Submission to the Nuclear Fuel Cycle Royal Commission

This submission was produced by the Public Law and Policy Research Unit at the University of Adelaide.

*The Public Law & Policy Research Unit (PLPRU) at the University of Adelaide contributes an independent scholarly voice on issues of public law and policy vital to Australia's future. It provides expert analysis on government law and policy initiatives and judicial decisions and contributes to public debate through formulating its own law reform proposals.*

The submission was written by Mr John Podgorelec,* with contributions by Dr Peter Burdon and Dr Alex Wawryk,† on behalf of the Adelaide Law School.

* Mr. John Podgorelec, Legal Counsel, International Human Rights Law. Mr Podgorelec has extensive experience in the practice of international human rights law. He has practised in this field in multiple jurisdictions including Australia, the USA, the UK and Mexico.
† Dr Peter Burdon and Dr Alex Wawryk are Senior Lecturers at the Adelaide Law School.
INTRODUCTION

As stated in Issues Paper No. 4, and indeed as is widely known, nuclear and radioactive wastes present risks to the community and the environment that need to be managed in order to protect health and safety.¹ These risks arise principally from radiation. The risks from the storage of intermediate and high level wastes need to be comprehensively analysed and addressed. Site selection for, and operation of, a purpose-built storage or disposal facility must take potential environmental impacts into account. Significant issues are the potential for the contamination of groundwater sources and the risk of land contamination at handling, storage and disposal sites. The contamination of the environment from radioactive wastes has grave and long-term ecological impacts upon animals and plants, and the health and safety of humans who use those resources.

The Issues Paper makes the point that facilities for the storage of intermediate level and high level waste are ordinarily located away from population centres.² In South Australia, the site(s) most likely to be proposed for a nuclear waste storage facility would be in remote regional areas, where the people most likely to be affected by adverse incidents, and thus who bear a higher degree of risk, are indigenous peoples, including existing recognised native title holders and the claimants of native title rights.³ While outback sites have been described as “benign and sparsely populated geology”,⁴ an accident or incident could have such grave or catastrophic effects on the health, safety and culture of native titleholders that

² Ibid.
³ While many native title claims have been determined by the courts, a number are still in the process of determination. The evidential requirements for proving the necessary connection with the land means that claims can take as long as 15 years to be determined. In this submission, any reference to ‘native title holders’ or to ‘the holders of native title’ includes not only those peoples or groups whose native title claims have already been recognised by the courts, but also the claimants of native title rights whose claims are yet to be determined. This is to ensure the principles of free, prior and informed consent are observed in relation to existing, recognised native titleholders and in relation to indigenous peoples whose claims are proceeding through the court system.
the continued existence of an entire group of indigenous people could be threatened. Thus, as is acknowledged by Issues Paper No. 4, the process for selecting a site would require consultation and negotiation with landholders and holders of native title rights.\(^5\)

Within this context, this submission addresses question 4.7: What are the processes that would need to be undertaken to build confidence in the community generally, or specific communities, in the design, establishment and operation of such facilities? Proper consultation is required for holders of native title rights to have confidence in the design, establishment and operation of such facilities. It is also necessary for the general community to have confidence that the decision to build a nuclear waste storage facility in a regional area of South Australia has not been imposed upon native title holders.

Unfortunately, Australia does not have a good track record in adopting a consensual process of site selection or ensuring community consultation and support. One notable example is when the federal government used the \textit{Lands Acquisition Act 1989 (Cth)} in 2003 in an attempt to establish a waste facility in at Billa Kalina, in South Australia.\(^6\) This development was resisted by indigenous people, including the Kupa Piti Kungka Tjuta, the senior aboriginal women’s council of Coober Pedy who stated: “We are the Aboriginal Women. Yankunytjatjara, Antikarinya and Kokatha. We know the country...We say, "No radioactive dump in our ngura – in our country. It’s strictly poison, we don’t want it.”\(^7\)

Following this, the federal government turned to the Northern Territory and passed the \textit{Commonwealth Radioactive Waste Management Act 2005 (Cth)}. The Act overrode territory law and the \textit{Aboriginal and Torres Strait Islander Heritage Protection Act (Cth) 1984}.\(^8\) Further, while the Act required consent from traditional owners, consultation was poorly executed and key legal and anthropological documents were withheld on the basis of "commercial in confidence". This resulted in protracted litigation between traditional owners and the Northern Lands Council before site nominations were eventually withdrawn.\(^9\)

While the opposition Labor government described the act as “sorry”, “arrogant” and “sordid”,\(^10\) their own legislation, the \textit{National Radioactive Waste Management Act 2012 (Cth)}, contained many of the same flaws. Writing at the time, David Sweeney noted that the Act “fails to restore procedural fairness and appeal rights, suspends the application of key

---

\(^5\) Above n 1.


\(^7\) \textit{Commonwealth Radioactive Waste Management Act 2005 (Cth)} s 10.

\(^8\) \textit{Commonwealth Radioactive Waste Management Act 2005 (Cth)} s 6.


\(^10\) Commonwealth, Parliamentary Debates, House of Representatives, 2 November 2005 (Peter Garrett),
indigenous and environmental protections and overrides all Commonwealth, state and territory laws that might delay or frustrate the opening of a waste dump.”

This submission argues that the processes regarding consultation over a facility to store toxic waste on indigenous peoples’ lands must be done in accordance with existing and developing international legal norms, and Australia’s international legal obligations. These standards require free, prior and informed consent, articulated in this way by the UK Committee on Radioactive Waste Management in 2006: “it is generally considered that a voluntary process is essential to ensure equity, efficiency and the likelihood of successfully completing the process. There is a growing recognition that it is not ethically acceptable for a society to impose a radioactive waste facility on an unwilling community.”

Unless international standards are met, neither indigenous peoples or the wider South Australian community can have confidence that the risks to the health, safety and culture of indigenous peoples have been properly identified, explained and addressed by environmental impact assessment and consent/development procedures, and that consent to the establishment and operation of such a facility, if gained, is informed and genuine. Moreover, unless planning and consent procedures comply with international standards, international finance may be very difficult to obtain; and any project, even if approved by the state and federal government, may be open to action under the complaints procedures of the United Nations human rights treaty supervisory committees.

2 NUCLEAR WASTE STORAGE SITE SELECTION - INDIGENOUS CONSENT FROM AN INTERNATIONAL HUMAN RIGHTS LAW PERSPECTIVE

Wrestling with the difficulty of site selection of nuclear waste facilities is not an uncommon problem for the international community. However, learning from past failures and for considerations of equity, the environment, safety and security, a common theme for the need of a “voluntary” or “consent” based approach to siting has emerged.

Consistent with this theme of volunteerism and consent has been the development of the right to free, prior, and informed consent (FPIC) in relation to development projects and


13 Mr. John Podgorelec, Legal Counsel.


resource extraction within the territory of indigenous peoples within international law.\textsuperscript{16} FPIC is more than consultation.\textsuperscript{17} Its basic principles are to
e

ensure that indigenous peoples are not coerced or intimidated, that their consent is sought and freely given prior to the authorisation or start of any activities, that they have full information about the scope and impacts of any proposed developments, and that ultimately their choices to give or withhold consent are respected.\textsuperscript{18}

This submission outlines the concept of FPIC within the international law specific to indigenous peoples. It does so by outlining the underpinnings of FPIC from established international human rights jurisprudence including principles of international law derived from treaties, declarations, and the decisions and practice of the supervisory bodies of the United Nations (UN) treaty system. It then presents the more controversial issue of whether consent by the indigenous in the context of the siting of nuclear waste facilities requires that consent actually be given as opposed to simply being a goal. Finally it will identify how the concept of FPIC has been adopted by certain international financial institutions through their policies and programmes on indigenous peoples.

This submission finds that at a minimum, States must engage in good faith consultations with the indigenous prior to undertaking projects of this type within their land. However, if risk mitigation is a priority, the minimum may not be enough to ensure a successful project. Gaining actual consent from the indigenous peoples as opposed to making it a goal would align the project with the international human rights jurisprudence, the evolving principles of FPIC and in turn with the lending policies of a growing number of international financial institutions.

\textbf{2.1 \textit{International Human Rights Law}}

\textit{The Treaties}

Australia has ratified multiple international human rights treaties. In particular, Australia is party to the \textit{International Covenant on Civil and Political Rights} (ICCPR),\textsuperscript{19} the \textit{International 5

---


Covenant on Economic, Social, and Cultural Rights (ICESCR),\textsuperscript{20} and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).\textsuperscript{21} Australia has also accepted the individual complaint procedures for the ICCPR and ICERD via their respective optional protocols.\textsuperscript{22} The ICCPR and ICESCR are endorsed in the preamble to the Native Title Act 1993 (Cth) which in turn was adopted into the Native Title Act 1994. The ICERD is endorsed and scheduled in the Racial Discrimination Act 1975 (Cth).\textsuperscript{23}

Specific to the rights of indigenous peoples, Australia adopted the United Nations Declaration of the Rights of Indigenous Peoples (“UN Declaration”) in 2009.\textsuperscript{24} Although not legally binding in itself, this UN Declaration has a dual nature. Firstly, it is a compilation of pre-existing rights sourced primarily from the above-mentioned legally binding covenants, and secondly, it incorporates evolving human rights standards that are relevant to indigenous peoples. Consequently it has both an authoritative interpretative value (in respect of the pre-existing rights), and, in respect of the evolving standards, may also be considered as a guide to assist States’ behaviour which may ultimately develop into customary international law.\textsuperscript{25}

Of these international instruments, only the UN Declaration refers specifically to the concept of FPIC.

What is free, prior and informed consent?

The UN Declaration requires that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them” (article 19) and “before the undertaking


\textsuperscript{23} Note: section 7(2) provides that any ambiguous terms in the NTA should be construed consistently with the Racial Discrimination Act (Cth) 1975.


of projects that affect indigenous peoples’ rights to land, territory and resources, including mining and other utilization or exploitation of resources” (article 32).

Critical for current purposes, in certain circumstances, there is an obligation to obtain the consent of the indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultations (emphasis added).\textsuperscript{26}

For example, the UN Declaration explicitly requires States to obtain consent of indigenous peoples in cases of:

- the relocation of indigenous peoples from their lands or territories (article 10); and
- \textit{the storage or disposal of hazardous materials on indigenous peoples’ lands or territories} (article 29) (emphasis added).

Moreover, indigenous peoples who have unwillingly lost possession of their lands, when those lands have been “confiscated, taken, occupied or damaged without their free, prior and informed consent” are entitled to restitution or other appropriate redress (article 28).\textsuperscript{27}

\textit{The basis for FPIC}

Indigenous peoples firmly place the right to FPIC as emanating from the right to self-determination pursuant to common article 1 of the ICCPR and ICESCR.\textsuperscript{28} The right to self-determination is said to include the right to freely pursue their economic development which in turn involves control over traditional lands and resources.\textsuperscript{29}

In the lead-up to the adoption of the UN Declaration some States (including Australia) raised concerns about this interpretation. Although their concerns were primarily centred on issues of state sovereignty and territorial integrity, there were also concerns about non-interference and the financial implications of many socio-economic dimensions of self-determination.\textsuperscript{30}

These were eventually overcome by an amendment limiting the right to self-determination to internal aspects of self-determination and the inclusion of article 46 effectively subjecting the UN Declaration to existing international and domestic law.\textsuperscript{31}

\textsuperscript{26} Above n 17, 26-29.

\textsuperscript{27} Ibid.

\textsuperscript{28} Ibid; Above n 16, 54; See Davis above n 25, 20.

\textsuperscript{29} Above n 16, 55; See Davis above n 25, 20.

\textsuperscript{30} See Davis, above n 25, 20-22.

\textsuperscript{31} Ibid, 22-23.
UN Treaties Supervisory Bodies

To assist States Parties on how to apply a treaty so that they may properly comply with their international obligations, the UN treaty supervisory bodies issue general comments, recommendations or concluding observations.

Although the ICCPR, ICESCR and CERD do not expressly mention indigenous peoples or FPIC, their UN treaty supervisory bodies have unambiguously and repeatedly interpreted their various provisions affirming the right to culture, right to equal treatment before the law, and right to self-determination, among others, to include the duty and obligations of States to secure consent in a range of circumstances.\(^\text{32}\)

For instance, the Office of the High Commissioner of Human Rights links FPIC to treaty norms including the right to self-determination pursuant to common article 1 of the ICCPR and ICESCR.\(^\text{33}\) Further, Article 27 of the ICCPR has been interpreted by the Human Rights Committee (HRC) in General Comment No. 23 to include the protection of indigenous peoples way of life that is connected to the control over, and use of, lands and resources.\(^\text{34}\)

Further still, there is a requirement that the State “ensure the effective participation of members of minority communities in decisions which affect them.”\(^\text{35}\) In their concluding observations, the HRC has consistently used this interpretation to reinforce the duty of

---


\(^\text{35}\) Ibid para 7.
States to consult with indigenous peoples prior to the start of development projects, resource extraction, and other investment projects within their territories.\textsuperscript{36}

Significantly, the ICESCR’s supervisory body, the Committee on Economic, Social and Cultural Rights, makes specific reference to FPIC in General Comment No. 21. It interprets “cultural life” to include the rights of indigenous peoples to restitution or the return of lands, territories and resources traditionally used and enjoyed by indigenous communities if taken without their prior and informed consent.\textsuperscript{37} Further, it calls on States to “respect the principle of free, prior, and informed consent of indigenous peoples in all matters covered by their specific rights”\textsuperscript{38} and to “obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk”.\textsuperscript{39}

When applying the ICERD, the Committee on the Elimination of Racial Discrimination (CERD) also interprets the rights of indigenous peoples to include the right to consultation and informed consent. In its General Recommendation No. 23 the CERD calls upon States Parties to “[e]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent”.\textsuperscript{40} Further, “[t]he Committee especially calls upon States Parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories” or, as it goes on to say, “the right to restitution.”\textsuperscript{41} In their concluding observations the CERD too have consistently reinforced the obligation of nation States to ensure that the right of


\textsuperscript{38} Ibid para 37.

\textsuperscript{39} Ibid para 55(e).


\textsuperscript{41} Ibid para 5.
indigenous peoples to free prior and informed consent is respected in the planning and implementation of projects affecting the use of their lands and resources.\textsuperscript{42}

Although these general comments, recommendations or concluding observations by the UN supervisory bodies are not legally binding,\textsuperscript{43} they do tend to show a minimum international standard (or norm) in relation to the right of indigenous peoples to be consulted in regard to development projects.\textsuperscript{44}

\textit{International Case Law}

Consistent with the UN supervisory bodies approach, multiple international jurisdictions have endorsed a similar approach to FPIC.\textsuperscript{45} Of particular significance is the 2007 case of \textit{Saramaka v Suriname}. This case revolved around the granting of resource concessions to private companies. The Inter-American Court of Human Rights held that the State has a duty to not only consult with indigenous peoples, but also to obtain their free, prior and informed consent, according to their customs and traditions, in cases of large-scale development or investment projects that would have a major impact within indigenous peoples’ territory.\textsuperscript{46}

Also in 2007, in \textit{Aurelio Cal v Attorney-General of Belize}, the Supreme Court of Belize specifically endorsed the principles of the UN Declaration.\textsuperscript{47} This case dealt with resource

\textsuperscript{42} See, for example, the \textit{Committee’s concluding observations} on the Lao People’s Democratic Republic (CERD/ LAO/ CO/16-18) and Canada (CERD/CAN/CO/19-20).


\textsuperscript{44} See above n 16, 57. See also Philippines, E/C.12/PHL/CO/4, 1 December 2008, para. 6 (interpreting the Covenant on Economic, Social and Cultural Rights and providing that the “Committee also notes with satisfaction the various legislative, administrative and policy measures adopted by the State party to recognize, protect and promote the individual and collective rights of the indigenous peoples living in the territory of the State party, including... (b) The Free and Prior Informed Consent Guidelines...”); See Ecuador: CERD/C/ECU/CO/ 19, 15 August 2008, para. 16, (interpreting the Convention on the Elimination of all Forms of Racial Discrimination and welcoming the adoption of the Consultation and Participation Act...that require[s] prior and informed consent...[and] urge[ing] the State party to enforce” the Act).

\textsuperscript{45} See e.g. \textit{Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya} (February 2010), para. 226 & 291, (interpreting State obligations under the Banjul Charter and providing that in the case of “any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.”); \textit{ILO Convention 169}, supra note 29, para. 6(1) (a) (“Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions”); \textit{see also Mayagna (Sumo) Awas Tingni Community v. Nicaragua}, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001); \textit{The Soc. and Econ. Rights Action Ctr. and the Ctr. for Econ. and Social Rights v. Nigeria}, Communication No. 155/96, African Commission on Human and Peoples Rights, (October 2001), para 53.

\textsuperscript{46} \textit{Saramaka People v Suriname}, Inter-American Court of Human Rights, Judgement of 28 November 2007, Series C No. 172 (Hereinafter “Saramaka”).

\textsuperscript{47} \textit{Aurelio Cal v Attorney-General of Belize}, Claim 121/2007 (Supreme Court, Belize, 18 October 2007) para 133.
concessions granted to foreign companies by Belize on the traditional lands of the Maya Communities. Finding that Belize was bound by its Constitution and International law to respect and protect Maya customary land rights, Chief Justice Conteh went on to say that Belize would be “unwilling, or even loath to take any action that would detract from the provisions of [the] Declaration importing as it does, in my view, significant obligations for the State of Belize in so far as the indigenous Maya [sic] rights to their lands and resources are concerned.”

In July 2012, the Inter-American Court of Human Rights handed down its decision in *Sarayaku v. Ecuador*. This case related to the granting of oil exploration and exploitation licenses on the traditional lands of the Kichwa People of Sarayaku. Whilst not dealing with the issue of consent, the Court found Ecuador liable for breaching the indigenous peoples’ right to free, prior and informed consultation in accordance with international standards. The Court stated that this obligation is to be considered a general principle of international law:

> Other courts of countries that have not ratified ILO Convention No. 169 have also referred to the need to carry out prior consultations with indigenous, native or tribal communities, regarding any administrative or legislative measure that directly affects them, as well as on the exploitation of natural resources in their territory. Thus, similar developments in case law are evident in the high courts of countries within the region, such as Canada or the United States of America, or of those outside the region such as New Zealand. In other words, the obligation to consult, in addition to being a conventional standard, is also a general principle of International Law.

These decisions are not binding on States Parties unless they have submitted to the relevant court’s jurisdiction. Australia has not. However, what *Sarayaku* neatly contextualises is how otherwise non-binding complementary international instruments, national legislation and jurisprudence can be interpreted to establish a minimum obligation to conduct free, prior and informed consultation given that this obligation constitutes a customary international law principle.

**Nuclear Waste Storage - Indigenous Peoples’ Right to Withhold Consent**

Article 29(2) of the UN Declaration states:

> States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

---

48 Ibid.


50 Ibid para 164.

51 Ibid.
In the current situation then, the State must have consent of the indigenous peoples if they plan to site a nuclear waste storage facility on their lands or territories.

The Controversy

Notwithstanding the apparent clarity of article 29(2) there is some controversy over whether this right to withhold consent is a right to veto certain projects or is seen simply as a way to ensure participation in the decision-making process.\textsuperscript{52}

As mentioned earlier, the UN Declaration (and in turn FPIC) has its foundations in the right to self-determination. It has been said that “[t]he [UN] Declaration seeks to assist states in the implementation of the indigenous right to self-determination within a democratic system without disrupting public institutions or the rule of law.”\textsuperscript{53} Whichever way one articulates the indigenous peoples’ right to self-determination (i.e. either as a right to decolonisation or a right of democracy)\textsuperscript{54} the right to prohibit a project by withholding consent may be seen by some as being at odds with this view of the UN Declaration’s intended use.

Regardless of the controversy, there is substantial support for the view that the right to withhold consent, in certain circumstances, may mean the prohibition of the project on the territories of the affected indigenous peoples.

Significant for the subject matter and because at the time the US was yet to adopt the UN Declaration, the CERD, responding to reports over nuclear testing and dangerous waste storage on Native American lands,\textsuperscript{55} commented:

> While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party’s obligations under the Convention relating to indigenous peoples.\textsuperscript{56}

In the \textit{Saramaka} case the Court found that in the case of large scale developments that could impact on the survival of a people, the State has a duty not only to consult, but also to obtain free, prior, and informed consent.\textsuperscript{57} Following on from the position taken by the

---

\textsuperscript{52} Above n 16, 58.

\textsuperscript{53} See Davis, above n 25, 22 where Megan Davis refers specifically to quote noted below at n 56.

\textsuperscript{54} Ibid, 20-22 particularly at 21; also see generally, Thomas M. Antkowiak, Rights Resources and Rhetoric: Indigenous Peoples and Inter-American Court, U. Pa. J. Int’l L. 113.

\textsuperscript{55} See Davis, above n 25, 28.

\textsuperscript{56} UN Committee on the Elimination of Racial Discrimination, \textit{Concluding Observations of the Committee on the Elimination of Racial Discrimination:} United States of America, 72nd sess, UN Doc CERD/C/USA/CO/6 (8 May 2008) 10.

\textsuperscript{57} See \textit{Saramaka} above n 46, para 134.
Court in *Saramaka*, the Special Rapporteur on the rights of indigenous peoples has stressed that

>a significant direct impact on indigenous peoples’ lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples’ consent. In certain contexts, the presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.58

As has been reflected throughout this submission, there is a level of consistency in approaches by the Inter-American Court of Human Rights and the UN treaty bodies. However, further guidance is still required from the international legal community on (a) the distinction of small- and large-scale projects and their potential impact on the survival of a people and (b) what ‘survival’ means. Guidance is also necessary when considering what type of project, in the context of nuclear waste facilities for example, might attract this requirement to obtain FPIC. Only when these issues have been fully explored might we be able to say with confidence that the right to withhold consent, thereby effectively prohibiting a project in certain circumstances, is evolving into a customary international legal principle or has been absorbed into the minimum international standard.

*How to Apply FPIC*

Substantially aligning with the UN treaty supervisory bodies approach, and somewhat aligning with the case law on FPIC, the United Nations Permanent Forum of Indigenous Issues has provided the following guidance on how to apply FPIC:

- **Free**, should imply that there is no coercion, intimidation or manipulation.

- **Prior** should imply consent being sought sufficiently in advance of any authorisation or commencement of activities and respective requirements of indigenous consultation/consensus processes.

- **Informed** should imply that information is provided that covers a range of aspects, including, among other things ... the nature, size, pace, reversibility and scope of any proposed project or activity; the reason/s or purpose of the project ...; the duration; locality or areas affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks; personnel likely to be involved in the execution of the project; and procedures the project may entail. This process may include the option of withholding consent. Consultation and participation are crucial components of a consent process.59

---

58 A/HRC/12/34, para. 47.

2.2 Financial Institutions - Adoption of UN Declaration and FPIC

The UN Declaration and the principles of FPIC have been incorporated into the policies and programmes on indigenous peoples of multiple intergovernmental development agencies and international financial institutions.

The International Finance Corporation has included the principles of FPIC into their Policy and Performance Standards related to indigenous peoples. The standards state that not only must consultation be undertaken, but also the FPIC of indigenous peoples must be obtained, “if the proposed activities (i) are to be located on or make commercial use of natural resources on lands subject to traditional ownership and/or under customary use by indigenous peoples; (ii) require relocation of indigenous peoples from traditional or customary lands; or (iii) involve commercial use of indigenous peoples’ cultural resources.” (Emphasis added)

Similarly, the European Bank for Reconstruction and Development, in its Environmental and Social Policy, and the Inter-American Development Bank’s Operational Policy on Indigenous Peoples and Strategy for Indigenous Development adopt the principles outlined in the UN Declaration and FPIC. Both banks require evidence of consent from the affected indigenous peoples before approving projects.

Particularly relevant to an Australian-based project is the specific incorporation of the UN Declaration and principles of FPIC in the Asian Development Bank’s Indigenous Peoples Safeguards Draft Working Document, which states as follows:

For a project with impacts on indigenous peoples, the Safeguard Policy Statement (SPS) requires borrowers to carry out meaningful consultation and to prepare and implement an indigenous peoples plan. The plan includes measures to ensure that indigenous peoples benefit, and that adverse impacts are prevented, or where this is not possible, mitigated. The SPS requires that broad community support of affected indigenous peoples’ communities be

60 See for example, The United Nations Development Programme policy on indigenous peoples “promotes and supports the right of indigenous peoples to free, prior informed consent with regard to development planning and programming that may affect them”, 132.


ascertained for project activities to which indigenous peoples are deemed particularly vulnerable.64

Adoption of the principles of the UN Declaration and FPIC by the international banking community may be seen by indigenous peoples as a last line of defence against States that choose to ignore those same principles. It may be that these financial institutions, only too aware of recent failed attempts to site nuclear waste management facilities, consider that compliance with FPIC will mitigate the risks of an unsuccessful project and in turn reduce their financial exposure.

3 CONCLUSION

Even though the UN Declaration, the UN treaty supervisory bodies’ commentaries and the jurisprudence of the Inter-American system are not legally binding, given that international customary law is both developed and evidenced by the practice of States,65 what these human rights instruments and mechanisms do is continue to challenge and guide State practice.

This submission shows that although the right of indigenous peoples to the full expression of FPIC, as it appears in the UN Declaration, may fall short of settled customary international legal principle, a minimum international standard (or norm) is emerging that requires good faith consultations prior to the commencement of projects that are within their territories or that affect traditionally-used resources. It is unclear whether the right of indigenous peoples to withhold consent which may effectively prohibit a project, such as the siting of a nuclear waste facility on to their territories, falls into this minimum international standard. However, there is more than a suggestion that the law is developing in that direction. That being the case, simply ignoring Article 29(2) of the UN Declaration may not be the surest path to a successful project.

Furthermore, the specific incorporation of the principles of the UN Declaration and FPIC by international financial institutions into their lending policies not only assists in the development of the minimal international standard but adds another potentially more practical dimension to a States’ considerations when weighing up site location.

---


It seems practical that the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved.\textsuperscript{66} Due to the inherent danger in the handling of radiotoxic materials, and the extraordinary length of time that they remain dangerous to humans, it would be hard to envisage a more suitable situation in which to grant affected indigenous peoples the right to withhold consent and to have that respected. Not only would this be consistent with the theme of volunteerism but it may be the defining feature of a successful project.

Not knowing which domestic legislative regime, or other process, the state or commonwealth plan to utilise to approach indigenous consent, it is impossible to say whether it is or will be FPIC compliant. However, what can be said is that at the domestic level, as Australian courts may use international law to resolve statutory ambiguities or to construe the meaning of a statute, challenges to laws or decisions that do not align with the principles of the UN Declaration and FPIC could not be ruled out. As Australia has adopted the optional protocols to the ICCPR and ICERD it is subject to the individual complaint processes via their respective supervisory committees. These avenues may only be exercised once all domestic remedies have been exhausted.

If it is that existing domestic legislation is intended to be utilised, such as the \textit{Native Title Act 1993 (Cth)} or \textit{Native Title Act 1993 (SA)}, and it does not accommodate the full principles of the UN Declaration and FPIC, including the right to withhold consent, then it may be necessary to make the appropriate amendments to limit the risk of a complaint being filed alleging a human rights violation to the relevant UN treaty supervisory committees.

\textsuperscript{66} Above n 58.