

FREE, PRIOR AND INFORMED CONSENT AND NATIVE TITLE

National Native Title Conference Darwin

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United Nations Declaration on the Rights of Indigenous Peoples

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 ...

Art 32

Free Prior & Informed Consent

- What is Free Prior & Informed Consent (FPIC)?
- Where does FPIC comes from?
- Is FPIC enforceable in Australia?
- How can FPIC work in the native title context?

Free

Consent given without:

- coercion
- intimidation
- manipulation

Boreal Leadership Council, 2012

- Enabling meaningful choices by Indigenous peoples about their country and their future
- Pay attention to the political economic and social context of a consultation process to ensure it is free from coercion

Prior

- Consent must be sought before every significant stage of project development
- Affected Indigenous peoples must have sufficient time to understand the information received, seek advice, and negotiate
- Must be meaningful input from the Indigenous people concerned from the earliest stage of project design
- FPIC must be an ongoing process throughout the project's lifecycle

Informed

- All parties must:
 - share information regarding the potential economic, social, cultural environmental impacts of the project
 - have access to information in a form that is understandable
 - have enough information and capacity to make informed decisions
- Information must be provided in good time, so the Indigenous people concerned can understand and consider it properly so they can make decisions based on it

Consent

- FPIC is an expression of the right to self-determination
 - not just an administrative process
 - obligation of the State
- Indigenous communities have the option to support or reject developments that have significant impacts on their lands or culture
- All consultation processes must be culturally appropriate
 - Appropriate language is used
 - Traditional decision-making is respected

Free, Prior & Informed Consent: content

- There is no firm and final view as to the content and scope of free, prior and informed consent
- Its content will depend, in each case, on the circumstances in which the issue of consent arises
- The content of the concept will continue to develop

Free Prior & Informed Consent: sources

- International law
- Domestic implementation of obligations under international law
- Contracts that require those dealing with Indigenous peoples to address FPIC
 - International Finance Corporation (arm of World Bank)
 - Equator Principles (private financial institutions)
 - International Council on Mining & Metals (ICMM)
 - corporate social responsibility
 - social licence to operate

FPIC in international law

- International instruments that might accord FPIC
 - United Nations Declaration on the Rights of Indigenous Peoples
 - ILO Convention 169
- International bodies that recommend FPIC
 - Human Rights Committee – ICCPR
 - Committee on the Elimination of Racial Discrimination – ICERD
- Regional Human Rights Systems
 - Inter-American Human Rights System

FPIC in international instruments

Right to self-determination

All peoples have the right of self-determination.

By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

ICCPR Art 1; ICESCR Art 1

FPIC in international instruments

Cultural rights

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

ICCPR Art 27

FPIC in international instruments

Right to non-discrimination

States must ensure that Indigenous peoples have equal rights to participate in public life and that no decisions relating directly to Indigenous peoples are to be taken without their informed consent

CERD Gen. Rec. 23

United Nations Declaration on the Rights of Indigenous Peoples

- UNDRIP is based on the principle of Indigenous self-determination, under which Indigenous peoples 'freely pursue their economic, social and cultural development'

UNDRIP Art 3

- Creates no binding domestic legal obligations
- Australia initially opposed UNDRIP, but endorsed it on 3 April 2009

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Content of FPIC principles

- Case law provides guidance about the application and scope of the duty under international law to obtain Free Prior & Informed Consent from Indigenous peoples when dealing with their land and resources
- International law cases include:
 - *Ominayak v Canada* (Human Rights Committee, 1990)
 - *Kichwa People of Sarayaku v Ecuador* (Inter-American Court, 2011)
 - *Mayan Communities of Sipacapa & San Miguel Ixtahuacan and Guatamala* (Compliance Advisor Ombudsman of International Finance Corporation (World Bank), 2005)
- Domestic cases include:
 - *Haida Nation v British Columbia* (Supreme Court of Canada, 2004)

FPIC in international law

- UNDRIP provisions may eventually bind Australia in international law
- Australia's democratically elected Parliament will always take precedence over UNDRIP
- For now, Australia is not obliged to deal with Aboriginal and Torres Strait Islander peoples on the basis of their Free Prior & Informed Consent
- However, FPIC principles can guide those dealings in practice ...

So what?

What is the relevance of Free
Prior & Informed Consent
principles in Australia?

Relevance of FPIC to native title

- Aspirational
 - FPIC identifies a standard to which government and developers should aspire in their dealings with native title groups
 - FPIC principles set the standard for NTRBs and PBCs in their dealings with native title groups
- Domestic political pressure to implement international standards
- Educative value
- Assists judicial interpretation of statutes
- Potential contractual term

Relevance of FPIC to native title

- Avoids commercial risks for developers
 - Project delays
 - Increased cost
 - Limited social licence to operate
 - Reputational risk
- Avoids risks for native title groups
 - Loss of native title rights and interests
 - Impacts on culture
 - Loss of economic opportunity
 - Division of communities

FPIC & decisions under the *NTA*

- Authorising the making of ILUAs and applications
ss 251A & 251B
- Negotiation in good faith with a view to obtaining the agreement of the native title parties
s 31
- If NTRB represents PBC or native title group, NTRB must be satisfied that it consents to NTRB's general course of action on its behalf
s 203BC
- Agreeing to the terms of a consent determination
s 87
- PBC must consult the common law holders and obtain their consent before making a decision that affects native title rights and interests
PBC Regs reg 8

FPIC and NTRB/SPs

- Aspire to achieve FPIC in the native title process
- Awareness that FPIC consent requires:
 - full and frank information being provided clearly
 - time to engage in culturally appropriate decision making processes
 - opportunities to explore the information or decision in more detail
 - respecting decisions which are made

Difficulties in attaining FPIC

- NTA – the role of the applicant
- Funding and costs
- Logistics
- Court imposed timeframes
- Proponents – government and private sector

Respect? Absolutely, when it suits us!

- Best intentions to engage in culturally appropriate ways often changes to sounds of impatience and complaints about costs:
 - Do we really need a full meeting for this?
 - Can't the negotiating committee just do this?
 - Why do you need more maps?

Alternative agreements & native title outcomes

Agreement making has an important role **BUT**

- this can't be at the cost of native title claimants achieving the best possible outcome
- the Court is increasingly forcing matters to hearing if agreements are not made
- native title claimants are increasingly being asked to consider alternative agreements — with or without a consent determination
- is free prior & informed consent possible when native title claimants are being asked to compromise on rights which are not yet determined?

FPIC in international law

There is a clear consensus within international human rights jurisprudence that at a minimum

States must engage in **good faith consultations** with Indigenous peoples before the exploration or exploitation of resources within their lands

Ward

Scope of duty to consult

However

- there is no clarity as to the scope of States' duty to consult in good faith with Indigenous peoples before the exploration or exploitation of resources within their lands