities with respect to cultural heritage management. It is only with this consent and recognition that appropriate engagement and consultation can occur.

Consultation and engagement should occur in a timely and consistent manner. This should include a thorough analysis ensuring Free, Prior and Informed Consent has been obtained. From the beginning of any proposal or project that could have cultural heritage impacts, the relevant representative organisation or community must be consulted. Beyond just early consultation, consultation should be ongoing throughout the company's use of that Country. This should be performed in an open, consistent, and active manner to assure that all steps are taken with due regard to Indigenous Peoples' views on the broad and continued use of Country and to help them manage continued cultural connection to this Country.

The requirements of Indigenous Peoples should be paramount in decision making about Country, ensuring that cultural connectivity to Country is maintained through both practices and site management. In addition, the community should be financially supported to do any work relating to managing land use agreements.

Topic related questions:

- How has the board/management established who the appropriate representative organisations are with regards to engagement on Indigenous cultural heritage?
- How does the board receive information about the perspectives of Indigenous Peoples and their representatives regarding the social performance of the company?
- Have any representatives of or members of the board met with Indigenous communities in the last five years? When was the last time? Has a request ever been made by communities themselves and been rejected?
- If relevant, where do decisions regarding Indigenous cultural heritage management sit in the approval process of a development proposal and project. This includes all stages such as exploration, development, construction, extraction (if appropriate), disposal, reclamation (note this is not an exhaustive list of stages)
- If relevant, what is the benefit sharing approach that the company takes with Indigenous communities – is there a royalty basis or is it more about support for local community on projects or employment?
- How does the company take the communities' preferences into account in determining the type and specifics of benefits?
- Who leads the company's engagement/relationships with Indigenous communities? Is it someone with specialist skills and knowledge of community and Indigenous engagement?
- What grievance mechanisms are in place for community members to raise concerns? How are grievances handled? How effective (i.e. legitimate, accessible, predictable, equitable, transparent, rights-compatible), is this mechanism? It is expected that mechanisms go beyond a third party grievance mechanism. See appendix 1 for UNDP guidance on grievance mechanisms.

IV. Agreements and agreement making

Agreements should be made in an environment of equity. There must be due regard paid to the ability of the inclusive and representative organisation to negotiate on behalf of the Indigenous communities which it represents, insofar as there is a recognition that English may not be the first language and all efforts will be made to ensure that any negotiation is fully understood before signed. It is expected that the negotiating party would ensure equal negotiation occurs. These remedies can include due compensation for appropriate legal

representation for the representative organisation and constructing agreements that do not unduly inhibit Indigenous Peoples or their representative organisations or from speaking about their experience.

It should also be acknowledged that agreements are not stagnant. Whilst an agreement is in place, there is a possibility that community expectations will evolve from the time when the agreement was signed off. The legal context in which agreements are made creates and reinforces the structural inequalities that exist in agreement negotiations. It is important that through consistent consultation that management and boards remain alert to evolving community expectations and therefore, the appropriateness of the agreements in place. Failure to do so may result in disputes arising with Indigenous Peoples. This could include an awareness of the importance of establishing that Free, Prior and Informed Consent has been applied throughout the agreement making process.

Topic related questions:

- Do you have Indigenous Land Use Agreements (ILUAs) in place with Indigenous communities? If yes:
 - Does the board or management periodically review these agreements, and how do they ensure the agreements continue to meet community expectations?
 - Does the company have confidentiality clauses in ILUAs which prevent Indigenous Peoples and/or their representative organisations from speaking publicly about issues relating to the agreement or destruction of cultural heritage? If so, why do you see these clauses as important?
- Have Indigenous Peoples lodged a dispute notice in the last three years regarding adherence to the agreement?
 - If so, what was the nature of the engagement prior to the dispute being lodged?
 - Since lodgement, how has the approach changed with regards to engagement with Indigenous Peoples and/or their representative organisations?

V. Cultural heritage management

Much of the conversation around cultural heritage focuses on the tangible (artefacts, sacred sites, carvings, cave drawings etc.). But another important element to cultural heritage is intangible heritage. From a spiritual perspective, sites can have value far beyond the physical features on them. It is expected that companies are engaging with Indigenous Peoples on both the tangible and intangible elements of cultural heritage, not just developing third party archaeological/anthropological cultural overlays, in order to create a more robust view of the overall heritage value of the site in question and manage it appropriately.

Topic related questions:

- Does the company understand what intangible heritage is?
- Does the company acknowledge the importance of intangible heritage?
- Does the company demonstrate how consideration of intangible heritage has influenced development proposals and engagements?
- Do agreements include a schedule of the most important cultural sites nominated by Traditional Owners which must be protected? Why/why not? What opportunities are available to alter these schedules?

- Has the mapping of these cultural sites been undertaken by members of the Indigenous community in conjunction with an archaeologist and anthropologist?

VI. Cultural heritage policy advocacy

Cultural heritage policy advocacy is key to elevating practices across industry. Many companies pride themselves on standards that aim to guide practices ‘over and above what is required by the law’, however when these standards are not upheld, companies are able to rely on a poor legislative environment. Furthermore, committing to higher standards does little to raise the bar for other companies, in particular private companies where disclosure is limited, and public shareholder engagement and investor influence is not possible. It is expected that where companies commit to high standards above what is required by law, like the UNDRIP articles, that they also seek to advocate for change in the policy space more generally, or in the very least do not actively or indirectly promote policy counter to internal standards, for example via industry associations.

Topic related questions:


- Is there evidence of the company’s awareness and position regarding Indigenous heritage legislation in Australia/New Zealand?
- Is the company aware of any misalignment between its own standards and its industry associations’ practices or policies?
- Is the company sharing its best practice examples with the sector and community, and is it transparent in its failures to influence policy and set benchmarks?

Informed stakeholder viewpoint

A fundamental challenge for investors is how to appropriately and effectively obtain an informed stakeholder viewpoint – in this case, of Indigenous communities and their representative organisations. *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* explains the context for ‘representative organisations’ within the UNDRIP:

“The key to UNDRIP is the principle of self-determination. In the context of Indigenous cultural heritage, this principle requires that the affected Indigenous Community itself should be the ultimate arbiter of the management of the Indigenous cultural heritage aspects of any proposal that will affect that heritage. Application of the UNDRIP is, in a practical sense, upon the ability of the affected Indigenous Peoples to act collectively and independently. Thus, in the crucial UNDRIP Article 32, reference is made to Indigenous Peoples acting through ‘their own representative organisations’...It is for the Indigenous community to decide who represents them, consistent with FPIC.”

Challenges for investors include properly identifying representative organisations; investors having the requisite skills and capacity to appropriately engage representative organisations; and, where appropriate, engaging suitable Indigenous-led intermediaries who understand the context of affected communities and have community relationships. Investors also need to be aware of power imbalances between representative organisations, companies and investors. Another key challenge is Indigenous communities, and their representative organisations may not have the resources (time, money, technical expertise) to effectively



engage with investors and other intermediaries. Engaging with investors can impose a significant burden on Indigenous communities so it is essential that any consultation provides financial or other developmental/capacity building support.

The investment community is now working with First Nations-led organisations in Australia, like the First Nations Heritage Protection Alliance, to find solutions to these challenges. Further, the Australian Sustainable Finance Initiative (ASFI) Roadmap's recommendation 6 provides: "Australia's financial system participants establish, through ASFI, a First Peoples Financial Services Office. This Office would be led by an Aboriginal or Torres Strait Islander person..." Its functions would include "building genuine partnerships" and "demonstrating respect for the rights of Indigenous Peoples in the due diligence processes by investors". This Office will help build the capacity of the investor sector to obtain an informed stake holder viewpoint.

Although it is long overdue, the conversation between the investment sector and First Nations representative organisations is, in many ways, just beginning. Investors are encouraged to tap into networks like RIAA, which is helping facilitate these conversations and capacity-building for the sector. In the meantime, the aforementioned *Dhawura Ngilan* suggests several ways to identify the appropriate representative organisation that can be used by investors.

Another promising initiative is the recently launched Mining Company Scorecard from the Wintawari Guruma Aboriginal Corporation (WGAC) (see Annex). The Mining Company Scorecard introduces greater transparency and accountability to the actions of mining companies and will assist them in their efforts to restore community confidence and trust. WGAC will assess mining companies on the following five areas – Heritage Surveys, Regulatory Compliance, Caring for the Environment, Relationships with Native Title Holders and Environmental Social and Governance (ESG) Reporting. WGAC will publish the results and provide feedback to the mining companies recognising areas of excellence and identifying areas for improvement. The initiative seeks to "engage with mining companies and the investment community in a positive proactive manner, providing a valuable feedback mechanism that will allow miners to ensure that they are meeting community expectations."

Appendix 1: Resources for further reading

1. United Nations Declaration on the Rights of Indigenous Peoples – https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf
2. Australian Business Guide to implementing the UNDRIP – 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
3. Heritage Chairs of Australia and New Zealand 2020, Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia, Canberra, September. CC BY 4.0 - <https://www.environment.gov.au/system/files/resources/8582db94-6daa-4097-b77e-079a797ef67d/files/dhawura-ngilan-vision-atsi-heritage.pdf>
4. IFC Performance schedule 7 – https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/ps7
5. ILO Convention 169 - https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169
6. Equator Principles – <https://equator-principles.com/>
7. Coalition of peaks – 16 new targets in 2020 – <https://coalitionofpeaks.org.au/new-national-agreement-on-closing-the-gap/targets/>
8. International Council on Mining and Metals (ICMM – Indigenous Peoples and mining - <https://www.icmm.com/en-gb/about-us/member-requirements/position-statements/indigenous-peoples>
9. Never Again – Joint Standing Committee on Northern Australia Interim Report – https://aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/CavesatluukanGorge/Interim_Report
10. A Way Forward: Final Report Into the destruction of Indigenous heritage sites at Juukan Gorge – Joint Standing Committee on Northern Australia – https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/CavesatJuukanGorge/Report
11. Indigenous Land Use Agreements – <http://www.nntt.gov.au/ILUAs/Pages/default.aspx>
12. UNDP guidance on Grievance mechanisms – [UNDP SES Supplemental Guidance Grievance Redress Mechanisms.pdf](#)

Appendix 2: Explanatory notes

Indigenous Land Use Agreements

An Indigenous Land Use Agreement (ILUA) is ‘a voluntary agreement between a native title group and others about the use of land and waters’ and ‘allows people to negotiate flexible, pragmatic agreements to suit their particular circumstances’. Importantly, an ILUA can be established where native title has not yet been established or where native title has not been claimed over an area. ILUAs can cover a broad range of topics including cultural heritage, benefit sharing arrangements including cash or other economic opportunities like employment, and reaching agreements on future development plans or access to an area.⁴

Section 18s

Under Section 18 (s18) of the WA Aboriginal Heritage Act 1972, land users who conclude that impact prohibited under Section 17 (s17) – excavating, destroying, damaging, concealing or in any way altering an Aboriginal site (as defined in s5) – is unavoidable, apply to the Minister for consent to bypass the protections provided in s17. Notice of application must be provided to the Aboriginal Cultural Material Committee (ACMC) who meet once a month and provide recommendations to the Minister, who then makes a final decision on whether or not the applicant may receive immunity for actions that would have otherwise been considered criminal acts under s17.

Decisions about granting s18s rest primarily with the ACMC and the Minister, and transparency on the decision-making processes is lacking. Significantly, these processes do not require, and therefore decisions can be made without, the voice of traditional owner or Indigenous communities that would be impacted by the heritage destruction in question. The WA Cultural Heritage Act 1972, and in particular s18, is viewed as outdated, and acts to perpetuate the power imbalances that exist for Indigenous Australians.

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and Indigenous cultural heritage protection

The application of UNDRIP to Indigenous cultural heritage protection (ICH) is well articulated by *Dhawura Ngilan*, which provides:⁵

The UNDRIP is widely understood by the world’s Indigenous Peoples as articulating the minimum standards for the survival, dignity, security and well-being of Indigenous Peoples worldwide. Acceptance of the UNDRIP obligations is increasingly a requirement of the processes of many multi-national agencies and organisations. The International Finance Corporation, the Equator Principles, the International Council of Mines and Metals and the UN Guiding Principles on Business and Human Rights are merely some examples of this general acceptance.

A number of the provisions of UNDRIP directly address issues associated with the enjoyment, management and protection of ICH. Articles 11, 12, 13, 18, 19 and 31 are examples of this. A number of other provisions of UNDRIP indirectly impact upon ICH. Provisions of UNDRIP that recognise the obligation to ensure the Free, Prior and Informed Consent of affected Indigenous Peoples before the approval of any project that affects Indigenous Peoples’ lands or the resources therein (particularly Article 32) are an example of this as is Article 40 dealing with dispute resolution.

⁴ National Native Title Tribunal, <http://www.nntt.gov.au/ILUAs/Pages/default.aspx>

⁵ *Dhawura Ngilan*, p.32, <https://www.environment.gov.au/system/files/resources/8582db94-6daa-4097-b77e-079a797ef67d/files/dhawura-ngilan-vision-atsi-heritage.pdf>

Free, Prior and Informed Consent

The UNDRIP provides guidance on how to ensure Free, Prior and Informed Consent (FPIC):⁶

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

FPIC is a specific right that pertains to Indigenous Peoples and is recognised in the UNDRIP. It allows them to give or withhold consent to a project that may affect them or their territories. Once they have given their consent, they can withdraw it at any stage. Furthermore, FPIC enables them to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated.

⁶ UN Department of Economic and Social Affairs, *Free Prior and Informed Consent – An Indigenous Peoples' right and a good practice for local communities*, <https://www.un.org/development/desa/indigenouspeoples/publications/2016/10/free-prior-and-informed-consent-an-indigenous-peoples-right-and-a-good-practice-for-local-communities-fao/>

Appendix 3: Cross sector case studies

The intent with this toolkit is that it be a valuable resource across multiple sectors and geographies, however it is recognised by the authors, that it has a natural focus on the mining sector in Australia, due to the catalyst event of Juukan Gorge. There are however many examples across multiple sectors, putting their business aspirations ahead of the Indigenous communities' welfare and wishes and showing little regard for the significance of First Nations land, communities or culture. Some examples of these are as follows (note whilst these are actual examples, company details/specifics have been removed):

- **Marketing/branding** – A non-Indigenous owned company uses Indigenous motifs designed by a non-indigenous person on its products. The Indigenous community states that this is culturally appropriating their cultural heritage.
- **Water** – An Indigenous mountain community in Canada, already struggling with drought, has water bottling companies enter their small mountain communities and tap into supplies, resulting in water contamination and severe environmental degradation to their sacred territories. Successful legal action is launched against the original company, however another water bottling business then takes its place and begins similar operations.
- **Beauty sector** – A beauty company puts a patent on using an Indigenous plant in beauty and cosmetic products that has been used by Indigenous communities for thousands of years. The beauty company then actively pursues legal action against any Indigenous-owned company using this ingredient in products. This is also known as 'bioprospecting- "The Indigenous communities from which these products and knowledge are obtained receive little or no recognition for their contribution, and generally do not share equitably in benefits resulting from uses of biological products and knowledge."
- **Clothing sector** – A clothing company peruses legal action against an Indigenous-owned and led social enterprise that sells clothing advocating Indigenous rights, citing trademark infringement.
- **Food and beverage retail** – A large supermarket retailer plans to build a bottle shop within walking distance of an alcohol free Indigenous community, without prior consultation. The local Indigenous community has been actively protesting the development of the large bottle shop saying that it will further fuel alcohol-related violence in the community.
- **Telecommunications** – A telecommunications provider uses exploitative practices to target Indigenous communities to sign up for mobile phone contracts they cannot afford. Many of the individuals who sign up do not speak English as a first language. Further exploitative practices include signing up customers to more than one contract in a day, not explaining the full costs and manipulating credit assessments.
- **Oil and gas** – An Ecuadorian Indigenous community wins a landmark battle against the government, when it attempts to sell Indigenous land, in the Amazon rainforest, to oil companies for extraction. The impact of extraction in this location is historically tremendously detrimental environmentally, however the Indigenous community in this region continues to battle the impact of oil spillages.

ANNEX: MINING COMPANY SCORECARD



SECTION A. Heritage Surveys

Background Information

- How many heritage surveys have occurred this year for this mining company?
- How many days spent in the field on heritage surveys (and cultural heritage research)?
- How much has been invested by the Mining Company in undertaking heritage surveys?

Performance

- 1 Were the survey scopes agreed with the mining company, complete and comprehensive?
Did the scope meet WGAC heritage expectations?
Was any restriction placed on the survey scopes by the mining company?
- 2 Were you satisfied with mining company conduct while in the field?
1. Always 2. Nearly Always 3. Mostly 4. Sometimes 5. Rarely
- 3 Was there any attempt by the mining company to restrict the survey reporting outcomes?
- 4 Rank the mining companies in terms of overall conduct and performance during the survey process.
1. Very Good 2. Good 3. Average 4. Poor 5. Very Poor
- 5 Has the Mining Company properly provided for the proper storage/keeping place for artefacts?
- 6 Have there been any incidents involving heritage sites (eg: trespass, damage etc)?
Were they appropriately managed and dealt with?

SECTION B. Regulatory Compliance - s16 and s18 Applications

Background Information

- How many s18 applications have been made this year by this mining company
- How many sites were covered in the s18 application(s)?
- How large an area of land was the s18 application(s) for?
- How many sites were subject to cultural salvage?
- How many days were spent in the field per application(s)
- How long did it take the Mining Company to get the s18 consent?
- Has there been any s16 research work on tenements during the year - if so how many days in the field?
- How much has been invested in cultural/heritage research outcomes (s16, rock art, other research)?

Performance

- 1 Has the Mining Company in consultation with WGAC agreed to a meaningful review of all historical s18 applications?
Is land use approval consistent with current standards, expectations? Does the heritage information need to be updated?
Has an audit been undertaken for compliance with all s18 Ministerial conditions?
- 2 Has the Mining Company committed to a stay on all unimpacted areas under currently held Section 18 permissions until a proper review has been undertaken?
- 3 Have all of the s18 Ministerial Conditions been complied with in the current year?
- 4 Did the mining company fully consult and discuss proposed land use before making the s18 application?
Was there appropriate notice? Was WGAC aware of mining company plans? Did WGAC have time to comment on plans?
- 5 Was the cultural value of the s18 area properly understood prior to the application?
Were comprehensive surveys undertaken? (eg: s16 research, adequate cultural investigation)
- 6 Did the mining company listen and act on any heritage concerns?
Did the mining company avoid heritage sites to WGAC's satisfaction? Was a management plan developed?
- 7 Did the mining company properly inform the ACMC of the cultural values of the area?
Was the s18 application sufficiently detailed and complete?

MINING COMPANY SCORECARD (Cont'd)



SECTION C. Relationships With Native Title Holders

Background Information

How committed is the mining company to having a good relationship with NT holders?

Does the mining company - walk the talk? Do the people who work for the mining company - live the values?

Performance

- 1 How many times has the WGAC Board met with the CEO of the mining company this year?
- 2 How many meetings occurred between WGAC Board and Mining Co Senior Management (GM and above) occurred this year?
- 3 Does WGAC have a constructive, respectful relationship with the Mining Company?
Are there positive outcomes and actions as a result of meetings?
- 4 How would you describe the relationship with this company?
1. Very Good 2. Good 3. Average 4. Poor 5. Very Poor
- 5 Does the Native Title Agreement reflect modern practice and allow for regular review?
- 6 Has the Mining Company complied with its Native Title Agreement?
- 7 Have any formal disputes occurred this year?
- 8 Have all royalties and other funding been paid on time?

SECTION D. Caring for the Environment

Background Information

Has the Mining Company adopted a socially responsible approach to the environment?

Has the Mining Company submitted an environmental application in the past two years?

What area of EG country did the EA cover?

What investment been made by the mining company in protecting the EG country/physical environment?

Performance

- 1 Has the Mining Company properly considered Social Surrounds (indirect impact) in its environmental applications?
Has WGAC been involved/consulted in the environmental approval process?
Was WGAC involved in the flora and fauna surveys undertaken?
- 2 Has the Mining Company properly considered and managed the impact of its operations on the creeks and rivers on EG country?
- 4 Is the Mining Company committing appropriate funds to the ongoing management and protection of the environment?
Is the Mining Company actively protecting the flora and fauna important to traditional owners?
Are they engaging with the WGAC Ranger Program to ensure the protection of the environment?
- 5 Has the Mining Company adequately addressed the issue of access to country for traditional owners?
- 6 Has the Mining Company fully complied with the conditions to its Environmental Approvals?
Has an audit been done of compliance with EA conditions and the results reviewed with WGAC?
- 7 Has WGAC been involved in the development of the rehabilitation and mine closure plans?
Are the plans adequate? Have the plans been well communicated?
- 8 Is the Mining Company genuinely working with WGAC to develop permanent conservation estates in EG country?

MINING COMPANY SCORECARD (Cont'd)

SECTION E. ESG Reporting

Background Information

Is the Mining Company a member of the Minerals Council of Australia, which is phasing in TSM reporting?
How does the Mining Company report on its sustainability (ESG) performance?

Performance

- 1 Does the Mining Company adequately evaluate, manage and communicate its sustainability performance.
- 2 Does the Mining Company's ESG reporting have an appropriate focus on Indigenous relationships and concerns?
- 3 Do we agree with what the Mining Company says about its sustainability performance as it applies to WGAC concerns?
- 3 Is the Mining Company's sustainability performance independently verified
- 4 Does the Mining Company demonstrate a commitment to obtain Free, Prior and Informed Consent of directly affected Indigenous peoples before proceeding with development and maintaining FPIC throughout the life of the project?
- 5 Does the Mining Company demonstrate a commitment to enhancing the awareness of the history, traditions and rights of the Eastern Guruma people.



RESPONSIBLE INVESTMENT ASSOCIATION AUSTRALASIA
Ground Floor, 555 Bourke St Melbourne, VIC 3000 Australia
+61 3 7018 7653
info@responsibleinvestment.org
responsibleinvestment.org

