

**NATIONAL NATIVE TITLE  
CONFERENCE 2014**

**FPIC, ICMM AND CSR: ALPHABET  
SOUP OR A SEA CHANGE?**

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OR...

*Why big miners will (should?) lobby for the introduction of an Aboriginal Land Rights (Northern Territory) Act 1976 (Cth.) veto into the Native Title Act 1993 (Cth.)*

# OVERVIEW

## Objectives

- Examine FPIC in International Council on Mining and Metals (ICMM) 2013 Position Statement on Indigenous Peoples
- Consider implications of the increasing importance of notions of Corporate Social Responsibility (CSR) to Indigenous Peoples' aspirations

# OVERVIEW (CONT.)

Will look at FPIC in:

- ICMM Position Statement Text
- World Bank Group (WBG)
- International Finance Corporation (IFCC)
- UN Dept of Economic and Social Affairs (UNDESA)
- UN Development Group (UNDG)
- UNPFII
- Equator Principles (EP)

Finally look at the possibilities CSR offers



# BACKGROUND

*UN Declaration of the Rights of Indigenous Peoples Art 32.2*

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions *in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*

*Native Title Act Future Act Regime does not satisfy this requirement (ALRA does).*

# ICMM

- 22 mining and metals companies
- 33 national and regional mining associations and global commodity associations.
  - Anglo-American, BHP-Billiton, Freeport, Mitsubishi Materials, Newmont, and Rio Tinto and the Minerals Council of Australia (MCA)*
- established to address core sustainable development challenges
- Members commit to implementing 10 key principles
- Subject to third party verification

# ICMM FRAMEWORK PRINCIPLES

1. *Implement and maintain ethical business practices and sound systems of corporate governance.*
2. *Integrate sustainable development considerations within the corporate decision-making process.*
3. *Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities.*
4. *Implement risk management strategies based on valid data and sound science.*
5. *Seek continual improvement of our health and safety performance.*
6. *Seek continual improvement of our environmental performance.*
7. *Contribute to conservation of biodiversity and integrated approaches to land use planning.*
8. *Facilitate and encourage responsible product design, use, re-use, recycling and disposal of our products.*
9. *Contribute to the social, economic and institutional development of the communities in which we operate.*
10. *Implement effective and transparent engagement, communication and independently verified reporting arrangements with our stakeholders.*

# INDIGENOUS PEOPLES AND MINING 2013

- Preamble provides it sets out ICMM members':  
“approach to engaging with Indigenous Peoples and to free, prior and informed consent”.
- FPIC is described as a : “process and outcome”  
“Outcome is that Indigenous Peoples may give or withhold consent to a project”
- The Position Statement body contains 6 *Recognition Principle Statements* and 6 *Commitments*




# RECOGNITION STATEMENT 4

Successful mining and metals projects require the support of a range of interested and affected parties. This includes both the formal legal and regulatory approvals granted by governments and the broad support of a company's host communities. ...States have the right to make decisions on the development of resources according to applicable national laws, including those laws implementing host country obligations under international law. Some countries have made an explicit consent provision under national or sub-national laws. In most countries however, "neither Indigenous Peoples nor any other population group have the right to veto development projects that affect them", so FPIC should be regarded as a "principle to be respected to the greatest degree possible in development planning and implementation". (Emphasis added)

## **RECOGNITION STATEMENT 5**

States also have an important role to play in the process of engaging with Indigenous Peoples. *They may be involved in determining which communities should be considered indigenous, in shaping the process for achieving FPIC and in determining how this relates to regulated processes for ensuring community participation in decision making.* Given their role in balancing the rights and interests of Indigenous Peoples with the wider population, states may also play an important role in supporting the resolution of disagreements that may arise between Indigenous Peoples and companies in the pursuit of FPIC. (Emphasis added)




## COMMITMENT 4

ICMM members commit to: ...Work to obtain the consent of indigenous communities for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of Indigenous Peoples...These processes should neither confer veto rights to individuals or sub-groups nor require unanimous support from potentially impacted Indigenous Peoples (unless legally mandated). Consent processes should not require companies to agree to aspects not under their control.

## COMMITMENT 5

Collaborate with the responsible authorities to achieve outcomes consistent with the commitments in this position statement, in situations where government is responsible for managing Indigenous Peoples' interests in a way that limits company involvement. *Where a host government requires members to follow processes that have been designed to achieve the outcomes sought through this position statement, ICMM members will not be expected to establish parallel processes.*



# POSITION STATEMENT – KEY THEMES

**1. FPIC is “aspirational”**

*(cites UNDESA 2008 Resource Kit)*

**2. FPIC is subject to application of domestic law**



# ASPIRATIONAL FPIC?

UNDESA Resource Kit: *“designed to provide United Nations Country Teams with guidance as to how to engage with indigenous peoples and include their perspectives in development processes”*

## ***UNDESA cites UNDG:***

“In the case of state owned sub-surface resources on indigenous peoples’ lands, indigenous peoples still have the right to free, prior and informed consent for the exploration and exploitation of those resources and have the right to any benefit-sharing arrangements”

# ASPIRATIONAL FPIC? (2)

Resource Kit also refers to Development Banks' standards and concludes:

“It should be noted that the FPIC process may include the option of withholding consent. It should also be noted that, in most countries, neither indigenous nor any other population group actually have the right to veto development projects that affect them. The concept of free prior and informed consent is therefore a goal to be pursued and a principle to be respected to the greatest degree possible in development planning and implementation.”

*The Resource Kit is not a strong basis for ICMM making FPIC aspirational!*



# FINANCE INSTITUTIONS

WBG - Operational Procedure 4.10

FPICon – however FPICon still requires broad community support

IFC - *2012 Performance Standards on Environmental and Social Sustainability*

FPIC and “evidence of agreement”





# FPIC AND DOMESTIC LAW

FPIC may infringe state sovereignty?

## UN Guiding Principles on Human Rights - The Corporate Responsibility to Protect Human Rights

*“The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights”*

If reliance on the text of national laws provided sufficient guidance for ICMM members on ethical behaviour there would be no need for the Position Statement or even ICMM.

# CSR

## Three approaches:

- Crude PR
- Long term sustainability
- Genuine Altruism
- (Combination of the above)

## Transnational sensitivity

- *ICMM is a manifestation of this*

# CSR AND FINANCIAL INSTITUTIONS

## Equator Principles (EP)

- 79 financial institutions (including Australian “big four”) in 35 countries

EP II implemented FPIC requirement.

EP III moved to FPIC following IFC 2012.

However, only in “Non-Designated Countries”

“Designated Countries” (incl Australia) local law applies

# CSR AND FINANCIAL INSTITUTIONS

EP III thus applies higher human rights standard on developing economies than on developed economies.

Sustainable position?



# CONCLUSION

**Assume ICMM Position Statement and EP III are altered:**

- Would mean large “CSR sensitive” corporations would be obliged to implement FPIC
- Smaller unscrupulous operators relying on local law would be at an advantage (even if only in securing title)

**Rational response?**

*Seek to implement FPIC into local law.*