



2 June 2022

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
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Dear Sir/Madam

THE APPLICATION OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP) IN AUSTRALIA

On behalf of the Australian Council of Superannuation Investors (ACSI), thank you for the opportunity to make a submission related to the application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia.

About ACSI

Established in 2001, ACSI exists to provide a strong voice on financially material environmental, social and governance (ESG) issues. Our members include 30 Australian and international asset owners and institutional investors with over \$1 trillion in funds under management.

Through research, engagement, advocacy and voting recommendations, ACSI supports members in exercising active ownership to strengthen investment outcomes. Active ownership allows institutional investors to enhance the long-term value of retirement savings entrusted to them to manage. ACSI members can achieve financial outcomes for their beneficiaries through genuine and permanent improvements to the environment, social and governance (ESG) practices of the companies in which they invest.

ACSI welcomes the implementation of UNDRIP in Australia

The Australian Government announced its support for the UN Declaration on the Rights of Indigenous People (UNDRIP) in 2009,¹ acknowledging it as a framework to better protect the rights of First Nations Australians. However, UNDRIP has not been enshrined in Australian law.² The Parliamentary Inquiry into the destruction at Juukan Gorge³ illustrated the shortcomings of Australia's legal frameworks in protecting First Nations people's rights and cultural heritage and sent a clear message on the need for legislative reform.

ACSI supports UNDRIP being enshrined in Australian law, across the various legislative frameworks that relate to First Nations people's rights. Gaps in legal frameworks have allowed for many examples of contraventions of the rights of First Nations people in Australia.⁴ In 2020, the destruction of significant sites in the Juukan Gorge in Western Australia was one example, but was certainly not unique.

¹ Australian Human Rights Commission, 'UN Declaration on the Rights of Indigenous Peoples', 14 Sept 2007.

² RMIT University, 'First Nations people and Land Justice Issues in Australia: Addressing Deficits in Corporate Accountability', 2021, p10.

³ Joint Standing Committee on Northern Australia, '[A Way Forward](#)', Report from the Inquiry into the Destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara Region of Western Australia, October 2021.

⁴ As illustrated in Joint Standing Committee on Northern Australia, '[A Way Forward](#)', Report from the Inquiry into the Destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara Region of Western Australia, October 2021.

The rights of First Nations people would be better protected in Australia if UNDRIP were embedded within domestic legal frameworks. ACSI is focused on the performance of ASX listed companies in which our members (institutional investors) are invested. While companies are not currently directly bound by UNDRIP, it is widely accepted that companies should respect the human rights of individuals and groups that are likely to be adversely impacted by their activities.⁵ Therefore, implementation of UNDRIP in Australia should include requirements for companies to respect the fundamental rights of First Nations peoples. Full implementation of UNDRIP would establish a legal baseline that would better protect rights, which would help investors to manage their risk.

The investment risk of poor company engagement with First Nations people

ACSI has long recognised that a company's long-term success is intrinsically linked to its ability to engage effectively with the stakeholders it impacts. This requires a thoughtful approach to engagement that considers the specific impacts that a company has on different stakeholder groups. For companies that interact with First Nations people, there are opportunities to engage in a way that is constructive and mutually beneficial.

Clear legal frameworks embedding requirements for more constructive engagement between companies and First Nations people will increase investment certainty over the long-term. Many companies have operations that impact First Nations people and their lands in Australia, including through minerals extraction, agriculture, transport and infrastructure development. There is growing global scrutiny of companies' interactions with First Nations people, and where company behaviour does not meet appropriate standards, the risk of significant investment loss is heightened.

Failure to uphold the rights of First Nations people can carry devastating human, social and cultural costs. Recognition of investment risks due to the financial costs of poor company engagement with First Nations people⁶ include production implications, project cancellations or delays, legal fees, reputational damage, difficulties retaining employees, and even physical damage where conflict arises.

Legislative frameworks across Australia should promote constructive engagement between companies and First Nations people would reduce damage to First Nations people's lands, communities and cultural heritage. Processes of engagement with First Nations people that are carefully planned from the outset, transparent, and consistent with the standards of FPIC promote certainty for all parties involved, including investors. Application of FPIC, based on international standards, is clarified in our [Research Paper on Company Engagement with First Nations People](#).

While long-term investors expect companies to go beyond mere compliance with minimum standards, the legislative framework provides a critical baseline. It is therefore important to make sure the law implements the international standards set out in UNDRIP, and acts to provide increased assurance that risks will be adequately managed and mitigated. Without higher legal standards, it is difficult for investors to assess the true nature of companies' relationships with First Nations people and the extent to which rights are being respected. This causes ongoing uncertainty and financial risk for investors.

Financial and social risks will remain as long as the legal frameworks in Australia fail to reflect international human rights standards. Implementing UNDRIP in a way that drives better company engagement with First Nations people will not only ensure greater protection of rights, but also improve long-term financial outcomes for investors.

Consultation process for the implementation of UNDRIP should reflect self-determination

First Nations people should be at the centre of determining how UNDRIP should be implemented in Australia. UNDRIP enshrines the right to self-determination for First Nations people, which the Australian Human Rights Commission defines as an 'ongoing process of choice to ensure that First Nations people are able to meet their social, cultural and economic needs'.⁷ The consultation process on the implementation of UNDRIP reflects the right to self-determination. Processes of co-

⁵ [Un Guiding Principles on Business and Human Rights](#).

⁶ For further details on the investment risk of poor company engagement with First Nations people, see ACSI's research report, '[Company Engagement with First Nations People](#)', December 2021, p9.

⁷ Australian Human Rights Commission, '[Right to Self Determination](#)'.

design can be effective in embodying the right to self-determination of First Nations people, empowering them to design the options for law reform alongside government policy-makers. The laws that ultimately implement UNDRIP in Australia should likewise embed the right to self-determination of First Nations people.

ACSI also recommends that the consultation process on the implementation of UNDRIP should be connected to, or integrated within, other related reform processes that are currently taking place. This could include, for example, the response to the Parliamentary Inquiry into the destruction at Juukan Gorge, the Commonwealth co-design process on Aboriginal cultural heritage law reform, and the House of Representatives Standing Committee on Indigenous Affairs Inquiry into corporate engagement with Aboriginal and Torres Strait Islander Consumers. It will be important to co-ordinate processes, to avoid overlap and repetition, to the extent possible.

Common standards across jurisdictions

The report of the Parliamentary Inquiry into the destruction at Juukan Gorge recommended the need for unified legal requirements across all Australian states and territories. Australia's current patchwork of varied legal frameworks in different jurisdictions creates inconsistent standards and gaps in the protection of First Nations people's rights. Having UNDRIP implemented in law at both the federal and state level would set a minimum baseline in the protection of rights. For example, free, prior and informed consent is not a legislative requirement in all legal frameworks across Australia,⁸ which can create risks of severe harm to First Nations people, lands and cultural heritage.

In the Australian context, implementation of UNDRIP should also incorporate and reflect the Dhawura Ngilan Best Practice Standards in Indigenous Cultural Heritage Management and Legislation ('Dhawura Ngilan')⁹, published by the Heritage Chairs and Officials of Australia and New Zealand. The Dhawura Ngilan Standards are widely recognised as a hallmark for good practice in protecting cultural heritage. The Standards reiterate the importance of enshrining UNDRIP in Australian law, as the fundamental international baseline for the protection of Indigenous rights.

Address power imbalances for effective implementation of UNDRIP in practice

In order to ensure that UNDRIP is genuinely adopted in Australia, it will be important to ensure that its objectives can be implemented in practice. Power imbalances are a common blockage to First Nations people being able to fully protect and enjoy their rights in practice, which can stem from vastly unequal resources and bargaining power between First Nations groups and companies (or other stakeholders, including governments).

Therefore, the legislative framework in Australia should seek to effectively mitigate power imbalances, in particular through adequate funding of First Nations representative bodies such as Prescribed Bodies Corporate. The work of protecting rights and cultural heritage over decades (e.g. negotiating agreements, establishing and monitoring cultural heritage management plans etc) can be a heavy administrative and financial burden for representative bodies. This requires significant funding, human resources and expertise (or access to expertise). The regulatory environment should ensure that the funding and support systems for representative organisations allows for this, to enable UNDRIP to be truly implemented in practice.

Effective implementation of UNDRIP by companies

In the absence of legal frameworks that embed the requirements of UNDRIP, ACSI established a clear expectation that companies align their policies and practices with UNDRIP. This is set out in our [Policy on Company Engagement with First Nations People](#). We expect that companies engage in good faith with First Nations people and obtain their free, prior and informed consent (FPIC) before

⁸ For example, given the possibility under Australian law for negotiation processes to be deferred to the Native Title Tribunal, the right of First Nations people to truly give their consent can be undermined. Where First Nations people decide not to consent to a project, their decisions have rarely been upheld by the Native Title Tribunal. Since 1994, in cases where native title holders have not provided consent and the matter has proceeded to determination before the Native Title Tribunal, the Tribunal has determined in 98% of cases that the company can proceed (sometimes subject to conditions), regardless of the opposition from Native Title holders. See the Interim Report of the Parliamentary Committee into the destruction of the Juukan Gorge: 'Never Again' p15.

⁹ [Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation](#), 2020.

commencing operations that impact their lands, communities or cultural heritage.

ACSI and its members are engaging with companies to seek alignment with UNDRIP and ensure they are developing strong, long-term relationships with First Nations people. There is wide divergence in practices among companies. If alignment with UNDRIP was effectively enshrined in Australian law, it would promote robust standards right across the market.

I trust our comments are of assistance.

Yours faithfully

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Australian Council of Superannuation Investors