"Oi oi oi oi ngala pitja kulila tjumaku!"

A call to action to responsible investors: what do you know about Aboriginal Australia?

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The brief of this address is to consider the role investors have to ensure their investments are in companies which implement a fundamental principle of the UNDRIP: the right of indigenous peoples to engage in Free, Prior and Informed Consent in their dealings with First Nations Australians … and how I see the finance sector might best deliver on this.

FNHPA: and why we are here

The Alliance was formed to achieve legislative, policy and practice reform nationally to ensure that affected Indigenous communities are the ultimate decision-makers in relation to the management and protection of their own cultural heritage and that the rules governing this protection are consistent across the various state jurisdictions. Currently all Indigenous heritage laws in Australia are focused more on regulating its destruction rather than providing protection or enhancing cultural heritage values.

There is a long history in Australia of **Indigenous groups being played off against one another** by Governments and corporations to achieve their desired outcomes. The Alliance seeks to bring together a broad range of organisations to work on areas of common interest, ensuring that **our voices and political reach are amplified**.

Why has the Alliance chosen engagement with finance as a strategic objective?

The Alliance has chosen to work with the finance and investment sector both to **gain allies** in influencing the actions of corporations and governments and to work with the finance sector to change their own industry.

The actions of Rio Tinto in destroying Juukan Gorge were not illegal. This was just one in a long line of incidents of damage, disturbance and destruction of sites. The power and influence wielded by investors in the wake of Juukan has shown that this sector has a critical role to play in holding

companies to account for their policies and practices. The uncertainty and risk in the current flawed legislative regime is harmful to investors and Indigenous groups alike.

What has been positive?

- That investment and finance organisations who have a genuine desire to work together in partnership to achieve better outcomes for both parties
- A desire on behalf of the investment community to understand the complexity of indigenous engagement.

What has been challenging?

- The objectives of the Alliance and (parts of) the finance sector overlap

  1. the need for security: Just as First Nations groups in Western Australia cannot look to government for security of protection for their customary capital (which I detail below), the government fails to provide regulated support for responsible investors.

  2. the interest in sustainability of investment

- but the ways in which we operate are quite different and this can lead to misunderstandings about how to work together.
- Post Juukan Gorge, members of the finance sector have been keen to understand the issues around cultural heritage protection and FPIC. The support has been welcome. However, in their eagerness to achieve outcomes, some of the outcomes sought by the investment sector have been pursued without the necessary input from Indigenous leadership, with Indigenous leadership being treated as stakeholders to be consulted. In such circumstances critical opportunities for meaningful commitments sought by Indigenous leadership from the mining sector have been lost.

What does the Alliance want from the finance sector?

The Alliance has chosen to work with the finance and investment sector both to gain allies in influencing the actions of corporations and governments and also to work with the finance sector to change their own industry.

The Alliance believes that if the finance sector and key parts of the extractives sector can stand with us in calling for deep and meaningful reforms that we stand a far better chance of achieving them.

The Alliance wants the finance sector to:

- better understand the perspectives of Indigenous groups.
- Agree to work in partnership with Indigenous groups instead of consulting them as an after thought
- To elevate Indigenous perspectives in the decision-making framework used to inform investment decision making
- Support for meaningful legislative reform at both the Commonwealth level and in WA.

Of the approaches utilised by investors to determine best fit for the responsible client, two stand out as particularly effective in furthering the protection of the rights of First Australians: **Corporate Engagement and Shareholder Action** and **Impact Investing.**

First Australians are not assisted by investors shying away, or divesting, from companies with low ESG compliance. We would rather see investors use the influence they have to ensure company Executives and Boards are engaging with First Nations groups responsibly.

Responsible investment in Australia's First Nations' space: what it must consider

Let me first offer a description of what the Australian First Nations space is. It is multi-dimensional, spans deep time and indeterminant futures, and holds myriad inter-relationships between differing cultures, heritages and laws. It is comprised of flora, fauna, landscapes, stone, waterways, cosmology and spirit. It's more than our cultural heritage. ***It is our customary wealth, (Wealth in First Nations) encompassing the total stock of cultural capital, natural capital, political capital, human capital, institutional capital.*** As part of economic talk, Customary wealth is held as part of our Stock, it is inalienable and is not for us to distribute or spend: it's our ancestors' investment in us, and ours for future generations, *ad infinitum*. Extraction, exploitation and other forms of realisation of customary wealth is the Flow, it is often within limited timelines, temporary and unsustainable but also reflects parallels with political governance cycles, CEO tenure cycles and short term Returns on Investments. A relationship with First Nations Australians must start from the recognition of inherent Customary Wealth of our Nations and how your skills, knowledge and

services may assist us in maintaining, preserving this asset and then supporting our access to the flow based opportunities.

What does responsible investment look like for us, you'll need to think big. Our formula works, but our methods are multi-layered and the extent of **our responsibility** is as significant as… well, as if our lives and culture depend upon it.

I'm a Ngalia man from desert country: our native title claims, our cultural heritage management programs, our cultural education and language programs, our leadership programs, our negotiating groups, economic and corporate ventures, our cultural competency programs, our artistic expression… are some of the ways we work to create two-way understanding, engage stakeholders, drive economic outcomes, protect our heritage and determine our futures and support access to unlocking and releasing the value of capital held within our Customary Wealth.

Ngalia influence in country lies primarily within the area of in the West Australian Goldfields. Gold, nickel, copper, tin, potash and Australia's current holy grail of investment: high-grade iron ore. Working to protect Ngalia cultural heritage is more than a full-time job: it is the burden of generations. And the pressure is only increasing. Sites my parents successfully saved from mining 30 years ago, such as at the then-proposed Yackabindie nickel mine, are now being destroyed. Despite all efforts, Lake Wells is currently under threat, and many more of our sacred sites and other culturally significant places to Ngalia have are currently slated for destruction by large and mid-sized mining companies. Ngalia were 'consulted' about all those ceremony grounds and waterholes and mountain ranges slated for destruction. Our consent was never provided. **The Minister has decided: it is in the 'public interest'.**

Customary capital and the matter of rights

Improved understanding of the nature of our customary capital is the first step for investors.

Our concept of land is not simply an entity which contains resources, such as iron ore. Our land holds and gives rise to us very particular sets of inter-related and multi-purpose rights. These are shared between human, animal, vegetable and spiritual entities. Land is vital part of our cultural

capital. It is held by different groups, and the **rights to hold this capital are inextricable from our Customary Wealth.** Ngalia describe this concept for a body of cultural capital as ***'Kangaralpi'***.

To use our landed resources in a non-sustainable way would diminish those rights. Use the whole resource and the right is lost. *Kangaralpi* does not allow for waterholes or cave sites to be traded away. Rather, **it allows for *rights* (such as those related to use) to be negotiated.**

Any framework for dialogue as regards a share in it **must be based squarely on rights.**

Protecting First Nations Customary Capital: the current situation

Those of you with an eye on the Senate Inquiry into Rio Tinto's destruction of *Juukan* Gorge may understand that *Juukan* was an act sanctioned under Section 18 of WA's *Aboriginal Heritage Act (1972)* (yes, 1972). In June 2020 Rio Tinto held Ministerial approvals for a **further 1780 sites** otherwise protected as 'sacred' and/or otherwise 'of importance and significance'. Mining, and other companies, currently hold such approvals to interfere with, damage or destroy **thousands** of culturally significant Aboriginal sites.

Approximately 471 Consent applications were made by **mining companies** in WA in the years 2010-2020. **All 471 were consented to**, most subject to 'conditions'. The number of tenements in each of these applications range between 1 and 25 – 30, and the size of each tenement differ, and consent information does not tell us how many sites lie within each tenement, or whether all sites were approved for destruction. My experience suggests the density of sites could be (and this is a wild, but conservative, guess but I want to give you an understanding of the scale of the issue) an average of, say, 10 ..??.. sites exist on each tenement. You can do the math. **We are talking about many hundreds, and potentially thousands, of sites currently subject to approvals by mining in Western Australia alone.** They will not all be classified 'highly significant' as Juukan was, but they are each a unique and vital cultural heritage component.

What 'consent with conditions' means is: the company engages with a land council or PBC to conduct a 'site survey'. Sites' boundaries and Dreamings and importance are discussed and further classified. Recommendations go back to the mining company about protection, removals or destruction. Then, as is the current case at Mt Richardson, where the hugely important site complex of …. [which contains some ….sites are set to be destroyed…. The ACMC may decide that the sites

were not sufficiently significant to warrant 'Registered' status and no protection was afforded. *(This is the mining company implementing **'best practice').***

The bulk of what is called 'cultural heritage work' is conducted toward the end of the 'approvals' process (a bit like Environmental approvals used to be, but even these go ahead of cultural heritage surveys in WA). This is where the cultural heritage surveys are conducted; the cultural landscape mapped into discrete sites, then categorised into areas of 'customary use' or 'significant'. 'Consultation' results go back to the company via the cultural heritage unit (sometimes called 'Heritage Approvals' units, such is their commitment to consent). Companies then have the site details they need to make their Section 18 applications for Ministerial consent.

Any attempt to keep cultural landscapes intact at this late stage is all uphill.

The AHA provides Site custodians **no right of review** of a Ministerial consent (conversely, if the Minister did not approve consent to interfere with a site, the proponent may appeal).

The ATSIHPSA has proved useless. It too is entirely dependent on the whim of the Minster of the day. No call from the *Puutu, Kunti Kurrama* and *Pinikura* peoples (PKKP) for the Federal Minister to enact protection (something they started asking for in 2013) was answered.

The NTA affords no right of veto on mining. In the best instance, the **Right to Negotiate** has transactionalised our Customary Capital which we are forced to negotiate over deals we are pressured to accept (because, again, we have no right of appeal). In the worst instances (and commonly), First Nations groups have to fall back on the AHA to protect sites and… you know the rest.

We need to improve the legislation, and it needs to be national. Sites cross borders, traditional land-owning groups cross borders, ore deposits cross borders, mining tenements cross borders.

The **current Amendment Bill** does not ……. We need significant lobbying in this space, with the support of the investment community.

The new framework must be based on International laws

The assumption by the State of the right to over-ride indigenous cultural heritage 'protections' afforded by its own judicial construct and methods is a clear **abrogation of its responsibilities under international human rights laws.** Our responsibility is to ensure the application of indigenous human rights principles in company procedures. This is no check-box exercise.

Australia signed on to the UNDRIP in 2009 'as a framework for better recognising and protecting the rights of Aboriginal and Torres Strait Islander Australians' (Reconciliation Australia). We must not allow ourselves to be restricted to using UNDRIP to guide on what proper 'consent' looks like. It is **vital that the totality of rights recognised and afforded under UNDRIP** are met. First Nations Australians will not allow FPIC measures to take the place of the suite of rights protected by this document.

The ***UN Guiding Principles on Business and Human Rights*** *(UNGPBHR)* **requires businesses to respect, and endeavour to further, the human rights which may be affected by the project the subject of investment.** In 2013, the UN Office of the High Commissioner for Human Rights (OHCHR) **clarified that the UNGPBHR applied to institutional investors,** including minority shareholders. Rio Tinto's Executive was thus bound to advise all shareholders as soon as 2013, when it received advice that *Juukan* 1 and 2 sites were 'held in the highest level of significance' by traditional owners.

The ***Universal Declaration of Human Rights*** is central to our work too.

The implication of Articles 18 and 27(1) is that: regardless of any Governmental approvals to interfere with areas of cultural importance, doing so without full and informed consent of indigenous peoples with especial religious associations to those places is, to those indigenous people, constitutes a 'barbarous act' under that Declaration.

For your PP:

Universal Declaration of Human Rights, whereby:

> Article 18, 'everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance', and;

> Article 27.1, 'everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.'
>
> *(ref…https://www.riotinto.com/en/sustainability/human-rights)*

Resect for indigenous human rights must lie within the pretext of any discussions, applications or consultations around interference with culturally significant places. Such interference and destruction has become so normalised, primarily through over-use of the Approvals process of the *AHA.* With it, appreciation of the extremity and depth of the impact on human rights has become lost in the narrative.

Let's talk about consent

It is no longer sufficient to say that indigenous **'consent'** has been afforded a project, and that it has been provided in accordance with the terms of the law. Investors will increasingly require evidence that consent has been given in such a way that it not only will have reduced negative impacts on First Nations Australians, but that projects enjoy the backing of First Nations groups because they have been **co-designed for minimal harm and mutual benefit**.

It may be added that; Australian First Nations' decision-making processes are the oldest, and likely among the fairest in human history. It would be a mistake to presume their consensus-based decision-making processes incapable of reaching multi-layered outcomes which benefit multiple groups.

Landed resources of First Nations groups are wrapped up with multi-layered rights, consent given by a First Nations group can rarely be considered to be comprehensive. A hierarchy of rights 'to speak for' each place does exist, and no one of us holds a complete set of rights. And none of these rights, I might add, includes approval to destroy. Add to the equation that the *Jukurrpa*, our Dreaming, necessitates rights in country be held by groups. I tell you this so you better appreciate the dilemma we experience when faced with the proposal from the mining company who says: "we need to bull-doze this mountain range".

FPIC (and skip to PP materials below to go with each)

1) Consent is not currently **freely** given in Australia (as there is no right of veto).

2) **'Prior'** consent is rarely given opportunity to form. Land Councils and PBCs are not engaged sufficiently early in the project **design** processes.

3) Ensuring consent is based on good **information** takes work. How can you ensure everyone understood the full impact of the proposal? Or that they attended the relevant meetings to authorise the decisions? Were interpreters used at all stages of the delivery of information provision? Did people agree to aspects of the proposal because they were 'worn down'?

4) '**Consent'** in First Nations Australia is the outcome of complex processes, generally arrived at in a 'rolling' sort of way. In English, it amounts to 'agreement', or 'yes'. Do not confuse the two.
5) A further dimension of FPIC operating well is that the consent be **current**. Yamatji Marlpa Aboriginal Corporation submitted they had facilitated more than 45 meetings related to negotiations over the Agreement between 2003 and 2012, which was Registered with the NNTT in April 2013. It reflected 'best practice' in the field of ICH protection, participation in decision making and economic opportunities. The Agreement, being 10 years old with much additional information about the significance of *Juukan* having emerged, had lost currency by the time the activities at Brockman 4 pit were undertaken. Processes must allow for the continual checking that the level or nature of consent has not changed between the time of it being provided and the works occurring.

The UN provides guidance on free prior, informed consent. All elements of FPIC are interlinked. The first three elements (free, prior and informed) qualify and set the conditions of consent as a decision-making process (*not an outcome).*

- **Free** refers to a consent given voluntarily and without coercion, intimidation or manipulation. It also refers to a process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed. More specifically:
    - rights-holders determine the process, timeline and decision-making structure;

- information is offered transparently and objectively at the request of the rights-holders;
- the process is free from coercion, bias, conditions, bribery or rewards;
- meetings and decisions take place at locations and times and in languages and formats determined by the rights-holders; and
- all community members are free to participate regardless of gender, age or standing.

- **Prior** means that consent is sought sufficiently in advance of any authorisation or commencement of activities, at the early stages of a development or investment plan, and not only when the need arises to obtain approval from the community. It should be noted that:
  - time is provided to understand, access, and analyse information on the proposed activity. The amount of time required will depend on the decision-making processes of the rights-holders;
  - information must be provided at the beginning or initiation of an activity, process or phase of implementation, including conceptualisation, design, proposal, information, execution, and following evaluation; and
  - the decision-making timeline established by the rights-holders must be respected, as it reflects the time needed to understand, analyse, and evaluate the activities under consideration in accordance with their own customs.

- **Informed** Information should be:
  - accessible, clear, consistent, accurate, transparent
  - delivered in the local language and in a culturally appropriate formats (radio, traditional/local media, video, graphics, documentaries, photos, oral presentations, or new media)
  - objective, covering both the positive and negative potential of the proposed activities and consequences of giving or withholding consent
  - complete, include preliminary assessments of the possible economic, social, cultural and environmental impacts, and potential risks and benefits

- complete, including the nature, size, pace, duration, reversibility and scope of any proposed project, its purpose and the location of areas that will be affected;
- delivered by culturally appropriate personnel, in culturally appropriate locations, and include capacity building of indigenous or local trainers;
- delivered with sufficient time to be understood and verified;
- accessible to the most remote, rural communities, including youth, women, the elderly and persons with disabilities, who are sometimes neglected; and
- provided in an ongoing way, which enhances local communication and decision-making processes.

- **'Consent'** is the collective decision made by the rights-holders and reached through their own customary decision-making processes, and through their own freely chosen representatives.

  Consent is:
  - a freely given decision that may be a "Yes", a "No", or a "Yes with conditions", including options to reconsider if the proposal changes or new relevant information emerges;
  - a collective decision made by the affected peoples in accordance with their own customs and traditions;
  - an expression of rights (to self-determination, lands, resources and territories, culture); and
  - given or withheld in phases, over specific periods of time, for distinct stages or phases of the project activities: not a one-off process.

Arriving at Current, Free, Prior and Informed Consent is hampered by **limited resourcing.** This is another area where we could use your weight: improving funding to enable First Nations groups engage effectively.

What CFPIC is, and is not…

CFPIC is not;

- defined by the non-indigenous party

- limited to consultation, even when the methods are sound
- measured by majority participation, but participation in accordance with decision-making processes of the affected group

CFPIC does;

- include the right to *withhold* consent
- require good information on proposals
- necessitate early, active and on-going participation by affected indigenous groups (Rumler 2011:5)
- reside primarily with the indigenous communities that will experience the direct impact of the project, but does not prevent other, less affected groups from participating (Rumler 2011:5)

CFPIC should;

- be subject to review by the affected group during the life of the project
- always meet best practice standards of the time
- *not* be avoided in favour of other legislative rights (as is the case I outlined in respect of *Juukan* and more generally in WA)
- *not* be over-ridden by any right of arbitration.

What should a matrix for implementation of CFPIC include?

It is important to clarify that implementation of CFPIC in accordance with the intent of the UNDRIP **is not the end game here: FPIC is the *process*.** The goal of First Nations Australians is to ensure;

- the intent of each agreement for a project or proposal has protection of our rights at its core
- FPIC has been implemented to standards set by the affected indigenous group
- there be compliance and enforcement measures stipulated by affected First Nation group/s, with education on compliance resourced by the proponent (*Dhawura Ngilan* 2020: 30)
- timeframes for realisation of outcomes are set as part of CFPIC
- the integrity of our cultural capital is maintained and governed by First Nations groups, and

- that its application does not prevent First Nations groups from drawing benefit from their customary capital where they wish to.

ESG: mind how we measure it

Caution must be applied to use of ESG measurement formulae where aggregate or averaged ESG measures rate a company's RI credentials. ESG grades must not be achieved by off-setting one lot of material issues against others. That is to say, First Nations Australians do not wish to see poor outcomes on cultural heritage management be off-set by increased outcomes in, say, carbon reduction: *this is a clear and present concern.*

The *UNGPBHR* is a reminder to companies, too, that while they may 'undertake other activities that support and promote human rights…. this does not offset a failure to respect human rights throughout their operations' (Commentary, Principle 11).

Mind the wording. Oxfam's review of Australian ASX listed mining companies in 2013 showed that; while 6 of the 53 companies state a commitment to 'the principle of free, prior and informed *consultation'*, only one of the 53 states a commitment to FPIC (Hill 2013: 11).

I have made a slide for your PP with these quotes from websites …

Mining company websites continue to state their commitment to;

'meaningful consultation' (FMG), and that they are 'actively engaging' (Rio Tinto) with First Nations groups. These are cleverly crafted. Other claims, such as; '… Our operations are required to establish culturally appropriate platforms for dialogue that enable us to work with our stakeholders to develop strategies that consider their concerns and aspirations' (BHP) are, perhaps, a little less so! Whatever they say, search any commitment to UNDRIP on the same websites and the results are very different.

In the mineral extraction industry **social measures are often met through employment targets, procurement from First Nations businesses and investment in local community programs**. These programs are admirable ventures, but investor diligence must assess whether these benefits are being drawn from capital created in accordance with soundly applied FPIC principles.

Currently, the miners all meet ESG requirements! This means the ESG measurements are wrong.

So, Social standards **material** to the mining sector in Australia are; company processes that demonstrate appropriate and fair collaboration with First Nations groups (in accordance with CFPIC principles), and conduct of works which do not diminish First Nations rights.

For these processes to be achieved;

- All relevant information must be shared in a timely and transparent way between the company Executive and First Nations group (ensuring interpreters were used as required), with information flow to company Board
- co-design must be shown, by the First Nations group, to have occurred
- decision-making processes of affected First Nations groups to be incorporated into company planning procedures for projects affecting First Nations groups
- measures of satisfactory processes must be set by First Nations Groups.

You are now aware that; what determines CFPIC among communities and land holding groups may differ as decision-making processes differ, some groups will have effective processes through either their Prescribed Body Corporate (PBC), NTRB or land council. Others may prefer to make decisions outside of these forums. Decisions about specific sites usually necessities another, more particular, set of processes be employed.

The enormous weight of mining applications on Eastern Guruma in the Pilbara has led them to compile their own 'scorecard' for ranking big miners (Wintawari Guruma Aboriginal Corporation; Ker 10/03/21 p.1). Other groups will fast be following. **Investors need to ensure they are determining *material Social measures* under the advice of affected First Nations groups.**

Impact Investing: its potential to help build Customary Capital

The above said, First Nations Australians do wish to use our customary capital to better position their interests, and we wish to gain income from our social capital. In some situations, First Nations groups have access to such resources and require the capital to assist them to attain economic power. This brings me to what I see as the second effective means of responsible investment: **impact investment**.

And, if we consider the best interests of our 30-year-old with super to invest for a further 40 years at this time of great change, it might be hard to envision what sort of place Australia might be and what sort of resources might be most of value. Food, clean water, reduced bushfires and floods, renewable energy plants. Surely these are favourable investments.

In the mineral extraction sector, **co-designing** projects to protect places of high cultural and environmental importance that benefit tourism, education and indigenous businesses are well worth investing it in.

What a visionary leap it would be for the investment community to realise the value in **truly sustainable capital: that of supporting First Nations to continue the good work of managing customary capital for the long term.** I see many areas where First Nations aims align with non-indigenous interests, and the many similar management strategies we have to improve the capital.

Protecting and restoring areas for the production of sustainable, native foods and other crops (including bush tuckers, sandalwood).

In parks, State forests and in agricultural zones we must be engaged to teach and implement environmental and resource risk management programs. Our strategies took millennia to hone, but our stock and flow management systems became history's most successful. Traditional Owners at Kakadu are warning that the Park is degraded by feral species and insufficient maintenance. Believe them: they know how to maintain the capital.

- Burning country to enhance healthy regrowth and increase native species numbers
- Increasing the health waterways by excluding domesticated livestock and feral species
- Pest management
- Endangered species populations protection
- Sustainable resource use, including sustainable fishing practices
- What about investment in intellectual capital…?
- … or choosing to invest directly in First Nations projects and capital (such as First Australians Capital https://firstaustralianscapital.org/investors/) ….

The risks are high

The legally-sanctioned and purposeful destruction of *Juukan* Gorge (Joint Standing Committee on Northern Australia .....) has shown just how unregulated access to First Nations' social capital by miners can affect investment capital. Demand kept ore stocks high, but Rio Tinto is yet to commence costly redress measures and rebuild a working relationship with community groups. The long-term damage to its reputation is as yet unknown, and, while government stands idly by, investors will pay the costs (Hesta 2020).

The 2019 High Court decision on compensation of the *Ngaliwurru* and *Nungali* Peoples of Timber Creek (ref…) set precedent for how First Nations Australians may be compensated for the loss of the economic value of their native title rights (Abraham & Isdale, 20/03/19). Here the High Court also recognised cultural and spiritual loss as compensable aspects of the rights of native title. It raises the bar on risk, and necessitates all native title agreements be formed using best practice methods.

These cases show that movement is afoot. Compensation costs are only beginning to be determined, but we know they will feature more prominently when things go wrong. However, my intention is not to dwell on remedy. **My interest is in reducing risk by getting the process right.**

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