ENVIRONMENTAL JUSTICE AUSTRALIA

Supplementary Submission in response to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs inquiry into:

Application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia

Prepared by

Environmental Justice Australia

19 October 2022

Dear Committee,

1. Environmental Justice Australia welcomes this opportunity to make further submissions to the Committee's inquiry into the application of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia.

A. About Environmental Justice Australia (EJA)

2. Environmental Justice Australia (EJA, formerly the Environment Defenders Office, Victoria) is a public interest environmental law practice, based in Melbourne and undertaking work across our areas of expertise throughout Australia. We act primarily for community organisations and NGOs on matters concerning environment and natural resources law and policy. EJA's expertise is in environmental and natural resources laws from a public interest perspective. Our work spans formal legal services as well as advocacy, capacity building, and law reform.

3. EJA's previous submission describes our involvement in issues of environmental justice for Aboriginal peoples. We are a non-Aboriginal organisation consciously seeking to work in support of and alliance with Aboriginal organisations, particularly those with whom we have a partnership arrangement or legal retainer.

B. EJA's Original Submission

4. We note that the previous UNDRIP inquiry, which commenced under the previous Parliament, lapsed on prorogation of that Parliament and that this Committee has accepted all public submissions into evidence for the current inquiry. We assume that EJA's prior submission, dated 16 June 2022, is therefore included in evidence in this inquiry.

5. The original submission addressed:

    a. General commentary on the UNDRIP and its application in Australia

    b. Specific application to key Commonwealth environmental legislative schemes, namely the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Water Act 2007* (Cth).

6. In this context, we take the content of this document to be supplementary to our original submission.

C. General comments

7. We recall for the purposes of this supplementary submission:

    a. UNDRIP preponderantly concerns the rights and interests of Indigenous peoples *qua* peoples, which is to say with reference to 'peoplehood' and therefore as political and jurisdictional actors and bearers of collective as well as individual rights

    b. UNDRIP contains many articles concerning Indigenous peoples' rights, interests and relationships to land, waters, resources and territories. Our prior submissions consider those questions in relation to key national environmental and natural resources laws and we refer the committee to those prior submissions.

8. Additionally, Terms of Reference i–iii advert to more general principles and directions of law, policy and constitutional reform by which Australian law and public policy can and should align with and implement UNDRIP provisions. We provide the following submissions and opinions on these principles and directions. We intend these submissions and opinions to provide only context and general discussion in support of our prior submissions.

D. Term of Reference ii: Options to improve adherence to the principles of UNDRIP in Australia

9. Having regard to EJA's work and expertise, we submit for the purposes of the second term of reference that amendment to national legislation, including the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Water Act 2007* (Cth), in the terms proposed in our prior submission provides options for improved adherence to UNDRIP in Australia.

10. Those propositions are not to detract from an approach intended more directly to incorporate UNDRIP into domestic Australian law, as for example has recently occurred under Canadian law.[1] We submit that this type of 'framing' legislative action is highly desirable.

E. Term of Reference iii: UNDRIP and implementation of the Uluru Statement from the Heart

11. The Uluru Statement from the Heart is a defining political statement of our time. In general, it contains four principal elements, each of which are integral to the program set out to and agreed by delegates:

    a. A 'voice' to Parliament incorporated into the national Constitution

    b. A 'makarrata' commission, being an agreement-making body, or which may be understood as a treaty-making institution

    c. A truth-telling process

    d. The founding of these institutions and processes on the sovereignty of Aboriginal and Torres Strait Islander peoples.

12. Broad and full implementation of the pillars of the Uluru Statement aligns with UNDRIP.

13. The alignment and consistencies of the Uluru Statement with UNDRIP is manifest in many of the Articles of the Declaration, such as: Article 3 (right to self-determination); Article 5 (right to maintain and strengthen political, legal, economic, social and cultural institutions); Article 18 (right to participate in decision-making in matters that affect them); Article 19 (State obligation to consult and cooperate in order to obtain free, prior and informed consent from Indigenous peoples through their representative bodies); Article 20 (right to maintain and develop political, economic and social systems and institutions and right to fair redress – also Article 28 on rights to redress and restitution and Article 40 on just dispute resolution with the State); Article 23 (right to determine development priorities and strategies); and Articles 25–32 concerning rights to use, access, control and management of traditional lands, waters, resources and territories.

14. The subject-matter of the UNDRIP, including specific articles, may be (non-exclusive) subject-matter on which institutions such as a Voice to Parliament might advise. The Voice to Parliament seems particularly to align with Article 19 concerning the obtaining of consent in relation to legislative or administrative measures affecting Aboriginal and Torres Strait Islander peoples. We note that the terms set out in Article 19 on which the obligation to consult is constructed are more than merely advisory.

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[1] The Canadian Federal Parliament enacted legislation in 2021 giving domestic effect to the UNDRIP: see *United Nations Declaration on the Rights of Indigenous Peoples Act* S. C. 2021 c 14. The key operative provision of this law, at section 5, provides: 'The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration'.

15. Agreement-making or treaty-making institutions may be mechanisms by which self-determination, strengthening of Aboriginal and Torres Strait Islander institutions, practices and systems can occur, rights to remedy and dispute-resolution can occur, and exercise of development models and use, protection and access to land and resources can occur.

16. Truth-telling may be a mechanism by which Aboriginal and Torres Strait Islander peoples exercise rights of redress, rights of revitalising culture, and the right to dignity of cultures, traditions, histories and aspirations (see Article 15).

17. The 'notion' of sovereignty is integral to the Uluru Statement from the Heart. Arguably, it is foundational, as it is the manner in which substantive authority – identified with the 'ancestral tie' between land and peoples – is expressed and the basis on which legal, constitutional, political and institutional reform is proposed.

18. Sovereignty is significant and relevant in respect of application of UNDRIP because 'ideas of sovereignty are connected to the concept of "self-determination"'.[2] Language of Aboriginal and Torres Strait Islander sovereignty is linked intimately to the right of self-determination. Sovereignty is the basis on which authority and agency are constructed and it also inherently establishes Aboriginal and Torres Strait Islander peoples as 'peoples' and as polities and their relevant authority and agency as jurisdictional. Sovereignty is the existence and exercise of political and legal authority. These propositions have been considered and developed at length by Aboriginal scholars and thinkers. If sovereignty is an expression of self-determination, it is understood through the Uluru Statement as a concurrent, or 'co-existing', sovereignty with that of the Crown.

19. The exercise of sovereignty can be viewed as consistent with the various rights operating under the UNDRIP, including rights to establish and maintain institutions, self-government, relationships to land and resources, to recognition, to consultation and consent in relation to State actions, and so forth. In the sense of sovereignty reflecting and operating through Aboriginal and Torres Strait Islander jurisdiction, what the State (which is to say, the Commonwealth) arguably needs better to come to terms with is Aboriginal and Torres Strait Islander peoples as bearers of law – that is the 'law of the land', the 'first law'[3] or 'raw law'.[4]

20. Aboriginal and Torres Strait Island law and custom as sources of law applying in Australia operate in various legal and practical contexts, such as native title and natural resource management. In our view, as our prior submissions set out, there is far greater need for statute law dealing with environmental and resource management to defer to Aboriginal and Torres Strait Islander jurisdiction and, in that respect, sovereignty. That is consistent with the right to self-determination as provided for in UNDRIP.

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[2] Brennan et al *Treaty* (Federation Press, 2005), 74
[3] Martuwarra RiverofLife et al 'Recognising the Martuwurra's First Law right to life as an ancestral being' (2020) 9 *Transnational Environmental Law* 3 541
[4] Watson *Aboriginal Peoples, Colonialism and International Law: Indigenous Peoples and the Law* (Routledge, 2015)

21. Consistently with other international instruments, such as the Biodiversity Convention (see Article 8(j)), deference needs also to account for revitalisation of Aboriginal and Torres Strait Islander law and custom.

22. Deference requires, or can be expressed in, a range of protocols, procedures, and arrangements giving effect to joint or concurrent authorities, including the management of environment and natural resources. These can include, for example, joint or integrated assessment processes,[5] consultation and consent provisions ('free, prior and informed consent') relating to regulatory approvals, joint planning, agreement-making,[6] and/or treaty-making.[7] In effect, as far as law is concerned this approach is an expression of 'legal pluralism'. Arguably, deference requires on the part of the state and other non-indigenous actors some degree of relinquishment of control over decision-making, policy-making, and use and exercise of power over land, waters and resources.

23. As much seems to be implied in the UNDRIP Article 19 condition on obtaining consent from representative institutions of (in Australia's case) Aboriginal and Torres Strait Islander peoples.

24. Other ways in which this relinquishment, power-sharing or 'pluralism' can be or has been expressed in law include, for example, the 'deep consultation' standard as required under Canadian constitutional law,[8] a 'federalism between settler and Indigenous traditions',[9] or treaty.[10]

25. To the extent implementation of UNDRIP into Australian law, including where refracted through the terms and concepts of the Uluru Statement from the Heart, proceeds (which we submit should occur), it is not necessarily an endpoint of the colonial conduct of the state or of 'decolonisation'. That language is important and should not be baulked at in this inquiry: the passage of the UNDRIP itself emerged out of common responses of Indigenous peoples to colonisation.[11]

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[5] See eg Moggridge et al 'Indigenous research methodologies in water management: learning from Australia and New Zealand for application on Kamilaroi country' (2022) *Wetlands Ecological Management*, https://doi.org/10.1007/s11273-022-09866-4; Cottingham et al *Cultural flows: Toogimbie wetlands indicator framework and methodology* (NCFRP, 2017), https://nban.org.au/wp-content/uploads/2020/06/Toogimbie-Wetlands-Indicator-Framework-and-Methodology-Report-Reduced.pdf; Secretariat of the Convention on Biological Diversity *Akwe:Kon Guidelines* (2004), https://www.cbd.int/doc/publications/akwe-brochure-en.pdf

[6] Eg Langton et al *Settling with Indigenous People: Modern Treaty and Agreement-Making* (Federation Press, 2006)

[7] See eg McMillan et al 'Obligations of conduct: public law – treaty advice' (2020) 44 *Melbourne University Law Review* 2 1

[8] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, 3 S.C.R. 511

[9] Lino Constitutional Recognition: First Peoples and the Australian Settler State (Federation Press, 2018), 244-250

[10] But see the points made by Professor Irene Watson that treaty-making poses substantial problems of pre-conditions, such as those relating to representation, equality, identification of parties, and starting points for negotiations: Watson *Aboriginal Peoples, Colonialism and International Law*, Ch 7

[11] Davis 'To bind or not to bind: the *United Nations Declaration on the Rights of Indigenous Peoples* five year on' (2012) 3 *Australian International Law Journal* 17, 20-23

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https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Aboriginal_and_Torres_Strait_Islander_Affairs/UNDRIP/Submissions