

## Indigenous rights and mining – international law and examples from Australia

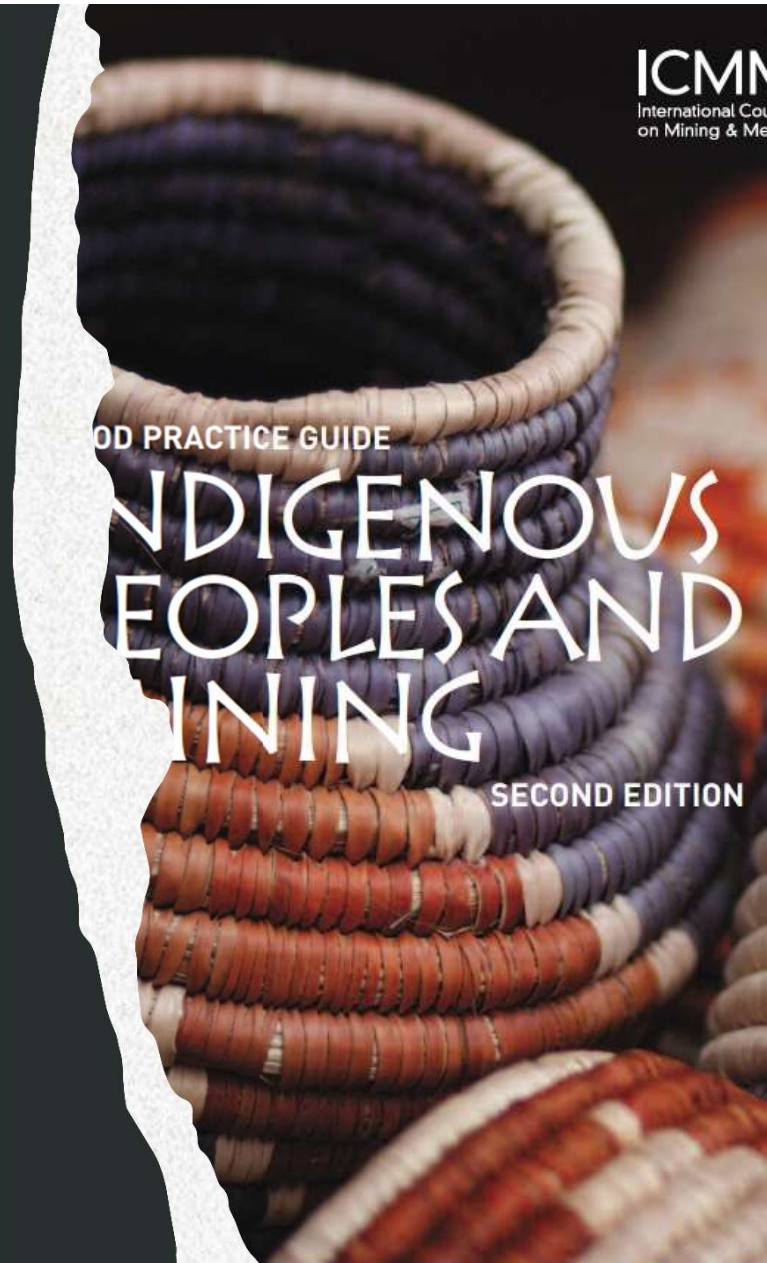
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# International law $\neq$ domestic law

- States ( = nation) must follow international law
- Governments ( = executive) must follow domestic law
- Businesses must follow domestic law where they operate
- Businesses must respect international human rights law

# International law sometimes ambiguous

- Agreed words ≠ agreed detail and application
- International law often general, leaving specifics to domestic law or future cases
- ‘Human rights’ ≠ international human rights law
- Ensuring enjoyment of human rights standards needs more than law

# What are 'human rights'?



# Key international HR standards on Indigenous – mining issues

treaties

- *ICCPR* right to culture (art 27 & explanation by committee)
- *ICERD* equality of rights & treatment (art 5 & explanation by committee)
- *ILO169* re Indigenous and Tribal Peoples (various articles)
- *UNDRIP* declaration (identifying expectations, particularly FPIC)
- *UNGPs*:
  - businesses must respect human rights (policy, due diligence, remediation)
  - ‘human rights’ incl. *ICCPR* and, where relevant, *ICERD* & *UNDRIP*; *ILO169*?
- *OECD Guidelines* on MNEs (and sectoral ‘guidances’ e.g. extractives)

# Summary of international standards on mining-Indigenous relations

- Mining developments breach human rights where:
  - threaten the way of life and culture of an Indigenous group;
  - amount to a denial of the right to culture; or
  - endanger the very survival of the community and its members; and
  - these impacts can arise from cumulative effects (ie. consider in context).
- No breach where limited impact on the way of life and the livelihood of Indigenous persons
- Where individual-group disagreement about measures:
  - not breach cultural human rights where objectives and measures are reasonable
  - members must have opportunity to participate in decision-making process about the measures
- Opportunity to participate:
  - not just consultation
  - where measures substantially compromise or interfere with culturally significant activities, this requires 'not mere consultation but the free, prior and informed consent of the members of the community'



# Implementation of international standards on Indigenous-mining relations

- Obligations on nations:
  - Treaty body/committee decisions and observations
  - UN monitoring (eg. through Universal Periodic Review)
- Obligations on governments:
  - Some international standards may become domestic laws & mechanisms
  - Regulator discretion
- Obligations on business:
  - Some international standards may become domestic laws & mechanisms
  - Some may become contractual requirements (eg. membership, financing obligations)
  - *OECD Guidelines on MNEs* complaints process

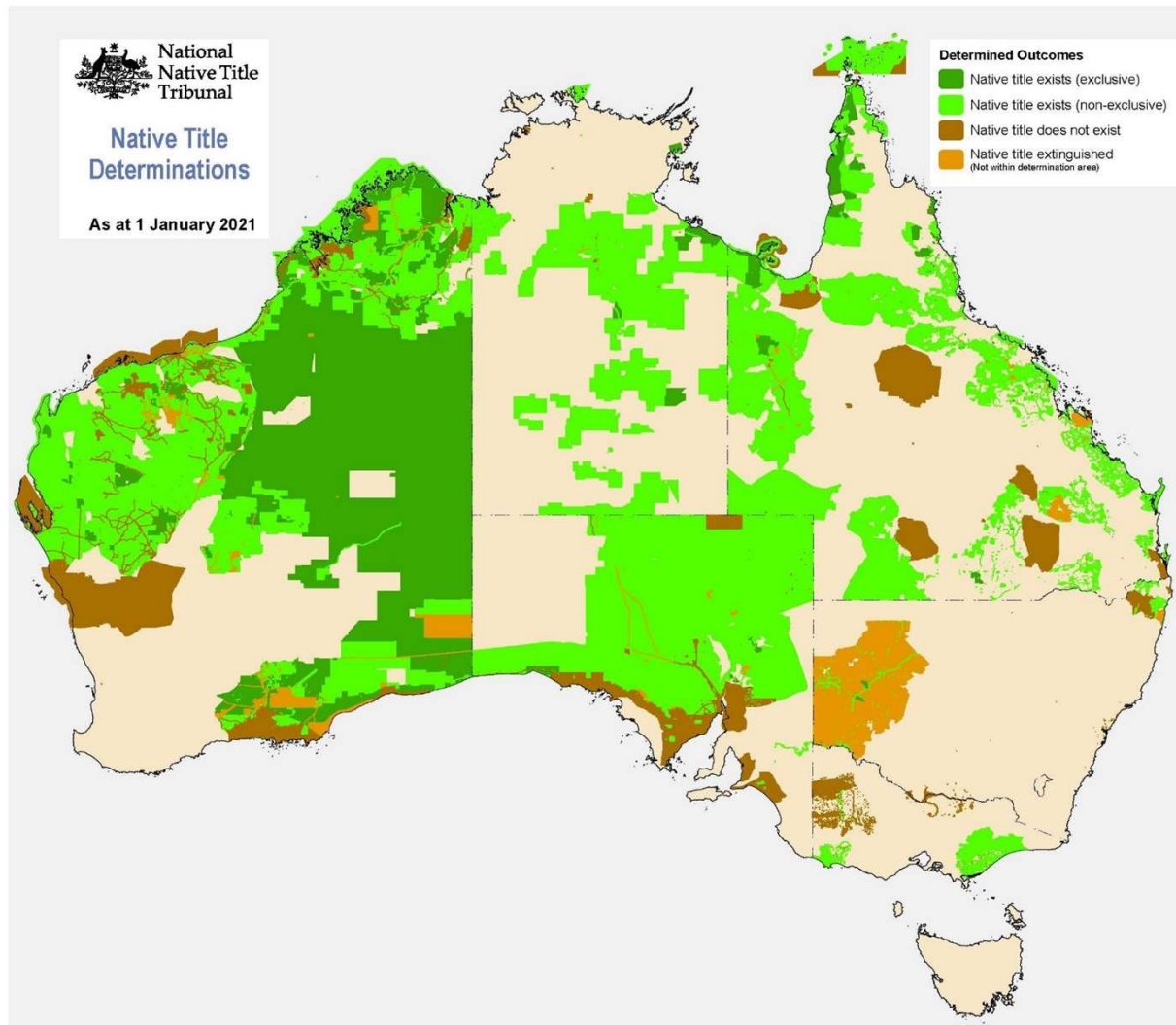
# Free, Prior, Informed Consent (FPIC)

- Various UNDRIP articles
- Group (not individual) right
- Relevant international decisions since 2007:
  - Failure to try to reach consent has been ruled in breach (eg. ICCPR, ICERD) but only where there was significant impact
  - No precedent where failure to try to reach consent was breach where the proposed activity only would have limited impact.
- Little national law requiring it
- But increasing reference in contracts and policies (eg. ICMM, IFC, OECD)



# Australian developments

- Federal nation (1901, combining former British colonies)
  - National government (w. international responsibilities, and list of domestic areas)
  - State/territory governments (w. land and resource responsibilities)
  - Indigenous issues arise in both
- Historically
  - Indigenous people & issues have suffered racist policies and laws
  - Many mining operations developed w/out concern for Indigenous impacts
  - Contemporary implications from these



# Australian Indigenous-mining laws and protections

- Indigenous heritage ‘protection’ laws
  - State & Territory laws of varying antiquity and effectiveness
  - national law, infrequently used
- National ‘native title’ law:
  - followed 1992 court decision confirming ‘common law’ of customary title
  - negotiations with all stakeholders 1992-1993, law began 1994
- *Native Title Act 1993* (Cth):
  - ‘native title’ broadly = group rights regarding access & use of land
  - established system for court recognition and protection of native title
  - validated all previous mining titles
  - established system for future negotiation of mining titles (binds States & Territories)
  - established system for assisting Indigenous groups

# Future expectations?

- ↑ expectations and mechanisms about company compliance with international human rights standards
- Even where that not required by domestic law
- ↑ regulatory encouragement of agreement-making between miners and land-users
- ↓ regulatory reliance on government approval/permission to impact
- ↑ attention to supply chains (incl. subsidiaries, service-providers) and their systems

# Thank you

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