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Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples

Submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs -- Response to Additional Written Questions on Notice

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1. How would the implementation of UNDRIP inform Treaty negotiations?
 - 1.1. Treaty is the product and the indicator of the coming together of sovereign parties to reach agreement on their relationship. That it would occur is a feature of self-determination of Aboriginal and Torres Strait Islander peoples.
 - 1.2. Given the concern of the UNDRIP with self-determination for indigenous peoples, its implementation in Australia would assert self-determination of Aboriginal and Torres Strait Islander parties as a precursor to establishing the framework for negotiation, both as a question of law and as a commitment of government and parliament.
 - 1.3. Without the UNDRIP, and given the failure generally of the Australian State and its laws to comprehend Aboriginal and Torres Strait Islander peoples as self-determining, some other legal mechanism would need to be implemented to provide the conditions for negotiation.
 - 1.4. Additionally, the UNDRIP provides a helpful framework of recognised and substantive rights in a range of areas that are of concern to First Nations peoples. In this way, it provides one means for identifying the substance of Treaty negotiations.
2. How would a Treaty support the application of, and adherence to, UNDRIP principles?
 - 2.1. Self-determination is the basis of UNDRIP principles and the precursor to, and consequence of, Treaty.
 - 2.2. Self-determination has been described as constitutive and continuing.¹ Treaty is one of the component mechanisms of *constitutive* self-determination. It establishes an institutional framework 'guided by the will of the peoples who are governed'² ie First Nations. Treaty will require accountability of the State as to its implementation.
 - 2.3. Treaty implementation will itself require adherence to principles of self-determination embodied in UNDRIP principles. This might be considered as *continuing* self-determination. It is a foundation for ongoing manifestation of self-determination, though we observe that further institutional reform will inevitably be required to *implement* Treaty obligations.
 - 2.4. Treaty and the UNDRIP comprise two mechanisms that work together to reinforce each other. They form part of a broader institutional infrastructure to support the manifestation of Indigenous self-determination within the colonial system.
3. In your view, what mechanisms would need to be in place to ensure that the rights as outlined in UNDRIP are enforceable?
 - 3.1. While the UNDRIP contains substantive rights, they are declared without the constitutional, legislative and judicial contexts of Australian law and its operation. This opens two principal avenues for enforcement.
 - 3.2. The first is through law reform to generate institutional responses implementing substantive UNDRIP rights. For example, the right to self-determination (Articles 3 and 4) might be afforded through a combination of Constitutional reform such as Voice to Parliament, and Treaty. Together these institutions provide a platform for accommodation of UNDRIP rights according to the imperatives and aspirations of First Nations people.
 - 3.3. The second is through an enforcement mechanism, such as a Human Rights Act and associated executive infrastructure. Such a response would facilitate identification of

¹ S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004).

² Ibid 104-5.

breaches of UNDRIP principles, and the means of implementing both individual and structural changes to prevent further occurrence.

4. What sort of reporting requirements and complaints mechanisms do you think would ensure the protection of FPIC and other UNDRIP principles?

4.1. As evidenced in the Robodebt Royal Commission, complaints mechanisms such as an ombudsman or commission can be an exhausting process for individuals who are aggrieved by breaches of their rights and who are required to challenge decisions. We observe the longstanding engagement of Aboriginal and Torres Strait Islander people with the Anglo-Australian court system, seeking to enforce their rights.³ We therefore identify the need for institutional mechanisms allowing individual and collective claims, whether by communities or peak bodies, as well as for ongoing accountability, monitoring and strategic reform.

4.2. Existing executive infrastructure such as the Australian Law Reform Commission and the Human Rights Commission might be deployed for this purpose. Similarly, Voice to Parliament could serve to monitor and report on FPIC and the UNDRIP principles in practice.

4.3. We cannot ignore, however, the need for substantial reform of the *Native Title Act 1993* and *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* to give expression to UNDRIP principles in relation to land. While we anticipate that land issues might be dealt with under Treaty negotiations thus introducing a negotiated means of introducing UNDRIP principles in these contexts, there remains an urgent need for prompt reform.

5. We still don't have proper land rights in this country, including veto rights. How do you see the implementation of UNDRIP leading to First Nations people having the right to FPIC over what happens on their lands and waters, including the development of national land rights legislation?

5.1. The UNDRIP provisions relating to land rights⁴ do not provide for a right of veto.

5.2. Further, Article 46(1) of the UNDRIP confirms the integrity of sovereign and independent states. The form of land rights as an expression of the UNDRIP principles will therefore need to conform with the framework expressed in other UNDRIP provisions.

5.3. Although veto is not included in the mechanisms evidencing the exercise of FPIC in land matters, the UNDRIP provides a range of substantive rights including:

- the right to lands, territories and resources⁵
- right to adjudication of land disputes⁶
- redress including restitution and compensation for land that has been confiscated or damaged⁷
- maintenance, control and protection of cultural heritage⁸
- determining and developing priorities and strategies for the development and use of land, territories and resources.⁹

³ For example, the litigation resulting in *Mabo v Qld (No 2)* (1992) 175 CLR 1 lasted 10 years.

⁴ Articles 26, 27, 28, 31, 32.

⁵ Article 26.

⁶ Article 27.

⁷ Article 28(1).

⁸ Article 31.

⁹ Article 32(1).

5.4. National land rights legislation

- 5.4.1. UNDRIP principles relating to land, including FPIC, might be expressed through dedicated land rights legislation.
- 5.4.2. Implementing this at a national level raises practical questions about the relationship between State and Commonwealth laws especially given the states' rights over land and minerals, and existing state based land rights legislation.
- 5.4.3. Given the range and extent of the rights afforded in relation to land, we are of the view that they would helpfully form the substance of Treaty negotiations to establish a shared understanding of how they are given expression through the process of FPIC.
- 5.4.4. We observe that the model afforded in the Victorian treaty negotiations expressly provides that there are 'no excluded matters'.¹⁰ On this model, land rights could form the basis of substantive negotiations.

5.5. FPIC in native title

- 5.5.1. For land the subject of a native title determination, implementing FPIC would require amendment of the *Native Title Act 1993* to affirm traditional owners' rights to FPIC over proposals by others to use the land.

5.6. Where native title has been extinguished

- 5.6.1. In places where native title has been extinguished, there is no current mechanism to afford First Nations FPIC on matters concerning that land.
- 5.6.2. To implement such a right requires looking beyond native title, a property right, and considering land rights according to self-determination principles.
- 5.6.3. To do so would require its own legislative foundation that, logically, would follow Treaty.

¹⁰ See, Victorian Treaty Negotiation Framework cl 25.1 <https://www.firstpeoplesrelations.vic.gov.au/treaty-negotiation-framework/part-e>.