



## Engagement Series Insights: *Working with Indigenous Communities*

### Introduction

In May 2020, Rio Tinto destroyed caves at Juukan Gorge in the Pilbara – recognised as some of the most culturally significant sites in Australia. Like many in Australia and overseas, we were dismayed by these actions. We were shocked because in the Responsible Investment world, Rio Tinto were held up as leaders in terms of relationships with the traditional custodians of the country on which they operate.

Following the destruction of the caves we:

- i) Undertook a series of meetings with the Board and Management of Rio Tinto;
- ii) Began listening to a broader set of stakeholders with deep on-the-ground experience of the relationships between Indigenous communities and extractive companies in Australia; and
- iii) Closely followed the initial evidence presented to the Parliamentary Inquiry into the destruction of 46,000-year-old caves at Juukan Gorge in the Pilbara region of Western Australia.

Through this process we began to understand that this issue was bigger than cultural heritage and that the legal and social license risks were sector-wide. Our concerns about the systemic nature of these risks have been validated by the findings and recommendations of the Parliamentary Inquiry's December 2020 interim report. Given HESTA's \$2 billion dollar investment into the Australian mining sector, this is a major concern for us.

To better understand these risks, from September to November 2020, we embarked on a series of engagements with companies to which we have material exposure in the Australian Metals & Mining and Oil & Gas sectors. The purpose of these engagements was to communicate HESTA's expectations of companies in working with Indigenous communities and to learn about various industry approaches and practices. In the meetings, we were trying to go beyond standard disclosures to understand:

- i. The extent of Board oversight of cultural heritage and relationships with Indigenous communities;
- ii. The quality of relationships between companies and communities; and
- iii. The company's style and approach to engagement.

This document reflects the insights we've gained so far. We're thankful to have met so many company representatives with diverse perspectives and for all the insights you've shared. We hope that by feeding back what we've learnt from this series about good practice and ongoing challenges, that we can help you to meet your aspirations for continuous improvement.

## Examples of Good Practice

### Board Oversight

- Standing board agenda item: Cultural Heritage and relationships with Indigenous Communities are set as a standing board agenda item. This is in line with best practice investors expect on safety reporting and elevates the frequency of Board discussion on the topic.
- Frequent deep dives: In addition to regular reporting, the events of Juukan Gorge have prompted the Board of at least one company to take a 'deep dive' into the topic every six months.
- Presentation of internal 'post-Juukan Gorge' reviews to the full Board: In many cases, internal reviews that companies had undertaken had been presented to the Sustainability Committee (or relevant committee with oversight of the issue). We have seen at least one example where management had undertaken significant and commendable work but in a separate meeting, the Chair had been unable to articulate that work. As such, given the importance and topical nature of the subject, it would be valuable and good practice to present any work that has been done to the full Board.
- Cultural heritage management identified as an enterprise risk: Cultural heritage management clearly articulated on the company risk register at a level that gives it elevated and frequent oversight. Ability to articulate to investors how this flows through reporting.
- Joint Venture (JV) oversight:
  - Proactive and direct discussion about the topic with JV partners, especially by the non-operating partner. One company had proactively shared HESTA's communications with the operating JV partner and the Chair and CEO had undertaken conversations with their counterparts.
  - Board visits to non-operated JV sites which include opportunities to meet formally and informally with community.

### Organisational Structure

- Clear lines to operations: Organisational structures where responsibility for cultural heritage and relationships with Indigenous communities sits in operations (as opposed to centrally/head office) and has a structure which mirrors that implemented for safety, i.e. the site employee with responsibility for cultural heritage and relationships held the same seniority and recognition as the person responsible for safety.
- Anthropological skills in-house: Internal anthropological skills with most of the team responsible for cultural heritage having recognised anthropological training. We also came across one example where the term 'anthropology' was in the team's title. They talked about how this acted as a significant point of interest in the company and gave a sense of academic rigour and importance to the function.

### Benefit Sharing Approach

- Community aspirations: The philosophy of benefit sharing is underpinned by a vision of supporting the aspirations of Indigenous communities and recognition that aspirations can evolve over time.
- Trust structures: Trust structures where the control of royalties is the sole responsibility of the community; check-ins with communities about their satisfaction with current

arrangements at the time of agreement reviews; examples of specific structures being unwound in line with community preferences, typically where legacy structures afforded company oversight of the use of royalties.

- Circumstances of care and maintenance: Consideration of how to support a community when a mine is placed into care and maintenance mode, including retraining local members of the community, and placing them in those maintenance roles.

### *Reviews post-Juukan Gorge*

- Undertaking a review: Recognition that the destruction of heritage at Juukan Gorge represented an opportunity for companies across the sector to formally review their approaches and to learn from the evidence presented at the Parliamentary Inquiry. Leading approaches included a wholesale review of approaches to relationships rather than focusing only on cultural heritage. In addition, we viewed favourably those companies that were open about the weaknesses they had found and were able to clearly articulate the actions they had taken/ planned to take to strengthen relationships. We note however, that many companies that undertook reviews did so early. With the wealth of information provided to the Parliamentary Inquiry in the second half of the year and publication of the Inquiry's interim report in December, we believe it would be beneficial for companies to consider any conclusions in the context of this new information.
- Inclusion of community voice in a review: Leaders who undertook an internal review post-Juukan Gorge consulted with the community as part of their review and included their views in presentations back to the Board.
- Review of Section 18s: Review of all Section 18s held but not yet actioned and consultation with community to ensure consent. This practice is in line with the Parliamentary Inquiry's interim recommendations. In one example, the company had defined Section 18's still afoot that had been granted over a certain number of years ago as 'no longer existing' to prompt renewed consultation if ground disturbance in this region was planned in the future.
- Senior leader check-in with Indigenous colleagues: Recognition of the gravity of the destruction of Juukan Gorge for Indigenous people working in the mining sector more broadly and communication by the CEO or senior leaders with those employees. We felt this reflected a positive culture of diversity and inclusion, recognition of different perspectives and open communication.

### *Social Performance and Status of Relationship*

- Approach to relationship-building: Positioning the relationship as a partnership and examples of meetings in which the purpose of the meeting was to invest in the relationship rather than simply for approvals/outcomes.
- Transparency of standards: While many companies referred to social performance standards, few made their standards publicly available. Doing so assists investors in understanding the standard and metrics that companies are setting internally.
- Board site visits: Regular opportunities for unfiltered dialogue between senior decision makers of the company and senior decision makers in the community is good practice. While processes should be in place to ensure the right information flows through to directors, having regular meetings acts as a circuit breaker to the risk that for whatever reason, communication may have been blocked. Showing the community that senior decision-makers are interested and invested in the relationship also reinforces mutual respect.

- Open and honest relationships: History of elders reaching out directly to senior members in the executive to discuss issues when necessary. We noticed that this example of good practice was more common among smaller companies.

### **Agreements and agreement-making**

- Review mechanisms: Review scope developed in partnership and provides an ability for genuine change of agreements of areas that parties do not believe are working e.g. trust structures.
- Process in the absence of Native Title: 'Goodwill' arrangements where companies had genuinely engaged and developed agreements with groups that are representatives but not yet registered native title holders. These arrangements provided clear explanation of what happens if the group or an alternate group becomes registered. These agreements go beyond management of cultural heritage by having benefit sharing arrangements in lieu of formal recognition or registration under native title.
- On 'gag' and non-disparagement clauses: We came across multiple versions of good practice in this area:
  - i) Disclose if these clauses are part of agreements.
  - ii) Public commitment to not enforce these clauses or to clarify with Traditional Owners that even if there is a perception that they can't speak out about cultural heritage issues, that they can. We note however, that in some instances we have cited 'gag clauses' that prevent Traditional Owners from speaking out on a variety of issues, not just cultural heritage. Our view is that public commitments should reiterate that Traditional Owners are free to speak out on any and all issues that may be relevant to them, not just as it relates to cultural heritage.
  - iii) Plans for removal of these types of clauses.
  - iv) Best practice in this area: We came across an example where not only were these clauses not part of agreements but the company had removed all doubt by including an affirmation of rights clause (to the effect that there was nothing in the agreement intended to cause or perceive to cause the denigration or abrogation of rights that would otherwise be afforded to the community under any state or federal statute).

### **Cultural Heritage**

- Cultural heritage training: Cultural heritage as a specific training module to reflect unique importance rather than rolling up in general cultural awareness training.
- Recognition of intangible heritage: Recognition of intangible heritage as part of cultural heritage protection, evidence of understanding the intangible heritage of Indigenous partners and ability to reflect on how intangible heritage was considered in planning processes.

### **Dispute resolution**

- Culturally appropriate dispute resolution mechanisms: Companies that were able to articulate how standard dispute resolution processes had been modified to fit unique characteristics of communities. For example, we heard about one community that signals that there is an issue that needs to be discussed by placing a branch of a specific tree across

a doorway/pathway. The company that works with this community has learnt about this process and recognises it as a legitimate way for the community to raise a grievance.

## Ongoing Challenges

While this engagement series offered many examples of good practice, there are several ongoing challenges that seem to affect many companies in the sector and investors' ability to make assessments.

- Efficacy of agreement review processes: A common answer to questions we posed about how long-dated agreements are able to evolve with community expectations was that the vast majority of agreements included standard reviews over the life of the agreement (typically every five years). However, companies often struggled to articulate how these review mechanisms had modernised their agreements. Further, we were unable to find a good answer on how practices such as the inclusion of gag clauses, which clearly no longer meet community expectations, had managed to stay part of some agreements despite multiple review periods in some cases. Our concerns of the efficacy of agreement review processes has been further heightened by our engagement with representatives of communities who have shared:
  - i) That the setting of the scope for reviews is often done by a company with little consultation with the community.
  - ii) Several areas of agreements they've attempted to update over the years, to no avail. These areas included aspects of trust structures, heritage processes, royalties, and consultation processes.

A challenge for companies is to ensure these processes are genuine and effective for both parties and then to find ways of communicating that to investors.

- Social performance metrics: Companies tended not to have clear metrics to monitor the quality of relationships, there was no equivalent to the leading and lagging indicators that have become so well developed in safety reporting. In addition, company disclosures tend not to capture the voice of the Indigenous communities with whom they work. The strength of the relationships is self-reported, unlike employee engagement reporting for example where employees are at least partly responsible for 'marking the scorecard.' In a post-Juukan Gorge era, where investors see risk when there is a mismatch between what a company says it does and what it actually does, there is a leadership mantle available for those that can find genuine, informative and creative ways of incorporating community feedback in disclosures.
- Evolution of FPIC towards FPIOC: In some of our meetings the concept of Free, Prior and Informed Consent evolving towards Free, Prior, Informed and Ongoing Consent was discussed. Typically, it was recognised that this evolution posed additional operational difficulty for mining companies but that the concept was becoming more topical; for example, the Parliamentary Inquiry's emphasis that FPIC requires an "ongoing process of review." Finding practical ways to satisfy increasing community expectations that companies obtain FPIOC is a challenge for companies and the sector more broadly but one that must be tackled in the coming years. There are also leadership opportunities available to

Australian companies to influence domestic legislation and global standards to evolve towards FPIOC and lift the bar around the world.