Australian National University

THE APPLICATION OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP) IN AUSTRALIA:

Supplementary submission by the ANU First Nations Portfolio – responding to questions on notice

We thank the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs for the opportunity to provide a supplementary submission, responding to further questions related to the application of UNDRIP in Australia.

The below responses to questions raised by the Committee are intended to be complementary to our original submission and to responses Professor Peter Yu and Thomas Snowdon provided at the Committee hearing on 10 March 2023. The responses below are not exhaustive and we have attempted to keep them concise. We note that some of the matters addressed below have been covered in our original submission. Where there is overlap, we direct the Committee to that submission.

Supplementary questions raised by the Committee:

1. How would the implementation of UNDRIP inform Treaty negotiations?

The UNDRIP can be used as a minimum standard for treaty processes and negotiations, and for the content of treaties.

Consistent with Indigenous peoples' right to self-determination, any framework and process established to facilitate prospective treaty negotiations needs to be developed in partnership with Indigenous peoples. It would be inappropriate and against the spirit of treaty-making and the purpose and contents of the UNDRIP for governments to engage in treaty-making in ways that do not reflect the interests, aspirations and rights of Indigenous peoples. This includes deciding on a process for negotiating treaties without securing agreement with Indigenous peoples.

It is therefore unclear how a national treaty-making process will take shape. However, the federal government's commitment to implementing the Uluru Statement from the Heart in full means creating a Makarrata Commission and committing to a process of agreement-making that its authors have confirmed includes treaty-making. Designing and establishing a Makarrata Commission with effective scope, powers and functions will be a critical first step. We suggest in our original submission that an appropriately enabled Voice would be the most appropriate forum with which to engage to develop a suitable and effective Makarrata Commission and treaty-making process. So they remain grounded in and reflect the rights of Indigenous peoples, we suggest that legislation establishing a Makarrata Commission and any subsequent process of treaty-making should, where relevant, be underpinned by the UNDRIP.

Treaties between Indigenous peoples and settler states are substantive agreements. Recent scholarship suggests they must satisfy three key criteria. First they must recognise Indigenous peoples as polities, 'distinctive from other citizens of the state, based on their status as prior, self-governing communities'. Second, treaties must be reached by a fair process of negotiation, 'conducted in good faith and in a manner respectful of each participant's standing as a polity'. Third, treaties are political settlements and they recognise or establish concrete outcomes, including some form of decision-making and control that amounts to some form of self-government.[1] These criteria highlight that treaty-making is a substantive exercise fundamentally about resetting the relationship between the state and Indigenous peoples to a fairer, more equal footing.

There are likely many important steps to be taken in Australia to conclude effective treaties, and many complex matters that will need to be resolved along the way. In Canada, modern treaty processes between governments and First Nations have taken a long time (often in excess of 20 years) to conclude. Summarily, those processes have involved establishing appropriate structures and machinery, setting rules and scope for

[1] Harry Hobbs, 'Treaty making and the UN Declaration on the Rights of Indigenous Peoples: lessons from emerging negotiations in Australia' (2019) 23, *The International Journal of Human Rights,* 176. See also NT Treaty Commission, *Discussion Paper* (Northern Territory Treaty Commission, 2020).

negotiation, and then negotiating and settling agreements.[2] These processes are often fraught, and once concluded, treaty implementation is often challenging. We believe that it is important that the UNDRIP be used to guide treaty-making in Australia, ensuring that any treaty process substantively reflects a respect for and expression of the rights of Indigenous peoples.

The UNDRIP as a guide to treaty negotiations

The UNDRIP can be used to guide treaty negotiations. Effectively used, it may lead to fairer negotiations that appropriately elevate the perspectives and rights of Indigenous peoples. As a set of minimum standards, the UNDRIP can be used to achieve substantive outcomes in treaty negotiations ensuring a whole range of issues are given expression in agreements. The UNDRIP can also inform preliminary processes and decisions related to treaty-making in Australia, including the scope and functions of a Makarrata Commission. Incorporating relevant articles and preambular statements of the UNDRIP into enabling legislation is one way this could be achieved.

Built into any treaty process, for example, through staged, legislative incorporation, the UNDRIP can work to ensure that each step of the treaty process, including negotiations, conforms to relevant Indigenous rights across a range of matters relevant to treaty-making. Where agreed by the parties, treaties themselves can include binding commitments to UNDRIP rights (see our original submission for a discussion on key rights).

The idea that the Declaration can be used as minimum standards in Australian treaty-making has been clearly articulated by the Northern Territory Treaty Commission,[3] and by leading legal scholars writing on this issue, including Asmi Wood[4] and Harry Hobbs.[5] The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) also states that 'states should consider the Declaration as the minimum standard for achieving Indigenous peoples' enjoyment of their rights, which does not preclude more ambitious initiatives'.[6] As Harry Hobbs has remarked in relation to the UNDRIP and treaty-making in Australia, 'the procedural and substantive rights recognised in the Declaration should therefore inform consultation and negotiations between First Nations and the state'.[7]

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[2] For example see processes for Nisga'a Final Agreement, Tla'amin Final Agreement, and the Yukon Umbrella Final Agreement and subsequent Yukon First Nation treaties.
[3] See Northern Territory Treaty Commission, *Discussion Paper* (Northern Territory Treaty Commission, 2020); Northern Territory Treaty Commission, *Final Report* (Northern Territory Treaty Commission, 2022).
[4] See Asmi Wood, 'Self-Determination under International Law and some Possibilities for Australia's Indigenous Peoples' in Laura Rademaker and Tim Rowse (eds) *Indigenous Self-Determination in Australia* (ANU Press, 2020).
[5] See Harry Hobbs (n 1).
[6] Expert Mechanism on the Rights of Indigenous Peoples, *Treaties, agreements and other constructive arrangements, including peace accords and reconciliation initiatives, and their constitutional recognition*, UN Doc A/HRC/51/50 (28 July 2022) 19..
[7] Harry Hobbs (n 1), 175.

The UNDRIP articulates a right of Indigenous peoples to treaties. Article 37(1) states that 'Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.'[8] As well, several preambular paragraphs consider the value of such agreements as affirming key rights and obligations, representing 'the basis for a strengthened partnership'.[9] A recent study by the EMRIP states that article 37 must be read in 'conjunction with other rights set out in the Declaration, including the rights to self-determination, free, prior and informed consent and to lands, territories and natural resources'.[10] As discussed in our original submission, because the UNDRIP deals with a full range of Indigenous peoples' rights, it is a sound baseline for treaty-negotiations. Without the UNDRIP as a minimum standard, treaties may not reflect a substantive expression of Indigenous rights and may, therefore, not meaningfully reflect the aspirations of First Nations parties – or meet a standard of treaties.

Already in Australia, preliminary steps taken in the Northern Territory[11] and substantive developments in Victoria[12] highlight there is recognition of the importance of the UNDRIP to treaty-making (for discussion see our original submission). QLD's Path to Treaty Bill also explicitly recognises the importance of the UNDRIP principles to treaty-making in that jurisdiction.[13] Overseas examples are salient, too. In British Columbia, Canada, the UNDRIP was endorsed as an underpinning to treaty negotiations in 2019. Adopted by the province of British Columbia, the Canadian government and representatives of British Columbia First Nations, the policy endorses the UNDRIP 'as a foundation of the British Columbia treaty negotiations framework'[14] and it is agreed that treaty negotiations are to be 'guided'[15] by, and that treaties ultimately entered into will provide for, the implementation of the Declaration.[16]

A key consideration in Australia will be how the Commonwealth engages with States and Territories to implement a national treaty-making process, and how standards such as UNDRIP might be given effect across the federation. This matter has legal implications as well as political ones and it will be important for government to engage constructively on the question of UNDRIP informing a national treaty process. Any such engagements must also meaningfully involve Indigenous peoples. Our original submission makes the argument that the UNDRIP can be incorporated into Australian law in stages and as an underpinning to the implementation of the Uluru Statement. In particular, treaty-making

[8] UNDRIP, article 37(1).
[9] Harry Hobbs (n 1).
[10] Expert Mechanism on the Rights of Indigenous Peoples (n 6), 3.
[11] For example see *Barunga Agreement* (2018).
[12] For example see Preamble, *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic); *Treaty Negotiation Framework* (Vic).
[13] See *Path to Treaty Bill 2023* (QLD).
[14] Federation of Victorian Traditional Owner Corporations, *Discussion Paper 3: UNDRIP and Enshrining Aboriginal Rights* (Federation of Victorian Traditional Owner Corporations, 2020) 12.
[15] Ibid.
[16] Ibid.

is a significant opportunity to achieve substantive implementation of the Declaration and provide for broad expression of Indigenous rights.

As per our original submission, we suggest that an appropriately designed and enabled Voice would be the appropriate forum with which to engage to consider the first steps of UNDRIP implementation, including how it best relates to prospective treaties. The UNDRIP could be effectively used to inform the scope, functions and powers of the Makarrata Commission, as well as other complementary steps required to ensure treaty-making is substantive and has an enduring and positive impact.

2. How would a Treaty support the application of, and adherence to, UNDRIP principles?

Treaty agreements could set out terms that reflect UNDRIP principles, creating avenues for legal remedy for breaching those terms. There may be various stages of agreement making in an Australian treaty process and UNDRIP can inform each stage.

It is unclear at this stage how treaty-making will take shape in Australia. Taking reference from developments in Canada, and in Victoria, different stages of agreement-making may be part of a pathway to ultimate treaty agreements between First Nations and Australian governments. Where deemed appropriate and preferred by the parties, terms of the UNDRIP could be embedded into these agreements through a process of structured negotiation, ensuring there is adherence to UNDRIP rights in throughout a treaty process.

An important step in Australia may be the negotiation of framework or umbrella treaty agreements. These are preliminary agreements creating a baseline for further negotiations. They are political agreements setting the broad scope and contents, minimum standards and expectations, and relevant obligations for treaty-making. Fuller, or more localised agreements between Indigenous peoples and the state, may be negotiated from that basis.

Both framework and umbrella treaty agreements have been used in Canada. The Yukon Umbrella Final Agreement (signed in 1990) is an example of an umbrella treaty agreement, concluded after a long process of negotiation by the Council of Yukon First Nations, the Government of Canada and the Yukon Territorial Government.[17] It is an overarching political agreement that has provided a framework under which each of the 14 Yukon First Nations are able to negotiate a more specific settlement agreement that deals more fully with their rights and interests. Framework agreements play a broadly similar role, although are more general in nature and are generally not comprehensive. They provide a broad outline of key matters to be considered in treaty negotiations agreed to by relevant parties establish key rules, standards and expectations. Framework agreements are used as part of the British Columbia treaty negotiation

[17] See, Benjamin J. Richardson, Donna Craig and Ben Boer, *Regional Agreements for Indigenous Lands and Cultures in Canada* (Discussion Paper, North Australian Research Unit, Australian National University, 1995) 59.

process. A similar idea is being pursued in Victoria as a step on the path to the negotiation of treaties there.

Negotiated umbrella or framework agreements could provide an opportunity to establish the UNDRIP as a minimum standard for the negotiation of subsequent, more localised treaties. This could be done partially, by nominating specific rights especially relevant, or through an endorsement of the entire Declaration as an expression of minimum standards. Those umbrella or framework agreements could include mechanisms for enforcement, ensuring there are avenues to challenge any breaches to agreed standards. With legislative effect, this could ensure that the treaty process advances in a way that reflects and provides expression for the rights set out in the UNDRIP.

More comprehensive and localised treaties, for example between individual First Nations and the state, are another consideration. In British Columbia, these agreements are the final stage in the treaty negotiation process and so build upon earlier framework agreements. Ultimate treaty agreements of this nature can provide legally binding commitments to a broad range of matters important to the parties and negotiated through the treaty process. Again, the UNDRIP may have significant utility in any such arrangements. The UNDRIP could be used to directly inform the content of these treaties, ensuring key rights are given expression. Again, providing legal remedies for breaching terms of these agreements, as well as appropriate dispute resolution processes, are important considerations. Fuller or other distinct matters could be negotiated beyond what is set out in the UNDRIP, but the Declaration can provide essential content to what is ultimately contained in treaties.

This is ultimately a matter for negotiation between the state and Australian First Nations peoples and it should by no means be expected that UNDRIP standards are appropriate to all groups in every instance in relation to every matter. The key point is that throughout the various stages of prospective treaty negotiations, including, where relevant, the possibility of establishing broad framework or umbrella agreements, UNDRIP can be a critical tool for the expression of important rights and interests. Binding treaty agreements (and there are various legal considerations in relation to this point beyond the scope of this submission) can be used to ensure broad application and adherence to UNDRIP principles in any treaty-making process. This is why we suggest treaty-making is the most appropriate opportunity for comprehensive incorporation of the UNDRIP into Australian law.

3. In your view, what mechanisms would need to be in place to ensure that the rights as outlined in UNDRIP are enforceable?

As we highlight in our original submission, making UNDRIP rights enforceable is a matter for Australian domestic law. This is an important consideration for the UNDRIP informing treaties or otherwise being generally domesticated.

The UNDRIP sets out that it is the duty of participating states to provide for its enforcement.[18] Ultimately, the UNDRIP will only have an effective and holistic restructuring effect on the relationship between the Australian state and First Nations peoples if those rights are enforceable against the Crown. That will happen only if and only when the Crown agrees to be bound by it. In relation to treaties, there is a risk that without enforceable mechanisms, both the negotiation and content of treaties will not satisfy the minimum standards set out in the Declaration, and so will not reflect substantive Indigenous rights.[19] We suggest that a staged process of incorporation of the UNDRIP should be pursued to support the implementation of the Uluru Statement. This approach means that, where relevant and appropriate, UNDRIP rights can be made enforceable. Different rights may have different utility to distinct steps in the implementation of the Uluru Statement. We submit that enforceable obligations will be particularly important when it comes to treaty-making.

Short of constitutional entrenchment of Indigenous rights (which at this stage is unlikely), the principle mechanism by which UNDRIP rights could be made enforceable is by creating justiciable obligations to UNDRIP rights clearly set out in legislation. This can occur at the Commonwealth and State and Territory level and can be done by clear words expressing Parliament's intention that specific articles, and eventually possibly the entire Declaration, should be enforceable. In this way Parliaments can commit to providing for rights and corresponding obligations, and that they will be bound by those commitments.

The Federation of Victorian Traditional Owner Corporations has written in relation to the question of UNDRIP enforceability and treaties, that enforceable rights:

> Could be realised through the direct and express recognition of the UNDRIP rights, as justiciable rights within a treaty. This would mean that whenever these rights were infringed, whether by government action, or inaction, they could be challenged through the courts or some other forum, resulting in enforceable orders against the State with which they are compelled to comply.[20]

Whether and the extent to which governments will endorse justiciable rights will depend on whether they are prepared to be bound by them. In the context of treaties, it is unlikely any meaningful agreement could be reached without such a commitment.

[18] See UNDRIP arts 27, 38, 40.
[19] For discussion see Harry Hobbs (n 1).
[20] Federation of Victorian Traditional Owner Corporations (n 14), 21.

An obvious limitation with legislative entrenchment is that Parliaments cannot bind future Parliaments and so even if enacted to have binding effect in Australian domestic law, a future Parliament could amend or repeal relevant legislation giving effect to UNDRIP rights. In that scenario, the rights would cease to have effect. This should not dissuade governments from pursuing enforceable obligations related to UNDRIP, which we see as critical to realising the goals set out in the Uluru Statement, and particularly those related to treaty-making. There is also a question of how the Commonwealth might cooperate with States to implement UNDRIP through legislation, whether as part of a prospective treaty process or otherwise. This will be a key consideration to the UNDRIP taking binding and substantive effect across the federation and will of course be impacted by the breadth and depth of rights that are subject to incorporation.

The UNDRIP addresses a wide range of rights related to many subjects. Any law providing for enforceable obligations relating to the UNDRIP (whether partial or fully) may, therefore, come into conflict with existing laws, at both the federal, and State and Territory level. In part, this is why we suggest in our original submission that a staged and strategic approach to implementing the UNDRIP in Australia is critical, and that the implementation of the Uluru Statement provides an important and unique opportunity to advance UNDRIP implementation. We suggest that implementation could start with an immediate process of review conducted by an appropriately resourced Australian Law Reform Commission, elaborating upon key rights and assessing current laws for consistency with the UNDRIP. We refer the Committee to our earlier submission for a more thorough discussion on this point.

As we discuss in our original submission, key matters must be addressed in Australia before certain rights could be made enforceable. For example, the right to self-determination inheres in Indigenous 'peoples'. It is a collective, not an individual right. Identification of the peoples to whom rights pertain would therefore be a necessary exercise. As well, rights related to traditional territories, requires an identification of those territories. These are important matters impacting how UNDRIP rights can be operationalised in Australia, and as we suggest in our original submission, government must take the lead from First Nations peoples to resolve them These matters are a key reason why we suggest a staged process of incorporation of the UNDRIP in Australia is important. Also important to the question of enforceability is consideration of how and where UNDRIP rights are adjudicated and enforced. It is important that any forum for their adjudication be capable of reflecting the substantive meaning of relevant rights.

Lessons from Canada in relation to the question of enforceability are instructive. We addressed in our original submission the current Canadian experience of implementing the UNDRIP through a legislative mechanism but note that neither the British Columbia model nor the federal model creates enforceable rights. These legislative mechanisms create a context and prescribe a period of time for focused collaborative reflection on how to make UNDRIP work as law in Canada.[21]

[21] See original First Nations Portfolio submission to JSCATSIA Inquiry.

Canadian legal scholar Kerry Wilkins argues in relation to the implementation of UNDRIP in Canada that 'if a goal is eventual enforceability within domestic Canadian law, at least three issues need attention: the pace and scale of implementation; the means to be used to introduce UNDRIP into Canadian law; and the choice of enforcement mechanism'.[22] Wilkins explains that in the Canadian context options for implementation include:

> Implementing across Canada the UNDRIP provisions that are easiest or more important to implement, then learning from that experience whilst phasing in implementation of the others; phasing in all or part of UNDRIP community by community, or willing province by willing province (again, potentially learning as we go); or making UNDRIP's provisions, like some recent federal legislation, available to Indigenous peoples exclusively on an opt-in basis.[23]

Wilkins considers enforceability as part of treaties in Canada and says 'treaties could be an attractive option for piecemeal or phased UNDRIP implementation; implementation schedules could be tailored specifically to the circumstances of each party to a given agreement'.[24] Wilkins here touches on a salient point relevant to Australia's consideration of the issue and explained above – treaties are an important opportunity to negotiate and implement UNDRIP rights and ensure they are legally enforceable.

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

There should be various domestic remedies and mechanisms, including special tribunals, as well as international oversight, such as through the Universal Periodic Review (UPR) process.

How UNDRIP rights are operationalised in Australia is a key question and goes to the capacity of government and its public service in providing for the substantive expression of rights articulated in the Declaration. Also important will be questions of resourcing, and the structures and machinery that may be required to facilitate effective implementation. A first step before considering complaints mechanisms is ensuring that domestic implementation of the UNDRIP is done strategically, to ensure that rights can be effectively operationalised. This is why our original submission recommends a specialised process of review and reporting be carried out by an appropriately resourced Australian Law Reform Commission to define key rights and their substantive meaning, to develop an assessment standard that could be used by government and its agencies to assess for compliance with the UNDRIP, and to report on key existing laws and their consistency with the UNDRIP. This exercise would highlight where current laws are in conflict with the UNDRIP and provide a critical body of work that could be brought to the attention of a prospective Voice, or to the Parliament more generally. This preliminary

[22] Kerry Wilkins, 'Strategizing UNDRIP Implementation: Some Fundamentals' in John Borrows, Larry Chartrand, Oonagh E Fitzgerald and Risa Schwartz (eds) *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Centre for International Governance Innovation, 2019) 181.
[23] Ibid.
[24] Ibid, 182.

step is important because it can work to ensure that UNDRIP implementation is effective and not beset by issues because of lack of consideration as to the context of its implementation. Preliminary steps taken in British Columbia and Canada to begin work to implement the Declaration are salient. We direct the Committee to our original submission for a discussion of some relevant issues on that experience.

As discussed, the UNDRIP could be implemented through a treaty-process. Specific complaints and dispute resolution mechanisms will need to be considered in any such process. Complaints in relation to breaches of rules governing a treaty process, including rules pertaining to negotiation and any substantive terms in treaty agreements must be enforceable and have recourse to appropriate dispute resolution processes. A Makarrata Commission may perform some basic functions in this space, for example possibly by monitoring negotiations and receiving complaints from parties about breaches to agreed rules or obligations underpinning the treaty process. Specific treaty tribunals could be established to hear disputes related to any such breaches, working to mediate and resolve issues between the parties. Finally, courts could provide forums for domestic arbitration, making orders to redress any breaches to agreed rules and standards. Complaints mechanisms and forums for dispute resolution should themselves ultimately reflect standards established in the UNDRIP, ensuring that Indigenous parties are not disadvantaged by the forum and related processes. Whether domestic courts can impartially reflect and look after the interests of Indigenous parties is a complex question, but it is an important one in relation to how disputes can be fairly addressed on matters related to Indigenous rights and interests.

Potential limitations in domestic law mean that international oversight should be considered as an avenue for complaints about breaches of Indigenous rights and interests. This is particularly important in the context of treaties and the incorporation of UNDRIP in Australia because, meaningfully realised, these developments should mean greater domestic protection and expression of Indigenous rights and interests. Domestic complaints mechanisms are limited because the Australian state is the ultimate arbiter of disputes against it. It retains paramount legal authority over matters impacting Indigenous peoples of Australia. There is, therefore, a question as to how fairly the state can engage with Indigenous peoples in any process of Indigenous rights recognition and expression that may require it to share power more fairly with Indigenous peoples. Noting the points made in our earlier submission about the legal distinctions between domestic and international law, state abuses of treaties or generally of Indigenous rights should be subject to some international oversight. The Universal Periodic Review (UPR) process could be one such mechanism providing international oversight to Australia's commitments to Indigenous peoples and their rights, such as may be made through treaties, or other commitments to implement the UNDRIP.

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?**

These rights can be made enforceable. Treaty-making may be the most appropriate opportunity to address them.

Treaty-making can be an important opportunity to provide for the appropriate structures and mechanisms to give fuller expression to the UNDRIP, including rights related to FPIC and the protection and management of Indigenous territories. Nine UNDRIP articles concern rights related to Indigenous peoples' lands, waters, territories or resources.[25] As discussed, operationalising UNDRIP rights related to Indigenous peoples' traditional lands means an effective process of identifying and recognising the territories to which UNDRIP rights pertain. Native title and land rights processes have provided a useful platform for this process in Australia, but they are by no means ideal solutions to identifying and providing protections for Indigenous territories.

Treaty-making is an opportunity to address this question comprehensively, in a fair and structured way, and in a way that reflects the UNDRIP standards. Fuller rights relating to Indigenous territories can be negotiated as part of a treaty process and these may go beyond limitations that exist in native title and land rights regimes. An appropriately structured treaty process may provide a more complete opportunity to engage in a process of identification and recognition of Indigenous peoples' territories and the rights related to them. Consistent with the UNDRIP, treaties may have a lot to say about rights relating to traditional territories that go beyond what is currently set out in in native title and land rights legislation. For further discussion on issues related to territorial rights see our original submission.

In the interim, the question of whether and the extent to which Australia's land rights regimes are compatible with UNDRIP could be part of a process of review and reporting undertaken by the ALRC. It could then be a matter for the Voice (if successfully established) to provide advice on. Ultimately, if UNDRIP is going to be implemented and there are barriers to achieving or operationalising UNDRIP rights pertaining to land, they need to be identified and strategically dealt with so existing regimes are consistent with relevant rights articulated in the Declaration. Treaty-making may be the most appropriate opportunity to comprehensively address concerns in this space, including by working with Indigenous peoples to provide a 'fair, independent, impartial, open and transparent process, giving due recognition to Indigenous peoples' laws, traditions,

[25] Arts 8(2)(b) (right to redress for dispossession), 10 (protection against voluntary relocation), 25 (right to maintain and strengthen spiritual and stewardship relationship with traditional lands and waters), 26 (right to state recognition of traditional lands, territories and resources), 27 (fair, independent, impartial, open and transparent process to adjudicate Indigenous territorial rights), 28 (right to restitution or compensation for lands taken, used or damages without consent), 29 (right to environmental protection and conservation), 30 (protecting traditional lands from military activities), 32(2) (protection from development or resource exploitation without Indigenous consent). See Kerry Wilkins (n 19), 180.

customs and land tenure systems, to recognise and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources' (per art 27).

Leadership by the Commonwealth in this space is important to show State and Territory governments, as well as relevant private actors, that the UNDRIP and its associated rights are being taken seriously and should be considered as an unavoidable parameter of reference to matters impacting land in Australia. In the aftermath of Juukan Gorge, there is no longer a social license for mining operators to operate without the support and engagement of Traditional Owners. This is the type of arrangement that could benefit from clear rules as to FPIC, which could even be used to encourage private firms to implement the Declaration and its relevant articles into their business practices and engagement and relationships with Traditional Owners and Indigenous communities. These matters could be comprehensively, strategically, and fairly addressed through the implementation of the Uluru Statement.