

Reimagining ESG: Protecting Indigenous culture in and beyond the boardroom after *Juukan Gorge*

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“Aboriginal and Torres Strait Islander peoples have lived on the land and seas around the Australian continent for more than 60,000 years. They are the First Peoples. The rich languages, cultures and traditions of Aboriginal and Torres Strait Islander peoples represent the world’s oldest continuous cultural heritage. This unique legacy is recognised internationally and is one of the things that sets Australia apart from the rest of the world.”

Referendum Council, *Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, 2016, p 1.

Introduction

The recently elected Federal Labor government has committed to implementing the *Uluru Statement from the Heart* (Uluru Statement) and to a referendum to amend the Australian Constitution in support of an Indigenous Voice to Parliament. The Uluru Statement is the culmination of many years of consultation and collaboration between and with Indigenous communities in the pursuit of recognition and a voice at national decision-making level. There is a clear shift in the landscape at a political, legal and moral level, heightening the importance of Indigenous rights. Corporate citizens in Australia will need to turn collective minds to this to think beyond compliance to a nuanced environmental, social and governance (ESG) framework when considering Indigenous issues, including impacts on cultural heritage in many sectors.

This article examines the *Juukan Gorge* case study and subsequent response to highlight the “S” in ESG and its interrelationship with its counterpart. The international fallout impacting global mining company Rio Tinto’s governance and operations, following its destruction of 46,000-year-old caves, rock art and cultural heritage objects at the caves at *Juukan Gorge* in Western Australia in 2020, underlines the significance to be given to protection of Indigenous cultural heritage. Organisations whose operations impact on any Indigenous cultural heritage will be cognisant of that outlook. An

examination of the connection of the “social” in ESG with environmental risk demonstrates the need for a holistic view, incorporating Indigenous culture and heritage as an important factor in management, investment, and value. This article is divided into three parts. It first outlines the meaning of ESG. Secondly, it analyses the *Juukan Gorge* case study in the context of ESG. Finally, it argues that the “S” in ESG is and should be integrated with environmental risks when evaluating impacts on Indigenous cultural heritage.

The meaning of ESG: conscience beyond compliance

ESG has emerged and evolved from corporate social responsibility (CSR)¹ and the “triple bottom line” accounting concept of integrating environmental, social, and financial values in place of one-dimensional profit considerations.² Myriad ESG obligations are now imposed on corporations through the Corporations Act 2001, in particular as directors’ duties³ or as relating to disclosures for financial products represented as being “sustainability products.”⁴ In Australia, practical and policy guidance is provided by regulatory bodies in Australia, with international standards including the *United Nations Global Compact*, the *United Nations Environment Programme Finance Initiative* through the *Principles for Responsible Investment*, the *Task Force on Climate Related Risk Disclosures* and the *United Nations Sustainable Development Goals*⁵ implemented by various organisations. Globally there is now a proliferation of relevant standards and guidelines adopted in multiple jurisdictions that apply to multiple industry sectors and corporations.

The “E” in ESG has been in the spotlight, chiefly due to the acceptance of the science of climate change and following on from the *Paris Agreement Under the United Nations Framework Convention on Climate Change* and the *United Nations Climate Change Conference* (COP 26) in Glasgow in the context of increasing environmental pressures. Breach of directors’ duties can, and has, lead to litigation and other consequences

relating to climate change and environmental risks, further drawing attention to the environmental component of ESG.⁶ Much guidance from regulating authorities — including the Australian Prudential Regulation Authority (APRA), Australian Securities and Investments Commission (ASIC), the Australian Stock Exchange (ASX) — has centred around reducing emissions, particularly from resource companies, and linking climate change risks to the value chain.⁷

The “S” in ESG has been explored less than its counterpart in this regard. This may be because it is sometimes difficult⁸ to know how to measure some social risks, though as a precursor to ESG, CSR has transformed social policy into “positive legal obligations for large companies with complex supply chains”, for example, through legal and policy mechanisms to curtail modern slavery.⁹ The “S” typically refers to social factors: modern slavery in manufacturing and supply chains, illustrating the interaction between human rights, labour and corporations; including labour standards, health and safety, diversity and inclusion and pay equity.¹⁰ It has traditionally been closely associated with and understood as human rights.¹¹ Human rights norms are generally applied in Australia despite not implementing a national Bill of Rights, leaving that task to Victoria,¹² Queensland¹³ and the ACT.¹⁴ The introduction of international models such as the *Guiding Principles on Business and Human Rights*¹⁵ has developed a framework of duties and responsibilities for business to follow globally, though legal sanctions do not follow. The international framework of human rights law connects to the right to protect Indigenous cultural heritage, for example through the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP).¹⁶

The “S” can also be referred to as “sustainability”, though it is generally considered as separate to environmental issues. For example, in 2017, ASIC issued Report 512 noting that a breach of s 180 could occur where a director fails to adequately consider, respond to and report environmental, particularly climate change, risks.¹⁷ Report 512 also refers to “other sustainability risks” without elucidating further but this arguably could pertain to social matters necessary to ensure sustainability, and more recently in Information Sheet 271 issued in June 2022 on “sustainability-related products”, where “sustainability” refers to environmental concerns rather than through reference to, for example, the *United Nations Sustainable Development Goals* and the concept of “ecologically sustainable development” incorporating social concerns such as intergenerational equity, and potentially, cultural heritage impacts.¹⁸ The question is, can a “sustainability-related product” that may impact cultural heritage be open to a claim for misleading or deceptive conduct, or for failure to disclose appropriate

impact, particularly where operations are in resources or land-based industries, and environmental issues interact with, for example, native title and cultural heritage? In the case of cultural heritage in particular, the separation between the environmental and the social within ESG presents complexities, as was highlighted in the case of *Juukan Gorge*, and presents an argument for integrating the concepts in particular circumstances.

Rio Tinto and the consequences of *Juukan Gorge*

In May 2020, Rio Tinto carried out a series of blasts in the Pilbara region, Western Australia to extend its Brockman 4 iron ore mine.¹⁹ The blasts destroyed rock shelters known as Juukan 1 and Juukan 2; the rock shelters contained “thousands of artefacts, including grinding stones, rock seats, a blade quarry and flaked stone materials, and remains of a belt of human hair” linked to the ancestors of the Puutu Kunti Kurrama People and Pinikura People (PKKP), native title owners of land on which the mining was carried out.²⁰ Scrutiny of the governance processes of Rio Tinto leading up to the blasts followed, investigations into the company and a Commonwealth Inquiry both culminated in reports condemning the destruction of the 46,000-year-old caves. Two board members of Rio Tinto, being the chairman and chief executive officer, voluntarily stood aside and the company made undertakings to repair the relationship with the PKKP and to follow the recommendations of the Parliamentary Inquiry to not carry out works near Juukan Gorge.²¹ Internationally, shareholders exercised voting rights to oppose a proposed executive remuneration package, and more senior executives announced resignations linked to the events.²²

The carrying out of the blasts was legal,²³ and remains “legal” even with a recently concluded review of cultural heritage laws in WA, which had commenced before *Juukan Gorge*,²⁴ authorised by the Minister pursuant to then s 18 of the Aboriginal Heritage Act 1972 (WA).²⁵ The legality of the action raises significant questions regarding moral obligations (the “conscience” of corporate citizenry) and how that interacts with an ESG framework. Other than the consequences for its decision makers and senior executives, Rio Tinto’s predominantly positive relationship with the Indigenous community and its social licence to operate was arguably impacted and, in a bid to reinstate its reputation as a leader in corporate social responsibility, it is re-building trust through agreement making, giving the PKKP the right to veto mining activities and to co-manage land.²⁶ It remains to be seen whether this will achieve the outcomes of both parties.

The events at *Juukan Gorge* and the actions of Rio Tinto have set an important litmus test for corporations navigating ESG and cultural heritage impacts. That is, just because an action is “legal”, is it morally sanctioned? The challenge is to incorporate this question into corporate decision making, particularly where corporations carry out operations that require Indigenous engagement, with protection of cultural heritage as key to good corporate governance. Further, in light of recent climate change litigation developments and ASIC’s guidance on greenwashing, the morality question interacts with whether an action will be legal, for example, under the Corporations Act, and subject to legal action. This has not yet been considered in more detail, nor has it been the subject of litigation pursuant to the Corporations Act — if, indeed, it could be — in relation to protection of cultural heritage. The Chair of the Parliamentary Inquiry Committee, the honourable Warren Entsch MP, challenged that “corporate Australia can no longer ignore the link between its social licence to operate and responsible engagement with Indigenous Australia.”²⁷ This is a clear marker for corporations to see Indigenous engagement and protection of cultural heritage as core to a holistic ESG approach.

Integrating the “social” and “environmental” to protect Indigenous cultural heritage

The conceptual distinction between the “E” and the “S” in ESG threads through environmental and cultural heritage laws across Australia: different jurisdictions deal with the issue differently. At Commonwealth level, the Environmental Protection and Biodiversity Conservation Act 1999, the primary legislation responsible for environmental regulation, links briefly into Indigenous consultation – supported by policy documents²⁸ — but does not go further, a fact that is noted in the Samuel Review delivered in October 2020 and not yet acted upon.²⁹ In NSW, cultural heritage protections are addressed in the National Parks and Wildlife Act 1974, predominantly otherwise environmental legislation, whereas in Victoria cultural heritage is protected under standalone legislation, the Aboriginal Heritage Act 2006, as are protections in Western Australia where *Juukan Gorge* took place.

The recently released *State of the Environment Report 2021* makes the case for linking the environment with the social, including highlighting impacts of poor environmental health on human health as part of caring for Country.³⁰ Country is a holistic concept that encompasses land and relationships through sacred or spiritual connections with it, and this relationship can then translate into “traditional ecological knowledge” devel-

oped and held by Indigenous communities. The concept of “Country” is summarised in *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander Heritage in Australia*³¹ as:

... a living connection between Aboriginal and Torres Strait Islander people today. Australia’s landscape, waters, and seas, collectively referred to as ‘country’, are alive with a profusion of heritage places. Imbued with the essence of ancestral beings that created them, it is through these places that family descent and kinship connections flow. It is this connection that gives owners’ rights, responsibilities, and duties to country.³²

This connection has been recognised in numerous cases, most notably in *Mabo v Queensland (No 2)*³³ and more recently in the *Timber Creek* case,³⁴ and yet the interaction between environmental, cultural, and social relationships remains persistently either separate, absent or nascent³⁵ within Australian ESG literature relating to Indigenous cultural heritage. Shareholder activism on climate change has predominantly been focused on environmental laws such as climate change, biodiversity and pollution impacts, and financial risks, rather than how those risks might be mitigated by engagement with Indigenous communities in the case of cultural heritage protection, and more broadly through links with the social impacts of climate change. Recently the “Australian climate change case” *Pabai Pabai v the Commonwealth*³⁶ was filed with the Federal Court of Australia in March 2022 and links climate change risks with living culture. The *Pabai Pabai* case is a claim made by two Torres Strait Islander people of the Gudamalulgal Nation, one residing on Boigu Island and the other claimant on Saibai Island. The claimants are suing the Commonwealth for impacts of climate change including greenhouse gas emissions impacting small and low-lying islands, which are linked to an impact on culture and heritage.³⁷

The Final Report of the Inquiry into *Juukan Gorge* considered the inadequacy of existing legislation such as the outdated Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIHP), which only provides for declarations or emergency declarations at the discretion of the Minister, and remedies on limited judicial review grounds — the impact on cultural heritage has usually already occurred — demonstrating again that the “legality” of an action, or the existing legal framework may not go sufficiently far enough to cover ESG risks. Ongoing work in improving these laws and policies in support is likely to gather pace.³⁸ Therefore the link between cultural connection with land, the environment and climate change risks is growing in importance. This further highlights the need for corporations to think more holistically about ESG —

integrating the environment with the social — to ensure good corporate governance and the implementation of “best practice” beyond mere compliance.

Conclusion

This paper first reviewed the international policy and legal understanding of ESG, and particularly the “S” in ESG. It then considered the *Juukan Gorge* case study to demonstrate the consequences of a moral, if not a legal, breach of corporate social responsibility and governance. Finally, it argued that to effectively assess ESG risks, corporations need to consider ESG holistically and to integrate an understanding of both environmental and social risks, particularly when assessing Indigenous cultural heritage impacts. The Final Report on *Juukan Gorge* noted that “no state or territory legislative or policy framework is adequately protecting the interests and heritage of Aboriginal and Torres Strait Islander peoples.”³⁹ ESG can guide corporations to avoid the consequences witnessed at *Juukan Gorge*, and to act as good corporate citizens meeting the standard called for in the emerging political and legal landscape in Australia. In the context of the *Uluru Statement* and more recently the introduction of climate change legislation to Federal Parliament,⁴⁰ there is a fast-emerging landscape for business organisations to integrate the “social” with the “environmental”, particularly when impact on invaluable cultural heritage is at risk.

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Clara is a senior environment and planning lawyer specialising in Aboriginal cultural heritage, environmental law and cultural planning. In 2021 she led delivery of a research paper on cultural heritage laws to assist the Commonwealth Parliamentary Inquiry into the destruction of 46,000-year-old caves at Juukan Gorge for its final report “A Way Forward”. Clara holds a Master of Administrative Law and Policy from the University of Sydney, qualifications with honours in Law and Environmental Management, for which she completed a thesis on the construction of a road through the Tarkine forest in Tasmania and its impacts on Indigenous communities, from Macquarie University and a Graduate Certificate in Arts and Cultural Management from Deakin University. She was tipstaff to his Honour Justice M Craig of the Land and Environment Court of NSW. With thanks to Jodie Wauchope and Genevieve MacDermott, for guidance and input. This paper was written on the land of the Gadigal people and respects are paid to its past, present and

future Indigenous custodians. The term “Indigenous” or “Indigenous people” is used throughout this article. These terms are used to refer to Aboriginal and Torres Strait Islander people, Indigenous Australians, and First Nations people recognising their may be preferences and geographical complexities relating to these references.

Footnotes

1. R Gilbert “The long and winding road to corporate social responsibility” (2006) 5(6/7) *FSN* 87, with historical examples of CSR being covered in a resource known as the 1995 “Blue Book” prepared by the then Investment and Financial Services Association.
2. B Horrigan “Teaching and integrating recent developments in corporate law, theory and practice” (2001) 13 *Aust J of Corp Law* 182; J Elkington, *Cannibals with forks: The triple bottom line of 21st century business*, Capstone, Oxford, 1998 referred to in C Hackett “Accountability for responsibility: An assessment of the transnational capitalist class’ role in driving a global CSR agenda” (2012) 27 *Aust Jnl of Corp Law* 188; J Elkington “25 Years Ago I Coined the Phrase ‘Triple Bottom Line.’ Here’s Why It’s Time to Rethink It.” in *Harvard Business Review* 25 June 2018, online at <https://hbr.org/2018/06/25-years-ago-i-coined-the-phrase-triple-bottom-line-heres-why-im-giving-up-on-it>.
3. Section 180 Corporations Act 2001.
4. Sections 1041E, 1041G and 1041H of the Corporations Act 2001.
5. See the UN Sustainable Development Goals incorporating social concerns available at <https://sdgs.un.org/goals>.
6. For example, *McVeigh v Retail Employees Superannuation Pty Ltd* [2019] FCA 14; BC201900144 (costs following settlement).
7. G North “Corporate management and communication of environmental and social risks in Australia: Pressures are mounting” (2018) 33 *Aust Jnl of Corp Law* 227.
8. R Gilbert “The long and winding road to corporate social responsibility” (2006) 5(6/7) *FSN* 87.
9. Above n 6.
10. J Barrett “*Human Rights and the Corporation in the 21st Century; A Humanist-Concession Perspective* (2021) 37 *Aust Jnl of Corp Law* 29; B Waas “The ‘S’ in ESG and international labour standards” (2021) 18 *International Journal of Disclosure and Governance* 403–10.
11. J Ruggie and E Middleton, “Money, Millennials and Human Rights: Sustaining ‘Sustainable Investing’” (Working Paper No 2018-01, Mossavar-Rahmani Center for Business & Government, Harvard Kennedy School, 2018) accessed 7 October 22 at <https://doi.org/10.1111/1758-5899.12645>; J Barrett, above n 6.
12. Victorian Charter of Human Rights and Responsibilities Act 2006.
13. Human Rights Act 2019 (Qld).
14. Human Rights Act 2004 (ACT).

38. See, for example, the NSW Draft Framework on Connecting with Country by the NSW Government Architect available at www.governmentarchitect.nsw.gov.au/projects/designing-with-country.
39. Parliament of the Commonwealth of Australia, Joint Standing Committee on Northern Australia (October 2021) “A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge”, at 6.
40. *Climate Change Bill 2022* available at www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6885