Indigenous rights and mining – international law and examples from Australia

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There is increasing attention to the interaction of mining and Indigenous peoples and issues. The standards and mechanisms of international law provide importance guidance but also have some significant limitations in how they operate, given the regulation of mining at the national level. This presentation and paper summarises relevant international standards and case, and examines developments in Australia.

[1] This paper draws from other materials and articles, with some large extracts where the relevant points have already been made elsewhere. These are all referenced, so readers can locate any original material, with the addition that where the extracted material included referencing, that referencing has been replicated in the footnotes and bibliography of this paper, to assist readers.

[2] There is increasing relevance for international human rights standards in the interaction of mining and Indigenous peoples and lands. This has long been the case for state responsibilities, but there are various ways in which these standards have more immediate and direct application to mining operators, separate from the law of the country in which they operate or are registered. This paper summarises the key standards and mechanisms, under the following headings:

What are 'human rights'?

[3] The focus here is on international human rights *law* regarding Indigenous rights and mining. The term 'human rights' has different understandings and uses, broader than what is

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covered in this paper. There are, arguably, four 'schools' of human rights,[2] which can help understand what a person means in their use and discussion of 'human rights'.

Different understandings of 'human rights' (Dembour 2006)

Natural school human rights are given, being 'minimal entitlements originating from Nature, God, Reason, Humanity, etc. These entitlements can and should be provided for in positive law'	**Deliberative school** human rights are 'procedural principles...-political or legal principles which have been agreed upon'
Protest school human rights are 'a language of protest...human rights are fought for'	**Discourse school** human rights 'exist only because they are talked about. …[N]either good nor bad [but to] judged, each time, by its outcomes'

[4] The approach and material in this paper broadly fits within the 'deliberative school'. In terms of the writing and use of human rights, this is not the most common 'school'/approach (which is the 'natural school') but it is the approach most suited to the tools of law: *the international human rights standards which are recognised and implemented through agreed mechanisms*.

[5] This should not, however, be understood as assuming some exclusive superiority to law in human rights analysis. Even if one accepts the law as providing and defining 'what are human rights', this will not necessarily provide the entirety on what human rights requires.

> *Many human rights standards are couched in general terms – entirely sensible given they apply worldwide – and so rely on various disciplines and experience to explicate the detailed requirements applicable in particular instances (eg. 'it is public health [writing and analysis] and not an immutable principle of human rights which suggests under what circumstances a government should be held accountable for specific conducts…or results…relating to an aspect of health'[3]). While law might take priority in describing what relevant human rights standards are, determining how to implement these standards needs experience beyond the law (eg. management, sociology, town planning, public health, politics, and accounting).*[4]

[6] This reinforces the importance of perceiving the legal understanding of human rights standards as *part* - arguably an important part - *but not all* of understanding and assisting a situation in which people are suffering discrimination or maltreatment.

Overview and context of international standards

[7] International law – historically and primarily – is the law about countries. Some of the key international laws relevant to mining-Indigenous interaction are international treaties – binding on those states which have joined them – and 'implemented' through oversight by mechanisms established under each treaty. Thus, the treaty on civil and political rights,[5] and

[2] Dembour identifies four 'schools' of human rights, depicted in the above text and explained further in Dembour 2006, 11 & 232. For other perspectives and ways of understanding human rights, see: Reidy 2006, 237-239; Schulz 2003, 110-119; Nussbaum 2002, 117-118; Taylor 1998, 317-318; Fredman 2008, vii-viii.
[3] Yamin 2008, 8-9.
[4] Southalan 2011, 222.
[5] *ICCPR* (1966).

the treaty on racial discrimination,[6] have provisions relevant to Indigenous rights which impose obligations on the states which have joined those treaties. Each treaty has a monitoring committee, which issues various documents giving greater information and explanation of what that treaty requires.

a) **General comments / recommendation** – which address issues in general, in explaining what states should do in promoting and protecting particular human rights. Most relevant to Indigenous-mining issues are a 1994 comment on protection of culture,[7] and a 1997 recommendation on equality in rights and treatment.[8] These documents explain what the relevant human rights standard entails, particularly how state-parties (those nations which have joined the treaty) should ensure the rights are observed and fulfilled in their nation.

b) **Concluding observations** – written in response to each state's regular report to the committee about their implementation of the treaty. These provide specific direction to the state about action considered necessary to meet the treaty's requirements, and cover all the rights under the treaty. Recent examples, with some material relevant to mining-Indigenous issues, include 2017 observations that Australia should 'take all necessary measures to ensure the legal liability of [Australian] companies ... regarding violations of economic, social and cultural rights by their activities conducted abroad, or resulting from the activities of their subsidiaries or business partners where these companies have failed to exercise due diligence';[9] and 2018 observations that Sweden should 'enshrine the right to free, prior and informed consent into law, in accordance with international standards'.[10] These documents advise each nation what is must specifically do to ensure compliance with that treaty.

c) **'Views on communications'** – which is the committee's decision on a complaint lodged by individuals that a country is in breach of particular obligations under a treaty. This is the most detailed analysis and application of international human rights – adjudging what is required in a particular case. There have been various cases arising from the impact of industrial developments on local communities. Many of these have concerned the impact of mining on Saami people and reindeer herding;[11] while others deal with government grants or legislation impacting Indigenous rights.[12] The key principles from these cases are summarised below. These documents adjudge a state's compliance or breach of specific articles.

d) **Urgent action** – this is not common but, where the treaty permits this, a committee can issue early warning or urgent action in relation to a State's actions or proposals which may contravene obligations under the treaty.[13] This has arisen in relation to Australia

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[6] *ICERD* (1965).
[7] *CCPR GC23 Minorities* (1994).
[8] *CERD GR23 Indigenous Peoples* (1997).
[9] *Concl Obs AUS CESCR* 2017, [14(b)].
[10] Concl Obs SWE CERD 2018, *CPRD GC 7 on participation of persons with disabilities in the implementation and monitoring of the Convention* (2018), [17(a)].
[11] eg. *Länsman -v- FIN* UN doc CCPR/C/52/D/511/1992; *Länsman -v- FIN* UN doc CCPR/C/58/D/671/1995; *Länsman -v- FIN,* UN doc CCPR/C/83/D/1023/2001 and *Ågren -v- SWE* UN doc CERD/C/102/D/54/2013.
[12] eg. *Poma Poma -v- PER* UN doc CCPR/C/95/D/1457/2006 and *Mahuika -v- NZL* UN doc CCPR/C/70/D/547/1993.
[13] CERD 2007.

(concerning amendments to its Indigenous land rights law in 1998, which did not have the effective participation and agreement of the peoples affected).[14]

[8] These documents - the further detail provided by these treaty committees – are essential to understanding the specific requirements of rights which may not always be clear from the original document's wording. Some text in international documents may represent the agreement of those negotiating at the time *on a set of words*, but not necessarily agreement between the parties on underlying concepts or what those words mean. The words may have been a deliberate choice to have some ambiguity and allow different positions to be maintained.[15] I do not have personal knowledge or evidence this occurred with some parts of UNDRIP, but the wording and continued divergence about FPIC suggest this dynamic may exist.

[9] The international human rights law does not demand any specific governmental or economic system.[16] There are different ways by which a nation can meet its human rights obligations, for example sometimes by directly providing the necessary materials/services itself, or by facilitating a system whereby these are provided by others.[17] As the role of the State changes, the way in which human rights are implemented can change.[18]

[10] International human rights law has traditionally been understood and applied as obligations on the state to people *within* the borders of that state. However more recent moves also examine nations responsibilities regarding activities occurring *outside* their borders. Recent treaty body observations in relation to Australia indicate that more attention may arise in this area.

> *The Committee [on the Rights of the Child] is concerned at reports on Australian mining companies´ participation and complicity in serious violations of human rights in countries such as the Democratic Republic of Congo, the Philippines, Indonesia and Fiji…. Furthermore, while acknowledging the existence of a [industry] voluntary code of conduct on a sustainable environment … the Committee notes the inadequacy of this in preventing direct and/or indirect human rights violations by Australian mining enterprises.*
>
> *…the Committee recommends that the State party: (a) Examine and adapt its legislative framework (civil, criminal and administrative) to ensure the legal accountability of Australian companies and their subsidiaries regarding abuses to human rights … committed in the territory of the State party or overseas and establish monitoring mechanisms, investigation, and redress of such abuses, with a view to improving accountability, transparency and prevention of violations;....*[19]

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[14] *CERD dec 2(54) AUS* (1999a) and *CERD dec 2(55) AUS* (1999b) ; these are expanded in the paper below at [17].

[15] A government official involved in the 1992 UN Conference on Environment and Development (which agreed the Rio Declaration, emphasising 'sustainable development') has written on the concept of 'common but differentiated responsibilities' which features in international documents deriving from that conference. She says, 'The Climate Convention ... contains a different formulation of this principle that is purposely ambiguous. I know that from personally negotiating the provision for the United States. There was no agreement among developed countries whether the reason they were to take the first action is that they were historically responsible or that they had more resources. ... So the agreement was written so that it could be argued either way': Biniaz 2002, 362.

[16] Limburg Principles 1986, [6]; see also Alston & Quinn 1987, 181–183.

[17] eg. Norton & Elson 2002, 20 & 22; Harvey & o'rs 2010, 5.

[18] eg. UN 2009, [22] & [27].

[19] *Conclusions: AUS* (2012), [27]-[28]; see to similar effect *CERD AUS conclusions,* (2010), [13].

[11] The International Labour Organisation has a separate convention regarding Indigenous peoples (ILO169),[20] which applies more widely than just labour and employment issues. In relation to States, this remains a significant international instrument[21] particularly for those countries which have joined it and thus bound by its provisions. However, in relation to the standards expected of mining companies, much of ILO169 in relation to land and resources has been overtaken by the 2007 UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**).[22]

[12] In some cases, domestic law will permit an activity which is contrary to international law[23] including contrary to international human rights standards. The domestic law may even have its own rules and procedures (eg. racial discrimination or cultural usufructuary rights) determining what 'complies' with that at the domestic level. Companies need to be aware that compliance with domestic law – even where that may have included procedures for engagement with Indigenous issues and people *and* authorised the company's proposed action – does not necessarily mean consistency with the international standards. This is explained below.

Application to companies

[13] The above summarised the key dynamics of how relevant international standards apply to nations or countries. The traditional way in which international human rights applied to mining companies and operations was through the nation implementing laws and policies to ensure the relevant rights existed within the country and were followed by all parties, including mining companies. Those obligations still exist, but since 2011 there has been a more immediate way in which international human rights are relevant for companies, under the UN Guiding Principles on Business and Human Rights[24] or **UNGP**s.

[14] In a 2019 paper for a Rocky Mountain Mineral Law Foundation conference,[25] I summarised as follows.

> *These [UNGPs] confirm that human rights obligations on (and of) the State remain unchanged[26] but, in addition, each business has a 'responsibility to respect' human rights. And 'human rights' here is defined to include the standards in the 1948 UN Declaration of Human Rights plus the subsequent international human rights treaties deriving from that, and also UNDRIP.[27] This applies even where the particular treaty has not been adopted by the country where the company is*

[20] *ILO 169* (1989).
[21] eg. Courtis 2011 & ILO 2009.
[22] *UNDRIP* (2007)
[23] eg. *Glamis Gold -v- USA (Award)* (2009), [770]; Southalan 2012, 17.
[24] UN 2011 (**UNGPs**).
[25] Southalan 2019.
[26] UNGPs (n24 above), Guiding Principle 1. This confirms the existing international law and structures which oblige states to respect & protect human rights (through laws, policies and measures) and fulfill human rights (ensuring remedies where these human rights are violated); further detail expanded in Guiding Principles 2-10. The obligations arise under existing treaty and UN processes (described in **Overview and context of international standards** of this paper): eg. *Gen Comm 31 CCPR* (2004), [4]-[8]).
[27] UNGPs (n24 above), Guiding Principle 12 and its following Commentary, which explicitly identifies some standards of the UN and the International Labour Organization but also incorporates 'additional standards…depending on the circumstances' which has been understood to include subsequent human rights treaties and declarations: eg. UN 2012, 11-12.

> *operating, or that country's domestic law is inconsistent. That is: if the domestic law permits activities below what is specified by international human rights standards, the company is still expected to respect the international standards.*[28]
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> *The business 'respect' for human rights, required under the Guiding Principles, comprises three elements.*
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> - *The business should adopt a human rights policy, involving a public commitment of the organisation's responsibilities and expectations regarding human rights impacts of its work and workers, reflected in operational policies and procedures.*[29]
> - *The business needs to conduct human rights due diligence of its operations, which involves identifying and preventing potential impacts as well as addressing actual impacts.*[30]
> - *Remediation processes should be established for impacts which have occurred or been identified.*[31]
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> *The UN Guiding Principles are implemented and monitored through different mechanisms. Some aspects are implemented domestic regulation applying to particular companies or sectors, such as France's due-diligence law, modern slavery acts in various countries, and conflict minerals reporting. Other mechanisms include the OECD Guiding Principles on Multinational Enterprises, IFC's Performance Standards, international financiers' and development banks' standards,*[32] *and various sector and company initiatives.*[33] *These all present ways in which extractives operations may be examined for their consistency with UNDRIP (and FPIC).*
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> *The UN Guiding Principles, and further guidance published by the OECD on due-diligence and stakeholder engagement, provide useful ways through which parties can assist Indigenous-mining relations to meet UNDRIP's expectations. Most relevant is the OECD's 2017 Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*[34]*...*

Content of standards concerning Indigenous issues / lands

[15] The above sections summarised *how* the international standards may be relevant to countries and to companies. Equally as important is understanding *the content* of what these legal standards require. In a current work, being co-authored Håkan Tarras Wahlberg and myself, we have summarised the standards as follows.

> *The relevant principles from these decisions [of treaty committees] are these.*

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[28] UNGPs (n24 above), Guiding Principle 23.
[29] UNGPs (n24 above), Guiding Principle 16.
[30] UNGPs (n24 above), Guiding Principle 17-21.
[31] UNGPs (n24 above) note 57, Guiding Principles 13 (distinguishing between the three instances of cause, contribute and linkage through a business relationship), 22 & 31.
[32] eg. the *Equator Principles* (of private financiers): EP4 2019, preambular para [2], Principle 2 and Exhibit I & II; and the governance/lending procedures of the FMO 2017, 2.3.2.
[33] eg. RSPO 2013 (palm oil); ICoC 2010 (security providers); RJC 2019 (responsible jewellery); ISO 2010 (standards on social responsibility).
[34] OECD 2017.

- *The protected cultural rights will be breached if a development threatens the way of life and culture of an Indigenous group[35] or has impacts which amount to a denial of the right.[36] That impact may result from the combined effects of actions or measures over a period of time and in more than one area, making it necessary to consider the overall effects of any measures on the ability of the indigenous people concerned to continue to enjoy their culture.[37]*
- *It is a breach to endanger the very survival of the community and its members.[38]. However measures that have limited impact on the way of life and the livelihood of indigenous persons will not necessarily constitute a breach.[39]. The question is whether the impact is so substantial that it does effectively deny the right to enjoy their cultural rights in that region.[40]*
- *Where an individual disputes measures adopted for the preservation and well-being of group as a whole (e.g. about various activities), those measure will not breach cultural human rights where the objectives and measures are reasonable.[41]*
- *The acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures.[42]*
- *Opportunity to participate involves more than just consultation and, 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'.[43]*

... Our understanding of the current international law is this. The promotion and protection of indigenous human rights have increased over time. Despite some uncertainty and disagreement about FPIC's application at its extremes, there are some generally-accepted basics. There is an emphasis on the process (consultation and its objective) not always an outcome (consent). There is, currently, an expectation that consent should be sought before any measures which may impact indigenous people. But, if that consent does not exist, a human rights breach only arises where the measure significantly impacts the Indigenous group's property or cultural rights. Failure to even attempt to reach consent has been identified as a human rights breach, but only in cases where there was also significant impact.[44] There is no precedent of a case adjudging a breach of human rights where there was failure to attempt to reach consent and the measure had only limited impact.

Australian developments

[16] In my 2019 paper for the Rocky Mountain Mineral Law Foundation, I summarised Australia's national Indigenous law as follows.

[35] *Ominayak -v- CAN* UN doc CCPR/C/38/D/167/1984, [33].
[36] *Länsman -v- FIN* UN doc CCPR/C/58/D/671/1995, [10.3].
[37] *Länsman -v- FIN,* UN doc CCPR/C/83/D/1023/2001, [10.2].
[38] *Poma Poma -v- PER* UN doc CCPR/C/95/D/1457/2006, [7.6].
[39] *Länsman -v- FIN* UN doc CCPR/C/52/D/511/1992, [9.4].
[40] *Länsman -v- FIN* UN doc CCPR/C/52/D/511/1992, [9.5].
[41] *Kitok -v- SWE* UN doc CCPR/C/33/D/197/1985, 9.8.
[42] *Mahuika -v- NZL* UN doc CCPR/C/70/D/547/1993, [9.5].
[43] *Poma Poma -v- PER* UN doc CCPR/C/95/D/1457/2006, [7.6].
[44] eg. *Poma Poma -v- PER* UN doc CCPR/C/95/D/1457/2006, *Ågren -v- SWE* UN doc CERD/C/102/D/54/2013.

The Native Title Act[45] is, inevitably, complex legislation. It was enacted after nearly two centuries of Australia's laws ignoring Indigenous connections to land, and - while it is a national law - also has to accommodate the grant and management of land and resources rights which are the constitutional responsibility of sub-national governments (Australia's State and Territory parliaments and governments). When introduced to parliament, the Native Title Act was described by BHP's then CEO as 'like reading porridge'.[46] The law is labyrinthine but some basics can be summarised for an international audience, making generalisations which overlook the intracacies. The following eight points are extracted from a recent article (in the Journal of Energy and Natural Resources Law) co-written with Joe Fardin.[47]

1) *Native title is the Australian legal system's recognition of some traditional/cultural rights of each 'group' of Indigenous people[48] to their land or waters. It can therefore entail different rights in different places (ranging from rights similar to freehold in some places, through to a 'mere' right to access in others) and is also subject to 'extinguishment' from various government actions. While the Native Title Act includes the possibility of native title being held by an individual, it has only been recognised as a group or community right.*

2) *There is no fixed definition of what 'native title' entails under Australian law, and thus what rights are regulated by the Native Title Act. The statute defines 'native title' as 'the ... rights and interests of [Indigenous] peoples ...in relation to land or waters, [which] are possessed under the [peoples'] traditional laws acknowledged, and the traditional customs observed, [which laws/customs] have a connection with the land or waters'.[49] But that is essentially wording the legislature copied (without further explication) from the High Court decision of 1992.[50] Ten years later, when the issue returned to the High Court, the majority decision read this definition narrowly, saying 'In so far as claims to protection of cultural knowledge go beyond denial or control of access to land or waters, they are not [native title] rights protected by the NTA [Native Title Act]'.[51] Another decade later, a different High Court majority took a wider approach, emphasising: 'It is especially important not to confine the understanding of rights and interests which have their origin in traditional laws and customs to the common lawyer's one-dimensional view of property as control over access'.[52] The upshot is that, while 'native title' may encompass broader rights, at a minimum it entails protection against government and third-party impacts on Indigenous rights of land use and access.[53]*

3) *When an Indigenous group first commences legal proceedings, seeking formal recognition and protection of their native title rights, their claim is assessed by a*

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[45] *Native Title Act 1993*.
[46] Burton & Smith 1993.
[47] Southalan & Fardin 2019.
[48] Australia's Indigenous population is broadly either Torres Strait Islander – from the seas off northern Australia – or Aboriginal from the 'mainland', but within these there are hundreds of different languages and groupings.
[49] *Native Title Act 1993*, 223.
[50] *Mabo -v- Queensland* [1992] HCA 23, [83] (p70).
[51] *WA -v- Ward* [2000] FCA 191, [468(7)] & [59].
[52] *WA -v- Brown* [2014] HCA 8, [36].
[53] The Native Title Act says 'Native title is not able to be extinguished contrary to this Act' (s11) and also provides that if a proposed grant of title (which would affect native title) does not follow the procedures then that action 'is invalid to the extent that it affects native title': s24OA.

Tribunal (established by the Native Title Act).[54] If there is prima facie material supporting the claim, the Tribunal registers the claim,[55] and the group is termed native title 'claimants' or 'claim group'.

4) *The legal proceedings then progress in Australia's Federal Court system,[56] usually taking many years to compile and present the relevant material. If the Court decides (or the government and all other parties involved agree) that the claim group has proved their connection, then the Court will issue a 'native title' determination. This determination will formally recognise and describe the native title rights which exist,[57] including the areas involved and the persons who have those native title rights.[58] These people are then termed 'native title holders'. The Court's determination is not creating new rights, but rather giving formal recognition and protection to some of the existing Indigenous norms regarding that land.[59]*

5) *When the Court has made a determination of native title, the 'native title holders' must nominate an Aboriginal Corporation which then represents them in dealings with other parties.[60]*

6) *The Native Title Act specifies many procedures and requirements where a government (or other parties) propose an action that may affect native title rights. If the procedures are not followed, before the action occurs, the action is invalid in relation to native title.[61] These procedures and requirements apply regardless of whether, at the time, the relevant Indigenous people are 'claimants', 'holders', or represented by an Aboriginal Corporation. That is: these protective procedures must be followed whether the native title rights are only claimed (but have been registered by the Tribunal) or have been determined (ie. recorded as proven and extant by a Court).[62] For the remainder of this paper, I will use the term 'native title group' to cover both 'native title holders' (ie. after the court's recognition) and 'native title claim group' (before a court determination) because many of the laws and procedures are identical.*

7) *The Native Title Act has not legislated FPIC[63] (whether understood by UNDRIP, ILO 169, or other standards). Rather, it has enacted an enforceable procedure of notification and*

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[54] Native Title Act, s190A. The full name of the tribunal is the 'National Native Title Tribunal' (established under s107) and some of its functions are undertaken by the Native Title Registrar (s75).

[55] Native Title Act, s190A(6) which involves the Tribunal being satisfied regarding the merits of the claim (s190B) and that relevant procedures have been followed (s190C).

[56] Proceedings usually take many years – sometimes more than ten – for all the parties and evidence to be collated and presented.

[57] The determination is not creating new rights but rather recognising and recording existing rights which the law deems to have always existed: eg. *Gepp-Kennedy (Dieri People) -v- SA* [2017] FCA 1156, [8].

[58] The rights may be as limited as entitlement to access an area for hunting, or as extensive as exclusive possession. Hence, the mere fact of 'native title' rights or a 'native title determination' in an area tells little about what those rights may be – that information can only be learnt from examining the specific determination and rights recognised.

[59] eg. *Yorta Yorta -v- VIC* [2002] HCA 58, [45] & [75]-[77].

[60] Native Title Act, ss 55-57. The bodies are more formally known as 'Registered Native Title Body Corporate' (ss 57 & 263) but, for this article, they will be referred to as 'Aboriginal Corporation'.

[61] Native Title Act, ss24OA, 25(4) & 28; *Burragubba -v- Queensland* [2017] FCAFC 133, [4].

[62] eg. Native Title Act ss30-31 (definition and rights of 'native title party' include claimants and holders); *Western Desert Aboriginal Corp -v- WA* [2008] NNTTA 22, [23].

[63] Various aspects of FPIC (envisaged by UNDRIP articles 28 & 32) are absent from the NTA's regime, including redress wherever traditional lands were taken without their FPIC, the group's right to set priorities and strategies (which other parties must follow) about their land use, and the agreement/consent issues described in the text in the following paragraphs. There is a closer legal arrangement to FPIC in one of Australia's sub-national jurisdictions – the Northern Territory – where the Aboriginal Land Rights Act requires consent before grant (*ALR Act*, s46(4)) but that is not a

negotiation. The Native Title Act provides native title groups with a 'right to negotiate', requiring proponents of developments which will affect native title to negotiate with the relevant native title group(s).[64] The company and government must negotiate for six months 'in good faith' and if, after six months, no agreement is reached then any party can ask the Tribunal to arbitrate.[65] The Tribunal has specified criteria for its assessment and decision (which specifically exclude any decision about payment from the use of the land),[66] and only has three permitted outcomes it can order: the proposal can proceed, proceed with conditions, or cannot occur.[67] The native title group has no 'right of veto';[68] and, if no agreement is reached, the Tribunal almost always rules the proposed development can occur.[69] However the Tribunal has rejected various proposals where the company or government did not negotiate in good faith.[70] In only two decisions (over twenty years) has the Tribunal ruled that a proposal cannot occur because of impacts on the native title group,[71][101] and once because of impropriety of the company's actions.[72][102]

8) *Many extractives operations which are large or long-life have negotiated and reached agreements with native title groups affected by their operations. This is even where the Native Title Act does not formally require this (eg. because the operations began before the Native Title Act commenced, or where the company could enforce a more restricted outcome through the Tribunal process). The company and native title group(s) use the procedures within the Native Title Act to identify and structure the relevant impacts and benefits, which can then be registered and protected through an agreement under the Native Title Act.*

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national law. Some Australian court decisions do use the phrase 'freely informed agreement' in their reasons in a 'consent' decision recognising native title (ie. where the Government, and all relevant stakeholders who could be affected, have agreed to the terms of the native title rights being recognised in a court order): eg. *Freddie -v- NT* [2017] FCA 867, [18]. However this wording is used as a descriptive comment and not as some relevant criterion which the Court requires. It appears to be wording aimed at Australian evidentiary law, explaining why the Court is not required to examine every detail of the Indigenous case but can rely on the native title group's agreement to the proposed determination, and the government's assessment of the relevant material, eg. *Lovett (Gunditjmara People) -v- VIC* [2007] FCA 474, [35]-[38] and *Far West Coast Claim -v- SA (No 7)* [2013] FCA 1285, [18]-[21].

[64] This is a generalisation, as some activities which are deemed to have less impact have lesser procedural rights and do not involve a right to negotiate (eg. requiring only notice, consultation or comment). The 'right to negotiate' system is contained in the Native Title Act, ss25-44.

[65] Native Title Act, ss 31 (negotiation procedure), and 35-36 (minimum of six months' good faith negotiation). The 'good faith' obligation continues if the negotiation progresses beyond six months: *Charles (Mount Jowlaenga Polygon # 2) -v- Sheffield Resources* [2017] FCAFC 218, [1] & [59]-[60].

[66] Native Title Act, ss39 (Criteria for making arbitral body determinations) & 38(2) (prohibition on Tribunal deciding payments arising from use of land).

[67] Native Title Act, s38(1) (Tribunal's powers to decide to allow or refuse).

[68] *AGL Loy Yang -v- Gunaikurnai Land & Waters Corp* [2015] NNTTA 50, [9]-[10]

[69] Corbett & O'Faircheallaigh 2006, 155. Note Tribunal employees reject those criticisms in Sumner & Wright 2009

[70] The 'indicia' of good faith negotiation are summarised in *Strickland (Maduwongga People) -v- WA* [1998] FCA 868, pp312-314, and if these are not met the Tribunal cannot approve the development to proceed: Native Title Act, s36(2) with examples including *WA -v- Taylor (Njamal people)* [1996] NNTTA 34 (government had not negotiated in good faith) and *Muccan Minerals -v-Taylor (Njamal People)* [2016] NNTTA 28, [103]-[112] (company had not negotiated in good faith).

[71] The only two cases are *Holocene Pty Ltd -v- Western Desert Aboriginal Corp (Jamukurnu - Yapalikunu)* [2009] NNTTA 49, [216] (the group's wishes should be given greater weight than the potential economic benefit and public interest of the proposal) and *Weld Range Metals -v- Simpson* [2011] NNTTA 172, [344] (the area was of such significance to the group that mining should only be permitted with their agreement).

[72] *Seven Star Investments -v- Freddie (Wiluna)* [2011] NNTTA 53[2011] NNTTA 53, [119] (not in public interest to grant an exploration title because the company's proposals had no 'rational or scientific basis' and there was an irretrievable breakdown in relations with the group)

[17] Relevant to international law, it may be of interest to know four aspects within significant 1998 amendments to the *Native Title Act 1993* were ruled in breach of treaties on racial discrimination and civil and political rights.[73] The issue is the lack of agreement, given the considerable impact of these four aspects.[74] No amendments have been made to those four aspects, and that inconsistency has been repeatedly identified as an area where Australian law falls below the international standards.[75] This makes it an important area for resources companies operating in Australia to be aware of, as it has been clearly flagged where aspects of the Australian law does not meet the relevant international standards. Through the use of agreements with groups, concerning the mining operations, companies can ensure they are meeting any shortfall in the local law.[76]

[18] A significant recent development in mining-Indigenous issues in Australia was the destruction of Indigenous heritage sites (of the Kurrama people) by Rio Tinto as part of blasting to expand an iron ore mine in Australia's north west.[77] The region is an area of high mineral prospectivity and Indigenous significance. Many mining companies have agreements with Indigenous groups, beyond what Australian law requires. Rio Tinto had (and has) an agreement with (Puutu Kurnti) Kurrama People about mining operations.[78] The company obtained permission from WA Government to damage the Indigenous heritage, which has been a common process in Western Australia for many mining companies and government agencies doing work in areas with Indigenous sites.[79] After the agreement was made, and Government permission obtained, more information learnt about the significance of Juukan Gorge. The extent of knowledge and decisions *within* Rio Tinto and the WA Government is not publicly known, but the blasting went ahead. The reaction has been considerable, and a national inquiry commenced in Australia's Parliament. The inquiry continues, and issued an interim report in December 2020, including the following statement.

> *The extremely low bar of protections offered by legislation has meant that the best option for heritage protection available to most Traditional Owners is the agreements they can make with companies. However, the nature of Native Title and the legal framework surrounding it means that these agreements are not between parties of equal power. In effect, agreements are offered on a take-it or leave-it basis by the mining companies, and failure to accept terms means effective exclusion from the benefits—royalties, training, employment, commercial engagement—which flow from these agreements. Most agreements have contained 'gag' clauses, which have prevented Traditional Owners from taking legal action or voicing their concerns to prevent the destruction of heritage. Indeed, once signed, the agreements often require consent to the destruction of heritage.*[80]

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[73] *CERD dec 2(54) AUS* (1999a), 6-8; *Conclusions: AUS* (2000), [498]-[528].
[74] The Act's "validation" provisions, the "confirmation of extinguishment" provisions, the "primary production up-grade" provisions, and restrictions concerning the right of Indigenous title holders to negotiate non-Indigenous land uses.
[75] eg. *Conclusions: AUS* (2009), [16]; and *Conclusions: AUS* (2010), [18].
[76] See Southalan 2016, 902
[77] Note the author, John Southalan, was a land-council lawyer in 2000-2001 and assisted the Puutu Kunti Kurrama People and Pinikura People begin a native title claim; and, from 2007-2010, he was the Rio Tinto Research / Teaching Fellow at Dundee University. In neither role, did he have any involvement nor knowledge regarding the agreements between the company and the Aboriginal groups, which were entered in 2011. The contents of this paper are written entirely from publicly available material, which has been identified.
[78] Rio Tinto 2020, [35].
[79] See Southalan 2020.
[80] AUS Plmnt 2020, 1.11.

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