



# ACSI Policy on Company Engagement With First Nations People

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We acknowledge and respect the traditional lands and cultures of First Nations peoples in Australia and globally. We pay our respects to Elders past and present, and recognise First Nations peoples' longstanding and ongoing spiritual connections to land, sea, community and Country. Appreciation and respect for the rights and cultural heritage of First Nations peoples is essential to the advancement of our societies and our common humanity.

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## Why is it important?

It is widely understood internationally that companies have a responsibility to respect human rights and cultural heritage of the communities that are impacted by company operations.<sup>2</sup> Risks and opportunities apply to companies<sup>3</sup> operating across various sectors that impact First Nations communities. Failure to uphold the rights of First Nations people,<sup>4</sup> including the right to protect and enjoy their lands and cultural heritage<sup>5</sup> carries a significant human, social and financial cost. Harm caused to the lands, culture and heritage of First Nations people has a deep and often irreversible impact on communities, and also represents a loss for the world's heritage and common humanity.

Respecting the rights of First Nations people is intrinsically linked with managing a company's long-term interests. Significant financial costs can arise from unconstructive relationships with First Nations people.<sup>6</sup> These costs can stem from production implications, project cancellations or delays, legal fees,<sup>7</sup> reputational damage, difficulties retaining employees, and even physical damage where conflict arises.<sup>8</sup> Ultimately, a company's long-term success and ability to operate can be undermined. It makes sound business sense to build long-term constructive and mutually beneficial relationships with First Nations people.

Increased costs from unconstructive relationships with First Nations people represent a material investment risk. Investors need assurance that the companies in which they invest are mitigating this risk by respecting First Nations people's rights and culture. ACSI engages with relevant companies that face a material risk, to understand how they are working to effectively manage and mitigate this risk.

Please also see [ACSI's Research Paper on Company Engagement with First Nations People](#), which addresses these issues in more detail and is intended as a practical guide to help companies improve their practices.

## Our view

ACSI expects companies to establish processes from the very initial stages of project planning that will facilitate constructive engagement with First Nations people whose lands, communities and cultural heritage are impacted by a company's operations, and obtain their free, prior and informed consent before commencing operations.<sup>9</sup> Companies and First Nations communities that treat each other as peers and develop respectful long-term relationships will be better able to find solutions in their mutual best interests. This should be the fundamental objective from the outset.

Companies must ensure strong engagement with First Nations people and risk management over the life of a project. Compliance with relevant domestic legislation is necessary, however in some cases adequate risk management will require reference to other standards.<sup>10</sup> Where international standards for the protection of First Nations people's rights and cultural heritage are not replicated in local law, companies should assess whether mere compliance with local law is sufficient to comprehensively manage risk and ensure the long-term success of the company.

## Company practice

A company's board is ultimately accountable for ensuring that the company respects the rights of First Nations people, and that standards are applied throughout all levels of operations. The board has a crucial role in setting the tone and priorities that guide company practice. Directors should set expectations, ensure there is sufficient resourcing, and seek appropriate assurance (from staff as well as external advisors where necessary) that risks are appropriately identified, mitigated and managed. It is important to maintain direct and regular engagement between the senior leadership of a company and First Nations communities over the long-term.

For effective risk management, we expect companies that impact First Nations people and face material risks within their operations to:

- **Assess risk:** A company should conduct robust assessments of the relevant risks and impacts both to the company and First Nations people – including their lands, communities and cultural heritage. Risk assessment should be integrated into the company's risk processes and should integrate First Nations people's own assessment of risk.
- **Align with standards:** Companies should establish policies that commit the company to respect First Nations people's rights and cultural heritage, in line with international standards, as set out in the [UN Declaration on the Rights of Indigenous Peoples](#) and the [UN Guiding Principles on Business and Human Rights](#). Additional guidance can also be found in the [IFC Performance Standards](#).<sup>11</sup> Companies should also be guided by the [Best Practice Standards in Indigenous Cultural Heritage Management and Legislation](#) published by the Heritage Chairs and Officials of Australian and New Zealand.

Companies should adopt a human rights-based approach to engagement with First Nations people, conducting robust due diligence to identify, prevent, mitigate, and account for the human rights risks associated with their operations and supply chains.<sup>12</sup> Companies should respect the right of First Nations people to self-determination.<sup>13</sup>

- **Develop strong relationships and robust agreements:** Companies must engage in good faith and work to build constructive long-term relationships with First Nations people. We expect companies to obtain and maintain free, prior and informed consent (FPIC) from First Nations people before commencing operations that will impact them, and on an ongoing basis throughout the life of a project.<sup>14</sup>

Agreements should be established with First Nations people to cover all phases of operations (including exploration). Agreements should also contain review clauses and be re-negotiated as necessary to reflect the positions of the parties.

Companies must understand and mitigate power imbalances. If First Nations people are not sufficiently resourced to effectively negotiate agreements or do not have access to independent legal and technical advice, this is likely to lead to a power imbalance that undermines FPIC.<sup>15</sup>

Agreements should aim to support impacted communities over the long-term through reasonable benefit-sharing provisions.

- **Conduct effective risk management:** Ongoing engagement with First Nations people should be built into policies and risk management frameworks. This should include appropriate board oversight of policies and practices, and accountability mechanisms for the board, management and staff responsible for engagement with First Nations people. Processes should also be established to assess the effectiveness of the company's risk management. Companies should establish dispute resolution and grievance mechanisms, and remedy any adverse impacts that the company has caused or contributed to.
- **Monitor performance:** Companies should set transparent targets and KPIs that reflect international standards, and establish accountability mechanisms when KPIs are not met. Performance against agreement terms and KPIs should be overseen by the board, who should be satisfied that assessment is appropriately independent. It is also important that First Nations people are involved in the monitoring process. A company should also evaluate how it learns from past mistakes and improves its practices on an ongoing basis, including through regular staff training.
- **Disclose:** Companies should provide sufficient information to enable investors to assess the quality of a company's engagement with First Nations people. Disclosure should provide a genuine explanation of a company's risks and approach (including the factors listed above), and how its policies are implemented in practice. This should include the system in place to enable the board to assess risk, as well as targets and performance over time. Disclosure should also include the nature and scope of agreements, timelines, and any key challenges. Where a company has relied on government approval or a dispute resolution determination that does not reflect the position of First Nations people, this should be disclosed.

Companies should apply these practices across the entire company group (i.e. any parent/subsidiary companies) and across supply chains, to the extent possible. Likewise, where companies participate in joint ventures, they should work with their partners to effectively manage risk, as they would in their own operations.

# Endnotes

- 1 ACSI developed this policy in collaboration with the Working Group on Rights and Cultural Heritage Risk Management. This Working Group is facilitated by ACSI and includes 7 ACSI members. The Working Group has received invaluable guidance from the National Native Title Council. The Working Group does not in any way claim to speak on behalf of First Nations people. We are focused on the concerns of investors about this issue and related financial risks, and seek to see improved company engagement with First Nations people. In order to improve standards, minimise the risk of harm, and ensure respect for the rights of First Nations people, we seek to embed the perspectives and lived experience of First Nations people at the core of the policy position. Please see ACSI's research for further information [here](#).
- 2 United Nations Human Rights Council (UN HRC), Human Rights and Transnational Corporations and other Business enterprises, UN HRC Res 17/4, 17th sess, A/HRC/RES/17/4, (6 July 2011); [United Nations Guiding Principles on Business and Human Rights](#), Australian Human Rights Commission, '[The Australian mining and resource sector and human rights](#)'.
- 3 While ACSI's mandate is to focus on material ESG risks for listed companies, these issues may have broader application to other assets (e.g. unlisted assets).
- 4 Throughout this Policy, we use the term 'First Nations people'. Our intention is to refer to First Nations peoples and Indigenous Peoples in all contexts around the world, in an inclusive way. We recognise that definitions and terminology vary around the world, and we use the term for efficacy, with no intention to exclude unnamed groups. We intend to refer to all people who hold rights under the United Nations Declaration on the Rights of Indigenous Peoples, and to whom FPIC applies (which is further outlined, for example, in ILO Convention 169 on Indigenous and Tribal Peoples).
- 5 UNDRIP states that First Nations people have 'the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources' (Article 32)
- 6 United Nations Global Compact, KPMG and University of Technology Sydney, '[The Australian Business Guide to implementing the UN Declaration on the Rights of Indigenous Peoples](#)', November 2020.
- 7 For example, in Australia, if a claim is brought successfully by Native Title Owners for damage caused by companies on their land, the Government is liable to pay compensation to Traditional Owners. However, this liability may be 'passed on' to the company that caused damage in some circumstances. For example, the relevant mining legislation in NSW and WA transfers liability for some native title compensation to the entity that applied for the grant of a mining lease (*Mining Act 1978* (WA) s 125A and *Mining Act 1992* (NSW) s 281B).
- 8 R. Davis and D. Franks, '[Costs of Company-Community Conflict in the Extractive Sector](#)', 2014.
- 9 Throughout this Policy, where the term 'First Nations people' is used in relation to expectations of companies, it is intended to refer specifically to the First Nations people whose lands, communities and cultural heritage are impacted by a company's operations.
- 10 International standards should include the [UN Guiding Principles on Business and Human Rights](#), and the [UN Declaration on the Rights of Indigenous Peoples](#). Further guidance can also be found in the [IFC Performance Standards 7 and 8](#).
- 11 Useful guidance can also be found in the [UN guidance on free, prior, and informed consent](#), the Initiative for Responsible Mining Assurance (IRMA)'s [FPIC Standard](#), and the [UN Global Compact's Business Reference Guide on the UN Declaration on the Rights of Indigenous Peoples](#).
- 12 [United Nations Global Compact, KPMG and University of Technology Sydney](#) (see above).
- 13 UNDRIP Article 32.
- 14 For further guidance on FPIC, see [ACSI's research paper here](#).
- 15 For further guidance on funding, see [ACSI's research paper here](#).

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