

Tools & mechanisms for ESG due diligence

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There is increasing reference to ‘due diligence’ for mining and petroleum operations. These include the [responsible sourcing requirements of the London Metals Exchange](#), guides about the extractives sector from the OECD, the [World Bank’s Environmental and Social Standards](#), the [Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains](#), the 4th edition of [the Equator Principles](#), and modern slavery laws in Australia (and elsewhere). This is not the traditional ‘DD’ of checking propriety before a merger or acquisition. Rather, it involves examining operations and supply-chains for human rights and other impacts.

There is a significant role for lawyers and law in these processes. Not a predominant role, because there are still directors’ responsibilities around risk, and important functions of corporate governance and community engagement (to ensure policies and procedures are observed in practice). But the law has important contributions. There are increasing standards and mechanisms which identify: (1) specific criteria, (2) steps a company should take, and (3) implications if these are not. These exist *in addition to compliance with domestic law*. Some of the key standards are summarised below.

- [OECD Guidelines for Multinational Enterprises](#). These are standards for responsible business conduct covering human rights, environment, labour relations and other fields. They apply to any Australian company operating overseas, or any international company operating in Australia. If a company is alleged to be non-compliant, a complaint can be made to the [Australian National Contact Point](#) (within Commonwealth Treasury) leading to a conciliation and public statement at the end of the process. Australian examples in the resources sector include a 2011 case regarding [labour relations at Xstrata coal operations in Australia](#), and a 2009 case regarding environmental and social impacts [of BHP Billiton coal operations in Colombia](#).
 - The OECD has guidance documents about how these standards operate in various sectors, three of which have relevance here. The (2017) guide on [Extractive sector stakeholder engagement](#) includes an assessment framework for evaluating companies’ stakeholder engagement performance and targeted guidance for specific stakeholder groups such as Indigenous peoples. The (2016) guide on [Mineral supply](#)
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[chains from Conflict and High-Risk Areas](#) provides a framework for due diligence as a basis for responsible supply chain management of mineral resources. It has informed procedures adopted by the London Metals Exchange, [regulations by the European Union](#), and [conflict minerals reporting rules through the US Securities and Exchange Commission](#).

- The OECD also has guides about financing, which have relevance for the resources sector given the extent of financial involvement in extractives' development and operation. These include a (2019) guide for [Responsible Corporate Lending and Securities Underwriting](#), and a (2017) document on [Responsible Business Conduct for Institutional Investors](#).
- Australia's [Modern Slavery Act](#) requires large entities (annual turnover > \$100M) to report on 'the risks of modern slavery practices in the[ir] operations and supply chains'. The Australian Government has issued [Guidance for Reporting Entities](#), covering issues such as reporting requirements about the actions taken to address modern slavery risks, including due diligence and remediation processes.
- In 2018, a group of organisations (with Swiss Government funding) published a 'monitoring and verification tool' to assist in determining whether a company/operation has the 'free prior informed consent' of impacted Indigenous communities. This includes a [FPIC Monitoring Tool Framework](#).
- 2018 also saw the World Bank publication [License to Drill: A Manual on Integrity Due Diligence for Licensing in Extractive Sectors](#), which builds on the 'fit and proper' from banking, in outlining checks relevant to extractives licensing.

These materials provide useful guidance for lawyers to advise and assist clients regarding due diligence in the resources sector. Due diligence obligations cannot be fulfilled simply by obtaining contractual warranties from counter-parties. The above tools help lawyers determine what kinds of issues ought be examined, and how to determine compliance.

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