



## THE APPLICATION OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP) IN AUSTRALIA:

Submission by the Australian National University First Nations Portfolio to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs 2022.

### Terms of Reference to 2022 inquiry:

The Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs inquire and report into the following:

The application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia, with particular reference to:

- (i) the international experience of implementing the UNDRIP
- (ii) options to improve adherence to the principles of UNDRIP in Australia
- (iii) how implementation of the Uluru Statement from the Heart can support the application of the UNDRIP
- (iv) any other related matters.

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Thank you for the opportunity to provide a submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs' inquiry into the application of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in Australia. We consider this a matter of great importance and commend the Parliament for establishing an inquiry with broad terms of reference inviting multifaceted engagement with the issue.

The First Nations Portfolio (FNP) is a branch of the Australian National University (ANU)'s Executive Group, established in 2021 to ensure a whole-of-university approach to First Nations issues. The FNP works across ANU to ensure it is a world leader in research and teaching on First Nations issues. We collaborate with existing ANU research and education units and are forming partnerships between ANU and First Nations communities and stakeholders. We have begun to make a leading contribution to national policy in the relationship between Indigenous Australians and the nation, as seen in the response to our Issues Paper on the Voice to Parliament.<sup>1</sup>

Our submission focuses principally on the critical need to ensure the UNDRIP underpins the implementation of the Uluru Statement from the Heart, as well as relevant related matters. We believe that gradual incorporation of UNDRIP through legislation enabling a Voice and a Makarrata Commission with treaty-making and truth-telling responsibilities should be a priority focus for Government and the Parliament. We submit that a preliminary process of review and reporting should be established in the short term to support that larger goal

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<sup>1</sup> The First Nations Portfolio Issues Paper is available at <https://anufirstnations.com.au/>.

and that supportive statements by the Prime Minister and members of the Executive about the Government’s commitment to UNDRIP are important for building public support for the Declaration in Australia. Our submission addresses the following areas:

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## 1. SUBMISSION OVERVIEW

The UNDRIP is a critical instrument to guide the implementation of the Uluru Statement and to advance important human rights standards as they relate to Indigenous peoples in Australia's domestic and international affairs. Holistic implementation of the UNDRIP into Australia's domestic affairs should be seen as fundamental to efforts to substantively recognise and protect the rights of Indigenous peoples in Australia. Comprehensive legislative incorporation of the UNDRIP should therefore be the ultimate aim of the Parliament.

Noting that Australia's legal system has a shamefully poor track record of protecting and advancing the inherent rights of Indigenous peoples, and noting the important opportunity before the Government to alter the status quo relating to the failure to recognise and protect Indigenous rights through the full implementation of the Uluru Statement, we propose that a staged approach to implementation of the UNDRIP should be preferred. A priority for the Government should be to ensure that the UNDRIP, its substantive purpose and provisions, underpins the implementation of the Uluru Statement from the Heart. This could be achieved by incorporating key preambular statements and provisions into legislation supporting the various components to the implementation of the Uluru Statement. Enabling legislation for the Voice would be the first site of this focus.

A Voice could provide a vital forum for the expression of free, prior and informed consent, a key element of the Declaration, and so would be the appropriate forum with which to engage to pursue fuller domestic incorporation of the instrument. We propose that, working with a properly enabled Voice, the UNDRIP should be seen as critical to shaping and informing the scope and functions of a Makarrata Commission, and a national treaty-making and truth-telling process. Our view is that without the UNDRIP built into and guiding that process, the promise and solemnity of the Uluru Statement may be unrealised.

We propose that a preliminary process of review and reporting be established as a first step. The Attorney General should, as soon as reasonably possible, refer

this work to be carried out by the Australian Law Reform Commission (ALRC).<sup>2</sup> It should involve assessing the scope of Commonwealth laws currently inconsistent with a substantive application of the UNDRIP. We suggest that this would provide an opportunity to highlight the extent of breaches against the human rights of Indigenous peoples. As part of a review and reporting process, the ALRC should be able to engage leading international law and other experts, noting the importance of ensuring First Nations experts are well represented. A priority focus of the ALRC would be on legislation deemed particularly relevant to Indigenous peoples' interests, including legislation relating to heritage and environmental protection, intellectual and cultural property, land and resource management, and native title and land rights.

Noting the tendency to misapplication of key provisions in the UNDRIP, we propose that as part of its engagement on the issue the ALRC should work to define the scope and meaning of key rights as well as highlighting underlying barriers to the effective domestication of the UNDRIP in Australia, for example the substantive scope and application of *self-determination, free prior and informed consent* and of economic considerations throughout the Declaration. A more innovative focus could also involve tasking the ALRC with developing an assessment standard that could be used by government and policy-makers as a guide to understanding potential inconsistencies of laws and policies with the UNDRIP. We suggest that such a tool could be useful for the public service and State and Territory governments as they consider the impact of the Declaration and their obligations arising from it. We suggest that this is important preliminary work which could provide a basis from which to address legislative incorporation of the UNDRIP as an underpinning of the implementation of the Uluru Statement.

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<sup>2</sup> In preparing this Submission we considered the utility of proposing amendment to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to enable the Parliamentary Joint Committee on Human Rights to do some of this work, however given the scope and technical nature of the work we believe referring it to a specialist body would provide for a better outcome. Although the ALRC is suggested as the preferred forum, the Australian Human Rights Commission through the office of the Aboriginal and Torres Strait Islander Social Justice Commissioner may also be an appropriate forum to carry out this work.

Political decision-makers must ensure that any effort to implement the UNDRIP into Australian law reflects the integrity and significant status of the Declaration and is focused at meaningfully recognising and protecting the substantive rights it sets out. Fully realised, the magnitude of such a task is significant and will require confronting systemic limitations in Australia's legal and political framework that have operated to marginalise the inherent rights and interests of Indigenous peoples since settler law was imposed on these shores by the British.

The UNDRIP is a direct challenge to the marginalisation of Indigenous peoples. Its implementation into Australian law must therefore be aimed at changing the status quo and at making meaningful space for the protection and advancement of the rights of Indigenous peoples. It is a critical matter in the pursuit of a more equitable and harmonious Australia.

#### **SUMMARY OF RECOMMENDATIONS:**

1. Relevant preambular statements and provisions related to free, prior and informed consent set out in the Declaration should be incorporated into enabling legislation establishing a Voice. Article 19 is particularly important in this regard, noting that this would not constitute a veto.

2. Preambular statements and provisions of the Declaration considered important to establishing a Makarrata Commission and to advancing Commonwealth treaty-making and truth-telling processes should be incorporated into relevant enabling legislation. An effective Voice would be the appropriate forum with which to engage to develop these ideas further and to contemplate fuller incorporation.

3. As a first step and in the short term the Commonwealth should engage the Australian Law Reform Commission to undertake a process of review and reporting on the consistency of current laws with the UNDRIP. Part of this work should involve articulating the scope and substantive meaning of key rights and developing an assessment standard to address ongoing issues of identifying inconsistencies with the UNDRIP in Australia.

4. The Prime Minister and members of the Executive should make supportive public comments about Australia's commitment to the UNDRIP and its principles, highlighting the Declaration's importance to informing Government laws and policies.

## 2. THE UNDRIP AND ITS IMPORTANCE

### 2.1. The legitimacy, moral and political weight of the Declaration:

The UNDRIP is a document with significant moral and political weight, reflecting the ‘minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world’.<sup>3</sup> It is an expression of generally accepted human rights standards applied to an Indigenous context and considering the communal nature of many of those rights. The Declaration is particularly legitimate as a universal standard for the expression of the rights and interests of Indigenous peoples because it is the product of decades of work, collaboration and thorough interrogation. It sprang from an institutionalised, established, transparent, ordered and inclusive process<sup>4</sup> and was subject to ‘in excess of 25 years of law-making progress, passing through no less than six UN institutions, and procedures, before it was adopted on 13 September 2007’.<sup>5</sup> The direct involvement of Indigenous peoples in its creation is particularly important. ‘No other UN human rights instrument has ever been elaborated with so much direct involvement and active participation on the part of its intended beneficiaries’.<sup>6</sup>

The widespread support among Indigenous peoples in the drafting and ratification of UNDRIP, ‘along with the now-unanimous acceptance of this document at the United Nations, signals expectations that human rights, not only of communities, but also of Indigenous individuals, must be respected’.<sup>7</sup> It is because of these considerations that Erica A Daes, the former Chairperson and Special Rapporteur of the UN Working Group on Indigenous Populations, said that the UNDRIP ‘constitutes the most important development concerning the

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<sup>3</sup> UNDRIP, Article 43.

<sup>4</sup> Claire Charters, ‘The Legitimacy of the Declaration on the Rights of Indigenous Peoples’ in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work* (Indigenous Work Group for Indigenous Affairs, 2009) 282.

<sup>5</sup> *Ibid*, 282.

<sup>6</sup> Erica-Irene A Daes, ‘The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples’ in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work* (Indigenous Work Group for Indigenous Affairs, 2009) 74

<sup>7</sup> John Borrows, ‘Revitalizing Canada’s Indigenous Constitution: Two Challenges’ in John Borrows, Larry Chartrand, Oonagh E Fitzgerald and Risa Schwartz (eds) *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Centre for International Governance Innovation, 2019) 23.

recognition and protection of the basic rights and fundamental freedoms of the world's Indigenous peoples'.<sup>8</sup>

The Declaration's very existence is in direct response to the failing of the international system of nation-states to sufficiently protect and promote the rights of Indigenous peoples. It is a tool to change the nature of the relationship between Indigenous peoples and states and to put it on a more equal footing. Former Special Rapporteur S James Anaya has highlighted this point, saying that 'it is precisely because the human rights of Indigenous groups have been denied, with disregard for their character as peoples, that there is a need for the Declaration in the first place'.<sup>9</sup> He says that the purpose of the Declaration is to 'remedy the historical denial of the right to self-determination and related human rights so that Indigenous peoples may overcome systemic disadvantage and achieve a position of equality vis-à-vis heretofore dominant sectors'.<sup>10</sup>

The denial of Indigenous rights has occurred for hundreds of years 'since the doctrine of discovery subverted the course of international law'.<sup>11</sup> It is a struggle contemplated by other international human rights instruments, including the International Labor Organization's Convention No. 169 on Indigenous and Tribal Peoples, which is the only formally binding international law agreement specifically related to Indigenous peoples. We note that the Australian Government has not yet ratified that convention.

## 2.2. The legal effect of the UNDRIP (binding or non-binding?)

As a declaration (as opposed to a convention or covenant) the UNDRIP is formally a non-binding instrument of international law. Initially opposing the Declaration with Canada, New Zealand and the United States, Australia was keen to stress the non-binding nature of the UNDRIP, stating that the Declaration is 'an

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<sup>8</sup> Erica-Irene A Daes, n 6, 74.

<sup>9</sup> S. James Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work* (Indigenous Work Group for Indigenous Affairs, 2009) 193.

<sup>10</sup> *Ibid*, 191, 193.

<sup>11</sup> Sharon Helen Venne, *Our Elders Understand Our Rights* (Theytus Books Ltd., 1998) 121.



aspirational declaration with political and moral force but no legal force' which is 'not intended itself to be legally binding or reflective of international law'.<sup>12</sup> Australia ultimately endorsed the UNDRIP in 2009.

The view that the UNDRIP has no binding effect at international law is contested. Although a non-binding instrument, rights set out in the UNDRIP are significant because they generally reflect well-established rights under international law. For example, rights to self-determination are well-established in international law, set out in Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It is increasingly being argued, and it has been accepted by some courts, that although the Declaration is a non-binding instrument, many of its provisions reflect binding, hard-law norms, including those related to self-determination, political participation and consultation (including free, prior and informed consent).<sup>13</sup> The UNDRIP is therefore a non-binding, influential and aspirational statement, and also an instrument that reflects established and binding rules of customary international law.<sup>14</sup> We advise that it should be seen as an increasingly robust legal instrument that

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<sup>12</sup> UN General Assembly Official Records, 61<sup>st</sup> session, 107<sup>th</sup> plenary meeting, UN Doc A/61/PV.107, 12. Cited in Luis Rodriguez-Pinero Royo, "Where Appropriate": Monitoring/Implementing of Indigenous Peoples Rights Under the Declaration' in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work* (Indigenous Work Group for Indigenous Affairs, 2009) 315.

<sup>13</sup> See S. James Anaya, 'The Emergence of Customary International Law Concerning the Rights of Indigenous Peoples' (2005) 12 *Law and Anthropology*, 127; Asmi Wood, 'Establishing a Neutral Legal Framework for Treaty in Australia' in Harry Hobbs, Alison Whittaker and Lindon Coombes (eds) *Treaty-Making: 250 Years Later* (Federation Press, 2021); Javaid Rehman, 'Between the Devil and the Deep Blue Sea: Indigenous Peoples as Pawns in the US "War on Terror" and the Jihad of Osama Bin Laden', in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart, 2011) 561; James Anaya, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*, UN Doc A/HRC/12/34 (July 15, 2009) 12 – 15; Harry Hobbs, 'Treaty making and the UN Declaration on the Rights of Indigenous Peoples: lessons from emerging negotiations in Australia' (2019) 23 (1-2) *The International Journal of Human Rights*, 178; Stephen J Anaya and Siegfried Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment' (2007) 206 *Third World Resurgence* 15; Asmi Wood, 'Self-Determination Under International Law and Some Possibilities for Australia's Indigenous Peoples' in Laura Rademaker and Tim Rowse (eds) *Indigenous Self-Determination in Australia* (ANU Press, 2019) 282.

<sup>14</sup> Megan Davis, 'To bind or not to bind: the United Nations Declaration on the Rights of Indigenous People five years on' (2012) 19 *Australian International Law Journal* 19. See also Sylvanus Gbendazhi Barnabas, 'The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law' (2017) 6 *International Human Rights Law Review*, 243.

provides an unavoidable parameter of reference<sup>15</sup> for Australia as it contemplates the rights and interests of First Nations peoples.

The dualistic nature of international law means that, regardless of its status at international law, the UNDRIP will not formally become part of Australian law and so have any domestic effect until it is incorporated into domestic law by legislation.<sup>16</sup> This requires specific legislation being passed to implement its provisions.<sup>17</sup> Consistent with the purpose of the UNDRIP, the Declaration should ultimately be fully incorporated into Australian law so it has domestic effect. Determining the best method of incorporation is a critical and complex matter and requires giving consideration to legal and political issues that have impaired the expression of Indigenous rights in Australia.

### **3. KEY RIGHTS PROTECTIONS: FREE, PRIOR AND INFORMED CONSENT AND SELF-DETERMINATION**

The UNDRIP does not create rights of indigenous peoples, it expresses existing human rights as they relate to Indigenous peoples. It therefore does not create for them substantive rights that others do not enjoy.<sup>18</sup> The UNDRIP is comprehensive because it covers the full range of civil, political, economic, social, cultural and environmental rights.<sup>19</sup> Each provision provides a baseline ‘as to how the rights should manifest themselves in the lives of Indigenous individuals and groups’.<sup>20</sup> Two critical rights which underpin much of the Declaration, and which we highlight as critical to Commonwealth engagement with the issue of

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<sup>15</sup> Felipe Gómez Isa, ‘The UNDRIP: an increasingly robust legal parameter’ (2019) 23(1-2) *The International Journal of Human Rights*, 7; Northern Territory Treaty Commission, *Final Report* (NT Government, 2022) 147.

<sup>16</sup> See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 (Mason J) at 224-225.

<sup>17</sup> *Dietrich v The Queen* (1992) HCA 57 at 17.

<sup>18</sup> S. James Anaya, ‘The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era’, n 9, 193.

<sup>19</sup> Claire Charters and Rodolfo Stavenhagen, ‘The UN Declaration on the Rights of Indigenous Peoples: how it came to be and what it heralds’ in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work* (Indigenous Work Group for Indigenous Affairs, 2009) 13.

<sup>20</sup> Dalee Sambo Dorough, ‘The Significance of the Declaration on the Rights of Indigenous Peoples and its Future Implementation’ in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work* (Indigenous Work Group for Indigenous Affairs, 2009) 266.

implementation, are the right to free, prior and informed consent (FPIC) on matters affecting Indigenous peoples, and the right to self-determination.

### 3.1. Free, prior and informed consent

FPIC is relevant throughout the Declaration and is expressed in articles 10; 11; 19; 28; 29 and 32. It is most clearly set out at Article 19, which mandates 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.

The focus of this right is particularly important in the context of the Government's commitment to the Uluru Statement because it relates directly to the potential scope, functions and operations of a prospective Voice.

FPIC is grounded in the fundamental rights to self-determination and to be free from racial discrimination guaranteed by the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>21</sup> Because the Declaration is broadly aimed at redressing the power imbalance between Indigenous peoples and states, FPIC is a critical component.<sup>22</sup> It aims to provide a means by which new partnerships can be forged based on rights and mutual respect between government and Indigenous peoples.<sup>23</sup>

A very brief summation of some key aspects of FPIC as expressed by the UN's Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) may be useful to the Committee. Each constituent element of FPIC has its own meaning.

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<sup>21</sup> United Nations Human Rights Council, *Free, prior and informed consent: a human rights based approach – Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/39/62 (10 August 2018) 2.

<sup>22</sup> See *Ibid*, 4.

<sup>23</sup> *Ibid*.

### *Free*

Means a process that is free from intimidation, coercion, manipulation, and harassment; that features of the relationship between the parties should include trust and good faith and not suspicion, accusations, threats, criminalisation, or violence or prejudiced views towards Indigenous peoples; that Indigenous peoples should have the freedom to be represented as traditionally required under their own laws, customs and protocols, with attention to gender ... ; Indigenous peoples should determine how and which of their own institutions and leaders represent them; that Indigenous peoples should have the power to determine how to consult and the course of the consultation process, and; Indigenous peoples should have the freedom to set their expectations and to contribute to defining methods, timelines, locations and evaluations.<sup>24</sup>

### *Prior*

Means Indigenous peoples should be involved as early as possible. 'Consultation and participation should be undertaken at the conceptualisation and design phases and not launched at a late stage in a project's development, when crucial details have already been decided'; Indigenous peoples should be provided with time necessary to absorb, understand and analyse information and to undertake their own decision-making processes.<sup>25</sup>

### *Informed*

Consultation must be 'informed', meaning that information made available should be 'sufficiently quantitative and qualitative, as well as objective, accurate and clear'; information should be presented in a way so it can be understood by Indigenous peoples, including translation into a language they understand. As well, consultations should be undertaken using culturally appropriate procedures, respecting the traditions and forms of

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<sup>24</sup> Ibid, 6.

<sup>25</sup> Ibid, 7.

organisation of Indigenous peoples concerned, and; adequate resources and capacity should be provided for Indigenous peoples' representative institutions or decision-making mechanisms, without compromising their independence.<sup>26</sup>

### *Consent*

Consent 'can only be received for proposals when it fulfils the three threshold criteria of having been free, prior and informed and is then evidenced by an explicit statement of agreement'.<sup>27</sup>

#### 3.1.1. FPIC and the Voice

Like most of the rights set out in the Declaration, FPIC operates fundamentally as a safeguard for the collective rights of Indigenous peoples.<sup>28</sup> It therefore 'cannot be held or exercised by individual members of an Indigenous community'.<sup>29</sup> This has implications for how the Government designs and enables a Voice. To be consistent with FPIC, a Voice must provide for adequate representation and engagement at the local and regional level as well as at the national level. Failure to engage with legitimate representatives of Indigenous peoples can undermine FPIC. It is therefore important that the Voice (including local and regional Voices) is designed with Aboriginal and Torres Strait Islander people and that it is capable of meaningfully engaging and is representative of Indigenous 'peoples', as the bearers of the right to FPIC.

FPIC can also inform the range of matters on which the Voice can be engaged. Measures 'considered to 'affect' Indigenous peoples to the extent that free, prior and informed consent will be required under articles 19 and 32 include matters of 'fundamental importance to their rights, survival, dignity and well-being'.<sup>30</sup> A

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<sup>26</sup> Ibid, 7.

<sup>27</sup> Ibid, 8.

<sup>28</sup> Ibid, 4.

<sup>29</sup> Ibid. 4.

<sup>30</sup> United Nations Human Rights Council, *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, UN Doc A/HRC/21/55 (16 August 2012) para 27. Cited in United Nations Human Rights Council, *Free, prior and informed*

2018 study by the EMRIP sets out that relevant factors in this assessment include ‘the perspective and priorities of the indigenous peoples concerned; the nature of the matter or proposed activity and its potential impact on the indigenous peoples concerned, taking into account, inter alia, the cumulative effects of previous encroachments or activities and historical inequities faced by the Indigenous peoples concerned’.<sup>31</sup>

How a Voice effectively gives expression to FPIC will depend on the functions and processes for engagement set out in legislation. A key and important design principle is that the Voice will not have a veto power over decisions of the Parliament, but that it will be able to provide advice to the Parliament and Government on matters impacting First Nations peoples. We propose that it is therefore important that Parliamentary processes for engaging the Voice ensure effective capacity of the Voice to engage with and provide advice to Parliament in accordance with FPIC. Enabling legislation for the Voice could set out that the Parliament/Government will engage with representations made by the Voice with the intention of achieving FPIC. This would not amount to a veto.

We suggest that the political and moral weight of the Voice will also have an influence on how it is engaged and its effectiveness in informing and having a role in government decision-making. Its political and moral weight will depend on the nature and process of its design. As suggested, design principles aligned to FPIC, and the incorporation of preambular principles and key provisions of the UNDRIP relating to FPIC into enabling legislation, will be important to its effect. We suggest a principal focus should be consistency with Article 19 in relation to FPIC.

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*consent: a human rights based approach – Study of the Expert Mechanism on the Rights of Indigenous Peoples*, n 21, 10.

<sup>31</sup> United Nations Human Rights Council, *Free, prior and informed consent: a human rights based approach – Study of the Expert Mechanism on the Rights of Indigenous Peoples*, n 22, 10.

### 3.2. Self-determination

The right to self-determination is identified as the ‘heart and soul’ of the Declaration, constituting ‘the river in which all other rights swim’.<sup>32</sup> Conceptually, self-determination refers to Indigenous peoples’ right to take control and responsibility for their own affairs (social, economic, political and cultural) through genuine decision-making powers, meaningful participation and freedom from discrimination.<sup>33</sup> It is a collective right owed to ‘peoples’<sup>34</sup> and is fundamentally about the ‘power to exercise power’<sup>35</sup> within the confines of the legal framework of States.<sup>36</sup>

It is a critical point of focus for the Commonwealth because internationally, self-determination is the only overarching policy that has shown sustained evidence of actually improving the condition of Indigenous peoples, because it has put ‘substantive decision-making power in Aboriginal hands’.<sup>37</sup> Although an underpinning of important Commonwealth laws established in the 70’s and 80’s that protected Indigenous rights, for example the *Aboriginal Land Rights (Northern Territory) Act 1976*, since the mid 1990’s, self-determination has not been a policy priority of federal governments.

Indigenous advocacy for the Declaration through the UN system for over two decades made clear that ‘self-determination is a foundational principle that anchors the constellation of Indigenous peoples’ rights’.<sup>38</sup> It is important to set

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<sup>32</sup> Michael Dodson, cited in Craig Scott, ‘Indigenous Self-Determination and Decolonisation of the International Imagination: A Plea’ (1996) 18 *Human Rights Quarterly*, 814; see Harry Hobbs, n 14, 177.

<sup>33</sup> Diane Smith, ‘Thematic Introduction: Concepts, Issues and Trends’ in Diane Smith, Alice Wighton, Stephen Cornell and Adam Vai Delaney (eds) *Developing Governance and Governing Development: International Case Studies of Indigenous Futures* (Rowman & Littlefield, 2021), 6.

<sup>34</sup> S. James Anaya, ‘The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era’, n 9, 184.

<sup>35</sup> Diane Smith, n 33, 7.

<sup>36</sup> See UNDRIP, Article 46.

<sup>37</sup> Stephen Cornell, ‘Indigenous jurisdiction and daily life: Evidence from North America’ (Paper presented to the National Forum on Indigenous health and the treaty debate, University of New South Wales, 11 September, 2004), cited in Sarah Maddison, *The Colonial Fantasy, Why Australia Can’t Solve Black Problems* (Allen & Unwin, 2019), xxiii.

<sup>38</sup> S. James Anaya, ‘The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era’, n 9, 184.

out plainly that the Declaration's very existence and its explicit affirmation in Article 3 that Indigenous peoples have a right to self-determination is clear recognition of the historical and ongoing denial of that right and the need for States to remedy that denial.<sup>39</sup> Realising substantive self-determination therefore requires 'confronting and reversing the legacies of empire, discrimination, and cultural suffocation' by empowering Indigenous peoples.<sup>40</sup> The Government has a critical opportunity to give substantive effect to self-determination through the implementation of the Uluru Statement.

Articles 3 – 5 give useful expression to self-determination in the context of the implementation of the Uluru Statement.<sup>41</sup>

#### *Article 3*

*Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

#### *Article 4*

*Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous function.*

#### *Article 5*

*Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.*

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<sup>39</sup> Ibid, 192.

<sup>40</sup> Ibid, 196.

<sup>41</sup> For an in-depth discussion on the right to self-determination in the Australian context see Asmi Wood, 'Self-Determination Under International Law and Some Possibilities for Australia's Indigenous Peoples', n 13.



### 3.2.1. The economic dimension of self-determination

As well as having important political, social and cultural components, self-determination has an important economic dimension, which, properly realised, should enable significant economic agency of First Nations peoples. This issue is particularly important to the work of the ANU FNP and we suggest that it may manifest in a variety of possible ways, but should not be seen as a limited right. As well as articles 3 - 5 specifically related to self-determination, articles 10, 11, 19, 28, 29 and 32 contain important economic rights.<sup>42</sup> Article 20(2) also deals with remedies for past harms, and states that 'Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress'.<sup>43</sup> Given the clear expression of rights with an economic nature it is wholly against the spirit and intent of the UNDRIP that where Indigenous peoples demand greater participation as self-determining agents they are told to 'search elsewhere for economic, political and social opportunities'.<sup>44</sup> The implication is that, consistent with obligations set out in the UNDRIP, the Government's commitment to the Uluru Statement should empower greater Indigenous economic and financial agency. We submit that these considerations will be particularly relevant for the design, functions and powers of a Makarrata Commission and to the prospects of any fair and substantive treaty process.

Properly realised, economic dimensions of the right to self-determination should have broad implications for the recognition of Indigenous economic rights. We submit that it should mean engaging Indigenous peoples in Australia's trade and investment relationships,<sup>45</sup> as well as empowering broad economic and financial agency through treaty negotiations, including through prospective aspirations

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<sup>42</sup> John Borrows, 'Indigenous Diversities in International Investment and Trade' in John Borrows and Risa Schwartz (eds) *Indigenous Peoples and International Trade* (Cambridge University Press, 2020) 25.

<sup>43</sup> UNDRIP, Article 20(2).

<sup>44</sup> John Borrows, n 42, 22.

<sup>45</sup> Although an adjacent matter to this submission, the ANU FNP would welcome the opportunity to provide comment on the economic nature of the Declaration and its relevance to Australia's international trade and investment relationships. We note that that matter is particularly relevant given the Government's recently released Indigenous Diplomacy Agenda. For commentary on the role of UNDRIP in shaping international trade and investment relationships see John Borrows, 'Indigenous Diversities in International Investment and Trade' n 42.

for self-government. The gradual incorporation of UNDRIP as part of the implementation of the Uluru Statement provides an opportunity to give expression to the full scope of the right to self-determination, including its economic dimension. As the Declaration sets out, it is the responsibility of State parties to engage with these matters and ensure they are reflected meaningfully in domestic arrangements.

Given the poor history in Australia of providing for Indigenous rights protections, it is critical that the Government's commitment to a Makarrata Commission and a national process of treaty-making and truth-telling substantively reflect and meaningfully protect the right to self-determination.

### 3.3. Recognising and operationalising key rights

The UNDRIP mandates that 'States, in consultation and cooperation with Indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration'.<sup>46</sup> As highlighted above, Article 19 also states 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'.<sup>47</sup>

It would be directly against the principles of FPIC for government to enact legislation implementing the UNDRIP without the informed consent of First Nations peoples. This is a key reason why the constitutional enshrinement of an Aboriginal and Torres Strait Islander Voice, appropriately conceived and representative of First Nations peoples, is an important opportunity to advance the implementation of the UNDRIP in Australia. Without meaningful engagement with First Nations peoples about proposals to implement the UNDRIP doing so will lack credibility and legitimacy. The process will have failed at the first critical

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<sup>46</sup> UNDRIP, Article 38.

<sup>47</sup> UNDRIP, Article 19.

hurdle. A properly designed and enabled Voice is therefore an important part of any approach to national implementation of the Declaration.

There is a danger that by failing to properly engage with the substance of the rights contained in the Declaration that implementation will not reflect the legitimacy of the Declaration, or the material rights set out in it. Government should avoid strategies of incorporation that will water-down the substantive meaning of the rights set out in the document. A critical question is how the specific rights affirmed in the Declaration can be made effective, improve the lives of Indigenous peoples and individuals and prevent serious violations from continuing.<sup>48</sup> We submit that it is therefore important that work is done to improve government and public service understanding of the substantive meaning and scope of rights such as self-determination and FPIC so it can better operationalise them. An effective review and reporting mechanism will be important to realising this goal. We suggest that this should be carried out by the ALRC.

The handbook for parliamentarians on implementing the UN Declaration, published by the Inter-Parliamentary Union and several UN agencies, cites the law-making role of parliaments as of particular importance in the implementation of the UN Declaration. As Sheryl Lightfoot highlights, ‘the handbook suggests that legislative review and reform are essential first steps in implementation efforts and that all future national legislation should be evaluated for compliance with the UN Declaration as an ordinary part of the legislative process’.<sup>49</sup> Similar mechanisms are proposed in the Bill put forward by Greens Senator Lidia Thorpe.

A full reading of the UNDRIP highlights that the domestic implementation of indigenous rights is expected to be comprehensive and systematic.<sup>50</sup> Comprehensive implementation ultimately must include ‘judicial reform, policy

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<sup>48</sup> Luis Rodriguez-Pinero Royo, n 12, 329.

<sup>49</sup> Sheryl Lightfoot, ‘Using Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples’ in John Borrows, Larry Chartrand, Oonagh E Fitzgerald and Risa Schwartz (eds) *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Centre for International Governance Innovation, 2019), 23.

<sup>50</sup> *Ibid*, 22.

reform and legislative avenues, the synergy of which will lead to full implementation'.<sup>51</sup> Noting the magnitude of the task for full and effective implementation, a gradual approach is a good option. The FNP sees the implementation of the Uluru Statement as a critical platform to undertake the necessary transformational work called for in the Declaration.

#### 4. THE IMPLEMENTATION OF THE DECLARATION AROUND THE WORLD

The UNDRIP is having a growing influence around the world. The Declaration has been used to guide the development of new legislation and to regulate consultations with Indigenous peoples, for example in several Latin American countries.<sup>52</sup> A report to the EMRIP on the 10-year progress of the UN Declaration highlighted that 'it now informs the work of many global actors, has influenced the drafting of multiple new state constitutions and statutes and has contributed to the development of laws and policies pertaining to Indigenous peoples worldwide.'<sup>53</sup> Bolivia was the first country in the world to adopt UNDRIP into its domestic law, giving binding force to the whole Declaration in 2007.<sup>54</sup> The Belize Supreme Court illustrated the impact of the Declaration when the court's Chief Justice stated in 2007, that because of the importance of the UNDRIP, reflecting the 'growing consensus and the general principles of international law on Indigenous peoples and their lands and resources ... this Declaration is of such force that the [...] Government of Belize, will not disregard it'.<sup>55</sup>

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<sup>51</sup> Ibid.

<sup>52</sup> S. James Anaya, 'The UN Declaration on the Rights of Indigenous Peoples: How Far We've Come and the Road Ahead' in Diane Smith, Alice Wighton, Stephen Cornell and Adam Vai Delaney (eds) *Developing Governance and Governing Development: International Case Studies of Indigenous Futures* (Rowman & Littlefield, 2021) 23.

<sup>53</sup> Sheryl Lightfoot, 'Using Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples', n 49, 21.

<sup>54</sup> Federico Lenzerini, 'Implementaion of the UNDRIP around the world: achievements and future perspectives. The outcome of the work of the ILA Committee on the Implementation of the Rights of Indigenous Peoples' (2019) 23 *The International Journal of Human Rights*, 57.

<sup>55</sup> *Cal & Ors v the Attorney General of Belize & Anor* (2007) Claim Nos 171 and 172 of 2007, (Conteh CJ) at 132 (Belize Supreme Ct).

#### 4.1. New Zealand

In 2019, New Zealand's Cabinet agreed to develop a plan that would include time-bound, measurable actions that show how the nation is making an effort towards achieving the aspirations of the Declaration.<sup>56</sup> Cabinet sought to comply with New Zealand's international obligations and to enhance their reputation on indigenous issues globally.<sup>57</sup> An advisory group was set up which published the *He Puapua* report. This report included recommendations for the implementation of each UNDRIP article, as per guidance from EMRIP.<sup>58</sup> Due to the likely need for the Declaration Plan to be regularly reviewed and revised over the years, the Minister noted that the plan should remain simple and focus on practical actions which align with government and Māori priorities.<sup>59</sup>

After the report was published, Te Puni Kōkiri (the Ministry of Māori Development) led an intensive engagement and feedback process. 70 workshops were held with invited Māori groups, who shared their visions for Aotearoa/New Zealand.<sup>60</sup> Engagement was conducted as per international guidance (EMRIP) on how to develop an UNDRIP plan, as well as local processes for Māori engagement (informed by the Treaty of Waitangi/te Tiriti o Waitangi).

There were a wide range of aspirations heard, but consistently these included the strengthening of rangatiratanga<sup>61</sup> for Māori people.<sup>62</sup> The Minister noted in a report that some existing laws and policies are not consistent with UNDRIP, but

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<sup>56</sup> New Zealand Government, 'UN Declaration on the Rights of Indigenous Peoples', *Ministry of Maori Development* (Web page) <https://www.tpk.govt.nz/en/a-matou-whakaarotau/te-ao-maori/un-declaration-on-the-rights-of-indigenous-peoples>.

<sup>57</sup> Minister for Maori Development, *United Nations Declaration on the Rights of Indigenous Peoples: Next Steps for a Declaration Plan* (Cabinet Paper, Te Minita Whanaketanga Māori, 15 June 2021), <<https://www.tpk.govt.nz/en/mo-te-puni-kokiri/corporate-documents/cabinet-papers/all-cabinet-papers/next-steps-for-declaration-plan>>, 1.

<sup>58</sup> *Ibid*, 4.

<sup>59</sup> *Ibid*, 8.

<sup>60</sup> Minister for Maori Development, *Update on the Development of the Declaration Plan* (Cabinet Paper, Te Minita Whanaketanga Māori, 22 April 2022), <<https://www.tpk.govt.nz/en/mo-te-puni-kokiri/corporate-documents/cabinet-papers/all-cabinet-papers/united-nations-declaration-on-the-rights-of-indige>>, 1.

<sup>61</sup> Generally translated as chieftainship, the right to exercise authority, sovereignty and self-determination. See [Maori Dictionary, 'rangatiratanga' \(Web page\)](https://maoridictionary.co.nz/search?&keywords=rangatiratanga) <<https://maoridictionary.co.nz/search?&keywords=rangatiratanga>>.

<sup>62</sup> Minister for Maori Development, n 60, 1.

that changes will only take place over time alongside public consultation.<sup>63</sup> Targeted engagement with Māori representative groups can help to ensure the Declaration plan itself and the implementation of UNDRIP in New Zealand actually follows UNDRIP principles around FPIC and engaging with Indigenous peoples.

The Declaration Plan will include actions that:

come from the intersect between government priorities, Māori aspirations and international indigenous rights discourse; contribute to enhancing the self-determination of Māori as the indigenous peoples of New Zealand; contribute to improving intergenerational Māori wellbeing; demonstrate ambitious actions as opposed to business as usual.<sup>64</sup>

A final Declaration Plan is expected to be delivered to NZ Cabinet in December 2022.<sup>65</sup> It is also worth noting that, despite not yet being officially implemented into domestic law, the UNDRIP is already wielding influence in the New Zealand Supreme Court, although on an ad hoc basis.<sup>66</sup>

#### 4.2. USA

In 2010, under President Obama, the USA endorsed the UNDRIP, reversing its previous position.<sup>67</sup> However, it has since made no move to implement, adopt or domesticate the Declaration.

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<sup>63</sup> Ibid 2.

<sup>64</sup> New Zealand Government, 'UN Declaration on the Rights of Indigenous Peoples', *Ministry of Maori Development* (Web page) <https://www.tpk.govt.nz/en/a-matou-whakaarotau/te-ao-maori/un-declaration-on-the-rights-of-indigenous-peoples>.

<sup>65</sup> Ibid.

<sup>66</sup> For a discussion on this issue see Claire Charters, 'The UN Declaration on the Rights of Indigenous Peoples in New Zealand Courts: A Case for Cautious Optimism', *UNDRIP Implementation: Comparative Approaches, Indigenous Voices from CANZUS* (Centre for International Governance Innovation, 2020).

<sup>67</sup> Government of the United States of America, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, (n.d.), <<https://2009-2017.state.gov/documents/organization/154782.pdf>>.

In response to a lack of action, a joint project between the University of California, Los Angeles Law School and the Native American Rights Fund, aimed to understand how to push the domestication of the UNDRIP in the USA. It produced a report which recommends that Tribal governments and Native Nations could ‘pass resolutions endorsing the Declaration and calling on federal, state, and local governments ... to implement it’.<sup>68</sup> Some Tribal governments and Native Nations (such as the Muscogee (Creek) Nation, and the Ho-Chunk Nation) have formally adopted the UNDRIP internally. The report suggests that internal implementation of the UNDRIP within Tribes, alongside advocacy to governments, would be ‘instructive and supportive’ to governments and the courts in how to implement the UNDRIP.<sup>69</sup>

#### 4.3. Canada

The Declaration is becoming part of the evolving contemporary relationship between Canada’s First Nations and Canadian governments. Canada is incorporating the Declaration at provincial and federal levels. In 2019, the province of British Columbia (BC) passed specific legislation (Bill 41) to incorporate the Declaration. The *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) requires the BC government, among other things, to take all necessary measures to make sure provincial laws are consistent with UNDRIP, and to establish an action plan to measure and report on progress.<sup>70</sup> The UNDRIP is also being used to inform the modern treaty process in BC - a useful cue to how the Government might consider the UNDRIP in relation to prospective treaty-making in Australia. In 2019, the UNDRIP was endorsed as a foundation of the British Columbia treaty negotiations framework.<sup>71</sup> The British Columbia Treaty

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<sup>68</sup> University of Colorado Law School, Native American Rights Fund, University of California, Los Angeles School of Law, *Project to Implement the United Nations Declaration on the Rights of Indigenous Peoples: Tribal Implementation Toolkit*, (12 April 2021), <<https://un-declaration.narf.org/wp-content/uploads/Tribal-Implementation-Toolkit-Digital-Edition.pdf>>, 7.

<sup>69</sup> Ibid.

<sup>70</sup> See Diane Smith, n 33, 4.

<sup>71</sup> Government of Canada, *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* (British Columbia, First Nations Summit, Canada, 4 September 2019) <<https://www.rcaanc-cirnac.gc.ca/eng/1567636002269/1567636037453>>.



Commission has argued that the BC treaty process is consistent with key principles of the UNDRIP, which ‘breathe[s] life into negotiations’.<sup>72</sup>

More recently, Canada’s federal legislature passed a law similar to British Columbia’s which has national effect: the *United Nations Declaration on the Rights of Indigenous Peoples Act*. The federal UNDRIP Act affirms that the Declaration applies in Canadian law and provides a framework for the Canadian Government’s implementation of the UNDRIP,<sup>73</sup> including the development of an action plan and measures to ensure existing federal laws are consistent with the Declaration.<sup>74</sup> The Act requires the Government of Canada to prepare an annual report on measures taken to align the laws of Canada with the Declaration.<sup>75</sup> The first annual report was tabled in June 2022.

Although undoubtedly an important first step to ensuring the UNDRIP has an impact at the domestic level, as John Borrows makes clear, the UNDRIP’s implementation by Canadian governments does not complete its implementation.<sup>76</sup> Principally this is because agreements to implement the Declaration accompanied by action plans and annual reviews ‘do not cover a broad enough field’.<sup>77</sup> It is the first step in a broader process of domestication of the Declaration in that jurisdiction.

The Federal Canadian model does not create enforceable rights, a point which has drawn some criticism, including by Canadian legal academic Kerry Wilkins, who has said the Canadian model is:

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<sup>72</sup> Harry Hobbs, ‘Treaty making and the UN Declaration on the Rights of Indigenous Peoples: lessons from emerging negotiations in Australia’ n 13, 185; Northern Territory Treaty Commission, *Final Report*, n 15, 147.

<sup>73</sup> See s 4; Northern Territory Treaty Commission, *Final Report*, n 15, 147.

<sup>74</sup> Government of Canada, ‘Bill C-15: What we learned report’ (Web page) < <https://www.justice.gc.ca/eng/declaration/www-cna/c15/index.html>>.

<sup>75</sup> Government of Canada, ‘Statement by Minister Lametti on the first annual progress report on the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples Act*’, Department of Justice Canada (Web page) < <https://www.canada.ca/en/department-justice/news/2022/06/statement-by-minister-lametti-on-the-first-annual-progress-report-on-the-implementation-of-the-united-nations-declaration-on-the-rights-of-indigeno.html>>.

<sup>76</sup> John Borrows, ‘Foreword’ (2021) 53(4) *UBC Law Review*, 962.

<sup>77</sup> *Ibid*.



Neither necessary nor sufficient to accomplish its objectives: not necessary because the federal government could have set about harmonising its laws with UNDRIP and developing and action plan for UNDRIP implementation even in the absence of enabling legislation; not sufficient, because nothing in the Act provides for enforcement of these requirements or attaches legal consequences to non-compliance.<sup>78</sup>

It is worth noting that the model legislated in British Columbia also does not create enforceable rights.<sup>79</sup> During debate in Committee about that Bill, Minister Fraser said ‘this bill does not give legal force and effect to UNDRIP’ and that ‘we’re not creating a bill here that is designed to have our laws struck down. What we’re doing is providing a plan, a framework, for government to work in cooperation with First Nations, including to address ... laws and bring them into alignment with the UN Declaration’.<sup>80</sup> The BC Act does not make the Declaration part of the law of BC, however it does ‘serve to make all of its provisions relevant to the interpretation of the laws of BC, regardless of whether or not the particular provision relied upon represents customary international law’.<sup>81</sup>

In relation to the federal Act, Wilkins recognises that ‘the new Act does ... create a context and prescribe a period of time for focused collaborative reflection on how to make UNDRIP work as law in Canada’.<sup>82</sup> It is therefore an important starting point for future holistic implementation of the UNDRIP in Canada in a way that provides for rights that are enforceable in their substantive effect. The larger and more complex question of how UNDRIP implementation may create enforceable rights for First Nations peoples is a critical matter, consideration of which must inform any approach to implementation in Australia.

#### 4.4. A note on lessons from these jurisdictions

Lessons from these examples can inform how the Commonwealth approaches implementation of the UNDRIP in Australia. Consideration of this matter must

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<sup>78</sup> Kerry Wilkins, ‘So You Want to Implement UNDRIP ...’ (2021) 53(4) *UBC Law Review*, 1245.

<sup>79</sup> For discussion see Nigel Bankes, ‘Implementing the UNDRIP: An analysis of British Columbia’s Declaration on the Rights of Indigenous Peoples’ (2021) 53(4) *UBC Law Review*.

<sup>80</sup> Cited in *Ibid*, 997.

<sup>81</sup> *Ibid*, 999.

<sup>82</sup> Kerry Wilkins, n 78, 1245.

give due regard to Australia's unique historical, legal and political situation, and potential barriers to the recognition of UNDRIP rights. As Sheryl Lightfoot observes, 'barriers to implementation, common to all states with Indigenous peoples, include difficulties operationalising Indigenous rights due to a lack of awareness about the rights and standards, difficulties in identifying practical steps for implementation and conflicting interpretations of the content of Indigenous rights.'<sup>83</sup>

Simply adopting the same approach taken in another jurisdiction without regard to unique local issues would run the risk of implementation not suiting the Australian context and so being potentially ineffective. Implementation must therefore be considered in a way that is unique to Australia and its legal and political system. We note that as a poor performer in the protection of Indigenous peoples' rights, there will be focused international attention on the Government's commitment to the Uluru Statement and what that means for the protection and advancement of Indigenous rights. This should motivate the Government to take seriously the opportunity presented by the Uluru Statement to take meaningful and considered steps to implement the UNDRIP into Australian law.

## **5. CANADA AND AUSTRALIA – SOME IMPORTANT DISTINCTIONS**

It is worth drawing out some critical matters for consideration in this context. The Canadian experience is particularly useful to Australia because Canada is, like Australia, a constitutional federation and a liberal democracy with a broadly similar colonial history to Australia, punctuated by systematic dispossession and assimilation of First Nations peoples. There are, however, some critical differences to the legal and political frameworks of Canada and Australia which mean each system is geared slightly differently to address UNDRIP rights. These distinctions are relevant to the extent to which the Canadian experience can be applied directly to Australia. In the context of the Government's commitment to

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<sup>83</sup> Sheryl Lightfoot, n 49, 21.

the implementation of the Uluru Statement, they are particularly important.

### 5.1. The Canadian context

In Canada, historical treaties and guarantees provided to First Nations by the Crown at the early part of colonisation have paved the way for modern treaty processes and the constitutional entrenchment of treaty and Aboriginal rights via section 35(1) of the Constitution Act 1982.<sup>84</sup> These rights reflect the unique history and development of legal principles and subsequent government action across Canada, and North America generally, which has affirmed that First Nations peoples possess key legal rights that impact how the Canadian state exercises its power.

A key basis for these rights, and for the subsequent development of Canadian law, included guarantees made by the Imperial Crown at colonisation in relation to Canadian First Nations. The Imperial law – Imperial Courts of review, imperial instructions, and the Royal Proclamation of 1763 (which essentially stipulated that only the Crown, not individual settlers, could purchase First Nations' land, and that all unceded land had Aboriginal title)<sup>85</sup> – recognised and reserved Aboriginal title and rights in North America.<sup>86</sup> A key difference compared to the Australian context is that in Canada there were treaties and an expectation that the Crown owed obligations to Indigenous peoples. The assertion of sovereignty in Canada, firstly by the French and then by Great Britain, therefore did not vitiate any parallel law-making systems of First Nations.<sup>87</sup> This has had the effect of ensuring ongoing recognition of the inherent rights of First Nations Canadians.

Although fraught in many ways, as the settler law developed in that jurisdiction, it placed important limits on the Crown and established protections for the

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<sup>84</sup> It is worth noting that many First Nations did not have their rights recognised in treaties, which meant they were largely ignored in relation to claims for their territories and other Aboriginal rights. See James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights* (Native Law Centre, University of Saskatchewan, 2006) 7.

<sup>85</sup> Indigenous Foundations, 'Royal Proclamation, 1763' (Web Page, 2009), <[https://indigenousfoundations.arts.ubc.ca/royal\\_proclamation\\_1763/](https://indigenousfoundations.arts.ubc.ca/royal_proclamation_1763/)>

<sup>86</sup> James Youngblood Henderson, n 84, 7.

<sup>87</sup> Daniel Lavery, 'The British Acquisition of New Holland: a residuum of allodial sovereignties?' (PhD Thesis, James Cook University, 2015) 284.

inherent rights of First Nations peoples. For example this history was a key basis for the finding, originally by the Supreme Court in *Guerin v The Queen*<sup>88</sup> in 1984, that Canada owes a fiduciary duty to First Nations to protect their Aboriginal title, rights and interests in land and other Aboriginal rights.<sup>89</sup> This ‘honour of the Crown’ principle is the source of the duty of provincial and federal governments to consult with Aboriginal peoples.<sup>90</sup> Although there are ongoing issues in Canada in relation to the effectiveness of the abovementioned protections,<sup>91</sup> the modern impact of Canada’s legal history is that First Nations peoples’ rights are better reflected in the legal apparatus of the state than they are here in Australia.

## 5.2. The Australian context

In Australia, there are precious few underlying legal protections for First Nations peoples and their rights. The absence of historical treaties between settlers and First Nations peoples on this continent, and the fiction of *terra nullius*, informed a constitutional and common law system that has broadly rejected the idea that the Crown owes any legal duty to recognise or make space for the inherent rights of First Nations peoples. Apart from recognition of native title at common law, there has been a significant and historical failure of settler-Australian law to protect and empower the rights of First Nations peoples. Settler law and society has been imposed upon First Nations peoples of Australia without their consent and with violent, disruptive, deep, and far-reaching consequences, many of which are ongoing. Throughout Australian history, the story has been that, unlike in Canada, Australia’s legal and political system and its key decision-makers have not been willing to make space, almost at all, for the rights of First Nations peoples.

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<sup>88</sup> (1984) 2 S.C.R. 335.

<sup>89</sup> James Youngblood Henderson, n 84, 41.

<sup>90</sup> *Haida Nation v British Columbia* (2004) 3 SCR 511, 530 (McLachlin CJ) at 37. Cited in Kirsty Gover, ‘The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism’ (2016) 38 (339) *Sydney Law Review*, 356.

<sup>91</sup> For example see Jeffrey G. Hewitt, ‘Options for Implementing UNDRIP Without Creating Another Empty Box’ in John Borrows, Larry Chartrand, Oonagh E Fitzgerald and Risa Schwartz (eds) *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Centre for International Governance Innovation, 2019).

The resulting absence and deliberate isolation of First Nations Australians from sites of political and legal power is glaring. Australian Federation marked the birth of the Australian nation but gave no meaningful recognition to First Nations peoples or their rights. The founders of our federation ‘paid no attention to the position of the Aboriginal peoples of Australia’,<sup>92</sup> denying them a meaningful place in the new Australian nation. This was captured in the Constitution, which excluded First Nations people, who were also given no say in the drafting of the document – a point most relevant now in the context of the Uluru Statement and the Government’s commitment to a referendum enshrining a Voice.

Except for native title, Australian common law has been ineffective at recognising and asserting unique rights for First Nations people. One example relates to the Stolen Generations. Despite the significant harm caused by policies of forced child removal referred to as the Stolen Generations, cases brought before courts in Australia to redress that harm have generally failed to establish liability on behalf of government.<sup>93</sup> In these matters, government has also strongly defended any question of its liability. The result has been piecemeal and limited redress of those wrongs by parliaments but no effective general law mechanism to recognise and redress a chapter in Australia’s history that has been widely and publicly condemned and is now accepted as abhorrent, destructive and is still painful for First Nations people.

In contrast, in Canada in litigation relating to the Indian Residential School Scheme (IRSS), which was similar to Australia’s Stolen Generation, Canadian courts interpreted key common law principles more broadly, including in relation

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<sup>92</sup> Geoffrey Sawer, ‘The Australian Constitution and the Australian Aborigine’ (1966) 2(1) *Federal Law Review* 17; cited in Asmi Wood, ‘Establishing a Neutral Legal Framework for Treaty in Australia’, n 13, 77.

<sup>93</sup> See *Cubillo and Gunner v The Commonwealth* (2000) FCA 1084; 103 FCR 1. Other notable decisions that followed similar reasoning include *Williams v The Minister of Aboriginal Land Rights Act* (2000) NSWCA 255; *Johnson v Department of Community Services* (2000) 5 AILR 49; *Collard v State of Western Australia* (2013) WASC 455; *Kruger v The Commonwealth* (1997) 190 CLR 1. Only in *South Australia v Lampard Trevorrow* (2010) 106 SASR 331 has there been a successful determination by an Australian court in relation to a Stolen Generations claim. In 2021 the Commonwealth established the Territories Stolen Generations Redress Scheme for Stolen Generations survivors who were removed as children from their family or community in the Northern Territory or the Australian Capital Territory prior to self-government, or the Jervis Bay Territory.

to limitations periods, rules of vicarious liability to support IRSS type claims, and the expansion of fiduciary duties in relation to claims of loss of culture which benefitted findings supporting First Nations applicants. Ultimately, this contributed to a wave of claims before the courts which led to the Indian Residential School Settlement Agreement (IRSSA) in 2007, a comprehensive reparative response.<sup>94</sup>

Making matters worse here in Australia, decisions of the High Court have established that the Commonwealth Government can use the 'race' power, contained at section 51(xxvi) of the Constitution,<sup>95</sup> to make laws that 'discriminate against or for the benefit of the people of any race'<sup>96</sup> including First Nations people. The race power has been used to make discriminatory laws that have adversely affected First Nations people.<sup>97</sup>

Parliaments have, on occasion, legislated to recognise and give effect to First Nations rights, including self-determination. Some examples of this include the *Aboriginal Land Rights (Northern Territory Act) 1976* (Cth), the now repealed *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), and the more recent *Land Administration (South West Native Title Settlement) Act 2016* (WA). Parliaments have been mostly ineffective at responding to the constant calls of First Nations people to be empowered to assert their rights as prior, and continuing, self-governing peoples.<sup>98</sup>

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<sup>94</sup> See *Bazley v Currie* (1999) 2 SCR 534; *Bonaparte v Canada* (2003) 2 CNLR 43; Graeme Mew and Adrian Lomaga, 'Abusive Limits: M.(K.) v. M.(H.) and A Comparison of the Limitation Periods for Sexual Assault' (2009) 35(2) *The Advocate's Quarterly*, 137; Mayo Moran, 'The Role of Reparative Justice in Responding to the Legacy of Indian Residential Schools' (2014) 64(4) *University of Toronto Law Journal*; Julie Cassidy, '*Cubillo and Gunner v The Commonwealth: A Denial of the Stolen Generation?*' (2003) 12(1) *Griffith Law Review*.

<sup>95</sup> The constitutional 'race' power at s.51 (xxvi) gives the Commonwealth power to make laws with respect to the 'people of any race for whom it is deemed necessary to make special laws'.

<sup>96</sup> Robert French, 'The Race Power: A Constitutional Chimera' in H. P. Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 180; see also Sarah Pritchard, 'The 'Race' Power in Section 51(xxvi) of the Constitution' (2011) 15(2) *Australian Indigenous Law Review*.

<sup>97</sup> See *Kartinyeri v Commonwealth* (1998) HCA 22; 195 CLR 337; see also Robert French, n 97.

<sup>98</sup> For example, including the Yirrkala Bark Petitions in 1963, the Wave Hill walk-off in 1966, the establishment of the Aboriginal Tent Embassy in 1972, the Barunga Statement in 1988 and most recently the 2017 Uluru Statement from the Heart.

### 5.3. A challenge for Australia

Implicit in this explanation is the key challenge of implementing the UNDRIP in a legal and political system that is not well designed to accept it. Highlighting the complexity of the task of achieving the aspirations of the Declaration through domestic incorporation, despite its theoretically more accommodating legal landscape, the same point has been made in respect of Canada.<sup>99</sup> The thrust here is that implementing the UNDRIP effectively is a significant undertaking, and must confront legacies of colonial impact that have destabilised and marginalised First Nations peoples from their laws, customs, languages, and dispossessed them of their countries. Government must make sure that any strategy to implement the UNDRIP is able to challenge many of these institutional limitations that have been stubbornly resistant to change - to the great disadvantage of First Nations peoples and to the broader Australian community.

These points should not deter the Commonwealth Parliament, but should motivate it to take serious action. They underline a moral imperative to implement the UNDRIP into Australian law. Properly realised, the Declaration can be a guide to resetting the relationship between government and First Nations peoples and protecting and advancing rights of First Nations peoples that have historically been sidelined as non-important. This is why the Declaration should be considered a critical underpinning of the Government's commitment to the Uluru Statement.

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<sup>99</sup> See Kerry Wilkins, n 78, 1246.

## 6. THE UNDRIP IN AUSTRALIA

### 6.1. Across jurisdictions

It is important to note that UNDRIP is already expanding its reach into Australia's domestic affairs through State and Territory jurisdictions. In Victorian legislation advancing the treaty-process on foot there, a preambular paragraph of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) states: 'the State recognises the importance of the treaty process proceeding in a manner that is consistent with the principles articulated in [UNDRIP]'.<sup>100</sup>

In the Northern Territory, its focus on treaty has also involved legislative recognition of the importance of the UNDRIP. The 2018 Barunga Agreement between the NT Government and the four NT Land Councils stipulates that the content of a prospective treaty between the Northern Territory Government and Northern Territory First Nations 'must ... honour the Articles of the [UNDRIP]'.<sup>101</sup> The Barunga Agreement was scheduled to the *Northern Territory Treaty Commissioner Act 2020* (NT), which established the NT Treaty Commission, so recognition of the UNDRIP has formed part of the laws of the Northern Territory. In its recently released Final Report, the NT Treaty Commission endorsed the UNDRIP as a foundation to prospective treaty negotiations. It recommended that:

1. The UNDRIP continue to be recognised as a foundation for the Treaty negotiation process and be embedded and respected in Treaty legislation, policy, and supporting instruments.
2. Supporting legislation underpinning the Treaty process should adopt key preambular principles and Articles of the UNDRIP.
3. The NT Treaty-making process pursues a key objective to get agreement between First Nations and government as to the precise form and content of the adoption of UNDRIP principles in NT legislation.<sup>102</sup>

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<sup>100</sup> Preamble, *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic).

<sup>101</sup> *Northern Territory Treaty Commissioner Act 2020* (NT), Appendix, 14.

<sup>102</sup> Northern Territory Treaty Commission, *Final Report*, n 15, 34.



Early work related to treaty in Queensland has also highlighted the importance of the UNDRIP to any treaty process.<sup>103</sup> The Queensland Government recently accepted, in its response to the Treaty Advancement Committee's 2021 Report, that the UNDRIP will be used to guide any prospective treaty process.<sup>104</sup>

The fact that the Declaration is finding expression in sub-national jurisdictions in relation to treaty-processes highlights the need for the Commonwealth to take seriously its obligation to engage with First Nations peoples in relation to the implementation of the UNDRIP as part of the process underpinning the implementation of the Uluru Statement from the Heart. These examples make clear that the UNDRIP should have a central role to play in any national treaty-making process. They also highlight the importance of ensuring that the Government and its public service comprehends and is able to give expression to the substantive scope and content of the rights articulated in the Declaration.

## 6.2. Lessons for the Commonwealth

Considering the international experience with the UNDRIP, there are some important matters that need to be interrogated in relation to how implementation might look in Australia. These include the extent and scope of FPIC and how it may intersect with existing consent arrangements such as those under the *Native Title Act 1993* (Cth) and the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). As well, specifying the Indigenous peoples 'to whom, and the lands and waters to which, UNDRIP, once in force, would apply',<sup>105</sup> will be fundamental to any effective implementation of the UNDRIP in Australia. Again, possible intersections with native title and land rights regimes will be important to addressing this issue. The best method for implementation, and considering government responsibilities post-implementation,<sup>106</sup> may depend on the

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<sup>103</sup> Queensland Treaty Advancement Committee, *Report* (QLD Government, 2021) 10.

<sup>104</sup> Queensland Government, *Queensland Government Response to the treaty Advancement Committee Report* (QLD Government, 2022) 3.

<sup>105</sup> Kerry Wilkins, 'Strategizing UNDRIP Implementation: Some Fundamentals' in John Borrows, Larry Chartrand, Oonagh E Fitzgerald and Risa Schwartz (eds) *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Centre for International Governance Innovation, 2019) 178.

<sup>106</sup> For a discussion on these matters in the Canadian context see Kerry Wilkins, n 78.

interrogation of some of these issues. We propose that an initial process of review and reporting carried out by the ALRC could address some of these matters. The below are proposed as relevant matters for consideration:

#### 6.2.1. The who and the where:

As Kerry Wilkins articulates, ‘apart from articles 6, 22 and 43, which speak only of ‘indigenous individuals’, and articles 41, 42 and 46, which are institutional and procedural, every UNDRIP provision articulates rights of, or states’ obligations to ‘indigenous peoples’’.<sup>107</sup> The Declaration does not however stipulate what makes ‘Indigenous peoples’ Indigenous, or what makes them ‘peoples’.<sup>108</sup> Wilkins rightly highlights that ‘identifying the bearers of these rights and the beneficiaries of these obligations’, is a crucial step in UNDRIP implementation.<sup>109</sup> For example, any effective implementation will depend on identification of entities deemed to have the right of self-determination, whose *free, prior and informed consent* would precede ‘adopting and implementing legislative or administrative measures that may affect them’ (Article 19), placing hazardous materials on their lands or territories (Article 29(2)) or approving ‘any project affecting their lands or territories and other resources’ (Article 32(2))’.<sup>110</sup>

In Australia there has been a general reluctance of governments to engage with First Nations peoples as political collectives. Land rights and native title regimes are limited examples but a key aspect of implementing the UNDRIP, and of any treaty-negotiation process, will likely be engaging with First Nations peoples as distinct political communities, and recognising their inherent rights as ‘peoples’. Government has proved over and over again that it is generally not competent or that it is plainly unwilling to engaging substantively with these matters. However, they are critical to

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<sup>107</sup> Kerry Wilkins, ‘Strategizing UNDRIP Implementation: Some Fundamentals’, n 106, 179.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

any process that purports to recognise and protect Indigenous rights as they are set out in the Declaration.

The prospect of a Voice is important in this regard because it could (noting the importance of local and regional Voices) provide an appropriately representative forum for First Nations peoples to speak for themselves and their communities. This point again goes to how ‘peoples’ are defined and represented in any Voice structure, and what would suffice to constitute effective informed consent. It would be directly inconsistent with the spirit and provisions of the UNDRIP for government to decide how to identify Indigenous ‘peoples’ in Australia. As per Article 33, it is Indigenous peoples themselves who have the right to ‘determine their own identity or membership in accordance with their customs and traditions’.<sup>111</sup> Addressing this matter and how it intersects with existing legislative arrangements, and a prospective Voice and treaty process, will be critical.

For some groups, defining a collective identity may be challenging because it occurs in the context of generations of colonial disruption, where governments have systematically weakened and attempted to destroy the Indigenous institutions of law and custom and connections to traditional territories that provide expression for collective identity. Again, this matter may be most appropriately addressed through a treaty-making process that supports First Nations to rebuild their structures of governance so they can exercise meaningful self-determination, as it is expressed in the Declaration. We suggest that a Makarrata Commission would have to be appropriately resourced and given broad scope and powers to facilitate this work.

Defining Indigenous territories relating to UNDRIP rights is a critical matter. Is native title and/or land granted under land rights legislation a sufficient expression of First Nation territories, or does there need to be more thorough, separate and distinct work done to establish where

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<sup>111</sup> UNDRIP, Article 33.

territories are for the benefit of Indigenous rights-holders? The Crown should not have any business making assumptions about these matters but should support First Nations peoples to identify their territories. Article 27 requires that there be an impartial process for deciding on Indigenous claims to territories.<sup>112</sup> The Crown could well support such a process through a treaty-making process overseen by an appropriately designed and enabled Makarrata Commission.

### 6.3. Enforceability and a way forward

Comprehensive implementation of the UNDRIP is a significant task because it is about changing the status quo such that Australian law makes space for the inherent rights of First Nations peoples. Any approach to incorporation therefore must be strategic and aimed to be effective in the long run.

Ultimately, for them to have practical effect, the rights and obligations set out in the UNDRIP and implemented into Australia's domestic arrangements, need to be enforceable. That is a task for domestic Australian law.<sup>113</sup> The UNDRIP will only have an effective and holistic restructuring effect on the relationship between the Australian state and Australian First Nations peoples if those rights are enforceable against the Crown. That will happen only if and only when the Crown agrees to be bound by it.

It is for these reasons that the ANU FNP sees the implementation of the Uluru Statement, and particularly prospective treaty negotiations, as the best forum to address full-scale implementation of the UNDRIP. Principally, this is because treaty negotiations are likely to be generally aligned to the same goals as UNDRIP,<sup>114</sup> aiming to reset the relationship between First Nations and

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<sup>112</sup> Kerry Wilkins, 'Strategizing UNDRIP Implementation: Some Fundamentals', n 106, 181.

<sup>113</sup> For discussion related to Canadian context see *ibid*.

<sup>114</sup> Article 37(1) highlights treaty rights of Indigenous peoples: "Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements." See also Northern Territory Treaty Commission, *Final Report*, n 15; Northern Territory Treaty Commission, *Discussion Paper* (NT Government, 2020).

government on a fairer, more equal footing. That process will also require addressing the effect of treaties, and any rights, interests and obligations flowing from them, across the federation. Invariably it will require agreement between First Nations, the Commonwealth, and the States and Territories about the meaning and reach of those prospective agreements.

## **7. INCORPORATION OF THE UNDRIP AS PART OF THE IMPLEMENTATION OF THE ULURU STATEMENT**

The UNDRIP should be incorporated as an underlying and guiding mechanism in the implementation of the Uluru Statement. Bringing the Declaration's legitimacy to bear on the implementation of the Uluru Statement would ensure that the process is aligned with the purpose and contents set out as minimum standards in the UNDRIP. It would be an important approach for a number of reasons. As set out above, the UNDRIP provides an 'external standard of legitimacy',<sup>115</sup> and incorporated appropriately into the process, would ensure that the operation of the Voice, and importantly any treaty-making and truth-telling process, and the content of negotiated treaties, satisfy the minimum standards contained in the UNDRIP.<sup>116</sup> By incorporating the UNDRIP in this way, the parliament could ensure, and First Nations could be assured, that the implementation of the Uluru Statement would remain focused on Indigenous rights and could therefore be used to appropriately enhance the unequal bargaining position of First Nations in relation to prospective treaty negotiations.<sup>117</sup>

As Harry Hobbs has highlighted, properly incorporated into that process, the UNDRIP 'would help to articulate justifications for both [the] distinct status of [First Nations] and the necessity of a treaty relationship [between First Nations

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<sup>115</sup> Harry Hobbs, 'Treaty making and the UN Declaration on the Rights of Indigenous Peoples: lessons from emerging negotiations in Australia', n 13, 185.

<sup>116</sup> *Ibid*, 184; See also Northern Territory Treaty Commission, *Final Report*, n 15; Northern Territory Treaty Commission, *Discussion Paper*, n 115.

<sup>117</sup> Harry Hobbs, 'Treaty making and the UN Declaration on the Rights of Indigenous Peoples: lessons from emerging negotiations in Australia', n 13, 184 – 185; See also Northern Territory Treaty Commission, *Final Report*, n 15; Northern Territory Treaty Commission, *Discussion Paper*, n 116.

and the Australian nation-state]’.<sup>118</sup> Mick Gooda has pointed out that ‘the implementation of the UNDRIP within Australia is the principal means of resetting the relationship between the Australian Government and Aboriginal and Torres Strait Islander peoples’.<sup>119</sup> It will therefore be critically important to the implementation of the Uluru Statement which calls on government to enact substantive measures addressing structural inequities explained in the Statement as ‘the torment of our powerlessness’.<sup>120</sup>

### 7.1. Some ideas for incorporation as part of the implementation of the Uluru Statement

In a design process meaningfully engaging First Nations peoples, enabling legislation for a Voice should incorporate preambular explanations and provisions, aligning the scope and functions of the Voice with relevant explanations and minimum standards set out in the Declaration. Enabling legislation could set out clearly an intention of the Parliament that the Voice, its powers and functions, be informed by or give effect to relevant provisions of the UNDRIP. In particular, we propose that Article 19 in relation to FPIC is important.

#### 7.1.1. The Voice

Article 19 should be incorporated into enabling Voice legislation, highlighting in regard to the composition, functions and powers of the Voice that it is intended to give effect to and be consistent with the meaning of FPIC set out in Article 19. Processes for Voice engagement set out in the legislation should also reflect a standard of FPIC set out at Article 19.

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<sup>118</sup> Harry Hobbs, ‘Treaty making and the UN Declaration on the Rights of Indigenous Peoples: lessons from emerging negotiations in Australia’, n 13, 186; see also Richard Wong Maning, ‘Indigenous Difference, Indigenous Rights and Decolonising the Australian Nation-State: The Case for UNDRIP-informed Tripartite Treaties with First Nations’ (PhD Thesis, Australian National University, 2021) 230.

<sup>119</sup> Cited in Richard Wong Maning, n 119, 230.

<sup>120</sup> The Uluru Statement, ‘Uluru Statement from the Heart’, *The Uluru Statement* (Web Page) <<https://ulurustatement.org/the-statement>>.

Government could advance the position in relation to enabling provisions, that in recognition of the right to free, prior and informed consent set out at Article 19 of the Declaration, the composition, functions and powers of the Voice are intended to be consistent with and provide expression to the obligation 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’. Enabling legislation for the Voice could set out that the Parliament/Government will engage with representations made by the Voice with the intention of achieving FPIC. This would not amount to a veto.

Meaningful engagement to develop legislation enabling a Voice should provide content to how FPIC may be reflected in the Voice. In relation to other matters that may be considered in Voice enabling legislation, the following Articles could provide useful content, ensuring consistency with relevant UNDRIP rights:

- **Article 18** may be relevant to provisions about participation in decision-making highlighting that representatives should be chosen by Indigenous peoples;
- **Article 33** may be relevant to provisions about determining identity or membership in accordance with customs and traditions;
- **Article 34** may be relevant to provisions stipulating governance and decision-making processes, highlighting the right to promote, develop and maintain institutional structures and distinctive customs ... in accordance with international human rights standards;
- **Article 38** could be incorporated as a provision setting out the broad purposes of the Voice legislation because it obliges states, in consultation and cooperation with Indigenous peoples, to take appropriate measures, including legislative measures, to achieve the ends of the Declaration. Many rights are important to the broad aspirations of a Voice;
- In relation to representation, consistency with **Article 44** as it relates to equality of rights between male and female Indigenous individuals, may be considered important to include. **Article 22** could be incorporated in a similar way, providing for the protection of the specific interests of Indigenous elders, women, youth, children and persons with disabilities.

The following preambular statements from the UNDRIP may be relevant to Voice legislation and could be incorporated into the preamble of enabling legislation providing a broad Indigenous rights context to the Voice:

- Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,
- Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,
- Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,
- Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.

We note that preambular statements from the *Native Title Act 1993* (Cth), or from the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) may also provide useful content to the consideration of preambular paragraphs contained in any Voice enabling legislation.

#### **RECOMMENDATION 1:**

**Preambular statements and provisions related to FPIC set out in the Declaration should be incorporated into enabling legislation establishing a Voice. Article 19 in relation to FPIC is particularly important in this regard, noting that this would not constitute a veto.**



### 7.1.2. A Makarrata Commission and incorporation of the UNDRIP

Aligned appropriately with FPIC, a Voice would be able to advise the Commonwealth on its preferred approach for more comprehensive incorporation of the UNDRIP. We suggest an important consideration will be the fuller entrenchment of UNDRIP into legislation enabling a Makarrata Commission and a national treaty-making and truth-telling process. There, we contend would be the appropriate forum for a fuller implementation of the UNDRIP, which could then form minimum standards for the scope and content of treaty negotiations. Key rights incorporated initially in that process may include recognition of the right to treaties at article 37 and articles 3 – 5 related to self-determination. Noting the importance of engagement with a prospective Voice on these matters, FPIC will be important to developing treaty institutions and processes. Depending on the approach preferred, once early treaty negotiations are underway, subsequent legislation, for example setting national minimum standards, or giving effect to mechanism such as framework agreements, could involve full-scale incorporation of the UNDRIP as a guide to the negotiation of treaties across the federation.

Through negotiation with, and agreement from, First Nations peoples, this approach would allow for supporting legislation to incorporate relevant articles and preambular principles that give clear effect to key obligations and rights. The Declaration could therefore be used to create enforceable obligations that can be relied upon in the negotiation and implementation of treaties.<sup>121</sup>

Using the UNDRIP as an underpinning of the Uluru Statement can also help frame the resourcing required to empower local and regional and a national Voice as well as the scope and functions of a Makarrata Commission.

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<sup>121</sup> We have not elaborated on this proposition in this submission because, as part of the Government's commitment, it is dependent on the creation of a well-designed Voice. We would welcome the opportunity to provide more detailed advice on how a Makarrata Commission and a Commonwealth treaty and truth telling process could best reflect the standards of UNDRIP.

## RECOMMENDATION 2:

Preambular statements and provisions of the Declaration considered important to establishing a Makarrata Commission and to advancing Commonwealth treaty-making and truth-telling processes should be incorporated into relevant enabling legislation. An effective Voice would be the appropriate forum with which to engage to develop these ideas further and to contemplate fuller incorporation.

### 7.1.3. Review and reporting – a preliminary step:

Noting the focus on UNDRIP supporting the implementation of the Uluru Statement, preliminary measure the Government should pursue in the short term is engaging the ALRC to review Commonwealth legislation for consistency with the UNDRIP and its provisions and report its findings to government. This should be facilitated as soon as reasonably possible. Reporting on such a review process would be a useful tool to highlight the extent of inconsistencies and rights breaches in relation to Commonwealth laws and the Declaration. We suggest that an initial focus should be laws particularly relevant to First Nations peoples such as those relating to heritage and environmental protection, intellectual and cultural property, land and resources, and native title and land rights.

That information could then inform work the Voice might undertake to address some of those issues. As well, the ALRC could also address important related matters, some of which are addressed above, for example in relation to clearly setting out the scope and substantive meaning of FPIC and self-determination, interrogating issues related to who ‘peoples’ are and the territories to which their rights pertain. Some of this work could be beneficial to improving the competence of government and its public service in understanding the scope and substantive meaning of Indigenous rights contained in the UNDRIP. This work should also involve developing an assessment standard that could be used by policymakers and by State and Territory Governments contemplating their own

interaction with the Declaration. These matters are critical to a comprehensive approach to implementing the UNDRIP as part of the Government's commitment to the Uluru Statement from the Heart.

**RECOMMENDATION 3:**

The Commonwealth should engage the ALRC to undertake a process of review and reporting on the consistency of current laws with the UNDRIP. Part of this work should involve articulating the scope and substantive meaning of key rights and developing an assessment standard to address ongoing issues of identifying inconsistencies with the UNDRIP in Australia.

7.1.4. Statements by the executive – important reinforcement

Given the poor rights protections that exist in Australia in relation to First Nations peoples and the history of government neglect and inaction in relation to advancing the rights of First Nations peoples, public statements of support are important. Although principally symbolic, statements by the Prime Minister and members of the Executive outlining the Government's commitment to UNDRIP are an important way to build public awareness of and support for the rights of Indigenous peoples. The Government should see this as complementary to advancing its commitment to implementing the Uluru Statement from the Heart.

**RECOMMENDATION 4:**

The Prime Minister and members of the Executive should make supportive public comments about Australia's commitment to the UNDRIP and its principles, highlighting the Declaration's importance to informing Government laws and policies.