SUBMISSION TO THE SENATE INQUIRY: APPLICATION OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES IN AUSTRALIA

Introduction

This submission is made by the National Native Title Council (NNTC) to the Legal and Constitutional Affairs References Committee for inquiry and report into the application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP; Declaration) in Australia.[1]

The NNTC makes this submission in its capacity as the peak body for Australia's Native Title Organisations representing Native Title Representative Bodies and Service Providers (NTRB/SPs) and Registered Native Title Prescribed Bodies Corporate (PBCs) recognised under the *Native Title Act 1993* (Cth) (NTA) and other comparable legal entities such as Traditional Owner Corporations recognised under the *Victorian Traditional Owner Settlement Act 2010* (Vic) (TOSA). The NNTC supports and advocates for First Nations people's right to true self-determination – their right to speak for and manage their own Country, to govern their own communities, to participate fully in decision-making and to self-determine their own social, cultural and economic development.

This submission has two parts. Firstly, it discusses the process for enacting and incorporating the UNDRIP in Australian law. The NNTC argues that Australia, as a Federation, needs to implement the UNDRIP at a national level in accordance with international standards to ensure there is a minimum national baseline of First Nations peoples' rights that any state legislation must adhere to. State and local adoption of the UNDRIP has limited effectiveness without national implementation into legislation.

Secondly, this submission identifies some of the key areas that need to be reformed in the native title system with specific consideration of the right to self-determination which is central to the UNDRIP. The NNTC urges the Committee to make recommendations that ensure the UNDRIP is incorporated into laws, policies, programs, and institutions that govern the native title process as an act of justice for First Nations people and in a show of commitment to reconciliation.

1. First Nations led national roadmap for implementing UNDRIP

<u>The incorporation of the Declaration should be led by First Nations peoples</u>

Australia should adopt national legislation to incorporate the UNDRIP. It should not only aim to harmonise State, Territory and Federal legislation with the Declaration, but also ensure substantive rights set out in the Declaration are embedded. This process should be led or, at the very least, co-

[1] In the NNTC's 2011 submission to the Senate Legal and Constitutional Affairs Committee for their Inquiry into the *Native Title Amendment (Reform) Bill 2011*, the NNTC proposed that the *Native Title Act* should be amended to enact the key principles of the Declaration, particularly for the purposes of agreement-making and for access and the use of Indigenous land.

designed with First Nations peoples. This will not only enable First Nations peoples to define key principles such as consent but also allow First Nations people to be the decision-makers who interpret and triage the laws and policies in order of importance to their own communities. The implementation of the Declaration should be subject to the direction and guidance of First Nations peoples, recognising that there are many distinct groups, all with their own identity and culture. If the Declaration is introduced as legislation, the significant impact it will have on First Nations peoples necessitates a comprehensive and far-reaching engagement process with those communities.

There are several factors to consider concerning the rights of First Nations peoples in the application and adoption of the Declaration. Some of those factors are historical but have implications for how the Declaration might be implemented in Australia. For example, while the Declaration could be considered the pinnacle of First Nations activism, settler state members of the UN frequently objected, re-wrote and removed sections of the Declaration despite boycotts by First Nations delegates.[2] Any process of implementation in Australia should revisit earlier drafts and give primacy to local understandings and interpretations of the Declaration by Australian First Nations peoples.

The Declaration has the potential to strengthen First Nations advocacy for meaningful reform by acting as the framework that underpins and guides the development of legislation, policies, and institutions in Australia. However, it is important to note that the Declaration sets out the minimum standards for the 'survival, dignity and well-being of the Indigenous peoples of the world', and for substantive rights to be realised First Nations peoples should be able to negotiate to build upon these standards and the government must shift from considering the Declaration as an aspirational outline to enforceable rights.

International precedent for implementation

The present inquiry follows international processes enacted to implement the Declaration in domestic settings as part of a global reckoning to address the systemic inequalities Indigenous people encounter. Australia should review and learn from these processes, including those undertaken by Canada and New Zealand where the first steps towards incorporating the Declaration into their laws, policies, and institutions are underway. Australia should follow the lead of Canada and New Zealand and demonstrate a strong commitment to First Nations peoples by incorporating the Declaration into Australian legislation, policies, and institutions.

In 2021, Canada enacted Bill C-15 requiring Canada to take all measures necessary to ensure its laws are consistent with the Declaration. Under this law, the Declaration is affirmed as applicable to Canadian law and requires the government to prepare and implement an action plan to harmonise Canadian laws with the UNDRIP. Importantly, the Canadian government is to work with Indigenous communities on the implementation of the Declaration.

In Aotearoa/New Zealand the government made a commitment in 2019 to undertake a process to develop a national plan for the implementation of the Declaration. The plan is to include application in the courts and an action plan to establish coherence in the application of the Declaration across

[2] Federation of Victorian Traditional Owner Corporations, 2020 *Enshrining Aboriginal Rights*, Melbourne, Victoria, p.7.

governments.[3] Work is underway to develop *He Puapua,* the technical working group report which outlines what a pathway forward may look like.[4]

Implementation underway in the business sector

In Australia, it could be argued that the private, rather than public, sector is leading the way in making incremental changes to adhere to the UNDRIP. For the past few years, there have been developments in the way the private sector does business with First Nations peoples, including a better understanding of the Declaration, self-determination and Free, Prior and Informed Consent (FPIC). For example, in 2020, the Global Compact Network Australia, KPMG, and the University of Technology Sydney (UTS) co-authored *The Australian Business Guide to Implementing the UN Declaration on the Rights of Indigenous Peoples*, which establishes six fundamental actions for businesses:

1. Adopting and implementing a clear policy statement of First Nations rights;
2. Conducting human rights due diligence;
3. Consulting in good faith with Indigenous peoples;
4. Committing to obtaining (and maintaining) FPIC;
5. Establishing culturally appropriate grievance mechanisms; and
6. Providing for the remediation for any adverse impacts on First Nations rights that the business has caused or contributed to.[5]

More recently, the First Nations Heritage Protection Alliance, the Global Compact Network Australia, and Responsible Investment Association Australasia have partnered to develop the *Dhawura Ngilan Business and Investment Initiative*, which is the action to support the business and investment community in practicing and demonstrating best-practice in Indigenous cultural heritage.

However, initiatives of the kind mentioned above need the support of the Commonwealth government to ensure widespread adoption of the Declaration by the business community. The application of the Declaration into Australian laws and policies will set the minimum standard for businesses engaging with First Nations peoples, lands and resources.

While incremental adoption of the Declaration should continue, the NNTC supports a more complete implementation that involves the application of the Declaration to all government policies and legislations with a clear process to rectify any inconsistencies between legislation and the Declaration.

[3] Federation of Victorian Traditional Owner Corporations, 2020. *Enshrining Aboriginal Rights*, Melbourne, Victoria, p.15.

[4] June Oscar, 2021. Incorporating UNDRIP into Australian law would kickstart important progress | Australian Human Rights Commission.

[5] KMPG, 2020. The Australian Business Guide to Implementing the UNDRIP, located here on KPMG website.

2. Embedding the UNDRIP into Australian law

Since Australia formally offered its support of the Declaration in 2009, there has been incremental implementation of key articles of the UNDRIP within the legislative and policy frameworks that form the native title regime, however, this is insufficient. Native title legislation, policies and institutions require urgent reform to deliver on the minimum standards articulated in the Declaration.

Self-determination is at the heart of the UNDRIP – the right for all Indigenous peoples around the world as outlined in 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.

First Nations peoples in Australia have been asserting their right to self-determination throughout colonisation through many different forms, but recently, policy shifts and programs have begun to incrementally adopt this framework. For example, the negotiation of the National Agreement on Closing the Gap led by the Coalition of Aboriginal and Torres Strait Islander Peak Bodies (Coalition of Peaks) stems from a campaign of self-determination.

While the right to self-determination, FPIC and redress for appropriated land are conceptually incorporated into some native title and adjacent laws to varying degrees such as the NTA*, Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA), TOSA, and *Northern Territory Aboriginal Sacred Sites Act 1989 (*NT), they do not meet the required standards under the Declaration, nor do they explicitly embed those rights. Most native title structures predate the Declaration and represent a significant departure from the standards set out therein. Further, the Declaration is not included as an international instrument of human rights within the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth),[6] which means that federal legislation, including changes to law that could impact on native title, land rights and cultural heritage are not accompanied by a statement of compatibility with the human rights protected under the UNDRIP.

<u>Reforming the native title system</u>

Substantial reforms are needed to the native title system to bring it in line with the Declaration and the central right of self-determination. Various features of the native title system currently undermine this fundamental right by failing to put native title holders on an equal footing with government and the private sector. After a native title determination is made, native title holders are compelled to establish a Prescribed Body Corporate (PBC) that triggers an onerous set of obligations under both the NTA and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). Due to inadequate funding, most PBCs find themselves stuck in a cycle of compliance rather than pro-actively advancing the aspirations of native title holders. The future acts regime also entrenches power imbalances by providing native title holders with only weak procedural rights that result in diminished bargaining power and unjust agreements, including projects going ahead without native title holder consent, sub-optimal compensation and benefit sharing outcomes, and gag clauses that prevent groups from asserting their rights.

[6] See section 3. https://www.legislation.gov.au/Details/C2016C00195.

Free Prior and Informed Consent

The requirement of FPIC should be central to all native title agreements and negotiations and needs to be legislated into the NTA and other related legislation.

FPIC is a key part of the Declaration and is contained in no less than six articles, the strongest articulation being in Article 32 which states that governments must obtain the free and informed consent of Indigenous peoples prior to the approval of any project that affects their lands or territories and other resources.

The role of FPIC in the native title future act regime needs to be carefully analysed in terms of contemporary international understandings of how FPIC should be applied to agreement-making. In Appendix 3 of the *2010 Native Title Report*, the Social Justice Commissioner provided a breakdown of what FPIC should mean in native title negotiations.[7] However, this was still under the legislative framework of the right to consult and negotiate, rather than the right to consent; to say no or to veto. An example of implementing the right to veto can be found in the ALRA which demonstrates the principles of FPIC in action. Here the right to veto ensures that traditional Aboriginal owners in the Northern Territory have a significant say with respect to exploration and associated mining, or other development activities on their lands.

The right to FPIC cannot be a 'tick box' activity for individuals or corporations proposing to undertake activities on Country. Too often, the involvement of First Nations peoples in projects is just in regards to consultation on heritage when the requirement for consent from First Nations peoples should be an ongoing obligation for the life of a project. FPIC is a process to be defined by First Nations peoples and respected by states and project proponents throughout the project cycle, including in due diligence processes, social and environmental impact assessments (including conversation and environmental concerns pursuant to Article 29), agreement-making, and project design and implementation.

Assumption of Continuity of Culture

The NTA should be amended to include an assumption of continuity of culture so the onus is not on First Nations people to 'prove' their ongoing connection.

Article 11 of the Declaration enshrines the right of Indigenous peoples to practice and revitalise their cultural traditions and customs. It states that First Nations peoples have the right to '*maintain, protect and develop the past, present and future manifestations of culture'*. Article 11 should be read with the preamble to the Declaration, which recognises '*the urgent need to respect and promote the inherent rights of indigenous peoples…especially their right to lands, territories and resources*'.

Currently, the NTA requires First Nations peoples to prove, justify or explain their continuity of culture. For example, under s 190B(5) of the NTA, in order for a claim to be registered, the Court must be satisfied that there *'exists traditional laws acknowledged by, and traditional customs observed by, the native title claim group.'* In doing so, the NTA fails to recognise how previous Australian Government

[7] Aboriginal and Torres Strait Islander Social Justice Commissioner, 2010 Native Title Report, Appendix 3, available here on the Australian Human Rights Commissioner website.

policies have impacted First Nations peoples' ability to practice culture. As stated in the preamble to the Declaration, First Nations peoples have suffered from '*historic injustices as a result of colonisation and dispossession of their land*'. In many instances, First Nations peoples have been forcibly removed from their land or punished for practising culture.

The NTA must make allowances for First Nations peoples because of these previous breaches of human rights and recognise the difficult impact the oppressive policies continue to have. The onus of proof with respect to continuing connection under the NTA should be reversed, thereby supporting the revitalisation of culture, rather than creating further barriers for First Nations peoples.

Decision-making institutions

In order to fulfil the right to self-determination, native title holders should be able to determine the most appropriate representative governance structure for their particular group and circumstances rather than having structures imposed on them. Article 18 of the Declaration states that Indigenous Peoples have the right to participate in decision-making that affects their rights and to develop their own decision-making institutions.

Under the NTA, native title holders are legally required to appoint a PBC to hold their native title rights and interests and have it incorporated either under the *Corporations (Aboriginal and Torres Strait Islander) 2006 (CATSI Act)*. This corporate structure is highly rigid and compliance based, imposing native title decision-making functions and governance structures that often do not align with the way communities make decisions and govern themselves under cultural protocol and custom. In fact, PBCs are restricted from undertaking self-governance functions. While they are able to make decisions about their lands, and some waters and resources, they have limitations in place when it comes to decision-making about their communities, laws and people. In accordance with Article 18, Indigenous peoples should be able to maintain and develop their own Indigenous decision-making institutions, whether that be through PBCs or other bodies.

Other decision-making institutions within the native title system, such as the National Native Title Tribunal, also need to be overhauled so that they are led by First Nations peoples and are better grounded in cultural protocol. The Treaty Authority being established in Victoria to oversee treaty negotiations between the government and the First Peoples' Assembly of Victoria is an important model as all members of the independent authority will be First Peoples. The National Native Title Tribunal needs to follow suit, with First Nations representation one element of broader institutional reform needed.

While the NTA and heritage legislation imposes wide-ranging obligations on PBCs and native title holders, including with respect to consultation with governments, PBCs are not provided with the commensurate resources required to operate. Each PBC in Australia is unique as First Nations laws and customs and communities are different around Australia and exist in perpetuity as their native title rights and interests exist forever. For PBCs to have the capacity to meaningfully function, they must be

adequately funded in perpetuity. This is vital to fulfilling the right to self-determination and Article 19 of the Declaration, under which governments are required to consult and co-operate in good faith with First Nations peoples through their own representative institution. The NNTC has called for the Commonwealth Government to consider a PBC Future Fund that would provide annual, secure and sustainable funding for PBCs.[8]

Compensation

Article 28(1) of the Declaration states that First Nations peoples have the right to 'redress, by restitution or where not possible compensation, for the lands, territories and resources which have been confiscated, taken, occupied, used or damaged without free, prior and informed consent'.

While the NTA recognises that native title holders have the right to compensation in some circumstances, claimants that have brought compensation cases through the courts have faced difficulty proving their claims as well as significant expenses and protracted litigation processes. The NTA should embed procedural and administrative measures for a streamlined compensation settlement process that avoids the unnecessary expense and delay involved in litigation and allows native title holders to define what negotiation processes look like according to their unique customs. This can only be achieved if governments negotiate in good faith in recognition of their responsibility regarding compensation and if native title holders are adequately resourced.

Other Reforms

The ALRC's 2015 *Connection to Country* report highlights other areas of reform to the NTA that need to occur to bring it in line with the Declaration, including with respect to commercial native title rights (see *Akiba*)[9] and approaches to cultural knowledge (art 31).[10] The right to inland water is another right that needs to be embedded in the NTA if it is to comply with the Declaration (art 25 and 32). In 2011, the NNTC suggested that implementing the Declaration might be supported through the insertion of an additional object into NTA to facilitate compliance with the Declaration.[11]

Cultural Heritage Regime

The protection of cultural heritage is intrinsically connected to native title and comprises a regime of State, Territory and Commonwealth laws that interact with the NTA. This regime requires significant reform to bring it in line with the Declaration, particularly Articles 32 and 11.

While the NTA's future acts regime does, in some instances, require project proponents to consider the likely impact on cultural heritage and provides native title holders the right to negotiate cultural

[8] Centre for Aboriginal Economic Policy Research, 2021. *Toward a Perpetual Funding Model for Native Title Prescribed Bodies Corporate*, available here online.

[9] *Akiba on behalf of the Torres Strait Regional Seas Claim People v Queensland (No 1)* [2006] FCA 1102 (18 August 2006) [29].

[10] Australian Law Reform Commission (ALRC), 2015. Connection to Country: Review of the *Native Title Act 1993 (*Cth) Final Report, available here online.

[11] National Native Title Council Submission to Senate Inquiry: Native Title Amendment (Reform) Bill 2011

heritage protection measures, in circumstances where this right is not available and where agreements cannot be reached, the NTA does not provide a right of veto over development activities. This right of veto must be brought into the NTA to respect the right of FPIC.

Beyond the NTA, the differing cultural heritage laws across State, Territory and Commonwealth jurisdictions do not adequately protect First Nations cultural heritage or enable Traditional Owners to self-determine how their own heritage is managed. These laws often prioritise archaeological significance and broader public interest considerations over the interests of First Nations communities and largely do not recognise intangible cultural heritage.

A partnership agreement signed in November 2021 between the Commonwealth government and the First Nations Heritage Protection Alliance commits both parties to co-design new national legislation. These reforms have the potential to provide Indigenous people with the right to practise and revitalise culture as well as the right to maintain and protect cultural sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.[12] Furthermore, by implementing the Declaration, States will be required to provide redress and restitution, developed in conjunction with Indigenous peoples, for any property taken without their free, prior, and informed consent or in violation of their laws, traditions and customs.[13] This will strengthen the protection of cultural heritage for Indigenous peoples in line with their laws, traditions and customs.

Treaty-Making and Self-Governance

For the Declaration to be adopted in a full and meaningful way, the right to self-government must be considered as set out in 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 functions.

While various other state legislations have incorporated aspects of the Declaration to various degrees, no legislation in Australia has included the right for First Nations to self-govern and this would likely require a Treaty process, as outlined in Article 37, to be realised.

There are various treaty processes underway in Australia at the state level, with Victoria being the most progressed and providing an example to other states and territories who have made commitments to Treaties such as the Northern Territory, Queensland, and the Australian Capital Territory. There is yet to be tangible progress towards a Treaty at the Federal level, although Article 37 of the Declaration expressly refers to treaties and ensures that Indigenous peoples are entitled to their recognition.

The Victorian Federation of Traditional Owners have already looked at how the Declaration may be adapted through the Victorian Treaty process and have outlined potential models:

1. embedding principles of the Declaration into Treaty negotiation processes and protocols

[12] *United Nations Declaration on the Rights of Indigenous Peoples* art 11
[13] Ibid.

2. legislation affirming the application of the Declaration to the laws of Victoria, with a requirement to rectify any inconsistency between the law and the declaration, and to prepare an action plan to achieve the objectives of the declaration (the Canadian Model)
3. include the rights outlined in the Declaration as enforceable and justiciable rights in treaties.[14]
4. Implementing the Declaration, its values and principles will strengthen agreement making for Indigenous peoples and establish the minimum standards against which negotiations such as treaties can be assessed.

Conclusion

This submission has highlighted the significant reforms needed to the native title system and associated cultural heritage and treaty-making regimes to bring them into line with the UNDRIP.

The NNTC submits that Australia must implement the UNDRIP at a national level in accordance with international standards to ensure there is a minimum national baseline of First Nations rights that any state legislation must adhere to. This process should be led or, at least, co-designed with First Nations peoples through far-reaching engagement involving First Nations communities across the country. The NNTC also urges the Committee to make recommendations that ensure the UNDRIP is urgently incorporated into laws, policies, programs, and institutions that govern the native title process.

[14] Federation of Victorian Traditional Owner Corporations, 2020 *Enshrining Aboriginal Rights*, Melbourne, Victoria, pp.17-18.