Submission to Inquiry into Australia's transition to a green energy superpower

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We acknowledge the Traditional Owners of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

We welcome the opportunity to contribute to the current Inquiry into Australia's transition to a green energy superpower. The ambition for Australia to transition to a green energy superpower is located at the nexus of two key investment themes (and societal aims) for the twenty-first century. These include achieving a rapid transition to a zero-carbon economy in order to reduce emissions and avoid the worst impacts of climate change and **realising equitable outcomes for First Nations peoples and communities**.

We propose that Australia's commitment to the superpower vision needs an equally ambitious framework, and clearly elucidated pathways, in support of the interests of Aboriginal and Torres Strait Islander traditional owners, Indigenous communities and populations in our transition to global provider of zero carbon commodities. In doing so we suggest that certainty - for states, key trading partners, proponents, landholders and communities - lies in a model consistent with Australia's commitment to the United Nations *Declaration of the Rights of Indigenous Peoples* (UNDRIP) and the principle of Free, Prior and Informed Consent. For reference, we provide the Committee with Dr Ed Wensing and Jason Field's submission from June this year, in relation to the Senate Legal and Constitutional Affairs References Committee Inquiry on the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, available here at **Appendix 1.** Our submission relates primarily to the critical importance of;

Prioritizing opportunities for First Nations in Australia's transition to a green energy superpower

A fundamental prerequisite for renewable energy generation and storage at the scales required by Australia's transition to a green energy superpower is access to large areas of land and sea [1]. In Australia much of the lands and waters necessary for hosting wind turbines, solar panels, electrolysers and associated infrastructure such as roads, laydown areas, storage and access to coastal shipping and pipelines, will be subject to varying strengths of First Nations rights and interests, through native title and statutory land rights regimes [2].

In this context, Australia's transition to a green energy superpower introduces risks of social-economic, cultural and environmental impacts for First Nations, as well as potentially presenting opportunities for Aboriginal and Torres Strait Islander peoples and communities to participate more effectively in the transition to a clean energy economy [3]. We welcome the announced commitment of $83.8 million over 4 years to the Australian Renewable Energy Agency specifically to develop and deploy microgrid technologies across First Nations communities, in order to increase access to cheaper, cleaner and more reliable locally available renewable energy. The commitment of $5.5 million over 3 years by the Department of Climate Change Energy the Environment and Water to co-design and commence implementation of a First Nations Clean Energy

Strategy signals a much-needed step toward engaging Indigenous voices in relation to Australia's transition to a green energy superpower. However, much more needs to be done.

Australia's transition to a green energy superpower presents a window of opportunity for Australia to rethink its relationship with First Nations peoples and communities and to commit to ensuring First Nations play a leadership role in the control, benefit and risk mitigation of zero-carbon development across scales, from small to large. Activating net-zero opportunities must not further contribute to marginalisation and harm, but rather strengthen opportunities to address socio-economic inequalities between Indigenous and non-Indigenous Australians, through policy aimed at the fair distribution of risk and gain [4,5]. It is a truism that many First Nations communities have not received benefits commensurate with the immense wealth generated from Indigenous lands during Australia's mining boom [6]. It has been observed that clean energy developments differ from extractive industries in a number of important ways, including exploiting non-depleting resources with a wide spatial distribution that may allow traditional owners continued access to lands and waters [3] . Research cautions that many of the legal, economic, informational and political asymmetries identified in relation to extractive industries also apply to large-scale clean energy development [7].

Broader benefits for landholders are more likely if traditional owner groups are well-resourced and well informed to meaningfully engage in development processes, to ensure projects are progressed that reflect community priorities, including economic inclusion through equity and ownership [8]. The drivers of Indigenous benefit in relation to extractives are shown to be the prevailing legislative regime and whether it favours Aboriginal interests, the political capacity of traditional owners to insist companies meet their obligations, the economics underpinning specific development proposals and the extent to which proponents are committed to principles of corporate social responsibility [9,10]. In calling for prioritizing the economic inclusion and participation of traditional owners in large scale clean energy projects in Australia's transition to a green energy superpower, this submission focusses on the efficacy of free, prior and informed consent as expressed in the United Nations *Declaration of the Rights of Indigenous Peoples* (UNDRIP) and highlights the critical importance of adequate resourcing for First Nations communities and representative bodies in energy transition.

While Australia was initially one of four countries (all settler colonies) that opposed the United Nations *Declaration of the Rights of Indigenous Peoples* (UNDRIP) in 2007, Australia endorsed the declaration in April 2009 [11]. The declaration asserts that nation-states have a duty to consult with Indigenous peoples on the basis of free, prior and informed consent (FPIC). The Declaration's provisions relating to FPIC provide the most suitable guide to engagement with Traditional Owners in relation to large scale development involving their native title rights and interests and are considered the minimum requirements to operationalise self-determination because of their conformity with both international human rights norms and standards and international law [12]. The UNDRIP expresses rights, and by doing so explains how Indigenous peoples want nation-states (and others) to conduct themselves in relation to matters that may affect their rights and interests (Wensing, 2019).

In that sense, there is an expectation by Indigenous peoples and others that UNDRIP imposes obligations on States and third parties to conform to the standards expressed in the Declaration and that as a consequence of endorsing UNDRIP nation-states can no longer make decisions affecting Indigenous peoples' rights and interests by imposition, but rather have a duty to consult with Indigenous peoples on the basis of FPIC. The right to FPIC is enshrined in several Articles, specifically:

> **Article 18**
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights
>
> **Article 19**

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them

Article 26(2)

Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
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.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Free, prior and informed consent provides the best framework for negotiating with traditional owners/native title holders in relation to large-scale development on the Indigenous estate because it provides a relatively clear process on governments and developers, which distinguishes it from principles such as social licence to operate (which are less precisely defined and rely on the goodwill of governments and industrial partners). The United Nations calls for its' adoption based on the intrinsic and instrumental rationales that it is the right thing to do, morally and legally, that it will lead to better and more sustainable human development outcomes and that applying these principles will create a process whereby governments, developers and First Nations peoples can talk to each other on an equal footing and come to a solution or agreement that all parties can accept [13]. Recent examples of Australia's failure to meet these minimum global standards emphasises the need for the Government to have independent oversight and informed advice on meeting these international obligations [14] [15].

In northern Australia, where many of the opportunities for zero-carbon exports are identified as extant, many native title claims have been finalised and most successful claimant groups have established "prescribed bodies corporate" (PBCs) to manage their native title. These PBCs are the legally required governance arrangements for land that is subject to native title rights and interests and PBCs are required to hold and manage native title in perpetuity - obligations which carry legally mandated compliance requirements. Yet it is widely acknowledged that Australian Government funding for these compliance requirements is inadequate. Estimates have shown that Australian Government funding for core compliance functions meets only 10% of the actual cost of compliance, with many PBCs self-reporting only limited or no income [16]. A 2019 survey by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) highlighted that up to 67% of these entities identified the absence or lack of funds as the key challenge they faced, while noting that significant additional resourcing of the sector is the crucial requirement to achieving their development goals. Indeed, organisations as diverse as the Australian Human Rights Commission (AHRC) and the Minerals Council of Australia (MCA) have emphasised the importance of strong sustainable PBC's with the MCA recommending "stable and sufficient funding for Prescribed Bodies Corporates (PBCs) to discharge statutory duties and meet increasing expectations for these entities to drive and support economic development activities" [17]

In the context of Australia's transition to a green energy superpower, it must also be considered that the level and pace of change underway has the potential to prohibit effective engagement, co-design and decision-making with First Nations, and that the level of resourcing for PBC's, First Nations communities and their representative organisations must be an urgent area of priority consideration for governments when pursuing expedited timelines for reforms enabling energy transition. Greater levels of resourcing will be immediately advantageous; for the many capable and independent Aboriginal PBCs who rightfully hold the predominant stake in economic development in the regions, as well as for those native title representative bodies ('NTRBs') who will play a critical role in securing benefit from distributed renewable energy resources and downstream zero-carbon derivatives. Greater levels of resourcing, for example for feasibility assessments for First Nations led new energy projects will be critical.

Without such measures First Nations will be exposed to unreasonable risk, cost and disadvantage from projects progressed by domestic and international proponents for their own commercial benefit, and which initiate processes the costs of which (in time, money, organisational capacity) risk being externalized to native title holders [3]. As many developments are likely to be at the cutting edge of industry and technical innovation and will most likely need to be located on land subject to native title rights and interests and/or statutory land rights grants/transfers, the policy frameworks supporting energy transition should also stipulate specified preference or support for native title parties to be integrally involved from the outset, such that they will be able to undertake their own due diligence of large-scale green energy projects and its likely impacts and benefits for their communities. Their land and water rights in this space must not be overlooked, as all levels of government have an important role to play in 'levelling the playing field', such that First Nations are well resourced to play a lead role in transition to more sustainable energy sources. [18] [12] [16] [19]

Finally, the role of the North Australia Infrastructure Facility (NAIF), which oversees funding of $7bn and will likely play a crucial role in the financing and development of zero-carbon industries, currently overlooks the development and infrastructure needs of First Nations community interests in northern Australia where zero-carbon opportunities proximal to growing market have been identified. The remit of the NAIF should be widened to include the realisation of energy security for First Nations communities as a priority, and as consistent with Australia's commitments to the United Nations Sustainable Development Goals (ie. SDG 7 *Ensuring access to affordable, reliable, sustainable and modern energy for all*. Not only is this a fundamental prerequisite underpinning Australia's development but domestic energy security is strongly linked to any estimate of the social licence that will necessarily underpin the focus of the current Inquiry - Australia's transition to a green energy superpower.

1. Jotzo, F. Hydrogen. in *The Superpower Transformation: Making Australia's zero-carbon future* (ed. Garnaut, R.) 196–219 (2022).
2. Thorburn, K., O'Neill, L., Hunt, J. & Riley, B. *Renewable Energy Projects on the Indigenous Estate: Identifying Risks and Opportunities of Utility-Scale and Dispersed Models*. (2019).
3. Riley, B. *Scaling up: Renewable energy on Aboriginal lands in north west Australia*. (2021) doi:10.32613/nrp/2021.6.
4. Hunt, J., Riley, B., O'Neill, L. & Maynard, G. Transition to Renewable Energy and Indigenous People in Northern Australia: Enhancing or Inhibiting Capabilities? *J Human Dev Capabil* **22**, (2021).
5. Vivoda, V. Australia's Energy Security and Statecraft in an Era of Strategic Competition. *Energies (Basel)* **15**, 6935 (2022).
6. Taylor, J. *The RIC Report Change in wellbeing indicators of Pilbara Aboriginal people: 2001 – 2016*. https://www.ricpilbara.com/wp-content/uploads/2019/02/ric-report_c.pdf (2018).
7. O'Neill, L., Beck, F., Cheng, W. & Nolan, K. *Renewable hydrogen will be produced on land traditionally owned by First Nations people: will its owners benefit?* (2022).
8. Trebeck, K. A. Tools for the Disempowered? Indigenous Leverage Over Mining Companies. *Aust J Polit Sci* **42**, (2007).

9. O'Faircheallaigh, C. *Negotiations in the Indigenous World*. (Routledge, 2015). doi:10.4324/9781315717951.
10. O'Neill, L., Thorburn, K. & Hunt, J. *Ensuring Indigenous benefit from large-scale renewable energy projects: Drawing on experience from extractive industry agreement making*. (2019).
11. UN General Assembly. United Nations Declaration on the Rights of Indigenous Peoples. Preprint at (2007).
12. Maynard, G. Renewable energy development and the Native Title Act 1993 (Cwlth): The fairness of validating future acts associated with renewable energy projects. *Centre for Aboriginal Economic Policy Research* **WP 143/2022**, (2022).
13. Wensing, E. & Field, J. *Submission to the Senate Legal and Constitutional Affairs References Committee on the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia*. (2022).
14. Joint Standing Committee on Northern Australia. Australian Parliament House. *Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia*. (2021).
15. Responsible Investment Association Australasia. *Investor Toolkit: An Investor Focus on Indigenous Peoples' Rights and Cultural Heritage Protection*. https://www.ausbil.com.au/Ausbil/media/Documents/Research%20and%20Insights/2111-Investor-Toolkit-An-Investor-Focus-on-Indigenous-Peoples-Rights-and-Cultural-Heritage-Protection.pdf (2021).
16. Woods, K. *et al. Towards a Perpetual Funding Model for Native Title Prescribed Bodies Corporate*. https://openresearch-repository.anu.edu.au/bitstream/1885/242830/1/CAEPR_CR_7_Woods_et_al_2021_Towards_a_perpetual_funding_model.pdf (2021).
17. Minerals Council of Australia. Submission to Joint Standing Committee on Northern Australia Inquiry into the Opportunities and Challenges of Engagement with Traditional Owners in the Economic Development of Northern Australia. https://www.aph.gov.au/Help/404?item=%2fparliament+ary_business%2fcommittees%2fjoint%2fnor+thern_australia%2ftraditionalowners4+6p%2fsubmissions&user=extranet%5cAnonymous&site=website (2019).
18. O'Neill, L. *et al.* Renewable energy development on the Indigenous Estate: Free, prior and informed consent and best practice in agreement-making in Australia. *Energy Res Soc Sci* **81**, 102252 (2021).
19. Wensing, E. *Land Justice for Indigenous Australians: How can the two systems of land ownership, use and tenure co-exist with mutual respect based on parity and justice?* . (2019).

Appendix 1:

Centre for Aboriginal Economic Policy Research (CAEPR)

Submission to the Senate Legal and Constitutional Affairs References Committee on the application of the United Nations *Declaration on the Rights of Indigenous Peoples* in Australia

Submission written by

Dr Ed Wensing[1] and Jason Field[2] for the Centre for Aboriginal Economic Policy Research, ANU

Centre for Aboriginal Economic Policy Research, ANU

The Centre for Aboriginal Economic Policy Research (CAEPR) is Australia's foremost social science research body focusing on Indigenous economic and social policy from a national perspective. CAEPR aims to undertake social science research on Indigenous policy and development which is excellent by the best international and disciplinary standards and that informs intellectual understanding, public debate, policy formation and community action.

The Centre is funded from a variety of sources including the ANU, the Australian Research Council, industry and philanthropic partners, the Department of the Prime Minister and Cabinet, and State and Territory governments. The principal objective of CAEPR is to undertake high-quality, independent research that will assist in furthering the social and economic development and empowerment of Aboriginal and Torres Strait Islander people throughout Australia. It aims to combine academic and teaching excellence on Indigenous economic and social development and public policy with realism, objectivity and relevance.

Introduction

Since WWII Indigenous peoples have achieved extraordinary things thanks to the rise of international human rights law and its work to moderate and regulate the conduct of states towards citizens. From the late 1940s to the present, a suite of human rights conventions and declarations have emerged from the UN. For historical reasons, human rights law is very interested in the treatment of marginalised minorities. Indigenous minorities are among the world's most marginalised peoples (UN-DESA 2009, 2016, 2017). Thus, they are supported by the international human rights law movement and have used the human rights system to tackle discrimination and abuses of their rights. The UN has increasingly become a place for Indigenous peoples from around the world to voice their concerns, and over the past 30 years the international community has increasingly recognised that special attention needs to be paid to their individual and collective rights.

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International Human Rights Standards

By way of background, international human rights standards have come a long way since the *Universal Declaration of Human Rights* was adopted and proclaimed by the General Assembly of the United Nations (UN) on 10 December 1948 (UN 1948). From the late 1940s to the present, a suite of human rights conventions and declarations have emerged from the UN, and over the past 30 years the international community has increasingly recognised that special attention needs to be paid to the individual and collective rights of the World's Indigenous peoples.

International instruments and the Articles of particular relevance to the rights of Aboriginal and Torres Strait Islander peoples of Australia, are shown in **Table 1.**[3]

UNDRIP was adopted by an overwhelming majority of UN Member States in September 2007. Four countries voted against UNDRIP (the common law 'CANZUS' countries of Canada, Australia, New Zealand and the United States) and 11 countries abstained (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).[4]

In the last two decades there have been several developments internationally that are increasingly pointing towards the adoption of human-rights-based approaches to policy, planning and development, especially when dealing with Indigenous peoples' rights. As the UN states, there are intrinsic and instrumental rationales for doing so:

- it is the right thing to do, morally and legally; and
- it will lead to better and more sustainable human development outcomes (UNICEF 2016).

UNDRIP expresses rights and by doing so explains how Indigenous peoples want nation-states (and others) to conduct themselves in relation to matters that may affect their rights and interests. In that sense, there is an expectation by Indigenous peoples and others that UNDRIP imposes obligations on States and third parties to conform to the standards expressed in the Declaration; and that, as a consequence of endorsing UNDRIP, nation-states can no longer make decisions affecting Indigenous peoples' rights and interests by imposition, but rather have a duty to consult with Indigenous peoples on the basis of free, prior and informed consent.

[3] Only two of the international instruments are entirely focused on the rights of Indigenous peoples. They are the International Labour Organisation (ILO) Convention No. 169 Indigenous and Tribal Peoples Convention (ILO 1989) and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (UN 2007). Only the ILO Convention No. 169 is legally binding on its signatories, but Australia is not a signatory. UNDRIP is not legally binding on states that endorse the Declaration.

[4] For a discussion of the reasons for the four CANZUS countries objecting to UNDRIP, see Ford (2013), Stavenhagen (2011:151) maintains these reasons were indefensible because UNDRIP was adopted by "*an overwhelming majority of 143 states, from all the world's regions and that, as a universal human rights instrument, it* morally and politically *binds all of the UN member states to comply fully with its contents"* (emphasis added). See also: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.

Table 1: International Instrum en ts and Articles of relevanceto the Indigenous peoples of Australia

UN Instrum en t	Year of adoption by the UN General Assembly or the ILO	Articles of specific relevance to the Indigenous peoples of Austr alia
United Nations Charter	1945	Article 1
Universal Declaration of Human Rights	1948	Article 2
International Conven tion on the Eliminat ion of All Forms of Racial Discriminat ion {ICERD)	1965	All
International Covenant on Civi l and Political Rights (ICCPR)	1966	Article 27
Internat iona l Covenant on Economic, Social and Cultural Rights {ICESCR)	1966	Art icle 1
Convent ion on the Elimin at ion of All Forms of Discrimination against Women {CEDAW)	1979	Article 1
Declaration on the Right to Development	1986	Article 5
ILO Convention No. 169 Indigenous and Tribal Peop les Convention {I LO 169)	1989	Art icle 1
Convention on the Rig h t s of the Child {CRC)	1989	Articles 17, 29 and 30
Convent ion on Biolog ical Diversity (CBD)	1992	Article 8j
Universal Declaration on Cult ura l Diversity	2001	Article 4
Convent ion on the Protection and Prom ot ion of the Diversity of Cult ural Expressions	2005	Preamble Para 8; Art icles 2, 3 and 7
Declaration on the Rights of Indigenous Peoples (UNDRIP)	2007	All
Human Rights and the Environment	2021	Art icle 6

Sources: UN (1945, 1948, 1965, 1966a, 1966b, 1979, 1986, 2007); ILO (1989}; Convention on Biological Diversity Secretariat {1992}; United Nations Educational, Scientific and Cultural Organisation (UNESCO) {2001, 2005}, United Nations Human Rights Council (UNHRC} (2021a)

UNDRIP may not be a direct source of law (UN 2013a:16), but it nevertheless carries considerable normative weight and legitimacy for several reasons:

- it was adopted by the UN General Assembly;[5]
- it was compiled in consultation with, and with the support of, Indigenous peoples worldwide;[6] and
- it reflects *"an important level of consensus at the global level about the content of Indigenous peoples' rights"* (UN 2013a:16).

UNDRIP also *"reflects the needs and aspirations of Indigenous peoples"* (Eide 2006:157) as well as the concerns of States. As James Anaya, the UN Special Rapporteur on the Rights of Indigenous Peoples from 2008 to 2014, reiterates, there are political and moral imperatives for implementing UNDRIP in addition to the legal imperatives (UN 2013a:18).

Furthermore, UNDRIP is an extension of the standards found in many other human rights treaties that have been ratified by and are binding on Member States, including the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Convention on the Elimination of All Forms of Racial Discrimination* (UN 2013a:17). Amnesty International Canada (2012) maintains that UN declarations, unlike treaties, covenants and conventions do not need to be signed or ratified because they are adopted by the UN General Assembly and are therefore considered to be universally applicable.

While UNDRIP elaborates the general principles and human rights standards contained in the other UN covenants and conventions as they specifically relate to the historical, cultural and social circumstances of Indigenous peoples, it does not create any new or special human rights.

UNDRIP is based on the principles of non-discrimination and equality and its standards *"share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that Indigenous peoples have faced in their enjoyment of basic human rights"* and *"connect to existing State obligations under other human rights instruments"* (UNHRC 2008, p. 24). Rodolfo Stavenhagen who was the UN Special Rapporteur on Human Rights and Fundamental Freedoms of Indigenous peoples from 2001 to 2007, maintains that UNDRIP is also *"a map of action"* for *"guaranteeing, respecting and protecting Indigenous peoples' rights"* (Stavenhagen 2011:150).

Australia's Aboriginal and Torres Strait Islander peoples are therefore increasingly demanding that the full suite of international human rights norms and standards apply to their affairs and to dealings with them (Referendum Council 2017a, 2017b), including UNDRIP (UN 2007).

Two key principles: self-determination and free, prior and informed consent

UNDRIP enshrines the principle of free, prior and informed consent as a *"critically important human right"* which is *"inextricably linked to the fundamental right of self-determination"* (Nosek 2017:125). According to Anaya (2009:186) *"self-determination is a right that inheres in human beings*

[5] The UN General Assembly has a long history of adopting declarations on various human rights issues, dating back to the Universal Declaration of Human Rights in 1948. Such declarations are adopted under Article 13(1)(b) of the UN Charter and are generally reserved by the UN *"for standard-setting resolutions of profound significance"* (UN 2013a:16).

[6] Daes (2008:24) maintains that *"no other UN instrument has been elaborated with such an active participation of all parties concerned".*

themselves". Anaya suggests that self-determination *"derives from common conceptions about the essential nature of human beings"* and that human beings *"individually and as groups, are equally entitled to be in control of their own destinies, and to live within governing institutional orders that are devised accordingly"* (Anaya 2009:186–187).

Erica Irena Daes (2008:25) asserts that it would be *"inadmissible and discriminatory to argue that Indigenous peoples lack the right to self-determination merely because of their indigeneity"*, and that nation-states therefore have *"a duty to accommodate the aspirations of indigenous peoples through constitutional reforms designed to expand the concept of democracy"*. Correspondingly, Indigenous peoples have a *"duty to try to reach an agreement, in good faith, on sharing power within the existing state and, to the extent possible, to exercise their right to self-determination by such means"*.

Self-determination

The principle of self-determination is enshrined in the UN Charter of 1945. It is a collective right that can only be asserted by groups who are identified as peoples (Weller 2018:119). Article 55 of the Charter places self-determination of peoples together with the principle of equal rights as the basis for international peace and stability (Strelein *et al*. 2001:116). Since that time the concept of self-determination has evolved into Common Article 1 in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both adopted in 1966 (UN 1966a, 1966b) with identical language: *"All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."*

Initially, Article 1 applied to the whole populations of sovereign states and was not viewed as applying to Indigenous peoples (Tobin 2014:34). Indeed, Britain and other European empires *"had no compunction in denying"* that the principle of self-determination had any application in the territories they invaded (Johnson 1970:268; Weller 2018:117–125). This changed over time[7] and by 2007, when the UN adopted UNDRIP (UN 2007), Article 3 provided that: *" Indigenous 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."*

Articles 4, 5, 18 and 23 also include references to or express provisions supporting Indigenous peoples' right to self-determination. In the course of developing UNDRIP, nation-states were concerned that self-determination of Indigenous peoples would pose *"a fundamental challenge"* to state authority which the State claimed to be a *"uni-polar right"* (Weller 2018:121). To address this concern, in the closing stages of the negotiations over the content of UNDRIP it was agreed between nation-states and Indigenous peoples to include Article 46, which provides that nothing in the Declaration may be interpreted as implying that any State, people, group or person has any right to engage in any activity which may be contrary to the Charter of the UN or could be construed as authorising or encouraging any action which would dismember or impair the territorial integrity or political unity of sovereign and independent States. Article 46 therefore alleviates nation-states' concerns that the right to self-determination would confer a special status on Indigenous peoples

[7] For an overview of how Indigenous peoples' rights reached the UN, see Diaz (2009:16–31) and Eide (2006:155–212). For an overview of how UNDRIP was adopted by the UN, see Eide (2009:32–46).

above the right to self-determination that peoples generally enjoy under international law (Anaya 2009:184; UN 2013a:19). It also prevents the use of UNDRIP as a basis for challenging *"the power imbalance they* [Indigenous peoples] *are locked into with states"* (Woons 2014:10); and confirms that *"external forms of self-determination are off the table for Indigenous peoples"* (Engle 2011:47). In addition, it provides that UNDRIP shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

Turning to Australian practice, the Australian Human Rights Commission (AHRC) gets around the imputation of independence from the nation-state by defining 'self-determination' as meaning Aboriginal and Torres Strait Islander peoples should have a choice in determining how their lives are governed, should be able to participate in decisions affecting them, and should have control over their lives and development (AHRC 2010:24).

Free, prior and informed consent

The principle that the free, prior and informed consent (sometimes referred to as 'FPIC') of Indigenous peoples *"should be obtained in relation to matters connected with their fundamental human rights and capable of producing significant negative effects on their cultures and their lives"* (Barelli 2018, p. 250) is enshrined in several Articles of UNDRIP (UN 2007).[8] In particular, Articles 19 and 32 detail what is entailed in enacting free, prior and informed consent (**Figure 1**).

Figure 1: UNDRIP Articles enacting free, prior and informed consent

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

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.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Source: UN (2007)

[8] In particular, Articles 10 (relocation), 11 (cultural property), 19 (regulatory measures), 28 (land and territories), 29 (environment) and 32 (development and use of land/territories). For more details, see Joffe (2013) and Southalan and Fardin (2019).

The principle of free, prior and informed consent has four interlinked elements, or 'concepts':

- **Free** means no coercion, force, bullying, pressure, or improper influence.
- **Prior** means that Indigenous peoples have been consulted before the activity begins.
- **Informed** means Indigenous peoples are given all of the available information and informed when that information changes or when there is new information. If Indigenous peoples do not understand this information then they have not been informed. An interpreter or other person might need to be provided to assist.
- **Consent** means Indigenous peoples must be consulted and participate in an honest and open process of negotiation that ensures:
    - all parties are equal, none having more power or strength;
    - Indigenous peoples' group decision-making processes are allowed to operate; and
    - Indigenous peoples' right to choose how they want to live and their worldviews are respected (AHRC 2010:25; Working Group on Indigenous Populations 2005, para 56).

The UN's Food and Agriculture Organization (FAO) (2016, p. 15) argues that these elements *"are interlinked, and should not be treated separately"*. Its good practice guide on the concept of free, prior and informed consent states that:

> *…consent should be sought before any project, plan or action takes place (prior), it should be independently decided upon (free) and based on accurate, timely and sufficient information provided in a culturally appropriate way (informed) for it to be considered a valid result or outcome of a collective decision-making process (consent)* (FAO 2016:15).

Applying these principles will create a process whereby governments, developers and Aboriginal and Torres Strait Islander peoples can talk to each other on an equal footing and come to a solution or agreement that all parties can accept (UNHRC 2009: Paras 36–57). It also means that Indigenous peoples must be involved in the design, development, implementation, monitoring and evaluation of all programmes, policies and legislation that affect them.

The principle of free, prior and informed consent raises the level of engagement with Indigenous peoples by switching the relationship from consultation to consent and provides a safeguard to Indigenous peoples' full participation in decisions affecting their rights and interests (Nosek 2017:119, 124). While the principle does not include a veto power, its articulation in UNDRIP does enable Indigenous people to say 'No': whether a state will choose to listen to them, even if it has followed the principle of free, prior and informed consent, is another matter.

Nevertheless, Indigenous peoples have also identified the principle of free, prior and informed consent as *"a requirement, prerequisite and manifestation of the exercise of their right to self-determination"* (UNHRC 2010a, 2010b). According to UNHRC (2009:14–15) those consent provisions are aimed at *"reversing the historical pattern of exclusion from decision-making, in order to avoid the future imposition of important decisions on Indigenous peoples, and allow them to flourish as distinct communities on lands to which their cultures remain attached"*. Violation of any of the elements of

free, prior and informed consent may invalidate the outcomes of any purported agreement with the Indigenous peoples concerned (UNHRC 2011:29).

While implementing free, prior and informed consent may seem *"deceptively simple"* (Southalan and Fardin 2019, p. 367) at the international level, complexities arise at the practical domestic level. Southalan and Fardin (2019, p. 367) argue that Australia has already engaged with some of the concepts of free, prior and informed consent which *"may have useful lessons for other jurisdictions".* The native title system in Australia recognises the communal, group or individual rights and interests of Aboriginal and Torres Strait Islander peoples,[9] and there is both jurisprudence arising from court decisions and specifically legislated requirements for consultation and consent in the *Native Title Act 1993* (Cth). As such Australia has had to deal with matters arising from group identification and decision-making and the *"dynamics comprised within free, prior and informed consent"* that *"provide examples for others grappling with how to implement free, prior and informed consent"* (Southalan and Fardin 2019:386). In summary, across the four concepts Southalan and Fardin found that:[10]

> ***Free*****:** Australian courts *"have ruled meeting outcomes invalid where they were inappropriately arranged or interfered with"* by a third party, have struck down rulings *"where decisions were made without the Indigenous group being adequately informed"* and have held that where members of the applicant group *"have acted improperly (and contrary to their fiduciary obligations), they can be held liable to compensate the group for losses incurred"* (2019:386).
>
> ***Prior*****:** *"The courts have ruled various titles and government grants invalid for failure to comply with the relevant native title procedures"* (2019:387).
>
> ***Informed:*** The native title system *"established the statutory funding and structures to assist Indigenous groups in understanding and exercising"* their procedural rights in the *Native Title Act 1993* (Cth)[11] and the courts see these provisions within the Act as assisting *"the native title groups in making decisions on an informed basis".* The courts also consider these elements of the native title system play a significant and important role in making the system workable (2019:387). *"Equally important"* is the *"authorisation process requiring evidence (usually through meeting notice and procedures) that decisions have been made by the group"*, and the courts note that *"a group cannot give an informed decision if only part of the group knows of the matter"* (2019:388).
>
> ***Consent*****:** The notion of 'consent' means *"there must be an option to withhold consent"* but Southalan and Fardin find that this *"is not the case in Australia's native title law"*, because *"Court and Tribunal decisions have consistently ruled there is no domestic 'veto' for Indigenous groups under the national law"* (2019:388). But, they claim, *"there is an obligation for governments and developers to negotiate in good faith, with laws and Court decisions*

[9] Section 223(1) of the *Native Title Act 1993* (Cth).

[10] Case citations supporting these findings are not reproduced here. See footnotes 150 to 165 in Southalan and Fardin, (2019:386–388) for details.

[11] Including the establishment of Native Title Representative Bodies or Native Title Service Providers to assist native title claimants or holders with native title matters under Part 11 of the *Native Title Act 1993* (Cth), and various procedural rights for future acts affecting native title rights and interests, including the right to be notified, the opportunity to comment, the right to be consulted or the right to negotiate depending on the nature of the future act. See Sections 24AA to 24OA and Section 233(1) of the *Native Title Act 1993* (Cth) for details.

prohibiting developments from proceeding where good faith negotiation had not occurred". They also argue that *"the validity of any 'group' decision is predicated on sufficient inclusion of individuals comprising the group"* and *"how the group's consent – or disputes about consent – is determined in practice"* are *"attendant considerations".* These matters are also relevant to the appointment and conduct of representatives, the conduct of meetings and whether decisions are made according to traditional or other practices (2019:388).

Southalan and Fardin's (2019:386) analysis shows that developments in Australian law and its related jurisprudence are relevant to the dynamics of applying the concept of free, prior and informed consent. However, they also reiterate and emphasise the fact that *"Australian laws do not replicate"* the key elements of free, prior and informed consent as reflected in UNDRIP (Southalan and Fardin 2019:386).

Responses to the Committee's Terms of Reference

The Centre for Aboriginal Economic Policy Research (CAEPR) welcomes the opportunity to provide a submission to the Committee on the implementation of UNDRIP in Australia.

The history of Australia's support for and application of the UNDRIP

Australia does not have a good history of support for UNDRIP. It must be recalled that when the Declaration went to the United Nations General Assembly, the four common-law CANZUS countries (Canada, Australia, New Zealand and the USA) voted against the UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP). Since that time, the four countries have subsequently reversed that position (Wensing 2021b:102).

Notably at the national level, Australia's level of support for, application of and compliance with UNDRIP's principles and standards remains poor (Wensing 2021b:109–112) (discussed further below), especially compared with Canada and New Zealand (discussed below).

The potential to enact the UNDRIP in Australia

CAEPR believes there is great potential to enact UNDRIP into Australian law. Indeed, such a step would mark a significant turning point in Australia's recognition and respect for Australia's Indigenous peoples.

The enactment of UNDRIP into Australian domestic law would require action at both the Commonwealth and State/territory levels, and that this should be undertaken with the full involvement of the Aboriginal and Torres Strait Islander peoples in each of those jurisdictions.

We fully endorse the points made by the North Australian Aboriginal Justice Agency's submission (No. 47) on page 12 of their submission, as follows:

- a framework for the development and enactment of laws, policies and practices at Federal, State and Territory levels as well as in more local decision-making to ensure consistency with the rights set out in the Declaration;
- practical criteria against which the implementation and effectiveness of such laws, policies and practices can be assessed, including a process for preventing the passage of draft Bills that do not meet certain requirements; and

- a process for considering existing domestic legislation against the UNDRIP and for addressing issues raised by that process with domestic legislation.

We also endorse their call for national and State/Territory plans and participation by Aboriginal and Torres Strait Islander peoples (Pages 12-13 of Submission 47).

International experiences of enacting and enforcing the UNDRIP

Guidance resources on implementing UNDRIP and FPIC in particular

Dr Ed Wensing recently undertook some research for the Fred Hollows Foundation to ascertain the existence of guidance materials about the implementation of UNDRIP, and in particular, the application of the right to free, prior and informed consent (FPIC) in UNDRIP and in terms of their relevance to the delivery of human services to Indigenous peoples.

This work was undertaken by Dr Ed Wensing in his capacity as an Associate and Special Adviser at SGS Economics and Planning and is shared with the Committee with the consent of the Fred Hollows Foundation.

The purpose of the research was to ascertain the usefulness of existing guides or resources that have been developed on implementing UNDRIP, and in particular, the application of the right to free prior and informed consent that is embedded in several Articles in UNDRIP, and in this particular case, its relevance to the design and delivery of particular kind of health services.

In total, over 200 documents from around the globe were scrutinised. These documents were prepared by the UN or its agencies, governments, research institutes, community and business organisations. This was narrowed down to 57 documents that were read in detail and the client was provided with an annotated bibliography of each of the 57 documents about their content and usefulness in developing further guidance material for the Fred Hollows Foundation.

The 57 short-listed documents were also entered into a spreadsheet of details about the agency, the title, year of publication, authors (where known), sector, abstract, usefulness for implementing UNDRIP and weblink. They were also ranked in terms of their relevance to implementing UNDRIP and, in particular, whether advice or guidance on applying the right to free, prior and informed consent. The criteria are shown in **Table 2**.

Table 2: Ranking of documents for level of relevance to implementing the right to FPIC in UNDRIP

Ranking	Level of Relevance to implementation of UNDRIP and applying the right to FPIC in the design and delivery of human services to Indigenous peoples	Number of Documents
A	Very applicable. Contains practical guidance on implementing UNDRIP and FPIC in particular	13
B	Contains valuable content to inform implementation of UNDRIP	24
C	No practical guidance, but contains helpful information about UNDRIP and about FPIC and Self-determination	20
TOTAL		57

The full excel spreadsheet is provided as a separate 8-page document.

In summary, the 'A' listed documents include:

- Seven documents produced by UN agencies providing very helpful insights and advice (No's 1, 3 – 7), noting that the Australian Human Rights Commission played a key role in the production of No. 6 with the UN Office of High Commissioner for Human Rights.
- One produced by the Australian Human Rights Commission (No. 2).
- One produced by Global Compact Network Australia, KPMG, University of Technology Sydney providing a Business Reference Guide to UNDRIP for Australian businesses (No. 8).
- Two produced by environmental NGOs with a focus on working with Indigenous peoples on conservation initiatives on their lands or waters (No's 10 and 11).
- Two produced by resource industry organisations with a focus on gaining accessing to Indigenous peoples' traditional or ancestral land or other natural resources (No's 12 and 13).

The 'B' listed documents include a wide range of resources form across the globe, mostly prepared by international NGOs, business organisations, human rights organisations, intergovernmental bodies or academics.

The 'C' listed documents also include a wide range of documents prepared by NGOs and intergovernmental bodies. Most of these documents contain useful information about UNDRIP, but not particularly focussed on providing specific guidance with implementing UNDRIP or FPIC.

This review of 57 documents came to the same conclusion that Equitable Origin *et al* (2018:2) and Wilson (2020:8) had reached in their research on the implementation of FPIC: That there is little guidance on what constitutes acceptable evidence of FPIC processes, and few resources that define what successful implementation of FPIC is from the perspective of affected communities. Most of the work being done in this space is not being done in collaboration with and in the interests of advancing the rights of Indigenous peoples *per se*. By far, the bulk of the work that is being done in terms of guidance for implementing UNDRIP is being done by non-indigenous organisations or interests for the purposes of gaining access to Indigenous lands or resources.

Where guidance materials on the implementation of FPIC have been developed, none of this work has been undertaken in Australia. Therefore, the work the Fred Hollows Foundation is doing in relation to the application and implementation of UNDRIP (including self-determination and FPIC) in relation to the delivery of health services with Indigenous peoples in Australia and internationally, is leading edge and ground-breaking.

Comparisons with Canada and New Zealand

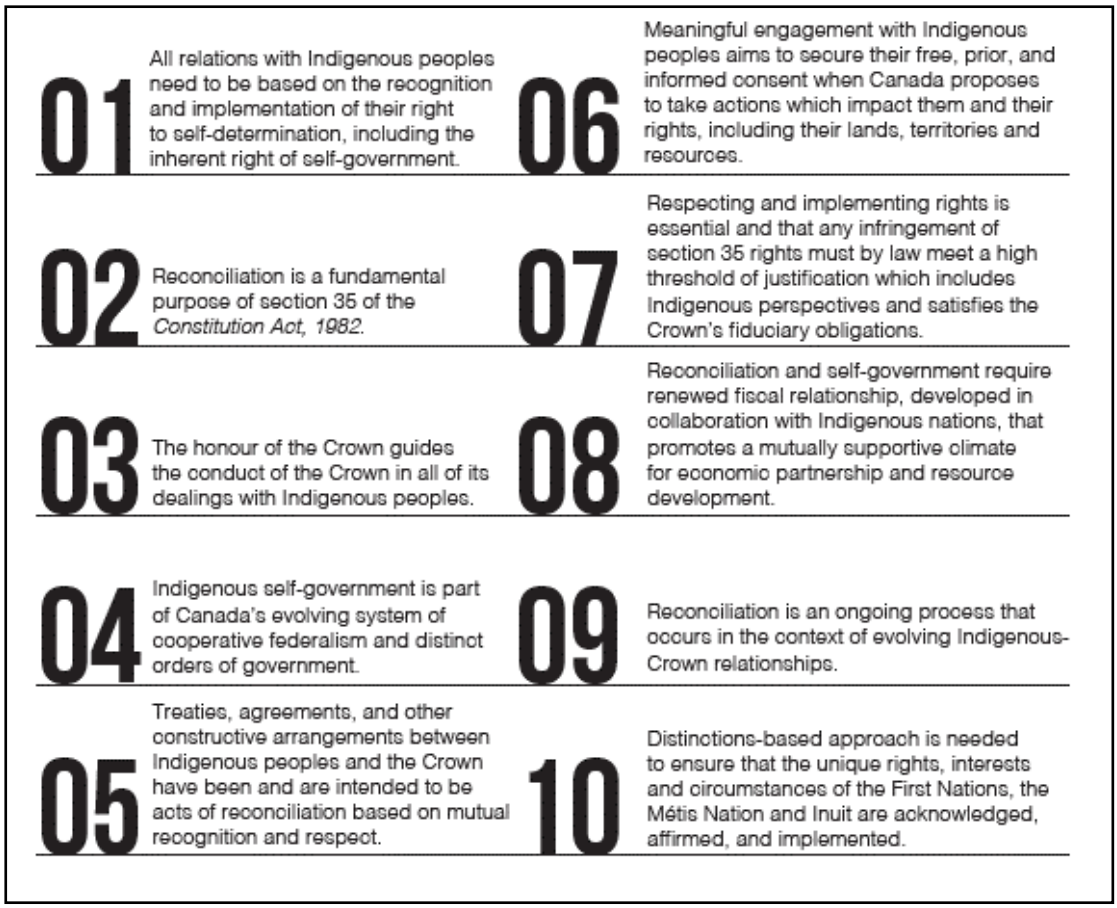
Two of the four common law CANZUS countries are well ahead of Australia in terms of their support for implementing UNDRIP in their respective countries. They are Canada and New Zealand. In Canada, British Columbia is the first sub-national jurisdiction in Canada to implement UNDRIP within its jurisdiction. Some details of the key documents in Canada and New Zealand are provided in a separate Excel spreadsheet.

Canada

Canada has a long history of treaty-making. There are 70 historic treaties forming the basis of the relationship between the Crown and 364 First Nations, representing over 60,000 Indigenous people (Government of Canada, undated). The modern treaty era began following the Supreme Court of Canada's 1973 decision in *Calder et al. v. Attorney-General of British Columbia,* in which the Court recognised Aboriginal rights for the first time. Since then, 25 more treaties have been signed and treaty-making continues to this day (Government of Canada, undated). However, treaties in Canada have not been without their difficulties with respect to reconciling sovereignties (Hoehn 2012:2, 35).

The Canadian government announced its support in principle for UNDRIP in 2010, and in 2016 re-endorsed the Declaration without qualification and committed to its full and effective implementation (Government of Canada, 2016). Recognising that implementation requires transformative change, in 2018 it adopted a set of Principles respecting the government's relationship with Indigenous peoples (**Figure 3**). The principles *"reflect a commitment to good faith, the rule of law, democracy, equality, non-discrimination, and respect for human rights"* and will guide the work required to fulfil the government's commitment to renewed nation-to-nation, government-to-government, and Inuit-Crown relationships (Government of Canada, 2018).

Figure 3: Principles for the Canadian Government's Relationship with Indigenous Peoples



Source: Government of Canada (2018)

In June 2021, the Canadian Parliament passed *'An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples*'. The purposes of the Act are to:

(a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and

(b) provide a framework for the Government of Canada's implementation of the Declaration.

The Act outlines measures to ensure that Canadian laws are consistent with UNDRIP. This specifically includes working with First Nations to set priorities and to identify laws that need to be changed. The Act states that the federal government *"must… prepare and implement an action plan to achieve the purposes of the Declaration".* It also provides that the action plan must be created in 'consultation and cooperation' with Indigenous peoples, and requires regular reporting on the progress being made, including published reports to parliament (Assembly of First Nations, undated).

British Columbia

In 2019, the province of British Columbia passed its own statute to implement UNDRIP, the first sub-national jurisdiction in Canada to do so. The Act's objectives are to affirm the application of Declaration to the laws of British Columbia, to contribute to the implementation of the Declaration, and to support the affirmation of, and develop relationships with, Indigenous governing bodies (British Columbia 2019). Unlike the Canadian statute, the British Columbia Act also includes provisions authorising the provincial government to enter into agreements with Indigenous governing bodies for joint decision-making or consent with respect to the use of statutory powers (Library of the Parliament of Canada 2021:5).

Under the Act, the provincial government must develop an action plan in consultation and cooperation with Indigenous peoples. A draft has been prepared for consultation, outlining proposed actions to be taken in cooperation with Indigenous peoples between 2021 and 2026, with progress to be reviewed and publicly reported annually. Actions are grouped under the four themes of self-determination and inherent right of self-government; title and rights of Indigenous peoples; ending Indigenous-specific racism and discrimination; and social, cultural and economic well-being (British Columbia 2021).

British Columbia has also developed ten draft principles, modelled on those introduced by the federal government in 2017, which provide high-level guidance on how provincial representatives engage with Indigenous peoples (**Figure 4**). As in Australia, it is notable that a sub-national government is playing a leadership role, albeit within a much more supportive national framework.

Figure 4: Draft Principles for British Columbia's Relationship with Indigenous Peoples

The Province of British Columbia recognises that:

1. All relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.
2. Reconciliation is a fundamental purpose of section 35 of the *Constitution Act*, 1982.
3. The honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.
4. Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.
5. Treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect.
6. Meaningful engagement with Indigenous peoples aims to secure their free, prior and informed consent when B.C. proposes to take actions which impact them and their rights, including their lands, territories and resources.
7. Respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.
8. Reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with the federal government and Indigenous nations that promotes a mutually supportive climate for economic partnership and resource development.
9. Reconciliation is an ongoing process that occurs in the context of evolving Crown-Indigenous relationships.
10. A distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of Indigenous peoples in B.C. are acknowledged, affirmed, and implemented.

Source: British Columbia (2018)

New Zealand

The Treaty of Waitangi, signed in 1840 by Māori Chiefs and representatives of the British Crown, continues to provide a framework for the relationship between Māori and the New Zealand government (Jones 2016:7, 42). While there is some contention about differences between the Māori and English versions of the Treaty, the essential element is that *"the Crown has the authority to establish some form of government in New Zealand and that the Māori property and other rights and the authority of the chiefs is protected"* (Jones 2016:7). Palmer (2008) maintains that the Treaty did not transfer sovereignty from the Māori to the British Crown.

The Treaty is not enforceable by the courts in New Zealand (Office of Treaty Settlements 2018:6), but its principles have been given some legal effect by reference in specific legislation, such as s.8 of the *Resource Management Act 1991* (New Zealand Government, 1991). Professor Hirini Matunga from Lincoln University[12] asserts that while these provisions have been laudable, they fail the Treaty

[12] Personal communications with Dr Ed Wensing, 26 October 2021.

responsiveness test because Māori planning, management and decision-making were not included in the Act in the first place.

When New Zealand endorsed UNDRIP in 2010, it did so *"without a substantive commitment to the core rights it affirms in that process"* (Te Aho, 2020:39). It was not until March 2019 that the New Zealand Attorney-General and Te Minita Whanaketanga Māori directed the Crown Law Office and Te Puni Kōkiri to start work on a Declaration Plan. A stocktake on the government's response to the Declaration until that point identified low public sector understanding of the Declaration and of its connection with the Treaty of Waitangi.

In August 2019, the Declaration Working Group was established to provide advice on the form and content of a Declaration Plan and engagement process. It reported to government in November 2019, outlining a vision for realising the Declaration by 2040 – in particular advancing Māori self-determination/*rangatiratanga,* and ideas for constitutional transformation (New Zealand Government, 2019). The government subsequently agreed to a two-step process including targeted engagement with key iwi and significant Māori organisations, as well as wider public consultations, with the intention of approving a Declaration Plan by the end of 2022 (New Zealand Government, 2021). However, Te Aho (2020:35) has expressed concerns that New Zealand's actions can be characterised as *"rights ritualism".* This was because when the government endorsed UNDRIP in 2010, it *"made it clear that implementation of the declaration would occur within existing constitutional and legal parameters*" (Te Aho, 2020:35).

Between September 2021 and February 2022, the National Iwi Chairs Forum Pou Tikanga, the NZ Human Rights Commission and Te Puni Kokiri led targeted engagement with Maori on the development of a plan to implement UNDRIP. Their report on key themes that emerged from the targeted engagements was released in April 2022 (Ministry of Maori Development – Te Puni Kokiri, 2022a). Twelve (12) key themes emerged from the Māori targeted engagement covering areas such as rangatiratanga, participation in government, equity and fairness, education, health, cultural expressions and identity, economic development and business, land resources and the environment, justice, housing, provision of information about Indigenous rights and healing past and current traumas (Ministry of Maori Development – Te Puni Kokiri, 2022a)

An outline of a Declaration Plan has also been released by the Ministry of Maori Development – Te Puni Kokiri (2022b) which will aim to:

- contribute to strengthening tino rangatiratanga and improving Māori wellbeing by affirming their rights, including the right of self-determination, as the Indigenous peoples of New Zealand;
- assist the Government with realising Te Tiriti o Waitangi and strengthening Māori-Crown relations as part of the Government's priority to lay foundations for the future, especially in the COVID-19 recovery;
- enhance New Zealand's reputation internationally by recognising our commitment to advocate for the rights and interests of Indigenous peoples; and
- benefit all New Zealanders (Ministry of Maori Development – Te Puni Kokiri, 2022b)

The current timeline is to have Declaration Plan in place by December 2022.

Legal issues relevant to ensure compliance with the UNDRIP, with or without enacting it

We agree with the submissions made by others (namely, Professor John Altman, Submission 44, the North Australian Aboriginal Justice Agency, Submission 47), that issue of compliance with UNDRIP is a critical issue, both at the institutional level, as well as at the individual level.

We agree with Jon Altman's observation that the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011* does not include UNDRIP as an international human rights instrument, and that the most recent Annual Report of the Committee for 2020 lists six bills for which international human rights legal advice (inclusive of UNDRIP) has been sought and provide where the rights of Aboriginal and Torres Strait Islander peoples to equality and non-discrimination are limited, in part because proposed laws have disproportionate impact on First Nations Peoples.

We also agree with Professor John Altman's comment that the inclusion of UNDRIP as a schedule to the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011*. Would provide a far higher degree of compliance with UNDRIP by the Federal Government in relation to the introduction of new legislation into the Australian parliament.

Key Australian legislation affected by adherence to the principles of the UNDRIP

Three Australian jurisdictions have enacted Human Rights Acts: Victoria, Queensland and the Australian Capital Territory (ACT).

While these jurisdictions have enacted human rights statutes or charters with specific provisions for protecting the rights of Aboriginal and Torres Strait Islander peoples, they only protect individual rights, not group rights, and there are limitations on how they may be applied in relation to protecting Aboriginal and Torres Strait Islander peoples' collective rights to their traditional lands in land use and environmental planning processes and decision-making (Wensing and Porter 2015).

Victoria's *Charter of Human Rights and Responsibilities Act 2006* makes reference to self-determination as a matter to consider in reviewing the Act. The Victorian Equal Opportunity and Human Rights Commission (2019:18) noted in its 2019 report on the operation of the Charter that the state has taken an important step towards self-determination of Aboriginal peoples with the establishment of the First Peoples' Assembly of Victoria, which has since been recognised as an elected voice for the Aboriginal people of Victoria to participate in future treaty discussions. Moreover, the Victorian government has also established a truth and justice process to formally recognise historic wrongs and address ongoing injustices for Aboriginal Victorians (Williams 2020; Power 2021).

Queensland's *Human Rights Act 2019* makes reference to self-determination in its Preamble but the Act does not include any provisions to enact it.

The *Human Rights Act 2004* (ACT) contains twenty human rights based on international agreements about how to protect values such as freedom, respect, equity and dignity. ACT Government agencies and other ACT public authorities must act and make decisions consistently with these rights. Under s.31 of the *Human Rights Act 2004* (ACT), international law and the judgments of foreign and international courts and tribunals relevant to a human right may be considered in interpreting a human right in the ACT. The definition of 'international law' in the Dictionary to the Act includes:

(a) the *International Covenant on Civil and Political Rights* and other human rights treaties to which Australia is a party; and
(b) general comments and views of the UN human rights treaty monitoring bodies; and
(c) declarations and standards adopted by the UN General Assembly that are relevant to human rights.

Following a review of the *Human Rights Act 2004* (ACT) in 2014, the ACT Government amended the Act in 2015-16, to insert S.27(1) which states:

> *(1) Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.*

S.27(2) was also added to the Act, in 2016 as follows:

> *(2) Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right—*
>
> *(a) to maintain, control, protect and develop their—*
> *(i) cultural heritage and distinctive spiritual practices, observances, beliefs and teachings; and*
> *(ii) languages and knowledge; and*
> *(iii) kinship ties; and*
>
> *(b) to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.*
>
> *Note The primary source of the rights in s27(2) is the UN Declaration on the Rights of Indigenous Peoples, Article 25 and Article 31.*

The Act does not make any specific reference to the right to self-determination.

As the then Minister for Indigenous Affairs in the ACT states in the Explanatory Memorandum for these insertions into the *Human Rights Act 2004* (ACT), S.27(2)(a) 'reflects the aspirations of Article 31 of UNDRIP, which recognises the right of Indigenous peoples to maintain, control and develop their cultural heritage and traditional knowledge' (Corbell, 2015:4). And that S.27(2)(a) 'properly provides formal recognition of the existence and continuing contribution of the cultural heritage of the First Peoples to the Canberra region, but this provision does not intend, and is not designed, to confer or create real or intellectual property rights over the expressions or manifestations of that cultural heritage, as regulation of those property rights is a matter for the Commonwealth' (Corbell, 2015:5).

The Explanatory Memorandum goes on to state that 'If such rights are claimed they must be claimed and exercised in accordance with the processes set out under the relevant Commonwealth laws' (Corbell, 2015:6).

The only Commonwealth laws providing recognition of Aboriginal or Torres Strait Islander peoples' 'property rights or other rights to maintain, control, protect and develop overt relationships with the environment and resources' which apply in the ACT are the *Native Title Act 1993* (Cth) with respect to native title rights and interests and the *Environment Protection and Biodiversity Conservation Act*

1999 (Cth) (EPBC Act) with respect to matters protected under that Act, including Aboriginal cultural heritage places entered on the Commonwealth or National Heritage Lists.[13]

Similarly, s.27(2)(b) also reflects the aspirations of Article 25 of UNDRIP, which further acknowledges the distinctive spiritual, material and economic relationships that Indigenous peoples, including Aboriginal and Torres Strait Islander peoples, have with the land and waters and other resources with which they have a connection under traditional laws and customs.

The Explanatory Memorandum goes on to explain that 'The intention behind the amendments to insert s.27(2)(b) is not to confer property rights through the recognition of native title, but to require the ACT Government to recognise the prior and continuing relationships of Aboriginal peoples with the Canberra region and environment as first owners and custodians and to value the importance of those relationships as an integral part of the history, cultural heritage and ongoing protection of the Canberra region and environment' (Corbell, 2015:6).

As stated above, s.27(2)(b) also includes a note to indicate that the primary source of the rights in s.27(2) is Article 31 in the United Nations *Declaration on the Rights of Indigenous Peoples*.

Article 31 of the UNDRIP states that:

1. *Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*
2. *In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.*

Article 25 of UNDRIP states that:

> *Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned land or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.*

Furthermore, the definition of International Law in the Dictionary at the end of the Act specifically includes 'declarations and standards adopted by the UN General Assembly that are relevant to human rights'. This would include the UN *Declaration on the Rights of Indigenous Peoples*) (UN, 2007), which by implication means that the ACT should have regard to all of the Articles in UNDRIP, not just Articles 25 and 31.

It is noted that the ACT Human Rights Commissioner has also made a submission to this Committee Inquiry (Submission 5). We agree with the ACT Human Rights Commissioner that the ACT's Human Rights Act is a modest first step in implementing UNDRIP, and that further reform is required to

[13] While this may be the case with respect to native title rights and interests as per the *Native Title Act 1993* (Cth), the self-government Act for the ACT does not preclude the ACT from designing a form of statutory land rights, subject to s.122 of the Australian Constitution.

ensure that the full suite of rights under the UNDRIP are vitally necessary to avoid the selective application of only some of the Articles in UNDRIP.

Australian federal and state government's adherence to the principles of the UNDRIP

To date, Australia's track record of adherence to the principles of UNDRIP are appalling. Especially the Federal Government's initial response to the *Uluru Statement from the Heart* which emerged from a series of regional Dialogues and the National Constitutional Convention held at Uluru on the lands of the Aṉangu People in May 2017. Significantly, the *Uluru Statement* was deliberately issued to *all the people* of Australia rather than their political leaders because *"the people of Australia… understand the current climate of policy inertia and it is they who ultimately can change the Constitution's text"* (Davis 2017:132).

In the course of conducting the Dialogues, the Referendum Council developed a set of Guiding Principles for assessing and deliberating on reform proposals. These were discussed and adopted by consensus at the Uluru Convention (Referendum Council, 2017a:22) and are reproduced in **Figure 5**.

Figure 5: Guiding Principles developed by the Referendum Council, 2017

The following guiding principles have been distilled from the Dialogues. These principles have historically underpinned declarations and calls for reform by First Nations. They are reflected, for example, in the Bark Petitions of 1963, the Barunga Statement of 1988, the Eva Valley Statement of 1993, the Kalkaringi Statement of 1998, the report on the Social Justice Package by ATSIC in 1995 and the Kirribilli Statement of 2015. They are supported by international standards pertaining to Indigenous peoples' rights and international human rights law.

The principles governing the assessment by the Convention of reform proposals were that an option should only proceed if it:

1. *Does not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty.*
2. *Involves substantive, structural reform.*
3. *Advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples.*
4. *Recognises the status and rights of First Nations.*
5. *Tells the truth of history.*
6. *Does not foreclose on future advancement.*
7. *Does not waste the opportunity of reform.*
8. *Provides a mechanism for First Nations agreement-making.*
9. *Has the support of First Nations.*
10. *Does not interfere with positive legal arrangements.*

Source: Referendum Council, 2017a, p. 22.

The first principle concerns Aboriginal and Torres Strait Islander sovereignty. Centring sovereignty in the *Uluru Statement* was deliberate, reflecting historic grievances with the Crown: *"Aboriginal and Torres Strait Islander peoples were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our laws and customs"* (Referendum Council 2017b). To convey the meaning of sovereignty, the Statement invoked international law on decolonisation and self-determination.

This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown (Referendum Council 2017b).

The need for truth-telling emerged from the Dialogues because *"the true history of colonisation must be told: the genocides, the massacres, the wars and the ongoing injustices and discrimination"* (Referendum Council 2017a, p. 32). Principle 5 therefore reflects the importance of truth-telling to heal the relationship between First Nations and Australia as a whole, echoing the United Nations (UN) *Declaration on the Rights of Indigenous Peoples* ('UNDRIP', UN 2007); the resolution on the *Right to the Truth* adopted by the UN Human Rights Council (UN 2012); and the similar resolution passed by the UN General Assembly in 2013 (UN 2013b).

Principle 8 is about agreement-making through treaty. The right to treaties, agreements and other constructive arrangements with nation states is enshrined in Article 37 of UNDRIP. Gover (2020 pp. 77–78) argues that Article 37 is a declaration that treaty guarantees are not to be diminished by other provisions in UNDRIP and therefore it "appropriately exemplifies the kind of priority that historical collective Indigenous rights must have if they are to be adequately protected from the competing claims of third parties". Gover (2020) also asserts that Article 37 "conveys the correct (in this author's view) understanding of appropriately concluded treaties as quasi-contractual constitutional agreements that are not subject to general norms of distributive justice, individual rights and non-discrimination principles". Current treaty developments in Australia provide an excellent opportunity to include references to Article 37 in preambular paragraphs and also in any legislative and regulatory mechanisms implementing them.

What stands out here is that Australia's sub-national jurisdictions have taken on treaty and truth-telling developments without the involvement of the Commonwealth. They are bold attempts to respond to calls by Aboriginal and Torres Strait Islander peoples for voice, treaty, and truth, and are consistent with the principles embedded in UNDRIP.

The *Uluru Statement* therefore represents a major turning point in Australia's national conversation about First Nations' rights precisely because it not only sets out Indigenous peoples' outstanding grievances, but also invites the Australian people to engage with them through treaty and truth-telling. While the Australian government's response has been at best disappointing, significant progress is being made in Australia's states and territories.

Concomitant with or since the release of the *Uluru Statement*, six of Australia's eight sub-national jurisdictions have committed to treaty or treaties. In order of commencement, those are Victoria, the Northern Territory (NT), Queensland, the Australian Capital Territory (ACT), Tasmania and South

Australia.[14] Also, in Western Australia a recent native title settlement has several hallmarks of a treaty. Some of these sub-national developments are arguably world-class (Wensing, 2021b).

There is also growing understanding in Australia that genuine reconciliation cannot be achieved without confronting and acknowledging the legacy of the past through some form of truth-telling (Referendum Council 2017a; Coalition of Peaks 2020). Notably, the *Uluru Statement* called for a Makarrata Commission to *"supervise a process of … truth-telling about our history"* (Referendum Council 2017b). Once again, sub-national governments have responded positively, and the actions of two jurisdictions – the Northern Territory and Victoria – are consistent with the resolution on the *Right to the Truth* adopted by the UN Human Rights Council and later the General Assembly (UN 2013b).

The key observation we make here is that the implementation of UNDRIP into Australian law cannot ignore the significance of the *Uluru Statement from the He*art, and that the principles of self-determination and free, prior and informed consent embedded in UNDRIP will be applicable to several Commonwealth and State/Territory statutes and treaty developments. What is absolutely necessary is clear leadership by the Commonwealth in ensuring that all of the rights and principles embedded in UNDRIP are applied equally and consistently across all of Australia's jurisdictions, and not just on an *ad hoc* basis at the whims of State and Territory governments for what suits them at any point in time.

The track record of Australian Government efforts to improve adherence to the principles of UNDRIP

Australia's lack of compliance

As noted earlier, Australia has yet to overcome its lack of political will and make a commitment to the effective implementation of UNDRIP, especially in so far as the Declaration applies to Aboriginal and Torres Strait Islander peoples' land rights and interests within Australia. Failure to protect Aboriginal and Torres Strait Islander peoples' laws and customs could also amount to a breach of Australia's international human rights obligations (Dodson 1998:210), something Australia has so far not avoided.

The UN has a framework for monitoring and assessing the human rights practices of State parties around the world. Key elements of that framework include the UN Office of the High Commissioner for Human Rights (OHCHR), UNHRC, the Special Procedures of the UNHRC and seven human rights treaty bodies that monitor the implementation of the core international human rights treaties.[15] The OHCHR supports the work of the treaty bodies and assists them in their monitoring and reporting requirements through their respective secretariats.

[14] The South Australia government embarked on treaty negotiations in February 2017, before the release of the *Uluru Statement,* as part of its commitment to building a better and stronger relationship with Aboriginal people. As a consequence of the state election in March 2018, the change in government at that time resulted in the government 'pausing' the treaty negotiations in favour of 'other priorities' on Indigenous matters (Walquist 2018; Thomas 2017). As a result of a change on government at the South Australian elections earlier this year, the incoming Labor Government has committed to resuming the treaty developments that it had previously instigated.

[15] The seven human rights treaty bodies are the Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee Against Torture (CAT), the Committee on the Rights of the Child (CRC), and the Committee on Migrant Workers (CMW).

Through ratification of international human rights treaties, State parties (i.e., national governments) undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints or communications are available at regional and international levels to help ensure that international human rights standards are indeed respected, implemented and enforced within States (OHCHR, 2019).

One of those mechanisms is the Universal Periodic Review (UPR). The UPR was established by the UN General Assembly in 2006 as a unique State-driven peer review mechanism whereby the human rights record of all 193 Member States is reviewed every four and a half years, on equal footing, by fellow States during an inter-governmental Human Rights Council Working Group session in Geneva. All States, without exception, are provided with the opportunity to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations, and all States can actively engage in reviewing the human rights record of their peers and in making recommendations to them (UNHRC, 2020). No other universal mechanism of this kind currently exists (UNHRC 2020). Each review is based on three documents:

- information provided by the State, which takes the form of a 'national report';
- information compiled from UN entities, including the UN human rights bodies, UN country teams and individual UN agencies, funds and programmes –which document is titled 'Compilation of UN information' and is prepared by the OHCHR; and
- information from other stakeholders, including national human rights institutions, NGOs and regional bodies, including regional human rights mechanisms, which is compiled into a document titled 'Summary of stakeholders' information', also prepared by the OHCHR.

During each review the nation-state presents its national report, which is followed by questions and recommendations from other States. The State under review has the opportunity to make preliminary comments on the recommendations, choosing to either accept or note them. The final report of the review then includes a clear State position on every recommendation and is adopted some three months later at a plenary session of the Human Rights Council and published on the Council's website (UNHRC, 2020).

Australia has participated in each of the UPR cycles since its inception, and appeared before the third cycle of the UPR in January 2021. In the UNHRC's *Compilation on Australia* report (UNHRC 2021b, p. 2), the Commissioner noted the Special Rapporteur on racism had found that Australia's Constitution provides no protection against racial discrimination and the Special Rapporteur on the rights of Indigenous peoples had found numerous disturbing reports on the prevalence of racism against Aboriginal and Torres Strait Islander peoples. The report also noted that the UN Committee on the Elimination of Racial Discrimination (UNCERD) regretted that Indigenous peoples' legal status was not enshrined in Australia's Constitution and noted UNCERD's concerns that the Indigenous peoples' land claims remain unresolved and that the *Native Title Act 1993* (Cth) remains a cumbersome tool requiring claimants to provide a high standard of proof to demonstrate their connections with the land. Australia's response to the UNHRC's *Compilation on Australia* report (UNHRC, 2021c) did not address these matters in any meaningful way.

The UPR Working Group's report on Australia (UNHRC 2021d) includes over 340 specific recommendations from various countries around the world, most notably recommending that Australia:

- ratifies the human rights instruments that it has not yet ratified (specifically ILO Convention 169, listed in Table 1);
- guarantees sufficient funding for the Australian Human Rights Commission so it can effectively carry out its work;
- strengthens measures to eliminate racial discrimination against its Indigenous peoples; and
- takes the necessary steps to develop a national plan of action to implement UNDRIP.

While the Working Group's report notes the Australian government's voluntary commitments to continue to work towards a referendum to recognise Aboriginal and Torres Strait Islander Australians in the Constitution, and to support that referendum when it has the best chance of succeeding, Australia is expected to respond to each of the recommendations in the Working Group's report to the UNHRC before the end of its forty-seventh session in July 2021.

As a signatory to the *Convention on the Elimination of All Forms of Racial Discrimination* (1965), Australia also comes under the scrutiny of UNCERD. Australia has included the *Convention on the Elimination of All Forms of Racial Discrimination* as a Schedule to the *Racial Discrimination Act 1975* (Cth). As such, Australia is obliged to take steps to ensure compliance with the rights set out in the Convention.

Australia's actions (or lack thereof) with respect to the land rights of its Indigenous peoples have therefore been scrutinised on several occasions by UNCERD, the first human rights treaty monitoring body to adopt a specific general recommendation on the rights of Indigenous peoples to their traditional lands (Gilbert, 2017).

Articles 5 and 6 of General Recommendation XXIII state the following:

> *5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.*
>
> *6. The Committee further calls upon States parties with indigenous peoples in their territories to include in their periodic reports full information on the situation of such peoples, taking into account all relevant provisions of the Convention* (UNCERD, 1997).

In 1998, UNCERD found that the winding back of protections to native title rights and interests in that year's amendments to Australia's *Native Title Act 1993* (Cth) went so far as to bring into question the Act's claim to be a 'special measure' within the meaning of Articles 1(4) and 2(2) of the *Convention on the Elimination of All Forms of Racial Discrimination,* as well as Australia's compliance

with Articles 2 and 5 of the Convention (UNCERD, 1999:7). 'Special measures' in international human rights law are generally understood as encompassing measures regarded as 'affirmative action' or 'positive discrimination' (Hunyor, 2009).

More recently, UNCERD in its eighteenth to twentieth periodic report on Australia (UNCERD, 2017) recommended that Australia:

- urgently amend the *Native Title Act 1993* (Cth) in order to lower the standard of proof of Aboriginal and Torres Strait Islander peoples' title to land and simplify the applicable procedures;
- ensure that the principle of free, prior and informed consent is incorporated into the Act and other legislation as appropriate and fully implemented in practice;
- consider adopting a national plan of action to implement the principles contained in UNDRIP; and
- reconsider Australia's position and ratify the *ILO Indigenous Tribal Peoples Convention 1989* (ILO No. 169) (ILO 1989).

In its latest 'concluding observations' on Australia's periodic reports, UNCERD has recommended that Australia accelerate its efforts to implement the principles of self-determination, as set out in UNDRIP (UNCERD 2017:5) and as cited in the *Uluru Statement from the Heart* (Referendum Council 2017b), including by *"entering into good faith treaty-negotiation with Indigenous Peoples"*. UNCERD has also requested that Australia provide detailed information in its next periodic report on concrete measures taken to implement this recommendation (UNCERD 2017:10).

Community and stakeholder efforts to ensure the application of UNDRIP principles in Australia

Australia's Aboriginal and Torres Strait Islander peoples are increasingly demanding that the full suite of international human rights norms and standards apply to their affairs and to dealings with them (Referendum Council 2017a, 2017b), including UNDRIP (UN 2007). UNDRIP may not be a direct source of law (UN 2013a:16), but it nevertheless carries considerable normative weight and legitimacy for several reasons: it was adopted by the UN General Assembly;[16] it was compiled in consultation with, and with the support of, Indigenous peoples worldwide;[17] and it reflects *"an important level of consensus at the global level about the content of Indigenous peoples' rights"* (UN 2013a:16). It also *"reflects the needs and aspirations of Indigenous peoples"* (Eide 2006:157) as well as the concerns of States. As the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya,[18] reiterates, there are political and moral imperatives for implementing UNDRIP in addition to the legal imperatives (UN 2013a:18).

[16] The UN General Assembly has a long history of adopting declarations on various human rights issues, dating back to the Universal Declaration of Human Rights in 1948. Such declarations are adopted under Article 13(1)(b) of the UN Charter and are generally reserved by the UN *"for standard-setting resolutions of profound significance"* (UN 2013:16).

[17] Erica-Irene Daes was Chairperson of the Working Group on Indigenous Populations and Special Rapporteur of the UN Sub-Commission on Human Rights from 1984 to 2001 and was instrumental in the preparation of UNDRIP. Daes (2008:24) maintains that *"no other UN instrument has been elaborated with such an active participation of all parties concerned".*

[18] James S. Anaya was the UN Special Rapporteur on the Rights of Indigenous Peoples from 2008 to 2014.

Furthermore, UNDRIP is an extension of the standards found in many other human rights treaties that have been ratified by and are binding on Member States, including the *International Covenant on Civil and Political Rights,* the *International Covenant on Economic, Social and Cultural Rights*, and the *International Convention on the Elimination of All Forms of Racial Discrimination* (UN 2013a:17). Amnesty International Canada (2012) maintains that UN declarations, unlike treaties, covenants and conventions do not need to be signed or ratified because they are adopted by the UN General Assembly and therefore considered to be universally applicable.

While UNDRIP elaborates the general principles and human rights standards contained in the other UN covenants and conventions as they specifically relate to the historical, cultural and social circumstances of Indigenous peoples, it does not create any new or special human rights. UNDRIP is based on the principles of non-discrimination and equality and its standards *"share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that Indigenous peoples have faced in their enjoyment of basic human rights"* and *"connect to existing State obligations under other human rights instruments"* (UNHRC 2008:24). In addition to a statement of redress, it is also *"a map of action"* for *"guaranteeing, respecting and protecting Indigenous peoples' rights"* (Stavenhagen 2011:150).[19]

The current and historical systemic and other aspects to take into consideration regarding the rights of First Nations peoples in Australia

The *Uluru Statement from the Heart* will live on because it not only sets out the grievances of First Nations peoples that require Australia's attention, but also includes three key mechanisms for addressing those grievances: Voice, Treaty, Truth.

The fact remains that Aboriginal and Torres Strait Islander peoples have become far more assertive in their bid for substantive recognition, seeking removal of remnants of racism from the Constitution together with amendments that safeguard their rights and go beyond mere symbolic gestures to *"more expansive projects of reconciliation, rights, sovereignty, treaty and postcolonial reckoning"* (Lino 2018:68).

There are many different ways of addressing the longstanding lack of recognition of First Peoples' prior ownership and occupation of the lands that comprise Australia, but history shows that such measures cannot be imposed, they must be negotiated (Hoehn 2016:125). The challenge is for any negotiations over land rights to be based on parity between the parties, mutual respect and justice, rather than exploitation and domination by one or other party.

In recent years, several sub-jurisdictions within Australia have formally commenced efforts to negotiate treaties. Three have indicated they are willing to consider treaties at the Aboriginal language group or regional level, based on affiliations between clans or native title determinations that have established connections to Country. This is the path that South Australia was pursuing before the change in government from Labor to Liberal in 2018 when the process was 'paused' (Government of South Australia 2013), and that the recently elected Labor Government in South Australia has recommitted to.

[19] Rodolfo Stavenhagen was the UN Special Rapporteur on human rights and fundamental freedoms of Indigenous peoples from 2001 to 2007.

What stands out here is that Australia's sub-national jurisdictions have taken on treaty developments without the involvement of the Commonwealth.

The sub-national approaches to treaty and truth telling are bold attempts to respond to calls by Aboriginal and Torres Strait Islander peoples for voice, treaty, and truth, and are consistent with the principles embedded in UNDRIP. At this point, it is still too early to determine whether the states and territories can accomplish what really needs to be achieved: a resolution of past wrongs, and a path to a better future for Aboriginal and Torres Strait Islander peoples that respects their rights and interests and their law and culture as Australia's First Nations peoples. The crucial test each jurisdiction will have to pass is whether they successfully adopt and apply the three critical ingredients of voice, treaty and truth-telling as the foundation for their negotiations, and fully comply with the UN Declaration on the Rights of Indigenous Peoples. Only the Commonwealth can do that through rigorous national legislation.

Any other related matters

We also wish to raise the relevance of the Convention on Biological Diversity (CBD).

The CBD is an international legally-binding treaty with three objectives:

- the conservation of biodiversity;
- the sustainable use of its components; and
- the fair and equitable sharing of the benefits arising from the use of genetic resources.

Australia has been a Party to the CBD since 1993 and the Department's website[20] notes the Australian Government's commitment to implementing its obligations in accordance with its national priorities. Article 8j of the CBD states that each contracting Party shall, as far as possible and as appropriate:

> *'Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices* (Secretariat of the Convention on Biological Diversity, 1992),

Adopted in 2010, the Nagoya Protocol is a supplementary agreement to the *Convention on Biological Diversity* and sets out core obligations for its contracting Parties to take measures in relation to access, utilisation, benefit-sharing and compliance of genetic resources. The Nagoya Protocol represents a significant evolution of Indigenous peoples' rights with respect to their traditional knowledge, where it is associated with the development of genetic resources. Once ratified by a UN member state, the Nagoya Protocol does have legal affect and carries significant obligations associated with its domestic implementation.

Critically, the *Nagoya Protocol* outlines a staged process that separates the 'prior informed consent' that is granted by traditional owners for others to 'access' their knowledge, requiring the undertaking of an additional consent process to then 'utilise' and apply that knowledge.

[20] https://www.environment.gov.au/biodiversity/international/un-convention-biological-diversity

Similar to UNDRIP and other international human rights instruments, the Nagoya Protocol provides governments and parliaments with choices. The first, is whether or not to agree to the standards set in the instruments. The second, arises out of a decision to accept the standards, which then requires consideration of the domestic arrangements for complying with the relevant standards.

Notwithstanding the important standards set out in UNDRIP and the Nagoya Protocol, it is important to note that both instruments represent a compromise on the parts of Indigenous negotiators. Further, there are enough caveats within the articles of these instruments to give governments and the parliament sufficient scope for flexibility with respect to any domestic arrangements that are put in place.

The question then arises is whether the reluctance of governments to put forward the Nagoya Protocol because of their referencing the interests of competing stakeholders over the rights and aspirations of Indigenous peoples. We call on the Senate to pass a motion supporting the rights and aspirations enshrined in the UNDRIP, the Nagoya Protocol and calling on the federal government to put forward the appropriate policy responses.

The *Bonn Guidelines* serve as inputs when developing and drafting legislative, administrative or policy measures on access and benefit-sharing with particular reference to provisions under Article 8(j) of the CBD.

The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity* (Secretariat of the Convention on Biological Diversity, 2011) is a supplementary agreement to the *Convention on Biological Diversity* and sets out core obligations for its contracting Parties to take measures in relation to access, benefit-sharing and compliance of genetic resources.

To the extent that the Hubs funded under the Commonwealth's National Environmental Science Program (NESP) engage in research that involves access, benefit-sharing and compliance of genetic resources of Indigenous peoples, the Hubs must conform with Nagoya Protocol and the Bonn Guidelines will apply.

In creating legislation implementing UNDRIP in Australia, care will need to be taken not to contravene or erode the rights established under the CBD, the *Nagoya Protocol* and the *Bonn Guidelines* in respect of access, benefit-sharing and compliance of genetic resources of Indigenous peoples.

Concluding Remarks

As important an instrument as the UNDRIP is, it is one of a suite of human rights instruments that need to be fully implemented in Australia.

Recognition of and respect for human rights at the highest levels of government and Australian institutions needs to be reinforced and backed up by legislation.

The human rights standards in UNDRIP and other instruments can be benchmarked in Commonwealth legislation, thereby setting the minimum standards that the Commonwealth and all other levels of government will have to comply with.

We therefore recommend:

- That the Government give urgent priority to amending the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to include UNDRIP as a schedule to the definition of human rights in that Act.
- That the Parliament support the *United Nations Declaration on the Rights of Indigenous Peoples Bill 2022* introduced by Senator Lidia Thorpe in March 2022. Even though the Bill has lapsed because Parliament was prorogued for the election, it deserves serious consideration by the Parliament.
- That the recommendations of several important inquiries and reviews of legislation that include a references to UNDRIP be implemented as a matter of urgency. These include for example, the Australian Law Reform *s* Commission's *Connection to Country: Review of the* Native Title Act 1993 *(Cth)* report; the *Independent Review of the Environmental Protection and Biodiversity Conservation Act—Final Report*; the Parliamentary Joint Committee on Northern Australia reports *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* and *The engagement of traditional owners in the economic development of Northern Australia*. We agree with Professor Jon Altman's comment that all land rights and native title laws must be UNDRIP compliant.
- That the current process to 'modernise' (strengthen) First Nations Cultural Heritage protection on and off Indigenous titled lands based on the *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia* report and current wide-ranging consultations delivers national standards for cultural heritage protection that are UNDRIP compliant and enforceable.
- The findings of this Inquiry be taken into consideration in the Government's intention to implement the *Uluru Statement from the Heart*

References

Amnesty International Canada. (2012) *United Nations Declaration on the Rights of Indigenous Peoples.* Fact Sheet. Available at: http://www.amnesty.ca/sites/amnesty/files/undeclarationfactsheetsept2012.pdf

Anaya, J. (2009) The right of indigenous peoples to self-determination in the post-declaration era. In: Charters, C. and Stavenhagen, R. (eds) *Making the Declaration work: The United Nations Declaration on the Rights of Indigenous Peoples.* Document No. 127. (pp. 184–198). Copenhagen: International Working Group for Indigenous Affairs.

Australian Human Rights Commission. (AHRC) (2010) *The community guide to the UN Declaration on the Rights of Indigenous Peoples.* Sydney: Australian Human Rights Commission. Available at: http://www.humanrights.gov.au/declaration indigenous/index.html

Barelli, M. (2018) Free, prior, and informed consent in the UNDRIP Articles 10, 19, 29(2) and 32(2), Chapter 9. In: Hohmann, J. and Weller, M. (eds) *The UN Declaration on the Rights of Indigenous Peoples: A commentary,* (pp. 247–269). Oxford, UK: Oxford University Press.

British Columbia (2018) *Draft principles that guide the Province of British Columbia's relationship with Indigenous peoples.* Available at: https://www2.gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft principles.pdf

British Columbia (2019) *Declaration on the Rights of Indigenous Peoples Act,* S.B.C. 2019, c. 44 (CanLII). Victoria, British Columbia, Canada: Queen's Printer.

British Columbia (2021) *Declaration on the Rights of Indigenous peoples Act, draft action plan. Draft for consultation.* Available at: https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan_for_consultation.pdf

Convention on Biological Diversity Secretariat (1992) *Convention on biological diversity*. Signed at the Earth Summit in Rio de Janeiro, Brazil, in 1992 and entered into force on 29 December 1993. Available at: https://www.cbd.int/convention/text/default.shtml

Corbell, S. (2015) *Human Rights Amendment Bill 2015, Explanatory Statement*, Attorney-General, ACT Legislative Assembly, accessed 28 July 2016. http://www.legislation.act.gov.au/es/db_51446/20150326-60327/pdf/db 51446.pdf

Daes, E.I. (2008) An overview of the history of indigenous peoples: Self-determination and the United Nations. *Cambridge Review of International Affairs*, 21 (1), 7–26.

Davis, M. (2017) Self-determination and the right to be heard In Morris, S. (ed.) *A rightful place. a road map to recognition,* (pp. 119-146). Carlton, Vic: Black Inc.

Diaz, A.W. (2009) How indigenous peoples' rights reached the UN. In: Charters, C and Stavenhagen, R. (eds) *Making the Declaration work: The United Nations Declaration on the Rights of Indigenous Peoples.* Document No. 127, (pp.16–31). Copenhagen: International Working Group for Indigenous Affairs.

Dodson, M. (1998) Six years of native title: Extinguishment of native title. Public lecture at the University of New South Wales (UNSW). *Native Title: Facts, Fallacies and the Future*, (pp. 205–211).University Symposium, 30 May 1998, Sydney: UNSW.

Eide, A. (2006) Rights of indigenous peoples – achievements in international law during the last quarter of a century. *Netherlands Yearbook of International Law*, 37 (December), 155–212.

Engle, K. (2011) On fragile architecture: The UN Declaration on the Rights of Indigenous Peoples in the context of human rights. *The European Journal of International Law*, 22 (1), 141–163.

Equitable Origin (EO), Roundtable on Sustainable Biomaterials (RSB) and Iseal (2018) *Enabling FPIC through Voluntary Standards*. Available at: https://www.isealalliance.org/sites/default/files/resource/2019-02/FPIC_Full Report.pdf

Food and Agriculture Organization. (FAO) (2016) *Free, prior and informed consent. An indigenous peoples' right and a good practice guide for local communities. Manual for project practitioners.* Available at: http://www.fao.org/3/a-i6190e.pdf

Ford, L. (2013) *Locating indigenous self-determination in the margins of settler sovereignty*. Chapter 1. In: Ford, L. and Rowse, T. (eds) *Between indigenous and settler governance*, (pp. 1–11). Milton Park, UK: Routledge.

Gilbert, J. (2017) CERD's contribution to the development of the rights of indigenous peoples under international law. Chapter 4. In: Keane, D. and Waughray, A. *Fifty years of the International Convention on the Elimination of All Forms of Racial Discrimination: A living instrument*, (pp. 91–105). Manchester, UK: Manchester University Press.

Gover, K. (2020) Treaties and the UN Declaration on the Rights of Indigenous Peoples. The significance of Article 37. In *UNDRIP implementation: comparative approaches, indigenous voices from CANZUS*. Special Report, (pp. 77–86). Centre for International Governance Innovation. Available at: https://www.cigionline.org/static/documents/documents/UNDRIPIII_web mar27.pdf

Government of Canada. (2016) *Canada becomes a full supporter of the United Nations Declaration on the Rights of Indigenous Peoples*. News Release, 10 May 2016. Available at: https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/canada-becomes-a-full-supporter-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html

Government of Canada (2018) *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*. Available at: https://www.justice.gc.ca/eng/csj-sjc/principles.pdf

Government of Canada (2021) *An Act respecting the UN Declaration on the Rights of Indigenous Peoples, statutes of Canada 2021.* Assented to 21 June. Ottowa, Canada: Published under authority of the Speaker of the House of Commons.

Government of Canada (undated) *Treaties and agreements*. Available at: https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231

Government of South Australia (2013) *Aboriginal regional authorities. A regional approach to governance in SA, Phase 1, Summary Report.* SA: Department of the Premier and Cabinet.

Hoehn, F. (2012) *Reconciling sovereignties. Aboriginal nations and Canada.* Saskatoon: Native Law centre, University of Saskatchewan.

Hoehn, F. (2016) Back to the future – reconciliation and indigenous sovereignty after Tsilhqot'In'. *University of New Brunswick Law Journal*, 67, 109–145.

Hunyor, J. (2009) 'Is it time to re-think special measures under the Racial Discrimination Act? The case of the Northern Territory Intervention'. *Australian Journal of Human Rights*, 14 (2), 39–70.

International Labour Organisation. (ILO) (1989) *Convention No. 169 Indigenous and Tribal Peoples Convention*. Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100 ILO CODE:C169

Joffe, P. (2013) *United Nations Declaration on the rights of Indigenous Peoples: Provisions relevant to 'Consent'.* Canada: Canadian Friends Services Committee (Quakers). Available at: http://quakerservice.ca/wp-content/uploads/2013/07/UN-Decl-Provisions-Relevant-to-Consent.pdf

Johnson, D.H.N. (1970) Review of books: *Grotian Society Papers 1968. Studies in the history of the law of nations.* Edited by C. H. Alexandrowicz, The Hague, Martinus Nijhoff, British Year Book of International Law, Volume 44, pp. 268–270.

Jones, C. (2016) *New treaty new tradition. Reconciling New Zealand and Māori law*. Wellington: Victoria University Press.

Library of Parliament of Canada (2021) *Legislative Summary Bill C-15: An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples*. Publication No. 43-2-C-15-E. Parliamentary Information, Education and Research Services. Available at: https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/43-2/43-2-c15-e.pdf

Lino, D. (2018) *Constitutional recognition. First peoples and the Australian settler state*. Annandale, NSW: The Federation Press.

Ministry of Maori Development – Te Puni Kokiri (2022a) *Key themes from Maori targeted engagement on a plan to implement the United Nations Declaration on the Rights of Indigenous Peoples,* April 2022. https://www.tpk.govt.nz/docs/tpk-undrip-append2-en.pdf and https://tpk.govt.nz/en/mo-te-puni-kokiri/our-stories-and-media/drafting-to-commence-on-declaration-plan-targeted-

Ministry of Maori Development – Te Puni Kokiri (2022b) *United Nations Declaration on the Rights of Indigenous Peoples, A Declaration plan in Aotearoa*. https://www.tpk.govt.nz/docs/tpk-undrip-a5book-en-feb2022.pdf

New Zealand Government (1991) *Resource Management Act 1991.* Wellington: New Zealand Government.

New Zealand Government (2019) *HE PUAPUA, Report of the Working Group on a plan to realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand.* Available at: https://www.tpk.govt.nz/en/a-matou-mohiotanga/cabinet-papers

New Zealand Government (2021) *UNDRIP: next steps for a declaration plan.* Cabinet Social Wellbeing Committee, Minute of Decision, 21 June. Available at: https://www.tpk.govt.nz/en/a-matou-mohiotanga/cabinet-papers

Nosek, G. (2017) Re-imagining indigenous peoples' role in natural resource development decision-making: Implementing free, prior and informed consent in Canada through Indigenous legal traditions. *University of British Columbia Law Review,* 50, 95–160.

Office of the High Commissioner for Human Rights. (OHCHR) (2019) *International human rights law.* Available at*:* https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx

Secretariat of the Convention on Biological Diversity (1992) *Convention on Biological Diversity*, signed at the Earth Summit in Rio de Janeiro, Brazil in 1992 and entered into force on 29 December 1993. Accessed 16 May 2016. https://www.cbd.int/convention/text/default.shtml

Secretariat of the Convention on Biological Diversity (2002). *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization*. Montreal: Secretariat of the Convention on Biological Diversity, Canada. https://www.environment.gov.za/sites/default/files/legislations/bonn guidelines.pdf

Secretariat of the Convention on Biological Diversity (2011) *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity.* Montreal: Secretariat of the Convention on Biological Diversity, Canada. https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf

Palmer, M. (2008) *The treaty of Waitangi in New Zealand's law and constitution.* Wellington: Victoria University Press.

Power, C. (2021) *Yorta Yorta Dja Dja Wurrung elder leads path to racial truth.* ABC Central Victoria, 2 June. Available at: https://www.abc.net.au/news/2021-06-02/yorta-yorta-dja-dja-wurrung-elder-leads-path-to-racial-truth/100185022

Referendum Council. (2017a) *Final report of the Referendum Council and* Uluru Statement from the Heart*.* Available at: https://www.referendumcouncil.org.au/sites/default/files/report attachments/Referendum Council_Final_Report.pdf

Referendum Council. (2017b) *Uluru Statement from the Heart*. Statement on the First Nations National Constitutional Convention, 26 May 2017. Available at: https://www.referendumcouncil.org.au/sites/default/files/2017-05/uluru statement from the heart 0.pdf. See also https://ulurustatement.org/the-statement

Southalan, J. and Fardin, J. (2019) Free, prior and informed consent: How and from whom? An Australian analogue. *Journal of Energy & Natural Resources Law,* 37 (4), 365–388.

Stavenhagen, R. (2011) *Making the Declaration on the Rights of Indigenous Peoples work: The challenge ahead*. Chapter 6. In Allen, S. and Xanthaki, A. (eds) *Reflections on the UN*

Declaration on the Rights of Indigenous Peoples. Studies in International Law. Oxford, UK: Hart Publishing.

Strelein, L., Dodson, M. and Weir, J. (2001) Understanding non-discrimination: Native title law and policy in a human rights context. *Balayi: Culture, Law and Colonialism*, 3, 113–148.

Te Aho, F. (2020) Treaty settlements, the UN Declaration and Rights Ritualism in Aotearoa New Zealand. In *UNDRIP implementation: comparative approaches, Indigenous voices from CANZUS.* Special Report, (pp. 33–40). Centre for International Governance Innovation. Available at: https://www.cigionline.org/static/documents/documents/UNDRIPIII_web mar27.pdf

Thomas, R. (2017) *Talking treaty. Summary of engagements and next steps.* Treaty Commissioner. (Held on file by the author.)

Tobin, B. (2014) *Indigenous peoples, customary law and human rights – why living law matters*. Oxon, UK: Routledge.

United Nations. (UN) (1945) *Charter of the United Nations*, into force on 24 October 1945. Available at: https://www.un.org/en/about-us/un-charter

United Nations. (UN) (1948) *Universal Declaration of Human Rights*, proclaimed 10 December 1948, General Assembly resolution 217 A. Available at: http://www.un.org/en/ga/search/view doc.asp?symbol=A/RES/217(III)

United Nations. (UN) (1965) *International convention on the elimination of all forms of racial discrimination.* General Assembly resolution 2106 (XX) of 21 December 1965. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx

United Nations. (UN) (1966a) *International covenant on civil and political rights*. General Assembly resolution 2200A (XXI) of 16 December 1966. Available at: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

United Nations. (UN) (1966b) *International covenant on economic, social and cultural rights*. General Assembly resolution 2200A (XXI) of 16 December 1966. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

United Nations. (UN) (1979) *Convention on the elimination of all forms of discrimination against women.* General Assembly Resolution 34/180 of 18 December 1979. Available at: http://un-documents.net/a34r180.htm

United Nations. (UN) (1986) *Declaration on the right to development.* General Assembly Resolution 41/128 of 4 December 1986. Available at: http://un-documents.net/a41r128.htm

United Nations. (UN) (1989) *Convention on the rights of the child.* General Assembly Resolution 44/25 of 20 November 1989. Available at: http://un-documents.net/a44r25.htm

United Nations. (UN) (2007) *Declaration on the rights of indigenous peoples.* General Assembly Resolution 61/295. Available at: http://legal.un.org/avl/pdf/ha/ga_61-295/ga 61-295_ph_e.pdf

United Nations (2012) *Right to the truth*. Resolution adopted by the Human Rights Council. A/HRC/RES/21/7. Available at https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/173/61/PDF/G1217361.pdf?OpenElement

United Nations (UN) (2013a) *Report of the Special Rapporteur on the rights of indigenous peoples*. General Assembly Sixty-eighth session, A/68/317. Available at: http://unsr.jamesanaya.org/docs/annual/2013-ga-annual-report-en.pdf

United Nations (2013b) *68/165. Right to the truth.* Resolution adopted by the General Assembly on 18 December 2013. A/RES/68/165. Available at: https://undocs.org/pdf?symbol=en/A/RES/68/165

United Nations Committee on the Elimination of All Forms of Racial Discrimination. (UNCERD) (1997) *General recommendation XXIII: Indigenous peoples.* CERD, UN Doc. A/52/18, Annex V; CERD/C/51/Misc. 13Rev.4, para. 4[d] [18 August 1997]. Available at: http://hrlibrary.umn.edu/gencomm/genrexxiii.htm

United Nations Committee on the Elimination of All Forms of Racial Discrimination. (UNCERD) (1999) *Report of CERD Fifty-fourth session (1-19 March 1999) and Fifty-fifth session (2-7 August 1999).* UN Doc. Supplement No. 18 (A/54/18). Available at: http://www.refworld.org/pdfid/45c30b260.pdf

United Nations Committee on the Elimination of All Forms of Racial Discrimination. (UNCERD) (2017) *Concluding observations on the eighteenth to twentieth periodic reports of Australia.* Adopted by the Committee at its ninety-fourth session (20 November–8 December 2017), UN Doc. CERD/C/AUS/CO/18-20. Available at: http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/CERD C AUS CO 18-20 29700 E.pdf

United Nations-Department of Economic and Social Affairs. (UN-DESA) (2009) *State of the world's indigenous peoples.* Volume 1, ST/ESA/328. New York: United Nations.

United Nations-Department of Economic and Social Affairs. (UN-DESA) (2016) *State of the world's indigenous peoples – access to health services.* Volume 2. New York: United Nations.

United Nations-Department of Economic and Social Affairs. (UN-DESA) (2017) *State of the world's indigenous peoples – education*. Volume 3, ST/ESA/368. New York: United Nations. Available at: https://www.un.org/development/desa/indigenouspeoples/publications/state-of-the-worlds-indigenous-peoples.html

United Nations Educational, Scientific and Cultural Organisation. (UNESCO) (2001) *Universal Declaration on cultural diversity.* Adopted 2 November 2001. Available at: http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html

United Nations Educational, Scientific and Cultural Organisation. (UNESCO) (2005) *Convention on the protection and promotion of the diversity of cultural expressions.* Available at: http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html

United Nations Human Rights Council. (UNHRC) (2008) *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya*. A/HRC/9/9, ninth session, Agenda item 3, 11 August. Available at: http://unsr.jamesanaya.org/docs/annual/2008_hrc_annual_report_en.pdf

United Nations Human Rights Council. (UNHRC) (2009) *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya.* A/HRC/12/34, twelfth session, Agenda item 3. Available at: http://unsr.jamesanaya.org/docs/annual/2009_hrc_annual_report_en.pdf

United Nations Human Rights Council. (UNHRC) (2011) *Final report of the study on indigenous peoples and the right to participate in decision-making.* Report of the Expert Mechanism on the Rights of Indigenous Peoples', A/HRC/18/42, eighteenth session, agenda item 5, 17 August. Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-42_en.pdf

United Nations Human Rights Council. (UNHRC) (2020) *Maximizing the use of the Universal Periodic Review at country level. Practical guidance*. Available at: https://www.ohchr.org/Documents/HRBodies/UPR/UPR_Practical Guidance.pdf

United Nations Human Rights Council. (UNHRC) (2021a) *Human rights and the environment, promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.* Forty-sixth session 22 February–23 March 2021. A/HRC/46/L.6/Rev.1. Available at: https://undocs.org/pdf?symbol=en/A/HRC/46/L.6/REV.1

United Nations Human Rights Council. (UNHRC) (2021b) *Compilation on Australia.* Report of the Office of the United Nations High Commissioner for Human Rights, Human Rights Council Working Group on the Universal Periodic Review, Thirty-seventh session 18-29 January 2021. A/HRC/WG.6/37/AUS/2. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/306/42/PDF/G2030642.pdf?OpenElement

United Nations Human Rights Council. (UNHRC) (2021c) *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21*. Australia. Human Rights Council Working Group on the Universal Periodic Review, Thirty-seventh session 18-29 January 2021. A/HRC/WG.6/37/AUS/1. Available at: https://undocs.org/A/HRC/WG.6/37/AUS/1

United Nations Human Rights Council. (UNHRC) (2021d) *Report of the Working Group on the Universal Periodic Review of Australia.* Human Rights Council, Forty-seventh session, 21 June - 9 July 2021 Agenda item 6, Universal periodic review. Distributed 24 March 2021. A/HRC/47/8. Available at: https://undocs.org/A/HRC/47/8

United Nations International Children's Emergency Fund (UNICEF) (2016) *Human Rights-based Approach to Programming. What is HRBA?* Available at: http://www.unicef.org/policyanalysis/rights/index 62012.html

Victorian Equal Opportunity and Human Rights Commission (2020) *2019 Report on the operation of the Charter of Human Rights and Responsibilities*. Melbourne. Available at:

https://www.humanrights.vic.gov.au/static/70ae20e42e2d600a03c7a67960858324/VEOHRC CharterReport2020 FINAL-lowres.pdf

Walquist, C. (2018) South Australia halts Indigenous treaty talks as premier says he has 'other priorities'. *The Guardian,* 30 April. Available at: https://www.theguardian.com/australia- news/2018/apr/30/south-australia-halts-indigenous-treaty-talks-as-premier-says-he-has- other-priorities

Weller, M. (2018) Self-determination of indigenous peoples. Chapter 5 In Hohmann, and M. Weller, J. (eds) *The UN Declaration on The Rights of Indigenous Peoples. A Commentary.* Oxford, UK: Oxford University Press.

Wensing, E. (2019) *Land Justice for Indigenous Australians: How can the two systems of land ownership, use and tenure co-exist with mutual respect based on parity and justice?* PhD Thesis, ANU. http://hdl.handle.net/1885/157200

Wensing, E. (2021a) 'Indigenous peoples' human rights, self-determination and local governance' – Part 1. *Commonwealth Journal of Local Governance.* 24: 98-123, https://doi.org/10.5130/cjlg.vi24.7779

Wensing, E. (2021b) 'Indigenous peoples' human rights, self-determination and local governance' – Part 2. *Commonwealth Journal of Local Governance.* 25: 133-160, https://doi.org/10.5130/cjlg.vi25.8025

Wensing, E. and Porter, L. (2015) Unsettling planning's paradigms: Toward a just accommodation of Indigenous rights and interests in Australian urban planning? *Australian Planner*, 53 (2), 91– 102. DOI: 10.1080/07293682.2015.1118394.

Williams, G. The Hon (2020) *Delivering truth and justice for Aboriginal Victorians.* Minister for Aboriginal Affairs, Victoria. Media Release, 11 July. Available at: https://www.premier.vic.gov.au/delivering-truth-and-justice-aboriginal-victorians

Wilson, E. (2020) *Voluntary standards and FPIC: Insights for improving implementation*. ISEAL Alliance and Evidensia. https://www.isealalliance.org/sites/default/files/resource/2020- 11/Voluntary-standards-and-FPIC_ISEAL 11-2020.pdf

Woons, M. (2014) Introduction: On the meaning of restoring indigenous self-determination. In Woons, M. (ed) *Restoring indigenous self-determination. Theoretical and practical approaches.* Bristol, UK: E-International Relations.

Working Group on Indigenous Populations. (2005) *Standard-setting: Legal commentary on the concept of free, prior and informed consent.* Expanded working paper submitted by Mrs. Antoanella-Iulia Motoc and the Tebtebba Foundation offering guidelines to govern the practice of implementation of the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources,

UN Doc E/CN.4/Sub.2/AC.4/2005/WP.1.