First Peoples and Land Justice Issues in Australia

Addressing Deficits in Corporate Accountability

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About this report

This report investigates the human rights impacts of companies operating on Aboriginal and Torres Strait Islander land. Research for this report is based primarily on information in the public domain, including academic journal articles, legal proceedings and judgments, the reports and findings of government and its agencies, and newspaper reports. Some consultation and fact-checking was also undertaken with members of Aboriginal and Torres Strait Islander community-based organisations and alliances about the findings of the report where information was not available in the public domain or ambiguity existed. Consultation of this type was limited by the load placed on communities to respond to various demands, without adequate resources to do so. Companies named in the report were also contacted for comment and fact-checking. Their responses are incorporated into each case study. Where companies disagreed with the findings of this report, this disagreement is noted. This report attempts to fairly represent where there is consensus around the nature of events and actions, and where there is a divergence of views. The analysis of events and recommendations in this report have been put forward by the researchers at RMIT University and reflect their research findings and conclusions alone.

The information in this report was fact checked to ensure its accuracy and currency as of October 2020. As the reported case studies are constantly developing, information may only be accurate as of this date.

Published: 17 March 2021

Acknowledgements

This report represents RMIT's commitment to reconciliation and land justice. RMIT has undertaken a firm commitment to contribute to, and lead in, the areas of reconciliation and Indigenous community development. The University values cultural diversity, believes all staff and students should be treated with dignity and respect, seeks to contribute to creating a nation that provides equal life chances for all, and works in collaboration with its Indigenous heritage. For more information about RMIT's reconciliation plan, see www.rmit.edu.au/about/our-values/respect-for-australian-indigenous-cultures/reconciliation.

This report was researched and written by Dr Nia Emmanouil and Carla Chan Unger. Advice was provided by Daisy Gardener and Associate Professor Shelley Marshall. The report was edited by Kate Taylor.

We are extremely grateful to the organisations and individuals who contributed to the research reflected in this report, as well as to the companies that provided detailed responses to the case studies and draft recommendations.

Image credit for Indigenous artwork: Louisa Bloomer, Kamilaroi
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ACKNOWLEDGEMENT OF COUNTRY

RMIT University acknowledges the people of the Woi Wurrung and Boon Wurrung language groups of the eastern Kulin Nation on whose unceded lands we conduct the business of the University. We respectfully acknowledge their Ancestors and Elders, past, present and future. RMIT also acknowledges the Traditional Custodians and their Ancestors of the lands and waters across Australia where we conduct our business. RMIT recognises the inherent value of Indigenous Australian perspectives to the University.

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Executive Summary

"I didn't agree with what they were talking about because we couldn't understand what they were talking about"

- Alan Watson, Alawa Traditional Owner

Alan Watson shares an experience with other First Peoples on resource-rich land – he did not understand the information provided by the company seeking to extract resources on his land and he did not provide *informed consent* to the project.

The evidence presented in this report suggests that Mr. Watson has sound reasons for opposing a legal framework and a company that refuses to acknowledge lack of consent. This report charts the reasons why, across Australia, many First Peoples are challenging companies and laws that are failing to respect and uphold their international human rights.

From Origin Energy's hydraulic fracturing (fracking) in the Northern Territory (NT), Bravus Mining and Resource's Carmichael Coal Mine in Queensland, to Glencore's Macarthur River Mine in the Northern Territory, many First Peoples are challenging the human rights impacts of projects, including a lack of free, prior and informed consent (FPIC), through legal challenges and campaigns.

This report describes the multiple barriers that First Peoples and land rights campaigners face to achieving land justice. In some cases, such as the Bravus (formally known as Adani) Carmichael Coal Mine, the Queensland government has gone so far as to extinguish native title, including over land presently being used for ceremonial purposes.

Key international human rights instruments including the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) have not been adequately incorporated into Australian law. This means that companies can act in compliance with state and federal law, though their actions contravene international standards.

The backlash following Rio Tinto's decision to destroy the Juukan caves in Western Australia has further exposed the failings of Australian law, including Native Title law, to protect sacred sites and respect the decisions of Traditional Owners. It has also demonstrated—as in the case of Bravus, Origin, and Glencore—that companies need to start adhering to international laws on the rights of Indigenous Peoples, as well as business and human rights frameworks.

Urgent legislative reform at state, territory, and federal levels is needed to ensure that the fundamental rights of First Peoples are upheld, while companies need to take their obligations under business and human rights frameworks much more seriously. This report points to where there have been serious accountability shortfalls in the mining and extractive gas industries and highlights what governments and companies should be doing to protect the rights of First Peoples impacted by major corporate developments in Australia.

"I didn't agree with what they were talking about because we couldn't understand what they were talking about."

- Alan Watson, Alawa Traditional Owner

Summary of Recommendations

Key recommendations for companies

All companies should:

- Adhere to international business and human rights norms, including those contained in UNDRIP, ICERD, ICCPR, UN Global Compact, and UN Guiding Principles on Business and Human Rights.
- Consult and cooperate in good faith with First Peoples through their own representative institutions in order to obtain their FPIC before undertaking projects that may affect them, including mining and other utilisation of resources.
- Make and adhere to due diligence commitments to ensure no further damage to sacred sites or anthropological sites.

Origin Energy should:

- Cease hydraulic fracturing in the Beetaloo Basin.
- Engage comprehensively and directly with Traditional Owners to settle the matter of whether there is FPIC for fracking to occur under its current mining leases.

Bravus Mining and Resources (formally known as Adani) should:

- Suspend mining developments and rail construction until all Traditional Owners support the project and give their FPIC.
- If unable to obtain FPIC consistent with international law and human rights norms, cease all work and engage in a conflict resolution process mediated by an appropriate United Nations (UN) (approved) agency.

Glencore should:

- Adhere to all recommendations of the NT Environmental Protection Authority's Assessment Report 86 and comply with the conditions of the Variation of Authorisation.
- Publicly release an (independently audited) economic analysis of the mine.
- Establish and officially recognise a self-determining Community Reference Group that is independent of both Glencore and the NT government and is representative of all four clan groups as appointed by the clan groups themselves.
- Work respectfully with this Community Reference Group to ensure that there is the FPIC of First Peoples to all current and future developments that relate to the mine.
- Fully investigate scenarios for the early closure, full backfill, and rehabilitation of the mine and engage the community in decision-making in relation to these.
- Publicly release all mining management plans and independent assessments of these plans.
- Significantly increase the amount held in the mining security bond to reflect the true costs associated with the long-term rehabilitation of the mine.
- Immediately and accurately report contamination incidents to local communities through notices that can be understood by the Garawa, Gudanji, Marra, and Yanyuwa Peoples.
- Provide clear evidence to the community demonstrating that it has implemented all the recommendations made in the mine's Independent Monitor Reports, within 6 months.

Torres Strait Islander flag

Aboriginal flag

Key recommendations for governments

The NT government should:

- Amend the *Mining Management Act 2001* (NT) to make the publication of mine management plans mandatory.
- Amend the *Environmental Protection Act 2019* (NT) to include the requirement of FPIC from Traditional Owners for projects being assessed under the Act.
- Amend the *Environmental Protection Act 2019* (NT) to impose a chain of responsibility on companies and their related parties so that they bear the cost of managing and rehabilitating sites.

In relation to Origin Energy's plans in the Beetaloo Basin

- Ensure that all future exploration permits for unconventional gas development are issued only where FPIC from Traditional Owners is established.
- Develop mechanisms for redress when the FPIC of Indigenous Peoples has not been sought in relation to projects that have commenced.

In relation to Glencore's operations at the McArthur River Mine

- Ensure the NT Environmental Protection Agency's recommendations are more strongly and accurately reflected in the conditions of the Variation of Authorisation and the Mine Management Plan, and that these recommendations and conditions are enforced.
- Implement the recommendations of the mine's Independent Monitor.
- Use powers under the *NT Inquiries Act 2011* (NT) to investigate the current state of the mine and its future plans, with independent assessment of: rehabilitation scenarios that examine the complete backfill of the open cut mine; current regulatory requirements; the adequacy of the rehabilitation bond; and the economic viability of the mine.
- Conduct a full investigation to determine the source of contamination of drinking water in the Garawa camps.

The Queensland government should:

In relation to Bravus's operations at the Carmichael Mine

- Hold an independent inquiry into the process used to obtain an Indigenous Land Use Agreement (ILUA), in which the state government as a signatory to the ILUA extinguished native title to assist Bravus with obtaining the Agreement.

All states and territories and the federal government should:

- Remove financial and other barriers to First Peoples accessing the courts to ensure they can effectively challenge decisions that affect them. This could include, for example, including protective and public interest costs orders and third-party appeal rights in all legislation that regulates Indigenous Peoples' rights.

The federal government should:

- Expand the formal legal requirement for extractive industries to obtain the Free and Prior Informed Consent of Traditional Owners to reflect best practice, in line with the advice of the UN Committee on the Elimination of Racial Discrimination. This includes legislative amendments to the:
    - *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), to include FPIC provisions that give Traditional Owners a veto right beyond the exploration phase of a development; and
    - *Native Title Act 1993* (Cth), to incorporate FPIC, including a veto right, and the lengthening of negotiation time frames.
- Reform the *Native Title Act 1993* (Cth) to bring it into line with Australia's commitment to the UNDRIP, including the adoption of the UNDRIP into the preamble of the Act, with a requirement that the Act's provisions be interpreted in a way that allows court cases to be brought on public interest and Indigenous human rights grounds.
- Legislate for mandatory human rights due diligence assessments.

More specific and detailed recommendations are provided in relation to each case study.

Acronyms

ACAN	Australian Corporate Accountability Network
CBT	Community Benefits Trust
FPIC	Free, Prior and Informed Consent
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on Elimination of All Forms of Racial Discrimination
ICMM	International Council on Mining and Metals
ILUA	Indigenous Land Use Agreement
MOA	Memorandum of Agreement
MIM	Mount Isa Mining
MRM	McArthur River Mining Pty Ltd
NLC	Northern Land Council
NNTT	National Native Title Tribunal
NTCA	Native Title Claim Applicant
NT	Northern Territory
NTEPA	Northern Territory Environmental Protection Agency
OMP	Overburden Management Project
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UN	United Nations

Introduction

Across the Australian continent, First Peoples are asserting their human rights in relation to land justice. While governments have primary responsibility for upholding human rights, it is broadly recognised by the United Nations and business communities that 'transnational corporations and other business enterprises have a responsibility to respect human rights'[1] and that their activities 'have a large impact on rights, particularly economic, social and cultural rights.'[2]

At present, in international human rights law there are no binding legal obligations on companies to uphold human rights. There are also no formal international human rights 'accountability mechanisms' that bind corporations. What does exist, are an increasing number of norm-building and soft law instruments, in the form of principles, that establish a rights-protective culture within the business community and corporate entities, as well as non-judicial human rights mechanisms. Specific obligations are also placed on companies through domestic law.

This report identifies three significant land justice cases where Australian companies and multinational parent groups operating in the mining and extractive gas industries in Australia are alleged to be negatively impacting the human rights of First Peoples. In this report, the conduct of these companies is assessed against corporate accountability norms and instruments to which each company has committed, in addition to the human rights protections for First Peoples in Australia. An examination of international instruments protecting First Peoples' rights and corporate accountability foregrounds the analysis of the following cases:

- Origin Energy's hydraulic fracturing (fracking) in the NT and a lack of FPIC in relation to its dealings with First Peoples.
- Bravus's Carmichael Coal Mine in Queensland and a lack of good faith and FPIC consent in addition to negative environmental impacts.
- Glencore's McArthur River Mine in the NT and a lack of good faith, FPIC, transparency and accountability, in addition to impacts on land and water.

A lack of FPIC from First Peoples is evident across all three case studies and emerges as a key finding of this report. FPIC is defined as 'the right to consent or withhold consent to development which is realised through processes consistent with consultation and participation.'[3] It represents the 'highest standard possible for the involvement of Indigenous Peoples in decision-making processes about large projects' and requires on-going community participation.[4] This principle is recognised in art 32(2) of the UNDRIP, whereby:

> 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, utilization or exploitation of mineral, water or other resources.

The protection of FPIC is also affirmed in the right to self-determination in art 1 of ICCPR. In addition to these responsibilities held by state parties, the UN Guiding Principles on Business and Human Rights have bearing on the application of FPIC by corporations in their relationships with Indigenous Traditional Owners.[5]

FPIC requires companies to operate in good faith to provide First Peoples with the information they need, in a way that is understood by them, to be able to freely give consent, without coercion. Significant regulatory gaps—at state, territory, and federal levels—mandating the requirements for FPIC from First Peoples in mining and gas development projects signal a need for both legislative reform and a best-practice approach to be taken by the private sector. Regulatory gaps, as well as inadequate compliance by companies, pose a threat to the protection of First Peoples' human rights in Australia, including those protections guaranteed under international law.

Key recommendations are made in relation to each of the three case studies. These recommendations aim to support constructive and respectful dialogue between First Peoples and these mining and gas companies in a way that promotes a rights-protective culture within the private sector. Finally, where it is perceived that legal and regulatory deficiencies are contributing to alleged human rights breaches, recommendations are made to state, territory, and federal governments for legislative reform.

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CONSENT

FREE: freedom from coercion, intimidation, manipulation, or undue influence or pressure, including freedom from conduct deemed inappropriate as a result of unequal power.

PRIOR: consent is sought in advance of any authorisation and commencement of activities, including the issuance of licences or concessions that impact Indigenous Peoples' rights, and in a manner that respects the time requirements of Indigenous consultation/consensus processes.

INFORMED: information is provided that covers a range of aspects including the nature, size, pace and duration of a proposed project, as well as potential positive and negative impacts. The information is provided in a culturally appropriate and accessible format for the relevant Indigenous Peoples, with sufficient time for their consideration.

CONSENT: incorporates the right to give or withhold consent, including in a manner that is unfettered by significant procedural conditions. In some instances, consent may be revoked if, for example, the consent was given without the benefit of all the available information.

Source: Australian Business Guide to Implementing the UN Declaration on the Rights of Indigenous Peoples.

Free

Means that consent is given freely without coercion, intimidation, or manipulation.

Prior

Consent is sought before every significant stage of project development.

FPIC

Informed

All parties share information, have access to information in a form that is understandable, and have enough information and capacity to make informed decisions.

Consent

The option of supporting or rejecting development that has significant impacts on Indigenous lands or culture.

Rights of First Peoples

The rights of First Peoples in Australia are protected across three key international human rights instruments: ICERD, ICCPR, and UNDRIP.

While ICERD and ICCPR are incorporated into Australian law to varying degrees, UNDRIP is not, meaning that the rights of First Peoples lack comprehensive protection under Australian law. Each of these three international human rights instruments are examined in turn, highlighting each instrument's capacity to protect the rights of First Peoples, and its limitations.

Convention on the Elimination of All Forms of Racial Discrimination

While Australia has incorporated ICERD into domestic law through the *Racial Discrimination Act 1975* (Cth), the UN Committee on the Elimination of Racial Discrimination has identified the need for protections against racial discrimination to be embedded at the constitutional level in Australia.[6] In its 2017 periodic review of Australia's implementation of the ICERD, the Committee observed that the ICERD is not yet fully integrated into Australian law and that anti-discrimination protections vary between state and territory legislation.[7]

In its reviews of Australia's implementation of human rights protections under the ICERD, Indigenous land justice issues are consistently highlighted by the Committee. In particular, the absence of FPIC in the *Native Title Act 1993* (Cth).[8] More broadly, and in addition to the principle of FPIC, the Committee recommends that the Australian government 'respect and apply the principles enshrined in the United Nations Declaration on the Rights of Indigenous Peoples and consider adopting a national plan of action to implement those principles.'[9]

International Covenant on Civil and Political Rights

ICCPR is a multilateral treaty adopted by the United Nations General Assembly in 1966. The Covenant commits its parties to protect a range of rights and freedoms, including the right to self-determination (art 1), respect for home and family life (art 23) and the right to non-discrimination (art 26), each of which are often used by First Peoples, both in Australia and overseas, to advocate for the protection of their rights and culture. Under the Optional Protocol to the ICCPR, First Peoples in Australia have access to a formal mechanism for reporting state breaches of ICCPR to the UN Human Rights Committee.

In its 2017 periodic review on Australia, the UN Human Rights Committee observed a broad 'failure to incorporate the Covenant into domestic law.'[10] In relation to Indigenous land rights, the Committee recommended that the *Native Title Act 1993* (Cth) be amended to remove the barriers to the full protection of these rights.[11]

United Nations Declaration on the Rights of Indigenous Peoples

UNDRIP sets out wide-ranging rights protections for First Peoples that affirm self-determination. Former UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, highlights the international significance of the UNDRIP, stating:

> The Declaration is the result of a cross-cultural dialogue that has taken place over decades and in which indigenous peoples have played a leading role. The norms of the Declaration substantially reflect indigenous peoples' own aspirations, which after years of deliberation have come to be accepted by the international community.[12]

The UNDRIP is not incorporated into Australian law and has no legal effect in Australia. Also, the Declaration, not being a treaty, is non-binding, and lacks a formal mechanism for reporting rights breaches to the United Nations.[13] However, the United Nations Special Rapporteur on the Rights of Indigenous Peoples does investigate, at the request of First Peoples, issues that substantially impact their rights. Past investigations have revealed inconsistencies between government policy and protections in the UNDRIP and other UN treaties to which Australia is a signatory.[14] While the views and recommendations emerging from these investigations are not binding on the Australian government, they make visible to the public the negative impacts on the rights of First Peoples. In relation to corporate accountability, the UNDRIP offers a guide to business engagement with First Peoples, without a binding mechanism.

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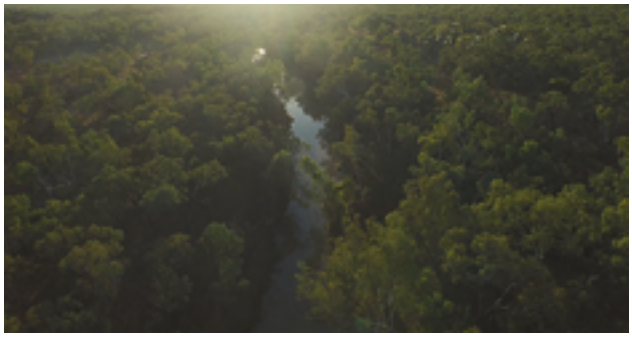
The Right to a Healthy Environment

Recent developments in international law signal a growing recognition of the intersection of human rights and environmental protection, often articulated as a right to a healthy environment. While this right is yet to be translated into an instrument of international law, such developments offer new grounds for analysing alleged deficits in corporate accountability.

In 2018, the UN Special Rapporteur on Human Rights and the Environment, David R. Boyd, called on states to constitutionally enshrine the right to a healthy environment. At present, over 100 countries have adopted such protections which reflect the interdependence between human rights and the protection of clean air, water, food, a safe and stable climate, biodiversity and healthy ecosystems.[15] While there is no global agreement giving effect to the right to a healthy environment at present,[16] the Special Rapporteur has presented the UN with 16 framework principles, drawn from existing obligations, that 'set out basic obligations of States under human rights law as they relate to the enjoyment of a safe, clean, healthy and sustainable environment.'[17]

Wangan and Jagalingou lands © Stop Adani (Flickr)



Uluru © Photoholgic (Unsplash)

Sunset near Uluru. The Uluru Statement from the Heart states that sovereignty has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

Corporate Accountability Instruments

There are a range of corporate accountability instruments relevant to the case studies conducted in this report, and which guide corporate conduct and community access to remedy.

Domestic instruments

Human rights protections in Australia are often described as 'patchwork' in nature, with inadequacies felt most by people who are marginalised and vulnerable.[18] The 2009 National Human Rights Consultation Committee concluded that current legal and institutional deficits 'fall short of [Australia's] commitment to respect, protect and fulfil human rights.'[19]

In accordance with international law, it is the responsibility of states 'to protect individuals against interference with their rights by non-state actors,'[20] which include corporate entities. Despite this, many of the international human rights treaties to which Australia is party have only partially been incorporated into domestic law and do not always extend to business activities. State and territory-based human rights legislation in Australia protects a number of rights, although only in relation to the activities of public authorities, not businesses.[21] This is despite an increased transfer of power from states to businesses and 'a corresponding increase in the role and even responsibilities attributed to private actors in both the corporate sector and in civil society.'[22]

With no constitutionally enshrined bill of rights, and limited human rights protections in the Australian Constitution, First Peoples in Australia rely on the creative application of other public and private laws—such as anti-discrimination law, property law, environmental law, labour law, criminal law, consumer law, and torts – to hold corporate entities to account.[23]

International instruments

For decades, human rights law had been 'virtually silent with respect to corporate liability for violations of human rights.'[24] In accordance with international human rights law, companies operating domestically and overseas are considered to be non-state actors and are not regulated by such laws.[25]

More recently, various international norm-building instruments have been developed, embodying social, environmental and economic principles with the aim of governing corporate activity. Combined, these instruments provide a framework for setting acceptable standards of conduct for business, making it easier to identify corporate accountability deficits. As is discussed later in this part of the report, an international treaty governing business and human rights is currently under negotiation. Until it is finalised and ratified by Australia a number of voluntary and non-binding mechanisms guide the business sector in protecting and promoting human rights.

The UN Global Compact, UN Guiding Principles on Business and Human Rights, OECD Guidelines for Multinational Enterprises, and the Equator Principles all aim to positively influence corporate conduct and decision-making to prevent harms in relation to human rights and the environment, and to encourage the establishment of redress mechanisms where harms occur. They do not, however, specifically address the rights of minorities and Indigenous Peoples – groups which are highly susceptible to exploitation and harms caused by business-related human rights abuses and environmental damage.

UN Global Compact

The UN Global Compact is a corporate sustainability initiative that calls on companies to 'align strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals.'[26] It promotes ten principles that are derived from the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the UN Convention Against Corruption.

Two of the principles in the UN Global Compact are specific to human rights:

- Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
- Principle 2: Businesses should make sure that they are not complicit in human rights abuses.

The UN Global Compact is non-binding and encourages rather than demands businesses to protect human rights through their activities.

Signatories to the UN Global Compact have established local networks in over 70 countries around the world. Local networks act in accordance with the principles and objectives of the Global Compact and provide regular reports to the Global Compact head office in accordance with a Memorandum of Understanding. Local networks are otherwise self-governing. The Global Compact Network Australia is the Australian, business-led network of the Global Compact.

UN Guiding Principles on Business and Human Rights

The UN Guiding Principles on Business and Human Rights builds on the principles of the UN Global Compact[27] to articulate 31 principles that together,

create a 'Protect, Remedy and Respect' human rights framework to regulate corporate activity.

These principles are based on three pillars, which include:

1. The state duty to respect, protect and fulfil the human rights and freedoms of its citizens through policy, law and enforcement;
2. The responsibility of corporations to respect human rights by identifying, preventing, mitigating, and avoiding the causation of, or contribution of harm towards people and communities; and
3. The responsibility of both states and corporations to ensure adequate access to remedies exist should business-related human rights abuse transpire.

While these principles aim to provide an 'authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity,'[28] some civil society groups have called into question the strength and effectiveness of these voluntary principles, at times labelling them regressive and proposing they should be more consistent with the views of UN treaty bodies on human rights matters.[29]

OECD Guidelines for Multinational Enterprises

Australia is signatory to the 2008 Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, which set out 'voluntary principles and standards for responsible business conduct consistent with applicable laws.'[30] Thirty countries have signed onto these voluntary standards which call for corporations to avoid causing or contributing to adverse social and environment impacts, and to provide redress mechanisms wherever this occurs. In accordance with these Guidelines, Australia has established a National Contact Point to receive complaints for Guideline breaches in relation to Australian companies operating overseas and multinational companies legally registered to operate in Australia.

The Equator Principles

The Equator Principles are a set of voluntary guidelines adopted by financial institutions to help them identify and manage environmental and social risks associated with the direct financing of large infrastructure projects, such as dams, mines, and pipelines. They are primarily intended to provide minimum standards for due diligence and monitoring to support responsible risk management.[31]

113 financial institutions in 37 countries have officially adopted the Equator Principles. There are currently five signatory financial institutions in Australia: Commonwealth Bank, Australia and New Zealand Banking Group, National Australia Bank, Westpac Banking Corporation and Export Finance Australia.

Similar to other corporate accountability instruments described above, membership to the Equator Principles is non-binding. While some non-government organisations have welcomed the initiative, others express concerns over its integrity, including the alleged failure to meet the challenges of protecting Indigenous Peoples' rights and combating climate change.[32]

Draft UN Business and Human Rights Treaty

While it is still in development and does not bear on current business practices, the UN is presently drafting an international human rights treaty that places binding obligations on transnational corporations and other business enterprises. The purpose of the treaty is to 'strengthen the respect, promotion, protection and fulfilment of human rights' and 'ensure effective access to justice and remedy to victims of human rights violations' in relation to the activities of transnational businesses, as well as to 'advance international cooperation in this regard.'[33]

The most recent iteration of the revised draft treaty, released in late 2020, stresses that state parties have a duty to 'protect against human rights abuse by third parties, including business enterprises, within their territory or jurisdiction, or otherwise under their control, and ensure respect for and implementation of international human rights law.'[34] The force of such a treaty, if eventually ratified, would compel state parties to adopt a stronger position in ensuring that non-state actors do not interfere with the protected individual and collective rights of Indigenous Peoples.

THE AUSTRALIAN BUSINESS GUIDE TO IMPLEMENTING THE UNDRIP

Released in late 2020, the Australian Business Guide has been developed to provide practical guidance for businesses operating in Australia on how to implement their human rights responsibilities and commitments with regard to Indigenous Peoples as outlined in the UNDRIP, and in line with other core standards including the UN Guiding Principles on Business and Human Rights and the UN Global Compact.

This Australian-specific guide encourages businesses to engage in meaningful consultation and partnership with Indigenous Peoples on a local level and to adapt the principles and practices suggested in the guide to their distinct situations and contexts. The guide was produced as a collaboration between the Global Compact Australia Network, KPMG Indigenous Services, and the University of Technology Sydney.

Map of Case Studies

Case study 1:

Origin Energy's Onshore Gas Fracking

The Company

Origin Energy is Australia's biggest energy retailer and a major explorer and producer of natural gas.[35] Its headquarters are in Sydney.

Origin Energy's 2019 Profit: AUD $1,211 million[36]

First Peoples

Traditional Owners and other First Peoples in the region between Miniyeri to Elliot, NT.

Summary

In April 2018, the NT government lifted its almost two-year moratorium on hydraulic fracturing (fracking).[37] This followed the release of the final report from the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory (Pepper Inquiry). Since this Inquiry, the validity of pre-moratorium agreements between Origin Energy and some Traditional Owners to explore shale gas in the Beetaloo Sub-basin have been called into question. A number of Traditional Owners are concerned that these agreements were not based on FPIC, a legal requirement for any gas or petroleum exploration activity in the NT. In 2018, a group of 30 Traditional Owners called on Origin Energy to demonstrate how FPIC had been obtained and review its decision-making process.

"I didn't agree with what they were talking about because we couldn't understand what they were talking about."

- Alan Watson, Alawa Traditional Owner

"I didn't agree with what they were talking about because we couldn't understand what they were talking about"

- Alan Watson, Alawa Traditional Owner[38]

"It needs to be explained properly, all the risks from this industry need to be explained properly, there need to be interpreters explaining this properly, it needs to be done properly"

- Nicholas Fitzpatrick, Indigenous resident[39]

Current regulations to frack for natural gas are uneven and inconsistent across each state and territory. © Staga (iStock)

Details

Since lifting a territory-wide moratorium on fracking, the NT government has earmarked the Beetaloo Sub-basin for early shale gas development.[40] A crucial requirement in the development of shale gas resources in the NT, is that gas companies obtain the FPIC of Traditional Owners.

Origin Energy's commitment to human rights

Origin Energy's Human Rights Policy specifically states that the company respects the rights of Indigenous Peoples and that its business activities are guided by ICPPR, UNDRIP, and the UN Guiding Principles on Business and Human Rights.[41]

Origin's response to this case study

As we noted at the outset of this report, we consulted Origin regarding a near final draft of this report. We offered Origin the opportunity to check the accuracy of information included in the draft case study and provide us with comments to include in the report. Where Origin has provided us with other comments disputing the account of events made in this report, we have included these within the text or as endnotes.

FPIC under relevant NT laws

Domestically, the incorporation of FPIC into law is inconsistent. In the NT, different land titles carry different legal rights for Traditional Owners when they engage in negotiations with oil and gas companies. While Aboriginal freehold title, governed under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), carries a veto right, land governed by the *Native Title Act 1993* (Cth) only gives Traditional Owners a right to negotiate.[42] This lack of veto right has been identified as incompatible with the FPIC principle.[43] In effect, the *Native Title Act 1993* (Cth) does not guarantee that the principle of FPIC 'is adhered to in the issuing of titles under the Petroleum Act.'[44] The Jumbunna Institute for Indigenous Education and Research identifies the lack of FPIC incorporation into the Native Title Act 1993 (Cth), characterised by no veto right and restrictions on negotiation timeframes, as leading to a 'significant power imbalance favouring gas companies.'[45] Together, these 'factors make FPIC improbable.' The Jumbunna research suggests that 'most, if not all, exploration permits issued in the Northern Territory for unconventional gas were issued in the absence of FPIC.'

Good practice in FPIC is understood to include:

> the need for information, the importance of community capacity and the means for ensuring capacity, and the need for enforceable and comprehensive legal agreement which provides for the terms and conditions to which consent is given.[46]

Carpentaria Highway, Daly Waters to Borroloola © Boobook34 (Flickr)

Human rights impact of Origin Energy's activities

Since participating in the Pepper Inquiry and becoming more informed about the fracking process, a number of Traditional Owners have questioned whether their 2015 agreement with Origin Energy to explore for shale gas on their traditional lands was based on FPIC.[47] More broadly, insufficient provision of information by gas companies to Aboriginal communities about fracking was highlighted by the Pepper Inquiry as a significant issue.[48] The Inquiry's report concluded that 'the knowledge of the likely impacts of this industry within the Aboriginal community in the Beetaloo Sub-basin, and more widely, is wholly inadequate.'[49]

According to the Pepper Inquiry, the lack of trusted, reliable, and accessible information about fracking has resulted in 'communities being divided between those in favour of hydraulic fracturing and those against it.'[50] The Inquiry's report notes that the 'Northern Land Council, Central Land Council and Aboriginal Areas Protection Authority have all raised concerns about the increased stress and social disharmony in Aboriginal communities where hydraulic fracturing has been proposed.'[51] The Northern Land Council (NLC) observed in its submission to the Inquiry that 'Indigenous traditional landowners and native title holders with rights to country over which there is a current petroleum title application comprise only a small portion of the Northern Territory's Indigenous population.'[52] The NLC further noted that 'the politicisation [of petroleum consultations] can and does have an incredibly disruptive effect on Aboriginal culture and society and on local group decision-making processes.'[53]

The NLC has, however, made it clear that, in its opinion, the statutory role of the Land Council is 'limited to providing information to Aboriginal people in respect of specific petroleum exploration and production tenement applications and where agreements are in place for granted tenements. The dissemination of information to the Indigenous public in respect of a growing onshore petroleum industry does not fall within the scope of Land Council's statutory functions and as a result the NLC is currently neither mandated nor resourced to undertake this work.'[54] Consequently, the Pepper Inquiry's Panel reported that it 'had received an abundance of evidence that the broader Aboriginal community was not being appropriately informed about hydraulic fracturing or the potential for an onshore shale gas industry more broadly.'[55]

In addition, given that many of the First Peoples who are likely to be affected by Origin Energy's fracking activities speak English as a second, third, or fourth language, the NLC and Origin Energy are faced with the significant challenge of translating highly technical information about fracking into local languages.[56] This in itself is a significant barrier to FPIC.[57]

In 2019, 30 Traditional Owners from the Northern Territory attended Origin Energy's AGM in Sydney. Together with the Protect Country Alliance, they organised a rally outside of the AGM telling the company: Don't Frack the NT.© Holli (Shutterstock)

Offered the opportunity to comment on the findings of our report, Origin Energy informed us that 'Origin meets with host Traditional Owners to review consented works as well as discuss the planned work programme for the coming year. The ongoing process that is followed for exploration activity is based on sharing annual work programs and participating in on-country meetings with the NLC and the native title holders and claimants who are hosting that work program (the host Traditional Owners),' adding 'we support the use of interpreters where English is not the primary language spoken,' and 'the NLC determines if interpreters are required.' Despite efforts to consult with some Traditional Owners via the NLC,[58] other Traditional Owners and Indigenous residents are questioning how Origin Energy can have official consent to explore and develop shale gas resources when many people in affected permit areas have no understanding of its development plans.[59]

To date, a range of organisations have supported affected communities to voice their dissent to fracking on their traditional lands. Shareholder activism is a key strategy being employed to address issues related to FPIC. In late 2018, a group of Traditional Owners gained the support of 100 Origin Energy shareholders to put forward a resolution at the Origin Energy annual general meeting calling on the company to review its consultation process and determine whether it had actually obtained consent from Traditional Owners for exploratory fracking activities in the Beetaloo Basin.[60] While the company's constitution failed to be amended to allow the resolution to be put forward, almost 8 per cent of shareholders backed the resolution.[61] Some concession was made by the company's board to address the concerns of these Traditional Owners and other affected Indigenous residents, who were permitted to address the meeting and question Origin Energy's future fracking plans and consultation processes.[62]

In response to the impactful presence of this group of Traditional Owners at the 2018 annual general meeting, public statements made by Origin Energy's independent non-executive chairman, Gordon Cairns, indicated that the company was committed to engaging more comprehensively and directly with Traditional Owners, not just their appointed representatives, the NLC.[63] However, such dialogue is yet to take place, despite the presence of 30 Traditional Owners at the 2019 meeting.[64]

It is unclear how Origin Energy will formally respond to the lack of FPIC given that it already has legal consent, in the form of agreements, to explore and develop shale gas in the Beetaloo Basin. Origin Energy was granted the necessary approvals by the NT government,[65] and began exploratory drilling in the Beetaloo Basin in late 2019. As highlighted by Brynn O'Brien, executive director of the Australian Centre for Corporate Responsibility, commitments made by Origin Energy to Traditional Owners need to go beyond mere legal compliance.[66]

Recommendations

To promote accountability, transparency, and good faith in its fracking operations in the Beetaloo Basin, Origin Energy should:

Recommendation 1:
Adhere to international business and human rights norms, including UNDRIP, ICERD, ICCPR, UN Global Compact and UN Guiding Principles on Business and Human Rights.

Recommendation 2:
Cease hydraulic fracturing in the Beetaloo Basin.

Recommendation 3:
Fulfil its commitment to explain how it established FPIC from Traditional Owners and Indigenous communities in relation to fracking projects in the Beetaloo Basin.

Recommendation 4:
Engage comprehensively and directly with Traditional Owners to settle the matter of whether there is FPIC for fracking to occur under its current mining leases.

In relation to Origin Energy's fracking operations in the Beetaloo Basin, the NT government should:

Recommendation 5:
Ensure that all future exploration permits for unconventional gas development are issued only where clear FPIC from Traditional Owners is established.

Recommendation 6:
Develop mechanisms for redress when the FPIC of Indigenous Peoples has not been sought in projects that have commenced.

In relation to Origin Energy's fracking operations in the Beetaloo Basin, the Australian government should:

Recommendation 7:
Address the advice of the UN Committee on the Elimination of Racial Discrimination by expanding the formal legal requirement for extractive industries to obtain the FPIC of Traditional Owners to reflect best practice. This includes legislative amendments to the:

- *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), to include FPIC provisions that give Traditional Owners a veto right beyond the exploration phase of a development; and
- *Native Title Act 1993* (Cth), to incorporate the principle of FPIC, including a veto right, and the lengthening of negotiation timeframes.

Case study 2:

Bravus (formerly known as Adani) Carmichael Coal Mine

The Company

Bravus Mining and Resources (formally known as Adani Mining Pty Ltd) is a subsidiary of the Adani Group which is based in India. In relation to its projects based in Australia, the company has operated as Bravus Mining and Resources since late 2020.

First Peoples

Galilee Mine site: Wangan and Jagalingou Peoples
Abbot Point Port: Juru Peoples
Rail corridor: Wagan Jagalingou, Jaang, Birriah, Juru Peoples

Summary

Bravus's Carmichael open-cut and underground coal mine in the Galilee Basin in Central Queensland covers 200 square kilometres of land, and if built, would be Australia's largest and the world's second largest coal mine. The development encompasses much of the Wangan and Jagalingou People's ancestral lands, including the Doongmabulla Springs sacred site.[68] The project includes the construction of a 189 kilometre rail connection between the proposed mine and the Bravus-operated Abbot Point Terminal, which is adjacent to the Great Barrier Reef. Members of the Wangan and Jagalingou People assert that Bravus has not consulted with them in good faith over the development. They argue that they have not given their FPIC to the development. The project also poses significant medium and long-term environmental impacts.

"Adani [Bravus] Mining and the Queensland government have not offered anything meaningful to protect and secure the future of our country and our sacred connection."

- Adrian Burragubba, authorised spokesperson for the Wangan and Jagalingou Family Council

"Adani [Bravus] Mining and the Queensland government have not offered anything meaningful to protect and secure the future of our country and our sacred connection. The price that Adani [Bravus] Mining is asking us to pay includes silence in the future – not being able to object to anything they do"

– Adrian Burragubba, authorised spokesperson for the Wangan and Jagalingou Family Council

Bravus is planning to mine 10 million tonnes of coal per year in Northern Queensland. © Dexter Fernendes, Pexels

Details

Bravus's commitment to human rights

Bravus publicly states that it 'respects and recognises the Traditional Owners of the land of which the Carmichael mine … is located' including the Wangan and Jagalingou people.[71] Bravus does not have a human rights policy.

Bravus's response to this case study

As we noted at the outset of this report, we consulted Bravus regarding a near final draft of this report. We offered Bravus the opportunity to check the accuracy of information included in the draft case study and provide us with comments to include in the report. Bravus was clear that it did not consider this consultation to be adequate. In response to the offer, Bravus stated that: 'We have been presented with this document for feedback only, while being given only two weeks to respond. This demonstrates a sincere lack of research integrity, subject bias, and ensures any participation from Adani [Bravus] would be tokenistic at best.' Where Bravus has provided us with other comments disputing the account of events made in this report, we have included these within the text or as endnotes.

Bravus's impacts on cultural heritage and the environment

This case highlights the interdependence of human rights and environmental protection, as promoted by the UN Framework Principles on Human Rights and the Environment. It makes clear the importance of dealing with environmental protection and human rights as joint, interrelated issues.

Accusations of poor labour[72] and environmental practices[73] in relation to Bravus's projects in India have undermined community confidence that the company will uphold its social and environmental responsibilities in relation to the Carmichael project in Australia.[74] The mine is likely to have significant medium- and long-term environmental impacts to the Wangan and Jagalingou People's ancestral estate (Country),[75] including the Doongmabulla Springs sacred site. Expressing their deep concern over the impacts of the proposed mine on their culture and Country, leaders from the Wangan and Jagalingou Family Council state:

> If our land and waters are destroyed, our culture will be lost and we become nothing. Our children and grandchildren will never know their culture or who they are, and will suffer significant social, cultural, economic, environmental and spiritual damage and loss if the mine is allowed to proceed.[76]

The known impacts of the mine affect cultural rights protected under both art 27(1) ICCPR and art 25 UNDRIP, whereby members of minority groups:

> Shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, and to use their own language.[77]

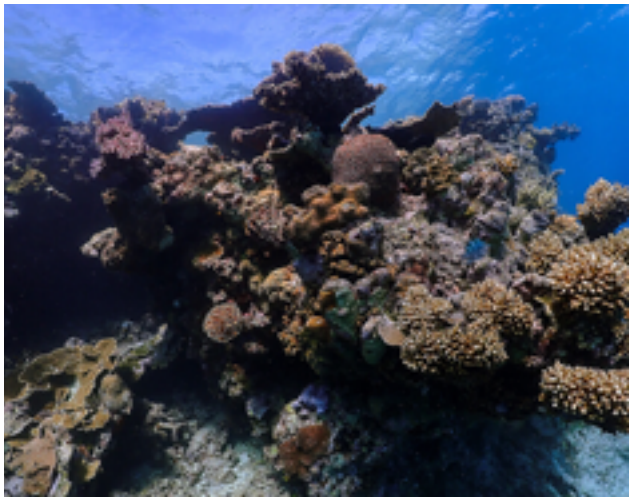
> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.[78]

To date, three judicial reviews have challenged environmental approvals granted by the Minister for Environment for the project.[79] Despite these challenges, Bravus has maintained all of the necessary environmental approvals.[80] This includes a water licence to extract an unlimited quantity of water from the Great Artesian Basin over the lifetime of the project, which is 60 years.[81] The annual water usage of the mine is estimated at 12 billion litres per year.[82] An unknown volume of surface water would also be consumed by the mine and involve damming of the Suttor River.[83] The mine site encompasses very high-quality habitat for the endangered southern black-throated finch[84] and other significant species.[85] In terms of climate impacts, mine operations and the burning of coal extracted from the mine are estimated to generate 4.7 billion tonnes of greenhouse gas emissions.[86]

The human right to a healthy environment is officially recognised in the United Nations Framework Principles on Human Rights and the Environment.[87] These principles highlight the interdependence of human rights and environmental protection and that 'environmental harm interferes with the enjoyment of human rights'.[88] While these principles are not binding on states or companies, they make clear the importance of dealing with environmental protection and human rights as joint, interrelated issues.

The endangered southern black-throated finch © Eric Vanderduys

Great barrier reef © Kristin Hoel (Unsplash)



Polluted wastewater from the mine could damage the nearby Carmichael river © Tom Jefferson

Lack of FPIC and good faith

In addition to the impacts on cultural heritage and Country (environment), a lack of good faith from Bravus in its negotiations, and a lack of FPIC for the Carmichael project, are further issues bearing on the human rights of the Wangan and Jagalingou People. Both principles are deemed essential to effective participation in decision-making within the international human rights framework.[89] While FPIC is recognised under art 32(2) of the UNDRIP, the United Nations Guiding Principles on Business and Human Rights, and the Framework Principles on Human Rights and the Environment, it is not protected under the Native Title Act 1993 (Cth). Negotiating in good faith is, on the other hand, a legal requirement under the Act, and is also enshrined in art 19 of the UNDRIP. As expressed by the Australian Human Rights Commission, 'acting in good faith ensures that decision-making processes are fair, cooperative and consistent with [Indigenous] cultural practices.'

In 2004, the Wangan and Jagalingou People lodged an application for native title recognition.[90] Thereafter, the *Native Title Act 1993* (Cth) 'Future Act' regime required Bravus (and all other development proponents) to engage in land use negotiations with the claim group, in good faith, even though the native title claim was yet to be determined.[91] In 2011, Bravus Mining entered into involuntary negotiations with the Wangan and Jagalingou People in its first attempt to create an Indigenous Land Use Agreement (ILUA).[92] The ILUA was crucial to providing nominal 'consent' to gain a key mining lease in the Carmichael complex and financial backing from banks that subscribe to the Equator Principles.[93] In late 2012, following 18 months of discussions, the company's proposal was rejected by the Wangan and Jagalingou People.[94] Failure to gain an ILUA is significant, as it means the state government can be 'forced' to extinguish or impair native title rights to grant a mining lease. This is also problematic for international financiers who would be exposed to contingent liability.

Following this decision, Bravus brought the matter before the National Native Title Tribunal (NNTT). In 2013, the NNTT determined that Bravus had negotiated in good faith with the Wangan and Jagalingou People,[95] and that a mining lease could legitimately be granted under the *Native Title Act 1993* (Cth).[96] This was despite arguments made by the Wangan and Jagalingou People that Bravus had participated in negotiations in the absence of good faith and that the company had undermined their cultural institutions and decision-making processes.[97] These arguments speak directly to a right protected under art 18 of the UNDRIP, whereby:

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Bravus later attempted to negotiate another ILUA with the Wangan and Jagalingou People, this time, for two additional mining leases in the Carmichael complex. In 2014, for the second time, the Wangan and Jagalingou People voted against the formation of an ILUA with Bravus.[98] Bravus again took this matter to the NNTT which, in 2015, once more determined that the Future Act 'may be done', allowing the mining leases to be granted, even though there was a clear lack of consent from the Wangan and Jagalingou People.[99] An attempt by the Wangan and Jagalingou People to have this decision reviewed by the Federal Court was unsuccessful.[100]

In 2015, Wangan and Jagalingou claimants met to review the formation of the Native Title Claim Applicant (NTCA) group in response to concerns that members of the group were not acting on the instructions of their wider community.[101] It is alleged that Bravus attempted to influence the proceedings and decisions made at this meeting in order to generate support for the Carmichael mine project, including through the introduction of a memorandum of agreement (MOA) with the Wangan and Jagalingou People.[102] The MOA was ultimately rejected.

Inconsistencies between Native Title law and protected rights

Later in 2015, members of the Wangan and Jagalingou People opposed to the Carmichael project made a submission to the Special Rapporteur on the Rights of Indigenous Peoples, alleging inconsistencies between Australian Native Title law and their protected rights under both ICERD and UNDRIP.[103] One of these rights is 'the right to equal treatment before the tribunals and all other organs administering justice'.[104] This submission called upon the Special Rapporteur to provide urgent scrutiny over Australia's compliance with its treaty obligations.[105] It also called upon the federal government, Queensland government and Bravus not to proceed with the development of the Carmichael coal mine on the ancestral lands of the Wangan and Jagalingou People without their consent, and to ensure that FPIC and all consultation takes place in good faith.[106]

In April 2016, Bravus entered into an ILUA with a select number of Traditional Owners. The promise of job opportunities was a major factor in influencing the decision of community members to eventually sign the agreement. These community members noted that:

An Aboriginal flag flown in protest against mining at the mine site © Inge Blessas (Shutterstock)

> The legacy of [forcible removal of people by the Queensland government] still has significant impacts on our community and this is reflected in a range of socio-economic indicators…This includes unacceptable unemployment rates for Traditional Owners and Indigenous Peoples in nearby communities with Woorabinda at 75% and Rockhampton 25%. Our goals include creating economic opportunities for our people and our negotiations for native title agreements generate benefits as well as opportunities for our people to access jobs, education and training, to enable their participation in the market and accumulate wealth.[107]

Patrick Malone, who represented the interests of the registered NTCA group at the time, explained that 'even though some [Wangan and Jagalingou] people didn't like the idea of the mine, most knew it would probably go ahead and it was best to take the opportunities for our people, to get jobs for the next generations.'[108]

The authorisation of this agreement was highly contentious and problematic as a significant section of the Wangan and Jagalingou community deemed the vote unrepresentative and illegitimate.[109] Bravus gained formal support for the Carmichael mine project from a then majority, but not from all members of the 12-person NTCA group.[110] One of the majority later rescinded their yes-vote, leaving the applicant group evenly split. In order to form an ILUA and to proceed with its plans, Bravus required the support of the broader group. This complex case highlights issues of agency and the contestation around who is authorised to speak on behalf of the Wangan and Jagalingou People.[111] The Wangan and Jagalingou People became divided in the course of negotiations, as some community members shared different opinions about the development on their land.

Concerns over the legitimacy of the ILUA, and the process by which it was formed and registered,[112] have led to further legal action by Wangan and Jagalingou Traditional Owners who are opposed to the mine's development.[113]

Prior to the signing of the ILUA, the Minister for Natural Resources and Mines granted Bravus the three mining leases required for its Carmichael mine project, relying on the NNTT's 'Future Act' determination. This decision was unsuccessfully challenged in the Land

Court of Queensland by Wangan and Jagalingou Traditional Owners opposed to the mine. An appeal to this decision was dismissed by the Supreme Court of Queensland, though part of the lower court's ruling was overturned, confirming that this group of Wangan and Jangalingou respondents did indeed have a 'right to natural justice.'[114] As this had not been argued in the lower court, it was therefore unable to affect the judgment on appeal.

In 2017, a decision by the full bench of the Federal Court found that ILUAs require signatures from all members of a NTCA group to be valid, not just a majority.[115] This decision rendered the Bravus ILUA invalid. However, in response to this issue, the federal government intervened in the Federal Court case against an application by this group of Wangan and Jangalingou Traditional Owners for summary dismissal of the ILUA and passed amendments to the Native Title Act 1993 (Cth) which allowed Bravus's ILUA to remain legally valid, despite the Federal Court's decision. [116'117]

In 2018, Noureddine Amir, Chair of the UN Committee on Elimination of Racial Discrimination, responded to the 2015 submission prepared by the Wangan and Jagalingou Family Council, calling on the Australian government to:

> Ensure the right to consultation and free, prior and informed consent regarding the Carmichael Coal Mine and Rail Project, in accordance with Indigenous Peoples' own decision-making mechanisms; and
>
> Consider suspending the Carmichael Coal Mine and Rail Project until free, prior and informed consent is obtained from all Indigenous Peoples, including the Wangan and Jagalingou Family Council, following the full and adequate discharge of the duty to consult.[118]

The Australian government is yet to respond.

A high-risk project

Following many unsuccessful attempts to gain the backing of Australian and international funders, the Carmichael project will now be funded entirely by India's Adani Group.[119] One reason for a lack of interest in the project is that under the Equator Principles, the proposed mine is a 'Category A' project and is likely to have 'potential significant adverse environmental and social risks and/or impacts that are diverse, irreversible or unprecedented.'[120]

Successful campaigning by members of the fossil fuel divestment movement has also contributed to Bravus's inability to attract funding for the project.[121] Before federal government approval for a Groundwater Dependent Ecosystem Management Plan and Queensland state approval for a management plan for protecting black-throated finch populations were granted in mid-2019,[122] allegations of non-compliant works on the mine site were made by environmental group Coast and Country.[123] Bravus denies these allegations and they were not investigated by the Queensland Department of Environment and Science. This followed earlier allegations of non-compliant water drilling on the site. While Bravus was cleared of wrongdoing by the federal government's Department of Agriculture, Water and the Environment, the matter was further investigated by the Queensland Department of Environment and Science.

Bravus officially began construction of the Carmichael coal and rail project in June 2019.

Seeking redress

Finally, in August 2019, Bravus was granted freehold title over parts of the Carmichael mine site by the Queensland government, without first notifying the Wangan and Jagalingou People. This act extinguished the native title of the Wangan and Jagalingou People over the site,[124] including land presently being used for ceremonial purposes.[125] In response to news of the extinguishment, Wangan and Jagalingou cultural leader Adrian Burragubba stated, 'we have been made trespassers on our own Country.'[126]

The act of extinguishing native title rights over the Wangan and Jagalingou People's traditional lands before a native title determination had been finalised relies on the coercive and discriminatory provisions of the amended *Native Title Act 1993* (Cth), and is inconsistent with art 8(2)(b) UNDRIP, which states that:

> States shall provide effective mechanisms for prevention of, and redress for … any action which has the aim or effect of dispossessing [Indigenous Peoples] of their lands, territories or resources.

We note that when we consulted Bravus regarding the findings of the report, Bravus responded as follows:

> We have been working with the Traditional Owners of the Carmichael Project area, including the Wangan and Jagalingou native title claimants since 2010. Accordingly, we have engaged every step of the way with Wangan and Jagalingou people and followed all Federal and State legislative processes for the delivery of the Carmichael Project. We are dedicated to continuing to work in partnership with all our Traditional Owners, including the Wangan and Jagalingou People, guided by the Indigenous Land Use Agreements.

Yet Bravus has been heavily and repeatedly criticised for its aggressive litigation strategy to silence dissent over the project,[127] which includes a successful attempt to bankrupt a leading Wangan and Jagalingou opponent of the mine.[128]

In December 2019, subsequent to the extinguishment of their native title rights, Wangan and Jagalingou Traditional Owners–those who had initially given consent to the mine and those who have remained opposed the mine–came together to defend their native title claim in the Federal Court. The Queensland government is now defending this litigation, rather than agreeing to a Consent Determination.[129] These Wangan and Jagalingou representatives, who had been split for years over the Bravus mining agreement, have publicly united to condemn the Queensland government's decision to contest their land rights claim.[130] Patrick Malone, a Wangan and Jagalinou Traditional Owner who had previously supported the land use deal with Bravus, stated "as a native title group, we've moved on from Adani [Bravus]. We're all on the same page and we want the same outcome … recognition of our native title and our native title rights."[131]

Wangan and Jagalingou lands

Working quarry with machinery and gravel with a rock being crushed to supply the new mine © Inge Blessas (Shutterstock)

Gladstone Port, Queensland © Mark Higgins (iStock)

Recommendations

To promote accountability, transparency, and good faith in its Carmichael Mine operations, Bravus should:

Recommendation 1:
Adhere to international business and human rights norms, including the UNDRIP, ICERD, ICCPR, UN Global Compact, and UN Guiding Principles on Business and Human Rights.

Recommendation 2:
Suspend mining developments and rail construction until all Traditional Owners support the project and give their FPIC.

Recommendation 3:
If unable to obtain full FPIC consistent with international law and human rights norms, cease all work and engage in a conflict resolution process mediated by an appropriate UN (approved) agency.

In relation to Bravus's operations at the Carmichael Mine, the Queensland government should:

Recommendation 4:
Hold an independent inquiry into the process used to obtain an ILUA, in which the state government as a signatory to the ILUA, extinguished native title to assist Bravus with obtaining the agreement.

In relation to Bravus's operations at the Carmichael Mine, the Australian and Queensland governments should:

Recommendation 5:
Respond to the UN Committee on Elimination of All Forms of Racial Discrimination's request to the charge that there is no FPIC for the mine and the leases granted, and halt the mine until FPIC is achieved.

Recommendation 6:
Remove the financial barriers to Indigenous People accessing the courts and the threat of punitive cost orders to allow for ILUAs to be effectively challenged.

In relation to Bravus's operations at the Carmichael Mine, the Australian government should:

Recommendation 7:
Reform the *Native Title Act 1993* (Cth) to bring it into line with Australia's commitment to UNDRIP.

Recommendation 8:
In line with UNDRIP provisions, support the adoption of the UNDRIP into the preamble of the *Native Title Act 1993* (Cth), with a requirement that the Act's provisions be interpreted in a way that favours those rights and allows court cases to be brought on public interest and Indigenous human rights grounds.

Case study 3:

Glencore's McArthur River Mine

The Company

McArthur River Mining Pty Ltd is a wholly owned subsidiary of Glencore plc, a transnational, Swiss-based mining and commodities trading company.

Glencore's 2018 profit: USD $3.4 billion

First Peoples

The Garawa, Gudanji, Marra and Yanyuwa Peoples.[132]

Summary

Wholly owned by Glencore plc and managed by McArthur River Mining Pty Ltd (MRM), the McArthur River Mine is one of the world's largest open cut zinc-lead mining operations.[133] It is located approximately 970 kilometres south-east of Darwin, near the township of Borroloola in the NT's Gulf Country. While the mine is situated on the traditional lands of the Gudanji People, the Garawa, Marra and Yanyuwa Peoples and their ancestral estates are also impacted by the mine. Despite its public commitment to human rights, Glencore is criticised, through the activities of MRM, for failing to obtain the FPIC of Traditional Owners for its current operations and proposed activities, a lack of transparency in and accountability for its mining operations, and for causing serious and significant environmental contamination that impacts the Garawa, Gudanji, Marra and Yanyuwa Peoples and their traditional lands and waters.[134] This case study highlights the importance of mutually addressing environmental protection and human rights problems.

"We want that Glencore mine to be stopped. That's why we are here, nobody has been listening to us."

- Nancy McDinny, Garawa Elder

"We want that Glencore mine to be stopped. That's why we are here, nobody has been listening to us."

– Nancy McDinny, Garawa Elder

"It's our right to stand up and fight and it's our right to have clean water in our community."

– Gadrian Hoosan, Garawa and Yanyuwa leader

Mineral ore with a zinc-lead pattern. The discharge of lead and zinc into the river raises significant concerns. © Panayot Savov (Shutterstock)

Details

Glencore's commitment to human rights

Glencore is a member of the UN Global Compact. Its human rights policy states:

> We recognise the unique relationship of the indigenous peoples with the environment in which they live, and commit to an engagement process that is based on good faith negotiations and is consistent with traditional decision making processes. This process is aligned with the principles of Free, Prior and Informed Consent for Indigenous Peoples, as endorsed by the International Council on Mining and Metals (ICMM).
> […]
>
> The policy is developed in accordance with the Universal Declaration of Human Rights, the International Labour Organisation (ILO) Core Conventions on Labour Standards, the Equator Principles, and the United Nations (UN) Guiding Principles on Business and Human Rights.[135]

On becoming a member of the ICMM in 2014, Glencore committed to a number of principles, position statements, and transparency and accountable reporting practices.[136] In relation to human rights, ICMM Principle Three states that member companies will 'respect human rights and the interests, cultures, customs, and values of employees and communities affected by our activities.'[137]

This commitment includes performance expectations regarding Indigenous Peoples,[138] and is articulated through the ICMM's position statement on Indigenous Peoples and mining, which recognises the individual and collective rights and interests of Indigenous Peoples, as enshrined in the UNDRIP.[139] Glencore reports working productively with Australian Indigenous communities in the McArthur River region.[140] It is also a member of the Plenary of the Voluntary Principles on Security and Human Rights. Glencore released its first dedicated human rights report in 2018.[141]

Glencore's response to this case study

We noted at the outset of this report that we contacted all companies for their comment on a final draft of the report. We offered Glencore the opportunity to check the accuracy of information included the draft case study and provide us with comments to include in the report. Glencore found this inadequate, noting: 'It is disappointing that the report's authors did not at any point request access to our operation or to interview any of our personnel. We are disappointed that RMIT made no previous attempt to contact us before compiling the initial draft.' Where Glencore has provided us with other comments disputing the account of events made in this report, we have included these within the text or as endnotes.

Human rights impact of Glencore's activities

Despite its public commitment to human rights, Glencore has long been criticised by civil society

organisations globally for negatively impacting local communities and the environment.[142] Management of the mine in Australia by MRM, both under the ownership of Glencore and historically under its predecessors,[143] is alleged to impact the human rights of the Garawa, Gudanji, Marra and Yanyuwa Peoples. While Glencore cannot be held accountable for human rights breaches carried out by past owners of MRM[144]—Glencore merged with its predecessor Xstrata in 2013[145]—historical issues are considered here to better comprehend the immensity of alleged human rights impacts on First Peoples as a consequence of the mine's existence.

Land rights

The influence of corporations on First Peoples' capacity to assert their land rights in the McArthur River Region dates back to the 1970s. In 1977, the Borroloola Land Claim (No. 1) was lodged as the first land rights claim under the new *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).[146] The boundaries of the land claim did not encompass the proposed mine site, yet the claim was actively opposed by the original mine owner, Mount Isa Mines (MIM), and the NT government.[147] The use of 'pressure, obstruction and chicanery' by the NT government to thwart land rights claims by Aboriginal Traditional Owners is well documented.[148]

State and corporate opposition to the assertion of land rights again became evident in the early 1990s when Mount Isa Mining announced that it was commercially viable to develop the mine. Even though the High Court of Australia had just recognised native title in the *Mabo* decision,[149] any potential native title rights that might be held by Gurdanji and other clan groups were not acknowledged. As mineral leases were granted to Mount Isa Mining before the *Native Title Act 1993* (Cth) came into force, Traditional Owners did not benefit from 'right to negotiate' provisions in the Act.[150] A non-extinguishment principle, in relation to the effect of the granting of leases and licences at the McArthur River Mine,[151] allowed for compensation to be determined under the Act.[152] According to the NLC, the NT government rejected attempts by the Council to negotiate on compensation, as native title had not yet been determined.[153]

The Yanyuwa and Gurdanji Peoples sought to be heard by the NT and federal governments on matters related to the social and environmental impacts of the proposed mine.[154] Former NLC solicitor Anthony Young reported that these requests went unanswered and that further calls by Yanyuwa People for ongoing and public environmental monitoring of the mine's impacts on the McArthur River were refused.[155] The lack of formal requirements to consult with Traditional Owners and other affected First Peoples under the Northern Territory's *Environmental Assessment Act 1982* and *Environmental Assessment Administrative Procedures 1984* meant that social and environmental assessments of the proposal failed to capture and address the concerns of the four clan groups.[156]

In 1992-1993, when the NLC facilitated consultation meetings with Aboriginal people in the McArthur River region, a majority of these people expressed opposition to the project.[157] However, divisions on whether to oppose or support the mine were also apparent.[158] Young reports that the project was reluctantly accepted by local Aboriginal people,[159] 'demonstrating the lowest form of social license for the operation of the mine.'[160] A social license to operate can be defined as 'the extent to which a community accepts a project, company or industry which may affect existing land uses.'[161] The concept of a social license is now well accepted by the mining sector. A community's social license for a mining project is underpinned by notions of trust, a sense of procedural justice, and can change over time.[162] In the case of the McArthur River Mine, a lack faith in the process undermined community trust in the mine from the very beginning.

The lack of jurisdiction of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) over the mine site also meant that Traditional Owners did not have a right to veto the development of the mine. Hence, there was no clear FPIC from Traditional Owners and local Aboriginal People in the development of the mine. The deficit of statutory mechanisms mandating that companies consult with Traditional Owners and local Aboriginal People flags substantial procedural justice issues in the history of this case.

In 1992, mineral leases were granted to MRM under special legislation,[163] for a period of 25 years until 2018, with the option for renewal for an additional 25 years.[164] At that time, the NLC raised concerns that this grant breached the *Racial Discrimination Act 1975* (Cth).[165] These approvals were 'fast-tracked' by the NT and federal governments without the recognition of native title rights over the mine site and without an ILUA in place.[166] Native title was only determined over the land, including the mine, on 26 November 2015. The available information suggests that to date, no formal agreement exists between Glencore and the Gurdanji People on whose land the mine is situated, nor with any other affected Indigenous Peoples.

Serious and significant environmental contamination

In 2003, the McArthur River Mine was wholly acquired by Anglo-Swiss transnational mining company Xstrata.[167] In 2005, in an attempt to extend the life of the mine by at least 25 years, MRM proposed the conversion of the mine from underground to open cut.[168] This proposal was opposed by a group of Traditional Owners for cultural and environmental

reasons.[169] Of primary concern were extensive plans to divert six kilometres of the McArthur River and its tributary, the Barney Creek, in order to access ore located underneath these waterways.[170] Collectively, the four clan groups refer to the McArthur River as *Narwinbi*,[171] which is a 'vital source of cultural, spiritual and physical sustenance.'[172]

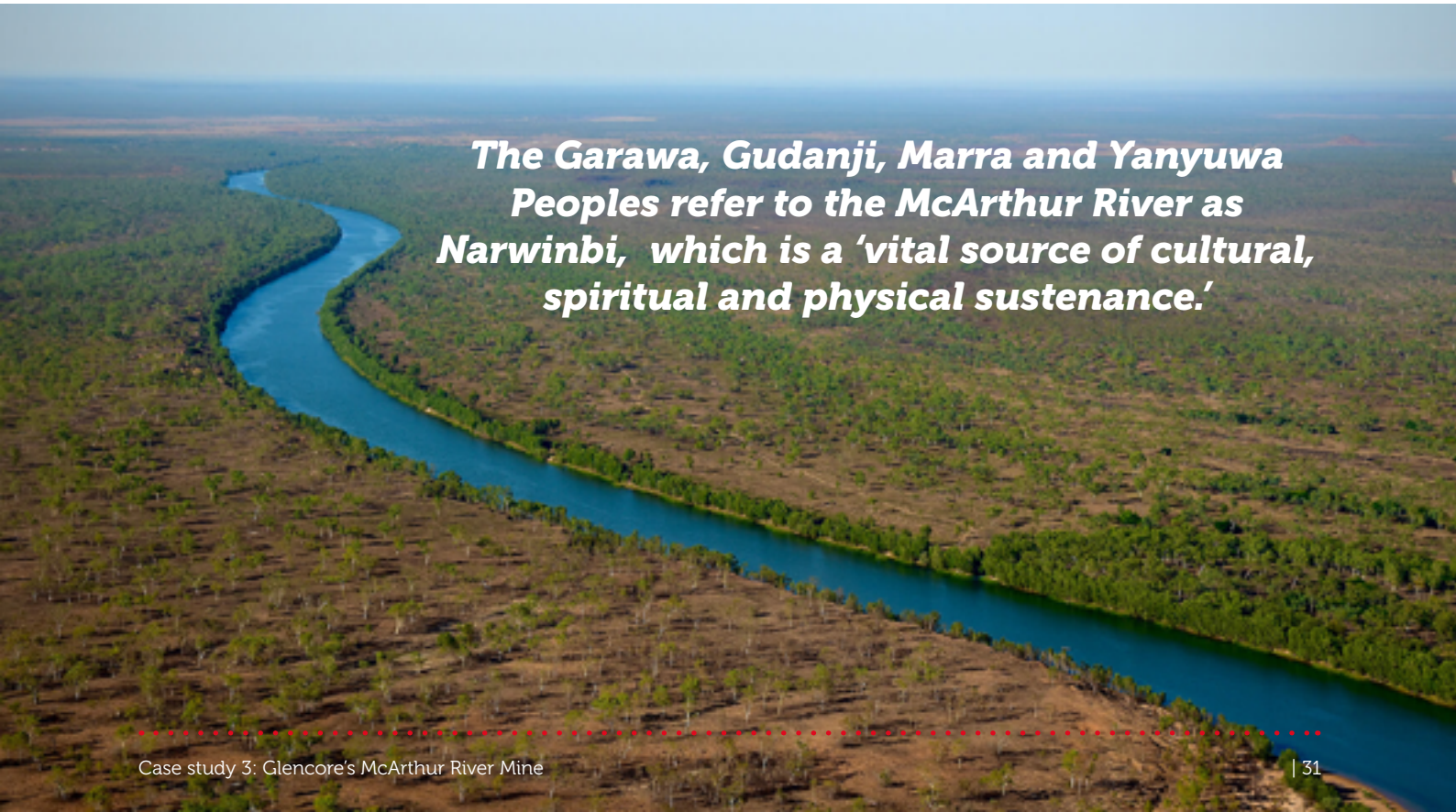
Based on the first of two environmental impact assessments of the proposal, the NT Environment and Heritage Minister held that the project should not go ahead due to 'significant uncertainties over the long term environmental impact associated with diverting the McArthur River and managing an open mine pit in the river flood plain.'[173] However, Young reports that intense pressure from industry and the federal government led to the conversion of the mine being approved by NT and federal governments.[174] Despite the appointment of an independent environmental monitor to oversee the mine as a condition of approval,[175] Howey and Duggin from the NT Environmental Defenders Office state that the approval of the mine's conversion to open cut 'set the mine on its trajectory of environmental impacts for hundreds of years into the future.'[176]

Members of the four clan groups acted in the NT Supreme Court and Federal Court to challenge federal and territory approvals for the mine's conversion. Their success in the NT Supreme Court was thwarted by special legislation passed days later by the NT government, nullifying the court's decision.[177] A successful appeal in the Federal Court came too late for these Traditional Owners, as the McArthur River had already been diverted by the mine's operators.[178]

The Purple-crowned Fairy-wren is a near threatened species found in the project area © Karen H. Black (Shutterstock)

The Northern Nail-tail Wallabies is a near threatened species found in the project area © Joe Ferrer (Shutterstock)

The McArthur River near Borroloola © Jack Kinny (Shutterstock)



The Garawa, Gudanji, Marra and Yanyuwa Peoples refer to the McArthur River as Narwinbi, which is a 'vital source of cultural, spiritual and physical sustenance.'

Red Sandstone Formations, Borroloola Northern Territory. © MK3 Design

Concerns that First Peoples' self-determining decision-making institutions were undermined

MRM's engagement with Indigenous Peoples was undermined by its refusal to work with Traditional Owners under their own self-determining decision-making institutions. In 2005, forming their own consultative body, First Peoples established the Borroloola Traditional Owners Group, which represented the four clan groups in the region.[179] MRM refused to engage with the Borroloola Traditional Owners Group, even after the company's actions were denounced by the NT Minister for Environment and Heritage.[180] Instead, MRM appointed its own Aboriginal representatives to a McArthur River Mine Community Reference Group that it governed.[181] In response to criticism, this Community Reference Group was disbanded in 2016.

Glencore responded to the findings of this report as follows:

> We engage with the Gudanji people and also with Yanjuwa, Garrwa and Marra people throughout the Gulf Region. Our engagement approach with the four language groups in the Gulf Region are consistent with the principle of free, prior and informed consent.'[182]

However, Glencore has not yet reconstituted a new representative group that is independent of both Glencore and the NT Government, and representative of all four clan groups (as determined by them), in line with the NT Environmental Protection Agency's recommendations in relation to the mine. Various town hall meetings and other open community consultation activities organised by Glencore are not consistent with the Environmental Protection Agency's recommendations to engage with Traditional Owner groups via their own self-determined and representative decision-making body.

While the UNDRIP—adopted by the UN General Assembly in 2007—has not been in existence as long as the mine, the MRM's engagement with First Peoples has undermined key principles contained in the UNDRIP throughout the life of the mine and in a manner that continues to this day. This includes art 18 UNDRIP, which states:

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain their own decision-making institutions.

And, art 35:

> Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

These rights are also recognised as a formal commitment in the ICMM's Indigenous Peoples and Mining Position Statement, whereby consultation processes should strive to be consistent with Indigenous Peoples' decision-making processes and

reflect internationally accepted human rights, and be commensurate with the scale of the potential impacts and vulnerability of impacted communities.[183]

Dr. Sean Kerins, an anthropologist at the Australian National University, reports that a lack of transparency in the functioning of the MRM's community engagement processes is a major concern for members of these clan groups.[184] These concerns also extend to the operation of the Community Benefit Trust (CBT), which the MRM was forced to establish in 2007, under the direction of the Northern Territory Minister for Environment and Heritage. According to Dr. Kerins, there was no consultation with clan group members over the allocation of funds to the Trust, nor its governance.[185] Community distrust of the CBT is an ongoing issue, such that:

> Traditional Owner groups see the CBT as a tool for MRM to assert control over Aboriginal development aspirations and silence their opposition to the environmental damage caused by MRM.[186]

We note that this account is disputed by Glencore, which responded that 'McArthur River Mine's Community Benefits Trust (CBT) has an independent Board and local community members make up the majority of its Directors. Four of the five community members are appointed by the Mawurli and Wirriwngkuma Aboriginal Corporation (MAWA) representing the four language groups of the region.'

Rather than acting as a vehicle for dialogue and partnership, the CBT has been criticised for actively diminishing Indigenous Peoples' capacity to self-determine and follow their own development agenda, [187] a right that is protected under art 1(1) ICCPR:

> All peoples have the right of self-determination. By virtue of that right they … freely pursue their economic, social and cultural development.

It is reported that one means by which traditional decision-making institutions continue to be undermined is through the use of 'informal' consultation meetings between MRM's CBT Project Officers and individual Aboriginal people when determining how CBT funds will be allocated.[188] Glencore disputes this, noting that 'the Trust's funds are allocated by the CBT Board not the project officers.' Glencore states that 'since its establishment in 2007, MRM has invested in about $17 million into around 90 programs to support socio-economic development in the Gulf Region and commits $1.25 million to the CBT.'[189]

Our research suggests that community members feel these financial contributions are conditional upon ongoing community support for the mine. Fear that the CBT's funds will be withdrawn underpins a lack of open dissent to the ongoing operation of the mine, as reflected in this statement by a local Aboriginal woman:

> No more dialysis machine at the clinic and that kind of stuff. We might lose that. We got to be careful.[190]

Concerns that CBT funds will be withdrawn if objections to the mine are voiced point towards further breaches of human rights. Art 19(1) ICCPR states 'everyone shall have the right to hold opinions without interference.' One of the impacts of the use of inducements by MRM is the destruction of social cohesion amongst and within clan groups.[191]

Concerns that good faith in negotiations were undermined

The use of inducements to garner support for the mine has long been an issue underpinning the engagement strategies of the MRM and governments with First Peoples. These strategies clearly undermine the duty of good faith in negotiations. The use of such practices was first evident prior to the federal government's initial approval of the mine.[192]

Despite promises of economic prosperity, MRM and the NT government have been criticised for supressing First Peoples' self-determining capacity to plan for the future by forcing them to negotiate for their citizenship rights.[193] MRM's approach to garnering Traditional Owner consent is described here by Senior Garawa Elder Jacky Green:

> The miners work like the Father Christmas throwing out Toyota motorcars, just like lollies, in front of people to get them to agree to damaging sacred places and contaminating Country. Some of our people run with their arms open wide and their eyes closed tight shut to get to the shit that the miners throw down. But while they are running to get a little they can't see how the miners are ripping our people apart and contaminating our Country with the toxic waste they make.[194]

"The miners work like the Father Christmas throwing out Toyota motorcars, just like lollies, in front of people to get them to agree to damaging sacred places and contaminating Country."

- Jacky Green, Senior Garawa Elder

Lack of accountability and transparency

In 2012, MRM sought approval to double the size of the open pit mine and substantially increase the size of the overburden waste rock pile.[195] In 2014, the overburden from the open cut mine combusted.[196] Despite this, MRM's application to expand the mine was approved.[197]

The waste rock pile contained a much higher than anticipated percentage of acid-forming rock; instead of an estimated 25 per cent, it contained approximately 90 per cent.[198] The waste rock pile continued to smoke for the entire year, 'emitting large plumes of toxic smoke and sulphur dioxide into the atmosphere.'[199] Subsequently, heavy metal contamination was detected in waterways and livestock.[200] This major contamination event brought to light significant and serious management failures of MRM and regulatory failures of the NT government.[201]

Critically, leading up to this event, MRM had failed to address serious concerns voiced by the mine's Independent Monitor of 'the very real risk posed by catastrophic events'.[202] Highlighting a lack of accountability in MRM's management of the mine, the Independent Monitor emphasised in 2018 that 'significant progress was made on many issues during the review period. However, none of the issues [identified by the Independent Monitor], the majority of which are long term and affect large areas of the mine site, have been resolved.'[203] During this incident, MRM failed to provide Indigenous Peoples with timely and accurate information about the risks associated with the mine and potential health impacts.[204] First Peoples responded by filing a complaint to the Australian Competition and Consumer Commission against MRM for making misleading statements about the risks associated with the mine and potential impacts on communities.[205]

The lack of transparency around the risks associated with this contamination continued to erode community trust of the MRM as well as the environmental regulator.[206] It also contravenes ICMM's Principle 10, which states that member companies will:

> Proactively engage key stakeholders on sustainable development challenges and opportunities in an open and transparent manner.
>
> Effectively report and independently verify progress and performance.[207]

The requirements under Principle 10 include the provision of timely, accurate, and relevant information to key stakeholders. Following this event, there were also unanswered questions about the regulator's ability to deal with the many existing and potential future significant environmental impacts associated with the mine.[208]

More recently, the detection of lead and manganese in bore water in two Garawa homelands has left community members with serious concerns that toxic seepage from the mine's tailings and acid-forming rock has contaminated their drinking water.[209] Subsequent testing several days later found that the bore supplying groundwater to the two Garawa camps did not contain lead or manganese. In this same announcement the NT Department of Health stated in in April 2018 that 'the PWC [Power and Water Corporation] is therefore investigating to see if the source of the contamination is the water pipework, for example, corrosion.' The Department issued precautionary advice to Garawa communities to use an alternative drinking water supply.[210]

To date, outcomes of any further testing have not yet been made publicly available, so the source of the contamination continues to remain unknown to the communities. Despite repeated community requests, the NT government is yet to conduct a conclusive investigation into the source of contamination to rule out the mine,[211] and the Department of Health has deemed that blood testing of affected community members is unnecessary.[212] In relation to the contamination of her community's drinking water, Garawa Elder Nancy Yukuwal McDinny stated:

> They don't want to test our people, because [then] they'll know that everyone has lead in their blood.[213]

Art 29(3) of the UNDRIP states that:

> States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Past and potential future contamination issues highlight the need for a legally recognised right to a healthy environment. Such a right does not exist under NT or Commonwealth laws. Legal recognition of such a right would create a formal instrument to protect clean air, water, biodiversity, and healthy ecosystems as a fundamental human right.[214]

In 2018, MRM's environmental breaches triggered another environmental impact assessment, this time, of the Glencore's proposed Overburden Management Project.[215] In addressing earlier concerns raised by the NT Environmental Protection Authority, the mine presented a new proposal to redesign the waste rock dump on the site to securely store reactive waste rock that were not accounted for in the original design. This new design would still result in the waste rock dump increasing in height from a proposed 80 to 140 metres, and the total footprint increasing from 485 to 511 ha.[216]

The acid-forming rock and heavy metals in the giant waste rock pile are considered hazardous.[217] Art 29(2) of the UNDRIP states:

> States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

Transparency issues have also plagued this most recent environmental impact assessment process. The mine's management plan, which contains key information about how MRM will address environmental issues, has been kept confidential.[218] This lack of transparency seriously limits the capacity for independent analysis and scrutiny of the mine's operations and is contrary to trends in the Australian mining industry towards greater openness in reporting.[219] MRM's withholding of important information also raises questions about how it is possible for Traditional Custodians to give their FPIC to the project. Glencore's commitment to the ICMM Indigenous Peoples and Mining Position Statement requires that even in situations where Indigenous Peoples do not have a legal right to veto a mining development that affects them, FPIC should be respected 'to the greatest degree possible in development planning and implementation.'[220]

There are several registered sacred sites and archaeological sites that are likely to be impacted by the Overburden Management Project, including *Damangani* (Barramundi Dreaming), a number of waterholes,[221] and other sacred sites.[222] As a condition of approval for the project, the NT Environmental Protection Authority mandated that MRM 'conduct all works in accordance with a valid [Authority] Certificate issued in accordance with the *Northern Territory Aboriginal Sacred Sites Act*'.[223] Meeting this condition required MRM to reach an agreement with custodians over the proposed works and their likely impacts to sacred sites.[224]

While MRM claims that agreement was reached with custodians of these sacred sites, the Aboriginal Areas Protection Authority (AAPA) is conducting an independent investigation to decide if the correct custodians gave agreement, before it issues an Authority Certificate to MRM.[225] There are also concerns that these more recent negotiations disregard the original agreement made between MRM and custodians before the mine was converted to open cut, in which custodians stipulated that the overburden pile should not be higher than *Damangani*.[226] AAPA was contacted by the authors of this report for confirmation of whether or not the Authority Certificate has been granted, but did not respond. At the time this report was published, it remains unclear as to whether the mine has been granted certification or not.

In expressing his deep concern for the protection of sacred sites, Garawa Elder Jacky Green stated:

> We're really worried about this Country, because there's a lot of sacred sites around this area. Whiteman doesn't understand, you damage something, they're not going to get into problem […] We the owner of that Country, we going to get damaged, because that's the blackfella land and it ties up to our songlines and ceremony.[227]

On 15 August 2019, the NT Minister for Primary Industry and Resources publicly released a variation of the mine's Authorisation, which included conditions related to the Overburden Management Project and the NT Environmental Protection Agency's recommendations in relation to the project.[228] As described, the only condition of approval that remains outstanding is the issuing of an Authority Certificate by the AAPA. Recent reforms in the *Environmental Protection Act 2019* (NT) will not impact mining operations that are already authorised under the *Mining Management Act 2001* (NT).[229] It is important to note that the new legislation fails to incorporate the FPIC of Traditional Owners as a relevant consideration in ministerial decision-making on environmental approvals.[230]

Insecurity about the future

Further transparency deficits have emerged in the wake of the waste rock combustion and lead contamination issues. Following these events, First Peoples concerned about the mine's impacts raised questions about the adequacy of MRM's mining bond to adequately remediate and rehabilitate the mine if Glencore ever walked away from the project. In doing so, this group of First Peoples exposed the lack of transparency in relation to the amount of money held in the MRM mining bond. This led to an action in the NT Administrative Appeals Tribunal to have the mining bond disclosed under Freedom of Information legislation.[231] Prior to 1 October 2015, the mining bond was set at $111,409,877. Shortly after, it was announced by the then Chief Minister, that the bond had been 'substantially increased', without disclosure of the amount.[232] The bond has since been raised to $519,728,466,[233] which is still judged to be insufficient to remediate the site.[234]

The MRM security bond is calculated in accordance with the NT Government's security calculation tool. It is based on the level of disturbance and activities on the mine site as described by the approved Mining Management Plan, and is independently audited.[235] However, there are calls to reform the way in which security bonds are calculated. The NT Environmental Protection Agency contends that, 'the mining security bond required under the Mining Management Act should be revised based on the updated Mine Closure Plan to ensure the costs of rehabilitation and post-

closure liabilities are not borne by the NT Government and the community, in the event of the Operator abandoning the site or becoming insolvent.'[236] In its submission to the NT government, the Environmental Defenders Office highlighted that:

> There is a growing recognition of the need to consider mine closure in the pre-mining phase… This recognition will lead to improvements in security bond calculations. While the mining closure policy is a good start, reform of the Mining Management Act (NT) to include more prescriptive criteria that the Minster must apply when calculating a bond would have great impact.[237]

Working alongside First Peoples, the Lock the Gate Alliance—a nation-wide grassroots alliance comprising more than 450 local groups—has advocated that the federal and NT governments investigate the closure of 'loopholes' that enable mining companies to avoid their rehabilitation duties by placing mine sites into perpetual care.[238] Despite the significant reforms contained in the *Environmental Protection Act 2019* (NT), the NT Parliament did not follow Queensland [239] in legislating measures to give greater powers to the Minister for Environment to 'effectively impose a chain of responsibility so that … companies and their related parties bear the cost of managing and rehabilitating sites.' [240]

Under the 'non-extinguishment principle' in the *Native Title Act 1993* (Cth), Traditional Owners will regain full native title rights over the mine site when the mineral leases terminate in 2043.[241] The lack of security in the current mining bond and questions over the cost of the long-term management of the mine site post-production—which is estimated at over 1,000 years[242]—highlight the vulnerability of the Gudanji Traditional Owners and other clan groups to the long-term environmental impacts of the mine. The NT Environmental Protection Agency has expressed its concern over the inadequacy of the security bond to cover for the full length of the mine's impact, stating:

> …it is difficult to see how the government could be holding a bond sufficient to cover the potentially 1000 years of rehabilitation and monitoring – indeed it is unclear how a bond of that nature could even be calculated…It would have been practically impossible.[243]

Similarly, the Independent Monitor describes the risk associated with the 'under-estimation of long-term post-closure monitoring and maintenance costs, which have been based on a period of 25 years following closure,' noting that costs are likely to be incurred for several hundred years' and 'in the scenario where MRM were to leave the site, the NT Government would be required to fund the shortfall.'[244]

The Australia Institute carried out an economic analysis of the mine which recommended that, 'from an economic perspective, it is likely that the best approach would be to close the mine and rehabilitate the site, and to ensure that Glencore pays for the rehabilitation.'[245] Given the significance of environmental contamination originating from the mine, the Mineral Policy Institute has recommended that a public inquiry be conducted under the *Inquiries Act 2011* (NT) to investigate the current state and future of the mine, with independent assessment of:

- rehabilitation scenarios that examine the complete backfill of the open cut mine;
- current regulatory requirements;
- the adequacy of the rehabilitation bond; and
- the economic viability of the mine.[246]

Threats to First Peoples' livelihoods

The capacity of clan groups to continue their customary practices and derive their livelihoods from their Country is dependent on a healthy environment and the protection of their lands and waters. Contamination of productive waters, including *Narwinbi*,[247] breaches art 29(1) of the UNDRIP, which states:

> Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

The NT Environmental Protection Agency carried out an assessment of the mine in 2018, which found that 'water quality and environmental monitoring has found no evidence of contamination of aquatic biota in the McArthur River near the mine site or downstream as a result of mining activities,' and that 'impacts to aquatic biota as a result of MRM operations are therefore largely restricted to waterways within the mine site.'[248] Yet the same report also found that: 'there is the potential for future adverse off-site impacts to occur as a result of the Proposal'[249] and 'the Proponent's current monitoring indicates that biota within the reaches of Surprise Creek and Barney Creek diversion on the mine site occasionally have elevated concentrations of lead, zinc, and other metals, and macroinvertebrate assemblages are beginning to show impact in these sites compared with reference sites. However, an analysis of trends has not been presented and there is some uncertainty about the actual degree of impact.'[250]

The NLC objected to MRM approvals in late 2019, raising specific concerns related to the discharge of lead and zinc into the river:

"Culture is stronger than contamination."

- Gadrian Hoosan, Garawa and Yanyuwa leader

> The mine's operating conditions for annual loads of lead and zinc discharged to the McArthur River are far from leading environmental management practice. They do not have a maximum set threshold for the discharge of lead and zinc. This would be of significant concern to Borroloola residents and other downstream Traditional Owners and community members.[251]

According to Garawa, Gudanji, Marra, and Yanyuwa Peoples who use the river, important animal species that are hunted, fished, and gathered are disappearing.[252] Significant fishing and hunting grounds are also restricted due to contamination or access restrictions.[253] Garawa and Yanyuwa leader Gadrian Hoosan emphasises the impact environmental contamination has had on his people's lifeways and livelihoods:

> We had those Independent Monitoring mob down here [in] 2014 and [they] told us that 'dem fish was poisoned and we are only allowed to eat a little bit of them. We used to eat as many fish as we could eat … No one done fish around here anymore. They had no right to contaminate that river, because we live downstream [...] That river was our livelihood and they took that away from us. People used to fish from top to bottom, and no-one fishes there anymore.[254]

Kerins and Jordan describe the mine, as managed by MRM, as a devastating example of neo-colonial resource extraction by a transnational corporation that is 'contaminating Indigenous land, overriding Indigenous law and custom and undermining Indigenous livelihoods.'[255] They assert that MRM's relationships with Garawa, Gudanji, Yanyuwa, and Marra Peoples are framed through an assimilationist agenda that restricts the freedom of First Peoples to determine their own development and livelihood goals, whereby:

> Absent major change, the best that Garawa, Gudanji, Yanyuwa, and Marra Peoples can hope for appears to be greater incorporation into the MRM project and its attendant possibilities for employment and individual financial return. These small gains in employment at MRM seem little consolation for the profound and irreversible disruption to people's lives, and the environmental and cultural destruction that capital will leave behind when it eventually moves on.[256]

In addition to initiating legal action in the courts, some Garawa, Gudanji, Marra, and Yanyuwa Peoples are employing a number of creative means to assert their rights.[257] The *Two Laws* film, made in the late 1970s, was the first story to emerge in which First Peoples in Borroloola asserted their sovereignty under First Laws and rights under settler law.[258] The more recent film, Warburdar Bununu: Water Shield, gives voice to Garawa People's concerns over the contamination of their drinking water, rivers, and fisheries.[259] In 2017, the Open Cut art exhibition was held in Darwin with the stated aim to assert sovereignty over Country.[260] In 2018, Garawa People travelled to Sydney to protest outside Glencore's Sydney office after drinking water on their homelands was found to be contaminated.[261]

The agency and determination of First Peoples to protect their Country and culture is summed up in this statement by Garawa and Yanyuwa leader Gadrian Hoosan:

> 'Culture is stronger than contamination'.

The Barramundi fish is one of many species found in the McArthur River © Emily Barker (Shutterstock)

Recommendations

To promote accountability, transparency, and good faith in its McArthur River Mine operations, Glencore should:

Recommendation 1:
Adhere to international business and human rights norms, including the UNDRIP, ICERD, ICCPR, UN Global Compact, and UN Guiding Principles on Business and Human Rights.

Recommendation 2:
Adhere to all recommendations of the NT Environmental Protection Authority's Assessment Report 86 and comply with the conditions of the Variation of Authorisation issued by the NT government.

Recommendation 3:
Publicly release an economic analysis of the mine, which includes: Economic benefits to the community and NT Government; an independent qualitative analysis of the loss of access to cultural resources (loss of connection to country/culture, loss of identity, impacts to water quality and impacts to health, etc.); and demonstrated financial capacity to satisfying mine closure and rehabilitation responsibilities.

Recommendation 4:
Establish and officially recognise a Community Reference Group, in accordance with the NT Environmental Protection Agency's recommendations in Assessment Report 86 and as required by Condition 129 of the Variation of Authorisation. This self-determining Community Reference Group should be independent of both Glencore and the NT government, and representative of all four clan groups as appointed by the clan groups themselves.

Recommendation 5:
Work respectfully with this Community Reference Group to ensure there is FPIC of Garawa, Gudanji, Marra and Yanyuwa Peoples to current and any future planned developments that relate to the mine.

Recommendation 6:
Fully investigate scenarios for the early closure, full backfill and rehabilitation of the mine in compliance with the conditions of the Variation of Authorisation (of 19 August 2019) and the NT Environmental Protection Agency's Assessment Report 86, and engage the community in decision-making through a Community Reference Group (described above) on an ongoing basis in relation to these.

Recommendation 7:
Publicly release all mining management plans, and independent assessments of these plans, as required by Recommendation 24 of the NT EPA's Assessment Report 86.

Recommendation 8:
Significantly increase the amount held in the mining security bond to reflect the risks and true costs associated with the long-term rehabilitation of the mine, as required by Conditions 127 & 128 of the Variation of Authorisation.

Recommendation 9:
Immediately and accurately report contamination incidents to local communities through notices that can be understood by the Garawa, Gudanji, Marra and Yanyuwa Peoples. Notifications of any incidents should additionally be reported to a self-determined Community Reference Group (as earlier described).

Recommendation 10:
Provide clear, comprehensive evidence to the community (i.e. through publicly available reporting) demonstrating that it has implemented all the recommendations made in the mine's Independent Monitor Reports, within six months.

Recommendation 11:
Make and adhere to due diligence commitments to ensure no further damage to sacred sites or anthropological sites.

In relation to Glencore's operations at the McArthur River Mine, the NT government should:

Recommendation 12:
Ensure the NT Environmental Protection Agency's recommendations are more strongly and accurately reflected in the conditions of the Variation of Authorisation and the Mine Management Plan for the mine under the *Mining Management Act 2001* (Cth), and stronger enforcement of approvals and conditions that apply to the mine.

Recommendation 13:
Implement the recommendations of the MRM Independent Monitor.

Recommendation 14:
Amend the *Mining Management Act 2001* (Cth) to make the publication of mine management plans, including that of MRM, mandatory.

Recommendation 15:
Use powers under the *Inquiries Act 2011* (NT) to investigate the current state and future of the mine, with independent assessment of:

- Rehabilitation scenarios that examine the complete backfill of the open cut mine;
- Current regulatory requirements;
- The adequacy of the rehabilitation bond;
- The economic viability of the mine.

Recommendation 16:
Amend the *Environmental Protection Act 2019* (NT) to include the requirement of FPIC from Traditional Owners for projects assessed under the Act.

Recommendation 17:
Amend the *Environmental Protection Act 2019* (NT) to impose a chain of responsibility on companies and their related parties so that they bear the cost of managing and rehabilitating sites.

Recommendation 18:
Conduct a full investigation to determine the source of contamination of drinking water in the Garawa 1 and 2 camps and provide remediation and remedy where appropriate.

In relation to Glencore's operations at the MRM, the Australian government should:

Recommendation 19:
Expand the formal legal requirement for extractive industries to obtain the FPIC of Traditional Owners to reflect best practice, in line with the advice of the UN Committee on the Elimination of Racial Discrimination. This includes legislative amendments to:

- *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), to include FPIC provisions that give Traditional Owners a veto right beyond the exploration phase of a development; and
- *Native Title Act 1993* (Cth), to incorporate the principle of FPIC, including a veto right, and the lengthening of negotiation time frames.

Recommendation 20:
Reform the *Native Title Act 1993* (Cth) to bring it into line with Australia's commitment to the UNDRIP, including the adoption of the UNDRIP into the preamble of the Act, with a requirement that the Act's provisions be interpreted in a way that allows court cases to be brought on public interest and Indigenous human rights grounds.

Endnotes

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148. Young, above n 132.
149. *Mabo v Queensland* (No. 2) (1992) 175 CLR 1.
150. Kirsty Howey, 'The Northern Territory and the McArthur River Mine' in Tim Bonyhandy and Andrew Macintosh (eds), *Mills, Mines and Other Controversies* (The Federation Press, 2010) 60, 63.
151. *Native Title Act 1993* (Cth) s 46. For commentary, see Northern Land Council, 'McArthur River Mine Compensation Talks', *Northern Land Council* (News, 31 October 2017) <https://www.nlc.org.au/media-publications/mcarthur-river-mine-compensation-talks>.
152. *Native Title Act 1993* (Cth) s 45.
153. Northern Land Council, above n 151.
154. Young, above n 132, 16.
155. Ibid. Between 1991 to 1994 Anthony Young was a solicitor with the Northern Land Council. He represented Borroloola claimants in the second Borroloola land claim. See Young, above n 132, 1. Since 2015, Young has been a judge in the Federal Circuit Court of Australia.
156. For a critical review of all environmental assessments of the McArthur River Mine up until 2010, see Howey, above n 150, 60.
157. Young, above n 132, 8.
158. Ibid.
159. Ibid.
160. Luke highlights that while 'reluctant acceptance' may be seen as a low level of acceptance in terms of social license to operate, it can actually be misinterpreted as such, instead of being seen, more accurately, as a low level of opposition. See Hanabeth Luke, 'Social Resistance to Coal Seam Gas Development in the Northern Rivers Region of Eastern Australia: Proposing a Diamond Model of Social License to Operate' (2017) 69 *Land Use Policy* 266, 268.
161. Hanabeth Luke and Nia Emmanouil, '"All Dressed Up with Nowhere To Go": Navigating the Coal Seam Gas Boom in the Western Downs Region of Queensland' (2019) 6(4) *The Extractive Industries and Society* 1350, 1351.
162. Ibid.
163. *McArthur River Project Agreement Ratification Act 1992* (NT).
164. Northern Land Council, above n 151.
165. Ibid.
166. De-identified fact check consultation re Glencore's McArthur River Mine.
167. Glencore, *Corporate Profile Australia* 2018 (2018) <https://www.glencore.com.au/en/publications/giabrochures/2018-Glencore-Australia-Corporate-Profile-WEB.pdf> 7.
168. McArthur River Mining, 'MRM Lodges Public Environmental Report' (Media Release, 4 July 2006) <https://www.mcarthurrivermine.com.au/en/media/MediaReleases/MRM_PER-lodgement_4July06.pdf> 3.
169. Kristy Howey and Gillian Duggin, 'A Mine That Can't be Closed? The McArthur River Mine and regulatory failure in the Northern Territory', *Australian Economic Review* (March 2019) https://parliament.nt.gov.au/__data/assets/pdf_file/0009/711099/94-2019-Submission-16a-Attachment.pdf> 4.
170. Seán Kerins, 'No Social License to Operate', *Land Rights News, Northern Edition* (January 2015) 17.
171. *Warburdar Bununu: Water Shield (*Directed by Jason de Santolo, Brown Cabs, 2019).
172. Howey and Duggin, above n 169, 3.
173. Young, above n 132, 17.
174. Ibid.
175. This was a condition imposed by the Northern Territory Minister for Environment and Heritage. Ibid.
176. Howey and Duggin, above n 169, 4.
177. *Lansen v Northern Territory Minister for Mines and Energy* (2007) 20 NTLR 6 and *McArthur River Project Agreement Ratification Act 2007* (NT).
178. Ibid.
179. Kerins, above n 170.
180. Ibid.
181. Ibid.
182. In response to our account of events, Glencore responded as follows: 'Contrary to claims in the report, MRM engages in an open and transparent manner with local residents and community members. MRM holds open town meetings in Borroloola which are open for every member of the community to attend. These meetings are further supported by frequent and open community engagement activities through our senior managers and a dedicated community engagement team. MRM has not operated a Community Reference Group since 2016. It is also worth noting that as part of our recent Environmental Impact Assessment consultation process, we had 263 community consultations and spoke with over 500 people, with 1,227 points of contact with stakeholders and community members.'
183. ICMM, above 139.
184. Kerins, above n 170.
185. Ibid.
186. Ibid.

187. Ibid
188. Ibid.
189. Consultation with Glencore.
190. Kerins, above n 170.
191. De-identified fact check discussion 2 re Glencore Mine.
192. For example, a group of Gurdanji Traditional Owners were granted the Bauhinia Downs pastoral lease. Also, 'the Aboriginal community at Borroloola' was granted a 25% interest in a trucking company and a limited number of Aboriginal employment guarantees were made in association with the MRM. See Young, above n 132, 17. These employment guarantees did not result in any significant employment of local Aboriginal people in the first 10 years of the mine's operations. See Young, above n 132, 16.
193. De-identified fact check discussion 1 re Glencore Mine.
194. Seán Kerins, 'Open Cut: Life on an Australian Frontier' *Arena Magazine* (2017) 150, 26.
195. Howey and Duggin, above n 169, 4.
196. Ibid.
197. Ibid.
198. NT Environmental Protection Authority, *Assessment Report 86: McArthur River Mine Overburden Management Project, McArthur River Mining Pty Ltd* (NT Environmental Protection Authority, July 2018) <https://ntepa.nt.gov.au/__data/assets/pdf_file/0004/553081/mrm_overburden_assessment_report.pdf>.
199. Howey and Duggin, above n 169, 4.
200. Seán Kerins, 'Sick Country: Poisoning Garawa with Mining and Politics', *New Matilda* (online) 23 July 2014 <https://newmatilda.com/2014/07/22/sick-country-poisoning-garawa-mining-and-politics/>.
201. Lock the Gate Alliance, *Submission to the Senate Standing Committees on Environment and Communications* (30 October 2017)
202. Northern Land Council, 'Condemnation for McArthur River Mine Approval', *Land Rights News, Northern Edition* (August 2018) 3, 12 <https://www.nlc.org.au/uploads/pdfs/LRN-August-2018_web.pdf>.
203. ERIAS Group, *Independent Monitor Environmental Performance Annual Report 2017-2018. McArthur River Mine* (Northern Territory Government, September 2018) 4 <https://industry.nt.gov.au/__data/assets/pdf_file/0009/597663/mrm-annual-report-2017-2018.pdf>.
204. Young, above n 132, 21.
205. Katherine Gregory, 'Borroloola Traditional Owners Take Environmental Concerns about Glencore Zinc Mine to ACCC', *ABC News* (online) 8 December 2014 <https://www.abc.net.au/news/2014-12-08/glencore-mrm-referred-to-accc-over-borroloola-mine/5953102>. This complaint did not lead to litigation by the ACCC.
206. Northern Land Council, above n 151.
207. ICMM, *Principle 10* <https://www.icmm.com/mining-principles/10>.
208. Howey and Duggin, above n 169, 3.
209. de Santolo, above n 171; Jane Bardon, 'Indigenous Mining Town Residents Demand Blood Tests After Lead Found in Water', *ABC News* (online) 21 April 2018 <https://www.abc.net.au/news/2018-04-20/borroloola-water-supply-tests-positive-to-lead-contamination/9677638>. Also see ERIAS Group, above n 203, 4-171 on the identification of mine tailing seepage as a 'key risk'.
210. Northern Territory Department of Health, 'Update: Precautionary Drinking Water Advice – Garawa', *Northern Territory Government* (20 April 2018). <https://health.nt.gov.au/news/pre-2020/update-precautionary-drinking-water-advice-garawa>.
211. Lauren Mellor in de Santolo, above n 171.
212. Jane Bardon, 'Authorities Say Borroloola Drinking Water is Safe — But Many Residents Don't Trust Them', *ABC News* (online) 10 August 2018 <https://www.abc.net.au/news/2018-08-10/indigenous-protest-lead-contamination-water-borroloola/10103122>.
213. Nancy Yukuwal McDinny in de Santolo, above n 171.
214. UNOHCHR, above n 12.
215. Referred to as the Overburden Management Plan.
216. NT Environmental Protection Authority, n 198, 63.
217. For health impacts associated with lead see McArthur River Mine, *Overburden Management Project Draft Environmental Impact Statement: Chapter 14 – Health and Safety* (McArthur River Mine, 2017)) 14.6.1.2.13.1.
218. Howey and Duggin, above n 169, 4.
219. Gavin M Mudd, *The McArthur River Project: The Environmental Case for Complete Pit Backfill* (Mineral Policy Institute, August 2016) 4 <http://www.mpi.org.au/wp-content/uploads/2016/08/The-McArthur-River-Project-The-Environmental-case-for-Complete-Pit-Backfill-1.pdf>.
220. Secretariat of the UN Permanent Forum on Indigenous Issues/DSPD/DESA, *Resource Kit on Indigenous Peoples' Issues* (UN Department of Economic and Social Affairs, 2008) <https://www.un.org/esa/socdev/unpfii/documents/resource_kit_indigenous_2008.pdf> 18.
221. Including Djirrinmini, Wurruni, Donagan's Lagoon and Nanbadini. See NT Environmental Protection Authority (n 199) 64-5.
222. Yukuwala and Garbula. See NT Environmental Protection Authority, n 198, 63-65.
223. See NT Environmental Protection Authority, n 198, Recommendation 16, 65-66. Applications for an Authority Certificate are made under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) s 19B, and variations to an existing certificate under s 23. Section 22(1) sets out the requirements for obtaining an Authority Certificate from the Aboriginal Areas Protection Authority.
224. *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), s 22(1).
225. De-identified fact check discussion 2 re Glencore Mine.
226. De-identified fact check discussion 1 re Glencore Mine.
227. Jacky Green in de Santolo, above n 171.
228. Minister for Primary Industry and resources, Northern Territory Government. Northern Territory of Australia Mining Management Act: Variation of Authorisation for McArthur River Mine (15 August 2019). <file:///C:/Users/Carla/Downloads/C_UserswesthDesktopMRM%20Variation%20of%20Authorisation.pdf>
229. 'Mining, Extractives and Exploration: What Environmental Impact Assessment and Approval Reforms Mean For You', NT Department of Environment and Natural Resources (Fact Sheet, 23 April 2019) <https://denr.nt.gov.au/__data/assets/word_doc/0004/694300/fact-sheet-19-mining-extractives-exploration-industry.docx>.
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231. See *Morris and Green v Department of Primary Industry and Resources, McArthur River Mining Pty Ltd and Information Commissioner* [2017] NTCAT 469, 30.

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233. NT Minister for Primary Industry and Resources, *Mining Management Act Variation of Authorisation: McArthur River Mining Pty Ltd* (Northern Territory Government, 15 August 2019), 6.
234. De-identified fact check discussion 1 re Glencore Mine; Howey and Duggin, above n 169, 6.
235. Glencore response, on file with authors.
236. NT Environmental Protection Authority, n 198, 102.
237. NT Environmental Defenders Office, 'Submission: Environmental Defenders Office NT with respect to the Northern Territory Government's Review of the Current Policy of Non-Disclosure to the Public of Mining Security Bonds' (2017) 6. <https://issuu.com/edonorthernterritory/docs/security_bonds_-_submission_-_polic>
238. Lock the Gate Alliance, above n 230, 2.
239. See *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (Qld).
240. See the explanatory notes in the *Environmental Protection (Chain of Responsibility) Amendment Bill (Qld).*
241. Northern Land Council, above n 151.
242. The Draft Environmental Impact Statement for the MRM Overburden Management Project identifies the need for proactive and reactive monitoring of the waste rock dump for up to 1000 years. See McArthur River Mine, *Overburden Management Project Draft Environmental Impact Statement: Chapter 4 – Decommissioning, Rehabilitation and Closure* (McArthur River Mine, 2017) <https://www.mcarthurrivermine.com.au/en/EIS/eisdocuments/Chapter-04-Decommissioning,-Rehabilitation-and-Closure.pdf> 3. It is also worth noting that the Commonwealth Government's approval for the Overburden Management Project under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) is also for a term of 1000 years. See Australian Government, Department of the Environment and Energy, Approval: McArthur River Mine Overburden Management Project, Gulf Region, Northern Territory (EPBC 2014/7210) (2019) <http://epbcnotices.environment.gov.au/_entity/annotation/2fe7e800-c390-e911-8f1d-00505684324c/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1596696935291>.
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