



THE RIGHT TO DECIDE:

COMPANY COMMITMENTS AND
COMMUNITY CONSENT

cær



OXFAM
Australia



Published May 2013

Authors: Christina Hill (Oxfam Australia), Julia Leske (CAER) and Serena Lillywhite (Oxfam Australia)

Contributors: Duncan Paterson (CAER)

Editor: Marian Reid

Designer: Morgan White

Proofreader: Meabh Friel

Print production: Jocelyn Tan

Acknowledgements

CAER and Oxfam Australia would like to acknowledge and thank Dr. Cathal Doyle (Middlesex University School of Law) and Michael Simon (Oxfam Australia) for peer reviewing this report. Their insights and advice were very valuable.

CAER

PO Box 229 Belconnen, ACT 2616 Australia

Tel: +61 2 6201 1900

Fax: +61 2 6201 1987

Email: contact@caer.org.au

www.caer.org.au

Oxfam Australia

132 Leicester Street, Carlton VIC 3053 Australia

Tel: +61 3 9289 9444

Fax: +61 3 9347 1983

www.oxfam.org.au

© CAER and Oxfam Australia 2013

Oxfam Australia is affiliated with the Australian Council for International Development (ACFID), by whose code of ethics we are bound; Oxfam International, by whose constitution and code of conduct we are bound; People in Aid, by whose code we are bound; and the Refugee Council of Australia.

This report is available online at www.caer.org.au and www.oxfam.org.au/explore/mining

Cover photo: Timothy Herbert/OxfamAUS.

This page: Claire Spoons/OxfamAUS.

0. EXECUTIVE SUMMARY 2

1. INTRODUCTION 4

2. MINING AND FREE, PRIOR AND INFORMED CONSENT – LEGAL AND POLICY PERSPECTIVES 5

3. AUSTRALIAN MINING COMPANY COMMITMENTS TO FREE, PRIOR AND INFORMED CONSENT 10

4. CONCLUSION AND RECOMMENDATIONS 17

APPENDIX 1 – METHODOLOGY 18

APPENDIX 2 – GLOSSARY 20

0. EXECUTIVE SUMMARY

This report examines the publicly stated positions of Australian mining companies, and some Australian oil and gas companies, in relation to the rights of indigenous peoples to participate in decision-making that affects them, their land and their natural resources. In particular we assess whether companies recognise the right of indigenous peoples to give or deny their Free, Prior and Informed Consent (FPIC) for mining projects on their land.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) promotes the right of indigenous peoples to give or deny their FPIC for projects that affect them, their land and their natural resources. FPIC is both a right in itself, and can help protect other human rights including rights to property, culture, religion, livelihood, health and physical wellbeing. Companies have the responsibility to respect all internationally recognised human rights, including the right of indigenous peoples to FPIC.

Indigenous peoples' rights, and their right to FPIC, are a critical issue for the Australian mining industry. Australian companies are not only trying to access minerals on indigenous peoples' land here in Australia but are also increasingly venturing overseas to do the same. The Australian mining sector — like the global mining sector — is facing growing calls from indigenous peoples to respect their right to land and their right to determine what happens on it.

Companies face potential legal, reputational and financial risks if they attempt to operate without the consent of the indigenous peoples whose land is at issue. Despite this, very few Australian companies respect the right of indigenous peoples to give or deny their FPIC for projects on their land. In fact, few companies make any public commitment to respect either human rights or indigenous peoples' rights.

The research for this study finds that:

1. less than 25% of the 53 ASX 200 extractive companies considered in this report have a public statement respecting the rights of indigenous peoples;
2. only two companies have a public commitment to adhere to the UNDRIP or ILO Indigenous and Tribal Peoples Convention 169 (ILO 169) (which are the key internationally recognised instruments for indigenous peoples' rights), and only one company has a public commitment to FPIC;
3. half of the companies reviewed for this report have not met a single indicator examined for this report. These indicators relate to strategy and responsibility, engagement and consent, and reporting and dialogue;¹
4. while extractive companies operating in Australia are required to undertake cultural heritage surveys, only 10 of the companies in this study have disclosed details of where they have undertaken broader social impact studies, that examine their impacts on indigenous peoples;
5. one quarter of companies have had indigenous peoples' groups or NGOs allege that they have negatively impacted on the rights of indigenous peoples. Only half of these companies have publicly acknowledged or responded to these allegations; and
6. less than 5% of companies considered in this study have disclosed detailed examples of how they engage with indigenous peoples. Issues such as meaningful and ongoing consultation, provision of grievance mechanisms, policies on resettlement and compensation or reporting of incidents of non-compliance had similarly low rates of disclosure.

¹ Examples of what these indicators contain include company commitments to human rights and indigenous peoples' rights, meaningful participation and ongoing consultation with indigenous peoples, undertaking Indigenous Impact Assessments, reporting on engagement activities, and disclosing incidents of non-compliance and remedial action taken.

It is recommended that Australian mining, oil and gas companies:

1. Develop and implement an indigenous peoples' rights policy that is based on the UNDRIP and ILO 169, and that is consistent with the UN Guiding Principles on Business and Human Rights. This policy may be included within a broader human rights policy but should include specific commitments regarding indigenous peoples' rights.
2. Make explicit commitments to respect the right of indigenous peoples to give or deny their FPIC for extractive industries projects on their land. This commitment to FPIC must apply to company operations both within Australia and overseas, and must commit to obtaining FPIC at all stages of the project cycle (exploration, construction, operation and closure).
3. Disclose indigenous peoples rights and broader human rights policies, ensuring that potentially affected indigenous peoples can access these policies.
4. Undertake Indigenous Impact Assessments — either as part of a broader human rights impact assessment or a stand-alone assessment — that involves the participation of affected indigenous peoples.
5. Commit to meaningful consultation and engagement with, and support the participation of, indigenous people and other affected people in project decision-making. This must include ensuring the involvement of women, based on the principles of gender equality and non-discrimination.
6. Establish grievance mechanisms designed to address the concerns of indigenous peoples, and other project-affected people, and remedy any adverse impacts which companies may have caused or contributed to. Grievance mechanisms must be legitimate, accessible, predictable, equitable, rights-compatible, transparent, and be based on dialogue and engagement.
7. Report on company engagement with indigenous peoples, how it manages grievances and concerns raised by indigenous peoples, and any allegations or violations of indigenous peoples' rights.
8. Learn from their experience of implementing FPIC, and share these lessons with others in the mining, oil and gas industry to improve the industry policy commitment to FPIC as well as implementation and practice.

It is also recommended that:

9. Project financiers and investors recognise the right of indigenous peoples to FPIC, and work with mining, oil and gas companies to implement the recommendations above.
10. The Australian Government clarify its expectations of Australian mining, oil and gas companies with regards to indigenous peoples' rights and support the industry to implement the recommendations made above.

FPIC is necessary to guarantee that the negative impacts of mining will be avoided, and that indigenous peoples' economic, social and cultural rights will be protected in situations where mining projects are operating on or near indigenous land. Genuine respect for the requirement for FPIC of indigenous peoples would undoubtedly have a transformative effect on the industry and its relationship with indigenous peoples.

1. INTRODUCTION

“The implementation of natural resource extraction and other development projects on or near indigenous territories has become one of the foremost concerns of indigenous peoples worldwide, and possibly also the most pervasive source of the challenges to the full exercise of their rights ... [There is] a clear understanding [among stakeholders] of the negative and even catastrophic effects on the economic, social and cultural rights of indigenous peoples due to irresponsible or negligent projects that have been or are being implemented in indigenous territories without proper guarantees or the involvement of the peoples concerned”.

James Anaya, Special Rapporteur on the rights of indigenous peoples²

This report examines the publicly stated positions of Australian mining companies, and some oil and gas companies, in relation to the rights of indigenous peoples to participate in decision-making that affects them, their land and their natural resources. In particular we assess whether companies recognise the right of indigenous peoples to give or deny their Free, Prior and Informed Consent (FPIC) for mining projects on their land.

This is a critical issue for the Australian mining industry. Australian companies are not only trying to access minerals on indigenous peoples' land here in Australia but are also increasingly venturing overseas to do the same. The Australian mining sector — like the global mining sector — is facing growing calls from indigenous peoples to respect their rights to land and their right to determine what happens on it. Communities potentially impacted by mining, including indigenous and non-indigenous peoples, know their rights and are demanding that their rights are respected.³ Without the consent of affected people, mining companies will find it more and more difficult to access land for mine development and operation. Further, mining, oil and gas projects risk being delayed or shut down if communities directly impacted are not involved in project decision-making and if projects go ahead without their consent, or if affected people are denied opportunity to share in the benefits from these projects.

Mining projects can impact on indigenous women and men in many and often harmful ways. The Special Rapporteur on the rights of indigenous peoples conducted a survey⁴ to understand concerns relating to extractive industries operating on or near indigenous territories, and found that mining projects can result in the following:

- loss of control over indigenous lands, territories and natural resources;

- degradation and destruction of ecosystems and resulting devastating effects on indigenous peoples' subsistence economies which are closely linked to these ecosystems;
- water resource depletion and contamination which has harmful effects on the availability of water for drinking, farming, grazing cattle and fishing;
- deterioration of health from water and air pollution, threats to food security and increased malnutrition;
- adverse impacts on social structures and indigenous culture, including declines in community social cohesion and the erosion of traditional decision-making structures — this is often felt most by indigenous women who can experience loss of social, economic and decision-making power when removed from their traditional land-based occupations; and
- destruction of places of cultural and spiritual significance.

Finally, indigenous peoples reported that the benefits from mining projects are often limited in scope and do not make up for the many problems associated with the projects. Furthermore, where rights are violated as a result of mining projects, compensation mechanisms tend to be inadequate and culturally inappropriate.

These frequently devastating impacts are symptomatic of a model of extractive industry engagement with indigenous peoples which is fundamentally at odds with the realisation of their right to self-determination.

FPIC is the minimum standard for the involvement of indigenous peoples in decision-making processes about large-scale projects. FPIC entitles indigenous peoples to determine the outcome of decision-making that affects them — it is not merely a right to be consulted about projects that others will ultimately make decisions on. FPIC is necessary to guarantee that the negative impacts of mining will be avoided, and that indigenous peoples' economic, social and cultural rights will be protected in situations where mining projects are operating on or near indigenous land.

This report also describes FPIC and its legal basis in international law, its value in protecting other human rights, and recent global developments on FPIC by a range of stakeholders.

The report concludes by calling on the Australian mining industry to strengthen its commitment to the rights of indigenous peoples, in particular indigenous peoples' rights to give or deny FPIC for mining projects on their land. This call is made in the context of an improved understanding by many in the Australian mining industry of its responsibility to respect human rights more broadly. This is a good and necessary basis on which to take the next step.

2. Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, 'Extractive industries operating within or near indigenous territories', A/HRC/18/35, 11 July 2011.

3. Oxfam Australia's Guide to Free, Prior and Informed Consent, June 2010, is an example of how communities are improving their understanding of FPIC.

4. Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, 'Extractive industries operating within or near indigenous territories', A/HRC/18/35, 11 July 2011.

2. MINING AND FREE, PRIOR AND INFORMED CONSENT – LEGAL AND POLICY PERSPECTIVES

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)⁵ promotes the right of indigenous peoples to give or deny their Free, Prior and Informed Consent (FPIC) for projects that affect them, their land and their natural resources. The UNDRIP requires that the FPIC of indigenous peoples be obtained in matters of fundamental importance for their rights, survival, dignity and wellbeing.⁶

The right to FPIC is also articulated in ILO Indigenous and Tribal Peoples Convention 169 (ILO 169)⁷ which deals with the rights of indigenous and tribal peoples. It is also affirmed in the jurisprudence of international and regional human rights bodies, which have interpreted the major human rights treaties as embodying the requirement for FPIC in relation to mining projects on the territory of indigenous peoples.

In the case of mining, the UNDRIP says: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.”⁸

However, FPIC is not only a concern for states (although it must be acknowledged that some states do not even recognise the status of some people as indigenous). Companies must also respect this right. The responsibility of companies to respect all internationally recognised human rights is articulated in various human rights instruments, including the United Nations Protect, Respect and Remedy Framework,⁹ which is the global standard of expected conduct for all businesses wherever they operate. This corporate responsibility to respect indigenous peoples’ internationally recognised rights exists in addition to the state responsibility to guarantee their protection.

Other stakeholders also recognise the right of indigenous peoples to FPIC. The World Bank’s private sector arm, the International Finance Corporation (IFC), for example, now requires its clients to obtain the FPIC of affected indigenous peoples in some circumstances, including when a project may result in adverse impacts and when the relocation of indigenous peoples from communal land is unavoidable.¹⁰

The circumstances elaborated clearly extend to mining projects in or near indigenous peoples’ territories. The IFC sets the standard for the Equator Principles Banks, and influences other standards such as the OECD Guidelines for Multinational Enterprises and the lending practices of some export credit agencies such as Australia’s Export Finance and Insurance Corporation. As the IFC itself has said, increasingly other international finance institutions, industry associations and round tables have adopted or are considering adopting FPIC.¹¹

Research undertaken by Oxfam America shows that some non-Australian multinational mining, oil and gas companies also make explicit commitments to FPIC.¹²

The right to FPIC must be understood within the broader context of the rights of indigenous peoples to maintain and strengthen their own institutions, cultures and traditions, and to pursue their development in keeping with their own needs and aspirations.¹³ Additionally, indigenous peoples’ right to FPIC is based on their right to self-determination. FPIC is an essential safeguard for the realisation of self-determined development in the social, cultural and economic spheres.

Indigenous peoples’ collective right to FPIC is an example of a specific right of indigenous peoples but one that is based on universal rights, including those in the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights. FPIC recognises indigenous peoples’ specific right to land and the cultural significance of land, as well as a historical lack of participation in decision-making by indigenous peoples and their political marginalisation. It is also, as noted above, a fundamental element of their right as peoples to self-determination.

FPIC requires that indigenous peoples and local communities must be adequately informed about mining, oil and gas projects in a timely manner, and given the opportunity to approve (or reject) projects prior to the commencement of operations. This includes participation in setting the terms and conditions that address the economic, social and environmental impacts of all phases of extraction and post-extraction operations.¹⁴ FPIC is a specific right held by indigenous peoples only. However, it also represents best-practice sustainable development and should therefore guide mining, oil and gas company practice when consulting and negotiating with all affected communities – both indigenous and non-indigenous.

5. The UNDRIP is an important human rights instrument even though it is not legally binding. The UNDRIP represents the commitment of governments to abide by certain principles and standards, is based on human rights enshrined in other legally binding instruments and represents the aspirations of indigenous peoples globally.

6. Expert Mechanism Advice No. 2, 2011: Indigenous peoples and the right to participate in decision-making.

7. www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm

8. United Nations Declaration on the Rights of Indigenous Peoples, article 32(2)

9. www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf

10. International Finance Corporation, Performance Standard 7 Indigenous Peoples, January 2012.

11. International Finance Corporation, Progress report on IFC’s policy and performance standards on social and environmental sustainability, and Access to Information Policy review and update process, December 2010.

12. Marianne Voss and Emily Greenspan, ‘Community consent index: Oil, gas and mining company public positions on Free, Prior, and Informed Consent (FPIC)’, Oxfam America Research Backgrounder series, 2012.

13. Frequently asked questions: Declaration on the Rights of Indigenous Peoples: www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf

14. Marianne Voss and Emily Greenspan, ‘Community consent index: Oil, gas and mining company public positions on Free, Prior, and Informed Consent (FPIC)’, Oxfam America Research Backgrounder series, 2012.

An investor perspective

Without properly managing relations with indigenous peoples, companies run the risk of losing investor support. Australian Ethical Investment's Chief Investment Officer David Macri talks about why FPIC is an important issue, not only from an ethical point of view but also because it makes good business sense.

At Australian Ethical, indigenous rights, including the right to FPIC are an integral part of our investment approach. While we are not big investors in the extractives sector, from time-to-time we do come across projects where FPIC is relevant. The Australian Ethical Charter (www.australianethical.com.au/ethical-charter) is a public statement of our investment ethics, and the human rights of indigenous peoples are clearly identified as something we consider.

It's not only good sense from an ethical point of view, we believe that companies considering issues like FPIC ought to be achieving better financial outcomes in the long-term. They will be exposed to fewer governance and project-related risks than operations that access indigenous land without consent from traditional owners. Without consent, projects may be delayed or disrupted, adding unforeseen costs. In extreme cases projects could be shut down, with investment costs sunk without providing returns. Companies complicit in human rights abuses may face legal challenges or suffer reputational risks, which in turn impacts on their licence to operate for current and future projects. Litigation and damage to a reputation can take many years to resolve, and will tie up large amounts of resources and management time.

From a regulatory perspective, governments have started to look at the issue of FPIC as well. Examples include the Indigenous Peoples Rights Act in the Philippines and the Northern Territory's Aboriginal Land Rights Act.

A history of poor management of projects on indigenous land can also result in project financiers increasing the costs of a company's access to capital. Examples of project finance conditions include International Finance Corporation safeguards which also are the basis for the Equator Principles. Many financial institutions providing financial support or guarantees have committed to the Equator Principles.

Investors are becoming savvy when deciding where they put their money, and key human rights principles such as FPIC will increasingly play a role in where they choose to invest. Companies that are managing their relations with indigenous communities well are more likely to be socially, environmentally and financially sustainable.

David Macri
Chief Investment Officer, Australian Ethical Investment

Further guidance is provided by the Expert Mechanism on the Rights of Indigenous Peoples who defines FPIC as follows:¹⁵

- “Free” implies no coercion, intimidation or manipulation.
- “Prior” implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow indigenous peoples to undertake their own decision-making processes.
- “Informed” implies that indigenous peoples have been provided all information relating to the activity and that the information is objective, accurate and presented in a manner and form understandable to indigenous peoples.
- “Consent” implies that indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.

In 2003, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples clarified that this includes “the right to say No”.¹⁶

The elements of FPIC are interrelated, and set the conditions for the consent of indigenous peoples. The “free”, “prior” and “informed” ensure a fair consent process. Violation of any of these three elements may invalidate any agreement said to have been made between extractive industry companies and indigenous peoples.

FPIC requires respect for both traditional and contemporary representative structures, and the customary laws and practices of communities including their collective decision-making practices. FPIC processes must also involve the participation of both indigenous women and men. The right to FPIC (and to participate in community decision-making processes) is not one held by men only. Women have equal rights,¹⁷ including to participate in community decision-making processes, to benefit from development and to be safe from the potential negative impacts of mining. Yet it must be acknowledged that indigenous women often face exceptional impediments to participation in decision-making.¹⁸ Any supposed justifications based on culture for the exclusion of indigenous women is not consistent with international human rights standards and must be challenged — within many indigenous communities, women have (or traditionally had) important decision-making roles.

Mining companies should not condone, tolerate or perpetuate discrimination against women, and should work to avoid the gendered impacts of mining¹⁹ by ensuring the involvement of indigenous women in FPIC processes. This is best done by acknowledging and supporting the efforts of indigenous women to operationalise consent in a manner consistent with the rights of all members of their community. It should also be indigenous women (not the imposition of others) who decide how and when they should participate in decision-making processes, as well as their involvement in FPIC processes, based on the principles of equality, non-discrimination and equity.

The right to FPIC should be considered in the broader context of business and human rights.²⁰ The UN Protect, Respect and Remedy Framework on Business and Human Rights articulates the roles and responsibilities of both governments and businesses in relation to preventing and addressing business-related human rights abuse. This framework has the support of governments, business and civil society. It has three interlinked pillars:

1. The state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication.
2. The corporate responsibility to respect human rights, which means that businesses should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.
3. The need for greater access by victims of business-related human rights abuse to effective remedy, both judicial and non-judicial.

The UN Guiding Principles on Business and Human Rights²¹ developed to help support the Protect, Respect and Remedy Framework explain that the corporate responsibility to respect human rights means business should avoid involvement in adverse human rights impacts, including through their business relationships. In other words, business should, as a minimum, do no harm. In practice this requires that businesses have a human rights policy that commits them to respect all human rights, implement a human rights due-diligence process to know and show that they are respecting human rights (requiring identification and assessment of impacts; integration of the findings of those assessments throughout corporate processes; and tracking and communicating human rights performance), and work to remedy any adverse impacts they may have caused or contributed to, such as through a formal grievance mechanism.

The state duty to protect, and corporate responsibility to respect, relate to all internationally recognised human rights, including the rights of indigenous peoples. There is no hierarchy of rights here — all human rights matter and all human rights require equal protection. These rights include indigenous peoples’ rights over land and natural resources, and to FPIC. Yet, as the Special Rapporteur has observed,²² there is a pervasive lack of understanding and conviction that the human rights that states must protect and business must respect includes the specific rights of indigenous peoples, especially those rights that are affirmed in the UNDRIP. This observation is confirmed by our research. As described in section three of this report, some Australian mining companies do commit to respecting human rights or indigenous peoples’ rights but most stop short of specifically recognising indigenous peoples’ rights to FPIC. This approach is inherently flawed as the respect for FPIC is necessary to guarantee respect for indigenous peoples’ rights.

15. Expert Mechanism Advice No. 2, 2011: Indigenous peoples and the right to participate in decision-making.

16. Report of Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Stavenhagen 2003 UN Doc. E/CN.4/2003/90, paras 13 and 66.

17. Convention on the Elimination of All Forms of Discrimination against Women.

18. Final study on indigenous peoples and the right to participate in decision-making, Report of the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/EMRIP/2011/2, 26 May 2011.

19. Oxfam Australia, Women, communities and mining: The gender impacts of mining and the role of gender impact assessment, 2009.

20. Protect, Respect and Remedy: A framework for business and human rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 7 April 2008.

21. www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

22. Statement by James Anaya, Special Rapporteur on the rights of indigenous peoples, Forum on Business and Human Rights, 5 December 2012, Geneva.

The mining and energy nexus: examples from the Asia Pacific region

Mining, oil and gas companies are, in general, not directly involved in proposing or developing hydro generation of electricity. However, by requiring energy in remote areas — often in countries with limited grid connectivity — mining companies either inadvertently or directly put pressure on governments to incentivise the development of new energy sources, including large-scale hydro schemes. These large-scale hydro schemes impact on indigenous peoples in many and often harmful ways.

In the Mekong region the development of hydropower dams characterises the rapid expansion of economic growth; achieved in large part by the exploitation and commercialisation of the natural resource base. This region has more than 100 ethnic minority or indigenous peoples groups, and the expropriation of natural resources for hydropower and related industrial activities from local communities is largely occurring without their FPIC.

The Mekong development model²³ anticipates cross-border regional grid connectivity linking growing urban markets with new sources of power. Included in this is the electricity connection from large hydropower dams to mining operations. Rural electrification is needed in most Mekong countries, yet the best way to deliver this is not large-scale hydropower but more decentralised and small-scale generation options. Economic development in many of the Mekong countries is putting pressure on electricity supplies but the primary drivers of energy development are not indigenous peoples. Local indigenous peoples are rarely represented in energy planning or decision-making in relation to energy or infrastructure.

Australian mining companies that have benefited from large hydro developments in the Asia-Pacific region include PanAust and Kingsgate Consolidated, which purchase hydro-generated electricity from the grids in Thailand and Laos. Neither company is directly involved in the development of dams. These companies typically state that their influence on how hydro projects are developed or operated is limited. Yet, companies have some obligations. The UN Guiding Principles on Business and Human Rights state clearly that business should seek to prevent adverse human rights impacts that are directly linked to their operations ... even if they have not contributed to those impacts.

In Malaysia, Rio Tinto Alcan acknowledged its interest in ensuring human rights were respected in the development of a hydro dam that would have provided power to a smelter it was considering building in Sarawak (the project was cancelled in March 2012 due to failure to reach agreement on commercial terms for a long-term power supply contract). "While resettlement was not occurring where the smelter was to be located, Rio Tinto Alcan had an interest in ensuring that any resettlement linked to its operation was conducted according to international best-practice and human rights due diligence. Rio Tinto Alcan needed to be aware of the full range of its business involvement, including the activities of the host government."²⁴

In Papua New Guinea, Origin Energy is developing the Purari Dam with most of the energy to be sent via under-sea cable to Australia to provide base-load power for minerals and other infrastructure development in Queensland.²⁵ Origin has stated a commitment to developing the dam with consideration of FPIC for local communities, but to do this meaningfully the process should include FPIC for communities at the dam site, downstream to the delta and port system, and across to the Australian mainland where the cables will cut through indigenous land in Cape York.

We can start to see that some companies recognise the wider sphere of their influence and responsibility to ensure that projects along their value chain, including energy supply, are undertaken in accordance with international human rights standards.

²³ Most clearly characterised in the Asian Development Bank driven Greater Mekong Subregion (GMS) program.

²⁴ Rio Tinto guide for communities and social performance practitioners, Why human rights matter: www.riotinto.com/documents/ReportsPublications/Rio_Tinto_human_rights_guide_-_English_version.pdf

²⁵ www.originenergy.com.au/files/FactSheetPNGRenewableEnergyProject.pdf

Reconciliation Action Plans

Some Australian companies have developed a Reconciliation Action Plan (RAP). These plans document what the company would do to contribute to reconciliation in Australia. They “outline practical actions the organisation will take to build strong relationships and enhanced respect between Aboriginal and Torres Strait Islander Peoples and other Australians. A RAP also sets out the organisation’s aspirational plans to drive greater equality by pursuing sustainable opportunities”.²⁶

An assessment of companies’ publicly stated commitments indicates that of the extractive industry companies among the top 200 companies listed on the Australian Securities Exchange (ASX) only BHP Billiton, Rio Tinto and Woodside Petroleum have RAPs. A RAP could be used by companies to outline how they respect and implement FPIC in Australia and may act as a useful starting point for implementing this standard across all of a company’s operations.

Further, on numerous occasions, mining company representatives have said to Oxfam that while they respect human rights they do not support FPIC thus erroneously disconnecting indigenous peoples’ right to FPIC from other human rights.

The right to FPIC is explicitly recognised in some national and state laws including in the Northern Territory of Australia. Many Australian mining companies would be familiar with these legislative requirements and, if they operate in the Northern Territory, would comply with these requirements. In fact, there is much that companies can learn from existing legislation and associated practice in the Northern Territory that they could implement (with adjustments as required) in their operations in other countries.

Oxfam Australia’s report on FPIC in Australia²⁷ describes some of these lessons. Yet many mining companies do not go beyond compliance with national law once outside of Australia — even when operating in countries where indigenous peoples’ rights are poorly protected and the specific right to FPIC is not recognised by law. The corporate responsibility to respect human rights requires companies to go beyond compliance with national law. It requires them, as a minimum, to do no harm, and respect international standards.

FPIC is both a right in itself and can also help protect other human rights including rights to property, culture, religion, livelihood, health and physical wellbeing. It must be recognised that mining has the potential to negatively impact these rights including, for example, when communities are forced to resettle to allow for the development of a mine. The Special Rapporteur on the rights of indigenous peoples has said that consent (and consultation) constitutes a special standard that safeguards and functions as a means for the exercise of indigenous peoples’ substantive rights.²⁸ Other safeguards include human rights and gender impact assessments, plans to mitigate the potential negative impacts on indigenous peoples’ rights, fair benefit-sharing and compensation agreements, and rights-compatible grievance mechanisms.

The many accusations of human rights abuse directed at the mining industry — and strong opposition to many mining projects — would not be nearly so high if mining projects are only developed when the consent of indigenous peoples is obtained. Companies need to understand the potential legal, reputational and financial risks of attempting to operate without this consent. Genuine respect for the requirement for FPIC of indigenous peoples would undoubtedly have a transformative effect on the industry and its relationship with indigenous peoples.

The next section of this report examines the publicly stated positions of Australian mining, oil and gas companies in relation to indigenous peoples’ right to FPIC.

²⁶ www.reconciliation.org.au/home/reconciliation-action-plans

²⁷ Mark Rumler, *Free, prior and informed consent: A review of free, prior and informed consent in Australia*, Oxfam Australia, December 2011.

²⁸ Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, A/HRC/21/47, 6 June 2012.

3. AUSTRALIAN MINING COMPANY COMMITMENTS TO FREE, PRIOR AND INFORMED CONSENT

This section examines the publicly stated positions of Australian mining, oil and gas companies in relation to the rights of indigenous peoples to participate in decision-making that affects them, their lands and their natural resources. In particular we assess whether companies recognise the right of indigenous peoples to give or deny their Free, Prior and Informed Consent (FPIC) for extractive industry projects on their land. To do so, this report focuses on company disclosures of their commitments to FPIC.

Internationally we have seen that large mining, oil and gas companies are improving their policies and disclosure on approaches towards indigenous peoples' consent and consultation.²⁹ This review considers the statements and guidelines of 53 mining, oil and gas companies among the top 200 listed companies on the Australian Securities Exchange (ASX 200). The review focuses on publicly available statements made by companies in relation to indigenous peoples' rights, FPIC and approaches to consultation and engagement with indigenous peoples.

It should be noted that some companies may have guidelines and policies that help their operations engage with indigenous peoples but have not made these publicly available. Ensuring policies are in the public domain is important. This assists all stakeholders to understand the standards the company has set for itself and the company culture, strengthens due diligence (a company's capacity to identify, mitigate, prevent and remedy adverse impacts) and enables impacted communities to engage more effectively and hold companies to account. The UN Guiding Principles on Business and Human Rights include company communication as a key element of human rights due diligence — it is part of showing that the company respects human rights. Further research could review how companies are implementing their own policies through case studies and outcomes analysis.

More detail on the methodology used for this study can be found in Appendix 1.

3.1 STRATEGY AND RESPONSIBILITY

While the issue of human rights has long been on the agenda for many companies, indigenous peoples' rights and the specific right to FPIC have as yet had little public attention in corporate disclosures by Australian extractive companies. This section examines how Australian extractive companies approach these issues in public policy statements. Clear policy commitments provide the basis for a company's strategy for upholding human rights and ensuring the respect and protection of indigenous rights where they operate. Publishing these statements and approaches builds the platform for transparent engagement and is a first step towards allowing stakeholders to understand how companies are managing these risks and opportunities.

There are various human rights instruments to assist companies to meet their responsibilities. The rights of indigenous peoples must be considered within a broader human rights context. Companies may be guided by international human rights instruments such as the UNDRIP or ILO 169. Only two companies in this study, Rio Tinto and BHP Billiton³⁰ (albeit qualified) have made a public commitment to support these declarations.

We found that 14 of the 53 extractive companies on the ASX 200 have published a policy commitment to upholding human rights throughout their operations. This is a start, but a somewhat surprisingly low number given the vulnerability of the extractives sector to human rights violations. The sector accounts for two thirds of the cases of alleged human rights abuses reported by non-government organisations.³¹ Companies in the extractive industries often operate in countries where governance is weak. This increases the need for responsible business conduct, robust policy and effective implementation. A survey undertaken in 2012 using the UN Guiding Principles on Business and Human Rights as its foundation confirms that among the extractive companies listed on the Forbes Global 2000 "nearly all companies had in place some sort of CSR activity or sustainability policy... [although] explicit human rights policies and human rights due diligence processes were less common".³²

Twelve of the 53 companies reviewed for this report have published a policy commitment which generally refers to the respect of indigenous peoples' rights (see Figure 1). These commitments are often disclosed in human rights or community policies, or corporate codes of conduct. Alumina, for example, specifies in their human rights policy to "respect the economic, social and cultural rights of indigenous peoples in all communities where we operate".³³ Similarly, highlighting specific attention to the rights of indigenous peoples is Alacer Gold whose code of conduct states that the company "shall strive to operate in a manner that respects human rights and is consistent with the principles articulated in the Universal Declaration of Human Rights. This respect includes social, economic and cultural rights. Special attention will be given to the rights of vulnerable and indigenous peoples".³⁴

29. Marianne Voss and Emily Greenspan, 'Community consent index: Oil, gas and mining company public positions on Free, Prior, and Informed Consent (FPIC)', Oxfam America Research Backgrounder series, 2012.

30. Rio Tinto Limited, Community agreements guidance: www.riotinto.com/documents/Community_agreements_guidance_2012_2014.pdf; and BHP Billiton Limited, Sustainability report supplementary information 2009, p21: www.bhpbilliton.com/home/investors/reports/Documents/2009/sustainabilitySupplementaryInformation2009.pdf

31. www.ibanet.org/Article/Detail.aspx?ArticleUid=866A30C1-76FC-42E4-9C05-9E3237F82781

32. <http://fairplayconsulting.wordpress.com/2013/02/14/making-the-case-for-human-rights-and-business-more-than-just-csr/>

33. Alumina Limited, Human rights policy: www.aluminalimited.com/human-rights-policy/

34. Alacer Gold Corp., Code of conduct: www.alacergold.com/files/governance/Alacer_Code_of_Conduct_and_Ethics_Policy.pdf

Figure 1 – Public commitment to indigenous rights

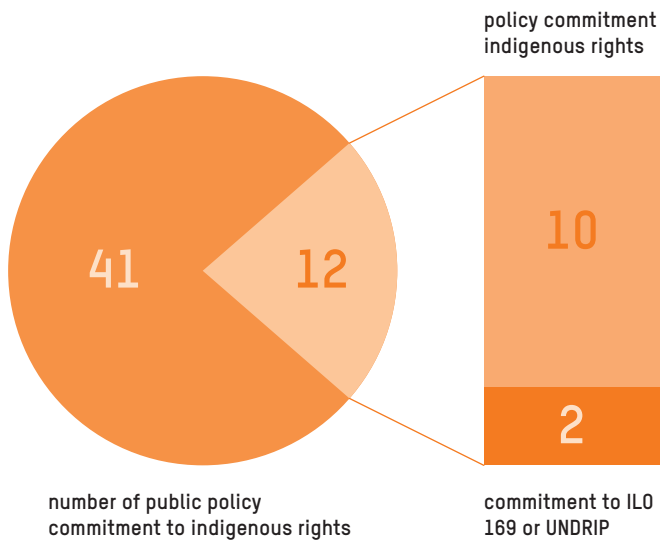
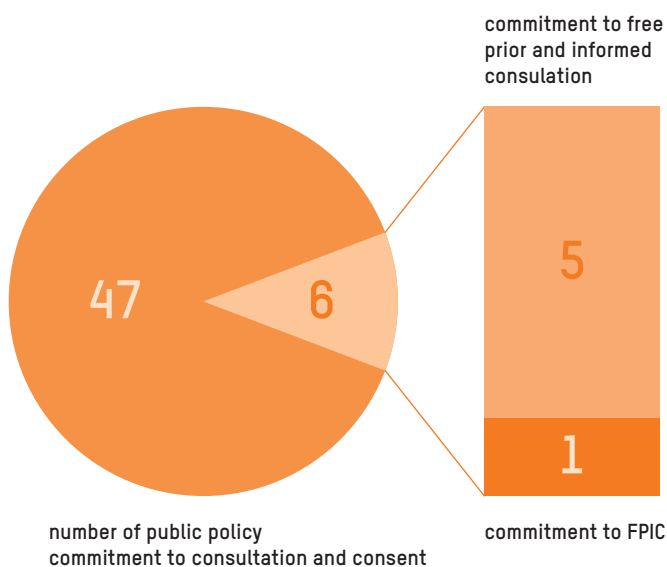


Figure 2 – Commitment to FPIC and consultation



In total 18 companies commit to respecting human rights and/or indigenous peoples’ rights more specifically.

The pressure to obtain consent drives companies to reach agreement with affected communities. If done well, in a participatory way that ensures agreement reflects the views of all in the community including women, this can assist in avoiding conflict, project delays and interruption. It can foster a strong basis of trust for ongoing good relationships with traditional owners and others in the community. It contributes to a stable operating environment, an increasingly important consideration for investors and shareholders.

The first step for this is consultation with communities. This study finds that only six companies have made public commitments to ensure adequate consultation with indigenous peoples prior to a project (see Figure 2).

With regard to public commitments to FPIC, the study confirms that Australian extractive companies are largely silent. Only one company (Rio Tinto) has a clear public commitment to FPIC. This commitment importantly and correctly identifies the formal right to consent as outlined in the UNDRIP and ILO 169. Six of the 53 companies have a public commitment to the principle of free prior and informed consultation. Consultation is not the same as consent, consent is more than a right to be consulted about projects that others will ultimately make decisions on. Yet a public commitment to the principle of free prior and informed consultation may be a good basis from which to take the next step and recognise indigenous peoples’ right to consent.

While the majority of companies lack clear policy disclosure on what principles guide their engagement with indigenous peoples, we can see that companies have started to publicly acknowledge the special interests and relationships indigenous peoples have to the lands that mining companies wish to access for resources extraction. There is, however, a long way to go.

STRATEGY AND RESPONSIBILITY	TOTALS		PERCENTAGE	
	YES	NO	YES	NO
Policy commitment to human rights	14	39	26%	74%
Policy commitment to indigenous rights	12	41	23%	77%
Policy commitment to ILO 169 or UNDRIP	2	51	4%	96%
Commitment to FPIC	1	52	2%	98%
Commitment to the principle of free prior and informed consultation	6	47	11%	89%

3.2 ENGAGEMENT AND CONSENT

A number of companies have provided details on how they approach engagement with affected indigenous peoples. Iluka Resources, for example, has a commitment to “open and meaningful engagement” and the “conduct [of] engagement in a manner that fosters mutual respect and trust”. Iluka Resources further states that it aims to work closely with land owners and traditional custodians of the land it mines to develop mutually beneficial access agreements.³⁵ Such commitments to meaningful engagement highlights that companies are well aware that external stakeholders are as important as internal stakeholders.

Meaningful, transparent and accountable engagement at the beginning of a project is crucial, but ensuring this occurs throughout a project’s life cycle is also important. Ongoing and frequent dialogue helps to develop a shared understanding of what is important to all parties. It is fundamental to good due diligence and helps identify and address grievances early. It is often inevitable that expectations are different among stakeholders, or that extractive projects change plans during operations, so at all stages companies should ensure that meaningful and transparent engagement is ongoing at the operational level. In practice companies often refer to community engagement plans which outline the frequency of engagement with community representatives, including specially nominated indigenous representatives.

Companies also report that they are in the practice of establishing community consultation groups with regular set meeting dates, or engaging indigenous liaison officers. For extractive operations in Australia, engagement mechanisms are often set in native title agreements. Most companies, however, fail to communicate these agreements to broader stakeholders. Such disclosure would help companies to demonstrate how they genuinely engage with indigenous peoples. Reporting on these engagement mechanisms — both the successes and challenges — would assist all stakeholders to understand what is happening on the ground. It would also contribute to improved engagement and understanding among indigenous peoples, other impacted communities, civil society organisations, investors and companies.

In reviewing approaches by extractive companies in the ASX 200, this study found that only nine companies made a clear public commitment to meaningful participation with indigenous peoples. Of these nine companies, only five companies made further commitments to ongoing engagement with indigenous peoples.

Understanding impacts

Mining, oil and gas companies are often required to undertake social and environmental impact assessments. These are usually needed to secure an exploration or operation licence and project finance. However, in many countries where Australian companies operate impact assessments do not include social or human rights impacts, nor are they required to involve the meaningful participation of affected people. The IFC recommends that companies involve impacted communities as part of their impact assessment process. This will assist in understanding the local context of the operation, including in relation to indigenous peoples.

An Indigenous Impact Assessment can be part of a broader social impact assessment. This study found that 10 extractive companies in the ASX 200 have publicly reported that they undertake such studies before commencing a project. Some of these companies have operations that are financed by IFC loans or guarantees and are therefore required to undertake such baseline studies. A further six companies highlight the importance of local indigenous input to establish and inform cultural heritage management plans and to identify culturally significant sites that may be impacted through extractive activities.

Meaningful dialogue and the establishment of a participatory and inclusive decision-making process on heritage assessment and protection are important. It is fundamental to ensuring indigenous peoples determine what areas may be accessed for extraction and what is off-limits, although a good Indigenous Impact Assessment does not only consider cultural heritage sites.

Impact assessments should also look at the broader social impacts on indigenous peoples and how extractive activities may impact their cultural, spiritual and economic relationship with their land, social structures and community. Impact assessments are essential to provide indigenous peoples with information on how a project may change their livelihood in positive and negative ways, and form the basis for discussion on how to avoid these negative impacts. Indigenous Impact Assessments can also assist in identifying potentially affected indigenous peoples, how they interact, and whether some will be more impacted than others. These assessments can help determine if a different engagement mechanism is required to standard company policy. Finally, it is important that these assessments are publicly available and accessible in appropriate formats, taking into account local context and language.

³⁵ Iluka Resources, Community relations policy: www.iluka.com/docs/2.4-governance/community-relations-policy-march-2007.pdf?sfvrsn=4

Resettlement

In many circumstances impacts on indigenous peoples may involve the relocation of entire communities. The IFC sets standards on land acquisition and involuntary resettlement (Performance Standard 5) and requires FPIC for relocation of indigenous peoples (Performance Standard 7). The World Bank and other development banks have involuntary resettlement safeguards as core policies which cover the impact on individuals who face involuntary resettlement from development projects. All resettlement poses serious human rights risks. However, the special relationship to the land held by indigenous peoples means relocation can have disastrous impacts on a range of human rights, including to culture and livelihood.

A company should only participate in resettlement in exceptional circumstances, and must only do so if the FPIC of the affected indigenous peoples has been secured. In addition, it is widely acknowledged that companies should provide adequate compensation and restoration of livelihoods to communities that are required to move from their land to enable the development of a project. Only six companies have provided public policies or guidelines in relation to resettlement that are, at a minimum, consistent with the IFC Performance Standards or World Bank safeguards.

For example, the Rio Tinto resettlement guidance³⁶ is steered by the principles and content of the IFC Performance Standard on land acquisition and involuntary resettlement. It recognises that “the resettlement of communities and people can have significant adverse impacts on their future life, social fabric and livelihoods”. The standard “requires businesses to ensure that resettled people are better off as a result of resettlement, according to their own assessment and external expert review”. However, challenges persist in the implementation of Rio Tinto’s policy frameworks around resettlement. Rio Tinto has recently engaged with civil society, including Oxfam who visited resettled communities in March 2013, and Human Rights Watch, in response to criticism regarding its resettlement program in Mozambique.

Tools to facilitate consent

While some companies have made, at minimum, a commitment to consult with indigenous peoples, there is very little information in the public domain as to how they will facilitate consultation or seek consent from indigenous peoples. Only one of the companies examined for this report published sufficient details to provide insight into how they facilitate consultation.

The types of things that a company can do, and should report on, include:

- beginning a dialogue and consultation process with indigenous peoples that respects traditional representation and decision-making processes, and that includes the participation of women and men, and young and elderly people;
- working with indigenous peoples to explore different options for project location and design;
- making sure information is accessible and understood through use of interpreters or providing documents in locally understood languages;
- disclosing information on how documents are provided to the community and what other communication tools have been used;
- describing the time frame provided for the local community to make a decision, ensuring it reflects the local circumstances; and
- disclosing the scope of the engagement and who was involved.

Reporting on these will assist all stakeholders, including investors, to better understand efforts taken by a company to avoid or mitigate potential negative impacts that affect indigenous peoples and other impacted communities. This can include the social, cultural (sacred sites or culturally important sites) or environmental impacts. It will also help ensure more meaningful engagement with impacted communities.

³⁶ Rio Tinto, Resettlement guidance: www.riotinto.com/documents/Resettlement_guidance_2011_2014.pdf

Grievance mechanisms

Conventional methods for providing grievance mechanisms, such as a toll free hotline for community grievances advertised in newspapers, may not work for indigenous peoples in remote locations. Companies need to adapt their methods based on local circumstances. Five of the 53 companies have provided details on grievance mechanisms appropriate for indigenous peoples and communities impacted by their operations, and information on how they let people know about the mechanism. Having a process in place where communities can raise grievances without fear is important to build ongoing meaningful relationships.

Grievance mechanisms should be legitimate, accessible, predictable, equitable, rights-compatible, transparent and be based on dialogue and engagement.³⁷ These principles help ensure issues are raised early, allowing them to be addressed before they escalate into entrenched conflicts while not foreclosing the option to go to other non-judicial or judicial mechanisms. The grievance mechanisms of companies in this report often take the form of indigenous community liaison officers, or opportunity for feedback via regular meetings or formalised community group meetings. It should be acknowledged that grievance mechanisms for indigenous peoples can be unique and will differ from operation to operation. However, they must incorporate the above principles to be credible and effective. Some companies have publicly disclosed their guidelines on how they establish and maintain the use of dedicated grievance channels. These companies tend to highlight the importance of reaching agreement with local communities about what is the most appropriate communications channel. One option is to use traditional grievance resolution processes.

OceanaGold has set out in its Corporate Social Responsibility policy that it aims to “creat[e] site specific grievance mechanisms with input from stakeholders so that the process is contextualised and tailored to project scope and community needs.”³⁸ Yet only five companies have publicly disclosed grievance mechanisms — this is somewhat surprising given a company-level grievance mechanism is an important tool to identify and remedy adverse human rights impacts, including those experienced by indigenous peoples.

Where there are disclosures, they often lack detail on who is involved in grievance meetings, what typical grievances are, and the frequency of communities using these channels. In cases of companies using regular community meetings as their primary means of feedback from communities, there is often a lack of disclosure on ways for communities to raise concerns outside of formalised meetings. A formal public meeting may not provide the free-from-reprisal security complainants usually want.

The engagement and consent mechanisms reviewed in this section describe how companies approach indigenous peoples. While companies appear to be reluctant to disclose detailed information on real grievances and the resolution process, Australian companies would increase stakeholder confidence in their engagement methods by providing examples from operations. To date, there is little in the public domain as to exactly how companies are engaging with indigenous peoples.

ENGAGEMENT AND CONSENT	TOTALS		PERCENTAGE	
	YES	NO	YES	NO
Commitment to meaningful participation	9	44	17%	83%
Commitment to ongoing consultation	5	48	9%	91%
Indigenous Impact Assessment*	16	37	30%	70%
* Cultural Heritage Assessment with local indigenous input	6	47	11%	89%
* Indigenous Impact Assessment reviewing broader social impacts	10	43	19%	81%
Active participation in resettlement	6	47	11%	89%
Facilitation of FPIC	1	52	2%	98%
Provision of a grievance mechanism	5	48	9%	91%

37. Oxfam Australia, Community company grievance resolution: A guide for the Australian mining industry, 2010.

38. OceanaGold, CSR policy: www.oceanagold.com/assets/documents/Governance/0902csrpolicyupdated.pdf

3.3 REPORTING AND DIALOGUE

To build trust and inform stakeholders it is important for companies to communicate efforts taken in relation to working with indigenous peoples. The low levels of disclosure noted above may not necessarily be a reflection of companies not doing the right thing, but a failure to communicate their approaches and activities to broader stakeholders.

When companies report on their engagement with indigenous peoples, it helps to deepen understanding of how they approach communities, and acknowledge and address their concerns. Of the Australian companies considered for this review, only two publicly report details on their engagement activities with indigenous peoples. Often companies include general information on stakeholder engagement, but fail to provide meaningful details that illustrate the engagement process between the company and indigenous peoples.

Stakeholders are increasingly interested in seeing both qualitative and quantitative information on:

- how a company deals with disputes with indigenous peoples as a result of its activities;
- concerns raised by indigenous peoples; and
- who a company engages with and how they were identified and selected.

Detailed case studies on specific engagement activities are a recent trend that may provide a good framework for companies to communicate activities. In a publication by Rio Tinto titled *Why human rights matter*,³⁹ the company uses case studies to increase understanding on how human rights standards have been applied. For example, a case study on Weipa (a bauxite mine in Queensland, Australia) describes how the operation communicates grievance channels to indigenous peoples and how grievances are considered and integrated into management procedures.

Of the 53 companies examined for this study, 13 have had indigenous peoples groups or NGOs raise concerns that their operations may breach or adversely impact on indigenous rights.⁴⁰ Less than half of these companies have acknowledged these allegations or concerns in a company document or formal statement. Allegations raised relate to issues such as benefit-sharing, land access and definition of traditional land-owner groups. Other common allegations include environmental pollution and the disruption or destruction of culturally significant or sacred sites.

It is particularly concerning to note the emergence of conflicts where companies are alleged to have had a hand in creating 'friendly' land-owner groups or have chosen to only engage with groups and community 'representatives' that are looking favourably at a proposed development. It has also been alleged that negotiations with traditional land owners have resulted in communities splitting. Conflicts may arise within communities around where to draw the line between conserving traditional lands, values and livelihoods, and economic development and benefits offered by companies. These alleged negative impacts illustrate some of the complex challenges that companies, indigenous peoples and other project-affected communities face. Such conflicts are often best addressed through an early and ongoing dialogue that fosters mutual understanding of issues and a diversity of opinions. The risk of escalating conflict leading to serious disruption of company operations and to communities has been shown in cases such as Woodside Petroleum's Browse project at Western Australia's James Price Point (which has recently been shelved), or OceanaGold's Didipio project in the Philippines. Both projects have experienced delays due to conflict with indigenous peoples.

Ultimately, it is unlikely that large-scale, high-impact projects such as mining, oil or gas extraction will proceed entirely without some conflict. Stakeholders are aware of this and companies are increasingly expected to be frank about the challenges they face and how they will be mitigated. Without such disclosure, the broader stakeholder community, particularly investors, will start to question a company's commitment to transparency and due diligence. Standards such as the Global Reporting Initiative (GRI) specifically call on companies to report incidents of non-compliance, including engagement with indigenous peoples.⁴¹ However, in practice, this often results in just a short statement that a company is not aware of any incidents of violations involving rights of indigenous people. From 53 companies, three companies' GRI reports identify whether breaches have occurred. In some cases statements also identify whether breaches to cultural heritage management plans have occurred, however, such disclosure often lacks detail on where and how specific breaches happened, or how companies have addressed these breaches through remedial action. Disclosure and open debate about grievances, allegations and breaches — real and perceived — of agreed commitments helps demonstrate that companies are serious about addressing issues that are important to impacted communities. It helps build trust and may be a first step to resolution if there is conflict.

39. Rio Tinto guide for communities and social performance practitioners, *Why human rights matter*: www.riotinto.com/documents/ReportsPublications/Rio_Tinto_human_rights_guide_-_English_version.pdf

40. This is based on information collected by CAER, sourced from the public domain including media and NGO reports.

41. Global Reporting Initiative G3 Guidance, Performance Indicator HR9.

Overall, the data indicates that half of the companies considered for this report have not met a single indicator reviewed. This means a large number of Australian mining, oil and gas companies make no mention of indigenous rights or engaging with indigenous peoples in their public reports. These companies therefore face considerable risk. This supports findings by the UN Special Rapporteur on the rights of indigenous peoples, James Anaya, in his report on the extractive industries operating within or near indigenous territories. He identified “the lack of a minimum shared understanding about the basic implications of accepted international standards or about the institutional arrangements and methodologies required to give them full effect in the context of extractive or development operations that may affect indigenous peoples”.⁴²

But this particular glass is also half full. This analysis confirms that 50% of extractive companies examined have, in some form, acknowledged issues relevant to indigenous peoples’ rights and interests, and the need for companies to engage in some way with indigenous peoples.

The relationship between extractive companies and indigenous peoples is always going to be complex, often involving a balancing act between traditional values and economic development. Improving disclosure on community engagement approaches, tools and outcomes will improve trust by indigenous peoples and other affected communities, as well as investors and other stakeholders in a company’s ability to enter new resource projects without major conflict and delays.

REPORTING AND DIALOGUE	TOTALS		PERCENTAGE	
	YES	NO	YES	NO
Reporting on engagement activity	2	51	4%	96%
Indigenous rights allegations	13	40	25%	75%
Response to controversies	6	47	11%	89%
Disclosure of incidents of non-compliance	3	50	6%	94%

⁴² www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35_en.pdf

4. CONCLUSION AND RECOMMENDATIONS

Free, Prior and Informed Consent (FPIC) is necessary to guarantee that the negative impacts of mining will be avoided, and that indigenous peoples' economic, social and cultural rights will be protected in situations where mining projects are operating on or near indigenous land. Genuine respect of the requirement for FPIC of indigenous peoples would undoubtedly have a transformative effect on the industry and its relationship with indigenous peoples.

The research for this study finds that:

- less than 25% of the 53 ASX 200 extractive companies considered in this report have a public statement respecting the rights of indigenous peoples;
- only two companies have a public commitment to adhere to the UNDRIP or ILO 169, and only one company has a public commitment to FPIC;
- half of the companies reviewed for this report have not met a single indicator examined for this report;
- while extractive companies operating in Australia are required to undertake cultural heritage surveys, only 10 of the companies in this study have disclosed details of where they have undertaken broader social impact studies that examine their impact on indigenous peoples;
- one quarter of companies have had indigenous peoples' groups or NGOs allege that they have negatively impacted on the rights of indigenous peoples. Only half of these companies have publicly acknowledged or responded to these allegations; and
- less than 5% of companies considered in this study have disclosed detailed examples of how they engage with indigenous peoples. Issues such as meaningful and ongoing consultation, provision of grievance mechanisms, policies on resettlement and compensation, or reporting of incidents of non-compliance had similarly low rates of disclosure.

It is recommended that Australian mining, oil and gas companies:

1. Develop and implement an indigenous peoples' rights policy that is based on the UNDRIP and ILO 169, and that is consistent with the UN Guiding Principles on Business and Human Rights. This policy may be included within a broader human rights policy but should include specific commitments regarding indigenous peoples' rights.
2. Make explicit commitments to respect the right of indigenous peoples to give or deny their FPIC for extractive industries projects on their land. This commitment to FPIC must apply to company operations both within Australia and overseas, and must commit to obtaining FPIC at all stages of the project cycle (exploration, construction, operation and closure).
3. Disclose indigenous peoples rights and broader human rights policies, ensuring that potentially affected indigenous peoples can access these policies.
4. Undertake Indigenous Impact Assessments — either as part of a broader human rights impact assessment or a stand-alone assessment — that involves the participation of affected indigenous peoples.
5. Commit to meaningful consultation and engagement with, and support the participation of, indigenous people and other affected people in project decision-making. This must include ensuring the involvement of women, based on the principles of gender equality and non-discrimination.
6. Establish grievance mechanisms designed to address the concerns of indigenous peoples, and other project-affected people, and remedy any adverse impacts which companies may have caused or contributed to. Grievance mechanisms must be legitimate, accessible, predictable, equitable, rights-compatible, transparent, and be based on dialogue and engagement.
7. Report on company engagement with indigenous peoples, how it manages grievances and concerns raised by indigenous peoples, and any allegations or violations of indigenous peoples' rights.
8. Learn from their experience of implementing FPIC, and share these lessons with others in the mining, oil and gas industry to improve the industry policy commitment to FPIC as well as implementation and practice.

It is also recommended that:

9. Project financiers and investors recognise the right of indigenous peoples to FPIC, and work with mining, oil and gas companies to implement the recommendations above.
10. The Australian Government clarify its expectations of Australian mining, oil and gas companies with regards to indigenous peoples' rights and support the industry to implement the recommendations made above.

APPENDIX 1 – METHODOLOGY

The underlying data for this study is sourced from a database developed and maintained by EIRIS, a leading global provider of independent research into the environmental, social, governance (ESG) and ethical performance of companies. EIRIS assessments of Australian companies are undertaken by, and make use of, information and research provided by CAER.

EIRIS and CAER research process

The core research process begins with a detailed review and analysis of company disclosures. Companies are provided with an opportunity to respond to questions in areas where the public data is unclear. This results in considerable focused dialogue with companies, and also encourages them to address the issues of concern to investors and to improve their public reporting. Sector specialists within each team review the research conducted by their colleagues before it is released.

For this report, indicators were selected that largely rely on public information, given that policy and reporting require information to be publicly available for all stakeholders. Information on internal systems and guidelines may have been supplied by companies directly and may not be available in the public domain – unless specifically noted this only relates to content under the heading 'Engagement and consent'.

Data chosen for this report

This report is based on data gathered for companies listed on the ASX. Companies selected are part of the 200 largest companies listed on the ASX whose main activities are extracting resources. The same indicators for commitments and reporting on engagement with indigenous communities have been applied consistently for all companies. Indicators examined include:

Strategy and responsibility

- Commitment to human rights – public commitment to respect international human rights standards.
- Commitment to indigenous rights – public commitment to respecting the rights of indigenous peoples. At a best-practice level this includes a commitment to the ILO 169 or the UN Declaration on the Rights of Indigenous Peoples.
- Commitment to the principles of FPIC or free, prior and informed consultation – public commitment to FPIC at each stage of the project. At a best-practice level an explicit commitment to FPIC (rather than consultation) is required.

Engagement and consent

- Public commitment to meaningful participation and ongoing consultation with relevant indigenous peoples.
- Indigenous Impact Assessment involving indigenous communities – commitment to undertake Indigenous Impact Assessment or Social Impact Assessments, including indigenous rights for new projects or significant extensions of existing operations.
- Active participation in resettlement, including compensation proposals where relevant – public commitment not to engage in forcible removal and commitment to fair compensation.
- Facilitation of FPIC and consultation – includes requirements to facilitate understanding (for example, through the provision of independent translators) and clearly identify negative impacts of a proposed project (for example, on sacred sites).
- Dedicated communication channel – at a best-practice level this includes a clear grievance mechanism and evidence this is communicated to indigenous communities.

Reporting and dialogue

- Reporting on engagement activity – disclosure of detailed examples of engagement.
- Disclosure of incidents of non-compliance and remedial actions – including incidents of violations involving indigenous rights, regulatory breaches etc. Disclosure must be public.
- Public response to allegations regarding breaches of indigenous rights – the company responds to allegations in relation to controversial high-profile incidents (if applicable).

In total the report examined 53 companies. Companies included are those ASX 200 companies identified as operating in resource extraction, namely the ones listed on the following page.

Asx code company

AQG Alacer Gold Corp.	EVN Evolution Mining Limited	MBN Mirabela Nickel Limited	STO Santos Limited
AWC Alumina Limited	FMG Fortescue Metals Group	MGX Mount Gibson Iron Limited	SAR Saracen Mineral Holdings Limited
AQA Aquila Resources Limited	Limited	NCM Newcrest Mining Limited	
AGO Atlas Iron Limited	GBG Gindalbie Metals Limited	NST Northern Star Resources Limited	SXY Senex Energy Limited
AUT Aurora Oil and Gas Limited	GRY Gryphon Minerals Limited		SLR Silver Lake Resources Limited
ASL Ausdrill Limited	ILU Iluka Resources Limited	OGC OceanaGold Corporation	
AWE AWE Limited	IGO Independence Group NL	OSH Oil Search Limited	SBM St Barbara Limited
BTU Bathurst Resources Limited	KAR Karoon Gas Australia Limited	ORG Origin Energy Limited	SDL Sundance Resources Limited
BPT Beach Energy Limited	KCN Kingsgate Consolidated Limited	OZL OZ Minerals Limited	
BDR Beadell Resources Limited	LYC Lynas Corporation Limited	PDN Paladin Energy Limited	TRY Troy Resources Limited
BHP BHP Billiton Limited	MAD Maverick Drilling and Exploration	PNA PanAust Limited	WSA Western Areas Limited
BRU Buru Energy Limited		PRU Perseus Mining Limited	WHC Whitehaven Coal Limited
CPL Coalspur Mines Limited	MML Medusa Mining Limited	RRL Regis Resources Limited	WPL Woodside Petroleum Limited
CDU Cudoco Limited	MIN Mineral Resources Limited	RSG Resolute Mining Limited	
DML Discovery Metals Limited		RIO Rio Tinto Limited	
DLS Drillsearch Energy Limited		SFR Sandfire Resources NL	

The tables below provide an overview of the findings per indicator:

STRATEGY AND RESPONSIBILITY	TOTALS		PERCENTAGE	
	YES	NO	YES	NO
Policy commitment to human rights	14	39	26%	74%
Policy commitment to indigenous rights	12	41	23%	77%
Policy commitment to ILO 169 or UNDRIP	2	51	4%	96%
Commitment to FPIC	1	52	2%	98%
Commitment to the principle of free prior and informed consultation	6	47	11%	89%

ENGAGEMENT AND CONSENT				
Commitment to meaningful participation	9	44	17%	83%
Commitment to ongoing consultation	5	48	9%	91%
Indigenous Impact Assessment*	16	37	30%	70%
* Cultural Heritage Assessment with local indigenous input	6	47	11%	89%
* Indigenous Impact Assessment reviewing broader social impacts	10	43	19%	81%
Active participation in resettlement	6	47	11%	89%
Facilitation of FPIC	1	52	2%	98%
Provision of a grievance mechanism	5	48	9%	91%

REPORTING AND DIALOGUE				
Reporting on engagement activity	2	51	4%	96%
Indigenous rights allegations	13	40	25%	75%
Response to controversies	6	47	11%	89%
Disclosure of incidents of non-compliance	3	50	6%	94%

APPENDIX 2 – GLOSSARY

ASX

Australian Securities Exchange.

ASX 200

200 largest companies listed on the Australian Securities Exchange (ASX) by market value.

Extractive industries

For the purpose of this report extractive industries include companies which have major activities in mining, oil or gas extraction.

FPIC

See Free Prior and Informed Consent.

Free Prior and Informed Consent

The Expert Mechanism on the Rights of Indigenous Peoples who defines FPIC as follows:

- “Free” implies no coercion, intimidation or manipulation.
- “Prior” implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow indigenous peoples to undertake their own decision-making processes.
- “Informed” implies that indigenous peoples have been provided all information relating to the activity and that the information is objective, accurate and presented in a manner and form understandable to indigenous peoples.
- “Consent” implies that indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.

Free Prior and Informed Consultation

Consultation with communities that is free, prior and informed (see above under FPIC for detailed definition for these aspects), and where there is no clear commitment to consent by the community (ie lacking the self-determination to decide on activities on their land).

IFC

International Finance Corporation.

Mekong countries

These include Burma, Laos, Thailand, Cambodia and Vietnam, and Yunnan and Guangxi Provinces in China.

ILO 169

ILO Indigenous and Tribal Peoples Convention 169 (1989) was the first binding international convention to address the specific rights of indigenous peoples and to outline the legal responsibilities of governments to promote and protect their human rights.

UNDRIP

See United Nations Declaration on the Rights of Indigenous Peoples.

United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples was approved in September 2007 with 143 member states voting in favour; 11 abstained and four voted against: Australia, New Zealand, Canada and the United States. However, Australia changed its position in April 2009 and now supports the Declaration. New Zealand, Canada and the United States now also support the Declaration.



OXFAM
Australia

**CAER – CORPORATE ANALYSIS.
ENHANCED RESPONSIBILITY.**

CAER is an independent, staff and not-for-profit owned research organisation. We assist investors seeking to apply environmental, social and governance criteria to their Australian and international investments. CAER collects data on approximately 300 environmental, social and governance issues for the SandP/ASX 300 and the NZX 50. With our UK partners EIRIS we are able to provide consistent sustainability data on more than 3,000 of the world's leading companies. The data is based on publicly available information gathered from company, government and NGO sources, as well as via direct communication with companies.

OXFAM AUSTRALIA

Oxfam is an independent, non-government aid and development organisation. The organisation undertakes long-term development projects, provides humanitarian responses during disaster and conflict, and advocates for policy and practice changes that promote human rights and justice. Oxfam Australia's Mining Advocacy Program works to influence the policies and practices of mining, oil and gas companies, and the Australian Government and multilateral institutions that support extractive industry activities. The Mining Advocacy Program also works with affected communities to support them to understand their rights and corporate accountability mechanisms available to them that can hold companies to account for their practices. The program focuses on human rights, gender, community-company relationships, revenue transparency and free, prior and informed consent.

cær

