

Submission for Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia

May 2022

Background

HESTA welcomes the opportunity to make a submission to this Inquiry.

HESTA is an industry superannuation fund dedicated to meet the specific needs of employees working in the health and community services sector. HESTA manages \$68 billion of assets and 900,000 members and was the first industry super fund to launch a Reconciliation Action Plan (RAP). We take our obligations to advance the ambitions of reconciliation in this country seriously.

HESTA's connection and interest to this Inquiry is two-fold:

- i) As a superannuation fund with both First Nations members and members who have dedicated their lives to advancing the aims of equality and reconciliation in this country through their work.
- ii) As an investor seeking to maximise long-term financial outcomes for our members.

Introduction

Our superannuation system was intended to benefit all Australians; however, the systemic disadvantage faced by many Aboriginal and Torres Strait Islander peoples during their working lives means that they also face increased financial insecurity in retirement. HESTA actively develops and implements strategies to try and address a range of issues that Aboriginal and Torres Strait Islander peoples face in relation to their super.

As long-term investors, we believe that strong and respectful stakeholder relationships are essential to realising long-term company value. The destruction of significant cultural heritage at Juukan Gorge by Rio Tinto, the findings of the independent panel review into Woolworths' proposed Dan Murphy's development in Darwin and the ACCC's findings against Telstra for unconscionable sales to Indigenous consumers, underscore the risks and potential value implications for investors when First Peoples rights are not upheld.

These rights are most clearly articulated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The Declaration, which was the result of more than two decades of negotiations between governments and First Peoples representatives, was endorsed by Australia in 2009.¹ It establishes universally applicable minimum standards for the survival, dignity, wellbeing, and rights of the world's First Peoples.

¹ Office of the High Commissioner for Human Rights, UN Declaration on the Rights of Indigenous Peoples – Background & Summary <<https://www.ohchr.org/en/indigenous-peoples/un-declaration-rights-indigenous-peoples>>

We recognise that the application of the rights articulated in the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) in Australia will lead to both improved long-term social and financial outcomes for Aboriginal and Torres Strait Islander people and improved long-term financial outcomes for investors.

This submission:

- i) Provides the Committee a summary of HESTA's experience of community and stakeholder efforts to support the application of UNDRIP principles in Australia. We suggest in the absence of national standards that align with UNDRIP principles, these decentralised stakeholder efforts can only take Australia so far (Terms of Reference: Part H).
- ii) Based on this experience, we contend that there is potential to enact UNDRIP in Australian legislation and outline supporting reasons (Terms of Reference: Part B).

In addition, HESTA would also like to note our support for the submissions made to this Inquiry by the Australian Council of Superannuation Investors (**ACSI**) and Responsible Investment Association Australasia (**RIAA**).

1. Community and stakeholder efforts to ensure the application of UNDRIP principles in Australia

The link between First Peoples' rights and investment outcomes has been a key focus for HESTA since the destruction of significant cultural heritage at Juukan Gorge by investee company, Rio Tinto. Over this time, HESTA has observed a considerable number of examples of community and stakeholder efforts to apply UNDRIP principles in Australia. We believe some of these are particularly relevant for this Inquiry and they are highlighted below:

Australian First Nations peak bodies and communities

Australian First Nations organisations, leaders and communities have worked tirelessly for the application of UNDRIP principles in Australia.

To feature one specific and Inquiry-relevant example of these efforts, we highlight the September 2020 publication of '*Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australian and the Best Practice Standards in Indigenous cultural heritage management and legislation*' (**Dhawura Ngilan**).² This document was developed by the Heritage Chairs and Officials of Australia and New Zealand and has been endorsed by the Chairs of Australia's national, state and territory Indigenous heritage bodies, with support from peak bodies representing every major land council and native title representative body in Australia.

This document recognises that the Declaration is "not a comprehensive code of model legislation" and lays out how to operationalise the UNDRIP principles into cultural heritage legislation.³ The best practice standards are a culmination of substantial

² Heritage Chairs of Australia and New Zealand, '*Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation*' <<https://www.awe.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>>.

³ Ibid, p.32.

community effort and represent the clearest path forward for the application of UNDRIP principles in Australian cultural heritage legislation.

Australian investment sector

In the investment sector, there is high-level support for the application of the principles of UNDRIP at investee companies to mitigate human rights-related risks at company operations.

For example, HESTA's Statement of Working with Indigenous Communities published in 2020 outlines an expectation that: "Robust governance arrangements should exist to ensure [the UNDRIP] principles are properly embedded in the operational areas of the organization."⁴

Similarly, the ACSI's policy on company engagement with First Peoples states: "Companies should establish policies that commit the company to respect First Nations peoples' rights and cultural heritage, in line with international standards, as set out in the UN Declaration on the Rights of Indigenous Peoples."⁵

These expectation documents form the basis of the ongoing stewardship work of HESTA and ACSI with Australian companies on the topic of First Peoples rights and cultural heritage management.

Australian companies and industry peak bodies

Domestically, several peak industry bodies publicly support the principles of UNDRIP in Australia or have sought to provide guidance to member organisations on applying the principles. For example, in November 2020, the Global Compact Network Australia (**GCNA**) together with KPMG and the University of Technology Sydney published a business guide to implementing UNDRIP.⁶

In HESTA's stewardship work with Australian companies in the resource sector, we have seen some examples of companies earnestly trying to apply UNDRIP principles in their operations. Examples of this include:

- i) Affirmation of rights clauses in agreements
- ii) Culturally appropriate dispute resolution mechanisms
- iii) Recognition of intangible heritage in cultural heritage management processes

Collaboration between First Nations, industry and investor communities

One constructive outcome emerging from the Juukan Gorge tragedy is collaboration between First Nations, business, and investor communities.

A key initiative that is particularly relevant for this Inquiry, is the recently announced *Dhawura Ngilan Business and Investor Initiative*. This initiative is a landmark initiative that brings together First Nations with business and investor communities, with the

⁴ HESTA Statement on Working with Indigenous Communities, August 2020, https://www.hesta.com.au/content/dam/hesta/Documents/HESTA_Working_with_Indigenous_Communities_Statement.pdf.

⁵ ACSI Policy on Company Engagement with First Nations People, December 2021, < <https://acsi.org.au/wp-content/uploads/2021/12/ACSI-Policy-on-Company-Engagement-with-First-Nations-People.Dec21.pdf>>.

⁶ The Australian Business Guide to Implementing the United Nations Declaration on the Rights of Indigenous Peoples, November 2020, https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People_FINAL.pdf.

explicit intent of translating the *Dhawura Ngilan* Vision into best practice standards for businesses and investors. These standards will be underpinned by UNDRIP principles.

2. Potential to enact UNDRIP principles in Australian legislation

Community and stakeholder efforts alone can only support the application of UNDRIP principles to a certain point. Investor reliance on these stakeholder efforts results in opaque assessments of the true level of human rights-based risk at companies and within portfolios.

Without state and federal legislation that aligns to UNDRIP, investors face ongoing uncertainty about this level of risk. The destruction of cultural heritage at Juukan Gorge shows this is true, even in the case where standards outlined in company policies strive for a standard higher than the legal minimum. Although we expect companies to recognise relying on legal minimum standards may not be adequate and therefore to make appropriate decisions to safeguard and enhance the value of the company over the long-term, we believe it would be less costly and easier for all parties if this gap did not exist.

Government support of community and stakeholder efforts to ensure the application of UNDRIP through the translation of these principles into legislation will create alignment for corporations and investors who already publicly support UNDRIP principles in their policies. It will also send appropriate signals to those that do not.

If we accept that alignment of legislation to UNDRIP principles will improve investors' capacity to assess human rights-based risk, then the natural question is whether it is possible to enact UNDRIP principles in Australian state and federal legislation.

We believe there is potential to enact UNDRIP in Australia for two reasons:

- i) There is already some Australian state-based legislation that recognises the principles outlined in UNDRIP. Examples include Victoria's Charter of Human Rights and Responsibilities (2006) and Queensland's Human Rights Act (2019). If this can be achieved at a state level in legislation, then it is reasonable to believe the principles can be applied at a national level.
- ii) Dhawura Ngilan sets out in detail, how to operationalise UNDRIP principles in cultural heritage legislation. While we recognise this is a very specific area of legislation, it is reasonable to believe that with the right co-design processes, a similar process could be undertaken to assess how to UNDRIP principles could be applied across a broader range of legislation.