THE FPIC FIXATION: INDIGENOUS – MINING LAW, INTERNATIONALLY AND AUSTRALIA[1]

John Southalan
Resources Law Network
Perth (Australia)

JOHN SOUTHALAN is a barrister (Western Australian Bar Association) and adjunct academic at the Universities of Dundee (Centre for Energy, Petroleum and Mineral Law and Policy), Western Australia (Law School) and Murdoch University. He assists clients in both litigious and non-litigious matters, including resources regulation in advising regulators, mining companies, land owners, communities and non-government organisations. John researches and teaches in mining regulation and also on human rights and resources; and has published and presented on human rights and business, mining regulation, climate change, Indigenous rights, minerals taxation, CSR regulation, and mining agreements. He undertakes extensive volunteer work including for NGOs in Myanmar, Thailand and Australia; and as a committee member of the Business and Human Rights Committee (*Law Council of Australia*) and the Indigenous Issues Committee (*Australian Bar Association*). John previously worked with the *Yamatji Marlpa Aboriginal Land Council* (Pilbara & Perth, Australia), *Centre for Energy, Petroleum and Mineral Law and Policy* (Dundee, Scotland), *Human Rights and Equal Opportunity Commission* (Sydney, Australia) and *Corrs Chambers Westgarth* (Perth, Australia).

'No aspect of the [UN] declaration [on the on the Rights of Indigenous Peoples] has received more attention than the concept of "free, prior, and informed consent" (FPIC) and its implications for resource development'[2]

I. Introduction

Free prior informed consent is frequently cited as a legal standard for the development of extractives projects which impact Indigenous groups,[3] particularly in Latin America[4] (through ILO Convention 169 and the Inter-American human rights regime). The basic concept is that mining impacts should not occur without the group's FPIC, but that simplicity hides domestic complexity, as noted in a recent article:

> *At the international level the concept of FPIC is deceptively simple, largely because implementation is not a primary consideration at that international level. The complexities arise at the domestic level with the practicalities of granting development rights, impacts on Indigenous groups, disputes about tensions between these two, and domestic courts having to adjudicate when such disputes cannot be resolved.*[5]

This paper outlines the current state of FPIC at the international level, examines some common difficulties, and then describes Australian domestic law regarding these issues.

Please cite as: John Southalan, "The FPIC Fixation: Indigenous – Mining Law, Internationally and Australia," *International Mining and Oil & Gas Law, Development, and Investment* 22A-1 (Rocky Mt. Min. L. Fdn. 2019).

II. International standards

There is a scary, and increasing, amount of material written on indigenous rights and FPIC – in the just the last twelve months there have been several UN and inter-governmental reports, a PhD thesis, numerous government submissions, and over 15 peer-reviewed journal articles.[6] Unsurprisingly, FPIC can be understood and characterised in various ways (eg. Indigenous-state geo-politics, cultural, political science). However, in terms of international human rights standards, FPIC's origins can be traced to earlier concepts of effective participation and informed consent (to decisions impacting minority rights and interests) as a protection of cultural rights and non-discriminatory treatment of property and related rights.[7] More recently, FPIC is emphasised as fundamentally about self-determination.[8]

International legal standards requiring some form of FPIC include the International Labour Organisation's *Convention 169* [9] (and, given 15 of the 23 parties to that treaty are Latin American countries, this region sees the most implications from C169[10]), and through the global treaty on biological diversity.[11] Notions of FPIC also feature in regional human rights structures[12] and inter-governmental arrangements.[13] Interestingly, while various European materials/officials refer to FPIC as an important concept,[14] FPIC does not seem to feature in any regional European treaty nor does it appear in any decision of the European Court of Human Rights.[15] In contrast, the Inter-American human rights system has developed considerable law on FPIC.[16] While its foundational documents (the 1948 declaration and 1969 convention[17]) do not mention indigenous people nor FPIC, the Inter-American Commission and Court have issued various decisions and materials developing FPIC, as part of rights to life, personal integrity, and (most significantly) the right to property under Convention article 21.[18] In 2016, the Organization of American States adopted the *American Declaration on the Rights of Indigenous Peoples.*[19] It is perhaps too early to determine its legal effect within countries, but commentary suggests the Declaration has lesser FPIC requirements than existing jurisprudence of the Inter-American Court.[20]

Through these various fora, some industrial developments have been found to have occurred without the FPIC of the affected communities.[21] In other cases, the international mechanisms have adjudged FPIC as present (or not required), thereby indicating the relevant development as not breaching Indigenous peoples' rights.[22] Clearly, lawyers working in this area (whether for companies, Indigenous groups, or government) need familiarity with the standards and mechanisms of FPIC.

The most comprehensive, international, statement of indigenous FPIC and land-use[23] is found in the 2007 UN *Declaration on the Rights of Indigenous Peoples*[24] (**UNDRIP**). Being a declaration and not a treaty, UNDRIP is not binding of itself,[25] but it is increasingly cited by human rights bodies in their decisions and observations of what is required under their treaties.[26] FPIC is found in six articles of UNDRIP: relocation, cultural property, regulatory measures, land & territories, environment and development & use of land/territories.[27] In relation to mining developments, UNDRIP's article 32 provides the greatest detail of what is envisaged by FPIC.

UNDRIP, 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, utilisation 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.*

There are various complexities and conundrums presented by these three sentences, which are examined further below.

(a) Group -v- individual

UNDRIP differentiates between the rights of 'individuals' and 'indigenous peoples'.[28] All the FPIC rights in UNDRIP are of 'indigenous peoples', meaning an indigenous group;[29] and UNDRIP prioritises the group's control regarding the responsibilities and roles of its individuals.

> *Art 9. ...[I]ndividuals have the right to belong to an Indigenous community...in accordance with the traditions and customs of the community.*
>
> *Art 35. Indigenous peoples have the right to determine the responsibilities of individuals to their communities.*

Difficulties here are obvious. Any group of humans, in discussing and determining how to best approach a subject, will have differences between them. Even after some general acceptance within the group on how to proceed, differences may remain between individuals. This is so wherever humans need to interact – whether a company, university department, government agency, or an indigenous group. As FPIC is a group right – being the consent *of the group* – what is the significance if individuals within the group do not agree?

International law is clear that a group's decisions/practices cannot justify the violation of an individual's human rights. This has been repeatedly confirmed, particularly regarding women and girls, around issues such as education, property and personal security.[30] However, the human right to culture is not an individual right in the same sense (eg. *my* body, education, property etc), rather it is the culture *as part of the* group.[31] So, an individual cannot invoke 'cultural' rights as individual rights which are inconsistent with the group from which they derive. The Human Rights Committee (which monitors implementation of the treaty on civil and political rights including its right to enjoyment of group culture) has rejected complaints from individuals asserting a breach of their cultural rights, where the broader group had agreed to the relevant actions. These involve cases about controls affecting reindeer herding in Finland and Sweden,[32] and fishing and sea rights in New Zealand.[33] In the latter case, the Committee's decision gives some guidance for future procedure.

9.6 ...[T]he State party [New Zealand Government] undertook a complicated process of consultation in order to secure broad Maori support to a nation-wide settlement and regulation of fishing activities. Maori communities and national Maori organizations were consulted and their proposals did affect the design of the arrangement. ... The Committee has noted the authors' claims that they and the majority of members of their tribes did not agree with the Settlement and that they claim that their rights as members of the Maori minority have been overridden. In such circumstances, ***where the right of individuals to enjoy their own culture is in conflict with*** *the exercise of parallel rights by other members of the minority group, or of* ***the minority as a whole, the Committee may consider whether the limitation in issue is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected.***

9.8 In the consultation process, special attention was paid to the cultural and religious significance of fishing for the Maori, ... ***[T]he State party has****, by engaging itself* ***in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities, taken the necessary steps to ensure*** *that the ...Settlement and its enactment through legislation, ... are* ***compatible with article 27*** *[of the ICCPR, regarding protection of culture].*[34]

Thus, UNDRIP's prioritisation of group control is valid as regards cultural rights, but would not support group practices which deny or impact an individual's human rights.

In relation to FPIC, there is considerable emphasis on the need to avoid internal discrimination and marginalisation – in material from various UN bodies[35] and other commentaries.[36] FPIC, they explain, requires that 'all community members are free to participate regardless of gender, age or standing'.[37] That logic and rationale is indisputable but, in practice, there are complexities. For instance, if a community's decisions or decision-making seem to be marginalising certain sectors (eg. women, children, people with disabilities) what is the responsibility of an external party (eg. government, company) who is engaging with that community? The external party should, quite properly, emphasise the importance that everyone potentially impacted by the proposal should have the opportunity to be informed about and involved in the decision. Is anything more required? UNDRIP has a relevant provision, but it is almost Nixonian in identifying an issue while avoiding any indication of responsibility.

Article 22

1. *Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.*
2. *States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.*

The two treaty bodies which have addressed FPIC and potential discrimination *within* a group provide contrasting and uncertain direction. In relation to children, the child-rights committee focussed mainly on the State's obligation not to impede the culture of the group

to which the child belongs.[38] In relation to women, the committee regarding female discrimination couched FPIC as applying to *all* rural women, regardless of indigeneity[39] thus seeming to be a requirement *in addition to* FPIC for an Indigenous group.

The issue - of UNDRIP's provisions relevant to group consent and individual rights - has received more detailed examination by the International Law Association (in 2012) and the UN's 'Expert Mechanism on the Rights of Indigenous Peoples' (a group established by the UN's inter-governmental Human Rights Council) in 2018. The International Law Association noted a 'possible tension between collective self-determination and autonomy of indigenous peoples and the individual human rights of their members'.[40] The 'solution' envisaged by the International Law Association was that the only circumstances in which a group's limitation could validly occur of its members were the same criteria under which a State's limitations can occur on the indigenous group.[41] That is: where the measures are 'non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society'.[42] That is a possible way forward, but some of these concepts (framed regarding the state's powers) do not easily translate to a group's role regarding its individual members. The UN's Expert Mechanism on the Rights of Indigenous Peoples takes the matter little further, essentially expanding the terms of UNDRIP but not giving significant guidance on what external parties should do when faced with differences (and possible discrimination) within an Indigenous group. The relevant parts of the 2018 report are these.

> *20(c) Indigenous peoples should have the freedom to be represented as traditionally required under their own laws, customs and protocols, with attention to gender and representation of other sectors within indigenous communities. Indigenous peoples should determine how and which of their own institutions and leaders represent them. They should therefore enjoy the freedom to resolve international representation issues without interference...*
>
> *23. ... All parties should ensure representation from women, children, youth and persons with disabilities, and efforts should be made to understand the specific impacts on them. Yet, identifying the legitimate representatives of indigenous peoples can be challenging. States should be mindful of situations where indigenous peoples' decision-making institutions have been undermined by colonialism and where communities have been dispersed, dispossessed of land or relocated, including to urban areas. These situations may require State assistance to rebuild indigenous peoples' capacity to represent themselves appropriately. It is important for States or third parties to ensure that institutions supporting indigenous peoples and claiming to represent them are so mandated.*
>
> *27. ... Indigenous peoples' consent should be given "in accordance with international human rights standards" (Declaration, art. 34) and particular attention should be paid "to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities", including in the elimination of all forms of discrimination and violence against indigenous children and women (ibid., art. 22).*

(b) Right -v- procedure

There is ongoing debate over whether FPIC, as presented in UNDRIP, means that consent, or even consultation, can be withheld on *any* basis (which would prevent a proposal from continuing because consent does not exist).[43] Various commentaries criticise a fixation on whether FPIC provides a veto as distracting from the broader significance and implications of UNDRIP.[44] There can be debate over different meanings of 'veto' and 'consent',[45] but the context of extractives development requires some clarity over if and when the lack of a group's agreement means a project should not continue, regardless of what label may attached to that process.

A simple point can be made at the outset: FPIC provides no veto to an individual. As explained above, FPIC is a group right. Where the group has come to its decision, the fact that individuals within that group may disagree and continue to disagree, does not invalidate the group's FPIC decision. The cases described above demonstrate various circumstances in which international bodies have effectively 'enforced' the group decision, rejecting individual complaints about cultural impacts. This is also reflected in the IFC's Performance Standards regarding Indigenous Peoples and its related commentary,[46] which describe engagement with affected Indigenous groups as needing to:

> *… Provide sufficient time for Indigenous Peoples' decision-making processes.* ***Internal decision making processes are generally but not always collective in nature. There may be internal dissent, and decisions may be challenged by some in the community. The consultation process should be sensitive to such dynamics and allow sufficient time for internal decision making processes to reach conclusions that are considered legitimate by the majority of the concerned participants. ...[P]rocesses should ensure the meaningful participation of Indigenous Peoples in decision-making, focusing on achieving agreement while not conferring veto rights to individuals or sub-groups****.*[47]

But what of the group's potential to veto / not consent? The most likely position, on UNDRIP's present wording around FPIC, is that consent is required where there is a sufficient degree of impact. Thus, FPIC does enable a veto or prohibition where the proposed impact on the Indigenous group is substantial, but not where the proposed activity has no significant impact on the enjoyment of any human rights. Consider the example where an Indigenous group has control and use of a large area of their traditional country, and an activity is proposed on a small part of this with no significant impact on cultural activities or the exercise of any other human rights (eg. livelihood, education). Most certainly UNDRIP would require company proponents (or the state, or both) to engage with the group to seek their FPIC. However, in the event that consent does not occur, it would be difficult to substantiate that the group will suffer human rights impact from the activity proceeding, and thus FPIC would likely not entail a 'veto' in this case.[48]

This interpretation accords with various decisions of international bodies, including the Inter-American Court of Human Right in its 2007 decision in *Saramaka People -v- Suriname* (namely 'the level of consultation that is required is obviously a function of the nature and content of the rights of the Tribe in question').[49] There *are* different views, with some arguing there *is* an autonomous right of veto,[50] and others seeing UNDRIP as containing *no* right of

veto.[51] But the international law support for these is inconsistent. As the International Law Association notes: the Committee overseeing the racial discrimination treaty has varied its description of the relevant obligations, sometimes being that the state must consult *with the aim of obtaining consent*, while at other times it is phrased that the state *must obtain consent*.[52]

In 2017, the OECD produced guidance on extractives engagement with indigenous peoples, which contains the following regarding consent.

> ***Responding to lack of consent or a refusal to engage***
>
> *When consent is withheld by an indigenous community an enterprise should consult with the community to understand the reasons behind the lack of consent and whether ongoing concerns can be addressed or accommodated. Consent previously granted under free, prior and informed conditions should not be withdrawn arbitrarily.*
>
> *In cases where their consent is not forthcoming or where indigenous peoples refuse to engage, material risks to the enterprise and adverse impacts to indigenous peoples may be generated. In situations where proceeding with projects will cause adverse impacts to indigenous peoples an enterprise should take the necessary steps to cease or prevent such impacts.*
>
> *If through its due diligence processes an enterprise concludes that consent is required to proceed with an activity, and the agreed process has not arrived at consent, activities should not proceed unless FPIC is subsequently forthcoming.*
>
> *For example a project financed by the IFC governed by IFC Performance Standards should not proceed, regardless of any authorisation by the State, if relocation of indigenous populations is required and FPIC has not been obtained from them. Conversely it will not be necessary to pursue FPIC in contexts where the rights of indigenous peoples are not being impacted.*[53]

(c) Ambiguities in international standards

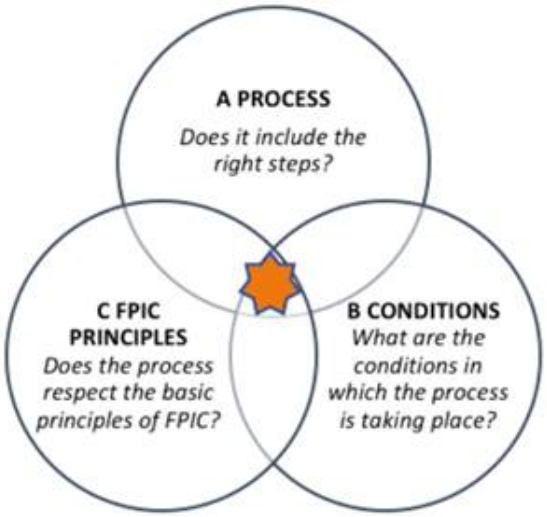
There is sometimes ambiguity in international standards, whether by design[54] or accident. It is not the case that there exists a perfect international clarity, merely awaiting application at the domestic level which will resolve existing disputes and tensions. However, the fact there remain areas of contest about FPIC internationally does not mean its entire content should be disregarded. There *are* many important concepts which have agreement at the international level (eg. there is, at least, a need for good faith consultation which seeks to reach consensus), and there are also increasing international mechanisms which can 'review' domestic arrangements diverging from these international standards. Examples include the Inter-American human rights regime, the OECD Guidelines for Multinational Enterprises, ILO and UN investigation processes, and financier requirements (including the IFC, CAO Ombudsman processes, and the Equator Principles). These all indicate a need for lawyers to know the field; and often an extractives project / operator can remedy or protect their position where national law is insufficient to meet international standards.

(d) Implementation: international mechanisms and industry codes

There are many sector-specific codes, and requirements for association membership, which encourage their members to address FPIC in their operations. Lawyers should be familiar with those applying to the operations on which they advise and assist their clients. Relevant to RMMLF this includes measures such as Equitable Origin (energy development), Roundtable on Sustainable Biofuels, Responsible Jewellery Council, Aluminium Stewardship Initiative, Initiative for Responsible Mining Assurance, Initiative for Responsible Steel, Bettercoal Code, Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains, and the International Council on Mining and Metals.

A recent, and useful, publication is a 2018 'FPIC monitoring and verification tool' to assist in determining whether a company/operation is achieving FPIC. This was produced in response to many industry groups and standards citing FPIC but auditors and other parties not knowing how to determine when and whether FPIC is being achieved. The report emphasises the tool cannot be used as a 'one-time checklist' but that the three 'elements' it identifies within FPIC all inform each other; and only when <u>all</u> are extant does FPIC 'exist', characterised by this diagram:

FPIC Monitoring Tool Framework[55]



The three elements identified here are explained in the tool, which breaks down each element with main points (and, under each point, significant detail of guidance and criteria). The main points relating to these three elements are extracted below.

A. PROCESS	*C. THE TENETS OF FPIC*
Establish the scope of the project *Establish the project developer's obligation to achieve FPIC* *Establish who are the rights-holders to FPIC* *Establish the willingness of potentially affected rights-holders to consider the proposed project*	*Free* *Prior* *Informed* *Consent*

Establish how the proposed project may impact identified rights-holders *Establish if the community wants to enter into negotiations* *Negotiated agreements* *Establish how sustainable the FPIC process is*	
B. CONDITIONS FOR THE PROJECT DEVELOPER *Procedures and Processes* *Designated project personnel* *Participation in Multi-Stakeholder Working Group* *Recognition of customary systems* *Gender* *Marginalised and vulnerable groups* *Cross-cultural understanding* *Technical knowledge and capacity* *Collaborative design*	*B. CONDITIONS FOR THE COMMUNITY* *Community representatives* *Gender* *Marginalised and vulnerable groups* *Community consensus* *Community institutional capacity* *Technical knowledge and capacity* *Cross-cultural understanding*

The 2018 report, which published this tool, also included a thorough literature review of the standards and materials which establish FPIC and its components.[56] As such, the report forms a useful guide for any practitioner needing to navigate their way through contemporary FPIC and what that implies for their client.

III. Recurring difficulties and some assistance

In preparing for the Rio 2019 institute, with colleagues who work in this area across different countries, we identified some recurring 'themes' or 'common issues' which arise. Four of these are summarised below, some of which are FPIC-specific and some are perennial complexities which occur in many extractives law and policy contexts. Following these, the paper describes two processes which may assist with some of these difficulties, being the UN's 'Guiding Principles on Business and Human Rights', and Regulatory Impact Assessment.

(a) Law changes

A common problem, in any law reform, is what occurs where there has been a change (often to impose new procedures addressing social or environmental impacts which were previously ignored). What happens to existing operations which were approved – and

sometimes have been running for many years – under the earlier law? This is not a new issue arising with FPIC and UNDRIP, and so guidance can usefully be drawn from examples and responses elsewhere.

Economic policy will suggest protecting existing operations or approvals through 'grandfathering' (ie. confirming existing operations can continue under the earlier law and ignore the changes). Each jurisdiction's constitutional and other legal provisions will likely provide some guidance regarding changed conditions (eg. what mining rights are impacted – and do they constitute 'property' or some other status which can only be impaired after strict procedures or adequate compensation). International law also has relevant standards: investment treaties may contain additional restrictions on State ability to change the law if that harms existing investment; and human rights may provide protections (and require redress) even where the domestic law does not specify that.

(b) State-company responsibilities

A dynamic of increasing significance, in human rights law, is the division of responsibilities between State and business. This difficulty is a perennial conundrum of the interaction between fundamentals of a commercial extractives sector and the law and management regarding impacts on third parties. Extractives *exploration* can often occur with relatively minor impact but exploration will only be undertaken by companies *provided* there is some guarantee of being able to extract any commercial find. That extraction invariably involves significant impacts. The result is that the assurance of a future right to extract (and necessarily its associated potential impacts) is wanted before committing investment to exploration (and its lesser impacts).

Considering this in relation to UNDRIP's FPIC structures: obviously information and good-faith engagement is required throughout, to endeavour to reach agreement. For various exploration projects, however, it may be that consent is not strictly a pre-condition (if the impacts are not significant) *but* there would need to be consent before an extraction operation commenced.

(c) Relation with international law

The interaction between domestic and international law is, again, not an UNDRIP-specific issue. There are different complexities which can arise here. First, what is the situation where the domestic law is inconsistent with international law. The second difficulty sometimes arising if where the domestic law seeks to incorporate international law but with insufficient attention to the legal structures or institutions necessary for that to operate.

In federal jurisdictions, with legal responsibility at different levels within the country, there can be a further disjunct between the State's international obligations and the internal agencies and implementation.

(d) Representation and group decision-making

This is a common issue arising in mining-indigenous relations, facing lawyers acting for all parties. Governments and companies are sometimes approached by individuals from within a group. At a local level, extractives operations will want direct and constructive engagement with indigenous persons affected by the project (and sometimes they may be employees or

business partners). Lawyers acting for indigenous groups engage with the complexities almost daily – what is the appropriate way to advise and get instructions from the group (cultural practices and resource constraints may prevent matters being dealt with in large group meetings, which inevitably then leads to many individual interactions).

Frequently, therefore, pressures arise as to how communications occur to and from the group. UNDRIP is clear that internal indigenous governance must not be interfered with. It is also clear that decisions should not marginalise or discriminate against persons within the indigenous group.

(e) UN's Guiding Principles on Business and Human Rights

One development which can help with some of these complexities is the UN's 2011 *Guiding Principles on Business and Human Rights*.[57] These confirm that human rights obligations on (and of) the State remain unchanged[58] but, *in addition,* each business has a 'responsibility to respect' human rights. And 'human rights' here is defined to include the standards in the 1948 UN *Declaration of Human Rights* plus the subsequent international human rights treaties deriving from that, and also UNDRIP.[59] This applies even where the particular treaty has not been adopted by the country where the company is operating, or that country's domestic law is inconsistent. That is: if the domestic law permits activities below what is specified by international human rights standards, the company is still expected to respect the international standards.[60]

The business 'respect' for human rights, required under the Guiding Principles, comprises three elements.

a) The business should *adopt a human rights policy*, involving a public commitment of the organisation's responsibilities and expectations regarding human rights impacts of its work and workers, reflected in operational policies and procedures.[61]

b) The business needs to *conduct human rights due diligence* of its operations, which involves identifying and preventing *potential* impacts as well as addressing *actual* impacts.[62]

c) *Remediation processes* should be established for impacts which have occurred or been identified.[63]

The UN Guiding Principles are implemented and monitored through different mechanisms. Some aspects are implemented domestic regulation applying to particular companies or sectors, such as France's due-diligence law,[64] modern slavery acts in various countries,[65] and conflict minerals reporting.[66] Other mechanisms include the OECD Guiding Principles on Multinational Enterprises,[67] IFC's Performance Standards,[68] international financiers' and development banks' standards,[69] and various sector and company initiatives.[70] These all present ways in which extractives operations may be examined for their consistency with UNDRIP (and FPIC).

The UN Guiding Principles, and further guidance published by the OECD on due-diligence and stakeholder engagement, provide useful ways through which parties can assist Indigenous-mining relations to meet UNDRIP's expectations. Most relevant is the OECD's 2017 *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, which contains an annex providing further material and guidance under these headings.

Engaging with indigenous peoples[71]

1. *Understanding context*
   Regulatory context
   Area of impact
   Land rights: Customary land tenure
   Self-governance
   Historical marginalisation or discrimination
   Cultural and spiritual heritage
2. *Ensuring that indigenous peoples are appropriately identified and prioritised*
   Land
   Culture
   Socio-economic status:
3. *Establishing the necessary support system for meaningful engagement with indigenous peoples*
4. *Designing appropriate and effective activities and processes for engagement with indigenous peoples*
   A. Identifying which mode of engagement is needed or required
   B. Identifying and applying best practices

(f) Regulatory impact assessment

Another concept which may assist with some of these difficulties is the process of 'regulatory impact assessment'. That seeks to provide an objective assessment of the relevant interests and options, to enable regulators to structure the most effective regime which achieves the objectives with least regulatory burden. There are various materials about regulatory impact assessment,[72] which will assist in any jurisdiction considering law changes as a result of UNDRIP or other international standards.

Regulatory impact assessment has some variations in how it operates in different jurisdictions (sometimes it is a legal requirement, sometimes it is policy). Broadly it involves any proposal for regulatory change to address four areas which are summarised below.

(a) ***Explain the context*** *by: (i) identifying the policy objective(s) of the regulatory proposal; and (ii) describe the nature and extent of the 'problem' to be addressed by the regulatory proposal*

(b) ***Explain the proposal****, detailing: (i) wording of the new/amended regulations, (ii) legal authority to make that regulation, (iii) groups likely to be affected by the regulation, and (iv) proposals for compliance.*

(c) ***Conduct cost-benefit analysis****: (i) outline the benefits and costs expected from the regulatory proposal in relation to each of administrative, economic, social, environmental, enforcement and compliance; (ii) compare the proposal's costs and benefits in each of these areas, and also do the same for any practical alternatives to the proposal*

(d) ***Describe the consultation and stakeholder involvement****.*[73]

IV. Australia's national law on Indigenous land and mining

Australia has a national law about Indigenous rights of land access and use, and the interactions of government and other parties (like miners) with those Indigenous rights, called the *Native Title Act 1993*.[74] Australia also has some sub-national laws (of State and Territory legislatures) which address issues like Indigenous heritage protection, environmental impact, and mining rehabilitation.[75] However the *Native Title Act* is the most relevant here as the national scheme for the interaction of Indigenous interests and mining.

(a) Basics of Australian 'native title' law

The Native Title Act is, inevitably, complex legislation. It was enacted after nearly two centuries of Australia's laws ignoring Indigenous connections to land, and - while it is a national law - also has to accommodate the grant and management of land and resources rights which are the constitutional responsibility of sub-national governments (Australia's State and Territory parliaments and governments). When introduced to parliament, the Native Title Act was described by BHP's then CEO as 'like reading porridge'.[76] The law is labyrinthine but some basics can be summarised for an international audience, making generalisations which overlook the intracacies. The following eight points are extracted from a recent article (in the Journal of Energy and Natural Resources Law) co-written with Joe Fardin.

1) Native title is the Australian legal system's recognition of some traditional/cultural rights of each 'group' of Indigenous people[77] to their land or waters. It can therefore entail different rights in different places (ranging from rights similar to freehold in some places, through to a 'mere' right to access in others) and is also subject to 'extinguishment' from various government actions. While the Native Title Act includes the possibility of native title being held by an individual, it has only been recognised as a group or community right.[78]

2) There is no fixed definition of what 'native title' entails under Australian law, and thus what rights are regulated by the Native Title Act. The statute defines 'native title' as 'the ... rights and interests of [Indigenous] peoples ...in relation to land or waters, [which] are possessed under the [peoples'] traditional laws acknowledged, and the traditional customs observed, [which laws/customs] have a connection with the land or waters'.[79] But that is essentially wording the legislature copied (without further explication) from the High Court decision of 1992.[80] Ten years later, when the issue returned to the High Court, the majority decision read this definition narrowly, saying 'In so far as claims to protection of cultural knowledge go beyond denial or control of access to land or waters, they are not [native title] rights protected by the NTA [Native Title Act]'.[81]. Another decade later, a different High Court majority took a wider approach, emphasising: 'It is especially important not to confine the understanding of rights and interests which have their origin in traditional laws and customs to the common lawyer's one-dimensional view of property as control over access'.[82] The upshot is that, while 'native title' *may* encompass broader rights, at a minimum it entails protection against government and third-party impacts on Indigenous rights of land use and access.[83]

3) When an Indigenous group first commences legal proceedings, seeking formal recognition and protection of their native title rights, their claim is assessed by a Tribunal (established by the Native Title Act).[84] If there is prima facie material supporting the claim, the Tribunal registers the claim,[85] and the group is termed native title 'claimants' or 'claim group'.

4) The legal proceedings then progress in Australia's Federal Court system,[86] usually taking many years to compile and present the relevant material. If the Court decides (or the government and all other parties involved agree) that the claim group has proved their connection, then the Court will issue a 'native title' determination. This determination will formally recognise and describe the native title rights which exist,[87] including the areas involved and the persons who have those native title rights.[88] These people are then termed 'native title holders'. The Court's determination is not creating new rights, but rather giving formal recognition and protection to some of the existing Indigenous norms regarding that land.[89]

5) When the Court has made a determination of native title, the 'native title holders' must nominate an Aboriginal Corporation which then represents them in dealings with other parties.[90]

6) The *Native Title Act* specifies many procedures and requirements where a government (or other parties) propose an action that may affect native title rights. If the procedures are not followed, before the action occurs, the action is invalid in relation to native title.[91] These procedures and requirements apply regardless of whether, at the time, the relevant Indigenous people are 'claimants', 'holders', or represented by an Aboriginal Corporation. That is: these protective procedures must be followed whether the native title rights are only *claimed* (but have been registered by the Tribunal) or have been determined (ie. recorded as proven and extant by a Court).[92] For the remainder of this paper, I will use the term 'native title group' to cover both 'native title holders' (ie. after the court's recognition) and 'native title claim group' (before a court determination) because many of the laws and procedures are identical.

7) The *Native Title Act* has not legislated FPIC[93] (whether understood by UNDRIP, ILO 169, or other standards). Rather, it has enacted an enforceable procedure of notification and negotiation. The *Native Title Act* provides native title groups with a 'right to negotiate', requiring proponents of developments which will affect native title to negotiate with the relevant native title group(s).[94] The company *and* government must negotiate for six months 'in good faith' and if, after six months, no agreement is reached then any party can ask the Tribunal to arbitrate.[95] The Tribunal has specified criteria for its assessment and decision (which specifically exclude any decision about payment from the use of the land),[96] and only has three permitted outcomes it can order: the proposal can proceed, proceed with conditions, or cannot occur.[97] The native title group has no 'right of veto';[98] and, if no agreement is reached, the Tribunal almost always rules the proposed development can occur.[99] However the Tribunal has rejected various proposals where the company or government did not negotiate in good faith.[100] In only two decisions (over twenty years) has the Tribunal ruled that a proposal cannot occur because of impacts on the native title group,[101] and once because of impropriety of the company's actions.[102]

8) Many extractives operations which are large or long-life have negotiated and reached agreements with native title groups affected by their operations. This is even where the Native Title Act does not formally require this (eg. because the operations began before the Native Title Act commenced, or where the company could enforce a more restricted outcome through the Tribunal process). The company and native title group(s) use the procedures within the Native Title Act to identify and structure the relevant impacts and benefits, which can then be registered and protected through an agreement under the Native Title Act.

These points summarise some basics of Australia's native title law and its operation. Relevant to UNDRIP, and legal structures relevant to mining-indigenous relations, there are three significant aspects which merit further examination: group composition, authorisation and government support. These are each expanded below, followed by some notes on the Australian responses to the 'recurring difficulties' earlier outlined.

(b) Composition of 'native title group' – protecting community rights; giving clarity to external parties

Under Australian law, a native title group *must include all* persons who have cultural or traditional rights in the relevant land. Where a claim includes only *some* of those persons who have traditional rights in that area, then the claim will not be registered (by the Tribunal[103] meaning no procedural protections - such as the 'right to negotiate' process described above) nor recognised in a Court determination.[104]

The group can determine its own identification and composition (this is not specified by government or third-party criteria) and, where that composition is agreed within the group, the Court usually accepts that as sufficient definition for the Court's determination and to be used by external parties.[105] However where there is internal disagreement about membership (eg. dispute over whether particular persons are part of the group) then the Court can hear and adjudicate those disputes.[106] In such cases, the Court will specify greater definition of the group's composition to minimise future disputes or confusion as to group membership or who external parties need to deal with.[107]

Under the Native Title Act, when a 'native title group' engages with external parties (including the court, companies, or government agencies) this occurs through:

- an 'applicant' (if the Court has not yet made a determination recognising native title rights in the area) which is some members the group has 'authorised'; or
- an Aboriginal Corporation (where the Court has made a determination recognising native title rights, and the group must form/nominate a Corporation through which they will manage the rights the Court has recognised).

Individual members in a native title group do not have standing to address the Court in native title proceedings,[108] nor the Tribunal in hearings about proposed developments.[109]

The applicant has a legal duty to consult the claim group,[110] similar to fiduciary duties,[111] particularly where negotiating an agreement on behalf of that group.[112] Individuals in an applicant have been held in breach of fiduciary obligations (and ordered to repay monies to the group) where they acted against the group's interests.[113]

While the Native Title Act requires that a group's composition include *everyone* who has traditional rights in the relevant country, it is not necessary that all those persons make every decision or take every action of the group. Where the wider claim group has had the opportunity to consider a matter and come to a decision, and has done so, the Court has upheld group decisions in spite of some dissent or opposition.[114] Correspondingly, where the wider claim group was not fully informed and able to participate in the relevant decision-making process, the Court has disallowed relevant decisions.[115] The Court has emphasised that decisions need not be agreed by the entire claim group, *provided* the entire claim group has had sufficient opportunity to be involved in the decision-making process.[116]

After a Court determination has been made, and the native title group is now represented through an Aboriginal corporation, the Native Title Act and subsidiary law regulates address the Corporation's 'native title decisions', which are decisions which may affect native title rights.[117] To make a native title decision, the Corporation must 'consult with, and obtain the consent of, the common law holders' of native title,[118] and failure to achieve the requisite consent can invalidate the Corporation's decision.[119]

(c) 'Authorisation' process – ensuring accountable representation and representatives

The Native Title Act establishes a process of 'authorisation' to ensure that significant decisions are made with the knowledge and involvement of the whole native title group. This has two applications.

1) *Commencing a native title claim* – where the 'applicant' (who is the party formally appearing in Court proceedings, or negotiating and agreeing with external parties) must be authorised by the native title group.[120] The Native Title Act has specific rights and procedures enabling the group to replace the applicant if those persons have exceeded their authority or are no longer authorised by the group. [121]

2) *Registering an 'indigenous land use agreement'* – which is a statutory scheme established under the Native Title Act, to give greater effect to contracts agreed by the native title group.[122] Significantly, this includes statutory recognition and enforcement of the agreement even against Indigenous persons who were not parties to the original agreement.[123] Given that operation, the Native Title Act requires that before these protections of registration can occur, the Tribunal must be satisfied that 'all reasonable efforts have been made ... to ensure that all persons who ... may hold native title in ... in the area covered by the agreement have been identified'[124] and that those persons have authorised the agreement.[125] It is not sufficient for these contracts simply to be agreed only by the group's applicant,[126] but the native title group must have 'authorised' the agreement.[127]

The 'authorisation' process requires evidence (usually through meeting notice and procedures) that decisions have been made by the group on whose behalf they are presented to the Court or Tribunal. This has two benefits. It protects the broader system and non-Indigenous parties (from having to deal with unsubstantiated claims).[128] Equally significant, it protects Indigenous groups (from having progress stalled by dissenting members, or from having fraudulent representatives acting against the broader group's interests).[129]

Authorisation was not a feature when the *Native Title Act* was enacted in 1993, but it was included in 1998 amendments after many native title claims were lodged by persons allegedly 'on behalf of' broader groups but with little evidence to substantiate the broader group's approval or involvement in that.[130] The Court has described authorisation as 'a matter of considerable importance and fundamental to the legitimacy of native title determination applications. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title'.[131]

Authorisation of the applicant by the claim group must be sufficiently clear. The Court has found the native title group's authorisation as insufficient where, for example, notice of an authorisation meeting was deficient.[132] This will be the case if, for example:

> *the notice was not sufficient to enable persons to whom it was addressed to judge for themselves whether they were included in those entitled to attend and vote, or to decide as to whether they should attend and or vote for or against any proposed resolution, or whether to leave the matter to be determined by the majority who would attend or vote on it.*[133]

The Court has ruled meeting notices deficient on a variety of grounds, including inadequate identification of the persons invited to the meeting to participate in decision making,[134] the potential for the notice to be misleading,[135] and inadequate circulation of the meeting notice.[136]

(d) Government support for Indigenous decision-making

The *Native Title Act* established a system of government-funded organisations termed 'native title representative bodies' to provide legal and other assistance regarding native title claims and issues in their region (Australia is divided into 15 such regions, with one representative body for each region). These representative bodies have designated functions to help native title groups in making their claims and negotiating with governments and developers.[137] Each representative body must have structures and procedures that 'promote the satisfactory representation' and 'effective consultation' of Indigenous people in its region.[138] These bodies are, effectively, a form of government 'legal aid' in that there is no requirement that a native title group *must* use the native title representative body[139] but that is the only way in which government funding will be provided to the native title group.[140]

(e) Australia and 'the recurring difficulties'

Not the best title for a Harry Potter novel, but a sufficient way to introduce how the Australian legal system operates regarding the four 'recurring difficulties' which were outlined in section III.

Law Changes

The Native Title Act was the culmination of 18 months' multi-stakeholder consultations (including sub-national governments) which arose after court decisions confirmed Australia's common law included protections for Indigenous rights.[141] The Native Title Act became the national regime enacted to clarify how these Indigenous rights (and interaction with Australian law) would operate. The law is the result of many compromises. Significantly, as part of the validation of earlier titles and actions (which could have been challenged as

invalid for their failure to account for any Indigenous rights) the Native Title Act established a scheme which prohibited future grants and impacts on Indigenous rights unless the 'right to negotiate' procedure was followed.

The Native Title Act did not require existing title-holders to comply with future law changes. However many companies have made agreements, beyond what Australian law requires, to ensure Indigenous acceptance of operations – no doubt influenced by FPIC.

State-company responsibilities

The Native Title Act, and government implementation of it, puts most obligation for negotiation on the company who wants the new mineral title (eg. exploration or extraction permit). Although the legal action (which triggers the 'right to negotiate') is the government's proposed grant of the title, the good faith negotiations (necessary for any Tribunal power to permit the grant if no agreement is reached) mainly focus on likely impacts on the group. The government has administrative and procedural obligations to meet its 'good faith' obligations.[142] But the government need not make any offer,[143] and the determination of good faith more frequently turns on whether the company's negotiations have been reasonable in light of the company's 'resources, access to professional advice and the ability to organise and attend meetings'.[144]

Relation with international law

There is an intriguing interaction between Australia's native title law and the country's obligations at international law. When the Native Title Act was first legislated in 1993, it was 'was deemed acceptable by the Committee [monitoring Australia's compliance with the international racial discrimination treaty] as a product of genuine negotiations with the indigenous population and their informed consent'.[145] However amendments were made in 1998 and four parts of those amendments have been repeatedly ruled as in breach Australia's treaty obligations.[146] The four parts which troubled various international committees have not been remedied (because the Government considers it is complying with international law). An additional dynamic now arises - through the 2011 UN Guiding Principles on Business and Human Rights – in that companies now face mechanisms where their activities may be questioned for non-compliance with human rights even where within domestic law.

UNDRIP, when voted upon at the United Nations General Assembly in 2007, was opposed by four states (45 other states abstained or absented themselves from the vote): Australia, Canada, New Zealand and the United States of America.[147] Those four opponents have since indicated their 'support' or acceptance of UNDRIP, but that is still subject to various 'reservations'.[148] Accordingly, UNDRIP's text – and particularly its FPIC provisions – do not have a universally accepted understanding. As recently as 2018, the Australian Government continues its ongoing resistance to international consensus, with a submission to the UN's Expert Mechanism on the Rights of Indigenous People, stating:

> *FPIC is a concept that is unique to the Declaration [UNDRIP]. As FPIC is not defined in the Declaration, its scope and content remains unsettled. ...*
>
> *Any understanding of FPIC that it constitutes a right of veto or that it requires unanimous consent prior to State action, even in circumstances where there is a*

compelling social need that requires State action, is unlikely to align with Article 46 of the Declaration. ...

While a number of multilateral treaties require States to consult, or otherwise engage with, Indigenous peoples on matters that affect them, these requirements are specific to those treaties and they do not equate with the concept of FPIC in the Declaration.

...[T]here is insufficient State practice and opinio juris to establish that FPIC has crystallized as a rule of customary international law.[149]

The Australian – international tensions continue, with the Committee overseeing the racial discrimination treaty recently writing to the Australian Government with concerns about Indigenous impacts from a proposed coal development.[150]

Representation and group-decision making

The relevance of Australia's native title system to a broader audience is perhaps of most interest around representation and group-decision making. Three aspects of FPIC can be identified here.

1) Regarding 'free' - Australian courts have ruled meeting outcomes invalid where the there were inappropriate arrangements or interference by a company,[151] and where decisions were made without the Indigenous group being adequately informed.[152]

2) The 'prior' aspect is well reflected in Australian law. The Native Title Act provides that if an action has bypassed the relevant native title procedures, it is invalid to the extent that it affects native title.[153] The courts have ruled various titles and other government grants invalid for failure to comply with the relevant native title procedures.[154]

3) The 'informed' part of FPIC is probably where Australia provides the best example and ideas for elsewhere. When the *Native Title Act* was enacted in 1993, with its various procedures and rights for Indigenous consultation, it also established statutory funding and structures to assist Indigenous groups in understanding and exercising these rights, in the form of 'native title representative bodies'.[155] The courts confirm this has been important for the workability of Australia's native title regime.[156] The operation of these bodies, and the various regulatory requirements for Indigenous consent and authorisation, emphasise the requirement for decision-making on an informed basis.

V. References

[1] Parts of this paper draw from the recent co-authored article JOHN SOUTHALAN & JOE FARDIN, *Free, prior and informed consent: how and from whom? An Australian analogue*, Journal Energy & Natural Resources Law (2018), and so credit for analysis should also go to Joe Fardin.

[2] KEN COATES & BLAINE FAVEL, *Understanding FPIC: From assertion and assumption on 'free, prior and informed consent' to a new model for Indigenous engagement on resource development* Aboriginal Canada and the Natural Resource Economy Series 9, Macdonald-Laurier Institute (2016), 1.

[3] For example, addressing FPIC in:

- **particular countries or regions**: LRC, *Free, Prior and Informed Consent in The Extractive Industries in Southern Africa* An analysis of legislation and their implementation in Malawi, Mozambique, South Africa, Zimbabwe, and Zambia, Oxfam (2018); ANNA ASEEVA & KA LOK YIP, *When Yes means Yes: Free, Prior & Informed Consent in "One Belt One Road" Projects in the context of Transnational Investment Law and Arbitration*, 2017 Transnational Dispute Management (2017); CSRM, *Lessons from Implementing Free Prior and Informed Consent (FPIC) in the Philippines* A Case Study for Teaching Purposes - Facilitator's Guide, The University of Queensland (2016); EMILY GREENSPAN, *Free, Prior, and Informed Consent in Africa: An emerging standard for extractive industry projects* Research Backgrounder series, Oxfam America (2014).
- **industries or companies**: REBECCA LAWRENCE & SARA MORITZ, *Mining industry perspectives on indigenous rights: Corporate complacency and political uncertainty*, The Extractive Industries and Society (2018); DAN MULLINS & JUSTUS WAMBAYI, *Securing Communities' Right to 'Free Prior and Informed' Consent in Kenya's Extractive Sector* Oxfam Briefing Paper, Oxfam (2017); GAVIN SCOTT, et al., *The new reality for major projects: working with FPIC in the natural resources sector*, 35 Australian Resources & Energy LJ (2016); ICMM, *Indigenous Peoples and Mining Position Statement*, (2013); AMY LEHR & GARE SMITH, Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges (Foley Hoag LLP, Talisman Energy 2010).
- **international law and institutions**: FAO, *Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities* Manual for project practitioners, United Nations (2016); CATHAL DOYLE, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent*, Taylor and Francis (2015) (FPIC generally); ILA, *Rights of Indigenous Peoples* Resolution No. 5/2012, (2012) (summary of contemporary international law); IFC, *Guidance Note 7: Indigenous Peoples*, (2012).

[4] Useful FPIC material regarding Latin America includes: JANNE DEWAELE, Indigenous People in Latin-America and their Right to Free, Prior and Informed Consent within International Law (2017) (Master of Laws, Ghent University); JUAN SONODA, Indigenous Rights in South America: FPIC and Other Key Issues for Natural Resource Development (Rocky Mountain Mineral Law Foundation 2016); LILA BARRERA-HERNÁNDEZ, *Indigenous Peoples and Free, Prior and Informed Consent in Latin America*, *in* Sharing the Costs and Benefits of Energy and Resource Activity (Lila Barrera Hernández, et al. eds., 2016); IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities* OEA/Ser.L/V/II. Doc. 47/15, Organization of American States (2015); and DPLF, *The Right of Indigenous Peoples to Prior Consultation* Executive Summary: Progress and Challenges in Bolivia, Brazil, Chile, Colombia, Guatemala and Peru, OXFAM (2015).

[5] SOUTHALAN & FARDIN, *supra* note 1.

[6] These include EO, *Enabling FPIC through Voluntary Standards* Funded by ISEAL Innovations Fund, Equitable Origin, Roundtable on Sustainable Biomaterials, La Coordinadora de las Organizaciones Indígenas de la Cuenca Amazónica (2018); ACHRP, *National Dialogue on the Rights of Indigenous Peoples and Extractive Industries* Final Communiqué, African Commission on Human and Peoples' Rights (2018); UN, *Free, prior and informed consent: a human rights-based approach* UN doc A/HRC/39/62, United Nations (2018) (**Expert Mechanism on the Rights of Indigenous Peoples**); UN, *Human rights and indigenous peoples* UN doc A/HRC/RES/39/13, United Nations (2018); STEPHEN YOUNG, The Legal Performativity of Indigenous Peoples' Free Prior and Informed Consent (2018) (Doctor of Philosophy, The University of New South Wales); AUS GOV, *Submission – Free, Prior and Informed Consent* UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) study, Office of the High Commissioner for Human Rights (2018); PATRICIA URTEAGA-CROVETTO, *Implementation of the right to prior consultation in the Andean countries. A comparative perspective*, 50 The Journal of Legal Pluralism and Unofficial Law 7 (2018); JASON TOCKMAN, *Eliding consent in extractivist states: Bolivia, Canada, and the UN Declaration on the Rights of Indigenous Peoples*, 22 The International Journal of Human Rights (2018); LAYLA HUGHES, *Relationships with Arctic indigenous peoples: To what extent has prior informed consent become a norm?*, 27 Review of European, Comparative & International Environmental Law 15 (2018); STEPHEN S. CRAWFORD, *The Canadian Crown's Duty to Consult Indigenous Nations' Knowledge Systems in Federal Environmental Assessments*, 9 International Indigenous Policy Journal (2018); ROGER MERINO, *Re-politicizing participation or reframing environmental governance? Beyond indigenous' prior consultation and citizen participation*, 111 World Development 75 (2018); ANA FILIPA VRDOLJAK, *Indigenous Peoples, World Heritage, and Human Rights*, 25 International Journal of Cultural Property 245 (2018); ALEXANDER DUNLAP, *"A Bureaucratic Trap:" Free, Prior and Informed Consent (FPIC) and Wind Energy Development in Juchitán, Mexico*, 29 Capitalism Nature Socialism 88 (2018); DEREK INMAN, et al., *Evolving Legal Protections for Indigenous Peoples in Africa: Some Post-UNDRIP Reflections.*, 26 African Journal of International and Comparative Law 339 (2018); GISELA ZAREMBERG & MARCELA TORRES WONG, *Participation on the Edge: Prior Consultation and Extractivism in Latin America*, 10 Journal of Politics in Latin America 29 (2018); BRENDAN BOYD & SOPHIE LOREFICE, *Understanding consultation and engagement of Indigenous Peoples in resource development: A policy framing approach*, 61 Canadian Public Administration 572 (2018); REBECCA LAWRENCE & SARA MORITZ, *Mining industry perspectives on indigenous rights: Corporate complacency and political uncertainty*, 6 The Extractive Industries and Society 41 (2019); JEREMY PATZER, *Indigenous rights and the legal politics of Canadian coloniality: what is happening to free, prior and informed consent in Canada?*, The

International Journal of Human Rights (2019); AMELIA ALVA-ARÉVALO, *A critical evaluation of the domestic standards of the right to prior consultation under the UNDRIP: lessons from the Peruvian case*, see id. at ; TOBY ROLLO, *Imperious Temptations: Democratic Legitimacy and Indigenous Consent in Canada*, Canadian Journal of Political Science (2018).

[7] eg. particularly *International Covenant on Civil and Political Rights* (UN General Assembly, 999 UNTS 171 (in force 23 Mar 1976), 16 Dec 1966), art 27 and its related *General Comment No. 23: The rights of minorities (Art. 27)* (Human Rights Committee, UN doc CCPR/C/21/Rev.1/Add.5, 8 April 1994); and *International Convention on the Elimination of All Forms of Racial Discrimination* (UN General Assembly, 660 UNTS 195 (in force 4 Jan 1969), 21 Dec 1965), art 5 and its related *General Recommendation XXIII: Indigenous Peoples* (Committee on the Elimination of Racial Discrimination, UN doc A/52/18, annex V, 18 Aug 1997).

[8] eg. KEVIN O'CALLAGHAN, *Introduction: Free, Prior and Informed Consent*, *in* Indigenous Rights in South America—FPIC and Other Key Issues for Natural Resource Development (Juan Sonoda ed. 2016) 7, 3; UN (Expert Mechanism on the Rights of Indigenous Peoples, 2018), *supra* note 6, [14]

[9] *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (International Labour Organisation, 1650 UNTS 383 (in force 5 Sep 1991), 27 June 1989), arts 6 & 16.

[10] C169 is used not only at the international level (eg. by ILO and Inter-American bodies) but also in domestic courts within Latin America, see eg. PETER BILLE LARSEN, *The 'New Jungle Law': Development, Indigenous Rights and ILO Convention 169 in Latin America*, 7 International Development Policy (2016); CHRISTIAN COURTIS, *Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous Peoples*, 18 International Journal on Minority & Group Rights 433 (2011).

[11] The treaty is *Convention on biological diversity*, 1760 UNTS 1 (in force 29 Dec 1993), 5 June 1992), which does not explicitly reference FPIC but has provisions about consent and Indigenous parties, and FPIC concepts have been further developed under subsequent guidelines adopted by the treaty parties: *Mo'otz Kuxtal Voluntary Guidelines* (Parties to the Convention on Biological Diversity, UN doc CBD/COP/DEC/XIII/18, 17 December 2016) & *Akwé: Kon Guidelines - Voluntary guidelines for the conduct of cultural, environmental and social impact assessments* (Conference of Parties of Convention on Biological Diversity, 13 April 2004).

[12] eg. AFRICAN COMMISSION, *Resolution on a Human Rights-Based Approach to Natural Resources Governance* 51st Ordinary Session, resolution 224, (2012), [2].

[13] eg. In 2012 the Pan African Parliament is reported to have called on states to 'ensure effective consultations with local communities and various people affected by investment projects and ensure that any investment is approved through free, prior, and informed consent of affected communities': GREENSPAN (2014), *supra* note 3, 14.

[14] eg. EU, *Land grabbing and human rights: The involvement of European corporate and financial entities in land grabbing outside the European Union* EP/EXPO/B/DROI/2015/02, European Parliament (2016), 11 & 38; and in 2010 the 'Deputy Head of Delegation of the European Union, said [to the UN's Permanent Forum on Indigenous Issues, that] ... the effective participation of indigenous peoples in projects relating to their development needs must be based on their free, prior and informed consent': UN, Speakers Highlight Devastating Impact of Logging, Mining, Other 'Mega' Development Projects on Indigenous Lands, as United Nations Permanent Forum Debate Continues (Department of Public Information, Permanent Forum on Indigenous Issues 2010).

[15] According to a text-search of FPIC and "free prior informed consent" in the Court's databases, performed in 2017.

[16] eg. DPLF (Due Process of Law Foundation, 2015), *supra* note 4 and IACHR (Inter-American Commission on Human Rights, 2015), *supra* note 4.

[17] *American Declaration of the Rights and Duties of Man* (Conference of American States, Adopted by the Ninth International Conference of American States, and *American Convention on Human Rights* (Organization of American States, 1144 UNTS 123 (in force 18 Jul 1978), 22 November 1969).

[18] Reportedly, 'No state has rejected the Court's interpretation of Article 21': CECILIA MEDINA, The American Convention on Human Rights (intersentia 2nd ed. 2016), 131.

[19] *American Declaration on the Rights of Indigenous Peoples* (Organization of American States, AG/RES.2888 (XLVI-O/16), 15 June 2016). 'The adoption of the Declaration was accompanied by the objection of the United States... the "non-position" of Canada...[and explicit reservations from] The Government of Colombia ...concerning free, prior and informed consent (Arts. XXIII, para.2; and XXIX, para.4) and military activities': STEFANIA ERRICO, *The American Declaration on The Rights of Indigenous Peoples*, 7 ASIL Insights (2017), fn1.

[20] DEWAELE, , [79]-[80] & [85].

[21] eg. *Kichwa -v- ECU* 2012, Series C No. 245, [299]-[301] and Order 3; *Endorois Council -v- KEN* 2009, 276/2003, 46th Ordinary Session,[290]; *Dann -v- USA* 2002, report Nº 75/02 Case 11.140, [131] & [141]; *Decision 2(54) on Australia* (Committee on the Elimination of Racial Discrimination, UN doc A/54/18, IIA, p5, 18 March 1999), [7] & [9]; NOR NCP, *Complaint from The Future In Our Hands (FIOH) against Intex Resources Asa and the Mindoro Nickel Project* Final Statement, Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises (2011), 25 & 28.

[22] eg. *Länsman -v- FIN* UN doc CCPR/C/58/D/671/1995; NOR NCP, *Jijnjevaerie Saami village – Statkraft SCA Vind AB (SSVAB)* Final Statement, Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises (2016).

[23] The phrase 'free, prior, informed consent', and variants of it, does feature in other human rights areas (eg. intellectual property of authors: *General Comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author* (Committee on Economic Social and Cultural Rights, UN doc E/C.12/GC/17, 12 January 2006), [32]) but these are not relevant to the issue of land-use and group decisions which is the focus of this article.

[24] *United Nations Declaration on the Rights of Indigenous Peoples* (UN General Assembly, UN doc A/RES/61/295, 13 Sep 2007).

[25] Declarations not binding: *Charter of the United Nations* (United Nations, 1 UNTS XVI (in force 24 Oct 1945), 26 Oct 1945), art 10; UN, *Questions relating to the voting procedure and decision-making process of the General Assembly*, UN Juridical Yearbook 274 (1986), 275. While UNDRIP is not a treaty it is, however, seen as having additional

authority by virtue of its lengthy drafting process and agreement involving Indigenous groups (and not just states as is the case for most UN declarations): eg. UN, *Report Second International Decade of the World's Indigenous People* UN doc A/64/338, United Nations (2009), [39]-[40]..

[26] eg. *General comment No. 24 on State obligations in the context of business activities* (Committee on Economic Social and Cultural Rights, UN doc E/C.12/GC/24, 10 August 2017), [12] & [17] and *General Comment No. 11 Indigenous children and their rights under the Convention* (Committee on the Rights of the Child, UN doc CRC/C/GC/11, 12 February 2009), [10] & [45]. UNDRIP also features in the decisions of the Inter-American human rights bodies.

[27] These are UNDRIP arts 10 (relocation), 11 (cultural property), 19 (regulatory measures), 28 (land & territories), 29 (environment) and 32 (development & use of land/territories).

[28] eg. UNDRIP preamble 'Recognizing and reaffirming that Indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that Indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples': preambular para 22.

[29] eg. UNDRIP, arts 19, 28(1) & 32(2). More broadly, the entire declaration is entitled as the rights of Indigenous 'peoples' not (individual) 'persons'. As summarised by SOUTHALAN & FARDIN, *supra* note 1: 'Individual rights under UNDRIP are about matters which are innately enjoyed or exercised by a person (not a group), ... emphasising that Indigenous individuals should not be discriminated against on that basis, for example in entitlements to work, health, education. The only time that UNDRIP mentions *individual* rights are these:

a) Indigenous individuals should not be discriminated against in health services (art 24), work conditions (art17.3), education (art14.2), or from being Indigenous (arts 2 & 9);
b) rights to 'life, physical and mental integrity, liberty and security of person': art7(1);
c) 'Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.': art 8(1)];
d) access to education in own culture/language: art14(3);
e) to enjoy international labour law standards of international or domestic law: art17(1);
f) right to nationality (art 6) and to 'obtain citizenship of the States in which they live': art33;
g) right 'to effective remedies for all infringements of their individual and collective rights': art 40;
h) UNDRIP rights 'equally guaranteed to male and female Indigenous individuals': art 44; and
i) there are some very general articles about entitlement to all human rights, which have limited relevance here because of the lack of any specificity (in addressing land/consent and group-individual issues), incl art 1'.

[30] eg. discrimination or violence on women or children: *Convention on the Elimination of All Forms of Discrimination against Women* (UN General Assembly, 1249 UNTS 13 (in force 3 Sep 1981), 18 Dec 1979), art 2; UN, *Intensifying global efforts for the elimination of female genital mutilations* UN doc A/RES/67/146 New York (USA) (2013), [2]-[5]); Gen Comm 11 CRC, *supra* note 26, [22]; *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices* (Committee on the Elimination of Discrimination against Women, UN doc CEDAW/C/GC/31, 14 November 2014), [16]; *General recommendation No. 33 on women's access to justice* (Committee on the Elimination of Discrimination against Women, UN doc CEDAW/C/GC/33, 3 August 2015), [64].

[31] 'The rights enshrined in [ICCPR] art 27 are thus based on the interests of the collective group, [and] the individual can *exercise those rights solely on the basis of his or her membership of the group*': RHONA SMITH, Textbook on International Human Rights (Oxford University Press 5th ed. 2012), 347 (emphasis added). This is also evident from ICCPR, art 27 ('persons belonging to ... minorities shall not be denied the right, *in community with the other members of their group*, to enjoy their own culture').

[32] *Paadar -v- FIN* (2014, UN doc CCPR/C/110/D/2102/2011), [7.4]-[7.7] addressed the imposition of percentage culls to control population and resources of reindeer, which impacted to different degrees within the group. The Committee formally dismissed the complaint citing a lack of evidence, but also stated the case *did 'not* concern unequal treatment between Sami and non-Sami herders but a divergence between members of the [particular Sami] cooperative': [7.4] (emphasis added). *Kitok -v- SWE* UN doc CCPR/C/33/D/197/1985, [9.8] was about status to enable reindeer herding, and the decision indicating the permissibility of 'a restriction upon the right of an individual member of a minority' which has 'a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole'.

[33] *Mahuika -v- NZL* (2000, UN doc CCPR/C/70/D/547/1993)

[34] *Mahuika -v- NZL*, *supra* note 33 (emphasis added).

[35] eg. UN (Expert Mechanism on the Rights of Indigenous Peoples, 2018), *supra* note 6, [27]; UN, *Guidelines on Free, Prior and Informed Consent* UN-REDD Programme 'Working Final' version, Food and Agriculture Organization of the United Nations (FAO), United Nations Development Programme (UNDP), United Nations Environment Programme (UNEP) (2013), 19; UN, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (Permanent Forum on Indigenous Issues, 2005), [47]; FAO (Food and Agriculture Organization, 2016), *supra* note 3, p 5 & 15

[36] eg. MULLINS & WAMBAYI (2017), *supra* note 3, 14; CARLA FREDERICKS, *Operationalizing Free, Prior, and Informed Consent*, 80 Albany Law Review 429 (2017), 440.

[37] FAO (Food and Agriculture Organization, 2016), *supra* note 3, 15.

[38] Gen Comm 11 CRC, *supra* note 26, [16]-[20].

[39] *General recommendation No. 34 on the rights of rural women* (Committee on the Elimination of Discrimination against Women, UN doc CEDAW/C/GC/34, 7 March 2016), [54] & [62(d)]).

[40] ILA (International Law Association, 2012), *supra* note 3, 3.

[41] ILA (International Law Association, 2012), *supra* note 3, 3.

[42] UNDRIP, *supra* note 24, art 46(2).

[43] Described in DOYLE (2015), *supra* note 3, p120-.

[44] eg. UN (Expert Mechanism on the Rights of Indigenous Peoples, 2018), *supra* note 6, 26(a); COATES & FAVEL (2016), *supra* note 2.

[45] eg. PAUL JOFFE, *"Veto" and "Consent" – Significant Differences* Unpublished paper, Assembly of First Nations (2015); COATES & FAVEL (2016), *supra* note 2, 20-21.
[46] IFC, *Performance Standards on Environmental and Social Sustainability*, (2012), Performance Standard 7.
[47] IFC (International Finance Corporation, 2012), *supra* note 46, [10] and GN22 (emphasis added).
[48] The ILA 2012 report also summarises 'In sum, international practice concerning this delicate issue is clearly heterogeneous; this circumstance confirms that the right contemplated by Article 19 UNDRIP does not imply the existence of a right to veto – *in general terms* – with respect to *every kind of measure* that may affect indigenous peoples.': ILA (International Law Association, 2012), *supra* note 3, 6-7.
[49] *Saramaka -v- SUR* Series C No. 172, [136]-[137] (citations omitted).
[50] eg. described in TOCKMAN, *supra* note 6, 339; see also FREDERICKS, *supra* note 36, 439-440.
[51] eg. '[T]he actual obtaining of consent is not mandatory – what is mandatory is a legitimate, good faith process': DWIGHT NEWMAN, *Political Rhetoric Meets Legal Reality* How to Move Forward on Free, Prior and Informed Consent in Canada, Macdonald-Laurier Institute (2017), 13.
[52] ILA (International Law Association, 2012), *supra* note 3, 4-7 (about FPIC and veto more generally, also examining decisions various international bodies in addition to the Committee on the Elimination of Racial Discrimination).
[53] OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector*, Organisation for Economic Co-Operation and Development (2017), p98 (the implementation of this document is explained in the text relating to note XX below).
[54] eg. sometimes diplomats and negotiators choose to agree on the wording of a text is sufficiently vague as to allows contrary positions to be maintained (because there was no agreement on those), see SUSAN BINIAZ, *Common But Differentiated Responsibility*, 96 American Society International Law Proceedings (2002), 362.
[55] Diagram from EO (Project Report, 2018), *supra* note 6, 73. The 'tool is annex three to that report (p89-201).
[56] EO (Project Report, 2018), *supra* note 6, 18-50.
[57] UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* Annex to UN doc A/HRC/17/31, United Nations Human Rights Council (2011) (**UNGP**s).
[58] UNGPs *supra* note 57, Guiding Principle 1. This confirms the existing international law and structures which oblige states to respect & protect human rights (through laws, policies and measures) and fulfill human rights (ensuring remedies where these human rights are violated); further detail expanded in Guiding Principles 2-10. The obligations arise under existing treaty and UN processes (eg. *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (Human Rights Committee, UN doc CCPR/C/21/Rev.1/Add.13, 26 May 2004), [4]-[8]; see more generally SMITH, *supra* note 31, ch 10).
[59] UNGPs *supra* note 57, Guiding Principle 12 and its following Commentary, which explicitly identifies some standards of the UN and the International Labour Organization but also incorporates 'additional standards…depending on the circumstances' which has been understood to include subsequent human rights treaties and declarations: eg. UN, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* UN doc HR/PUB/12/02, United Nations (2012), 11-12.
[60] UNGPs *supra* note 57, Guiding Principle 23.
[61] UNGPs *supra* note 57, Guiding Principle 16.
[62] UNGPs *supra* note 57, Guiding Principles 17-21.
[63] UNGPs *supra* note 57, Guiding Principles 13 (distinguishing between the three instances of cause, contribute and linkage through a business relationship), 22 & 31.
[64] *Law relating to the duty of vigilance of parent and instructing companies* (National Assembly, LAW n° 2017-399, JORF n° 0074, 28 March 2017); see discussion in TIPHAINE BEAU DE LOMÉNIE, *Vigilance Plans Reference Guidance* First edition, Sherpa (2019).
[65] eg. *Modern Slavery Act* ; *Modern Slavery Act 2018* (AUS) No. 153, 2018.
[66] eg. *Regulation laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas* (European Parliament and Council, Regulation (EU) 2017/821, 19 May 2017); USA GOV, *Section 1502* Dodd-Frank Implementation, (2012).
[67] OECD, *OECD Guidelines for Multinational Enterprises*, Organisation for Economic Co-operation & Development (2011).
[68] IFC (International Finance Corporation, 2012), *supra* note 46, see Performance Standard 1, [3] and its Guidance Note [GN44]-[GN45] & [GN108]-[GN109]. These various requirements apply to *current* World Bank projects, with new projects from 2018 being subject to the World Bank's new *Environmental and Social Framework* (WORLD BANK, *The Environmental and Social Framework* Brief, International Bank for Reconstruction and Development (2017)), where FPIC features in the *Environmental and Social Standard 7: Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities*: WORLD BANK, *Environmental and Social Framework*, International Bank for Reconstruction and Development (2016), [24]-[28].
[69] eg. the *Equator Principles* (of private financiers): EPIII, *The Equator Principles III* A financial industry benchmark for determining, assessing and managing environmental and social risk in projects, Equator Principles Association Secretariat (2013), preambular para [3] and Principle 2, exhibit II(1); and the governance/lending procedures of the Netherlands Development Finance Company (FMO) and German Investment Corporation (DEG): FMO, *Independent Complaints Mechanism* Version 2.0, FMO and German Investment Corporation (2017), 2.3.2.
[70] eg. RSPO, *Principles and Criteria for the Production of Sustainable Palm Oil* Endorsed by the RSPO Executive Board & accepted at Extraordinary General Assembly by RSPO Members on April 25th 2013 (incl Major Indicators endorsed by RSPO Board of Governors on 15 November 2013), Roundtable on Sustainable Palm Oil (2013) (palm oil); ICOC, *International Code of Conduct for Private Security Service Providers* Signatory Companies,, (2010) (security providers); RJC, *Code of Practices* Approved by RJC Board, Responsible Jewellery Council (2013) (responsible jewellery); ISO, *Guidance on Social Responsibility* Reference number ISO 26000:2010(E), (2010) (standards on social responsibility).
[71] eg. OECD (OECD Secretariat, 2017), *supra* note 53, particularly 'Annex B Engaging with indigenous peoples'

[72] eg. OECD, *Regulatory Impact Analysis: A Tool for Policy Coherence*, Organisation for Economic Co-operation & Development (2009); DAVID PARKER & COLIN KIRKPATRICK, *Regulatory Impact Assessment in Developing Countries*, *in* Regulatory impact assessment; towards better regulation? (Colin Kirkpatrick & David Parker eds., 2007).

[73] JOHN SOUTHALAN, et al., *Parliaments and Mining Agreements: Reviving the Numbed Arm of Government* IM4DC Action Research Report, International Mining for Development Centre (2015), [82] (internal citations and explanations omitted).

[74] *Native Title Act (AUS) Act No. 110 of 1993 1993* (Commonwealth Parliament) (hereafter in footnotes '**NTA**'). The NTA also enables various associated regulations, the most relevant of which (to Indigenous decision-making) is the *Native Title (Prescribed Bodies Corporate) Regulations 1999*, No 151 of 1999, 30 September 1998) (**PBC Regs**).

[75] Details on other Australian laws involving indigenous impacts and protection include: AUS GOV, *Engage early* (Department of the Environment, 2016); AUS GOV, *Ask First: a guide to respecting Indigenous heritage places and values*, Australian Government (2002); .

[76] TOM BURTON & MARK SMITH, *BHP boss blasts PM's Mabo bill* The Australian Financial Review 18 November 1993. 1993.

[77] Australia's Indigenous population is broadly either Torres Strait Islander – from the seas off northern Australia – or Aboriginal from the 'mainland', but within these there are hundreds of different languages and groupings.

[78] Native title is a 'communal' right. This was indicated in *Mabo -v- QLD* [1992] HCA 23; 175 CLR 1, [69]-[70] (p62) and [58] (p109-110); then reflected in NTA, s223; and reaffirmed recently in *Burragubba -v- QLD* [2017] FCAFC 133, [144].

[79] NTA, s223.

[80] *Mabo -v- QLD*, *supra* note 78, [83] (p70).

[81] *State of WA -v- Ward* [2002] HCA 28; 213 CLR 1, [468(7)] & [59].

[82] *WA -v- Brown* [2014] HCA 8; 253 CLR 507, [36].

[83] The NTA says 'Native title is not able to be extinguished contrary to this Act' (s11) and also provides that if a proposed grant of title (which would affect native title) does not follow the procedures then that action 'is invalid to the extent that it affects native title' (s24OA).

[84] NTA, s190A. The full name of the tribunal is the National Native Title Tribunal (established under NTA s107) and some of its functions are undertaken by the Native Title Registrar (NTA, s75).

[85] NTA, s190A(6) which involves the Tribunal being satisfied regarding the merits of the claim (s190B) and that relevant procedures have been followed (s190C).

[86] Proceedings usually take many years – sometimes more than ten – for all the parties and evidence to be collated and presented.

[87] The determination is not creating new rights but rather recognising and recording existing rights which the law deems to have always existed: eg. *Gepp-Kennedy (Dieri People) -v- SA* [2017] FCA 1156, [8].

[88] The rights may be as limited as entitlement to access an area for hunting, or as extensive as exclusive possession. Hence, the mere fact of 'native title' rights or a 'native title determination' in an area tells little about what those rights may be – that information can only be learnt from examining the specific determination and rights recognised.

[89] eg. *Yorta Yorta -v- VIC* [2002] HCA 58; 214 CLR 422, [45] & [75]-[77].

[90] NTA, ss 55-57. The bodies are more formally known as Registered Native Title Body Corporate (NTA, ss 57 & 263) but, for this article, they will be referred to as 'Aboriginal Corporation'.

[91] NTA, ss24OA, 25(4) & 28; *Burragubba -v- QLD*, *supra* note 78, [4].

[92] eg. NTA ss30-31 (definition and rights of 'native title party' include claimants *and* holders); *Western Desert Aboriginal Corp -v- WA* [2008] NNTTA 22, [23].

[93] Various aspects of FPIC (envisaged by UNDRIP articles 28 & 32) are absent from the NTA's regime, including redress wherever traditional lands were taken without their FPIC, the group's right to set priorities and strategies (which other parties must follow) about their land use, and the agreement/consent issues described in the text in the following paragraphs. There is a closer legal arrangement to FPIC in one of Australia's sub-national jurisdictions – the Northern Territory – where the Aboriginal Land Rights Act requires consent before grant (*Aboriginal Land Rights (Northern Territory) Act 1976* (AUS) Act No. 191 of 1976, s46(4)) but that is not a national law. Some Australian court decisions do use the phrase 'freely informed agreement' in their reasons in a 'consent' decision recognising native title (ie. where the Government, and all relevant stakeholders who could be affected, have agreed to the terms of the native title rights being recognised in a court order): eg. *Freddie -v- NT* [2017] FCA 867, [18]; *Lovett (Gunditjmara People) -v- VIC* [2007] FCA 474, [37]. However this wording is used as a descriptive comment and not as some relevant criterion which the Court requires. It appears to be wording aimed at Australian evidentiary law, explaining why the Court is not required to examine every detail of the Indigenous case but can rely on the native title group's agreement to the proposed determination, and the government's assessment of the relevant material, eg. *Lovett (Gunditjmara People) -v- VIC*, *supra* note 93, [35]-[38] & *Far West Coast Claim -v- SA (No 7)* [2013] FCA 1285, [18]-[21 *Northern Territory -v- Doepel* [2003] FCA 1384; 133 FCR 112, [36].

[94] This is a generalisation, as some activities which are deemed to have less impact have lesser procedural rights and do not involve a right to negotiate (eg. requiring only notice, consultation or comment). The 'right to negotiate' system is contained in the NTA, ss25-44.

[95] NTA, ss 31 (negotiation procedure), and 35-36 (minimum of six months' good faith negotiation). The 'good faith' obligation continues if the negotiation progresses beyond six months: *Charles (Mount Jowlaenga Polygon # 2) -v- Sheffield Resources* [2017] FCAFC 218, [1] & [59]-[60].

[96] NTA, ss39 (Criteria for making arbitral body determinations) & 38(2) (prohibition on Tribunal deciding payments arising from use of land).

[97] NTA, s38(1) (Tribunal's powers to decide to allow or refuse).

[98] *AGL Loy Yang -v- Gunaikurnai Land & Waters Corp* [2015] NNTTA 50, [9]-[10]

[99] TONY CORBETT & CIARAN O'FAIRCHEALLAIGH, *Unmasking Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions*, 33 Uni Western Australia L Rev (2006), 155. Note Tribunal employees reject those

criticisms in CHRIS SUMNER & LISA WRIGHT, *The National Native Title Tribunal's Application of the Native Title Act in Future Act Inquiries*, 34 UWA L Review (2009).

[100] The 'indicia' of good faith negotiation are summarised in *Strickland (Maduwongga People) -v- WA* [1998] FCA 868; 85 FCR 303, pp312-314, and if these are not met the Tribunal cannot approve the development to proceed: NTA s36(2) with examples including *WA -v- Taylor (Njamal people)* [1996] NNTTA 34 (government had not negotiated in good faith) and *Muccan Minerals -v-Taylor (Njamal People)* [2016] NNTTA 28, [103]-[112] (company had not negotiated in good faith).

[101] The only two cases are *Holocene Pty Ltd -v- Western Desert Aboriginal Corp (Jamukurnu - Yapalikunu)* [2009] NNTTA 49 [216] (the group's wishes should be given greater weight than the potential economic benefit and public interest of the proposal) and *Weld Range Metals -v- Simpson* [2011] NNTTA 172, [344] (the area was of such significance to the group that mining should only be permitted with their agreement).

[102] *Seven Star Investments -v- Freddie (Wiluna)* [2011] NNTTA 53, [119] (not in public interest to grant an exploration title because the company's proposals had no 'rational or scientific basis' and there was an irretrievable breakdown in relations with the group)

[103] *Northern Territory -v- Doepel*, *supra* note 93, [36].

[104] *Brown -v- SA* [2009] FCA 206, [19]-[20]. Equally, the Tribunal and Court do not accept representation or submissions which are made only on behalf of a sub-set of the native title group: eg. *Burragubba -v- QLD*, *supra* note 78, [118] & [122].

[105] *Moses -v- WA* [2007] FCAFC 78; 160 FCR 148, [373].

[106] eg. where there is a dispute over whether a particular ancestor had Indigenous cultural ties with the area of the claim (and therefore whether descendants are part of the 'native title group' for that area), the Court can hear and determine these matters: *Aplin (Waanyi Peoples) -v- QLD* [2010] FCA 625, [9], [18], [256], [260] & [267]-[271]; *Peterson (Wunna Nyiyaparli People) -v- WA* [2016] FCA 1528, [18], [122]-[124] (upheld on appeal: *Wunna Nyiyaparli People -v- WA* [2017] FCA 1056, [8]).

[107] eg. *WA -v- Graham (Ngadju People)* [2013] FCAFC 143, [91]-[92]; and *Banjima People -v- WA* [2013] FCA 868, [531]-[534].

[108] *Far West Coast Claim -v- SA (No 6)* [2013] FCA 1270, [27]; the sole exception is NTA s 84D(2)(c) (where an individual from the claim group can contest the applicant's authorisation to act on behalf of the group, and can seek Court orders demanding evidence of this).

[109] *Burragubba -v- QLD*, *supra* note 78, [165].

[110] *Hatfield (Darumbal People) -v- QLD* [2013] FCA 1151, [38].

[111] See eg. *Gomeroi People -v- NSW* [2016] FCAFC 75; 241 FCR 301, [147] (addressing both obligations on applicant and the lawyer; although this judge was in the minority on the overall decision, the remaining two judges did not address this issue); *Weribone (Mandandanji People) -v- QLD* [2013] FCA 255, [58] & [61]-[62]. The Tribunal has also been prepared to impute 'a high duty of care, akin to a fiduciary duty' to the applicant on the basis that the applicant is 'the primary voice of the claim group': *Foster (Waanyi Peoples) -v- QLD* [2006] NNTTA 169; [2006] NNTTA 61, [39].

[112] *Weribone (Mandandanji People) -v- QLD (No 2)* [2013] FCA 485; 217 FCR 189, [44] & [46].

[113] *Gebadi -v- Woosup* [2017] FCA 1467, [96], [103], [161] & [172]-[173].

[114] eg. *Coyne -v- WA* [2009] FCA 533, [5]; *Daniel -v- WA* [2002] FCA 1147, [54]; *Lawson (Paakantyi People) -v- NSW* [2002] FCA 1517, [27]; *KK (Nyul Nyul people) -v- WA* [2013] FCA 1234; 217 FCR 115, [40]-[41] & [87]-[89].

[115] eg. *Evans (Koara People) -v- Registrar* [2004] FCA 1070 [40]-[43]; *Reid -v- SA* [2007] FCA 1479, [47]; *Ridgeway (Worimi People) -v- Bissett-Ridgeway* [2001] FCA 848, [34]; *Ward -v- NT* [2002] FCA 171, [21] & [23]-[24]; *Wharton (Kooma People) -v- QLD* [2003] FCA 790, [34], [37]-[39]; *Levinge (Gold Coast Group) -v- QLD* [2012] FCA 1321; 208 FCR 98, [1] & [46]-[50]; *TJ (Yindjibarndi People) -v- WA* [2015] FCA 818; 242 FCR 283, [124] see also [77] & [84]-[85].

[116] See eg. *Doctor (Bigambul People) -v- QLD* [2015] FCA 581, [46].

[117] PBC Regs, *supra* note 74, r 8(1)(a). 'Native title decision' is defined in r3(1) as 'a decision … to surrender native title rights and interests in relation to land or waters; or … to do, or agree to, any other act that would affect the native title rights or interests of the common law holders'.

[118] PBC Regs, *supra* note 74, r8(1)(a)

[119] PBC Regs, *supra* note 74, r8(6); *Gulliver Productions -v- Western Desert Lands Aboriginal Corp* [2005] NNTTA 88, [86].

[120] NTA, ss 61(1) & 251B.

[121] NTA, s66B(1). There have been many cases considering these provisions, with a recent Full Court authority (identifying the relevant criteria) being *Gomeroi People -v- NSW*, *supra* note 111, [83]-[92] & [105]-[106] & [112].

[122] NTA, ss24BA-24EC, with the term 'Indigenous Land Use Agreement' frequently abbreviated to 'ILUA'.

[123] NTA, 24EA(1)(b); *McGlade -v- Registrar* [2017] FCAFC 10; 251 FCR 172, [13].

[124] NTA, ss24CG(3)(b) (the Tribunal can be satisfied either on the basis of material provided to the Tribunal's Registrar, or the certification by a native title representative body).

[125] NTA, ss251A & 24CL.

[126] *Gomeroi People -v- NSW*, *supra* note 111, [77] (other Judge agreeing at [1]). The Tribunal's decision to register an agreement can be reviewed by the courts, with some agreements being ruled ineligible for registration because the requisite criteria were not extant: eg. *McGlade -v- Registrar*, *supra* note 123, [28]-[30] & [272]-[274].

[127] eg. *QGC Pty Ltd -v- Bygrave* [2010] FCA 1019; 189 FCR 412, [111]-[114].

[128] *Gomeroi People -v- NSW*, *supra* note 111, [76].

[129] *Gomeroi People -v- NSW*, *supra* note 111, [76].

[130] eg. AUS GOV, *Connection to Country: Review of the Native Title Act 1993 (Cth)* Report 126, Australian Government (2015), [10.15]; *Risk (Larrakia People) -v- NT* [2006] FCA 404, [64]-[66].

[131] *Strickland -v- Native Title Registrar* [1999] FCA 1530, [57].

[132] *Bolton (Southern Noongar) -v- WA* [2004] FCA 760 [45]-[46].

[133] *TJ (Yindjibarndi People) -v- WA*, *supra* note 115, [120].

[134] *Bolton (Southern Noongar) -v- WA*, *supra* note 132, [46].
[135] *TJ (Yindjibarndi People) -v- WA*, *supra* note 115, [87].
[136] *TJ (Yindjibarndi People) -v- WA*, *supra* note 115, [77] & [84]-[86].
[137] NTA, ss203B-203BK.
[138] NTA, s203BA(2)(a); *Miller -v- Goldfields Land and Sea Council Aboriginal Corp* [2014] FCA 183; 219 FCR 153, [39].
[139] *Little (Djaku:nde People) -v- QLD* [2015] FCA 287, [67].
[140]eg. *Agius -v- SA* [2017] FCA 361, [78].
[141] The two decisions were *Mabo -v- QLD* [1988] HCA 69; 166 CLR 186 and *Mabo -v- QLD*, *supra* note 78. A common myth in Australian law and politics is the 1992 *Mabo* decision was an unheralded reversal of land management, but in 1979 the High Court had clearly indicated the concept of common law native title was feasible: *Coe -v- Cwth* [1979] HCA 68; 24 ALR 118, 129-130 (Gibbs CJ & Aickin J), 135-136 (Jacobs J), 137-138 (Murphy J).
[142] eg. *Strickland (Maduwongga People) -v- WA*, *supra* note 100, 312-313.
[143] eg. *Strickland (Maduwongga People) -v- WA*, *supra* note 100, 321.
[144] *Muccan Minerals -v-Taylor (Njamal People)*, *supra* note , [105].
[145] PATRICK THORNBERRY, The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary (Oxford University Press. 2016), 349.
[146] See description in JOHN SOUTHALAN, *Human rights and business lawyers: The 2011 watershed*, 90 Australian Law Journal 889 (2016), 902.
[147] UN, Official Records, Sixty-first session, 107th plenary meeting (General Assembly, United Nations 2007), 12, 13 & 15 recording various government statements against UNDRIP.
[148] see eg. AUS GOV, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Minister for Indigenous Affairs, 2009), 3 & 5; USA GOV, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples* 2010), 5; CAN GOV, *Canada's Statement on the World Conference on Indigenous Peoples Outcome Document* (Permanent Mission of Canada to the United Nations, 2014), 1 (two years later, Canada announced it is 'now a full supporter of the Declaration without qualification. We intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution. … Canada believes that our constitutional obligations serve to fulfil all of the principles of the declaration, including "free, prior and informed consent".': CAN GOV, *Speaking Notes for the Honourable Carolyn Bennett* (Indigenous and Northern Affairs Minister, 2016)). See also See also NEWMAN (Aboriginal Canada and the Natural Resources Economy Series, 2017), *supra* note, 12-16 (contrasting consultation and consent, and differences between Canadian and international standards.
[149] AUS GOV (Australian Government, 2018), *supra* note 6, 1-4.
[150] UN, *Letter to Permanent Representative of Australia to the United Nations Office* UN doc CERD/EWUAP/Australia/2018/JP/ks, Office of the High Commissioner for Human Rights (2018)
[151] eg. *TJ (Yindjibarndi People) -v- WA*, *supra* note 115, [55] & [115]; see also [2], [5] & [28] (the meeting's outcome was not invalidated simply because of a company involvement/interest but, rather, the way in which that occurred was of various factors contributing to inadequate notice and procedures); see discussion in *IV. (c) 'Authorisation' process – ensuring accountable representation and representatives*.
[152] eg. *Collins (Wongkumara People) -v- Harris (Palpamudramudra Yandrawandra People)* [2016] FCA 527, [32]-[34]; see discussion in *IV. (c) 'Authorisation' process – ensuring accountable representation and representatives*.
[153] NTA, ss 24OA, 25(4) & 28.
[154] eg. *Warrie (Yindjibarndi People) -v- WA* [2017] FCA 803, [211]-[216]. The issue is, however, complex because the extent and effect of any invalidity (in terms of impact on non-Indigenous parties) is still contested, as evident the recent decision *BHP Billiton -v- KN (Tjiwarl)* [2018] FCAFC 8, [22], [27] & [35]-[45].
[155] The role of these bodies was described in *IV. (d) Government support for Indigenous decision-making.*
[156] eg. *Budby (Barada Barna People) -v- QLD* [2013] FCAFC 149, [26]; *MT (decd) -v- WA* [2013] FCA 1302, [35].