

Superannuation Fund Responses to Human Rights Complaints Report

Version dated 26 October 2023



Photo by Rebecca Parker

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This report was prepared on behalf of:

PIRRAWAYINGI (MARIUS) PURUNTATAMERI

Munupi Senior Man, Mayor of the Tiwi Islands, Traditional Owner and senior Elder of the Munupi clan of the Tiwi Islands

PAULINA JEDDA PURUNTATAMERI

Tiwi Woman from the Munupi clan, a freshwater woman, and an Elder in her community

CAROL MARIA PURUNTATAMERI

Munupi Senior Woman, Traditional Owner and Elder of the Munupi clan of the Tiwi Islands

DENNIS MURPHY TIPAKALIPPA

Munupi Senior Law Man, Traditional Owner and leader of the Munupi clan of the Tiwi Islands

THERESE WOKAI BOURKE

Regional Councillor, leader of the Malawu clan of the Tiwi Islands

SIMON MUNKARA

Member of the Jikilaruwu clan of the Tiwi Islands

TIBBY QUALL

Larrakia Elder and Traditional Owner

KARRA KINCHELA

Gomeri/Gamilaraay Traditional Owner

MIAH WRIGHT

Gomeri/Gamilaraay Traditional Owner

OCTOBER 2023

Prepared by Equity Generation Lawyers

The Billiga Forest holds both tangible and intangible cultural heritage that needs to be protected for the cultural values held by our Gomerioi/Gamilaraay people. We will not allow it to be damaged or desecrated to a point where it will not return to its natural state. With at least 90 cultural sites, the most abundant wildlife and biodiversity there is no other place like it in Australia

Karra Kinchela, Gomerioi/Gamilaraay Traditional Owner

Our connection to sea country is way too strong, and it has been since the creation of time for us. The water may have risen and moved over time, but it has never interrupted our spiritual connection to the land that is now underwater. That is our most important and strongest ties to our cultural heritage and our spiritual practices and beliefs, it's a part of who we are.

We want investors that we've met with to listen and act accordingly, to respect what we say. No money can buy back what we risk losing if this project goes ahead.

Pirruwayangi Puruntatameri, Tiwi leader, elder and senior cultural lore man

Everyone expresses anger about a disaster like Juukan Gorge after it happens. Tiwi people are saying right now that destruction is about to happen if we don't do everything in our power to stop it. Do not wait until after Santos have done their damage to slap them on the wrist. We need to stop them now. Santos has announced that they will commence drilling and laying pipeline in the next 2 weeks without legal approvals being announced which require a 10 day public notification.

We have asked Federal politicians, Federal regulator NOPSEMA, the United Nations, NT Government and investors to protect us. Investors have been asked to exercise their own human rights policies and not loan money to Santos or invest in them. We shared maps and evidence of underwater cultural heritage sites with all of them to ask Santos not to go near them”

Antonia Burke, Lead Campaigner, Human Rights Advocate

Across the country, bad things continue to happen to our precious land and water. Our Gomeroi people have been resisting Santos for over 10 years. It's crucial to raise awareness of this company's threat to Australia.

In the wake of Voice to Parliament, our non-Indigenous allies must support its First Nations and ensure Santos and the Government respect it. One of Australia's biggest mistakes will be the Billiga's destruction of the Great Artesian Basin and its drilling of 850 gas wells.

Miah Wright, Gomeroi/Gamilaraay Traditional Owner

We have been fighting this project every step of the way. With Santos now trying to push ahead and ignore our human rights, we will continue to pursue all political, financial, and legal avenues to prevent the harm that will be caused by this project.”

Super funds and banks have failed to listen, investors need to double down, we call on super funds, Australian Council of Superannuation Investors (ACSI), all of Santos’ investors to engage with the company to put a stop to this, if Santos are ultimately unsuccessful they are wasting investors money. They are trampling on our human rights. No-one should be investing in this destructive project. Do they really want this blood on their hands?

Therese Wokay Bourke - Tiwi leader, councillor and traditional owner

Report: Superannuation Fund Responses to Human Rights Grievances

October 2023

We have been instructed to prepare this report by Traditional Owners, Elders and clan members of the Gomerioi/Gamilaraay, Tiwi and Larrakia communities who sent letters to 20 superannuation funds in April 2023. The funds collectively own about 7.75% of Santos. We have been asked to publish the report on our website.

Section 1 of this report provides a summary of the superannuation funds' responses.

Section 2 provides further detail on the responses. It compares the responses to internationally accepted standards for business and human rights.

As at the date of this report, Santos has not started drilling or building the pipeline for the Barossa project in waters off the Tiwi Islands, nor has it made a final investment decision for the Narrabri project in New South Wales. Santos has not obtained the free, prior and informed consent of the Traditional Owners whose economic, social and cultural rights are imperilled by the Barossa and Narrabri project.

Note: This is an updated version that now corrects references to responses from AMP Super, the Australian Retirement Trust (ART), Brighter Super, Construction and Building Unions Superannuation Fund (Cbus), Emergency Services and State Super (ESSS) and State Super. This updated version has recategorised a number of other responses.

The original, superseded version was available on EGL's website from 11am (AEDT) on 19 October 2023 to 2:30pm (AEDT) Friday, 20 October 2023.

SUMMARY

On 26 April 2023, Gomerioi/Gamilaraay, Tiwi and Larrakia Traditional Owners, Elders and clan members, along with fund members, sent letters to superannuation funds who hold shares in Santos Ltd (**Santos**). The twenty funds that received letters are listed at the end of this report. For the purposes of this report the term superannuation fund includes GESB, Commonwealth Super Corporation and others that are created by statute and not governed by the *Superannuation Industry (Supervision) Act 1999* (Cth).

A sample letter to AustralianSuper can be viewed [here](#).

The letters were sent as an information request on behalf of fund members under section 1017C of the *Corporations Act 2001* (Cth). The letters were also written on behalf of Pirrawayingi (Marius) Puruntatameri, Carol Maria Puruntatameri, Dennis Murphy Tipakalippa and Paulina Jemma Puruntatameri, Munupi clan Elders, leaders and Traditional Owners; Therese Wokai Bourke, Malawu clan leader; Simon Munkara, Jikilaruwu clan member; Tibby Quall, Larrakia Elder and Traditional Owner; Karra Kinchela and Miah Wright, Gomerioi/Gamilaraay Traditional Owners.

Three out of twenty funds had not provided us with the requested information at the date of this report. The remaining seventeen funds provided responses with varying degrees of detail and information.

The Traditional Owners extended invitations to all funds to learn about Santos' impacts on Country. Ten of the twenty funds did not respond to the invitations.

Most of the funds that responded have an environmental, social and governance (**ESG**) policy or a responsible investing policy that mentions human rights as one of the "S" or "social" factors. However, none of the funds have a standalone human rights policy in line with Principle 16 the UN Guiding Principles on Business and Human Rights (**UNGPs**). Current fund policies do not explain how human rights are defined or how they are applied across investment decisions. None of the funds disclosed any human rights due diligence processes for their investments as expected by the UNGPs.

Some funds disclosed that they actively engage with investee companies on issues concerning indigenous rights and human rights. REST and Aware Super noted their direct engagement with Santos on the company's human rights issues whilst other funds explained that the Australian Council of Superannuation Investors (**ACSI**) represented them in engagement with Santos. Others relied on external investment managers to engage on their behalf.

The UN Office of the High Commissioner for Human Rights (**OHCHR**) observed that investor engagement on human rights issues is a critical part of using leverage to prevent human rights

violations.¹ Divestment may be an option after several failed attempts at mitigating the harm but the OHCHR noted that divestment may not be appropriate in all cases because without investor engagement, there is often no other voice persuading the company to change its practices.²

The OHCHR also states that investor responsibility to respect human rights is applicable to “all investment activities, products and services offered by institutional investors, **including passive investing**.”³

While ACSI has an important role to play in providing a collective action platform for activating leverage against Santos, funds ultimately hold the responsibility to respect human rights. The funds have not explained how they would assess the effectiveness of ACSI’s engagement, nor have they explained their own escalation strategies to prevent the violation of the right to free, prior and informed consent (**FPIC**). Without clear policies and processes in place to reflect the expectations of the UNGPs, funds may miss critical opportunities to identify and prevent adverse human rights impacts before they arise.

Funds have a responsibility to prevent the violation of economic, social and cultural rights (such as FPIC) of Traditional Owners affected by the Barossa and Narrabri projects, both under international standards and to act in the best financial interests of members. By lagging on human rights, funds may have another disaster like the Juukan Gorge on their hands.

¹ UN OHCHR, “Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights” (A/HRC/47/39/Add.2).

² Ibid, p 7.

³ See also UN OHCHR, “Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights” (A/HRC/47/39/Add.2) (**OHCHR Guidance**), p 26.

Summary of fund responses to human rights complaint

Fields are left blank where no data is available.

		AusSuper	AMP ⁴	ART	Aware	BrighterSuper	BT	Cbus	CSC	Equip	ESSS	GESB	HESTA	Hostplus	MLC/OnePath	REST	SAS
	What percentage of Santos does the fund own? ⁵	0.35%	0.14%	0.55%	0.48%	0.25%		0.93%	0.70%	0.22%	0.05%	0.19%	0.59%	1.22%	0.56% / 0.07%	1.19%	0.02%
	Is the ownership direct (D) or passive (P)?	P			Both				P		P	Both				Both	
1	Does the fund have a standalone human rights policy or make a commitment to respect internationally-recognised human rights in its existing policies? (UNGP 15a & 16)	No	No	Partly	No	No	No	Partly	No	No	Partly	No	Partly	No	No	No	No
2	Did the fund confirm it conducts human rights due diligence into investee companies? (UNGP 15b)	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No
3	Does the fund have a grievance mechanism for stakeholders to submit complaints about the firm's investments?	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No
4	Did the fund confirm that it directly and actively engages with and uses leverage over investee companies on human rights issues? (UNGP 19)	Yes	No	Yes	Yes	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Partly
5	Did the fund acknowledge the concerns about Santos raised in the letter? (UNGP 18)	Yes	No	Yes	Yes	No	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
6	Did the fund confirm it has previously directly engaged with Santos on these	No	No	Yes	No	No	No	Yes	No	No	Yes	No	No	No	No	Yes	No

⁴ AMP noted that the fund member who wrote the letter did not appear to be a current or former member of the fund. However, the letter was also from the impacted Tiwi, Larrakia and Gomeri communities

⁵ For all funds except AustralianSuper, Aware, BrighterSuper and CSC, the figures represent the shareholdings in the funds' default investment option only (as at 31 December 2022), as a proportion of Santos' total issued and fully paid shares as at 31 December 2022. AusSuper, Aware and CSC have provided fund-level ownership figures as at April / May 2023 in their responses. BrighterSuper has provided its fund-level ownership stake of Santos as at 31 December 2022.

	issues (before receiving the letter)? (UNGP 19(b))																
7	Since receiving the letter, has the fund confirmed that it would use its leverage with the aim of ensuring that the Barossa and Narrabri projects do not proceed without FPIC?	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No
8	Did the fund confirm that it is represented by ACSI ⁶ in discussions with Santos?	Yes	No	Yes	Yes	No	No	Yes	No	Yes	Yes	No	Yes	Yes	No	Yes	Yes
9	Did the fund say it is open to meeting Traditional Owners including via ACSI?	Yes	No	Yes	Yes	No	No	Yes	No	Yes	Yes	No	Yes	Yes	No	Yes	Yes

The funds below provided limited or no response⁷

1. **Colonial First State** (0.03% ownership stake in Santos). The human rights complaint was sent to a general 'Contact Us' address. We did not receive any confirmation of receipt of the human rights complaint.
2. **SuperSA** (0.18% ownership stake in Santos). We received an automated response to the email attaching the complaint but we did not otherwise receive any correspondence.
3. **UniSuper** (0.33% ownership stake in Santos). We received an automated response to the email attaching the complaint but we did not otherwise receive any correspondence.

⁶ ACSI is the Australian Council of Superannuation Investors

⁷ Ownership data was obtained through public sources including portfolio holdings disclosures for the default fund option only.

Section 3: Analysis of fund responses

The letters were sent to funds on behalf of both Traditional Owners who would be impacted by Santos' activities as well as fund members.

Fund members have a right to request information under section 1017C of the *Corporations Act 2001* (Cth). The purpose of this provision is to give concerned members information that they reasonably require for the purposes of, among other things, making an informed judgement about the management and financial condition of the superannuation entity or understanding the particular investments of the superannuation entity.⁸

In addition to obligations under Australian law, institutional investors are expected to show transparency on human rights matters under the UNGPs and other international guidance. The Office of the High Commission for Human Rights (**OHCHR**) stressed the importance of investors formally disclosing how they take action to prevent, mitigate and address human rights risks and impacts.⁹

The responses of the funds are analysed below.

1. **None of the funds embed their responsibility to respect human rights through a statement of policy in line with Principle 16 of the UNGPs.**

Several funds noted in their responses that they have “ESG” and “responsible investing” policies. In some policies, the funds note that the “S” or “social” factors include human and labour rights, along with issues regarding indigenous communities.¹⁰ Most funds have a modern slavery statement which details how they manage the human rights risks of modern slavery in their supply chains

However, none of the funds have a statement of policy to embed their responsibility to respect internationally recognised human rights in line with the UNGPs. HESTA is the only fund that has an expectation embedded in its policy that “robust governance arrangements should exist to ensure [the UNDRIP] principles are properly embedded in the operational areas of the organisation.”¹¹ UNDRIP is the United Nations Declaration on the Rights of Indigenous Peoples. Although most funds have a Reconciliation Action Plan, they do not explicitly commit to respect all internationally recognised human rights.

⁸ Section 1017C, *Corporations Act 2001* (Cth).

⁹ <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNGPs10/Stocktaking-investor-implementation.pdf>, p 22.

¹⁰ See, for example, GESB's ESG and responsible investment policy.

¹¹ HESTA Statement on Working with Indigenous Communities, August 2020.

The UNGPs and guidance from the OHCHR expect institutional investors to have a human rights policy¹² which elaborates on how the institution operationalises its human rights commitment.¹³ It is not sufficient to have an ESG or responsible investment policy that makes a passing reference to human rights as one of the “S” factors. This is for two reasons.

First, the funds’ existing ESG policies typically focus on risks to the fund or its investments, as opposed to risks to rights-holders. This is reflected in the funds’ responsible investment policies, where ESG factors are described as risks that can have a material effect on the performance of the fund’s portfolios.¹⁴ The UNGPs emphasise that the business “responsibility to respect human rights” must focus on harm to human beings, not just harm to the fund’s financial position.¹⁵ The Australian Retirement Trust (**ART**) is the only fund which has noted in its response that human rights risk “means risk to people rather than risk to the Fund.”

In practice, most human rights risks eventually lead to material investment risks (such as in the Juukan gorge case). Relevantly, there is overwhelming evidence of a positive correlation between ESG and financial performance, indicating the sole purpose and best financial interests requirements for super funds are satisfied for them to vigorously undertake human rights due diligence and engagement.¹⁶

However, the first step to ensure that risks to rights-holders are properly identified and managed, is for funds to have a clearly articulated human rights policy in order to embed the respect for rights in their operations. This ensures that funds are acting in the best financial interests of members while avoiding being linked to human rights violations.

Second, expressing a commitment to respect human rights in a statement of policy can lead to the development of procedures and systems to embed human rights criteria across wider business activities and relationships (such as in setting financial and other performance incentives for personnel, procurement practices and lobbying activities where human rights are at stake).¹⁷ Policies also provide a foundation for due diligence processes to identify and mitigate potential human rights impacts (as detailed in the following section).

Without a policy commitment to human rights, funds fall short of Guiding Principle 16 and the business responsibility to respect human rights.

¹² Guiding Principle 15 & 16; see also UN OHCHR, “Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights” (A/HRC/47/39/Add.2) (**OHCHR Guidance**), p 4. Accessed at <<https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNGPs10/Stocktaking-investor-implementation.pdf>>

¹³ Ibid, p 4.

¹⁴ See, for example, HESTA Policy and Guidelines on Responsible Investing, page 4.

¹⁵ See UNGPs, Principle 17 (Commentary).

¹⁶ See for example, McKinsey Quarterly: Five ways that ESG creates value (November 2019), accessed via: <<https://www.mckinsey.com/~media/McKinsey/Business%20Functions/Strategy%20and%20Corporate%20Finance/Our%20Insights/Five%20ways%20that%20ESG%20creates%20value/Five-ways-that-ESG-creates-value.ashx>>

¹⁷ See UNGPs, Guiding Principle 16 (Commentary).

2. None of the funds had processes to conduct human rights due diligence as expected under Principles 15 and 17 of the UNGPs.

Many funds stated they conduct due diligence to assess the efforts of investment managers' on ESG risks. While assessing the efforts of investment managers is important, it is also critical that funds, when they invest on their own account, examine the human rights impacts of their investments activities. None of the funds said they conduct human rights due diligence (as defined in the UNGPs) when making investment decisions.

Human rights due diligence is the process of identifying and assessing real and potential adverse human rights impacts, and taking steps to address and remedy those impacts.¹⁸ Principles 15 and 17 of the UNGPs expect investors to undertake human rights due diligence both prior to new investments and throughout the life of the investment, particularly where that investment carries greater human rights risks.¹⁹

As detailed above, human rights due diligence is about identifying risks to human rights, not just risks to the fund or the investments.²⁰ Some funds like AustralianSuper and Aware Super have broader "ESG" due diligence processes in their stewardship and responsible investment policies. While such due diligence processes are commendable, they only identify ESG risks that would impact the value of the investment, and it is not clear that they identify risks to rights-holders. Although human rights risks generally create financial risks, the "responsibility to respect" in the UNGPs is about businesses identifying and preventing their own human rights impacts (whether they are causing, contributing or directly linked to such impacts).

As noted by the OHCHR, human rights due diligence by investors should go beyond traditional exclusionary approaches (or negative screens) to include ongoing due diligence of existing investments, especially relating to the management of salient risks.²¹

The responses received suggest that funds need to improve their internal processes to meet the expected standards of the UNGPs.

3. None of the super funds had a human rights grievance mechanism that is in line with Principle 29 of the UNGPs.

None of the twenty funds named in this report currently have an operational-level grievance mechanism.

¹⁸ See UNGPs, Principle 17 (Commentary).

¹⁹ See also UN OHCHR, "Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights" (A/HRC/47/39/Add.2) (**OHCHR Guidance**), p 5.

²⁰ See UNGPs, Principle 17 (Commentary).

²¹ See also UN OHCHR, "Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights" (A/HRC/47/39/Add.2), p 5.

The UNGPs, along with OHCHR guidance,²² require institutional investors to have effective grievance mechanisms in place to ensure that they provide a remedy when they cause or contribute to the violation of human rights. Where the investor is directly linked to human rights harms but does not directly cause it or contribute to it, it should seek to prevent or mitigate such harms.

Grievance mechanisms can help provide early stage recourse and resolution to human rights concerns. They can also help the fund identify adverse human rights impacts early on as part of their due diligence processes. Such mechanisms should be accessible for individuals and communities who may be adversely impacted by a fund's investments.

4. Twelve out of twenty funds actively engaged with investee companies about ESG issues.

Twelve out of twenty funds confirmed they use a variety of “active” engagement methods with investee companies they directly hold shares in, to affect change in the behaviour of that company regarding “ESG” factors.

The responses outlined various engagement strategies such as one-on-one meetings, collaboration with industry partners or using external service providers such as the Australian Council of Superannuation Investors (**ACSI**). Some funds also explained engagement strategies to include voting at Annual General Meetings or proposing shareholder resolutions.

When it comes to investing, in many cases, third-party investment managers are responsible for allocation strategies and for carrying out day-to-day investment decisions. Those investment managers can be responsible for engaging with investee companies.

Several funds noted the passive nature of investments in Santos (through index funds or similar strategies) as a justification for not engaging directly with the company. The OHCHR states that investor responsibility to respect human rights is applicable to “all investment activities, products and services offered by institutional investors, **including passive investing**.”²³

Principle 19 of the UNGPs notes that businesses should use any leverage they have to prevent or mitigate adverse human rights impacts they may be linked to.²⁴ The OHCHR observed that embedding the respect for human rights throughout the stewardship stage of the investment lifecycle requires that investors use and maximise their leverage to facilitate

²² UN OHCHR, “Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights” (A/HRC/47/39/Add.2) (**OHCHR Guidance**), pp 18 - 19.

²³ See also UN OHCHR, “Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights” (A/HRC/47/39/Add.2) (**OHCHR Guidance**), p 26.

²⁴ UNGPs, Principle 19 (Commentary).

respect for human rights.²⁵ Engagement is an important tool, but funds need to use engagement to proactively *prevent* and *mitigate* human rights issues in line with the UNGPs, rather than only responding reactively.

Funds need to harness their leverage and engagement strategies beyond ESG factors and towards preventing potential adverse human rights impacts. The funds that do not have any engagement strategies appear to be failing their responsibility to respect human rights.

5. Twelve funds acknowledged the human rights concerns raised in the letter.

Twelve out of the twenty super funds acknowledged the concerns of the Tiwi, Gomeroi and Larrakia communities raised in the letter.

The funds that failed to acknowledge the concerns, or failed to take steps to investigate the potential human rights impacts, fall short of the UNGPs. Principle 18 of the UNGPs notes that businesses should identify and assess the nature of any actual or potential adverse human rights impacts with which they may be involved. They should “*pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalisation.*”²⁶

6. Four funds previously engaged with Santos on related conduct before receiving our letters.

Construction and Building Unions Superannuation (**Cbus**), Emergency Services and State Super (**ESSS**), REST and ART confirmed they engaged with Santos on climate change and human rights issues.

The remaining funds should have known about the human rights issues arising from Santos’ activities from reporting on the impacts of the Barossa and Narrabri projects. Strong human rights policies and due diligence processes would have ensured that the funds identified the human rights risks and used their leverage at earlier stages.

7. None of the funds confirmed they would use their leverage to attempt to prevent the development of the Barossa and Narrabri projects.

The right to free, prior and informed consent (**FPIC**) is a cornerstone of international human rights law and is a critical safeguard for Indigenous peoples to preserve their cultural resources, customs and way of life. By proceeding with the Barossa and Narrabri projects without consent, Santos is violating the right to FPIC.

²⁵ See also UN OHCHR, “Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights” (A/HRC/47/39/Add.2) (**OHCHR Guidance**), pp 18 - 19.

²⁶ UNGPs, Principle 18 (Commentary).

Several funds described engagement and escalation strategies with respect to Santos' sustainability and human rights issues. Funds like ART, Aware, ESSS, Cbus and REST described their general escalation strategies as well as their engagement with Santos about issues concerning First Nations people.

However, no fund disclosed or committed to a specific strategy to use its leverage with the aim of preventing the development of the Barossa and Narrabri projects in circumstances where First Nations groups have withheld consent. The engagement described by funds in their responses appeared to focus on consultation, as opposed to consent.

Consultation is a requirement under domestic law but FPIC is the human right that is embedded in international law standards that the UNGPs and the UN OHCHR require businesses to respect. By failing to articulate and implement escalation or engagement strategies to uphold FPIC, funds may be contributing to the potential destruction of cultural heritage.

The Australian government agreed with the recommendation by the Juukan Gorge Inquiry that one of the minimum standards to protect cultural heritage is to include "*an ability for Traditional Owners to withhold consent to the destruction of cultural heritage.*"²⁷ The Interim Juukan Gorge Inquiry Report makes it clear that FPIC is central to the protection of Indigenous rights.²⁸

Funds must use their collective leverage with the goal of strengthening Tiwi, Gomeroi and Larrakia communities' ability to withhold consent to the destruction of their cultural heritage. The UNGPs expect investors that have insufficient leverage to look for other ways to increase it,²⁹ such as by collaborating with other investors. Collective leverage has been used with varying degrees of success in Australia. Following the destruction of the Juukan Gorge, investors collaboratively pushed for stronger transparency measures from Rio Tinto.³⁰ Another example is when investors banded together to voice their support for a Modern Slavery Act in Australia.³¹

As detailed in the following section, some funds have enlisted the services of ACSI to engage with Santos on their behalf. While this is a step forward in terms of collective

²⁷ Commonwealth of Australia, "Australian Government response to the Joint Standing Committee on Northern Australia's 'A Way Forward' and 'Never Again' Reports" (November 2022), p 8. Accessed at

<<https://www.dcceew.gov.au/sites/default/files/documents/australian-response-to-destruction-of-juukan-gorge.pdf>>

²⁸ Joint Standing Committee on Northern Australia, "Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia - Interim Report"

<https://parlinfo.aph.gov.au/parlInfo/download/committees/reportint/024579/toc_pdf/NeverAgain.pdf;fileType=application%2Fpdf>/

²⁹ UNGPs, Principle 19 (Commentary).

³⁰

<https://acsi.org.au/media-releases/juukan-gorge-destruction-investor-collaboration-drives-new-transparency-commitments-by-rio-tinto/>

³¹ See "Investor Statement in Support of Establishing a Modern Slavery Act in Australia" at

<https://www.alphinity.com.au/wp-content/uploads/2018/08/Investor-statement-in-support-of-Australian-Modern-Slavery-Act.pdf>.

engagement, neither the funds nor ACSI explained whether they will use active escalation strategies (such as voting, proposing resolutions or making an AGM statement) to prevent the violation of the right to FPIC occasioned by Santos' activities. There was also no mention from ACSI of conducting any human rights due diligence to identify and assess all the potential impacts.

8. Ten funds confirmed they were represented by ACSI in discussions with Santos.

Ten funds confirmed they were members of ACSI and that ACSI was engaging with Santos on their behalf. ACSI is a service provider that engages on behalf of its members on ESG issues to influence companies and financial markets in the interest of long-term investors.³²

Some funds play active roles in ACSI. For example, HESTA sits on the ACSI Working Group on Rights and Cultural Heritage Risk Management while other funds like REST take part in ACSI's engagements.

ACSI does not have a human rights policy but its report titled "Company Engagement with First Nations People" supports standards in the UNGPs and UNDRIP.³³ ACSI stated "the minimum standard expected of companies is that they...understand and avoid causing or contributing to adverse human rights impacts through their activities; and address adverse human rights impacts with which they are involved."³⁴ Following the destruction of the Juukan Gorge, ACSI said "mining and other related sectors should reflect on how to approach engagement with Traditional Owners of the land in which they work and how to sustain these relationships over the long-term."³⁵

Relevant funds provided summaries of ACSI's ongoing engagement with Santos. Detail of this engagement was omitted ostensibly due to confidentiality reasons, however ACSI appears to have sought responses from Santos to concerns raised by Traditional Owners. Some funds said ACSI had been engaging with other organisations believed to represent Traditional Owners.

The responses did not provide any detail about ACSI's escalation strategies and the steps it would take to prevent Santos from violating the right to FPIC through its Barossa and Narrabri projects. Engagement through ACSI may provide a useful collective platform for engagement however the responsibility to respect human rights still lies with the funds themselves. To that extent, funds must ensure that any leverage they use directly or through ACSI is effective, especially when they are directly linked to the adverse impacts of Santos' activities.

³² <https://acsi.org.au>

³³ <https://acsi.org.au/wp-content/uploads/2021/12/Company-Engagement-with-First-Nations-People.Dec21final.pdf>, p 10.

³⁴ <https://acsi.org.au/wp-content/uploads/2021/12/Company-Engagement-with-First-Nations-People.Dec21final.pdf>, p 10.

³⁵ <https://acsi.org.au/rio-tinto-statement-130820/>

9. Ten out of twenty funds said they were open to meeting Traditional Owners including via ACSI

Three funds, ART, Aware Super and ESSS, accepted Traditional Owners' invitation to directly meet on Country.

Cbus, HESTA, SAS State Super and REST agreed to meet Traditional Owners directly by participating in ACSI consultations with Traditional Owners.

AustralianSuper, Equip Super and Hostplus noted that ACSI would consult with Traditional Owners on their behalf. AustralianSuper said it would "consider carefully...the possibility of having one of its representatives attend" any meeting between ACSI and Traditional Owners.

Some funds suggested that using resources for consultation with the impacted communities might be at odds with their duties to their members. Such an approach appears to sacrifice short-term financial performance over long-term risks. As observed in OHCHR commentary, investors are increasingly recognising that fiduciary duties include identifying longer-term risks such as human rights issues.³⁶

Funds must make an effort to consult with Traditional Owners as part of any meaningful human rights due diligence. Principle 18 of the UNGPs states that the process of identifying and assessing any actual or potential adverse human rights impacts should "*involve meaningful consultation with potentially affected groups and other relevant stakeholders*".

On **30 June 2023**, Tiwi, Larrakia and Gomeroi communities officially extended an invitation to ACSI to meet them on Country. ACSI responded on **13 October 2023** noting that their "mandate includes meeting with local community members who may be impacted by projects undertaken by companies in whom ACSI's members are invested, to understand their point of view. ACSI may use these insights to...encourage good governance practices including better engagement with First Nations peoples when it meets with listed company boards and management." ACSI stated that "it would be keen to explore the opportunity to meet" Traditional Owners on Country.

As detailed above in this report, ACSI played an important role in using the collective leverage of member funds to push greater transparency measures from Rio Tinto following the destruction of the Juukan Gorge. In circumstances where Traditional Owners have warned both ACSI and its members about the potential adverse human rights impacts of the Barossa and Narrabri projects, ACSI must act in a timely manner to prevent another violation of cultural heritage and Indigenous rights.

³⁶

<https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNGPs10/Stocktaking-investor-implementation.pdf>

Annexure 1: List of superannuation funds that were sent complaints

AMP Limited

Australian Retirement Trust (ART)

AustralianSuper

Aware Super

Brighter Super (formerly LGIASuper, includes Energy Super)

BT (formerly BT Financial Group)

Construction and Building Unions Superannuation Fund (Cbus Super)

Colonial First State

Commonwealth Superannuation Corporation

Equisuper (includes Catholic Super)

Emergency Services & State Super

Government Employees Superannuation Fund

HESTA

Hostplus

MLC Super Fund

OnePath

Retail Employees Superannuation Trust (REST)

State Super

Super SA

UniSuper