



FOR A MORE TRANSPARENT AND ACCOUNTABLE MINING SECTOR

NATIVE TITLE

Lack of transparency, accountability and poor representation can lead to native title agreements that may not serve an Indigenous community's best interests.

For mining to take place on native title (Indigenous) land, a mining company needs to negotiate with the native title party (Indigenous group) in relation to the impact of mining activities on their native title rights and interests. The grant of exploration licences and mining leases over land where native title may exist is called a future act. Under the *Native Title Act 1993* (Cth) there are three agreement making processes that can be used for future acts negotiations such as exploration and mining: the expedited process, the right to negotiate process, and Indigenous Land Use Agreements (ILUAs).

Transparency International Australia's [research](#) identified corruption risks in the agreement making process between native title parties and a mining company. These risks include those negotiating with a mining company on behalf of a native title party not representing community members' interests and the lack of transparency of the content of agreements between mining companies and Indigenous parties. These risks are heightened by the complexities and dynamics of Indigenous groups entering into agreements and an imbalance of power and resources between the group and a mining company.

Agreements between native title parties and a mining company can include things like native title rights and interests, compensation, and the protection of significant cultural heritage sites.

What is Native Title?

The *Native Title Act 1993* (Cth) defines native title as the communal, group or individual rights and interests of Aboriginal people or Torres Strait Islanders in relation to land and water under traditional law and custom.¹ These rights can include the right to possess and occupy an area to the exclusion of all others, often called a right of exclusive possession. However, native title is more likely to be a set of non-exclusive rights, which means there is no right to control access to, and use of, the area but a right to co-exist alongside non-Indigenous property rights such as pastoral leases. Examples of non-exclusive native title may include the right to live on the area, hunt, fish, gather food or teach law and custom on country.² There can be no native title rights to minerals, gas or petroleum recognised under Australian law.³

CORRUPTION RISKS

1. POOR REPRESENTATION

Due to the complexity of agreements, native title parties are often represented in negotiations by other agents. There is a corruption risk when agents can negotiate terms that benefit themselves or local elites but not the broader community they are supposed to represent.

2. LACK OF TRANSPARENCY

While there may be valid reasons for agreements to remain confidential, the lack of transparency also creates a corruption risk. Without transparency, people cannot see what benefits they were promised, or what environmental, social or heritage impacts were negotiated. This also hinders people's ability to monitor the implementation of those agreements and hold local elites and mining companies to account.

Issues surrounding a lack of transparency of agreements between Indigenous groups and mining companies were brought to light in Australia in May 2020 when Rio Tinto destroyed a site of significant Indigenous cultural heritage, the Juukan Gorge rock shelters, to make way for the expansion of their iron ore mine. The event shone a light on widespread practices of agreements containing gag clauses to prevent an Indigenous party from speaking out on matters concerning them - a serious integrity, transparency and accountability concern. It also illustrated serious power imbalances and deficiencies in the Western Australian law that is supposed to protect Indigenous cultural heritage, prompting a [review of the outdated Aboriginal Heritage Act 1972 \(WA\)](#). For more information please see our statement: [Indigenous heritage and culture must be better protected from the impact of mining: We can do this through greater transparency, accountability and respect.](#)

3. IMBALANCE OF POWER

An imbalance of resources, including knowledge, skills, and finances, between mining companies and native title parties means that Indigenous people may not have the skills to negotiate or the resources to hire the experts required to negotiate complex native title agreements.

In Australia – and indeed many other countries – an imbalance of power between a mining company and an Indigenous group can create barriers for meaningful community consultation. (Read our [global case study on community consultation](#)).

Challenges of meaningful community consultation and power imbalances are compounded for Indigenous communities. Indigenous people often live in the remote regions where mining companies operate; they have a historical, cultural, and spiritual connection to the land and often suffer disproportionately with poorer access to health and education, economic opportunities, and political voice.

A BETTER WAY FORWARD

For corruption risks to be reduced in the negotiation of native title agreements, there needs to be:

- **Higher levels of transparency and accountability in the negotiation process** to reduce the risk that the people tasked with negotiating with a mining company on behalf of a native title party will not represent the community's best interests.
- **Greater transparency over the content of agreements** between mining companies and native title parties so that the agreements can be held to account and the promised benefits can be fairly distributed.
- **To redress the imbalance of power** to ensure negotiations are genuine and that native title holders can have meaningful say on what happens on their land, including the ability to protect sites of cultural and spiritual significance.
- **Changes to Australian native title and Indigenous cultural heritage legislation** to protect the rights and interests of native title groups and protect Indigenous cultural heritage.

What is FPIC?

Free, Prior and Informed Consent (FPIC) refers to the right to give or withhold consent for project development. The right relates directly to the right for Indigenous Peoples to control their own future and the future of their people. It has been stated as the right "to give or withhold their free, prior and informed consent to actions that affect their lands, territories and natural resources".

This means:

- negotiations and agreements with Indigenous peoples must be free from coercion or improper influence
- Indigenous peoples' consideration and consultation must be given prior to any developments
- all members of the Indigenous group need to be well informed about mining and other large projects with the opportunity to withhold consent

Australia's native title regime implements FPIC to a certain extent. It upholds elements of free, prior and informed but falls down in relation to consent. An Indigenous group cannot veto a mining operation in Australia.

The absence of consent calls into question the true nature of agreements between mining companies and Indigenous groups.

ENDNOTES

1. *Native Title Act 1993* (Cth) ss 223(1)(2).

2. *Ibid.*

3. *Ibid.*