

**TSA** Driving sustainable outcomes for end-of-life tyres



# Collaborating with Indigenous Peoples and Local Communities in OTR Rubber Product Recovery

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**Global review and  
recommendations**

**June 2023**



# Collaborating with Indigenous Peoples and Local Communities in OTR Rubber Product Recovery

## Global review and recommendations

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### Client

Tyre Stewardship Australia (TSA)

### Author

David Bledsoe - Senior Attorney, Resource Equity

Leslie Hannay - Attorney, Resource Equity



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# Glossary of Terms and Abbreviations

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Term / abbreviations	Description
AMV	African Mining Vision
AU	African Union
CDA	Community Development Agreement
CFS	United Nations Committee on World Food Security
CSO	Civil Society Organization
CSR	Corporate Social Responsibility
DFI	Development Finance Institution
EITI	Extractive Industries Transparency Initiative
ESG	Environmental, Social, & Governance
FAO	United Nations Food and Agriculture Organization
FPIC	Free, Prior, and Informed Consent
ICMM	International Council on Minerals and Mining and Metals
IFC	International Finance Corporation
IPLC	Indigenous Peoples and Local Communities
MOU	Memorandum of Understanding
PWYP	Publish What You Pay
SPG	Standards, Principles, and Guidelines
UNGP	United Nations Guiding Principles on Business and Human Rights
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security

## Meaning of IPLC

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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.<sup>A1</sup>

A1: See: Á Lanzas 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>

# Executive Summary

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**Tyre Stewardship Australia (TSA) seeks to facilitate collaboration between users of off-the-road tyres, tracks and conveyor belts (OTR products users) and Indigenous Peoples and other local communities (IPLC) to leverage opportunities for end-of-life (EOL) tyre resource recovery in regional, rural and remote Australia.**

Specifically, TSA wants to establish best-practice standards for environmental and social practices that OTR tyre products users and IPLC can embrace to build effective partnerships.

This is the first of two studies – from both a global and national perspective – being undertaken by TSA to establish those standards, as part of the TSA 'OTR Project' that is running until March 2023.

Resource Equity (RE)<sup>1</sup> was commissioned to review global practices (excluding Australia) and share its institutional knowledge on international social and environmental standards and best practices.

For the research, RE looked at project examples that are similar in scope, scale, and impact to recycling initiatives (mining, scale agriculture, and others), as it explored successful and unsuccessful social and environmental frameworks and approaches. RE also shares in this document information on the importance of social license – how public and community perceptions can make it easier or more difficult to succeed in interacting with neighboring communities and the broader public.

**Organized around 10 key questions, and presented in terms of the business case for adoption of best social and environmental practices, this document:**

- Describes the applicable international standards and their sponsors.
- Identifies the applicable practices set out in the standards.
- Describes the discrete activities that make the best practices real.
- Explains why social license is key to any business case to be made for embracing the practices.
- Offers examples of how the practices have been used on projects similar to OTR recycling.

## Summary of answers to the 10 key questions

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### **1. What are the international standards for interactions with IPLC that are relevant for OTR waste and recovery?**

A number of international standards, principles, and guidelines (SPG) could shape recycler actions that touch IPLC. The SPG are not entirely "of a kind:" they vary across their intended audiences, normative clout, level of abstraction, purpose, approach, and content. Yet the SPG set out standards of care and the best practices for OTR product recyclers.

Some SPG sit at a relatively macro level. For instance, the UN Guiding Principles on Business and Human Rights state that businesses must not violate the human rights of others, and that if there are violations, they must be remedied. Other SPG, such as the African Union's (AU) Guiding Principles on Large Scale Land Based Investments, are regionally focused. Several SPG focus on specific sectors, with the AU's Africa Mining Vision (AMV) serving as an example.

1. Resource Equity is a U.S. non-profit organization that focuses on improving land and natural resource tenure for men, women, and communities across the Global South. It has worked extensively on best practices for responsible investments in land and natural resources in the context of agriculture and extractives (oil, gas, and minerals).

Development finance institutions (DFI) – like the International Finance Corporation (IFC) – all use standards to guide borrower actions. That is, all DFIs call for borrowers to comply with the lender’s environmental and social standards. Many DFIs use the IFC standards. Other DFIs have their own standards, but all DFI standards are somewhat similar in their content and typically call for good or best social and environmental practices. Many civil society organizations (CSO)s and NGOs monitor borrower compliance with DFI standards. Yet other SPG are published by civil society organizations, NGOs, and donors.

## **2. What are the best practices for OTR recyclers that derive from these international standards?**

Synthesis of the SPG yields the practices that recyclers should embrace when their work affects IPLC.

They include:

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

The sequencing of the practices is generally in the order they are presented above. However, some need to be sustained throughout any project, but with an emphasis on the start. Responsibility for undertaking the practices rests with the recycler, although many of the activities are best performed with the assistance of qualified experts with specialized expertise and experience.

## **3. How can OTR recyclers earn and maintain the social license to operate, and does it matter?**

Social license is important to project 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 license is:

- Built upon or damaged by the way that people view a business or neighboring 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 behavior in view of standards, practices, or values.

Social license is most evident when it is eroding or has evaporated because it is at this point that a business begins to see the risks, damages, and costs that loss of social license creates. Public perception shapes social license, and negative perception erodes it. Recyclers that create and sustain a strong social license would tend to operate according to best social and community practices, such as those established by international standards and principles (FPIC, for example).

With social media and increases in public access to information, the public perceptions that make-or-break social license evolve more quickly and are more apparent than ever. Therefore, erosion of social license can occur quickly, with significant impacts on recycler operations and overall sustainability.



#### **4. What is free, prior, and informed consent (FPIC)?**

Free, Prior, and Informed Consent (FPIC) refers to the right of a community to participate in decision-making about issues that will impact their well-being, and to give or withhold their consent to proposed projects that might affect the lands and resources they own, occupy, or otherwise use. It also often encompasses a process of consultation necessary for obtaining valid consent. FPIC grew out of the recognition that collective land ownership systems are common among Indigenous Communities (IC) globally, and it established processes and standards for engaging with IC to safeguard community rights to land and natural resources. FPIC builds on established standards on community consultation, and goes a step further by requiring the community's consent to a given proposal rather than merely requiring consultation.

The application of the FPIC standard and its attendant practices has been widened beyond IC and now tends to include IPLC. That is all impacted local communities – Indigenous or not – are now seen as appropriate beneficiaries of the FPIC process. Plus, FPIC application often imposes a requirement on governments to ensure that FPIC is embraced by project sponsors, calling for IPLC to be adequately informed of a project's likely positive and negative impacts, and for IPLC to meaningfully provide their consent and agreement free from any pressure or interference prior to the commencement a project.

#### **5. What are global best practices for assessing and mitigating impacts of OTR recovery on IPLC?**

Waste recovery projects can impact IPLC in a variety of ways – both positive and negative. Unmitigated social and environmental risks are a significant source of IPLC-company conflict, resulting in costs and delays. Recyclers should work to enhance benefits and avoid negative impacts on IPLC wherever possible. In short, recyclers should identify and address a project's impact on the community, environment, and human rights. Assessments should consider IPLC rights and the extent to which the proposed project might impact livelihoods, access to resources, and the health and wellbeing of different groups within the community, including women. Assessments should look for and yield opportunities for IPLC to benefit from a proposed project.

Assessments should be done early in any project and be renewed as necessary, seeking out and incorporating input, perspectives, and objectives of IPLC through sustained participation.

#### **6. What steps should a recycler take to ensure OTR waste and recovery agreements with IPLC are fair and effective?**

Resource-intensive projects often include processes for benefit sharing and improving development outcomes for project-affected communities. These benefit-sharing arrangements are generally governed by agreements between the project proponent and IPLC. Often referred to as Community Development Agreements (CDA), these agreements may be required under domestic laws and policies, or they may be the result of voluntary negotiations between companies and affected communities.

While there is much guidance on good practices and standards for CDA, there is no single, common reference framework or universal standard for them. Project context, geography, and IPLC characteristics would determine the best CDA model or set of steps for a particular OTR recycling project.

The CDA process should begin early in the project life cycle, during the pre-feasibility and exploration phases. CDAs often address the scope of the follow-on best practices. For example, recyclers would work together with IPLC to agree on a process through which the consultation and decision making will take place. The process would be described in the CDA. Despite the need for sufficient detail, simply drafted and accessible CDAs are the best. Simple agreements are easier to draft, negotiate, understand, and implement.

## **7. What provisions should be included in the long-term operating agreement between an Indigenous Community and a private sector actor for OTR waste and recovery?**

The contents of any long-term operating agreement would depend on the project context, the goals and aspirations of the recycler and IPLC, and what they collectively see as fair and reasonable. However, the agreement would reflect the systematic embrace of best social and environmental practices. Traditionally, CDAs primarily focused on financial benefits to communities. Increasingly, CDAs are being expanded to include the provisions needed for the long-term operating agreement. Whether in the CDA or in a separate agreement, these topics should be addressed:

- Company support (financial and otherwise) for community projects and initiatives.
- Financial payments and disbursement arrangements.
- Capacity building.
- Community participation in decision-making processes.
- Information sharing requirements and procedures.
- Local community development objectives and programs to meet those objectives.
- Local business development and sourcing plans.
- Employment and training.
- Management and monitoring of community development programs and related funds.
- Dispute resolution and grievance mechanisms.
- Environmental, social, cultural, livelihood, and health impact management.
- Governance arrangements.
- Specific provisions related to community use of land, resources, or infrastructure within the company's project area.
- Addressing environmental, social, and economic conditions during and after the conclusion of the project, and a sustainable transition to a post-investment economy.

## **8. Are there research gaps in the application of standards and good or best practices?**

Yes. Research gaps clearly exist, particularly around examples of the application of good and best practices to interactions and agreements with IPLC for collaborative, voluntary projects undertaken by sponsors and IPLC. The gaps reflect the reality that best practices may not be exhaustively applied to an investment or operation because they can be difficult and costly. This has created a barren landscape for best practices case studies. Plus, the gap reflects the common failure to adequately sustain good and best practices over the longer term of a project. Some companies view best practices as only being needed at the start of a project, or when difficulties arise that begin to create risks, liabilities, and costs. Other factors that make it difficult to find good examples of best practices being applied to projects affecting IPLC include a lack of qualified expertise in the many technical niches that best practice application can require; the fact that reporting on practice application or simply on the environmental and social outcomes of an operation is not required by applicable legislation or industry standards; the fact that civil society and press observers are often largely on the alert for problems or troubling scenarios, yielding only examples of poor practices; and the failure to disaggregate qualitative information and quantitative data by sex, which can leave women's stories and the impacts that affect them unseen and unexamined.



## 9. Is there variation of good and best practices among sectors?

Yes, uptake and implementation of practices can vary depending upon the sector. Each sector has characteristics that prompt emphasis of some practices over others. In some cases, a sector creates broader, deeper impacts than other sectors, requiring that all or most of the practices be undertaken with more intensity. Large-scale mining is an example.

Sector variation can be accommodated by the sensible and variable application of the best practices themselves. For example, thorough and sustained social and environmental impact evaluation and mitigation can better accommodate the wider and deeper environmental and social affects upon IPLC that can be created by some sectors or operations. Intensified stakeholder mapping and consultation and engagement may better accommodate larger impacted populations that reside or work closer to the project or operation. More sustained pursuit and memorialization of consent (particularly with a larger, more dispersed, or less sophisticated population of surrounding inhabitants or community members) may pay dividends in cementing the fact of consent and in establishing and maintaining social license.

## 10. What are the final recommendations for making best practices real?

Because a failure to earn or maintain a social license can create burdensome risks and costs, a recycler would benefit from building and sustaining it. With social license and all the attendant best practices, a recycler will benefit from remembering that attention to detail matters. Plus, best practices are often iterative, and repetition of steps is often required. Early efforts towards one step in the process may inform the later configurations of that step or future steps.

Finally, skill and experience should shape the iteration of practices and steps. Practitioners that have done it before are best equipped to perform the tasks. If inexperienced staff internal to a project sponsor are slated to do the work, they should be trained by skilled practitioners.

Best practices case studies are the result of successful projects. Success is more likely if both the sponsor and the IPLC genuinely benefit from the project. While the sponsor knows from the start of the benefits it seeks, the IPLC will need help in defining what it wants. Talking and listening are the path to helping an IPLC see and ask for what it needs to meaningfully benefit in both the near- and long-term. Importantly, IPLC women require special focus because they can be most easily harmed by projects that affect the resources that sustain their livelihoods. Plus, they are the least likely to benefit from projects because their needs and desires often remain unseen.

# Introduction

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**Australia must increase OTR tyre resource recovery in regional, rural and remote areas to realise all the benefits of a circular tyre economy which contributes to a sustainable society.**

TSA sees this challenge as an opportunity for OTR tyre products users and IPLC to collaborate and gain all the benefits, such as new markets, commercial enterprises and jobs, that a circular economy could bring to the community in which they live and work.

To facilitate this, TSA wants to establish best-practice standards for environmental and social practices that OTR tyre users and IPLC can embrace to build effective partnerships.

## Strategic context: The End Goal

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The Australian Government has set a target of 80% average resource recovery rate from all waste streams by 2030.<sup>2</sup>

TSA contributes to this by collaboratively ensuring the sustainable management, recycling and productive use of end-of-life tyres<sup>3</sup> across two sectors:

1. **Consumer, including passenger cars and motorbikes**
2. **Commercial, including buses, trucks and fleets**

It does this through market stimulation programs and the operation of Australia's Tyre Product Stewardship Scheme (TPSS) - an ACCC-authorized, industry framework to effectively reduce the environmental, health and safety impacts of the 56 million Equivalent Passenger Units (EPUs) which reach the end of their life in Australia each year.

The end goal is a circular economy for end-of-life tyres which contributes to a sustainable society by reducing the economic and environmental burden of waste for future generations.



## Introducing a third sector: The OTR Project

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In June 2020, TSA was awarded a National Product Stewardship Investment Fund grant to build a business case for extending tyre resource recovery to the OTR sector which includes tyres, rubber tracks and conveyor belts used in mining, agriculture, construction and aviation sectors.

In regional, rural and remote areas, the OTR sector provides the volume of used-tyre resources needed to realise the full potential of the circular tyre economy to fuel new markets, commercial enterprise and jobs.

Yet recovery of OTR tyres remains low. In 2020-21, only 11% of around 129,000 tonnes of OTR tyres sold in Australia was recovered. This compares with 90% of domestic tyres recovered.<sup>4</sup>

The tyranny of distance makes OTR tyre resource recovery a challenge. As a result, most OTR tyres end their life in stockpiles, on-site burial or landfill.



2 <https://www.awe.gov.au/environment/protection/waste/publications/national-waste-policy-action-plan>

3 <https://www.tyrestewardship.org.au/about-tsa/strategy/>

4 <https://www.tyrestewardship.org.au/handbooks/tyre-consumption-recovery-fact-sheet/>

TSA’s ‘OTR Project’ will run until March 2023, culminating in a Business Case to federal government that provides a roadmap to improved resource recovery of used OTR tyres, rubber tracks and conveyor belts.

The OTR Project will also look to expand the TPSS to include rubber tracks and conveyor belts.

The OTR Project will include significant research (such as this study), several demonstrations resulting in costings/findings for used OTR product resource recovery solutions and require data to be collected, analysed and reported on.

## Project scope and methods

RE compiled information on international standards for social and environmental performance for projects that are similar in scope, scale, and impact to recycling initiatives (mining, scale agriculture, and others), and it undertook a global review (excluding Australia) of how mining, agricultural, and other private sector actors have implemented good and best practices in the field during their investments and projects. The research explored successful and unsuccessful engagement frameworks and approaches, with a focus on those delivering sustainable project outcomes. RE also compiled and shares in this document information on the importance of social license – how public and community perceptions can make it easier or more difficult to succeed in interacting with neighboring communities and the broader public.

Largely organized around key questions, and presented in terms of the business case for adoption of best social and environmental practices, this document:

- Describes the applicable international standards and their sponsors.
- Identifies the applicable practices set out in the standards.
- Describes the discrete activities that make the best practices real.
- Explains why social license is key to any business case to be made for embracing the practices.
- Offers examples of how the practices have been used on projects similar to OTR recycling.

## Who should read and use this report

TSA hopes everyone who has a stake in the success of collaborative efforts to increase OTR tyre products resource recovery in regional, rural and remote Australia to read and use this report.

Key Stakeholders	Can use this report to
Mining, Agriculture, Construction and Aviation businesses that operate in regional, rural and remote Australia	Form effective partnerships with IPLC to increase OTR tyre products resource recovery
IPLC in regional, rural and remote Australia	Form effective partnerships with OTR tyre products users, collectors and recyclers to realise the commercial environmental and social benefits from OTR tyre products resource recovery
Federal and State governments	Support best practice in development of domestic policy and regulatory frameworks around OTR tyre products resource recovery
Local governments in regional, rural and remote Australia	Guide partnerships between public and private sectors to increase resource recovery and decrease the burden of waste for future generations
EOL tyre collectors and recyclers	Form effective partnerships with IPLC to realise the commercial, environmental and social benefits from OTR tyre products resource recovery

# What are the international standards for interactions with Indigenous People/Local Communities that are relevant for OTR waste and recovery?

**A number of international standards, principles, and guidelines (SPG) bear upon recycler actions that touch Indigenous People and local communities (IPLC). The SPG are not entirely “of a kind.” They vary across their intended audiences, normative clout, level of abstraction, purpose, approach, and content. Yet the SPG set out standards of care and best practices for OTR product recyclers.**

Some SPG, like the Guiding Principles on Business and Human Rights (UNGP) and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT) sit at a higher normative level. The UNGP and VGGT have been endorsed by the UN Human Rights Council and by the UN Committee on Food Security (CFS), respectively. UN committee member-nations have “signed off on them.” For example, Australia, as a member of the CFS, joined over 190 other states in endorsing the VGGT in 2012.

The African Union’s (AU) Guiding Principles on Large Scale Land Based Investments in Africa were endorsed by the AU Joint Conference of Ministers of Agriculture in 2014, and they are intended to inform the development of African state land policies, as well as the behavior of businesses. At a more granular level, AU’s Africa Mining Vision (AMV) calls upon AU states to ensure compliance of industry actors with the highest standards of corporate governance and environmental, social, and material stewardship. The AMV calls upon states to support the creation of contractual arrangements and legal instruments that facilitate increased participation by local communities and other stakeholders, as well as revenue distribution mechanisms for sharing benefits at local level (AU, 2009). At a similarly high level, the AU’s High-Level Panel on Emerging Technologies encourages African states to urgently shift from uncontrolled dumping of waste materials to pursue renewal, restoration, reclamation, and recycling of mainline recyclables such as tyres (AU, 2021).

After promulgating higher-level principles, more detailed guides often follow. For example, the UN Food and Agriculture Organization (FAO), which was responsible for facilitating the VGGT drafting and consultation process, later issued several guides aimed at implementation, including Responsible Governance of Tenure: A Technical Guide for Investors (FAO, 2016). While this guide focuses on agriculture, it calls for many of the good and best practices that have also been suggested for mining and other sectors.

Some SPG are more squarely aligned with specific sectors. For example, FAO has published Tenure Rights in Large-Scale and Artisanal Mining: Implications of the VGGT Tenure Guidelines (FAO, 2021). As another example, the International Council on Mining & Minerals Good Practice Guide on Indigenous Peoples and Mining (ICMM, 2015), along with the Organisation for Economic Co-operation and Development Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (OECD/EG), are squarely targeted at the mining and extractives industries. The former acknowledges the UNGP and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), while presenting both an explanation of best practices and a set of tools that provide more detailed guidance for each practice. The tools focus on engagement, managing impacts, creating agreements, and dealing with grievances. The OECD guidance exhaustively addresses engagement, and includes a significant annex on engaging Indigenous Peoples. Australia is an OECD member country.

Development finance institutions (DFI) all use SPG to guide borrower actions. DFIs provide credit at

concessional rates to sovereign state governments and private sector borrowers for projects that meet their strategic, development-oriented lending portfolio criteria. The International Finance Corporation (IFC) is an example of a DFI.<sup>5</sup> All DFIs call for borrowers to comply with the lender's environmental and social standards. Many DFIs use the IFC standards – IFC Performance Standards on Environmental and Social Sustainability (IFC, 2012a). Other DFIs have their own standards, but all DFI standards are somewhat similar in their content and typically call for good or best social and environmental practices. Many civil society organizations (CSO) and NGOs monitor borrower compliance with DFI standards.

Other SPG are published by civil society organizations, NGOs, and donors. One guide was published by an informal network of individuals from companies, CSOs, investors, governments, and international organizations – the Interlaken Group. The guide aims to support companies in respecting land and forest rights and reflects the VGGT. It is organized around the notion of “greenfield” and “brownfield” investments in land and forests, with the latter category covering the prospect that past land acquisitions may have resulted in unremedied and uncompensated displacement of land rightsholders. The IG membership includes practitioners aligned with the mining sector.

The table below lists the SPG mentioned above, along with their publication date and primary audience.

Name and Responsible Party	Date	Primary Audience
<i>Guiding Principles on Business and Human Rights</i> (UNGP), UN Office of the High Commissioner ( <a href="#">link</a> )	2011	States, businesses, civil society, donors, others
<i>Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security</i> (VGGT), UN Food and Agriculture Organisation ( <a href="#">link</a> )	2012	States, businesses, investors, other non-state actors
<i>Guiding Principles on Large Scale Land Based Investments in Africa</i> (AUGP), African Union ( <a href="#">link</a> )	2014	AU states, businesses, investors
<i>Good Practice Guide on Indigenous Peoples and Mining</i> (GPG), International Council on Mining & Minerals ( <a href="#">link</a> )	2015	ICMM member companies & other private sector actors
<i>Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector</i> (OECDG), Organisation for Economic Co-operation and Development ( <a href="#">link</a> )	2017	Businesses
<i>IFC Performance Standards on Environmental and Social Sustainability</i> (IFCPS), International Finance Corporation ( <a href="#">link</a> )	2012 (rev)	State & private sector borrowers
<i>Responsible Governance of Tenure: A Technical Guide for Investors</i> (FAOTG), UN Food and Agriculture Organisation ( <a href="#">link</a> )	2016	Investors
<i>Respecting Land and Forest Rights: A Guide for Companies</i> (IGG), Interlaken Group ( <a href="#">link</a> )	2015	Businesses

5. Multi-lateral DFIs include: AFDB (African Development Bank), ADB (Asian Development Bank), EBRD (European Bank for Reconstruction and Development), EIB (European Investment Bank), IDB (Inter-American Development Bank), IFC (International Finance Corporation), ISDB (Islamic Development Bank). There are about twenty bi-lateral DFIs. They largely correspond to the North American and European democratic (higher GDP) nations. Australia lacks a DFI but has given its export credit agency the authority to make equity investments. Export Finance Australia publishes corporate responsibility standards that address such topics as stakeholder engagement. However, IFC investments in Australia are subject to IFC Performance Standards.

# What are the best practices for OTR recyclers that derive from these international standards?

Synthesis of the SPG yields the practices that recyclers should embrace when their work affects IPLC. They include:

- Respect for human rights.
- Respect for legitimate land and resource tenure rights.
- Inclusion and consideration of women and vulnerable groups.
- Governance framework due diligence, gap analysis, and backfilling (to offset local realities that may lack best practice regulatory mandates).
- Consideration of national policy objectives.
- Stakeholder mapping.
- Stakeholder consultation and engagement.
- Comprehensive social and environmental impact assessment.
- Impact avoidance or mitigation.
- Identification of formal and customary/informal land and resource rights.
- Negotiation of and compliance with fair and transparent agreements with affected communities.
- Payment of fair compensation and non-monetary benefits.
- Obtaining Free, Prior, and Informed Consent (FPIC).
- Establishing investment-specific grievance mechanisms.
- Ongoing monitoring and evaluation.
- Environmentally and socially responsible project close-out.

Distilled even further, these are the core practices that any recycler should embrace when interacting with IPLC:

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

The sequencing of the practices is generally in the order they are presented above. No. 1 needs to be sustained throughout any project, with an emphasis on the start because project design and impact assessment (No. 3) is informed by information gathered during early consultations. An FPIC process (No. 2) requires early contact and frequent information delivery to local communities, and No. 3's impact mitigation likely needs to be sustained throughout any project. Payments and other compensation (No. 5) may be dispersed throughout the life of the project. No. 6 needs to be established early in the planning and design process and continue through the life of the project because grievances are sure to arise throughout. No. 7's project performance and impact monitoring occurs throughout the project's life and during No. 8's close-out activities. In short, all the practices need to be planned for (if not commenced) at the very start of a project.



Responsibility for undertaking the practices rests with the recycler, although many of the activities are best performed by qualified experts with specialized expertise and experience.

**Needed expert specializations may include:**

- Stakeholder mapping and engagement specialists (including experts in interacting with Indigenous Communities and women).
- Experts able to obtain informed consent from affected communities.
- Impact assessment specialists.
- Resettlement specialists.
- Legal experts with experience in crafting and negotiating agreements between recyclers and communities.
- Dispute resolution specialists.
- Monitoring and evaluation experts.

Such experts are readily available, having provided services on many similar types of projects and investments in Australia and elsewhere. This said, international experts may sometimes be preferable because they are accustomed to providing services in regulatory environments (outside of Australia) that may lack specific best-practice mandates and that may suffer from inadequate state monitoring and compliance. In any event, the experts would undertake the work under the direction of the recycler. A recycler may find it easiest to use the services of a project manager or task leader experienced in meeting all the social and environmental practice requirements.

# How can OTR recovery landscape actors earn and maintain a social license to operate, and does it matter?

**Social license is important to recyclers 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.<sup>6</sup> It is largely a product of good or best social and community practices.**

Social license is:

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

Social license is most evident when it is eroding or does not exist because it is at this point that a business begins to see the risks, damages, and costs that loss of social license creates.

Waning social license risks and damages can include:

- General hostility toward recycler staff and management.
- Complaints and legal proceedings.
- Strikes and protests.
- Theft of equipment.
- Encroachment.
- Vandalism (fires, damage, and the like).
- Violence.

Higher-tier impacts could affect multinational companies providing OTR products within Australia, including negative publicity, reputational damage, boycotts, and declining products sales.

Public perception shapes social license, and negative perception erodes it. Important perceptions can include:

- Extent to which the recycler complies with legal and regulatory frameworks.
- Extent to which the recycler generates unmitigated social or environmental impacts.
- Degree to which employees are satisfied and extent to which this dissatisfaction is communicated to the public.
- Extent to which a recycler is seen to act contrary to the public good or local community wellbeing.
- Extent to which a recycler treats women differently than men.
- Extent to which a recycler appears to wrongly benefit from assets (like land or other natural resources) seen to have been unfairly acquired.
- In situations where government fails to deliver basic services and community development improvements, extent to which the recycler is seen as being responsible for delivering them, and the related degree to which the recycler fails to meet those expectations.
- Extent to which a recycling operation tends to prosper amid communities or individuals that are not prospering.

6. See Sustainable Business Council (2013) [New Zealand report] Social License to Operate Paper, available at [https://www.sbc.org.nz/\\_data/assets/pdf\\_file/0005/99437/Social-Licence-to-Operate-Paper.pdf](https://www.sbc.org.nz/_data/assets/pdf_file/0005/99437/Social-Licence-to-Operate-Paper.pdf)

- Extent to which authorities (traditional/customary, religious, or state) characterize a recycler as an abusive or bad neighbor or citizen.

**Recyclers that create and sustain a strong social license would tend to:**

- Operate according to best social and community practices, such as those established by international standards and principles (FPIC, for example).
- Act fairly and equitably.
- Operate transparently.
- Sustain strong and enduring communications, engagement, and consultation efforts.
- Comply with the requirements of governance frameworks.
- Treat women equally and use special efforts to promote and protect women's rights and uses of assets (such a land and other natural resources).
- Provide for fair, accessible, and responsive grievance mechanisms.
- Require that their supply chain partners embrace these behaviors.
- Have and observe internal policies related to social, economic, and environmental impacts and mitigation.
- Engage in corporate social responsibility initiatives (that could include many of the above items).
- Provide community services and development services and benefits.

With social media and increases in public access to information, the public perceptions that make-or-break social license are more apparent than ever. So erosion of social license can occur quickly, with significant impacts on recycler operations and overall sustainability. News and information can travel widely both vertically and horizontally across social structures to audiences and actors at the local, national, and global level.

# What is free, prior, and informed consent (FPIC)?

**Free, Prior, and Informed Consent (FPIC) refers to the right of a community to participate in decision-making about issues that will impact their well-being, and to give or withhold their consent to proposed projects that might affect the lands and resources they own, occupy, or otherwise use. It also often encompasses a process of consultation necessary for obtaining valid consent.**

FPIC grew out of the recognition that collective land ownership systems are common among Indigenous Communities globally, and establishes processes and standards for engaging with these communities in order to safeguard community rights to land and natural resources. FPIC was first extended to Indigenous Communities and continues to be so extended. FPIC builds on previously established standards on community consultation and goes a step further by requiring the community's consent to a given proposal rather than merely requiring consultation.

A few resources are available that provide detailed guidance to companies on FPIC steps and processes.<sup>7</sup> In this section, we focus on key issues and considerations most relevant to the prospect of voluntary collaborations with IPLC.

The FPIC standard imposes a requirement on governments and, where relevant, companies, to ensure that IPLC are adequately informed of a project's likely positive and negative impacts and can meaningfully provide their agreement free from any pressure or interference prior to the commencement a project. While rights under FPIC were originally attributed to Indigenous and tribal peoples under international law, an increasing number of businesses and international standards have adopted FPIC as a requirement for all project-affected communities, and FPIC is now a part of many corporate social responsibility (CSR) business practices. FPIC principles are increasingly being applied to consultations and negotiations with non-Indigenous communities, even where a government or company may not be required to do so under domestic or international law.

FPIC mandates that companies consult with Indigenous Peoples before a project can take place. This timing is critical to ensure that a project respects community rights – including the right to say no to a proposal. However, a company often may already have obtained rights to develop a resource before it begins working to obtain FPIC, which can obviously undermine the entire spirit and mechanics of an FPIC process. The FPIC standard further implies a continuing relationship of negotiation and consent, even after initial approval has been granted (Anaya et al, 2017). Remedial action on the part of a company – one that works towards agreed measures for remedying the past FPIC breach and establishes an expectation and process for implementing FPIC for future decisions – may be required.

7. See RESOLVE (2021) FPIC Guide, FPIC Solutions Dialogue, available at <https://fpicdialogue.org/fpic-guide/>; Food and Agriculture Organization (2014) Respecting free, prior and informed consent, available at: <http://www.fao.org/3/a-i3496e.pdf>; Business for Social Responsibility, (2012) Engaging with Free, Prior, and Informed Consent, available at: [http://www.bsr.org/reports/BSR\\_Engaging\\_With\\_FPIC.pdf](http://www.bsr.org/reports/BSR_Engaging_With_FPIC.pdf); ICMM Good Practice Guide: Indigenous Peoples and Mining ,2nd ed. available at <https://www.icmm.com/en-gb/guidance/social-performance/indigenous-peoples-mining>.

## Is FPIC relevant and is it required for OTR waste recovery?

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FPIC has been mandated or recommended in several international and national legal and policy documents specifically aimed at protecting Indigenous rights and well-being in the face of extractive projects.<sup>8</sup> In addition, FPIC is linked to Indigenous Peoples' right to self-determination, lands, and territories, and it factors into broader discussions around how the costs, benefits, risks, and responsibilities associated with project activities should be shared. While initially established in the context of extractive projects, FPIC is increasingly required by various industry and multi-stakeholder initiative standards,<sup>9</sup> and is included in screening processes to evaluate environmental, social, and governance (ESG) risks. Increasingly, a failure to obtain FPIC is considered a red flag for potential resource-intensive projects and can present issues for projects seeking to secure capital.

While the FPIC standard has a specific meaning and application under international law, as discussed above, its application is expanding: actors in resource- or land-intensive industries can increasingly expect to apply FPIC or its principles to their activities in order to ensure that their projects are both legally and socially legitimate. Because securing and maintaining a social license to operate is largely driven by the stakeholders' perceptions of a project or actor's legitimacy, understanding their respective perspectives on FPIC can help to clarify when and whether FPIC is helpful.

## Indigenous perspectives on FPIC

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Indigenous Peoples (IP) regard FPIC as a right, based on their collective right to self-determination and collective decision making. For IP, the right to FPIC derives from their rights over their lands, territories, and resources and the right to be consulted in a manner consistent with their Indigenous culture and related sovereignty. Visions about how to make decisions over natural resource extraction can also differ, and can lead to resentment and conflict even after a legally compliant consultation has concluded. The Indigenous view that, as owners of their territory, they should have ultimate decision-making authority over a proposed project can put them at odds with companies and governments, which generally hold the view that the state – as owners of the sub-surface resources – have ultimate decision-making power (Schilling-Vacaflor, 2013).

FPIC also guarantees respect for Indigenous Peoples' decision-making processes and right to accept or reject a project that will affect them. FPIC demonstrates good faith negotiation and helps to establish a foundation of mutual respect and equality. For many Indigenous Peoples, decisions about shared resources are made by consensus, wherein the various parts of a community can be included in decision making based on customary or traditional norms and processes.

## Intergovernmental and government perspectives on FPIC

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Most countries retain the ownership of mineral rights and have the right to make decisions on developing resources according to national laws. Indigenous Peoples' rights, and particularly their rights to maintain their own political, legal, economic, social, and cultural institutions, and their collective rights to lands and natural resources, are at odds with some states' view of national sovereignty and governance. Nonetheless, emerging case law makes clear that communities that self-identify as Indigenous have a right to FPIC protections and to determine how their lands and resources are used, regardless of whether a government

8. These include the UN Declaration on the Rights of Indigenous Peoples (2007), the ILO Indigenous and Tribal Peoples Convention, 1989 (No 169), the European Bank for Reconstruction and Development's Environmental and Social Policy (2008) Performance Requirement 7 on Indigenous Peoples, the Philippines' Indigenous Peoples Rights Act (1997), and the Australian Aboriginal Land Rights (Northern Territory) Act 1976, among others.

9. Including, for example, the Forest Stewardship Council, the Roundtable on Sustainable Palm Oil, and the EO100 Standard for Responsible Energy.

recognizes them as such;<sup>10</sup> elsewhere, courts have found regional human rights conventions (treaties) establish the right of IP to be consulted as a general principle of international law.<sup>11</sup>

ILO Convention 169 recognizes that Indigenous rights to their lands are fundamental to achieving the broader set of rights related to self-determination. The Convention is legally binding on the countries that have ratified it,<sup>11</sup> and imposes a duty on the state to consult IP before exploration or exploitation of sub-surface minerals and requires states to determine whether and how the proposed activity would adversely impact Indigenous Communities. The Convention also requires IP to participate in the benefits of such activities wherever possible and receive fair compensation for any damages they may sustain as a result. Further, IP should not be removed from their lands and the ILO Convention provides safeguards against such displacement,<sup>12</sup> outlining requirements for participation, obtaining consent, and compensation and restitution in the event of displacement.

## Company perspectives on FPIC

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Successful resource-intensive projects require the support of a range of interested and affected parties. Recyclers seeking this support should expect to meet IPs 'where they are' and engage in ways that are culturally appropriate and that work to ensure that community rights, interests, and capacity to engage are realized over the course of a project.

A recycler's engagement and consultation strategy will, by necessity, change according to the local community context. Each Indigenous Group differs in its internal cohesiveness, institutions and level of organization and processes, and perspectives and experience with resource-intensive projects. The effect of consultations on overall project success thus greatly depends on the specific affected group and its historical, political, economic, cultural, and ecological context (Schilling-Vacaflor, 2013).

### The Risks of Inadequate Consultation

In a number of cases, exclusion of community members from meaningful participatory engagement and consultation processes only fostered opposition to a project, ultimately resulting in the rejection of a deal altogether. For example, in the Cordon Esquel mining project in Patagonia, the government's opaque, technocratic attitude and assumption that a proposed mining project would go forward regardless of community acceptance provided common ground around which citizen groups were able to mobilize in opposition to the project. The government and company response to community concerns about public health and environmental impacts of the project was to avoid public debate; the very fact that citizens had no chance to voice their concerns led them to organize their opposition and adopt a more complex and political understanding of the project, ultimately recruiting support at the local, national, and international levels and blocking the proposed project. (Walter & Martínez Alier, 2010).

10. See, for example, African Commission on Human and Peoples' Rights, 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya (Nov. 25, 2009): <http://tiny.cc/ACHPRDecision>; African Court on Human and Peoples' Rights, African Commission On Human And Peoples' Rights v. Republic of Kenya, Application No. 006/2012, Judgment (May 26, 2017): <https://cutt.ly/8uN6sYC>.
11. In addition, the Inter-American Court of Human Rights has held that States Parties to the American Convention on Human Rights, which do not include Australia, have a duty not only to consult with Indigenous peoples but also to obtain their FPIC according to their traditions and customs, (Inter-American Court of Human Rights, Case of the Kichwa Indigenous People of Sarayaku v Ecuador, Judgment of 27 June 2012, [164].)
12. As of February 2022, these are: Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Germany, Guatemala, Honduras, Luxembourg, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, Venezuela.



## Some challenges with engagement and participation

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Past resource-intensive investments, often done without consent or done through state expropriation (without consent), often leave legacy issues in their wake. These issues can include negative community perceptions born of the belief that the community was the victim of a land grab, and that compensation or resettlement was inadequate or simply not provided. Such negative perceptions are long-lived – in some cases they persist over generations – and can make it difficult to solicit IPLC participation and to start and sustain IPLC engagement in follow on projects. That is, social license may be irreparably damaged.

Such legacy issues, along with other IPLC perspectives and desires, can complicate community expectations about new projects or ventures. In some cases, IPLC communities can have an expectation that any resource-intensive project should also address an earlier injustice, for example through compensation or other benefits. The rural and remote setting of many IPLC communities can create additional challenges: when government services are chronically lacking, IPLC may expect any project to bring community improvements, such as schools, improved roads, and public water sources.

Recyclers operating in areas with a history of resource-intensive projects should be prepared to encounter and address legacy issues arising from prior, negative community experiences with state and private actors. Where communities have had negative experiences and persistent social and environmental problems, recyclers may encounter frustration and mistrust that they will need to overcome to ensure a successful project (Schilling-Vacaflor, 2013).

## FPIC and OTR resource recovery

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As discussed above, FPIC is an emerging standard for responsible business practice: whether it is *required by law* will depend on the particular jurisdiction and details of a project or policy initiative; however, it is increasingly the case that the viability of a project that impacts IPLC hinges on whether that project or operator has secured and retained a social license to operate, of which FPIC is an important element.

States, Indigenous Peoples, and private sector entities will have varying views on the extent of consultation required or the consequences of failing to arrive at consensus in securing consent in a proposed project context. For example, Australia takes the approach that consultation should be proportionate to the potential impacts of the proposal, and the form of consultation will depend on the issues under consideration, who must be consulted, and the amount of time and resources that are available.<sup>13</sup> This means that in determining its approach to FPIC for specific OTR resource recovery efforts, a recycler must evaluate the legal framework in the state or territory of proposed operation, evaluate the potential social, environmental, and economic impacts of the proposed project, and assess historical and recent events and/or conflicts pertinent to IPLC in the proposed area and industry.

13. Australian Government. (2018). Study on free, prior, and informed consent, submission to United Nations Expert Mechanism on the Rights of Indigenous Peoples (EMRIP). See also, Office of Best Practice Regulation (2021) Guidance Note: Best Practice Consultation, <https://obpr.pmc.gov.au/resources/guidance-obpr-procedures/best-practice-consultation>.

# What are global best practices of assessing and mitigating impacts of OTR recovery on Indigenous Communities?

Waste recovery projects can impact IPLC in a variety of ways – both positive and negative. Companies should work to enhance benefits and avoid negative impacts on IPLC wherever possible. Although the overall environmental, social, or economic impact of a project cannot always be predicted or fully mitigated, there are some basic steps that can help to reduce the scale of any negative impact and enhance the likelihood that there will be positive long-term outcomes for communities.

Recyclers should identify and address a project's impact on the community, environment, and human rights. This should begin with an effort to understand communities and groups through stakeholder mapping, baseline studies, anthropological surveys, and impact assessments, as well as ongoing engagement. These steps will enable a recycler to understand the social, political and cultural context of the IPLC. Assessments, including but not limited to those undertaken as part of an Environmental and Social Impact Assessment (ESIA), should address human rights issues and impacts and support both the project proponent and affected communities over the course of negotiations for resource development or a collaborative venture. These studies should consider women's rights and the extent to which the proposed project might impact livelihoods, access to resources, and the health and wellbeing of different groups within the community, including women.

The assessment process is critical to the success and durability of a project: studies have shown that unmitigated environmental risks are a significant source of conflict between IPLC and private sector actors, resulting in costs and delays for the company. Increased involvement of IPLC in consultation and decision-making from early on in a project helps to reduce environmental and social risks.

Mitigating identified risks should be a top priority during the project design phase. Tenure assessments can help recyclers to identify situations in which IPLC claims to customary land are contested or uncertain prior to undertaking any activities on that land. Recyclers may play a role in helping to resolve such issues, such as through funding experts or specialists to work with communities to map their land rights and adjudicate (through mediation, customary, or formal legal processes) disputed land claims. Resolution of land tenure issues should be a prerequisite for continuing with a proposed project.

Seeking out and incorporating the input, perspectives, and objectives of communities through sustained participation is an important element of project design and planning. Implementation plans and strategies should be made concrete through the development of work plans with assigned responsibilities, reporting pathways, and timelines.

Intra-community conflicts not only pose a challenge to successful consultations, but in some cases rifts and divides within communities – such as Indigenous Organizations' struggles with cohesion, insufficient transparency, and contested leaderships – can be worsened by the consultation process itself. Where communities' contexts and capacity needs are not sufficiently considered, consultations can do harm to community members and can exacerbate inequalities, such as between men and women or between leaders and community members (Schilling-Vacaflor, 2013). Negotiated agreements can and should benefit all parties.

For IPLC, agreements can provide a structured, binding mechanism through which their rights and interests are documented and respected. Importantly, agreements can help to define and secure a satisfactory share of project benefits for a community, along with commitments from the project sponsor to address unanticipated impacts that arise during the life of the venture. Participatory monitoring, which actively involves IPLC, can be an important element of effective implementation.

Agreements often provide IPLC with a broad range of financial and non-financial benefits. It is important for IPLC and companies to define such benefits through consultation and negotiation to ensure that they are welcomed or needed by a particular affected community.

# What steps should a private sector actor take to ensure OTR waste and recovery agreements with Indigenous Communities are fair and effective?

**Investments in resource-intensive projects often include processes for benefit sharing and improving development outcomes for project-affected communities. These benefit-sharing arrangements are generally governed by agreements between the project proponent and IPLC. Often referred to as Community Development Agreements (CDA), these agreements may be required under domestic laws and policies, or they may be the result of voluntary negotiations between companies and affected communities.**

An increasing number of countries have incorporated requirements to include benefit sharing or other community development-focused initiatives into mining, land, and natural resources legislation and regulations.<sup>14</sup> Often, governmental and civil society actors encourage companies to work with communities to develop CDAs. Subnational politics and dynamics come in to play as well: context and local politics may lead companies to favor engagement with communities over regional or national governments.

## Types of Agreements

- Community Development Agreements
- Community Development Initiatives
- Voluntary Agreements
- Indigenous Land Use Agreements
- Partnering or Partnership Agreements
- Community Contracts
- Landowner Agreements
- Shared Responsibilities Agreements
- Community Joint Venture Agreements
- Empowerment Agreements
- Exploration Agreements (Canada)
- Impact Benefit Agreements (Canada)
- Impact Benefit Agreements (Canada)
- Social Trust Funds (Peru)
- Investment Agreements (Mongolia)
- Benefits Sharing Agreements (Chile)

These agreements, while similar, are not interchangeable: the detail, legal requirements, and scope of each can vary considerably.

Source: World Bank (2012) "Mining Community Development Agreements: Source Book," p.5

14. The Mapping Community Development Requirements project has collected, and catalogued community development requirements related to the mining sector, and features laws and agreements from over 54 countries. The website includes an interactive map and a searchable database of all laws and community development agreements, available at <https://www.iied.org/mapping-community-development-requirements-mining-sector>. In addition, the Columbia Center on Sustainable Investment's Open Community Contracts database contains community-investor or community-government contracts and agreements relating to agriculture, forestry, mining, oil and gas extraction, and other natural resource projects. See <https://opencommunitycontracts.org/>. See also International Bar Association's Fiscal Instruments Database, which provides key information and links to CDAs and other agreements for 75 extractive and other projects [http://rem-main.rem.sfu.ca/planning/IBA/IBA\\_Fiscal\\_Instruments\\_Database.pdf](http://rem-main.rem.sfu.ca/planning/IBA/IBA_Fiscal_Instruments_Database.pdf).

While several SPG offer good practices and standards for CDA<sup>15</sup>, the particular investment context, geography, community, and company will determine the best model or set of steps for a particular project. Drawing from the available literature, this section discusses leading practices and examples drawn from publicly available contracts, analysis, and other relevant information.

The engagement process itself is a key benefit of CDAs. While the process of engaging with IPLC can be a complex, multi-year investment of time and effort, it can lead to increased stakeholder capacity; improved relationships between the company and affected IPLC; and better project design through the identification of shared interests. Importantly, strong relations forged through the process can help the parties to manage change and quickly address issues before they escalate.

The CDA process should begin early in the project life cycle, during the pre-feasibility and exploration phases. This process varies with each agreement but can be seen as occurring in three stages: the pre-negotiation stage, in which the company and the IPLC establish a foundation for negotiations; the research and consultation stage, in which the company seeks to understand the context, identify affected IPLC, and establish points of contact for consultation and negotiation with IPLC; and the final stage where negotiation and endorsement of the final agreement occur.

To ensure that participation and engagement meets the standard for meaningful participation and decision making, recyclers should work together with IPLC to agree on a process through which the consultation and decision making will take place. Understanding the complexities and dynamics of local decision-making processes and structures, as well as any differences or divisions that may exist within communities, may be needed to ensure that outcomes are inclusive and representative. Drafting a Consultation Agreement (also referred to as exploration agreements, protocol agreements, communication agreements, cooperation agreements, memorandums of understanding, or relationship agreements) can be a helpful way to establish clear, shared expectations and enhance the consultation and engagement activities.

Simple and accessible processes make for more effective consultation agreements. Simple agreements are easier to draft, negotiate, understand, and implement. In many cases, several preliminary agreements may be developed for a single project, particularly where engagement and consultation periods stretch over a period of years.

**Consultation Agreements will contain provisions related to:**<sup>16</sup>

- Principles of engagement between the parties.
- Establishing expectations and a shared definition of “consultation.”<sup>17</sup>
- Sharing of information about the project, Indigenous interests, and potential impacts.
- Communication processes.
- Capacity funding (e.g., company-provided support for negotiations and legal representation).
- Employment opportunities during the due diligence and exploration stage.
- Measures to address any negative impacts identified.
- Commitments to later stage agreements.
- Timeframes for negotiation and decision-making.
- Public disclosure of the agreement.

15. A number of practical tools and guidelines have been developed to help companies navigate the process of developing agreements with communities. See, for example, ICMM Community Development Toolkit, Tool 14: Community Development Agreements, available at <https://guidance.miningwithprinciples.com/community-development-toolkit/tool-14-community-development-agreements/>.

16. Association for Mineral Exploration British Columbia (2016) Aboriginal Engagement Guidebook: A Practical and Principled Approach for Mineral Explorers.

17. Loutit, J., Mandelbaum, J. & Szoke-Burke, S. (2016) Emerging Practices in Community Development Agreements, 7(1) J. Sustainable Dev. L. & Policy 64. [https://scholarship.law.columbia.edu/sustainable\\_investment\\_staffpubs/116](https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/116).

## Stages of the agreement-making process

### Pre-Negotiation

This stage lays the groundwork for negotiations. This may include preliminary agreements, such as a memorandum of understanding (MOU) or a negotiating framework, which set out rules to govern the process for negotiating the CDA. Pre-negotiation agreements allow parties to identify and address past grievances and demonstrate the parties' willingness to resolve past issues and move forward. By formalizing the engagement and negotiation process, the agreements can help to ensure that the process is fair and equitable and that all parties are invested in and understand the process.

**Project proponents should take care to:**

- Identify the relevant parties to pre-negotiation agreement.
- Be flexible and willing to adapt to information and input resulting from the research and consultation process.

**Potential IPLC stakeholders include:**<sup>18</sup>

- IPLC having a recognized legal right to land within or adjacent to a project area.
- Other IPLC and individuals whose rights may not be formally recognized, but who nevertheless will be directly impacted by the project.
- IPLC that are not located in the vicinity of the project, but which will be impacted by 'downstream' impacts of the project (e.g., increased traffic, market impacts, etc.).

While the law may only require that companies engage with the first category, many companies voluntarily include the other categories of IPLC.

Recyclers may elect to narrowly define affected IPLC by listing the towns considered to be in the project area. For example, in its Social Responsibility Agreement for its Ahafo Gold Project in Western Ghana, Newmont opted to specify that communities were "Community towns that are physically located in the Mining Lease..." and listed the towns in the stated area in order to limit future obligations to residents of towns and settlements established after the signing of the agreement.<sup>19</sup> Agreements can also define affected IPLC to include the broader range of stakeholders, allowing for IPLC to opt in to agreements at later stages in the process. For instance, in its Socio-Economic Monitoring Agreement, the Diavik Diamonds project defines affected communities to include Canada's Aboriginal communities in the regions in and around the project area.<sup>20</sup>

An important element of the pre-negotiation framework is providing clarity as to whether and how the recycler will provide funding to assist IPLC over the course of negotiations. Such support, sometimes called "participatory funding," ensures that IPLC can meaningfully participate in the process. Funding can be used to hire experts, advisers, or legal representatives, or support costs of negotiation, capacity development, or convening community members (Loutit et al, 2016). In addition, if needed, funding can support the creation of processes or institutions for IPLC decision-making. Establishing a budget for IPLC participation can help to avoid a breakdown in relations or in the negotiation process due to budget limitations. Funding can be provided through the creation of a fund, or on a reimbursement basis.

18. *Id.*

19. Ahafo Social Responsibility Agreement between the Ahafo Mine Local Community and Newmont Ghana Gold Limited (2008), Schedule 1, Clause 1, <https://opencommunitycontracts.org/contract/the-ahafo-mine-local-community-newmont-ghana-gold-ltd-2008-social-responsibility-agreement/>.

20. Diavik Diamonds Project, Socio-Economic Monitoring Agreement between Diavik Diamond Mines Inc., the Government of the Northwest Territories, and Aboriginal signatories and parties, <https://opencommunitycontracts.org/contract/northwest-territories-and-aboriginal-peoples-diavik-diamond-mines-1999-socio-economic-monitoring-agreement/>.



## Research and consultation

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Determining which IPLC should be participants in the consultation and negotiation, ascertaining who represents those IPLC, and establishing a process by which negotiation and consultation should take place is a critical part of the CDA process. This stage includes stakeholder mapping to determine the universe of groups, institutions, and individuals likely to be affected by the project, and impact assessments, including ESIA and land tenure assessments. Capacity building – provided either by the government or project proponent – should take place during this stage to ensure that IPLC and their representative are sufficiently well-informed and supported to meaningfully participate in the negotiation.

In some cases, determining who should be party to an agreement is not obvious. Anthropological and demographic research can help companies to better understand the local context and stakeholders. Research on the cultural and structural features of the impacted IPLC will help companies to avoid and mitigate potential conflict within and between IPLC over the terms and benefits contained in the final agreement.

Ensuring that potentially marginalized groups – including women, youth, and migrants – are represented can be challenging, given that women are frequently not considered to be members of IPLC when it comes to control over and decision-making about land and natural resources.

## Negotiation and endorsement

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### *Facilitating a community's negotiating position*

A negotiating position is a tool that can help an IPLC to clearly state its priorities and interests and can serve as a starting point for negotiations. The negotiating position is not a binding offer, but rather states in non-technical terms the IPLC's priorities prior to the beginning of negotiations. The document should be informed by the research, assessments, and studies that have taken place during the pre-negotiation and research and consultation stages. Developing a negotiating position can help IPLC to reflect on their priorities and plan for negotiations and can provide a reference point against which to understand and evaluate proposals made during the negotiation process. The negotiating position is first developed amongst IPLC members (sometimes with support or facilitation from the project sponsor), and then shared with the company to commence negotiations.

### *Endorsement*

The consent of an IPLC should be determined in accord with its customary laws and practices, and the IPLC's members should establish the consent process. The IPLC and its members should specify which representative institutions are entitled to express consent on behalf of the affected IPLC. Mechanisms and procedures to verify that voluntary agreement has been sought and obtained are important to both the company's compliance with best practices and (where applicable) legal requirements. The verification is also key to supporting the company's social license to operate.

## Transparency, dissemination, and communication

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There is a growing recognition of the importance of transparency in ensuring sustainable, equitable investments in extractives, land, and other natural resources. Transparency is just as important to voluntary collaborations in follow-on ventures. While companies may be accustomed to including confidentiality clauses in their agreements, and may argue that CDAs contain commercially sensitive information,<sup>21</sup>

21. This argument is undermined by the fact that many CDAs may be extensively circulated within the private sector already, and that they do not generally contain information that would have a concrete impact on the company's competitiveness. See EITI (2021) Policy Brief: The case for contract transparency, <https://eiti.org/document/case-for-contract-transparency>.

confidentiality provisions can weaken the capacity and power of IPLC by limiting their ability to consult with experts or other stakeholders for advice and support. Disclosure of CDAs can be an important tool for supporting IPLC capacity to engage and negotiate and can help IPLC that lack experience to conceptualize and consider a proposed project and its potential complexities and impacts.

**Appropriate governance, monitoring, and review processes can help to ensure that strong CDAs are well-implemented. Companies should work to ensure that:**

- CDAs clearly and fully document agreements in a way that is accessible to IPLC.
- Responsibility for implementation is allocated early on and that performance expectations are clear.
- Implementation involves IPLC members and the company working together towards shared objectives.
- Plans, actions, and follow-up or remediation related to agreement commitments are documented
- Action plans are aligned with the CDA.
- Compliance monitoring is ongoing.

Even a seemingly robust engagement process can fail to achieve its objectives if not sustained with clear, ongoing communication and engagement with communities. For example, following the signing of the Cooperation Agreement with Surgold (in Suriname for the Merian mine), while most Pamaka (the IPLC) said that they accepted agreement as legitimate, there was limited awareness about the contents of the agreement and the opportunities and protections it offered the community. Some Pamaka noted that once the company obtained the Mineral Agreement, its engagement with community members dropped off, and that community members – particularly women and youth – were left out of engagement processes once the Negotiation Committee’s role was established (Anaya et al, 2017).

Leading practice shows that the most effective CDA implementation processes are focused on the outcome, rather than merely the process: internal and external monitoring of the outcomes of the project and its CDA can help to guide an adaptive, more effective CDA process that realizes the desired outcomes of the project. Both parties must commit to making the CDA work.

# What provisions should be included in an agreement between an Indigenous Community and a private sector actor for OTR waste and recovery?

**The contents of any agreement will depend on the context, the goals and aspirations of the parties, and what they see as fair and reasonable. Traditionally, CDAs primarily focused on financial benefits to communities.**

Increasingly, CDAs address other topics as well, such as:<sup>22</sup>

- Company support (financial and otherwise) for community projects and initiatives.
- Financial payments and disbursement arrangements.
- Capacity building.
- Community participation in decision-making processes.
- Information sharing requirements and procedures.
- Local community development objectives and programs to meet those objectives.
- Local business development and sourcing plans.
- Employment and training.
- Management and monitoring of community development programs and related funds.
- Dispute resolution and grievance mechanisms.
- Environmental, social, cultural, livelihood, and health impact management.
- Governance arrangements.
- Specific provisions related to community use of land, resources, or infrastructure within the company's project area.
- Addressing environmental, social, and economic conditions during and after the conclusion of the project, and a sustainable transition to a post-investment economy.

Agreements should also include provisions outlining the roles and responsibilities of both the recycler and the IPLC, implementation and monitoring mechanisms, required project budgets, and grievance mechanisms for resolving issues relating to the agreement's implementation. Provisions protecting all parties in the event of a change in ownership can also help to assure all parties of the durability of the agreement in the face of future uncertainty (ICMM, 2010).

The ultimate content of the CDA (or a separate longer-term operating agreement) will be determined through the process of consultation and negotiations. Even where domestic legislation or agreements (such as a mine development agreement between the company and the host government) provide a list of areas to be covered in the CDA, recyclers should anticipate and welcome legitimate negotiations with IPLC to address their unique interests and circumstances. Whatever benefits the CDA aims to provide, the agreement must establish a process for fairly distributing those benefits. Actual or perceived inequity in benefit sharing has led to conflict among IPLC members and between Indigenous Groups, impacting implementation of the CDA and jeopardizing the overall project.

The remainder of this section addresses specific topics or provisions that are typically addressed in CDAs.

22. Adapted from Bruckner, K. (2016). For a more comprehensive list of issues contained in a CDA, see Model Mining Development Agreement Project, MMDA, Annex B <https://www.mmdaproject.org/annex-b-2/>.

## Compensation

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Monetary compensation, while often required under the law, is often insufficient to ensure that affected IPLC are able to sustain or improve their livelihoods and attain an equivalent or higher standard of living as compared to prior to a voluntary collaboration. Worse, monetary compensation on its own can reinforce risks of poverty and harm communities' social and economic well-being (Loutit et al, 2016).

Often, negotiations over compensation are carried out behind closed doors, with only a few (mostly male) representatives present. Community members often lack detailed knowledge about these negotiations or their outcomes, rendering it nearly impossible for affected communities to exercise control over or access the funds that result. This can result in conflicts over compensation – particularly regarding its use and distribution. Such conflicts thrive where there is a high level of distrust and allegations of corruption and can lead to the fragmentation of community organizations and communities (Schilling-Vacaflor, 2013).

Local employment opportunities associated with the project and commitments by the project sponsor to source goods and services from local providers are benefits that help to foster IPLC development and strengthen its physical, economic, and human capital. To help minimize IPLC exposure to risk, the CDA can provide for a combination of financial and nonfinancial benefits that can help sustain the IPLC even after the project has concluded (ICMM, 2010).

**CDAs can set out the revenue sharing arrangements and can include a number of types of revenue streams in combination. Revenue sharing can take various forms:**

- Fixed payments (predictable, easy to understand, but not linked to project volume, impacts, or profitability).
- Royalties based on the volume of outputs or volume of production (not subject to commodity prices, which is good and bad).
- Revenue linked to profits.
- Equity share for the community.

For example, the Newmont Ahafo Mine Development Foundation Agreement contains multiple types of financial benefit sharing. The agreement requires the company to pay to a community foundation US\$1 for every ounce of gold from the mine sold, as well as 1 per cent of the company's net pre-tax income, and of any gains made in selling assets that total US\$100,000 or more (Loutit et al, 2016).

## Non-financial community benefits

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IPLC benefits will vary depending on the IPLC's priorities and needs, as well as on the project itself. Ideally, benefits should improve short-, medium-, and long-term opportunities and well-being of IPLC members.<sup>23</sup>

**Non-financial community benefits may take the form of:**

- Employment and training.
- Business development on behalf of community businesses.
- Infrastructure and service provision.

<sup>23</sup> For a comprehensive summary of the many different forms that financial benefits can take, see Gibson, G. & C. O'Fairchealleigh (2010) IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements.

### Engagement Good Practice Example: Sullivan Mine, Kimberly, Canada

The Sullivan Mine in Kimberly, Canada operated for almost 100 years, employing nearly 3,500 people at its peak. Teck worked to include the local community and Indigenous Peoples in planning for post-mine closure land use. The company started engaging with communities as early as the late 1960's to develop impact mitigation strategies, including career transition planning and training opportunities for employees, the formation of a multi-stakeholder committee to provide community input into closure planning, and transitioning from mining to a tourism-based

economy. Rehabilitation after mine closure included tree replanting, water collection, and water treatment system enhancements (ICMM, 2021).

The City of Kimberley is now a tourism and recreation destination, and Teck-owned lands were turned over to the city to expand the local ski hill and recreational resorts. In addition, through a collaborative partnership a community solar power plant was completed and began operating in 2015 on reclaimed land at the Sullivan site.

## Employment and training

Employment and training are among the most desirable benefits for IPLC, but, on their own, can be insufficient to meet IPLC needs. CDAs that establish a blend of benefit arrangements and mitigation measures extend the most security and stability to IPLC and their relationship with the sponsor and project. Specific targets have been shown to be more effective than general statements or commitments to local employment. Training programs and specific commitments aimed at increasing IPLC members' access to jobs and transferable skills, combined with scheduling and other considerations to accommodate traditional ways of life, have helped to address barriers to employment. Local content –using local skills and materials in constructing and maintaining the plant and support facilities needed for a project –can spur the development of other local businesses and the local economy generally.

A challenge with employment provisions is that they tend to lack enforceability – rarely having procedures or penalties for failure to meet targets – and tend to permit the company to exercise discretion in its hiring methods and decisions. Plus, where a project aligns with what is viewed as a “male dominated” industry (like scale mining), women may fail to enjoy employment opportunities.

Emerging good practices include:

- Providing clear and accessible pathways for employee career advancement.
- Providing mentoring programs and on-the-job training programs.
- Proactively working to eliminate workplace bias and discrimination.
- Prioritize local content to support the development of the skills and capabilities of local firms.
- Increasing the number of IPLC members in management positions.

Providing training programs that meet IPLC gaps can support IPLC development beyond the life of the project.

## Infrastructure and service provision

In many developing economies and rural or remote contexts, community priorities include improvements to infrastructure and services to meet community needs. Often, local governments are unable to meet local priorities. Infrastructure and services can be a part of the benefit package that is offered by project sponsors to IPLC. However, as mentioned above, there may be risks to this approach, and

clarity is important. Recyclers should consult with IPLC members to determine what specific needs they prioritize. To avoid ambiguity and future conflict, CDAs should clearly establish which project assets and infrastructure developments may be shared with or used by IPLC (or even maintained and owned by IPLC). The CDA may also establish a fund for community development or organizations that can then develop community-led infrastructure projects. To assure sustainability of these benefits, recyclers should seek to strengthen and complement existing structures and partner with existing government or community-based institutions.

## Plan for project closure and sustainability

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To be successful, a CDA must be fully implemented during the life of the project, and then should ensure that the social and economic gains in the IPLC continue after the project concludes. Effective CDAs initiate planning for project closure at the start of the project and put into place needed plans and processes during the project to support long-term positive outcomes.

Some effective approaches include:<sup>24</sup>

- Clear communication about the timetable, including the expected closure date.
- Active engagement with the IPLC on anticipating and addressing the impacts of closure.
- Supporting alternative local economies over the course of the project.
- Where feasible, supporting infrastructure improvements.
- Supporting efforts to strengthen IPLC self-governance.

Many CDAs include statements agreeing to deal with closure and rehabilitation, and some even agree to create a taskforce to deal with closure. However, most agreements fall short in that they fail to include details or work plans. As a result, projects often miss the opportunity to holistically plan for IPLC well-being over the longer term. Yet including such provisions need not be overly complicated. For example, the Tolukuma Gold Mining Project Agreement in Papua New Guinea stated that the national government would create a closure task force three years prior to mine closure and would develop and share a Conceptual Mine Closure Plan for key stakeholders to review and provide comments.<sup>25</sup> This was a simple, actionable, and effective plan that helped ensure that the mine closure objectives were implemented as intended.<sup>26</sup>

## Fund disbursement models

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There are a number of models for disbursing financial benefits from a collaborative project. These include:

- Direct payments to named individuals or groups.
- Payment to a group through its representative organization – paid into an account held solely by the group or held jointly with the government.
- Payment through an intermediary organization (often a CSO, NGO, or the government).
- Payment into a company internal fund or program managed within the company or fund set up on behalf of the IPLC.
- Payment into an external trust, fund, or foundation with the specific purpose of managing the funds.

24. Loutit, J., Mandelbaum, J. & Szoke-Burke, S. (2016) Emerging Practices in Community Development Agreements, 7(1) J. Sustainable Dev. L. & Policy 64. Available at: [https://scholarship.law.columbia.edu/sustainable\\_investment\\_staffpubs/116](https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/116).

25. Memorandum of Agreement (revised) relating to the Tolukuma Gold Mining Project between the Independent State of Papua New Guinea and the Central Provisional Government, the Woitape Local Level Government and Tolukuma Gold Mines Limited and Yulai Landowners Association Inc (2007) Art. 11, <http://ccsi.columbia.edu/files/2015/01/PNG-Tolukuma-Clayfield-Pty-Ltd-2007-Agreement.pdf>.

26. See also Newmont's Ahafo Development Foundation agreement, which provides for coordination with community members to identify and develop programs and community training for mine closure and reclamation, and includes a Closure Plan and a multistakeholder closure panel. Newmont Ghana Gold Ltd Social Responsibility Agreement - The Ahafo Mine Local Community (2008), <https://opencommunitycontracts.org/contract/the-ahafo-mine-local-community-newmont-ghana-gold-ltd-2008-social-responsibility-agreement/>.



Funds disbursement should also accommodate the needs and realities of women. Often, women are excluded from funding and revenue transactions at the local level, with male heads of household often controlling community and household financial activities. Any disbursement scheme should take this reality into consideration.

Companies and IPLC should carefully explore the pros and cons of the different models and agree on a model during negotiations; determining the disbursement model should not be left until after an agreement has been signed.

## Grievance mechanisms

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To develop a well-functioning grievance mechanism, the system and process should be transparent, legitimate, accessible, holistic, predictable, equitable, culturally appropriate and rights-compatible.<sup>27</sup>

ICMM guidance on grievances highlights four key broad principles for establishing grievance mechanisms that can successfully and appropriately resolve issues and strengthen company relations with IPLC and their individual members (ICMM, 2009).

These are:

- Ensuring that the mechanism is safely accessible to all community members.
- Establishing a mechanism early on that is based upon a transparent, predictable process.
- Working to build trust in the legitimacy of the mechanism.
- Creating an organizational structure that supports the mechanism.

Effective grievance mechanisms can provide trusted channels of communication between companies and IPLC. These mechanisms can serve as an important tool to build trust and common understanding and can ultimately strengthen community support for a project. They also can help operations identify and address issues before they grow into larger conflicts.

ICMM identifies factors that can give rise to conflict between IPLC and companies:<sup>28</sup>

- Establishing a mine without securing broad community support or obtaining FPIC.
- Inadequate engagement or decision-making processes.
- Inadequate or inequitable compensation for land.
- Inequitable distribution of benefits.
- A lack of trust due to broken promises and perceptions of inadequate benefits (including employment and local sourcing opportunities).
- Failure to realize expected employment, training, supply, or community development.
- Failure to follow through on commitments in a timely fashion.
- Environmental degradation.
- Disruption to environment, livelihoods, and quality of life
- Violation of human rights.
- Social impacts.
- Unresolved legacy or historical issues.
- Lack of respect (perceived or actual) for Indigenous customary rights.

<sup>27</sup> A number of good practice guides provide detailed guidance on establishing effective grievance processes. These include the ICMM Good Practice Guide (ICMM, 2010), the IFC's Good Practice Note on Addressing grievances from project-affected communities (IFC, 2009), and the guidance tool on Rights-compatible grievance mechanisms (Harvard Kennedy School, 2008).

<sup>28</sup> ICMM (2010) Good Practice Guide: Indigenous Peoples and Mining, 2nd ed.

# Are there research gaps in the application of standards and good or best practices?

**Research gaps clearly exist, particularly around examples of the application of good and best practices for interactions and agreements with IPLC for collaborative, voluntary projects undertaken by sponsors and IPLC.**

The gaps reflect:

- The reality that best practices may not be exhaustively applied to an investment or operation because they can be difficult and costly. This has created a barren landscape for best practices case studies.
- A failure to adequately sustain good and best practices over the longer term of an investment or sector operation. Some operators view best practices as only being needed at the start of an operation or project, or when difficulties arise that begin to create risks, liabilities, and costs. For example, consultation and engagement is sometimes undertaken only at the start of the project, and it may focus largely on telling communities what may befall them. Effective consultation and engagement are sustained throughout a project's life and should be used to solicit information from IPLC so that project design, impact assessment, negotiations, and agreements are grounded in meaningful input obtained from affected parties.
- A lack of qualified expertise in the many technical niches that best practice application can require, and the cost of maintaining this expertise over the life of an investment. Many businesses simply do not maintain staffing levels that include the needed experts and specialists on a fulltime, extended basis. Some companies are loath to spend money on consultants.
- The reality that reporting on practice application or simply on the environmental and social outcomes of an operation is not required by applicable legislation or industry standards. While some reporting may be required on objective indicators (employment of surrounding community members, or on local content achievements, for example), reporting may not be required on more nuanced situations and outcomes.
- The fact that civil society and press observers are often largely on the alert for problems or troubling scenarios, yielding case studies of poor practices. While these can be informative, they can sometimes lack the objective detail needed to draw useful conclusions and determine how things might have been done better.
- An unmet need for qualified practitioners and the resources needed to undertake the assessments that lead to good (objective, methodologically sound, and insightful) case studies (showing both good and bad practices).
- A failure to disaggregate qualitative information and quantitative data by sex, which can leave women's stories and the impacts that affect them unseen and unexamined.

**Several things can be done to fill research gaps and improve the incidence of best practice case studies and availability of useful information. These steps include:**

- Advocate for national and industry requirements that reporting reach a certain level of frequency and sophistication. Organizations such as the Extractive Industries Transparency Initiative (EITI) and Publish What You Pay (PWYP) are making progress in this regard, although participation is largely voluntary, often misses gender-differentiated information, and often focuses (necessarily) on quantitative data.

- Use of civil society organizations as collaborators in monitoring, evaluation, and reporting. The Kumacaya Initiative provides an example. Kumacaya, started in 2017, was designed to provide an independent performance/compliance verification process. It involves a network of local civil society actors at the landscape level to report on local outcomes. It can provide relatively deep monitoring if local civil society organizations are given due time and resources for the needed consultation process. The approach can also train and use local community members as agents for information collection.<sup>29</sup>
- Use of standardized approaches or work plans for conducting case studies. While this may present a risk that operators may fail to scrutinize practices in a sufficiently detailed level, standardized approaches can be useful starting points in creating an assessment approach that reflects sectoral, geographic, and social nuances.
- Incentivize academic programs that focus on Indigenous Community, environmental, and social justice and sustainability to sponsor case studies as a part of their learning and research programs. Commission such programs to undertake the assessments needed to create best practices case studies. An example might be the University of Melbourne's Social Equity Institute, and the associated Community Engagement Grants.
- Encourage foundations and other funders to support such case studies as a part of program portfolios. A number of foundations support programs aimed at environmental and social equity for Indigenous and other local communities, social justice, and environmental sustainability.

<sup>29</sup> See [www.kumacaya.org](http://www.kumacaya.org) and [www.earthworm.org](http://www.earthworm.org) for more information.

# Is there variation in good practices among sectors?

**Uptake and implementation of practices that can create collaborative, well-received, and beneficial relationships between businesses and Indigenous and other local communities can vary depending upon the sector. Each sector has characteristics that will prompt emphasis of some practices over others. In some cases, a sector creates broader, deeper impacts than other sectors, requiring that all or most of the practices be undertaken with more intensity.**

Large-scale mining, for example, has the potential for direct and significant environmental and social impacts of operations and “wing-span” impacts on surrounding areas that may exceed the impacts of other sectors. The relatively large and often expanding footprint of some mining operations can contribute to this reality. As well, the requirements for closure and restoration can demand sustained engagement and performance of contractual obligations after revenue streams have slowed. Incentives to cut costs after revenue streams have slowed may prompt best practices to fall by the wayside.

The aviation sector, with air travel, cargo, and maintenance facilities being the primary development, and with most aviation installations being located largely within static pockets in or near urban or peri-urban areas, may not carry environmental and social impacts that are equal to mining or other sectors. Plus, widespread economic and social benefits of aviation installations may offset perceived and actual impacts for those living near or regionally surrounding airports.

Large-scale agriculture may lean toward the more significant impacts born of mining, but agriculture does not typically involve the systematic destruction or conversion of the landscape to the same extent as mining. Agriculture may be a more compatible use with the land and resource uses and livelihoods of surrounding IPLC. Granted, agriculture can display significant environmental impacts (associated with the use of fertilizers and chemicals, the use and discharge of water, and changes to habitat and climate), but the overall impacts are probably less significant and may be more economically managed. As well, large-scale agriculture can also be designed to include local communities, by involving them in out-grower schemes where they contribute “cash crop” produce to the overall production scheme. Sugarcane farming is an example. Employment opportunities in scale agricultural operations may be more in alignment with traditional livelihood patterns engaged in by surrounding communities than be some other sectors.

Sector variation can be accommodated by the sensible and variable application of the best practices themselves. For example, thorough and sustained social and environmental impact evaluation and mitigation can better accommodate the wider and deeper environmental and social affects upon Indigenous and other local communities that can be created by some sectors or operations. Intensified stakeholder mapping and consultation and engagement may better accommodate larger impacted populations that reside or work closer to the project or operation. More sustained pursuit and memorialization of consent (particularly with a larger, more dispersed, or less sophisticated population of surrounding inhabitants or community members) may pay dividends in cementing the fact of consent and in establishing and maintaining social license.

Agreements and memorandums of understanding are a logical place to accommodate the variation between sectors. A few of the topics and provisions within agreements that can be tailored to accommodate sectoral variation include:

**Term of the agreement** and extending it to cover the full (and often long) period covering startup and construction through decommissioning, closure, and remediation.

**Parties to the agreement**, to include a broader pool that encompasses more of the affected parties (or their transparently and equitably nominated representatives), and perhaps including local and national government and civil society actors (sometimes to provide monitoring and evaluation of aspects of the operation, administer grievance mechanisms, provide forums for alternative dispute resolution, or to police the terms and conditions of the agreements themselves).

**Performance obligations** can be made more extensive and sophisticated to match up with more extensive or impactful sector operations.

**Opportunities or triggers to review and amend agreements** can be included to better accommodate changes or missed opportunities.

**Monitoring and evaluation requirements** should almost always be made a part of agreements, and the sophistication of indicators and reporting requirements can be shaped to reflect the complexity of the sector and the likelihood of impacts.

**Grievance mechanisms** can be included that reflect the type, likelihood, and originators of complaints, based upon the sector characteristics and the substantive areas likely to generate disputes (over employment, impacts, health and safety, economic impacts and benefits, the characteristics of surrounding communities, and other variables).

The Columbia Center on Sustainable Investment at Columbia University in New York maintains an expanding collection of contracts negotiated between local communities, investors, and/or host governments seeking to use their lands and resources. The collection, housed at [OpenCommunityContracts.org](https://opencommunitycontracts.org), is a repository of publicly available community-investor or community-government contracts and agreements relating to mining, agriculture, forestry, oil and gas extraction, and other natural resource projects. It features plain language summaries of key provisions and provides links to learn more about how each agreement was negotiated and implemented in practice.

## What are the final recommendations for making best practices real?

**This report sets out the best practices for engaging with IPLC, and makes the case that a failure to earn or maintain a social license can create burdensome risks and costs. Without social license, a project can fail by virtue of delays and costs. The previous section describes how application of the best practices necessarily translates into more detailed best-practice steps for participation, engagement, impact assessment, impact avoidance and mitigation, arriving at agreements, fielding and resolving grievances, and monitoring and evaluation. In short, detail matters.**

The process is iterative. Repetition of steps is required. Early efforts towards one step in the process often inform the later configurations of that step. For example, early and thoughtful engagement informs later engagement and all the practices and steps that follow. In fact, talking and listening to IPLC shapes follow-on engagement and all of the subsequent steps that lead up to creating and implementing a meaningful and mutually-beneficial agreement with an IPLC. The talking and listening does not stop.

Skill and experience should shape the iteration of practices and steps. Practitioners that have done it before are best equipped to perform the tasks. If inexperienced staff internal to a project sponsor are slated to do the work, they should be trained by skilled practitioners. If done in-house, the residual legacy of expertise is worth the investment, given that the best practices and implanting steps must endure for the life of the project. If inexperienced staff are tasked with the practices and steps, inefficiencies and longer implementation times must be expected if the process is to approach best practice.

Success is more likely if both the sponsor and the IPLC genuinely benefit from the project. While the sponsor knows from the start of the benefits it seeks, the IPLC will need help in defining what it wants. Talking and listening are the path to helping an IPLC see and ask for what it needs to meaningfully benefit in both the near- and long-term. Early IPLC benefits may be the capacity to better participate in articulating later benefits. Later benefits may evolve over the life of the project, and this should not be seen as manipulative gaming on the part of the IPLC. On a longer-term project, IPLC evolution in its sophistication and desires should be seen as both a reality and a benefit.

One final recommendation: IPLC women require special focus because they can be most easily harmed by projects that affect the resources that sustain their livelihoods. Plus, they are the least likely to benefit from projects because their needs and desires often remain unseen. One approach to making sure that women are seen, heard, and accommodated is to start with women. Men and other community members are seldom slighted when women are the first to be consulted and practices and steps are shaped to meet women's needs.

# Appendix:

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## Case Studies and Examples of Good Practice

### Case Study:

#### Frieda River Project, Papua New Guinea<sup>30</sup>

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The Frieda River Project in Papua New Guinea is a large-scale mining and infrastructure project undertaken by PanAust, an Australian-registered mining company owned by the Chinese government and part of state-owned Guangdong Rising Assets Management. Four interdependent projects across the West Sepik and East Sepik Provinces comprise the Frieda River project, including an international maritime port, public roads, a regional airport, and telecommunications services, which would be developed by third parties. The proposed 16,000-hectare mine would be built in one of the most seismically active regions in the world; the accompanying dam would store 1,500 megatonnes of waste. In its feasibility study, PanAust identified that resettlement of communities in the Project area would be required because of the mine, dam, impoundments, or other facilities that make up the hydro-electric dam built as part of accompanying projects (See Frieda River Ltd., Environmental Impact Statement (Nov. 2018), available at <https://friedariver.com/eis/>).

According to PanAust, the company has engaged in “extensive and ongoing engagement ... over several decades” with those affected by the mine and has held information sessions in nearly 140 villages attended by more than 18,000 people (Togiba, 2021). In its community engagement, the company has paid particular attention to women community members. In its Community Leaders Forum (CLF) and outreach efforts by its community relations team, PanAust’s work demonstrates leading practices for ensuring gender integrated community engagement.

The Community Leaders Forums were established in the area prior to PanAust’s arrival and serves as a conduit for information between the company and the community. When it began engaging with the CLFs, the company noticed no women were participants; based on its experience in other contexts, the company knew that including women was essential to the success of its engagement efforts. After initial reluctance on the part of male CLF members, they eventually agreed to include women. As a result, there are seven women participants in the CLF (out of 21).

The PanAust community relations teams are responsible for building trusting relationships between the company and the affected communities, as well as facilitating basic community services and support. The team realized that the success of the company’s gender integration aims would require the buy-in of male community members. The team worked to demonstrate their interest and commitment in working with women by distributing information booklets to women, refusing to begin public meetings until women were present, and speaking to women in the community who did not attend meetings while men were watching to convey that the company valued women’s perspectives.

In spite of these positive efforts, affected communities are now protesting the project, alleging in a human rights complaint filed with the Australian government that PanAust failed to obtain the free, prior, and informed consent of the landowners, and that the mine poses serious risks for the communities and the environment in the project area (Togiba, 2021). While the company is not formally required to halt its development of the project at this time, these recent developments indicate the challenges of developing a large-scale project affecting a diverse range of IPLC, and the importance of securing a social license to operate that can endure over the long term.

30. Adapted from Scalise, E. (2019) Papua New Guinea: Seeking Gender Equity in Distribution of Mining Benefits to Communities. One of three Women, Land, and Mining Case Studies.



## Case Study:

### Red Dog Mine Operating Agreement<sup>31</sup>

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Red Dog was developed in 1982 under an innovative operating agreement with NANA Regional Corporation, a Regional Alaska Native Corporation owned by the Iñupiat people of Northwest Alaska. The mine has been internationally recognized as a model for environmentally and socially responsible resource development. The operating agreement granted Teck exclusive rights to build and operate the mine and to market its metal production in exchange for royalties from production for NANA. The development agreement also included provisions to bring economic opportunity to the region and protect subsistence, giving the native corporation a management role in the mining operations and establishing shareholder hire preferences, shareholder training and promotion, and stipulating a preference for contracting to local (native-owned) companies.

The collaborative management structure was accomplished largely through the formation of a number of committees, including a Subsistence Advisory Committee (providing direction on environmental and subsistence matters) and an Employment Advisory Committee (identifying opportunities to work towards the goal of hiring 100% of mine employees from the NANA community).

The Employment Advisory Committee meets regularly discuss and develop plans for improved hiring practices, workforce development, workforce retention and workplace satisfaction. One study evaluating the long-term benefits derived from the negotiated management and local hire provisions in found that company engagement did result in lasting and significant gains to local residents. However, the community benefits accounted for a relatively modest share of total employment and earnings generated by the mine.

## Good Practice Example:

### Partnerships to support conservation and sustainability

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Anglo American proposed opening the Gamsberg Zinc Project, a large open pit mine, in Bushmanland in South Africa. Detailed assessments of biodiversity showed that the area was the single most important site for biodiversity conservation in the region; environmental organizations were concerned that the overall Environmental Impact Assessment was insufficient and that proposed mitigation measures were inadequate. Following extensive engagement, an agreement was reached to establish a partnership project between conservation NGOs, the mining company, and local communities to establish a multi-owned protected area. The protected area will achieve conservation targets for biodiversity, while the partnership will develop local conservation management capacity through training of local community members as conservators within the project management team.

The collaboration among formerly opposed interests has made possible systematic conservation planning to determine the impacts of the Gamsberg mine, suggest meaningful mitigating measures, build credibility of biodiversity goals, and provide a way for the mining sector to contribute that adds directly to efforts to meet biodiversity conservation targets (ICMM, 2006).

31. Case study adapted from Berman et al (2020) Long-term benefits to Indigenous communities of extractive industry partnerships: Evaluating the Red Dog Mine. Resources Policy 66 (2020).

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# Annex 1:

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## Standards and Best Practices in the Australian Context

The international standards and best practices described in this document are just that – international. They have been promulgated by international bodies, lenders, NGOs, and industry groups. An assessment of their suitability for application in Australia by OTR recyclers would likely reflect these considerations:

- Extent to which the international standards and best practices have already been applied in Australia by domestic entities, multinational corporations, DFI borrowers, or other project sponsors.
- Extent to which the Australian government has endorsed or approved the standards or best practices.
- Extent to which the standards and best practices mesh or conflict with existing Australian national, state, and territorial laws and regulations.
- Extent to which gaps exist between Australia’s governance framework and the international standards and practices.

The types of experts needed to perform an assessment would probably include legal experts; specialists with exposure to and familiarity with the international standards and practices; and specialists in application of the practices on the ground in places that require them or that have existing governance frameworks that fall short of requiring them. Expertise in industrial/commercial waste disposal and recycling would be useful as well.

