TSA Driving sustainable outcomes for end-of-life tyres

TyreStewardship AUSTRALIA

Engaging with Aboriginal and Torres Strait Islander Peoples in OTR Rubber Product Recovery

June 2023

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Engaging with Aboriginal and Torres Strait Islander Peoples in OTR Rubber Product Recovery

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Meaning of IPLC in Australia

We use the term Indigenous Peoples and local communities (or the shorthand, IPLC) as a very general term in a deliberate attempt to refer to the peoples around the world who either self identify as indigenous and/or who are members of local communities that maintain intergenerational connection to place and nature through livelihood, cultural identity and worldviews, institutions and ecological knowledge. By using the terms together we do not intend to conflate the two, nor do we suggest that there is commonality of experience, recognition, identity, or rights in a given context. We also recognise that there are polemical issues with use of the grouping terms but that it is the best of available options to cover a diversity of identities globally.[A1]

In the Australian context, we have used the term Aboriginal and Torres Strait Islander peoples. We recognise that these terms of grouping are umbrella terms, within which sit a large array of different nations, each with their own culture, language, beliefs and practices, and we acknowledge that there is great diversity within these two broad terms. [A2]

A1: See: Á Lanzares Fernández-Llamazares et al (2021). Scientists' Warning to Humanity on Threats to Indigenous and Local Knowledge Systems. Journal of Ethnobiology, 41(2), 144–169. https://doi.org/10.2993/0278-0771-41.2.144

A2: For further discussion on these terms and the respectful use of them, see Australian Institute of Aboriginal and Torres Strait Islander Studies, https://aiatsis.gov.au/explore/australias-first-peoples

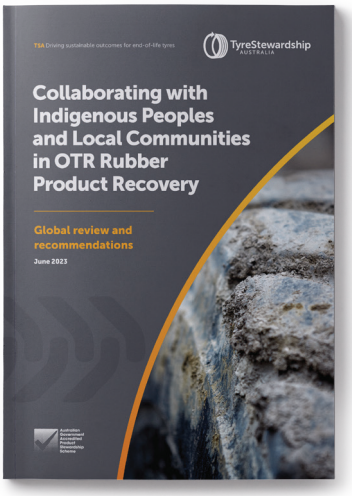
Executive Summary

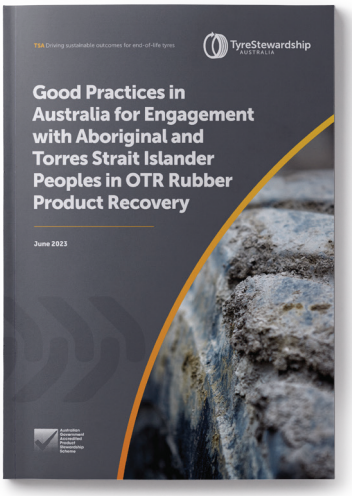
Tyre Stewardship Australia (TSA) seeks to support principled and appropriate engagement with Aboriginal and Torres Strait Islander peoples on OTR rubber product recovery in regional, rural, and remote Australia.

The recovery of off-the-road tyres, conveyors, and rubber tracks (OTR rubber products) provides significant opportunities for regional, rural, and remote communities to reduce environmental risks for future generations and create new markets, commercial enterprises, and jobs.

Currently, the recovery rate for OTR rubber products is only 10%, with over 90% disposed of onsite, stockpiled, or landfilled, which is a waste of valuable resources for Australia. 80% of Australia's waste OTR rubber products are generated by the mining sector and 10% by the agriculture sector. This waste is often co-located in areas of significance to Aboriginal and Torres Strait Islander peoples across Australia.

To be effective, any OTR resource recovery operation requires collaboration between the mining and agriculture businesses that use OTR rubber products and the IAboriginal and Torres Strait Islander peoples on or near whose lands these rubber products are often disposed of. Solutions must recognise and account for historic, existing, and future issues, perceptions, and points of sensitivity for those communities. The challenge is where to start, because there is no single solution or template for every situation in every community.





To create a practical starting point, in 2022, TSA commissioned Resource Equity (RE) and RMIT University (RMIT) to research and report on best practice principles for engagement with Indigenous People and Local Communities in the context of OTR rubber product recovery. This is intended to assist Australian stakeholders, including government, businesses, and research institutions, to appropriately engage with Aboriginal and Torres Strait Islander peoples on OTR rubber product recovery activities.

This research is part of the TSA National OTR Project, funded by the Australian Government's National Product Stewardship Investment Fund and TSA's OTR levy contributors[1].

The research produced two companion reports:

Collaborating with Indigenous Peoples and Local Communities in OTR Rubber Product Recovery – Global Review and Recommendations
– June 2023

Engaging with Aboriginal and Torres Strait Islander Peoples in OTR Rubber Product Recovery
– June 2023

1 Ascenso, Bearcat, Bridgestone, Goodyear Dunlop, Kal Tire, Michelin, Yokohama

The first report answered 10 critical questions to identify best practices in a global context

Critical questions answered:

1. What are the international standards for interactions with Indigenous People and Local Communities that are relevant for OTR waste and recovery?
2. What are the best practices for OTR recyclers that derive from these international standards?
3. How can OTR recovery landscape actors earn and maintain the social licence to operate, and does it matter?
4. What is free, prior, and informed consent (FPIC)?
5. What are global best practices of assessing and mitigating impacts of OTR recovery on Indigenous Communities?
6. What steps should a private sector actor take to ensure OTR waste and recovery agreements with Indigenous Communities are fair and effective?
7. What provisions should be included in an agreement between an Indigenous Community and a private sector actor for OTR waste and recovery?
8. Are there research gaps in the application of standards and good or best practices among sectors?
9. Is there variation in good practices among sectors?
10. What are the final recommendations for making best practices real?

Based on the research, the report outlined best practices that OTR product users should embrace when their work affects IPLCs:

1. Stakeholder mapping, consultation, and engagement throughout the life of the project.
2. Social and environmental impact assessment and impact avoidance or mitigation.
3. Negotiation of and compliance with fair and transparent agreements with affected communities.
4. Obtaining Free, Prior, and Informed Consent (FPIC).
5. Payment of fair compensation and non-monetary benefits.
6. Establishing a project-specific grievance mechanism.
7. Environmentally and socially responsible project close-out.
8. Ongoing monitoring and evaluation.

In this second report, we show how global best practice can be applied in the Australian context, recognising the major sources of OTR rubber product resources in regional, rural and remote areas.

The report provides six reference points for use by OTR rubber product stakeholders, including:

- OTR tyre, track and conveyor belt manufacturers and importers
- OTR rubber product users, including Mining, Agriculture, Manufacturing, Construction and Aviation
- Aboriginal and Torres Strait Islander peoples
- Federal Government
- State and Territory governments
- Local governments
- OTR rubber product collectors and recyclers
- OTR rubber product belt manufacturers and importers

1. Conceptual considerations that have implications for who participates

The term 'public participation' has effectively been supplanted by 'community engagement'. This shift reflects a recognition that any engagement of the public now needs to be thought of as a longer-term strategy that is less about fulfilling regulatory obligations of public participation, and more about ensuring that projects have appropriate community feedback that improves the legitimacy and acceptance of the project throughout its lifecycle. Importantly, it also reflects a move away from a decision-focused outcome to relationships and dialogue between communities and project proponents. However, the literature cautions against homogenising communities and stresses the importance of being sensitive to social and political dynamics that influences who participates. Further, in Aboriginal and Torres Strait Islander communities, it is important to ensure that local Aboriginal and Torres Strait Islander leaders are consulted to co-develop or lead engagement activities.

2. How Aboriginal and Torres Strait Islander peoples engagement is framed in Australia's ESG landscape

Environmental governance in Australia is primarily composed of Commonwealth and state/territorial legislation focused on Aboriginal and Torres Strait Islander Peoples, environmental protection, and mining. The Environment Protection and Biodiversity Conservation territorial enactments focused on these topics. Other governmental programs and strategies also shape or influence stakeholder behavior (such as the Commonwealth's Leading Practice Sustainable Development Program aimed at mining actors).2 International conventions endorsed by the national government (such as the United Nations Declaration on the Rights of Indigenous Peoples also have the potential to shape the landscape if their adoption is operationalised. This is especially important for ensuring the observation and practice of Free, Prior, and Informed Consent for Aboriginal and Torres Strait Islander communities. Finally, some civil society and thematic peak body frameworks (such as the International Association for Public Participation's Spectrum of Public Participation) have been woven into national and state/territorial government approaches.3

3. Emerging practices and concerns

Emerging practices in Aboriginal and Torres Strait Islander engagement in Australia are in line with international trends such as practicing 'social licence to operate'. Research shows that community engagement plays a key role in fostering community well-being and resilience during the implementation and delivery of large infrastructure projects and mitigates social risk which translates to a reduction in potential losses. Like other countries, significant legislative reform is underway to bring Australia in line with global standards and expectations around Aboriginal and Torres Strait Islander engagement. Legally-binding agreements and Impact and Benefits Agreements are also increasingly used as an alternative means of project governance that provides an explicit role for Aboriginal and Torres Strait Islander landowners and communities throughout the project lifecycle. However, there appears to be a concerning practice of 'intentional ignorance' to subvert corporate and public sector obligations to revisit and provide strategies for any identified social impacts, especially on Aboriginal and Torres Strait Islander communities, indicating a lack of transparency in public dealings.

2 See https://www.industry.gov.au/publications/leading-practice-handbooks-sustainable-mining/reference-guide-leading-practice-sustainable-development-mining.

3 See https://iap2.org.au/resources/spectrum/.

4. Insights into the realities at the coalface of Aboriginal and Torres Strait Islander engagement

Interviews were held with representatives from Commonwealth and state/territorial governments, Aboriginal and Torres Strait Islander territorial and local land councils, peak bodies, private sector service providers, and academia. They provided information on Aboriginal and Torres Strait Islander land council organisation, governance, and activities; governmental participation and practices linked to development projects from environmental and social perspectives; providing services to government and Aboriginal and Torres Strait Islander communities about local development projects, and industry group practices used during private sector interactions with Aboriginal and Torres Strait Islanderpeoples during projects and investments.

Three key interlinking themes about Aboriginal and Torres Strait Islander engagement practices in Australia emerged from the interviews:

1. Lack of national or local standards/regulations guiding Aboriginal and Torres Strait Islander engagement.
2. The need to build and develop genuine, trusting relationships for Aboriginal and Torres Strait Islander engagement to be effective.
3. Limiting transparency and scope of engagement due to perceived risks and project delays.

These echo and reinforce the findings from the first report.

5. A comparative analysis between the international best practices and Australian practices

While Australia demonstrates many good practices of Aboriginal and Torres Strait Islander engagement, there is room for improvement. Comparative analysis identified substantive, legislative, or procedural areas where improvements might better position an actor or stakeholder to better engage with Aboriginal and Torres Strait Islander peoples. This analysis is framed in the context of the eight international best practices listed above.

Seven areas were identified for improvement with the first two relevant to all eight practices:

1. **Inconsistent legislative requirements** make it difficult for actors and stakeholders to consistently plan and implement practices.
2. **Incomplete set of practices**, which affects Aboriginal and Torres Strait Islander engagement across the whole lifecycle of projects but particularly project close-out and beyond.
3. **FPIC**, which needs to be explicitly operationalised but the nuanced nature of which also needs to be better understood.
4. **Impact assessment, avoidance, and mitigation** should be seen as stand-alone best practices because of their importance and complexity, along with the risks that come with inadequate assessment and mitigation/avoidance.
5. **Agreements and project close-out**, where agreements should reflect the entirety of the engagement and the project and project close-out, which has often been ignored and mishandled.
6. **Project-specific grievance mechanisms**, which do not appear to be mandated in Australian governance frameworks and should be for each project that includes or affects Aboriginal and Torres Strait Islander peoples.
7. **Ongoing monitoring and evaluation**, which does not appear to be mandated in Australian governance frameworks and should be an obligation for a project proponent to undertake in terms of project performance and environmental and social impact/outcomes.

6. Recommendations for best practice Aboriginal and Torres Strait Islander engagement in Australia

Based on the research, four recommendations around best practice Aboriginal and Torres Strait Islander engagement in Australia were proposed for TSA's consideration.

1. Adopt a best practices approach

TSA should consider adopting or endorsing a best practices approach of its own. Such an approach would be intended for use by TSA's industry affiliates. Key to this is making explicit how TSA defines community engagement and the assumptions underpinning their approach, particularly around how to understand 'community' and worldviews and the tension these may bring to the engagement.
For example, this figure shows these best practices could potentially be mapped to the OTR rubber product recycling value chain in a way that can recognise and adapt to local conditions and considerations *(see **Figure 1**)*.

2. Populate the best practices with specific, subordinate steps and approaches.

This effort could be built around the detailed principles, processes, procedures, and steps that have been developed by others. The key Aboriginal and Torres Strait Islander concept of relationality should be at the forefront of TSA's approach as this would ensure Aboriginal and Torres Strait Islander agencies and relationships are centered in any process.

3. Support OTR product stakeholders in acknowledging and calculating the actual cost of engaging with Aboriginal and Torres Strait Islander peoples.

TSA could support prospective OTR rubber product recyclers in planning for "true costs" of Aboriginal and Torres Strait Islander engagement by providing information on the labour and expense requirements for best practices engagement, and by providing or pointing the way to the costing and budgeting tools that include the detail needed to accurately budget best engagement practices.

4. Continue to collaborate with like-minded leaders.

TSA should seek out and align its activities with other Australian leaders that are attempting to fill the same best practices vacuum. TSA's leadership could help influence the development and refinement of the governance landscape that shapes the mandated practices for Aboriginal and Torres Strait Islander engagement and recycling generally.

Introduction 1

Tyre Stewardship Australia (TSA) has a key objective of generating new, sustainable markets for end-of-life tyres. The 2020 TSA-commissioned report analysing used off-the-road (OTR) tyres[1] identified the mining and agriculture sectors as dominating OTR consumption (75%). However, tyre disposal practices in the mining industry identified that the OTR recovery rate is only 11%, with 81% disposed of onsite at mining, farming, or other sites. Hence, TSA must ensure that any new intended activities do not cause environmental or social harm.

In 2021-22, with research support from Resource Equity, TSA explored international best practices for Indigenous Peoples and Local Communities (IPLC) engagement. In this report, supported by Resource Equity and RMIT University, TSA sought to understand how these global best practices could be contextualised for Australia. This report should therefore be read as an accompanying document to the global study.

Aboriginal and Torres Strait Islander peoples in Australia (whether through groups or local Aboriginal Land Councils) now hold some form of legal tenure over half of Australia's land mass[2]. At the same time, an estimated 60 percent of Australian mines are proximate to these communities. These two facts alone make Aboriginal and Torres Strait Islander peoples a significant stakeholder in TSA's work. Therefore, the focus of the report is on applying the concepts regarding IPLCs in the conext of Australia's Aboriginal and Torres Strait Islander peoples, recognising the complexity of land tenure in Australia and its governance history.

Best practices for IPLC engagement: Overview of global study 1.1

Over 2021-22, with research support from Resource Equity, TSA explored international best practices for Indigenous Peoples and Local Communities (IPLC) engagement. Given gaps in the laws and practice mandates of many countries, TSA and Resource Equity looked to the best practices standards and statements promulgated by:

- International organisations (such as the UN and the Organisation for Economic Co-operation and Development).
- Regional organisations (such as the African Union).
- International donors (such as AusAID, USAID, and UK's FCDO).
- Development finance institutions (DFI) (such as the International Finance Corporation), consistently call for borrowers and grantees to comply with their environmental and social standards.
- Civil society organisations (CSOs) and NGOs (such as the Interlaken Group).
- Industry organisations (such as the International Council on Mining and Metals).

1 https://www.tyrestewardship.org.au/wp-content/uploads/2020/04/TSA0012-Mining-OTR-Analysis-Screen-1.pdf (Accessed 28 January 2023)

2 https://www.niaa.gov.au/indigenous-affairs/land-and-housing#:~:text=Aboriginal%20and%20Torres%20Strait%20Islander%20peoples'%20rights%20and%20interests%20in,cent%20of%20Australia's%20land%20mass (accessed 3 February 2023).

The 'best practices' derived from these sources were not entirely "of a kind," and varied across their intended audiences, normative clout, level of abstraction, purpose, approach, and content. A synthesis of the sources yielded the best practices that recyclers and other project sponsors should embrace when their work affects IPLC:

1. Stakeholder mapping, consultation, and engagement throughout the life of the project.
2. Social and environmental impact assessment and impact avoidance or mitigation.
3. Negotiation of and compliance with fair and transparent agreements with affected communities.
4. Obtaining Free, Prior, and Informed Consent (FPIC).
5. Payment of fair compensation and non-monetary benefits.
6. Establishing a project-specific grievance mechanism.
7. Environmentally and socially responsible project close-out.
8. Ongoing monitoring and evaluation.

Figure 1 shows how these best practices could potentially be mapped to the OTR tyre recycling value chain.

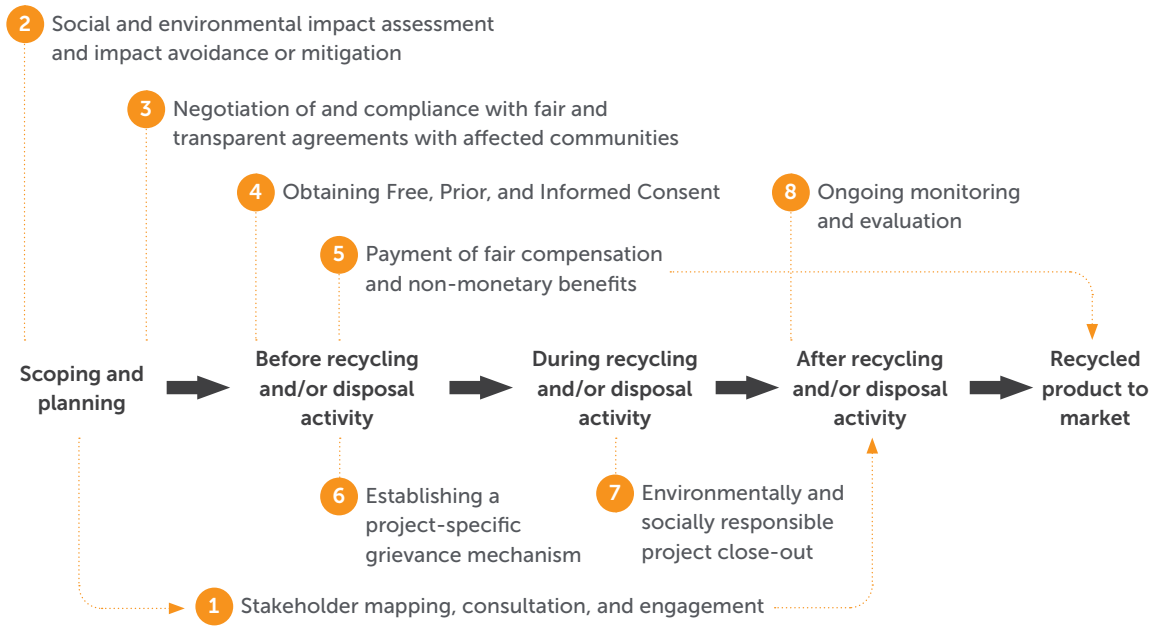


Figure 1. International best practices mapped to the OTR value chain.

Best practices for engagement in Australia? 1.2

Organisations like TSA that operate in or near Aboriginal and Torres Strait Islander communities must have, as a basic starting point, an explicit understanding of the history of settler-colonialism, dispossession, racism, and extractivism that exists in Australia and how this has resulted in an ongoing disadvantage for Aboriginal and Torres Strait Islander communities but also social dynamics between Aboriginal and Torres Strait Islander communities (Lane & Corbett, 2005; Langton & Mazel, 2008; O'Faircheallaigh, 2011). Drawing from academic and grey literature and media articles, this report provides some examples of how engagement and relationships with Aboriginal and Torres Strait Islander communities continue to be fraught and contested – even among Aboriginal and Torres Strait Islander communities themselves. Getting community engagement 'right' with Aboriginal and Torres Strait Islander peoples, as well as other local communities affected by socially and environmentally impactful activities like mining – is difficult.

This report first considers issues around the concept of community engagement which has evolved to better encapsulate the need for ongoing engagement, as well as the two- or multi-way direction of engagement. Importantly, the shift towards the term 'community engagement' also places the focus on relationships rather than decisions. In this report, "engagement" therefore refers to a broad range of activities and processes relating, but not limited to consultation, stakeholder identification, impact assessment, impact mitigation/avoidance, negotiating compensation or Aboriginal and Torres Strait Islander participation in the proposed project, agreement negotiation, agreement enforcement, ongoing grievance mechanisms, on-going monitoring/ reassessment, and project close-out.

To contextualise the international best practice principles for Australian use related to OTR disposal/ recycling, the report first reviews how community engagement is framed in domestic environmental governance frameworks. Relevant emerging practices in Australia around Aboriginal and Torres Strait Islander engagement are then highlighted and discussed. Finally, key informant interviews provided empirical insight into the links between the regulatory and functional landscape of practices used in Australia to engage with IPLC around development projects. It also reinforced many of the findings from the desktop review. The analysis raised three cross-cutting themes around the practice of Aboriginal and Torres Strait Islander peoples engagement: standards/regulations around best practices the need for genuine, trusting relationships; transparency, and scope of engagement.

A comparative analysis between the international best practices and Australian practices is then provided and on this basis, a series of four recommendations are proposed for TSA to consider as input into the design, development, and stewardship of industry best practices to get Aboriginal and Torres Strait Islander engagement 'right'.

Conceptual Considerations: From Public Participation to Community Engagement

2

Since the 1960s, there has been an upward and exponential trend in public participation, especially in large-scale mining and resource development industries. Much of this has been attributed to general trends in democratisation since the late 1980s, but also the normalisation of discourse around sustainable development, human rights – especially IPLC rights, and growing 'soft laws' such as standards and requirements set out by influential organisations like International Financial Organisations (Pring, 2001). However, since the early 2000s, there has been a noticeable shift in the lexicon from 'public participation' to 'community engagement'.

Public participation in environmental decision-making

2.1

There is longstanding recognition that active citizen participation is foundational to the ideal of democracy (e.g., Pateman, 1970), i.e., government by citizens. Public participation as a procedural task in environmental decision-making stemmed from regulatory requirements emerging in the 1960s in the USA, which were then adopted by other countries including Australia. This took on a more normative position as many organisations recognised the value of public participation in gaining community support, legitimising projects, and obtaining feedback about the impact of proposals.

However, since the early 2000s, there has been a shift away from the term 'public participation' towards 'community engagement'. This shift was also coincident with the valuing of public participation in policy-making internationally, which argued for an explicit role for citizens (e.g. OECD 2001). Ross, Baldwin, and Carter (2016) argued that there was a sense that 'public participation' was more "about the right to participate in another party's decisions" (p.124). The shift towards community engagement reflected a maturation of the practice of public participation as recognition grew that public participation needed to be more than just a one-directional transaction for regulatory 'box-ticking'. Community engagement as a concept encapsulated the ongoing nature of public involvement as well as the dialogic nature of the process where 'relationships rather than decisions' (p.125) were the priority. Australia's Murray-Darling Basin Commission's community engagement toolkit itself argued that (Aslin and Brown, 2004: 5):

> ***Engagement goes further than participation and involvement. It involves capturing people's attention and focusing their efforts on the matter at hand–the subject means something personally to someone who is engaged and is sufficiently important to demand their attention. Engagement implies commitment to a process which has decisions and resulting actions. So it is possible that people may be consulted, participate, and even be involved, but not be engaged.***

There is therefore a strong sense of agency embodied in 'engagement'. Hence, the objectives of public participation or community engagement can be thought of as being motivated by three different rationales (Glucker et al., 2013, pp. 107–108):

- a ***normative*** rationale, i.e., to influence decisions, to exercise citizenship and enhance democracy, to facilitate social learning (or deliberative democracy), and to empower
- a ***substantive*** rationale, i.e., harness local knowledge, incorporate experimental and value-based knowledge, testing robustness of information)
- an ***instrumental*** rationale, i.e., generating legitimacy, resolving conflict, and facilitating reflection.

All three rationales are codified in Articles listed under the Aarhus Convention[3], a global compact among UN Member Countries guiding public participation in environmental decision-making. The Convention emphasises access to information, participation in decision-making, and access to justice. Australia is not a signatory to the Convention; however, public participation is mandated, regulated, or invoked (primarily) through Environmental Impact Assessment (EIA) activities. For example, the state of *Victoria's Mineral Resources (Sustainable Development) Act 1990* requires a community engagement plan as part of a mining work plan. This requires the mining company to identify relevant communities and detail how, when, and what engagement will occur with identified communities during all stages of a mining project[4].

The limited concept of public participation is still in use, for example in the International Association for Impact Assessment's (IAIA) definition of public participation (André et al., 2006, p. 1):

> ***"the involvement of individuals and groups that are positively or negatively affected by, or that are interested in, a proposed project, program, plan or policy that is subject to a decision-making process."***

However, the intention of 'community engagement' can be inferred from the IAIA's principles of best practice (Table 1). Nonetheless, the conceptual vagueness of IAIA's definition and approach has been criticised: the extent of involvement of the public – and hence the effect of participation – remains unclear (Glucker et al., 2013).

Table 1. Basic vs. Operating Principles of public participation as defined by IAIA.

Basic Principles	Operating Principles
• **Adapted to the context** – understand, appreciate and respect the social institutions, values, and culture of the communities in the project area. • **Informative and proactive** – recognise that the public has a right to be informed early and meaningfully about projects. • **Adaptive and communicative** – recognise heterogeneity of the public and communicate effectively. • **Inclusive and equitable** – ensure all interests are respected regarding distribution of impacts, compensation and benefits. • **Educative** – contribute to mutual respect and understanding of all IA stakeholders. • **Cooperative** – promote cooperation, convergence and consensus-building rather than confrontation. • **Imputable** – use public inputs to improve the proposal under study, and provide feedback as to how these have contributed to decision-making.	• **Initiated early and sustained** – public should be involved early (before major decisions are made) and regularly. • **Well-planned and focused on negotiable issues** – stakeholders should know the aims, rules, organisation, procedure and expected outcomes of the PP process. • **Supportive to participants** – provision of necessary support to allow participants to access information, events, etc. • **Tiered and optimise**d – occurs at the most appropriate level of decision-making and optimised (time, space) for community involvement. • **Open and transparent** – accessible information in plain language and opportunity to participate in relevant events. • **Context-oriented** – adapted to the social organisation (cultural, social, economic and political dimensions) of impacted communities. • **Credible and rigorous** – adhere to established ethics, professional behaviour and moral obligations.

(Source: André et al., 2006, p. 2-3).

3 The UN Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was adopted on 25 June 1998 in Aarhus, Denmark, and entered into force on 30 October 2001 (https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27. accessed 6 February 2023).

4 https://www.legislation.vic.gov.au/in-force/acts/mineral-resources-sustainable-development-act-1990/126 (accessed 8 February 2023).

Another global peak body for public participation, the International Association for Public Participation (IAP2), uses public participation and community engagement interchangeably. They define public participation as:

> ***any process that involves the public in problem-solving or decision-making and that uses public input to make better decisions***

This synonymity is also evident in how the IAP2 frames its 'Spectrum of Public Participation' which aims to "assist with the selection of the level of participation that defines the public's role in any community engagement program"[5]. The Spectrum is defined as a continuum of processes of weak to stronger forms of participation: informing, consulting, involving, collaborating, and empowering citizens (Head, 2007) and has been adopted internationally and within Australia. For example, in Australia, it is the central framework underpinning the South Australian Environment Protection Authority's (EPA) "Guideline for Community Engagement"[6]. Therefore, for this document, the more nuanced 'community engagement' concept that focuses attention on community agency and relationships is preferred.

Who is engaged? 2.2

The literature around EIA and social impact assessment (SIA) recognises that a key issue in community engagement is fundamentally around *who* participates. Terms like 'citizens', 'the public', 'the community', and 'stakeholders' are often used either interchangeably (Glucker et al., 2013) or treated as singular publics (Brandsen et al., 2017). Terms like 'the public' or 'community' can be used to reference the inclusion of "ordinary people" versus other interested stakeholders like professionals and non-government organisations (Martin, 2008).

Such distinctions can lead to issues in designing community engagement processes. It can lead to trade-offs between intentions of being inclusive (i.e., involving 'the public') and exclusionary practices that result in a select group of participants to operationalise community engagement; even worse are attempts at "orchestrated" participation where selected voices deemed to be more 'appropriate' to the scope of community engagement subverts the integrity of participation (Cornwall, 2008). The conceptualisation of 'community' has also been criticised for its assumption of shared identity and inclusiveness rather than reflecting a reality where social and economic differences more than likely exist within groups of people (Head, 2007). Also, women may not automatically be considered community "members," while at the same time, membership can be a prerequisite for participating in community governance, engagement, and benefits (World Bank, 2021). We acknowledge here that even the term 'IPLCs' as used in this document is problematic.

Studies have also shown that increased willingness to engage in community engagement processes regarding environmental decision-making is likely motivated by high interest in the topic or higher risk perception (i.e., the expectation of more direct impacts), but can also be attributed to prevailing negative attitudes (Hoti et al., 2021). There also tends to be an assumption in global standards and the literature that the participation of the public is positive. While the function of community engagement is a positive thing, the process of putting it in place often requires sensitivity to the politics and social dynamics that can impact who is included or excluded (Glimmerveen et al., 2022).

In Australia, engaging with Aboriginal and Torres Strait Islander peoples requires that organisations work to understand how dispossession, racism, and extractive capitalism have resulted in ongoing disadvantages, especially for Indigenous communities (Lane & Corbett, 2005; Langton & Mazel, 2008; O'Faircheallaigh, 2011). There are myriad examples in the literature on how engagement and relationships with Indigenous communities continue to be fraught and contested – even among Indigenous communities themselves – with historical dispossession opening questions of appropriate and legitimate representation.

5 https://www.iap2.org/page/pillars (accessed 23 January 2023)
6 https://www.epa.sa.gov.au/files/13483_guide_industry_engagement.pdf (accessed 15 January 2023).

For example, Norman's (2016) research on resource extraction in Gomeroi Country in NSW provides insight into the importance of understanding the social, political, and cultural histories related to IP communities in impacted areas in large-scale resource projects. Areas like NSW with a complicated history of displacement and dispossession and racialised capital accumulation (e.g., via farming) introduce layers of political and social issues around Indigenous engagement. This can include contested representation of Indigenous perspectives, which the author observed in her research with the Gomeroi. Therefore, reflecting the focus on relationships in the concept of community engagement, best practices need to be able to stratify and make distinctions between different interests and authorities in any impacted community.

Whose worldview and whose knowledge? 2.3

In thinking about how to practice 'good' community engagement, a salient issue that tends not to get as much attention is what differing knowledge paradigms are at work and how this matters for Aboriginal and Torres Strait Islander engagement.

The tensions between Indigenous knowledge and Western knowledge in environmental management are well-recognised including the tendency for non-Indigenous practitioners to 'dismiss understandings that do not fit their own' (Berkes, 1999, p. 12). An important area that this might play out is in social impact assessment (SIA) activities, where the effectiveness of such activities rests on how social impact is understood. In his analysis of what 'effective' SIA is in large-scale resource extraction in Australia, O'Faircheallaigh (2009) found that Indigenous communities face substantial challenges in engaging in impact assessment activities, including (p.99):

- The failure of governments and proponents to legitimately consider Indigenous ecological, cultural, and social knowledge, or to consider indigenous challenges to dominant epistemologies.
- The culturally alien character of SIA processes, including their adversarial nature, their insistence on the use of written rather than oral submissions, and their failure to recognise the need to facilitate communication with Indigenous participants (e.g., by providing interpreters).
- Lack of financial resources to attend regulatory hearings and gain access to the technical expertise needed to challenge proponents and regulators.
- The short periods allowed for submission to IA inquiries, which exacerbated the impact of resource constraints and were often inconsistent with the need for consultation with Aboriginal communities.

An example of the devastating consequences of not being mindful and respectful of different knowledge systems can also be seen in Lawrence and O'Faircheallaigh's (2022) study on the Ranger uranium mine in the Northern Territory (NT). Towards the end of the mine's lifecycle, the NT government's Supervising Scientist Body made a finding that the mine had not negatively impacted the environment – accurate insofar as related to Western concepts of the environment pertaining to biophysical aspects. This, however, stood in contrast to evidence found by NGOs of almost 1000 environmental breaches at the mine (Lawrence, 2021).

When engaging with Indigenous communities, these processes and in particular, impact assessment activities, need to be actively led and/or controlled by Indigenous leaders to be considered 'effective'. Examples of how this can work include community-based SIAs that are undertaken by Indigenous groups themselves or independent conduct of SIAs that can then be used as the basis for negotiating legal agreements with governments and corporations (see O'Faircheallaigh (2009) for more details).

Aboriginal and Torres Strait Islander Engagement in Environmental Governance

3

The Australian Constitution does not explicitly provide the Commonwealth Government with the power to make laws about the environment; this falls to states and territories. However, the Commonwealth can indirectly legislate for environmental governance by drawing on other constitutional powers (e.g., international obligations) (Power, 2019).

Community engagement in regulatory and policy frameworks

3.1

The Environment Protection (Impact of Proposals) Act 1974 (EPIP Act) was the first explicit attempt by the Commonwealth to regulate and govern environmental protection in Australia – with equivalent laws in states and territories. However, a lack of uniform standards was identified as an issue in coherent environmental governance, especially when environmental issues have cross-border governance implications, e.g., the Murray-Darling River system which spans four states. The EPIP Act was repealed and replaced by the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)[7]. The EPBC Act is now Australia's key Commonwealth environmental legislation and governs the protection of nine 'matters of national environmental significance'. These relate:

- **World Heritage sites**
- **Places with national heritage**
- **wetlands of international importance**
- **listed threatened species and ecological communities**
- **listed migratory species**
- **nuclear actions**
- **Commonwealth marine areas**
- **the Great Barrier Reef Marine Park**
- **water resources in relation to coal seam gas development and large coal mining.**

The EPBC Act also applies to actions that may have environmental impacts on Commonwealth land, and to actions taken by the Australian Government or Australian Government agencies which are likely to have a significant impact on the environment in Australia. Specifically, it recognises that Indigenous communities are important stakeholders in any environmentally impactful activities. To facilitate Indigenous engagement, the (then) federal Department of the Environment[8] published two key resources to support IP engagement[9], to be read in the following order:

i. **Ask First:** A Guide to Respecting Indigenous Heritage Places and Values.
ii. **Engage Early:** Indigenous Engagement Guidelines.

The EPBC Act was reviewed in 2020 by the Indigenous Advisory Committee (IAC)[10], a statutory body under the Act providing independent advice to the Minister. The IAC Review was convened in recognition that the EPBC Act does not adequately protect culturally important values of Aboriginal and Torres Strait Islander peoples; they are not adequately engaged nor is their advice being transparently considered throughout decision processes under the EPBC Act. Consistent with other legal reviews from 2020 onwards, the IAC

7 https://www.legislation.gov.au/Series/C2004A00485 (accessed 9 February 2023).
8 Now called the Department of Climate Change, Energy, the Environment and Water.
9 The 'Ask First' guide should be read first (https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/ask_first.pdf), followed by the 'Engage Early' guide (https://www.dcceew.gov.au/sites/default/files/documents/engage-early-indigenous-engagement-guidelines.pdf, both accessed 9 February 2023).
10 https://epbcactreview.environment.gov.au/sites/default/files/2020-05/BHLF-QJCP-UG3C-Z- Indigenous Advisory Committee.pdf (accessed 9 February 2023).

recommended that the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Universal Declaration on Human Rights be incorporated and implemented in the revised EPBC Act and that FPIC principles should be made explicit as a requirement of the Act.

Another regulatory area that has tended to reference community engagement activities is mining legislation, the responsibility for which is vested in state and territory governments. Due to the impact of mining on Aboriginal and Torres Strait Islander peoples, all levels of government in Australia are now producing resources to facilitate community engagement practices, for example:

- The federal Department of Industry, Science and Resources developed the Leading Practice Sustainable Development Program (LPSDP) for the Mining Industry which is intended to promote sustainable mining practices. A series of handbooks were developed to support various stakeholders including the 'Community Engagement and Development' handbook[11].
- The Department of Mines, Industry Regulation and Safety in Western Australia has developed a 'Stakeholder Identification Tool' to "provide a transparent, consistent ad repeatable methodology for stakeholder consultation"[12].

Other wide-ranging policy initiatives to elevate community engagement are also evident: the Northern Territory Government has developed a **Remote Engagement and Coordination Strategy**[13], which is accompanied by an online resource, the **'Remote Engagement and Coordination Online Toolkit'**[14]. In the context of mining and other large-scale resource extraction activities, the complexities of environmental governance arising from the federated nature of government in

Australia has resulted in legal experts arguing that Australia's existing legislation and governance preference support industry-sponsored mining projects (Bates, 2019). This has resulted in excluding the types of community engagement processes that lend transparency and integrity to these approval processes to ensure that are both environmentally and socially sustainable (Preston, 2014).

Free, Prior, and Informed Consent in policy 3.2

The concept of Free, Prior, and Informed Consent (FPIC) was covered in the first report to TSA, "Global OTR Study", by Resource Equity (section 4). To recap, the United Nations Declaration on the Rights of Indigenous People (UNDRIP)[15] is the authoritative international standard informing the way governments across the globe should engage with and protect the rights of Indigenous peoples. However, it is not legally binding under international law and has no formal accountability mechanisms, i.e., there are no binding obligations on companies to uphold human rights. UNDRIP represents a normative instrument that seeks to establish best practice principles.

In 2009 the Australian Government formally endorsed the UNDRIP but has not yet taken steps to implement it into law, policy, and practice. The principles outlined in the UNDRIP have been implemented piecemeal at state and territory levels, resulting in a confusing patchwork of jurisdictional approaches related to the human rights of Aboriginal and Torres Strait Islander peoples and FPIC directly relevant to any projects affecting their lands or territories.

11 https://www.industry.gov.au/sites/default/files/2019-04/lpsdp-community-engagement-and-development-handbook-english.pdf (accessed 9 February 2023).
12 https://www.dmp.wa.gov.au/Stakeholder-and-Community-16278.aspx (accessed 9 February 2023).
13 https://bushready.nt.gov.au/__data/assets/pdf_file/0007/282292/remote-engagement-and-coordination-strategy.pdf (accessed 9 February 2023).
14 https://bushready.nt.gov.au/ (accessed 9 February 2023).
15 https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (accessed 6 February 2023).

There are significant gaps between Australian domestic law at all levels of government and international FPIC standards. Considering the recent outcry on the destruction of culturally significant sites for Aboriginal and Torres Strait Islander peoples (**Case Study 1**), there is growing recognition[16] of the urgent need for legislative reform of how Indigenous communities grant consent about major resource projects such as mining.

Case Study 1. Juukan Gorge and Rio Tinto: Key lessons on FPIC.

Juukan Gorge and Rio Tinto: Key Lessons on FPIC

The destruction of highly significant Aboriginal cultural heritage at Juukan Gorge by the mining corporation, Rio Tinto, in May 2020 was directly linked to Rio Tinto's lack of appropriate engagement with Indigenous communities and resulted in significant financial and reputational consequences for the company. The case drew global attention to the imperative for mining companies to adhere to the principles and practice of Free, Prior, and Informed Consent (FPIC) regardless of domestic legislative provisions.

Juukan Gorge highlighted significant gaps in the operation of mining and extractive industries in Australia between (good) practice community engagement and what is technically prescribed under the law. Rio Tinto's actions were technically legal but were found to be ethically reprehensible and failed to adhere to FPIC principles. This resulted in public condemnation and loss of social licence to operate.

In 2020, a Parliamentary Joint Standing Committee on Northern Australia examined the circumstances of the Juukan Gorge incident, resulting in requirements of Rio Tinto for restitution, site remediation, and rehabilitation, amongst others. Since 2020 there has been increased pressure on state, territory, and federal governments to implement the UNDRIP and FPIC into Australian legislation, including statements from the Australian Human Rights Commission and the Law Council of Australia. Lessons learned for mining companies include embedding FPIC into the entire project cycle, addressing power imbalances, corporate structures, and culture to enable these.

(Source: Nagar, 2021).

Formal legal adoption of the UNDRIP at a national level, which enshrines FPIC, together with a National Action Plan for implementation, is considered fundamental to the protection of Indigenous rights in Australia. Multiple Treaty negotiations are currently underway in all states and territories in Australia, but until national legislation is adopted, these processes are vulnerable to being overridden by the Federal Government. Presently, engagement and consultation with Indigenous communities are required when projects may affect Indigenous land, resources, or cultural heritage, and this requirement falls broadly under Australia's Native Title Act 1993 (NTA) legislation, environmental and cultural heritage policies, and the processes and practices associated with these.

3.2.1. Native Title Act

The federal *Native Title Act 1993* (NTA) provides limited recognition of Indigenous rights to lands, territories, and resources and recognition of traditional laws and customs. Native title exists in recognition of pre-existing Indigenous rights and interests according to traditional laws and customs and is not the same as land rights. Land rights are freehold or perpetual leases granted to Indigenous Australians by federal, state, or territory governments and may or may not exist in conjunction with native title possession.

16 For example, see the Australian government's response to the destruction of Juukan Gorge (https://www.dcceew.gov.au/about/reporting/obligations/government-responses/destruction-of-juukan-gorge, accessed 8 February 2023).

Land and seas governed by the NTA provide recognised Traditional Owners with the right to negotiate within set timeframes but no veto right, making FPIC improbable. Historically, this has led to cases where state and federal Native Title Tribunals have overruled the concerns of Traditional Owners who do not wish to give consent for mining or other activities (**Case Study 2**). This has been argued to effectively undermine Indigenous self-determination about economic and political sovereignty[17].

Case Study 2. No veto on "an emotive and divisive issue" under EPA NSW.

Lack of veto rights: Whitehaven Coal (Maules Creek) mine and tyre disposal activities

In NSW, the Red Chief Local Aboriginal Land Council (LALC) felt compelled to approve an application by Whitehaven Coal (WHC) to dump 400 off-the-road tyres per year onsite arguing a lack of 'feasible or viable' recycling options.

WHC had to seek consent from the LALC who stated they were "not in a position to veto or prevent the modification" and therefore felt forced to approve the tyre burial despite it being "an emotive and divisive issue." Under current NSW Department of Planning, Industry and Environment (DPIE) and NSW EPA regulations, burying tyres is currently an acceptable practice "until a viable alternative can be sought", but additional licencing conditions are being considered including WHC reporting on attempts to find tyre recycling alternatives.

(Source: Oataway, 2021).

Native title rights and interests vary among Indigenous communities in Australia. In addition to the NTA, there are around 13 statutory schemes in all states and territories (except Western Australia) that provide inalienable freehold (statutory schemes) and/or non-exclusive rights (typically NTA) over land.

These legislations have tended to precede the NTA. The limits of native title are evident in the fact that States and Territories can extinguish native title (as in the case of the Queensland government's approval of the Bravus/Adani Coal Mine development, **Case Study 3**) and appeals by the Commonwealth government to Federal Court decisions regarding compensation around extinguishment (e.g., the Timber Creek compensation case[18]). These cases highlight the imbalance of power in negotiations under the NTA that favour large and powerful corporations.

Case Study 3.
Extinguishing native title rights in support of mine development in Queensland.

Bravus (Adani) Carmichael coal mine and extinguishment of native title rights

The Queensland government extinguished native title in the Adani/Bravus Coal mine dispute. This complex case highlights issues of agency and the contestation around who is authorised to speak on behalf of the Wangan and Jagalingou People through several attempts made by Bravus to obtain an ILUA (Indigenous Land Use Agreement).

In 2017 the federal government intervened in the Federal Court case against an application by a group of Wangan and Jagalingou Traditional Owners for summary dismissal of a contested ILUA and passed amendments to the Native Title Act 1993 (Commonwealth) which allowed Bravus' ILUA to remain legally valid despite the Federal Court's decision that ILUA was not valid.

(Source: Emmanouil & Unger, 2021).

17 Public comments made by Indigenous academic, Prof. Gary Foley (https://nit.com.au/06-02-2023/4892/veteran-indigenous-rights-activist, accessed 8 February 2023). See also earlier publication by Gary Foley, "Native Title is not Land Rights" (1997) available at http://www.kooriweb.org/foley/essays/pdf_essays/native%20title%20is%20not%20land%20rights.pdf (accessed 8 February 2023).

18 https://aiatsis.gov.au/explore/timber-creek-compensation-case (accessed 9 February 2023).

Indigenous land use agreements 3.2.2

Indigenous Land Use Agreements (ILUA) are a legal instrument under the NTA. It is a voluntary agreement between native title parties and other people or bodies about the use and management of areas of land and/or waters. An ILUA can be about any native title matter agreed by the parties, including settlement or exercise of native title rights and interests, surrender of native title to governments, land management, future development, mining, cultural heritage, the coexistence of native title rights with other rights, access to an area, and compensation for loss or impairment of native title. ILUAs are not normally used for large-scale mining, but in the case of the Queensland government and Bravus/Adani Carmichael coal mine where FPIC was contested, an ILUA was used to force agreement from certain members of the Traditional Owner group to extinguish native title and grant Bravus/Adani access to Indigenous lands. This is despite the federal government's guide, 'Working with Indigenous Communities' handbook for the mining industry, stating that ILUAs are "not normally used for large-scale mining unless access to additional land to undertake activities associated with mining is required." (Australian Government, 2016, p. 45).

State and territory Environmental Protection Agencies 3.2.3

State and territory Environmental Protection Agencies (EPAs) are state- and territory-based independent environmental regulators operating under their respective jurisdiction's EPA Acts, although each EPA varies greatly in function, powers, structure, and effectiveness (Queensland is currently the only state that does not have an EPA). All the EPA Acts recognise the importance of Indigenous engagement in environmental impact processes with their stakeholder engagement policies and guidelines tending to adopt the International Association for Public Participation (IAP2) core values as the international standard for community engagement, rather than FPIC.

For example, EPA NT has policy and guidance documents outlining their approach to and advice on stakeholder engagement based on the IAP2 (2019) but mention FPIC in relation to engaging Aboriginal communities in environmental impact assessment processes (NT Environment Protection Authority, 2021). EPA NSW's 2021 Charter of Engagement19 and Regulatory Strategy20 commits to actively listening to the First Nations Peoples of NSW according to principles of good engagement but does not specifically invoke FPIC. EPA VIC looks to the IAP2 for standards of community engagement in their Charter of consultation but since 2019, has had a three-year Aboriginal Inclusion Action Plan to ensure that Traditional Owners' cultural knowledge and environmental stewardship is recognised within EPA's regulatory work. EPA VIC has also established an Aboriginal Strategy and Partnerships Unit focused on forming partnerships with Traditional Owner groups[21].

In their 2017 report on environmental decision-making, the South Australian branch of the Environmental Defenders Office (EDO) stated that (Environmental Defenders Office (SA), 2017):

> ***"Advancing public participation rights in environmental decision making is a key concern of the EDO. There has been a rapid development of environmental law and policy in this area. However, the EDO is concerned that these processes have not, for the most part, prioritised public participation rights. Good and robust environmental decision-making processes occur where there are broad public participation rights including the right to information, the right to participate and the right to challenge decisions in a court of law." (p.5).***

19 https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/epa/21p3064-charter-of-engagement.pdf (accessed 10 February 2023).
20 https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/about/21p2753-regulatory-strategy-2021-24.pdf?la=en&hash=3B9B2967B102A87AF2D66618E9501A984B1C8597 (accessed 10 February 2023).
21 https://www.epa.vic.gov.au/about-epa/recognition-and-inclusion-of-victorian-aboriginal-people-and-traditional-owners (accessed 10 February 2023).

As an outcome of their assessment, the report argued that best practice PP should (p.5):

- include a provision (the promise) that the public's contribution will influence the decision
- promote sustainable decisions by recognising and communicating the needs and interests of all participants, including decision makers
- seek out and facilitates the involvement of any person
- seek input from participants in designing how they participate
- provide participants with the information they need to participate in a meaningful way
- communicate to participants how their input affected the decision.

More recently, a 2022 report by the national Environmental Defenders Office reviewing EPAs' roles and performance in Australia noted that their primary 'customers' are industries, which are regulated through the licensing of environmental impacts with a focus on pollution (Environmental Defenders Office, 2022). The report found that none of the EPAs' activities were grounded in environmental justice and did not explicitly act in conformity with the UNDRIP and other human rights-based international laws. The priority recommendation of the report is for Australian EPAs to act following First Nations Cultural Protocols, and uphold the UNDRIP – in particular, the principles of FPIC and self-determination. **Case Study 4** provides insights into the complexities of environmental governance and limitations in EPA powers currently. In a major overhaul to Australian environmental laws, the establishment of a Federal EPA was announced in December 2022 to develop a set of national standards for environmental policies, including a national standard on First Nations engagement as a priority[22].

Case Study 4. Mining over native title rights - Glencore McArthur River mine in Northern Territory.

EPA and Glencore's McArthur River mine (Northern Territory)

In the Northern Territory (NT), the case of Glencore's McArthur River open-cut zinc-lead mine highlights the importance of mutually addressing environmental protection and human rights issues, both failing to obtain FPIC from Traditional Owners and causing serious environmental contamination.

EPA NT raised many concerns, from securely storing reactive waste rock in relation to environmental impact assessments, to impacts on sacred and archaeological sites and the inadequacy of the security bond to sufficiently cover the mine's rehabilitation post-closure. However, lack of transparency about the company's mine management plans severely limited scrutiny and EPA NT's licencing conditions mandating approval from valid Traditional Owner groups concerning impacted sites were overruled by the NT Minister for Primary Industry and Resources.

Despite reforms to the Environmental Protection Act 2019 NT, conditions authorised under other Acts (e.g., Mining Management Act 2001 NT) have precedence and do not affect mining operations. Furthermore, the new EPA NT Act fails to incorporate FPIC of Traditional Owners as a relevant consideration in ministerial decisions on environmental approvals despite this having significant impacts on the outcomes for both Indigenous communities and the environment.

(Source: Emmanouil and Unger, 2021).

22 https://www.abc.net.au/news/2022-12-08/australia-environment-laws-federal-epa/101744044 (accessed 10 February 2023).

Legislative reform

3.3

There is a significant amount of legislative reform currently underway in Australia around environmental governance, with an increased onus on companies to take responsibility for community and environmental impacts.

For example, Victoria's Department of Earth Resources is developing a trailing liabilities regime[23] for La Trobe Valley coal mines to ensure Victoria has a fit-for-purpose legislative framework allowing the Victorian Government to respond to the **challenges of rehabilitating former mine sites** as it transitions to more sustainable fuel sources. The new regulations aim to ensure no entity can walk away from its mine rehabilitation obligations. Victoria will be the first Australian state to introduce provisions of this kind, which are being modelled on the scheme introduced for Australia's offshore petroleum sector by the Commonwealth in 2022 (Case Study 5).

This is an indication of the types of obligations and responsibilities businesses will need to factor in, including long-term post-closure plans and activities, ongoing site monitoring, and management of waste, including disposal of OTR tyres. Currently, costs for onsite disposal of OTR tyres are assumed to be zero as part of normal mining site operations, but these recent legislative reforms at Federal and increasingly at State level may change this.

Case Study 5. Commonwealth trailing liabilities regime.

Trailing Liabilities Regime: The Northern Endeavour Floating Production Storage Facility

In 2015 Northern Oil and Gas Australia (NOGA) acquired the Laminaria-Corallina oil fields and the Northern Endeavour Floating Production Storage and Offtake facility in offshore waters regulated by the Commonwealth Government. NOGA's 2015 acquisition was made on the assumption that further petroleum production was possible despite the previous title holder having announced its intention to cease production from Northern Endeavour in the second half of 2016.

NOGA had significant issues in complying satisfactorily with its regulatory safety obligations which lead to actions by NOPSEMA requiring production of gas to cease. NOGA had insufficient financial resources to continue operating and went into voluntary administration in September 2019.

The Commonwealth Government is now managing the decommissioning of the facilities and the associated oilfields. To ensure taxpayers were not left to pay for the decommissioning and remediation, the Commonwealth Government passed legislation to apply a temporary levy on other petroleum producers. The Australian Government introduced a trailing liabilities framework (the Commonwealth Framework) for the offshore petroleum sector in Commonwealth waters, which enabled it to call back a former titleholder and/or related persons to complete rehabilitation or address issues with rehabilitation.

This precedent has influenced the Victorian Government to introduce a Trailing Liabilities Regime for companies to meet the cost of long-term mine site rehabilitation.

(Source: Department of Energy, Environment and Climate Action, 2022[24]).

23 https://www.premier.vic.gov.au/improving-certainty-coal-mine-rehabilitation (accessed 10 February 2023).
24 https://earthresources.vic.gov.au/__data/assets/pdf_file/0009/908055/Trailing-Liabilities-for-Victorias-Declared-Mines-Consultation-Paper.pdf (accessed 10 February 2023).

Emerging Practices and Concerns 4

There are some emerging practices in Aboriginal and Torres Strait Islander engagement in Australia. One academic think tank is undertaking innovative research in an attempt to get at the core of what Aboriginal and Torres Strait Islander think about engagement and how it affects them. However, there are also emerging concerns.

Social licence to operate 4.1

Social licence 4.1.1

There has been a growing trend in the use of the 'social licence to operate' (SLO) concept, especially in large-scale environmental activities like forestry and mining. This reflects the changing dynamics between communities and large corporations, where communities are increasingly strident in their demands for inclusion in decision-making processes, bringing higher expectations of fair and transparent dealings by corporations including benefits and compensation, and ultimately demanding proper regulation of activities (Prno, 2013).

Social licence is important to project proponents, sponsors, and operators because it reflects the trust and confidence a community or society has in a business or sectoral operation to behave in a legitimate, transparent, accountable, and socially acceptable way. It is largely a product of good or best social and environmental practices. Social licence is:

- Built upon or damaged by the way that people view a business or neighbouring operation – it is a product of perception.
- Is not formally granted on the basis of legal or regulatory compliance, although its existence is often linked to compliance and usually reflects perceptions of behaviour in view of standards, practices, or values.

Today, an SLO broadly constitutes an informal social contract between organisations and communities but an organisation's legitimacy of operations can also be a consequence of other legal and political approval processes (Bice et al., 2017).

For practitioners, Robinson et al.'s (2020) study on social licence in mining activities in Western Australia found myriad licence avenues. These avenues were found to be a combination of social, legal and political avenues, for example:

- **Social:** social acceptance research, social impact assessments, social media, protesting and blockading.
- **Legal:** various regulatory schemes including the Mining Act 1978 (WA), Environmental Protection Act 1986 (WA), the Environmental Protection and Biodiversity Conservation Act 1999 (Commonwealth), the Native Title Act 1993 (Commonwealth), the Aboriginal Heritage Act 1972 (WA) and the Mines Safety and Inspection Act 1994 (WA).
- **Political:** state agreements, government policies, state elections.

Similar mechanisms would exist for other jurisdictions; these would be important considerations for ensuring the public's interests are appropriately represented.

New social licence research 4.1.2

The Institute of Infrastructure for Society (I2S) at the Australian National University has been undertaking a major research project into 'next generation' engagement (NextGen), largely in response to projected

infrastructure investment amounting to an estimated $60 billion. The project recognises that the implementation of major infrastructure projects requires management of social risk – necessitating the need for negotiating social licences to operate. The research aims to respond to gaps in evidence that can "better articulate the value of engagement, social risk and social licence" (Melbourne School of Government, 2017, p. 3). The research recognises the role of community engagement in mitigating social risk and gaining social licence – in turn translating to reduction in potential losses. These losses are significant: research by Franks et al. (2014) demonstrated that a major mining project with capital expenditure of between US$3-5 billion lost around US$20 million per week in delayed production arising from community conflict. Similarly, the NextGen project found that from 2007-2017, losses amounting to $20 billion from projects on the Australian east coast alone were in part motivated by a lack of social licence (Melbourne School of Government, 2017). Hence, the NextGen project argues that community engagement is crucial to fostering community well-being and resilience during implementation and delivery of large infrastructure projects (Vella-Brodrick, 2017):

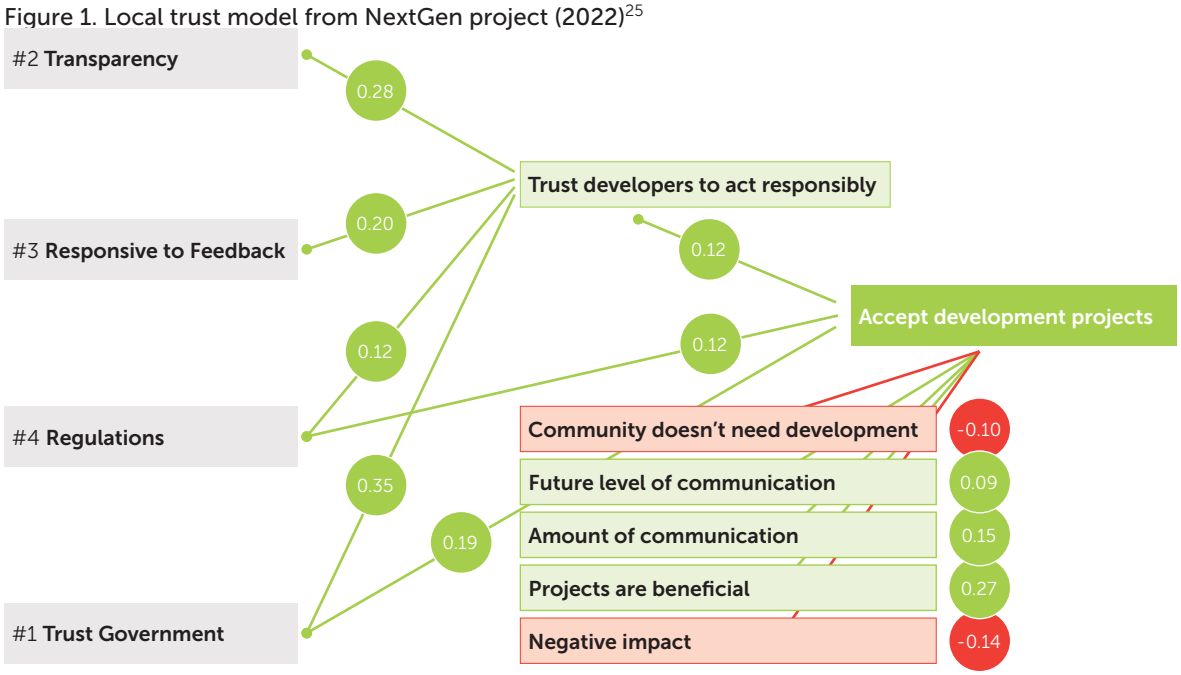
> ***Community engagement, undertaken as an authentic social process associated with infrastructure projects, can prompt opportunities to foster resilience and wellbeing (p.3).***

Arising from their large survey of 9 local communities directly affected by infrastructure development (>1600 impacted community members participated), the NextGen project found that four attributes were key to facilitating trust, and ultimately, acceptance of infrastructure projects:

- regulation
- procedural fairness/responsiveness
- community self-determination and benefits
- positive impacts on local economy.

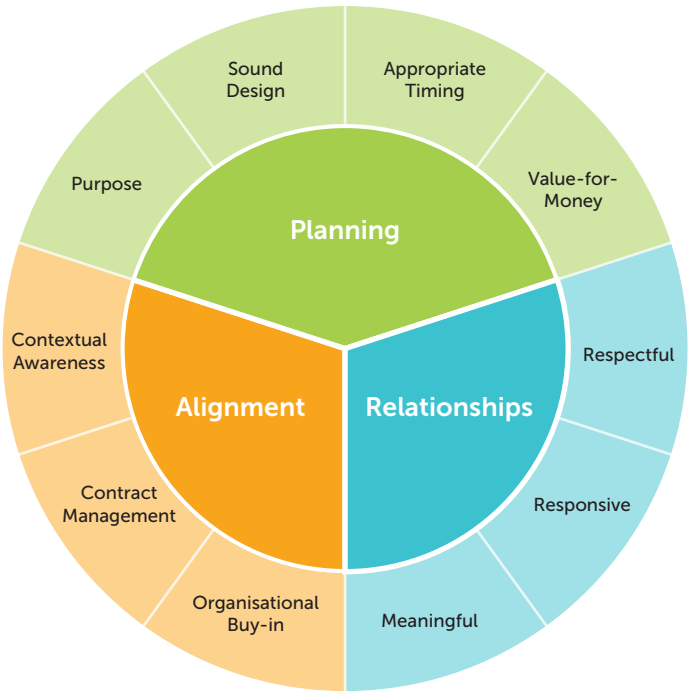
In particular, the survey findings showed that trust in government was correlated to trust in developers, but that ultimately, the presence of effective regulation protecting communities' interests was strongly correlated to acceptance of infrastructure projects (**Figure 1**). Finally, a key finding from the research was the development of a framework to support infrastructure engagement excellence (**Figure 2**) and a set of accompanying standards and indicators to guide practices (Appendix 3).

Figure 1. Local trust model from NextGen project (2022)[25]



25 http://www.nextgenengagement.org/wp-content/uploads/2022/08/Pulse-Surveys-Website-Upload.pdf (accessed 23 February 2023).

Figure 2. NexGen's framework of Infrastructure Engagement Excellence[26]



Enduring engagement? End-of-project considerations 4.2

In terms of end-of-life engagement and outcomes, a study by Lawrence and O'Faircheallaigh (2022) illustrates a significant gap in practice and more worryingly, the practice of intentional ignorance to subvert corporate and public sector obligations to revisit and provide strategies for any identified social impacts, especially on Indigenous communities.

In their study on the closure of the Ranger uranium mine on Mirarr Aboriginal land in Australia's Northern Territory, the authors found that, despite clear evidence that mining has had negative social impacts on the Mirrar people throughout the life of the mine (information which was made available to both corporate and government stakeholders), strategies to revisit or alleviate these impacts were not included in mine closure plans or the government's assessments. They argued that the practice of ignorance was intentionally used to "obscure the social impacts of mining on Indigenous lands, and perpetuate long-standing social and environmental injustices in settler colonies such as Australia".

This reflects a larger issue of structural bias in impact assessment activities that frontload assessment activities – particularly ones focused on social impacts – and leave unattended the impacts of mining (or other resource extraction) projects on Indigenous communities and lands. The study also underscored a lack of transparency in public dealings and the provision of information that was easily accessible. The authors found that what was missing was, "a full, publicly available social impact assessment and social closure plan that deals with the social impact issues" (p.6). These findings had already been detailed in at least three preceding inquiries going as far back as the late 1970s. They further argued that "omitting the extensive social impact data collected during the decades of Ranger's operations constitutes a profound and significant social injustice perpetuated by ERA, and by the Commonwealth Government" (p.6).

26 http://www.nextgenengagement.org/infrastructure-engagement-excellence-framework/ (accessed 23 February 2023).

Potential levers for effective public participation 4.3

Although much of the literature emphasises significant challenges in PP, especially for IP communities, there are also suggestions on various levers that can be adopted to improve effective PP.

Legislative levers appear to be a common consideration. There is already growing recognition that existing legislations need reform to bring Australia in line with global standards and expectations, especially concerning IP and FPIC **(**section 3). However, there is an area of operations where Aboriginal and Torres Strait Islander engagement seems particularly absent: mine closure planning and governance. Therefore, Lawrence and O'Faircheallaigh (2022) argue that a "root-and-branch" legislative reform is required to ensure that affected Indigenous landowners are explicitly and formally included as a stakeholder in legislation governing mine closure and rehabilitation activities.

Apart from legislation, there is also the growing use of **legally-binding agreements** that can be negotiated between IP communities, governments, and corporations to explicitly include Indigenous landowners in broader decision-making processes between corporations and communities (O'Faircheallaigh, 2015). More recently, **impact and benefits agreements (IBAs)** are being used as means of project governance and monitoring as they tend to deal with the entire lifecycle of the project (thus addressing the tendency to overlook end-of-life impact and engagement issues). IBAs are defined as (O'Faircheallaigh, 2020, p. 1339):

> ***"... negotiated agreements which seek to shape the occurrence and distribution of costs and benefits arising from major projects, in this case from extraction of mineral resources, and which embody the support of Indigenous entities (landowners, communities, governments) for the project concerned."***

Importantly, explicit Indigenous consent for projects is a key element of IBAs. However, contemporary thinking around 'consent' is that it is not a simplistic 'yes/no' matter, and should be understood as a "spectrum," representing degrees of consent that may be related to the scope of activity and afforded protections under existing legislation (O'Faircheallaigh, 2020). This, therefore, sets up the capacity of IBAs to act as monitoring mechanisms, i.e., whether the provisions of the agreement are being attended to (which requires regular information from the community) and whether the project is sensitive and responsive to impacts it is having on the community. The author provides examples of the Browse Agreements negotiated for a proposed Liquefied Natural Gas (LNG) 'precinct' at James Price Point in the Kimberley region of northwest Western Australia (Case Study 6).

Case Study 6. The Browse Agreements in the Kimberley region.

Impact and Benefits Agreements: The Browse Agreements

The Browse Agreements were negotiated for a proposed Liquefied Natural Gas (LNG) 'precinct' at James Price Point in the Kimberley region of Western Australia. The agreements were negotiated between the State of Western Australia ('the State'), the Kimberley Land Council (KLC), the Goolarabooloo Jabirr (GJJ) native title claim group that had lodged a claim over the site of the planned precinct, and Woodside, representing the developer. It was expected that other stakeholders may join the Agreements as the project unfolded.

The Agreements cover both local and regional impacts as a result of KLC arguing that such a project would have regional impacts. The Agreements provide for extensive benefits at local and regional levels, including transfers by the State of land, houses and project infrastructure to native title groups; hundreds of millions of dollars in additional funding by the State for new initiatives in Aboriginal education, training, housing, employment creation, business development, and regional infrastructure; and payments by Woodside and any additional proponent linked to the volume of gas processed, paid directly to the GJJ native title group and for the benefit of Aboriginal people in the broader Kimberley region. The Agreements also have provisions related to maximising Aboriginal economic participation in the Precinct and in relation to environmental management and protection of Aboriginal cultural heritage. Explicit bodies were named in the Agreements who would be responsible for internal and external monitoring of benefits and impacts.

The Agreements were signed in 2011 but in 2013, Woodside decided not to proceed with its investment in the Browse Precinct leaving the Agreements not fully implemented.

(Source: O'Faircheallaigh, 2020, p.1340)

Key Informant Interviews 5

A select number of organisations were identified by TSA as prospective key stakeholders for interviews about OTR recycling/disposal activities and/or Aboriginal and Torres Strait Islander outreach and engagement in Australia.

While some of the initial interviewees were available for interviews, others were unavailable or not responsive. To obtain additional key informant information, several additional contacts were identified (often recommended by original stakeholders).

The final list of interviewees included representatives from the following stakeholder groups:

- Industry (5)
- Land Councils (2)
- Academia (3)

Attempts were made to contact government representatives across different jurisdictions but these were ultimately unsuccessful within the timeframe of the project."

During the interviews, the following was discussed:

- Organisation's/industry's experiences with OTR recovery/disposal activities (if any) OR any other environmental activities related to resource use/extraction/management.
- Experiences and activities related to engagement of Aboriginal and Torres Strait Islander peoples.
- Reflections on organisational/industry good practices and areas of improvement.

Interviews were conducted over January and February 2023 and typically lasted one hour. In most cases, notes were written and sent to participants for review and amendment. The following themes and conclusions emerged during the interviews.

"No standards for best practice" 5.1

One of the clear themes that emerged from the interviews was the **lack of national (or sometimes local) comprehensive standards or regulations guiding Aboriginal and Torres Strait Islander engagement practices** for a private actor to embrace when interacting with Aboriginal and Torres Strait Islander concerning a project proposal. An industry informant was emphatic that there were, "No standards for best practice."

Community engagement practices were seen as needing to be responsive to the specific community context (cultural, social, environmental, economic, etc.), which included the need to have an understanding of who the key stakeholders in the particular town or area were, and local Indigenous community leaders. This makes it difficult to codify Aboriginal and Torres Strait Islander engagement practices. This was reiterated by informants in almost every sector with an academic asserting the importance of conducting some form of baseline assessment, which should also identify the community's priorities and needs. However, several informants also flagged the need to be conscious of the 'over-consulted' nature of Indigenous communities. In these instances, there would be a need to consider what might constitute 'effective' engagement and building trust becomes contingent on delivering real action..

A representative from the NSW Aboriginal Land Council (ALC) did point to some NSW regulations, requirements, and guidance that called for certain steps to be undertaken on the part of a local land council (LALC) when a proposal from a private actor would rise to the level of "land dealing."[27] This interviewee stressed that any significant, longer-term development project undertaken or engaged with by

27 See NSWALC's "Land Dealing Fact Sheet" at https://alc.org.au/publications/land-dealings-01-what-is-a-land-dealing/. Also see the land dealing guidance for LALCs at https://alc.org.au/publications/page/2/.

a LALC in cooperation with a private project proponent would likely be deemed a land dealing, and would be subject to NSWALC guidance and approval. The land dealing planning, documentation, review, and approval process (set out in several NSWALC guidance documents) would carry with it the presumption of a project and that a governance design and planning process would be undertaken before and during the land deal. In such a case, approval would be contingent upon NSWALC's review and approval of the land deal. Any complex project undertaken by or in cooperation with a LALC would take years to push through a project design and approval process.

However, the NSWALC guidance for land deals targets LALCs and their required behaviour and practices – not the practices required on the part of the private project proponent. Importantly, the NSW legislation and the NSWALC land dealing guidance does not expressly address life-of-project or post-project requirements or key activities that must be undertaken by LALCs or private project proponents.

The NSWALC's requirement that NSW LALCs develop 5-year Community, Land, and Business Plans (CLBP) is also worthy of mention. A CLBP is required of each NSW LALC and is written prospectively, listing ventures and activities that the LALC wants to pursue. CLBP sophistication varies in conformance with the sophistication of the LALC that prepares it and with the initiatives included within the CLBP. CLBPs are not written for singular, specific projects or cooperative private-Aboriginal and Torres Strait Islander investments, but, rather, address the full portfolio of envisioned LALC activities or projects over the upcoming 5-year period. These CLBPs are to include information on (1) community needs assessment, (2) other related plans and policies (such as state/territorial environmental planning policies, regional environmental plans, local environmental plans, and development control plans), and (3) impact and financial assessments. The NSWALC guidance on the preparation of CLBPs does not provide details on how to gather this needed information. The contents of the guidance suggest that the CLBPs are to address smaller-scale development planning for such things as housing and infrastructure improvements.[28]

"It doesn't work when it's transactional" 5.2

Another clear theme that emerged from the interviews was the perspective on, and need for **developing genuine, trusting relationships**. In addition to being over-consulted, there is also an ongoing legacy of distrust amongst Indigenous communities when dealing with governments and large mining (and other private) organisations. This distrust is not unilateral or one-directional; there are perceived difficulties on both sides.

This establishes the clear need to build strong relationships with Aboriginal and Torres Strait Islander peoples that are accompanied by bilateral bonds of trust. This takes significant time and energy and aligns with the Indigenous emphasis on relationality, which focuses on connections. In practice, this can play out in various ways, e.g., being genuine about wanting feedback; acting on feedback; appointing Traditional Owner Representatives or other cultural liaisons on site as activities are implemented. This was seen as central to responding to the discovery of culturally significant objects/sites (e.g., bones, artifacts, middens) that can stop work until community-based assessments are performed and linked decision-making occurs.

Some large mining companies may have existing agreements with Indigenous communities and LALCs that might ease negotiations and ongoing interactions. Such instances of collaboration are important for sharing knowledge and power. The practice of FPIC was raised here as an example of how, without strong relationships, FPIC can quickly degrade to another 'box-ticking' exercise. This aligns with the NextGen project's research findings that relationship quality is the main driver of community resilience.

28 See the "Preparing a Community, Land and Business Plan Guide for Local Aboriginal Land Councils" at https://alc.org.au/comm-land-business-plans/.

One informant noted that there seemed to be an emerging trend toward engaging Indigenous-owned businesses to undertake Aboriginal and Torres Strait Islander engagement on behalf of companies. While it was remarked that it was good to see IP businesses operate and profit from this space, it could bring cultural risks and conflicts. It was also noted that, while efforts were made to include Indigenous communities, it was also important to realise the landscape of possibilities and help people connect to the right people to advance participation.

The theme around relationships is not just applicable to interactions between organisations (public or private) and Aboriginal and Torres Strait Islander peoples but also within those organisations and communities themselves. Specialist knowledge in Aboriginal and Torres Strait Islander engagement tends to be held within small groups within organisations and these tend to be under-resourced given the landscape of complexity in engagement. The challenge here, as argued by one informant, is to build a longer-term capacity but not dependency on these individuals to enable effective engagement to be consistently practiced.

Transparency and scope of engagement 5.3

Some interviewees mentioned that a significant barrier/challenge to Aboriginal and Torres Strait Islander engagement is transparently relinquishing or sharing control of engagement processes. This is usually borne of fear of veto or of projects being stalled/not going ahead. That is, the risk of project delay or foreclosure prompts project proponents to limit the transparency and scope of engagement.

At the same time, this limiting carries risks: costs can be created when project realities and impacts are not openly shared with impacted Aboriginal and Torres Strait Islander peoples. Similarly, costs can be created when end-of-project impacts and trailing liabilities become known to affected Aboriginal and Torres Strait Islander peoples or government regulators.

Towards Australian Aboriginal and Torres Strait Islander Engagement Best Practices

6

The Australian environmental governance and policy frameworks were reviewed and key informant interviews were conducted to gather the information needed to characterise the regulatory and functional landscape of practices now used in Australia to engage with Aboriginal and Torres Strait Islander peoples around development projects.

The focus was on the OTR tyre and related products market, although large-scale mining and other commercial investments and projects necessarily informed the inquiry. This section analyses how the Australian landscape compares to international best practices for IPLC engagement on development projects. The section concludes with some recommendations for TSA to consider.

Aboriginal and Torres Strait Islander engagement in Australia: comparative analysis

6.1

While Australia shows the application of many good practices for Aboriginal and Torres Strait Islander engagement, as in most countries, there is room for improvement – on the part of the government and private sector project proponents. Factors derived from the Australian context that could be considered by TSA as it seeks to better embody international best practices are summarised below. Substantive, legislative, or procedural areas where improvements might better position an actor or stakeholder to better engage with Aboriginal and Torres Strait Islander peoples in Australia are also described. These are discussed in relation to the 8 international best practices that recyclers and other project sponsors should embrace when their work affects Aboriginal and Torres Strait Islander peoples.

1. Stakeholder mapping, consultation, and engagement throughout the life of the project.
2. Social and environmental impact assessment and impact avoidance or mitigation.
3. Negotiation of and compliance with fair and transparent agreements with affected communities.
4. Obtaining Free, Prior, and Informed Consent (FPIC).
5. Payment of fair compensation and non-monetary benefits.
6. Establishing a project-specific grievance mechanism.
7. Environmentally and socially responsible project close-out.
8. Ongoing monitoring and evaluation.

Inconsistent legislative requirements 6.1.1

Australia's constitution does not enable the Commonwealth government to enact laws that would nationally and uniformly govern environmental and social impacts and considerations borne of private sector investments and projects at the state/territorial level (with several exceptions noted above).

Therefore, a single set of practice standards does not apply across Australia.

As they have in many other countries, states, and territories have enacted their practice standards for Aboriginal and Torres Strait Islander engagement. For example, and as mentioned above, UNDRIP's provisions have been implemented incompletely and inconsistently at state and territory levels, resulting in a confusing patchwork of jurisdictional approaches related to Aboriginal and Torres Strait Islander engagement. Regulations and approaches for largely agreed practices for Aboriginal and Torres Strait Islander engagement (such as local sensitisation and participation) are also inconsistent in their content across the states and territories. This disparity makes it difficult for actors and stakeholders to consistently plan and implement practices.

Incomplete set of practices 6.1.2

In parallel with the inconsistent governance landscape, the set of best practices generally embraced across Australia is inconsistent and incomplete in its content. For example, while project proponents in Australia largely agree on the importance of "engagement" and public participation, there is less understanding of and consistency in approaches to the other best practices.

Impact assessment provides an example, with the timing, approach, steps, mitigation or avoidance requirements, and compensation expectations largely unacknowledged and undefined. Even the question of who should be included remains problematic. Similarly, the requirements for a life-of-project agreement or contract between Aboriginal and Torres Strait Islander peoples and project proponents are unacknowledged and undefined. Ideally, the process and content for Aboriginal and Torres Strait Islander-proponent contract negotiations, consent, and enforcement would be embraced as a core best practice and then uniformly and consistently defined and mandated. As well, clear requirements for project close-out and enduring liabilities – usually seen as a stand-alone best practice – are inconsistently articulated and embraced in Australia. Several of these missing pieces are discussed in more detail below.

FPIC 6.1.3

FPIC in Australia serves as another example where a best practice is inconsistently acknowledged, articulated, and embraced. Although the Commonwealth voted against UNDRIP in 2007 (along with the U.S., Canada, and New Zealand), it subsequently endorsed the convention in 2009 and has pledged to take actions to implement it. As mentioned above, implementation has been slow and inconsistent.

In any event, it is important to understand that the concept of "consent" (despite its seemingly binary nature of "yes" or "no") is practically more a continuum of acceptance or endorsement. This is in line with both the literature, with Indigenous perspectives (e.g., see the principles under the Aashukan Declaration), and with informant experiences. The strictest interpretation would call for consent by all Aboriginal and Torres Strait Islander individuals within an affected community or project footprint, except when land is compulsorily acquired by the state pursuant to a legitimate public purpose and only after a right to appeal and full compensation for the loss. (Australia's 1969 Land Acquisition Act provides a detailed process for compulsory acquisition by the state.)

However, consent is complicated by such considerations as: whether consent can be withheld for any reason or no reason, except in the case of compulsory acquisition; whether all affected Aboriginal and Torres Strait Islander individuals must assent, or whether a representative group can alternatively assent on behalf of a larger group; and whether consent can be withdrawn if the scope or impacts of a project

change or the proponent is in breach of agreed terms and conditions. For the first, clear standards and grounds are needed if consent is seen as something that cannot be "unreasonably" withheld. For the second, protocols are obviously needed if representative assent is permitted, and the third underlines the importance of a clear, binding, and enforceable agreement that can accommodate changes and provide remedies for breach (a recognized best practice that is often ignored or only partially embraced).

Impact Assessment, Avoidance, and Mitigation 6.1.4

Impact assessment, avoidance, and mitigation should be seen as stand-alone best practices because of their importance and complexity, along with the risks that come with inadequate assessment and mitigation/avoidance. Several other factors should prompt a best practice status.

Historically, environmental impacts have arguably been more routinely identified and addressed than social impacts. The state of Australian legislation reflects this reality, with the current key impact assessment requirements being more squarely targeted toward environmental impacts. Among other factors, this can be attributed to the more apparent and universally objective standards for impacts on the natural environment. Social (including, to some extent, economic) impacts have historically been more difficult to identify and define. In recent years, much attention has been paid to improving processes for SIA, and to making SIA a more seamless partner to EIA.[29]

In any event, impact assessment merits a stand-alone best practice status in the Aboriginal and Torres Strait Islander context because it is difficult to do. It requires careful stakeholder identification, including the inclusion of women and other persons that are often not viewed as "members of the community," and thorough social (and economic) impact evaluation that identifies the full scope of the changes (both positive and negative) that could potentially befall Aboriginal and Torres Strait Islander individuals and groups. Finally, careful attention is needed in deciding how to avoid impacts and mitigate harmful impacts that cannot be avoided. The topic of consent plays a role here as well because a full characterisation of impacts and avoidance/ mitigation (done early in a project's conception) is needed for Aboriginal and Torres Strait Islander people to decide on assent or rejection.

Agreements and project close-out 6.1.5

Negotiation of and consent to transparent but thorough agreements and clear requirements, and liability for project close-out, are related but should be seen as discrete best practices because, although linked, each can be complicated by itself and they occur at different points in any project lifecycle. The Australian landscape reflects this dichotomy, as such topics as ILUA and stand-alone project agreements, and project close-out and trailing liability, are treated separately (although imperfectly) in the legislation, commentary, and research.

Project agreements – negotiated between Aboriginal and Torres Strait Islander peoples and project proponents (and even perhaps third parties, such as the state) – should reflect the entirety of the engagement and the project (sensitization, participation, dialog, assimilation of input, project conceptualisation, impact assessment, project design, compensation and co-benefit calculations, life-of-project monitoring and evaluation, and close-out).

It is important to stress that project proponents (or the state) should never perceive negotiations as signifying Aboriginal and Torres Strait Islander peoples' consent to the project. Instead, negotiations should be viewed as an opportunity for Aboriginal and Torres Strait Islander peoples to express their interests and concerns and to make counteroffers. Project proponents should ensure that all expressed Aboriginal and Torres Strait Islander peoples interests and proposed counteroffers are those of the community as a whole (including women and other often unheard voices), and not just those of individuals or groups in positions of power.

29 See Vanclay, 2001; Vanclay, 2003; Slootweg et al., 2012; Friesema & Culhane, 1976; Dendena & Corsi, 2015; Esteves et al., 2012; Walker, 2010.

Project close-out, which should be exhaustively addressed in any project agreement between Aboriginal and Torres Strait Islander peoples and a project proponent, merits stand-alone best practice status because it has often been ignored and mishandled. This reality is made evident by the need for trailing liability schemes, which are legislatively imposed after the fact when project agreements and agreed project close-out schemes and liability obligations were inadequately shaped when the project was agreed upon and permitted. In short, project close-out processes and procedures should also cover trailing liability.

Project-specific grievance mechanisms 6.1.6

The Australian governance framework does not appear to mandate a project-specific grievance mechanism for each project that includes or affects Aboriginal and Torres Strait Islander peoples. The obligation to create such a mechanism should be a part of every project agreement entered into by Aboriginal and Torres Strait Islander peoples and project proponents. A grievance mechanism ensures that Aboriginal and Torres Strait Islander peoples and project proponents have access to a set process for voicing and resolving conflicts when they inevitably arise. The mechanism should set out the procedures for lodging a complaint or an assertion of a breach of the agreement between parties. To the extent possible, any mechanism (mirroring the project agreement) should describe the specific remedies that could become available to a complainant or in the event of breach of contract or other failure to deliver expected benefits. Remedies could include one-off remedies extended to Aboriginal and Torres Strait Islander individuals or groups, recession of the agreement, a stop-use obligation on the part of the project proponent, or money damages for a prevailing claimant or party.

Ongoing monitoring and evaluation 6.1.7

The Australian governance framework does not appear to mandate an obligation for a project proponent to u**ndertake ongoing monitoring and evaluation of project performance and the project's environmental and social outcomes**. Ongoing monitoring and evaluation should be seen as a stand-alone best practice for projects that affect Aboriginal and Torres Strait Islander peoples, and project agreements between Aboriginal and Torres Strait Islander peoples and project proponents should thoroughly cover monitoring and evaluation obligations (including reporting and the actions to be taken when agreed triggers are observed). It should be acknowledged during this best practice (and most of the other best practices) that it can be more difficult to see, measure, and report on the social and economic metrics linked to Aboriginal and Torres Strait Islander peoples than the environmental metrics that are tied to the land, water, and other natural resources. That is, the social side of the equation may present more challenges than the environmental side. This makes it even more important to seek clarity on social indicators at the start of any project, during impact assessment, and when negotiating project agreements.

Recommendations 6.2

The following recommendations draw on the above analysis and are based on the research presented in this report. The recommendations assume that the Australian governance and regulatory landscape will not soon be populated with a uniform and nationally applicable set of best practices and subordinate implementing activities.

Adopt or endorse a best practices approach 6.2.1

There is currently no legislative framework in Australia that comprehensively and uniformly prescribes the behaviour that TSA's industry affiliates should display when proposing, designing, implementing, or closing out OTR tyre recycling or disposal projects that affect Aboriginal and Torres Strait Islander peoples. Therefore, TSA should consider adopting or endorsing a best practices approach of its own. Such an approach would be intended for use by TSA's industry affiliates. Key to this will be making explicit how TSA defines community engagement and the assumptions underpinning their approach, particularly around how to understand 'community' and worldviews and the tension these may bring to the engagement.

The approach should include the selection of the best practices seen across the international landscape for project proponent interactions with Aboriginal and Torres Strait Islander peoples in advance of and during projects like tyre recycling initiatives (such as mining and large-scale acquisition of agricultural land). The selection of best practices should also reflect the engagement, participation, and assessment steps and activities now called for under Australian law (Commonwealth and state/territorial) for interactions with Aboriginal and Torres Strait Islander peoples and for environmental and social impact assessments generally, to ensure conformance to the applicable legislative landscape. This noted, it seems there is little risk that an approach that includes the best practices described above would fail to comport with the activities called for under Australian law.

At its inception, TSA's best practices approach need not necessarily include the detailed steps required to fully implement the best practices. The first step should simply be to broadly articulate the best practices to which TSA recommends its industry affiliates commit.

Populate the best practices with specific, subordinate steps and approaches 6.2.2

With the support of its affiliates and Australian experts and collaborators, TSA should begin to populate its endorsed best practices with the needed subordinate steps and activities. This effort could be built around the detailed principles, processes, procedures, and steps that have been developed by others.

That is, TSA could look to already-existing practice principles, standards, and guides for needed detail. The key Indigenous concept of relationality should also be at the forefront of TSA's approach to selecting and adapting best practices. This would ensure Indigenous agencies and relationships are centred in any process.

For example, an impact assessment best practice could be populated (as a first step) with the IAIA operating principles and then further detailed with step-by-step instructions on how to create and undertake an impact assessment that focuses on the social realities surrounding Aboriginal and Torres Strait Islander peoples. Similarly, the South Australian Environment Protection Authority's (EPA) "Guideline for Community Engagement," which reflects the IAP2's 'Spectrum of Public Participation,' or the NextGen project's set of standards and indicators could be used to add subordinate detail to a stakeholder mapping, consultation, and engagement best practice.

Other best practices may need new, original content that fits with the landscape of Australian practices. That is, some of the subordinate materials for TSA best practices may need to be created "from scratch." Should this be the case, certainly, information on approaches and content would still be available. The best practice of crafting a thorough, fair, and binding written agreement (following the principle of Impact Benefit Agreements) between a project sponsor/proponent and an Aboriginal and Torres Strait Islander community is an example. At this point, there may not exist a sample agreement that could be used as a model for a recycling venture that would involve Aboriginal and Torres Strait Islander peoples.

TSA could also recommend guidelines around cost-benefit analysis, including appropriate discount rates and/or timeframes. That said, there are assuredly publicly available materials and templates that could be used as a starting point. For provisions or topics that lack examples, TSA could draft model language to cover some of those voids. Agreement language that addresses trailing liability might be an example. TSA could create language for a project agreement that provides that a project sponsor/promoter would assume and retain liability and an indemnification obligation for damages and losses that trail project close-out.

Finally, model work plans could be developed for the activities needed to undertake best practices. While detailed work plans can only be developed in response to a specific site, community, and project realities, model work plans can still provide enough detail (and show where more detail will be needed) to enable project proponents to see what it will take to weave best practices through a project's life cycle.

Support OTR tyre recyclers in acknowledging and calculating the actual cost of engaging with Aboriginal and Torres Strait Islander peoples 6.2.3

Many private sector project proponents that seek to site projects on lands belonging to Aboriginal and Torres Strait Islander peoples fail to recognise and plan for the actual costs that are required to use best practices for Aboriginal and Torres Strait Islander engagement. Information gathered from the desk research and key informants supported this reality. As a project budget line item, projected costs for engagement, which should reflect the full list of best practices, are often inadequate.

Some estimates for engagement focus primarily on early-stage sensitisation and consultation with Aboriginal and Torres Strait Islander peoples. These estimates fail to include the resources needed for impact assessment, project design that avoids or mitigates impacts, compensation or benefit sharing for affected Aboriginal and Torres Strait Islander peoples, establishing and sustaining a project-specific grievance mechanism, ongoing monitoring and evaluation, project close-out, and trailing liabilities that may surface long after project close out.

TSA could support prospective OTR tyre recyclers in planning for "true costs" by providing information on the labour and expense requirements for best practices engagement, and by providing or pointing the way to the costing and budgeting tools that include the subordinate line item detail needed to completely and accurately budget for the work plan activities needed for best engagement practices.

Contiue to collaborate with like-minded leaders 6.2.4

TSA should seek out and align its activities with other Australian leaders that are attempting to fill the same best practices vacuum. For example, the ANU I2S NextGen engagement initiative parallels TSA's interest in how to best engage Aboriginal and Torres Strait Islander peoples. As mentioned above, this initiative has done recent quantitative research looking at engagement and the factors that matter to Aboriginal and Torres Strait Islanderpeoples and prompt them to trust project proponents and accept their projects and investments. Even though NextGen is focused on infrastructure investments, the parallels are significant, and there are certain to be benefits to collaboration.

National and state/territorial government leaders would also benefit from learning about TSA's work and findings as those entities further develop and refine the legislative and regulatory landscape that shapes the mandated practices for Aboriginal and Torres Strait Islander engagement and recycling generally.

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Appendix 1:

Sample list of policy frameworks supporting public participation in Australia

Jurisdiction	Organisation	Policy Name	Details
Australia	Australian Government	Native Title Act 1993	• Provides limited recognition of Indigenous rights to lands, territories and resources and recognition of traditional laws and customs. • Gives Traditional Owners right to negotiate within set timeframes. There is no right of veto. • It has a mechanism for payment of limited compensation.
Australia	National Native Title Tribunal	Indigenous Land Use Agreement (ILUA)	• An ILUA is a voluntary agreement between native title parties and other people or bodies about the use and management of areas of land and/or waters, is binding while registered, and operates as a contract between the parties. Negotiated under the Native Title Act. • An ILUA can be about any native title matter agreed by the parties, including settlement or exercise of native title rights and interests, surrender of native title to governments, land management, future development, mining, cultural heritage, coexistence of native title rights with other rights, access to an area, and compensation for loss or impairment of native title.
Australia	Australian Government	Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)	• Australia's main environmental law. The EPBC Act covers nine protected matters: – world heritage areas – national heritage places – wetlands of international importance (listed under the Ramsar Convention) – listed threatened species and ecological communities – listed migratory species (protected under international agreements) – Commonwealth marine areas – Great Barrier Reef Marine Park – nuclear actions (including uranium mines) – water resources (that relate to coal seam gas development and large coal mining development). • The Act also protects the environment when actions are taken on Commonwealth land or impact upon Commonwealth land by an Australian Government agency anywhere in the world that impact Commonwealth heritage places overseas.
Australia	Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS), 2020	AIATSIS FPIC Policy Snapshot 2020: Engaging with Traditional Owners	• Summary of implementing FPIC in practice. • FPIC is not merely informing and getting consent, it is about effective and meaningful participation to ensure the best decision making for sustainable outcomes – especially where intergenerational decisions are involved. Where a determination recognising native title is made by the Federal Court, the NTA requires native title holders to establish a corporation to represent them and their interests. These organisations are known as Registered Native Title Bodies Corporate (RNTBCs). They are most commonly known as Prescribed Bodies Corporate (PBCs).

Jurisdiction	Organisation	Policy Name	Details
NT	EPA NT	Environmental Protection Act 2019 (NT)	• EPA NT Act 2019 recognises importance of community involvement in environmental impact assessment process, particularly IPLCs, expressed in sections 3(d) and 3(e): – to provide for broad community involvement during the process of environmental impact assessment and environmental approval – to recognise the role that Aboriginal people have as stewards of their country as conferred under their traditions and recognised in law, and the importance of participation by Aboriginal people and communities in environmental decision-making processes. • EP Act requires a proponent to consult with communities, take account of their views, document their knowledge and address Aboriginal values and rights (sections 43(a) to 43(d)). • EPA NT act does not currently include the requirement of FPIC from Traditional Owners for projects being assessed under the Act.
NT	EPA NT	NT EPA Stakeholder Engagement	• Establishes NT EPA's approach to informing, engaging and communicating with its stakeholders under new EPA Act, March 2019. • Policy states that NT EPA adheres to three key principles "consistent with international and national best practice for stakeholder communication and engagement" (unspecified): Communication (committed to listen and talk with stakeholders), Transparency and Accountability, Respect and Inclusiveness. • Engagement is primarily about "informing" by publishing licences, reports, compliance actions on website (and elsewhere as appropriate), having a public register of decisions and Statement of Reasons, inviting public submissions, media releases, site visits, formal and informal meetings etc. • Engagement is ensured to be 'inclusive' and affected stakeholders "have access to the NT EPA" incl Aboriginal Areas Protection Authority. • FPIC is not mentioned. • NT EPA has developed separate guidance document for proponents on best practice stakeholder engagement for proposals undergoing environmental impact assessment.
NSW	NSW EPA	NSW EPA Climate Change Action Plan 2023-26	• EPA NSW makes public Statement of Commitment to Aboriginal People of NSW, and in spirit of reconciliation commit to work in respectful partnership, actively learn from an listen, include Aboriginal knowledges and science in EPA decision-making, embed consistent, meaningful, and trustworthy engagement with Aboriginal communities, and respect Aboriginal people's knowledge and science as an equal to conventional science (amongst other). • EPA NSW's Regulatory Strategy (2021a) has 8 elements working together including listening, enabling, monitoring and influencing embedded in Climate Action Plan, including "Listen to and learn from Aboriginal people" (Pillar 1, Inform and Plan, Action 6).
NSW	NSW EPA	NSW EPA Regulatory Strategy 2021-24	• EPA NSW utilises different mechanisms for community engagement, including coordinating local community groups, working with Aboriginal communities, listening to interest groups, NGOs, stakeholder surveys, partnerships with local government and Aboriginal organisations, and youth engagement.
NSW	NSW EPA	NSW EPA Charter of Engagement 2021	• NSW EPA Charter of Engagement (2021) is a plain language statement guided by a set of 7 principles that 'place people at the centre of our thinking' signalling an intention to "better listen, inform, consult and involve community, industry and government in our work."

Jurisdiction	Organisation	Policy Name	Details
NSW	NSW Resources Regulator	Resources Regulator NSW Engagement and public consultation policy	• NSW Resources Regulator is state's standalone regulatory body for work health and safety for mines and petroleum sites, quarries and extractive operations. Key focus on mine rehabilitation compliance and enforcement activities under Mining Act 1992. • Best practice principles for stakeholder engagement recognised as IAP2 framework, adopting the five levels of participation
VIC	EPA VIC	EPA VIC Charter of Consultation (15 June 2021)	• This Charter of Consultation is EPA's commitment to consultation with Victorians under section 53 of the Environment Protection Act 2017 (the Act). It outlines key parts of Victoria's laws that require or may benefit from consultation and describes how EPA may undertake such consultation.
QLD	Department of Environment and Science (DES)	QLD DES Regulatory Strategy 2022–2027 QLD DES Stakeholder Charter (Feb 2022)	• DES is Queensland's environmental regulator. The Regulatory Strategy 2022–2027 has 6 key focus areas, including one on communication and engagement summarised in the Stakeholder Charter. The Strategy states that DES will "work with First Nations people and communities through various forums to ensure engagement" including implementing ESR's Aboriginal and Torres Strait Islander Council Engagement Program (p.15). • QLD DES Stakeholder Charter is a brief table outlining 7 principles to set expectations of stakeholders (transparent, safe, respectful, timely, inclusive, effective, purposeful).
WA	EPA WA	Stakeholder Reference Group TOR (March 2012, updated May 2018)	• EPA WA does not have a readily accessible stakeholder engagement plan or charter. EPA WA conducts site visits, forums, invites public submissions on assessments and regularly meets with its Stakeholder Reference Group. • The EPA Stakeholder Reference Group (SRG) meets quarterly and does not include any First Nations groups. • Opportunities for public participation are open for online submissions only at https://consultation.epa.wa.gov.au
SA	EPA SA	EPA SA Engagement Charter (2021)	• EPA SA's Engagement Charter outlines guiding 'values' and does not mention First Nations/Indigenous engagement. The stakeholder groups are identified as the South Australian public, Community groups and organisations, Industry, peak bodies, government agencies, local government and media.

Appendix 2:

Sample list of practice frameworks/guidelines for public participation in Australia

Jurisdiction	Organisation	Framework Name	Details
Australia	**Department of Climate Change, Energy, the Environment and Water (DCCEEW)**	Engage Early Guidelines (February 2016)	• Guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) • The Australian Government considers that best practice consultation includes: – identifying and acknowledging all relevant affected Indigenous peoples and communities – committing to early engagement at the pre-referral stage building trust through early and ongoing communication for the duration of the project, including approvals, implementation and future management – setting appropriate timeframes for consultation, and – demonstrating cultural awareness.
Australia	**Department of Industry, Science and Resources**	Leading Practice Sustainable Development Program (LPSDP) for the Mining Industry – Handbook on Working with Indigenous Communities (September 2016)	• Handbook published by industry.gov.au and dfat.gov.au • Good practice from cross-cultural international development is evident in this publication, which includes brief overviews of historical and social contexts, case studies, cultural heritage, principles of environmental co-management and relevant statutory and institutional frameworks. • Mentions the Brundtland Commission "Our Common Future" principles of sustainable development and intergenerational equity and makes arguments for positive relationship building and for mining companies to earn a 'social licence to operate'. General tone is of persuasion, stating that "effective community engagement makes good business sense." (p.4) • Refers directly to FPIC as "the highest standard for the participation of Indigenous communities in decision-making," (p.20) and "an integral part of the company's social licence to operate." (p.47) • Outlines good practices incl. cross-cultural awareness training, multi-lingual communication and the inclusion of Indigenous science and culture in mining approvals and closer phases with reference to standards and guidelines to ethical research practices (AITSIS), along with clear, succinct guidance on conducting negotiations according to principles of FPIC (Section 9, Negotiating and Implementing Agreements.) • Emphasises the complexity of community engagement – "it should be managed as a complex, time-consuming and often difficult process of relationship building" • Emphasises the need to recognise complex contexts that are the result of colonisation, dispossession and ongoing settler colonialism.

Jurisdiction	Organisation	Framework Name	Details
Australia	Commonwealth Dept of Industry, Science and Resources	Leading Practice Sustainable Development Program for the Mining Industry Community Engagement and Development Handbook (September 2016)	• Addresses social dimension of sustainable development and community relations in relation to social licence to operate. Focus on inclusive engagement (including gender). • Community relations activities are referred to within IAP2 Public Participation Spectrum. • Provides guidelines and principles for good practice community engagement, plus case studies. • Good overview of typical community engagement and development activities for each step of minerals project life cycle, from exploration to post-closure. • Does not mention FPIC – refers to LPSDP Indigenous Communities handbook for this. • Good discussion of Social Licence to Operate in Section 4.0.
Australia	Australian Heritage Commission	Ask First: A Guide to Respecting Indigenous Heritage Places and Values (2002)	
NT	EPA NT	Stakeholder Engagement and Consultation: Environmental Impact Assessment Guidance for proponents (6 Jan 2021)	• The document provides guidance on implementing stakeholder engagement and outlines principles for best practice stakeholder engagement based on IAP2 core values standards. • Aboriginal stakeholders must be consulted about proposals and given opportunities to discuss and influence the outcomes of actions and decisions that may affect them. • Section 4.2 is specifically about engaging with Aboriginal stakeholders. "Consulting with Aboriginal communities in a culturally appropriate manner is a statutory requirement of proponents undertaking an environmental impact assessment process under the EP Act (s43(b)). • The guidance document refers to Land councils to assist with identifying best approach to engaging with specific Aboriginal communities.
NT	NT Government	Remote Engagement and Coordination Online Toolkit (2020)	• NT government's 'Bushready' website brings together information gathered about the most effective ways to engage with people in regional remote communities (https://bushready.nt.gov.au/). • Provides guidance on how to conduct good engagement with remote Aboriginal communities to achieve mutually beneficial outcomes, including transparent of decision-making.
NT	NT Govt BUSHTEL Dept of Chief Minister and Cabinet	Remote Aboriginal Community Planning Framework (RACPF) to deliver Community Land Use Plans (CLUP)	• Many remote Aboriginal communities in the NT are not currently subject to legislated land planning requirements. In response, both the AG and NT Governments support a tailored approach to land planning for remote Aboriginal communities. This will provide clear, transparent, and streamlined development consent processes to support economic development activity. • The framework will provide an understanding of appropriate land use, the capacity or constraints for infrastructure to support future growth, and community land use plans developed through community consultations. • Includes Industrial Use Areas e.g., recycling depot.
SA	EPA SA	EPA SA Industry Guideline for community engagement (July 2021)	• EPA SA's Guidelines for community engagement is designed for industry/business and is based on the IAP2 spectrum in conformity with the South Australian Government's Better Together program establishing a set of guiding principles to underpin all engagement with the community. It does not mention FPIC or Indigenous stakeholders.

Appendix 3:

Recent media articles of relevance in Australia

Date	Organisation	Title and URL	Details
11 Nov 2021	Allens & Linklaters, Law Firm	'Protection of cultural heritage and FPIC' https://www.allens.com.au/insights-news/insights/2021/11/Protection-of-cultural-heritage-and-FPIC/	• Allens Insight article by Rachel Nicholson and Dora Banyasz. Summary of Stakeholder expectations concerning FPIC
24 Feb 2022	Federal Dept of Industry, Science & Resources	'Amendments to enhance offshore oil and gas decommissioning framework' https://www.industry.gov.au/news/amendments-enhance-offshore-oil-and-gas-decommissioning	• Federal government conducted extensive policy review and public consultation to strengthen offshore oil and gas infrastructure decommissioning framework and enhance policy, legislation and regulation to expand trailing liability provisions, increase regulatory scrutiny of companies and cost recovery for administering remedial directions.
5 May 2022	WA government	'$14.6 million to create Aboriginal Empowerment Unit' (media statement' https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/05/14-6-million-dollars-to-create-Aboriginal-Empowerment-Unit.aspx	• McGowan Government commits $14.6 million for the establishment of an Aboriginal Empowerment Unit within the Department of Mines, Industry Regulation and Safety • New business unit to ensure resource development is culturally respectful. LCA notes that this Unit **does not reference consultation with First Nation**s peoples and that 2018 WA Aboriginal advocacy statutory office stalled following community feedback.
8 July 2022	Law Council of Australia (Peak body for legal profession)	'Australia must formally adopt UN Declaration on Rights of Indigenous People, 8 July 2022' https://www.lawcouncil.asn.au/publicassets/7a2d1e30-5bfe-ec11-945c-005056be13b5/2022%2007%2008%20-%20LCA%20MR%20-%20Australia%20must%20formally%20adopt%20UN%20Declaration%20on%20Rights%20of%20Indigenous%20People.pdf	• Peak Body, Law Council of Australia calls on Australian government at all levels to formally adopt and comprehensively implement UNDRIP to protect Indigenous rights. LCA states that comprehensive legal and policy reform across all federal, state and territory jurisdictions is required. Without this, breaches of human rights in Australia will continue to occur.
Nov 2022	Australian Government, Department of Climate Change, Energy, the Environment and Water (DCCEEW)	'Australian Government response to the destruction of Juukan Gorge' https://www.dcceew.gov.au/about/reporting/obligations/government-responses/destruction-of-juukan-gorge	• Australian Government response to the Joint Standing Committee on Northern Australia's: A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge and Never Again: Inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia - Interim Report

Date	Organisation	Title and URL	Details
8 Dec 2022	Federal Minister for Environment, Australia	'Government to establish federal environmental protection agency in major overhaul of Australia's environmental laws' https://www.abc.net.au/news/2022-12-08/australia-environment-laws-federal-epa/101744044	• The new federal EPA will have a set of "national standards" which will dictate the intended environmental outcomes of those decisions. In addition, all conservation plans, policies and strategies developed under the environmental laws will need to be consistent with the national standards. • A national standard on First Nations engagement will also be developed as a priority, ensuring Indigenous people are properly and fully involved in decisions relating to their country and custom. Those standards will be legally binding and have a ratchet mechanism built in whereby reviews can only result in them being strengthened, not weakened. • Legislation is expected to be tabled in Parliament by end of 2023.

TyreStewardship AUSTRALIA

Australian Government Accredited Product Stewardship Scheme

TSA0268/06.2023