

# **The United Nations Declaration on the Rights of Indigenous Peoples Application in Australia**

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## **Colonisation of Australia**

The nation of Australia has a distinct, unique history regarding the colonisation of the lands, territories and resources of the Aboriginal and Torres Strait Islander Peoples.

The British Government undertook to possess the territories of Australia in the latter half of the eighteenth century. It was a late stage of world imperialism by European powers, and the taking of possession gave no due regard to the First Nations that existed for over 60,000 years.

The British claim to possess Australia immediately followed the American Revolutionary War, as British interests in north America then turned attention to the continent of Australia.

The British claim to possession of Australia disregarded the First Nations of Australia. Colonisation proceeded without treaties with the indigenous populations and acts of genocide proceeded unchecked as free settlement was encouraged. Six British colonies were established, with each colony adopting their own policies to deal with the indigenous populations.

In 1900 the British legislated to provide independence for the Australian colonists and a year later the Australian parliament was formed by adoption of a Constitution which united the six British colonies into the nation of Australia.

The Constitution of Australia did not acknowledge any system of government or laws belonging to the First Nations, prevented the First Nations population from integration in the Australian nation and assumed all lands, territories and resources belonged to the Crown.

The Aboriginal and Torres Strait Islander population of Australia is considered to be the oldest continuing civilisation in the world, extending over a period in excess of 60,000 years. The indigenous population is known to be 'peoples', distinct from the peoples taking control of the territories and resources since 1788.

The nature and scope of ownership and control of lands, territories and resources in Australia, as held by the Aboriginal and Torres Strait Islander Peoples for 60,000 years, is unrecognised and undefined in modern political and legal terms, due to singular rights claimed under the Constitution of Australia, British imperialism and the contemporary international law.

Despite recent judgements, such as the High Court decisions in the 'Mabo' and 'Wik' cases, the Australian legal system is unable to reach back into pre-colonial times and find legal validation applicable to the First Nations. The only legal basis for First Nations historical rights in Australia lies in the Australian Common Law, applicable after 1901. The Australian

Constitution is lacking in ensuring equality and protection from racial discrimination for the First Nations.

The protection of First Nations' interests must be found in modern human rights law. Much of the human rights law has been developed at the international level and Australia has been a strong supporter of the international human rights system, following the outcome of World War 2. Australia has ratified the majority of international human rights treaties, excepting the treaties applying to migrant workers, and applying to enforced disappearances.

However the Constitution of Australia does not incorporate protections for the Indigenous Peoples through human rights laws. Such protections are only provided by relevant legislation adopted by the parliament. The Australian Parliament has been reluctant over the past 120 years to define suitable protections for the Aboriginal and Torres Strait Islander Peoples, and has experienced significant debate in giving recognition to inherent rights belonging to First Nations.

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## Aboriginal Rights to Self-Determination

While a number of treaties provide adequate promotion and protection for human rights pertaining to Indigenous populations there has been, until recent years, inadequate interpretation of the human rights of Indigenous 'Peoples', i.e. recognition of the status as peoples within the meaning of international law. Following, it is no surprise the implementation of these human rights treaties, worldwide and in Australia, has in many instance overlooked the status and roles of Indigenous Peoples, by ignoring the collective right of peoples to self-determination.

In 2007 the UN General Assembly adopted the Declaration on the rights of Indigenous Peoples. In reaching this human rights standard the United Nations has accepted that Indigenous Peoples have the right of self-determination equal to all other peoples of the world. This is a significant development in the human rights framework, established and expanded since World War 2.

The right to self-determination is confirmed and defined in the two covenants; the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. It is embodied in the UN Charter and is protected from racial discriminatory interpretations by the International Convention on the Elimination of All Forms of Racial Discrimination.

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

*Article 1.1, International Covenant on Civil and Political Rights*

Perhaps the most overlooked aspect of self-determination is the associated right to resources for development. While historical policies in Australia have centred upon the assimilation of the Aboriginal and Torres Strait Islander population - policies that still are applied in the

modern era - the fundamental elements of self-determination are the availability of lands, territories and resources to aid development.

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

*Article 1.2, International Covenant on Civil and Political Rights*

It should be noted that the Declaration on the rights of Indigenous Peoples is not a standard that identifies new or different human rights to all other peoples and individuals in the world. The Declaration is a standard that has been identified and articulated because Indigenous Peoples have been historically those rights throughout history, modern civil and political developments in law, and in subjugation from dominant societies.

Indigenous Peoples have ancient and continuing connection with their lands territories and resources, despite the establishment of State control over their lands, territories and resources, and often through racially discriminatory laws, programs and policies intended to segregate and manage their lives to the convenience of economic development by the State and vested interests.

The Declaration, as an entire document, represents the way in which self-determination by Indigenous Peoples can be expressed and exercised. It is a standard setting out the components necessary to empower communities and to foster their development, free from racial discrimination and inequality.

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## Is The Declaration An Aspirational Document?

Some people are dismissive of the Declaration on the Rights of Indigenous Peoples, arguing that the Declaration has no legal effect and is aspirational. This argument arises from time to time in Australia, and has been used by political interests and juridical institutions to dismiss any legal interpretation or effect of the Declaration.

However there are a number of reasons why this view of the Declaration should not have any standing in Australia. The first of these reasons is that the Aboriginal and Torres Strait Islander Peoples and individuals hold these human rights, regardless of the legal rulings of the Australian courts or the political machinations. These rights exist and cannot be removed by any authority. They can only be conceded by the individual or collective rights holders.

So, in truth, the rights to self-determination and development cannot be taken by the State or any authority. The rights can only be oppressed or manipulated, and that can only happen through discrimination, unequal treatment and oppression.

Also the nature of human rights needs to be understood. Under the global governance system held up by the United Nations human rights are universal and inalienable.

The principle of universality of human rights is the cornerstone of international human rights law. This means that we are all equally entitled to our human rights. Human rights are inalienable. They should not be taken away, except in specific situations and according to due process.

All human rights are indivisible and interdependent. This means that one set of rights cannot be enjoyed fully without the other. For example, making progress in civil and political rights makes it easier to exercise economic, social and cultural rights.

Article 1 of the UDHR states: "All human beings are born free and equal in dignity and rights." Freedom from discrimination, set out in Article 2 of the UDHR, is what ensures this equality.

Non-discrimination cuts across all international human rights law. This principle is present in all major human rights treaties. It also provides the central theme of 2 core instruments: the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination against Women.

Each year the UN Secretary General submits a report to the UN General Assembly entitled "The rights of peoples to self-determination". In this report the Secretary General comments on the exercise of self-determination, including updates on the right of Indigenous Peoples to self-determination.

FAIRA states that it is wrong for the Australian Government to ignore the human rights of the Aboriginal and Torres Strait Islander Peoples, but it is even more a breach of Australia's sacred duty to fail to promote and protect the self-determination of the First Nations of Australia.

**The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.**

*Article 1.3, International Covenant on Civil and Political Rights*

The constitutional and legal restraints on the Australian courts to prevent recognition of pre-colonial laws, laws which may have been established and observed by the First Nations, and to dismiss international law and human rights treaty obligations unless they have been legislated into Australian law by the parliament, is a manifest breach of obligations to rights and wellbeing of the Aboriginal and Torres Strait Islander Peoples.

FAIRA asserts that the Declaration on the Rights of Indigenous Peoples should be legislated into Australian law without delay. To do otherwise is to condone and continue a major breach of human rights, and action to perpetuate a hostile act of racial discrimination against the First Peoples.

## **The international experience of implementing the UNDRIP**

The situation of Indigenous Peoples did not gain attention within the United Nations until the early 1980s, when a Working Group on Indigenous Populations was created under the Sub-Commission on the Promotion and Protection of Human Rights. A report was also sought on the situation of Indigenous Populations around the world. This was the Cobo Report which sets out the locations of Indigenous Populations and their characteristics and status.

Delegations from Indigenous populations around the world began to appear at the United Nations, to follow the work of the Working Group on Indigenous Populations. The Working Group created a draft Declaration based upon the evidence and information provided by the delegations of Indigenous Peoples. This draft was later taken on by a designated Working Group engaging member States of the UN, and accredited delegates from Indigenous People.

The original versions of the draft Declaration had sections to deal with category of rights. These were:

- PART I (general principles)
- PART II (life, integrity and security)
- PART III (culture, religious and linguistic identity)
- PART IV (education and public information)
- PART V (economic and social rights)
- PART VI (land and resources)
- PART VII (indigenous institutions)
- PART VIII (implementation)
- PART IX (general provisions)

The sections later disappeared in the later stages of drafting, as articles were combined or moved around within the draft declaration. However the sections give clear indication that the rights under consideration were considered to be collective rights held by peoples and not drafted to indicate individual human rights as may be defined in the Universal Declaration on Human Rights.

It took a number of years and many drafting sessions to approach a consensus on the wording of the draft declaration. The final result reflected the amount of attention given to each article by the States and the delegates of Indigenous Peoples. By 2006 the Draft Declaration was ready for adoption, having gained consensus from the States and the Indigenous Peoples delegations.

However, at the critical time for adoption of the Draft Declaration at the Human Rights Council, in 1996, the government of Canada, which had provided much leadership in the debate of the Declaration, withdrew its support for the document, causing a vote to be taken instead of adoption by consensus. The Draft Declaration was easily supported in the vote - Indigenous Peoples' delegations could not vote - and the document was sent to the UN General Assembly for final endorsement.

At UN Headquarters in New York the Declaration did not go forward for adoption for nearly a year, as some States sought to re-examine the document, and make some changes before final adoption. The Indigenous Peoples delegations accepted the minor changes and agreed the

vote on the Declaration should proceed. On 13 September, the General Assembly voted to adopt the Declaration by 144 votes in favour and four votes against.

Canada, Australia, New Zealand and USA each voted against adoption of the UN Declaration on the Rights of Indigenous Peoples. This negative attitude was a surprise to many States but the CNAZUS group have each changed their position since the vote was taken, and are now in support of the Declaration.

The reasons given for opposing the Declaration were mostly centred around the concern for self-determination, in the mistaken belief that self-determination carried a right to secession. This is incorrect as there is no human right provision which authorises succession.

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## Implementation of the Declaration

The the Declaration became official there was a wide call from States, Indigenous Peoples and the United Nations. For States and Indigenous Peoples to form partnerships to promote and protect the rights of Indigenous Peoples. Under Article 42 the implementation of the Declaration was to be promoted and monitored by the UN Permanent Forum on Indigenous Issues in particular, and by other specialised UN agencies in general.

Subsequently in its report E/2009/43, the Permanent Forum on Indigenous Issues includes a General Comment as an Annex to its report, addressing the implementation of the Declaration. In the General Comment the Permanent Forum considers the legal character of the Declaration in Paras 6 - 13.

The General Comment states the Declaration is the most universal, comprehensive and fundamental instrument on Indigenous Peoples rights and the binding value of the Declaration "must be seen in the wider normative context of the innovations that have taken place in international human rights law in recent years".

The Declaration forms a part of universal human rights law. The basic principles of the Declaration are identical to those of the main human rights covenants. In this way the Declaration affirms, in its article 3, the right of indigenous peoples to self-determination, in terms that restate the common provisions of article 1 of the two 1966 international covenants. The human rights treaty bodies will need to refer to the Declaration, as their practice already indicates, whenever dealing with indigenous rights.

The UN General Assembly decided to convene a World Conference on Indigenous Peoples in 2014 to follow-up the implementation of the Declaration within the member States. The

World Conference is conducted as a “high-level plenary meeting” of the General Assembly and has the purpose to promote implementation of international agendas for equality and justice.

In preparation for the World Conference Indigenous Peoples convened and participated in the Indigenous Peoples World Conference in Alta, Norway, to be known thereafter as the Alta Conference. The conference adopted the Alta Outcome Document as its major input to the UN World Conference. The Alta Outcome Document consists of recommendations for adoption by the United Nations, and is regarded as the input provided by the Indigenous Peoples of the World.

The UN World Conference on Indigenous Peoples met for two days and on 22 September 2014 adopted the WCIP Outcome Document by resolution - A/RES/69/2. This resolution is as important as the Declaration on the rights of Indigenous Peoples because it is prepared as an action document for States to commit to the rights of Indigenous Peoples.

3. We reaffirm our support for the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on 13 September 2007, and our commitments made in this respect to 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, in accordance with the applicable principles of the Declaration ....

8. We commit ourselves to cooperating with indigenous peoples, through their own representative institutions, to develop and implement national action plans, strategies or other measures, where relevant, to achieve the ends of the Declaration.

*A/RES/69/2 = Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*

The Outcome Document of the WCIP was adopted by consensus at the General Assembly.

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## Ratification of ILO Convention No. 169

In 1989, the International Labour Organisation adopted the Indigenous and Tribal Peoples Convention No. 169 to promote and protect indigenous peoples' rights.

The Convention has been ratified by 23 countries - Argentina, Bolivia (Plurinational State of), Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji,

Germany, Guatemala, Honduras, Luxembourg, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, Venezuela (Bolivarian Republic of).

The UN has called upon all States, including Australia, to ratify the ILO Convention. The resolution occurs at least once each year at the various levels of the UN. It may be advantageous to ratify the convention but some discussion should be held beforehand to see if the Aboriginal and Torres Strait Islander Peoples consider the convention to be beneficial to their interests. There is no obvious reason why this convention, and existing treaty on the rights of Indigenous Peoples, should not be ratified.

## **Options to improve adherence to the principles of UNDRIP in Australia**

By far the greatest impediment to the Enjoyment of rights and freedoms in Australia is the lack of support and infrastructure at the community level, within the community and under community control.

The past 50 years has seen the rise and fall of community development as the political winds of national and State / Territory governments tear apart the fabric of community organisation and leadership. In contemporary times, more that ever, it is obvious that governments are controlling the lives of the Aboriginal and Torres Strait Islander population through remote handling and ill-defined policies and practices.

Community -controlled organisations are no longer community controlled and the administration of the essential services to communities are tied to government terms and conditions which have negative impacts. The voices of change and advocacy organisations are at best, weakened and at worst, dismantled and bereft of resources.

In Australia the Aboriginal and Torres Strait Islander Peoples are without local and national representation because the government refuses to provide financial resources to communities. Those resources are essential to community organisation and development.

The Aboriginal and Torres Strait Islander Peoples are without national representation, and anything that looks like self-determination. The Labor Government should take responsibility for the collapse of the National Congress of Australia's First Peoples, as much as the Coalition Government which withdrew funding to the National Congress. While the Coalition withdrew the support, the Labor Government failed to offer the protections needed for Congress to withstand hostility and lack of support or encouragement from the political opponents to self-determination.

FAIRA can vouch that Aboriginal and Torres Strait Islander self-determination in Australia will not achieve success at the community level until the community is protected from political infringements upon their rights.

The Declaration on the rights of Indigenous Peoples should be implemented immediately into Australian law and at the same time there should be actions taken to establish the structures identified in Articles 27, 32 and 40. These structures relate to adjudication of disputes and provision of remedies for infringement of rights.



States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 27

1 Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2 States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3 States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 32

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 40

## **How implementation of the Uluru Statement from the Heart can support the application of the UNDRIP**

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### **Current Government Policy**

Current policy of the Government of Australia is to fully implement the provisions of the “Statement From The Heart” adopted in May 2017 at the First Nations Constitutional Convention at Uluru, Australia.

The statement is promoted to the public with the following text.

In 2016 and 2017, the Referendum Council led a series of Regional Dialogues to discuss options for constitutional recognition with First Nations people from all corners of the country. The purpose of these First Nations Regional Dialogues was to ensure that Aboriginal decision making was at the heart of the process. The stories that were recounted in those Dialogues were collated, and, along with the Records of Meetings, read to the First Nations Constitutional Convention at Uluru in May 2017, as “Our Story”. The Convention endorsed the work of the Dialogues and issued the Uluru Statement from the Heart to the Australian people.

The Referendum Council infers that the statement is derived from regional dialogues to discuss options for constitutional recognition and, according to the above statement, the purpose of the regional dialogues was to ensure that Aboriginal decision-making was at the heart of the process.

However the Referendum Council claims “The Convention endorsed the work of the Dialogues and issued the Uluru Statement from the Heart to the Australian people.” This statement was not formulated in regional dialogues nor prepared by the convention participants. It had been drafted by a small select committee, to be released unchanged as the output of the convention.

The delegates to the convention were called upon to endorse the prepared statement for release to the “Australian people”. In doing so the delegates were not asked to consider implementation of the Declaration. Rather the design of the statement from the First Nations Constitutional Convention was to follow a pre-determined course, set by the Referendum Council, for vague change to the constitution by referendum.

At no time were the dialogues or the convention called upon to consider the Declaration.

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## Relevance to Human Rights of Indigenous Peoples

The Statement From The Heart does not attempt to equate to the UN Declaration on the Rights of Indigenous Peoples.

It is not possible to find reference from within the Statement From The Heart to a particular provisions of the Declaration. Perhaps a parallel exists in the reference to sovereignty,

This sovereignty is a spiritual notion: the ancestral tie between the land, or ‘mother nature’, and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia’s nationhood.

It might be considered that the statement is an assertion of self-determination, as identified in Article 3 of the Declaration, but this is subject to interpretation.

The call for a constitutional Voice to Parliament is defined in just one sentence.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

There is no further elaboration, just an expression of hope that a constitutional voice will empower the Aboriginal and Torres Strait Islander people, “where the destiny of our children will flourish and they will walk in two worlds”. This anticipation, or expectation, has no grounding or basis for change. There would need to be much more specific detail and commitment to deliver such changes, and the political and legal history of Australia does not provide the evidence that change will occur as a result of the anticipated change likely to be made to the constitution.

The Statement From The Heart also calls for a procedure to make agreements between the government and the Aboriginal and Torres Strait Islander Peoples.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

The Makarrata Commission is not under consideration for a referendum intended to change the constitution. It is a call for a commission typically established under legislation of the parliament. A Makarrata Commission can be implemented immediately if government decides to take such action and the structure and terms are decided.

The proposed Commission can be linked with Articles 27, 32 and 40 which address adjudication of disputes between States, or other parties, and Indigenous Peoples. Given the lack of information provided in the Statement From The Heart or government policy it is not clear whether these Articles will be considered or incorporated.

The Commission is proposed to “supervise a process of agreement-making between governments and First Nations”. This function would possibly facilitate the function of self-determination by the Aboriginal and Torres Strait Islander Peoples, as addressed in Articles 3, 4 and 5, of the Declaration should the Peoples exercise and enjoy self-government

The Makarrata Commission also may be committed to actions consistent with Outcome Document of the World Conference on Indigenous Peoples, as per Paragraphs 3, 7 and 8.

FAIRA recommends that the government consider in consultation with the Aboriginal and Torres Strait Islander Peoples the establishment of a Makarrata Commission as soon as reasonably possible.