

Engaging with Traditional Owners



AIATSIS

‘Consent is a significant element of the decision-making process obtained through genuine consultation and participation. ...the duty to obtain the free, prior and informed consent of Indigenous Peoples is not only a procedural process but a substantive mechanism to ensure the respect of Indigenous Peoples’ rights.’¹

Engaging with Aboriginal and Torres Strait Islander people requires an understanding of the diversity of their beliefs, customs, traditions, social structures, cultural practices and histories. Aboriginal and Torres Strait Islander people have unique relationships to the land, sea and waterways. Their ownership and stewardship of country needs to be acknowledged.

Australian law recognises that Aboriginal and Torres Strait Islander people have rights and interests in the land and sea under their traditional laws and customs - that they are Traditional Owners. Any engagement processes needs to be based on the principles of Free, Prior and Informed Consent (FPIC) that recognise the critical decision making role of Traditional Owners.

What is FPIC?

A central element of FPIC is genuine inclusion, disclosure, and respect for Indigenous Peoples, decision-making processes. The three elements (free, prior and informed) qualify and set the conditions of consent as a decision-making process. In the native title context, consent refers to the decisions made by the Traditional Owners being reached through their customary decision-making processes.²

FPIC is not merely informing and getting consent, it is about effective and meaningful participation to ensure the best decision making for sustainable outcomes – especially where intergenerational decisions area involved.

Law vs best practice

The NTA provides native title groups with a ‘right to negotiate’. Therefore FPIC is required in every case concerning Aboriginal and Torres Strait Islanders, their lands, or their resources, such as when new legislation is being considered.

FPIC has grown out of international treaties and international mechanisms such as the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the UN General Assembly in September 2007. Although not legally binding FPIC should be followed as a standard of best practice to support sustainable decision making over Indigenous held lands and waters.³

Australia has not legislated FPIC but is engaging in the complexities of this area under the Native Title Act 1993 (Cth) (NTA). Australian laws and emerging jurisprudence emphasise the importance of Traditional Owners’ knowledge about the land and reinforce that this knowledge matters in decision making, their ability to be involved in that decision, and the accountability of their representation.⁴

What does FPIC look like in practice?



What are the benefits of the FPIC process?

FPIC ensures that Aboriginal and Torres Strait Islander peoples are involved in the process at all stages. It minimises risks (such as disputes or other forms of conflict), establishes trust-based relationships and provides for a sustainable decision process.⁶

How to find the right Traditional Owners to engage with?

Where a determination recognising native title is made by the Federal Court, the NTA requires native title holders to establish a corporation to represent them and their interests. These organisations are known as Registered Native Title Bodies Corporate (RNTBCs). They are most commonly known as Prescribed Bodies Corporate (PBCs).

Finding the appropriate Traditional Owners of Country is often a multitier process contacting regional or local organisations that can then connect you with the respective Traditional Owners. Aboriginal and Torres Strait Islander people are governed by many layers of authority including cultural and family governance as well as PBCs and NTRBs/NTSPs.

PBCs in Australia

The PBC website offers contact details for all PBCs <https://nativetitle.org.au/find/pbc>.

It is not enough to seek consent from one individual or family, it needs to be worked out across these layers of governance to match the type of decision being made.

Local Aboriginal Land Councils (LALCs, NSW), Registered Aboriginal Parties (RAPs), Land councils in other states, NTRB/MTSPs in Australia

There are also NTRB/NTSPs, organisations appointed under the NTA to assist Indigenous people with all aspects of their native title claims and managing their Country. They often also function as peak bodies for PBCs in their jurisdiction. Land councils and Registered Aboriginal Parties (RAPs) are also functioning as peak bodies for Traditional Owners where no native title determination was reached. For key contacts <https://nativetitle.org.au/key-contacts>.

The National Native Title Tribunal website offers a visual approach to unlock information about native title – [Native Title Vision](#).

With this application you can search PBCs anywhere in Australia. Choose the [RNTBC](#) map and type in the nearest location. The surrounding PBCs are then listed. To determine the Representative Aboriginal and Torres Strait Islander Body (RATSIB, or NTRB/NTSP) choose the respective state map and turn on the RATSIP area layer in the anchor bar at the bottom.

Notes

- 1 UN General Assembly Human Rights Council, Final study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples, Final Report, A/HRC/EMRIP/2011/2, United Nations, 2011, p. 22, p. 5.
- 2 For an extensive bibliography on recent writings on FPIC especially in the context of the mining and extracting industries see J Southalan & J Fardin, 'Free, prior and informed consent: how and from whom? An Australian analogue', *Journal of Energy & Natural Resources Law*, vol. 37, no. 4, 2019, pp. 365–388; for a comprehensive literature review see Equitable Origin, Roundtable on Sustainable Biomaterials & La Coordinadora de las Organizaciones Indígenas de la Cuenca Amazónica, *Enabling FPIC through voluntary standards: An ISEAL Innovations Fund Project*, Equitable Origin, July 2018; see also T Bauman, Z Jokic, C Keller & L Wisemman, *Free prior and informed consent, engagement and consultation. An emerging bibliography*, AIATSIS Research Publications, Canberra, ACT, 2015, viewed 30 July 2018, <https://aiatsis.gov.au/sites/default/files/research_pub/free-prior-and-informed-consent-engagement-and-consultation-emerging-bibliography_2.pdf>.
- 3 Equitable Origin et al., *Enabling FPIC through voluntary standards: An ISEAL Innovations Fund Project*, p. 20f.
- 4 Southalan & Fardin, 'Free, prior and informed consent', p. 386.
- 5 Australian Trade and Investment Commission, *Engaging with traditional owners*, n.d., viewed 30 November 2020, <<https://www.austrade.gov.au/land-tenure/Engagement/engaging-with-traditional-owners>>; Cultural Survival, *Free, prior and informed consent: protecting Indigenous peoples' rights to self-determination, participation, and decision-making*, Cultural Survival, n.d., viewed 30 April 2015, <<http://www.culturalsurvival.org/publications/cultural-survival-quarterly/free-prior-and-informed-consent-protecting-indigenous>>.
- 6 M Colchester & S Chao, *Respecting free, prior, and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition*, Governance of tenure technical guide, Food and Agriculture Organization of the United Nations, Rome, 2014, p. 19.