ENVIRONMENTAL JUSTICE AUSTRALIA

Submission in response to the Senate Legal and Constitutional Affairs References Committee Inquiry into:

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

Prepared by

Environmental Justice Australia

16 June 2022

Dear Committee,

Environmental Justice Australia (EJA) welcomes this opportunity to make a submission on the application of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia.

Our submission principally concerns the following terms of reference:

a. the history of Australia's support for and application of the UNDRIP;
b. the potential to enact the UNDRIP in Australia;
c. international experiences of enacting and enforcing the UNDRIP;
d. legal issues relevant to ensure compliance with the UNDRIP, with or without enacting it;
e. key Australian legislation affected by adherence to the principles of the UNDRIP;
f. Australian federal and state government's adherence to the principles of the UNDRIP;
g. the track record of Australian Government efforts to improve adherence to the principles of UNDRIP.

About Environmental Justice Australia (EJA)

1. 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.

2. EJA's involvement in issues of environmental justice for Aboriginal peoples extends back to 2014-2015. At that time, we provided assistance to the Murray and Lower Darling Rivers Indigenous Nations (MLDRIN) on their exercise of consultation rights under the Basin Plan 2012. Through MLDRIN we advised specific Traditional Owner bodies on Basin Plan implementation. We advised MLDRIN in relation to the South Australian Royal Commission on the Murray Darling Basin. Subsequently, EJA have worked closely with other Traditional Owners on water issues, such as strategies for design and implementation of cultural flows models on the Murray floodplain near Robinvale, advice on VEWH water trading strategies and Traditional Owner interests, and ongoing advice to MLDRIN.
3. One of EJA's senior legal staff (Dr Bruce Lindsay) was retained as a consultant on Component 5 of the National Cultural Flows Research Project and Dr Lindsay co-authored the main report of that Component. Component 5 of the NCFRP concerned legal and policy design enabling cultural flows and their implementation.
4. At the outset, EJA restates that we are not an Aboriginal organisation. We are a non-Aboriginal organisation consciously seeking to work in support of and alliance with Aboriginal organisations, notably those with which we have or seek partnership arrangements or for whom we act and to whom we provide legal or related services. 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.
5. Given EJA's areas of expertise, specifically associated with environmental and natural resources law, our submissions below are mainly confined to:
    a. General commentary on the UNDRIP and its application in Australia
    b. Specific application to key Commonwealth legislative schemes, namely the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Water Act 2007* (Cth).

General Commentary on UNDRIP

Background

6. On the 13th of September 2007, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by a total of 144 member states of the United Nations.
7. The UNDRIP was the product of several decades of advocacy and negotiation between States and Indigenous groups to fill a gap in international human rights law. While several existing international human rights instruments had some relevant provisions for Indigenous peoples, it was apparent that none addressed the full range of human rights specific to Indigenous peoples and their distinctive experience of deprivation of human rights under colonisation.

8. Indeed, it was hoped that the declaration would

> … go some way to delivering justice to those first peoples whose deprivation of human rights is the very cornerstone of the sovereignty, wealth and power of the most obstructive and argumentative states who voted against the declaration in the General Assembly.[1]

9. The declaration was intended to provide a framework for advocacy for Indigenous rights and an agenda for policy or legislative reform by member States. At the time, one of the negotiators, Professor Megan Davis, stated that the declaration 'symbolises goodwill on the part of states in acknowledging the historical injustice toward indigenous peoples.'[2]

10. Upon adoption, the declaration was widely hailed as a success both for Indigenous advocacy with the UN and for the creation of an international legal standard for the affirmation of the rights of Indigenous peoples. It was stated

> The Declaration will embolden the contemporaneous indigenous narrative of state dispossession that seeks redress for the gross violations of human rights that indigenous peoples were subjected to historically and that continue to this day.[3]

11. It is worth noting that UNDRIP is a non-binding legal instrument. The rights contained within are not enforceable against State actors unless they are adopted into domestic law. However, as a formal UN declaration approved by a strong majority of member states, it has considerable moral authority and member States are expected to adhere to the principles.[4] It is understood to be the most significant international statement on the rights of Indigenous peoples.[5] There was some immediate recognition of UNDRIP principles in international human rights jurisprudence following the adoption in 2007, bolstering UNDRIP as the dominant standard for State relations with Indigenous peoples.[6]

12. The content of obligations contained in the UNDRIP are broad ranging. For present purposes, our submission is concerned principally with those matters related to environment, land, natural resources and procedural duties and rights affecting those matters. We note that state obligations and Indigenous rights applying to these matters frequently cannot be distinguished in practice from cultural, linguistic, educational, social and economic rights. To do so is largely a product of norms derived from colonial regimes (including legal norms and practices) and, in the case of Australia, imposition of law derived from English inheritance. We acknowledge and accept that Aboriginal law generally does not make the distinction of land and natural resources from cultural, linguistic and social considerations. The paradigms, content and norms of 'First Law' or 'Raw Law' are essentially 'relational', distinctive and the subject of Indigenous institutions and practices. That is a fundamental condition that Australian law, administration and state practice needs to accommodate.

---

[1] Megan Davis, 'The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 6(30) *Indigenous Law Bulletin* 6, 8.
[2] Ibid.
[3] Megan Davis, 'Indigenous Struggles in Standard-Setting: the United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9(2) *Melbourne Journal of International Law* 439.
[4] Harry Hobbs, 'Treaty Making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia' (2019) 23(1-2) *The International Journal of Human Rights* 174, 178,
[5] Megan Davis, above n 1.
[6] Megan Davis, above n 3.

Critiques of UNDRIP

13. It is widely accepted that the UNDRIP is a significant step toward reconciliation between State governments and Aboriginal people.

14. Nevertheless, UNDRIP has been criticized for centering the views of States over Indigenous perspectives and for the inevitability of this, as an instrument originating from the UN, an international body constituted exclusively by State parties.[7] Indigenous agency under UNDRIP is effectively 'permitted' by the State in which the Indigenous people reside.

15. Professor Irene Watson notes that the UNDRIP model of rights reproduced the 'domestication' of Indigenous peoples within the nation-state, continuing patterns of colonization and genocide in different forms, as distinct from genuine processes of decolonization.[8]

16. Much of the controversy throughout negotiations revolved around Article 3 of the 1993 draft, which was ultimately retained in the adopted declaration. It reads:

> *Indigenous 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.*

17. Disagreements over the potential meaning of the term 'self-determination' and over various attempts to limit it through the addition of other language to the declaration were central to the failure of states and Indigenous groups to agree upon a text for the declaration for many years.[9]

18. Article 46 was intended to assuage the concerns of States concerned that self-determination for Indigenous peoples would threaten the integrity of nationhood. Article 46 specifically limits the rights of any groups to engage in activity which would 'dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'.

19. Article 46 limits self-determination to the internal affairs of Aboriginal groups. It is agreed by various scholars that this maintains Indigenous peoples to existing as groups that are confined within the state and not as independent entities.[10] King states that the inclusion of Article 46 effectively

> puts the state's interests first and foremost. But the article goes even further, giving states a backdoor out of the declaration by excusing any of the content they disagree with as a threat to 'territorial integrity or political unity', however they choose to define it.[11]

20. This concession provides an arguable failing of UNDRIP. It implies that if Indigenous decision-making on Indigenous affairs holds priority, then it has the potential to disrupt the conventional framework of governance associated with nation-states.

---

[7] Hayden King, 'UNDRIP's Fundamental Flaw' (2019) *Open Canada* (online) <https://opencanada.org/undrips-fundamental-flaw/> 16 June 2022.
[8] Irene Watson, *Aboriginal People, Colonialism and International Law: Raw Law* (Routledge, 2014).
[9] Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22(1) *The European Journal of International Law* 141, 147-148.
[10] See, eg, Karen Engle above n 9 and Rashwet Shrinkhal, '"Indigenous Sovereignty" and the Right to Self-Determination in International Law: A Critical Appraisal' (2021) 17(1) *AlterNative* 71.
[11] Hayden King, above n 7, 3.

21. It is EJA's position that while there are flaws with UNDRIP, its application in Australia would strengthen Aboriginal control of and access to management of country, preservation of traditional ecological knowledge and the protection of environmental rights for Aboriginal people.

UNDRIP's Application in Australia

Australia's endorsement of UNDRIP

22. Australia was one of four countries that voted against adoption of the declaration in 2007. The Australian ambassador to the United Nations at the time, Robert Hill, expressed concerns over the UNDRIP, particularly with the element of self-determination. He asserted that it would 'impair the territorial and political integrity of a state within a system of democratic government', adding that it would place customary law above national law.[12]

23. Self-determination was a central concern of several member states, particularly the CANZUS States (Canada, Australia, New Zealand and the United States) who all voted against endorsement of the declaration and who pushed for the dilution of the wording in relation to rights to self-determination and to the notion of free, prior and informed consent (FPIC).[13]

24. The relationship of Indigenous self-determination and the integrity or internal coherence of the nation-state is a live question and one that has been considered by Indigenous legal scholars such as Professor Watson.[14] For present purpose, EJA notes this critique and potential practical ramifications of a more 'internationalized' approach to the relationships of states and Indigenous peoples. We do not presently go further and comment on those issue but rather consider the application of UNDRIP provisions to Australia domestic laws, specifically environmental and natural resources laws.

25. Australia endorsed the declaration in 2009. This followed a change of government to Labor in late 2007 and in the aftermath of National Sorry Day. One of the Rudd Labor government's election commitments was to endorse and 'be guided by [UNDRIP's] benchmarks and standards.[15]

26. In making the endorsement, then Prime Minister Rudd also noted concerns with the notion of 'free prior and informed consent' and asserted that those aspects of the declaration would be interpreted within the constraints of maintaining the political integrity

---

[12] The Hon. Robert Hill, Ambassador and Permanent Representative of Australia to the United Nations General Assembly, 'Explanation of Vote by Australia' (2007) (online, as delivered) <https://unny.mission.gov.au/unny/GA_070913.html>.
[13] Brenda Gunn and Oonagh Fitzgerald, 'Introduction' in Centre for International Governance Innovation, *UNDRIP Implementation: Comparative Approaches, Indigenous Voices from CANZUS* (2020) 1.
[14] Irene Watson, above n 8.
[15] Megan Davis, above n 3, citing Australian Labor Party,*Election Platform 2007 — Aboriginal Peoples and Torres Strait Islanders* (2007) <http://www.alp.org.au/platform/chapter_13.php#13aboriginal_peoples_and_torres_strait_islanders> at 23 September 2008.

of the state.[16] Further government hesitations included Articles 25 and 26, which assert the rights of Indigenous peoples to 'own, use, develop and control' traditional lands.[17]

27. The endorsement came during the Northern Territory Intervention and was soundly criticised as hypocritical and tokenistic given the ongoing and oppressive nature of that intervention and its incompatibility with Indigenous self-determination as stated in Article 3 of the Declaration.[18]

28. The above conduct appears consistent with the Australian Government's subsequent reticence to integrate UNDRIP principles into Australian legislation and policy.[19]

Australia's performance since endorsement of UNDRIP

29. Thirteen years on from endorsement of UNDRIP, Australian law contains no scheme of general application of the UNDRIP. There has been limited progress on implementing UNDRIP principles into domestic law and practice or on the accommodation of Indigenous rights more generally, specifically having regard to the colonial project in Australia and the nation's wealth and natural resource base.

30. There is no constitutional recognition of Indigenous sovereignty, history or rights at the federal level. There has never been a treaty between Indigenous Australians and the settler state. Only three jurisdictions have enacted general human rights legislation, including Indigenous rights provisions, and there is yet no federal mechanism for establishing or adjudicating human rights.[20]

31. The failure to move forward on the application of UNDRIP in Australia is a condition of 'political inertia' underpinned by persistent racism and state ambivalence towards the rights of Aboriginal and Torres Strait Islander peoples.[21] In 2021, as part of the Universal Periodic Review of Australia, 'the Special Rapporteur on the rights of Indigenous peoples had found numerous disturbing reports on the prevalence of racism against Aboriginal and Torres Strait Islander peoples'.[22]

32. Consequently, there remains an enormous implementation gap for the broad spectrum of rights encompassed by UNDRIP in Australia.

---

[16] Hayden King, above n 7.
[17] The Hon. Robert Hill, above n 12.
[18] 'Australia backs UN on Indigenous Rights', *Sydney Morning Herald* (online) 3 April 2009 <https://www.smh.com.au/national/australia-backs-un-on-indigenous-rights-20141112-9lpg.html>. See also UNDRIP, Article 3.
[19] Harry Hobbs, above n 4, 175.
[20] hose three state human rights Acts are the Victorian *Charter of Human Rights and Responsibilities 2006*, Queensland's *Human Rights Act 2019* and the ACT's *Human Rights Act 2004*.
[21] Joe Morrison, 'Caring for Country: Indigenous guardianship and the failure of our national environmental and heritage laws' (September 2020) *Australian Environment Review* 100, 103, and Harry Hobbs, above n 4.
[22] Ed Wensing, 'Indigenous Peoples' Human Rights, Self-Determination and Local Governance – Part 1' (2020) 24 *Commonwealth Journal of Local Governance* 98.

UNDRIP and Indigenous environmental rights in Australia

33. Deprivation of Indigenous peoples' rights to access, control or manage land, water and natural resources has had devastating consequences for environmental justice for Aboriginal peoples in Australia:

> The violations of indigenous peoples' rights to self-determination and other economic and social rights are strongly linked to indigenous peoples' historical experiences of marginalization, dispossession from and environmental destruction of their ancestral lands and lack of self-determination over development pathways.[23]

34. Aboriginal control of land, water and natural resources in Australia has made progress as a consequence of land rights and native title legislation, but not without serious shortcomings in terms of access to these mechanisms and/or their partial reflection of Indigenous desire for self-determination. Laws governing natural resource management frequently reproduce the juridical invisibility or absence of Indigenous people and their laws in the management of land, waters and resources (as Country).[24]

35. Environment and natural resource management is still largely governed by legislation which perpetuates Aboriginal invisibility or 'permits' Aboriginal rights on the State's terms. In Victoria, by way of example, many environmental and natural resource management laws have little or no real recognition of Aboriginal people.[25] For those Acts that do provide some procedural and substantive rights over land and natural resource management, State recognition and registration of traditional owner groups is a precondition to the overwhelming majority of rights.[26] This process is onerous and often prohibitive for traditional owners.

36. Full implementation of UNDRIP provisions concerning land and natural resources, particularly in relation to procedural rights over land management and substantive rights to control and access Country would be significant to advancing Aboriginal rights and interests in their ancestral estates and in our view promoting ecological management, protection and recovery across the continent.

37. We deal more fully with UNDRIP provisions relating to environmental and natural resource management below. Nonetheless, we note here particular obligations bearing on conservation and natural resource control. For example, Article 19 states:

> States shall 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.[27]

---

[23] Ibid, 14.
[24] Environmental Justice Australia *First Nations Natural Resource Management: Scoping Report* (2021) (in progress).
[25] See, eg, *Code of Practice for Bushfire Management on Public Land (Forest Fire Management Victoria) 2012* and the *Environmental Effects Act 1978*.
[26] See eg, the definition of 'specified Aboriginal party' in the *Water Act 1989*, s3, and the *Marine and Coastal Act 2018*, s3.
[27] UNDRIP, Article 19.

38. Development pressures on Indigenous lands and waters are increasing and highlighting the need for a comprehensive, legislated obligation on the State and corporate actors to gain free, prior and informed consent (FPIC) from traditional owners.[28]

39. Rights expressed in Article 29 are fundamental to environmental and natural resource governance in Australia yet are largely absent from the Acts that regulate those areas:

> Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.[29]

40. The capacity for Aboriginal people to exercise environmental protection and conservation rights, such as those asserted in Article 29, is severely compromised by the intensifying impacts of climate change, impacts that the Australian government has so far proven unwilling and ineffective in preventing or mitigating.

41. Rights to ecosystem conservation cannot be effectively utilised without the corresponding access to and control of traditional lands and funding to facilitate management activities, as stated in Articles 25 and 26. Indigenous ranger programs by which traditional owners are funded to care for country have been successful in extending Aboriginal control and management of land and waters and in promoting the use of traditional ecological knowledge in environmental management.[30] There is a growing body of experience in joint management of land and natural resources between Indigenous organisations and state agencies.[31] These successes in the application of UNDRIP principles into Australian environmental and natural resource governance are worth highlighting.

42. However, much more extensive effort is required to integrate into national legislation the rights for traditional owners to control and access and fully participate in all management decisions affecting their lands.

43. A systematic and rigorous plan for the implementation of UNDRIP into domestic law, led by Aboriginal voices, is fundamental to seeing the principles gain legal effect and to enabling the decolonisation of environmental and natural resource management legislation in Australia.

44. Full recognition of Aboriginal sovereignty at the constitutional level and the application of Indigenous self-determination into parliamentary processes are critical to fostering a new era of settler state-Aboriginal relations in which the principles of UNDRIP are firmly embedded into policy and legislative frameworks.

45. Recent government commitments following the May federal election to implement the Uluru Statement and move towards constitutional recognition of Aboriginal existence and rights signal a welcome change in government sentiment.

---

[28] Victoria Tauli-Corpuz, Special Rapporteur on the Rights of Indigenous Peoples, *Rights of Indigenous Peoples*, GA Report, 70th sess, Item 70(a), A/70/301 (7 August 2015).
[29] UNDRIP, Article 29(1).
[30] Joe Morrison, above n 21.
[31] Bruce Lindsay and Hanna Jaireth, 'Australian Environmental Democracy and the Rule of Law – Thoughts from APEEL' (October 2016) *Australian Environment Review* 245, 248.

Application of UNDRIP in State legislation

46. The Indigenous rights paradigm exemplified by UNDRIP is reflected in certain sub-national human rights laws in Australia. UNDRIP is a basis for interpretation of these provisions. In Victoria, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) incorporates UNDRIP type provisions into cultural rights protections under section 19.

47. Subsection 19(2) provides

> Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—
>
> (a) to enjoy their identity and culture; and
> (b) to maintain and use their language; and
> (c) to maintain their kinship ties; and
> (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

48. The Queensland *Human Rights Act 2019* goes further and closely replicates Article 29 of the Declaration, stating

> (2) Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community—
>
> […]
>
> (e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.[32]

49. These are useful articulations of UNDRIP principles into domestic law and an important inclusion of Aboriginal rights to connection to, and development and management rights over, Country.

50. Some progress has been made on this front with grants of cultural water allowances for traditional owners.[33] However, there is very little evidence, at least in the Victorian example, of a systemic or coordinated approach on the part of the administration of government to ensure implementation of cultural rights in favour of Indigenous people.

51. Victoria has made other progressive steps in line with UNDRIP principles, particularly the recurrent theme of redress, including by committing to establishing a truth and justice process, a stolen generation redress scheme and the creation of the First Peoples' Assembly of Victoria to progress conversations towards a treaty.

52. These moves are foundational but need to be accompanied by thorough overhaul of natural resource and environment legislation in each state and territory with a view to inserting Aboriginal rights to participation, consultation and self-determination.

---

[32] *Human Rights Act 2019* (Qld) s 28(2). See also *Human Rights Act 2004* (ACT) s 27 for another example of Aboriginal cultural rights in subnational legislation.

[33] See eg DELWP *Water is Life: Traditional Owner Access to Water Roadmap* (2022), currently in draft form (online) <https://www.water.vic.gov.au/__data/assets/pdf_file/0034/572983/Water-is-life-Draft-Summary.pdf>.

UNDRIP and national environmental law: the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

53. The EPBC Act is Australia's principal national environmental statute. As such, it represents a key legal space by which land, environment and natural resources intrinsic to Indigenous peoples' Country are regulated and subject to positive law.[34]

54. Although an 'omnibus' law, the EPBC Act's central legislative tasks include:

    a. Establishing a regulatory regime over conduct of public and private persons that will or is likely to impact adversely on a set body of environment matters (referred to as 'Matters of National Environmental Significance')

    b. Establishing in statutory form a legal regime for intergovernmental arrangements (within the Australian federation) concerning environmental management

    c. Implementing in domestic legislation various international environmental treaties, such as the Convention on Biological Diversity, the Ramsar Convention, the World Heritage Convention, treaties relating to migratory species, and the Convention on the Trade in Endangered Species.

    d. Establishing arrangements for national environmental administration.

55. Section 3 of the Act sets out its objects. These include, as directly referencing Indigenous peoples:

> (1)The objects of this Act are:
> …
> (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and
> …
> (f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
> (g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.
>
> (2) In order to achieve its objects, the Act:
> …
> (g) promotes a partnership approach to environmental protection and biodiversity conservation through:
> …
> (iii) recognising and promoting indigenous peoples' role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity…

[34] We use the term 'positive law' here to reflect law made by state institutions within the Commonwealth, including Parliamentary legislation, executive legislation, and common law, across the various polities of the Federation. 'Positive law' is arguably distinct from Aboriginal law – or what may be referred to as Aboriginal law and custom: see *Native Title Act 2003* (Cth) – which might be said to be the principal vernacular law associated with Aboriginal peoples and the condition and exercise of Aboriginal sovereignty.

56. Regulatory measures operating expressly under the Act intended to enable the role of Indigenous peoples in conservation, use of Indigenous knowledge and/or partnerships with Indigenous peoples are limited to:

    a. The power to identify and protect 'indigenous heritage values' of a National Heritage Place

    b. Ministerial consideration of Indigenous peoples' interests in relation to the making of bilateral agreements

    c. The permitting of actions affecting listed threatened species which are part of 'Indigenous tradition'

    d. Indigenous peoples' interests and role in the making of recovery plans, threat abatement plans, wildlife conservation plans

    e. Permitting take of species affecting by laws restricting international trade in wildlife for cultural purposes

    f. Ministerial powers to enter into conservation agreements with Indigenous people

    g. Involvement of Indigenous peoples in the management and use of Commonwealth reserves

    h. Establishment and functioning of an Indigenous Advisory Committee

57. In practice, the role and prominence of Indigenous peoples in national environmental affairs as regulated under the Act is limited to certain procedural rights (such as participation on advisory bodies and consultation rights), if not cursory, and, where substantive outcomes have been achieved through the use of protected areas under the Act, protections, use and management associated with those areas. Latter examples include joint management under Commonwealth reserves and the listing of World Heritage Sites on the basis (in whole or part) of Indigenous values (for example Budj Bim Cultural Landscape).

58. In his report in review of the EPBC Act published in October 2020, Professor Samuels was highly critical of the failure of the Act to fulfil 'its objectives as they relate to the role of Indigenous Australians in protecting and conserving biodiversity, working in partnership with and promoting the respectful use of their knowledge'.[35] He identified a 'culture of tokenism and symbolism' at the heart of the design and administration of the Act. Samuels proposes a National Environmental Standard for Indigenous Engagement and Participation in Decision-Making, as well as overhaul of cultural heritage laws.

59. Samuels' proposals for codified rules of engagement between environmental decision-makers and Indigenous peoples are a useful and important starting point, specifically in relation to issues of procedural rights (see below) in environmental decision-making.

---

[35] Samuels *Independent Review of the EPBC Act: Final Report* (2020), 57.

Their implementation would achieve greater alignment with certain key provisions of UNDRIP and environmental management under the EPBC Act.

60. Samuels proposes that a National Environmental Standard is 'intended to be consistent with' UNDRIP and the Convention on Biological Diversity (Biodiversity Convention).[36] That broad approach appears to be captured in his report but we think it may be limited or potentially ambiguous in relation to the following:

    a. It does not engage directly or at length with what the legal standard of 'free, prior and informed *consent'* in environmental decision-making (including regulatory approvals of development) should look like;

    b. It does contemplate the role of Indigenous participation and knowledge as a foundation of environmental governance and management but arguably this approach does not capture fully the political, juridical and institutional nature of 'self-determination' as set out in UNDRIP, including for example how Indigenous peoples' rights in relation to environmental management are to be implemented through rights to recognition and protection of laws and institutions that govern the environment.[37]

61. To the extent that the term 'self-determination' is co-extensive, in Australia, with concepts of Indigenous (Aboriginal) sovereignty, notions of sovereignty are not referred to in the Samuels Review report. Given the relevant nexus in Australia between concepts of Aboriginal sovereignty and self-determination, the former needs to be explored and embedded in Australian environmental laws.

62. Although not regulated expressly under the Act, the emergence of Indigenous Protected Areas (IPAs) based on the Aboriginal estate and involvement in conservation management across the continent is now a cornerstone of national conservation and protected areas management, intrinsically based on the recognition and accommodation of Indigenous leadership, management, law and practices in the governance of that estate. Arguably, the emergence and expansion of IPAs has been enabled by the EPBC Act, among other State and Federal schemes, although not addressed directly by the Act.

63. The EPBC Act was enacted prior to the coming into force of UNDRIP. Other international environmental instruments do set out obligations and guidance concerning the adoption of Indigenous rights relating to environmental management of state parties. To some degree there is overlap in the nature or substance of rights and duties operating under those international environmental agreements and rights and obligations set out in UNDRIP.

64. For example, relatively developed duties and practices are associated with the Biodiversity Convention, such as the program of work implementing Article 8(j) of the Convention which includes extensive guidance to state parties (including Australia) on development assessment impacting on cultural and social values as well as environmental values.

---

[36] Samuels Review, 63.
[37] See eg UNDRIP, Articles 18-20, 26-27.

65. Similarly, Ramsar Convention guidance and work concerning management of wetlands includes obligations on state party collaboration with Indigenous peoples.

66. Section 3 objects advert to the incorporation of Article 8(j) obligations into the EPBC Act but largely those international obligations are not given force and effect in the domestic sphere.[38] For instance, Article 8(j) provides for …

67. Implementation into domestic law (via the EPBC Act) of international obligations for involvement of Indigenous peoples in management of Ramsar wetlands is arguably more legally tractable and evidenced in legislative mandate, if (as far as we are aware) untested. Specifically, under section 334 of the EPBC Act the Commonwealth and its agencies must act consistently with the Ramsar Convention, such conduct including implementation of relevant guidance and resolutions agreed to under the Convention for Indigenous joint management of Ramsar sites. Indigenous peoples' involvement in Ramsar site management has been interpreted by the parties to that Convention as an extension of the principle of 'maintenance of ecological character', the core obligation under the Convention.

68. As these examples indicate, implementation into domestic environmental law of international environmental obligations, as they relate to or enable Indigenous peoples' rights, might be characterized as both limited, ad hoc and/or obscure on the one hand but nevertheless potentially significant on the other hand.[39]

69. International and domestic environmental law has not easily or effectively come to terms with a systemic and foundational role for Indigenous peoples in environmental management, notwithstanding that it does gesture to this accommodation or relationship and that its essential subject-matter is the land, waters, and resources intrinsic to Indigenous peoples' society, polities, practice and, indeed, being.

70. Obligations under international environmental instruments should be read consistently with UNDRIP and, arguably, should be shaped by UNDRIP, noting that UNDRIP is reasonably to be seen as the leading instrument concerning indigenous rights within the international community.

71. In that vein, reform of the EPBC Act (or whatever form future national environmental law is to take) must be informed by UNDRIP and actively apply the measures relating to land, waters and natural resources operating under UNDRIP and endorsed by Australia. Two broad themes emerge from UNDRIP as it can or should apply to Australia's domestic environmental legislation:

---

[38] Article 8(j) of the Convention on Biological Diversity provides:

> Each Contracting Party shall, as far as possible and as appropriate… (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

[39] Such as where implementation of the Ramsar Convention implies co-management rights or obligations arrangements over designated wetlands.

a. Implementation of substantive rights over land, waters and resources, and

b. Procedural rights relating to the use, development, or protection of land, waters and resources.

72. Articles 23, 25, 27, 28, 29, and 32 most directly concern the operation of Indigenous rights in relation to the environment, land, territories, water and natural resources. Various other Articles rely on such rights in order give effect to social, health, linguistic, religious and other human rights. Such reliance is inherent in the intimate and essential connections between Indigenous peoples' being and the natural world. That is a relationship ordinarily referred to as connection to Country in Aboriginal terms in Australia. Indigenous peoples in other jurisdictions typically refer to analogous relationship between society and the natural world.

73. Articles 25 and 26 reflect the provision of substantive rights in relation to land, waters and resources:

> *Article 25*
>
> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
>
> *Article 26*
>
> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

74. Article 29 establishes rights concerning conservation and environmental protection of Indigenous peoples' land, territories and resources. State obligations in support of those rights include obligations to implement conservation programs.

75. While there are various means by which these obligations may be translated into operational outcomes under Australia's national environmental laws, two broad approaches readily come to mind, having regard to existing programs such as IPAs and active involvement of Indigenous people in management of certain lands, waters or protected areas:

a. Expansion and/or greater formalization of protected areas arrangements under the EPBC Act under regimes for concurrent or prevailing Indigenous community governance. Expansion and legislative support for IPAs are one example, including expansion of IPAs into Country and jurisdictions where Indigenous control over land, environment and natural resources has historically been more sparse (such as the eastern States) in order that implementation of UNDRIP provisions relating to the environment and Country are more representative. Much fuller and more robust implementation of commitments under international

treaties, such as the Ramsar Convention, are another example. Full and effective implementation of Ramsar provisions concerning wise use and Indigenous peoples' role in wetland protection and restoration would be broadly consistent with UNDRIP articles noted above as they concern wetlands.[40] Exemption of certain ecosystems from operation of the EPBC Act, notably forests through the Regional Forest Agreement mechanism, substantially undermines the function and/or potential of the Act in implementation of UNDRIP obligations. Those exemptions should be removed.

b. A multitude of planning mechanisms operate or are available under the EPBC Act. Some of these are used relatively routinely, such as recovery plans, threat abatement plans, protected area management plans or conservation advices. Other mechanisms are used far more fleetingly, such as bioregional plans. While consultation provisions may apply to preparation of such plans, in general they are rarely co-produced with Indigenous people directly interested in their subject matter or yet more rarely an outcome led by and principally prepared by Indigenous people. Notwithstanding the widespread need and requirement for planning instruments in environmental management, the fact that Indigenous peoples commonly are preparing plans and arrangements for protection and health of Country is rarely accommodate in or foundational to planning mechanisms under the EPBC Act. Arguably, management of Commonwealth reserves and (outside of the Act) collaborations with private conservation entities are an exception and represent models of better practice. More routine instruments such as preparation of recovery plans or conservation advices (indeed reform of the listing process itself) could be reformed to require accommodation of Indigenous peoples rights to 'resources' insofar as these are intrinsic cultural resources as well as 'natural resources'.

76. UNDRIP is noteworthy and has been developed mostly in relation to procedural rights, specifically the affording of a right to 'free, prior and informed consent' (FPIC) on certain classes of decision-making. For environmental decision-making duties agreed to by state parties on consultation with Indigenous peoples in relation to development and use of land, territories and resources are exemplary of these FPIC rights.

77. For example, Article 32 of the UNDRIP provides:

> *Article 32*
>
> 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

[40] Obligations contained in the Ramsar Convention represent both foundational propositions for all wetlands: Ramsar Secretariat *Wise Use of Wetlands: Concepts and Approaches for the Wise Use of Wetlands* (Ramsar Handbook Vol 1, 4th ed, 2010), [23], and specific obligations applying to designated Ramsar wetlands. The pre-eminent Ramsar obligation to 'promote the conservation… and wise use of wetlands' is to be 'furthered' by the involvement of Indigenous peoples in wetland management': Ramsar CoP *Guidelines for Establishing and Strengthening Local Communities' and Indigenous Peoples' Participation in the Management of Wetlands* (Resolution XII,8, 7th Meeting of the Conference of the Parties, 1999), [3].

> 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.

78. Consultation obligations under UNDRIP are strictly conditioned by their design to achieve the purpose of FPIC. The FPIC model has been widely considered in jurisdictions elsewhere, perhaps most comprehensively and effectively in the Americas including by way of the jurisprudence of the Inter-America Court of Human Rights. FPIC obligations operate in relation to state parties, corporations and multilateral agencies. Controversy surrounding exercise of FPIC obligations has concerned non-observance in practice and undue qualification or limitation of consultation obligations (so that they do not necessarily accord with the FPIC standard).

79. To paraphrase the finding of the Samuels Review report in to the EPBC Act, the relatively few and thin procedural rights contained in the EPBC Act benefiting Indigenous peoples amount largely to 'tokenism and symbolism'.

80. As noted above, Samuels recommends a far more robust and effective scheme for Indigenous participation and recognition, notably in relation to procedural rights. Samuels proposals would perhaps be similar to the Canadian constitutional approach known as 'deep consultation'. That is a principle deriving from Canadian constitutional recognition of treaties with Indigenous peoples. 'Deep consultation' requires consultation to be conducted with a view to *dialogue and accommodation*. It is a model analogous of bargaining and negotiation,[41] short of a requirement to obtain consent.[42] The obligation includes the requirement to be prepared to test proposals and amend positions in pursuit of agreement and reconciliation, in addition to other procedural obligations such as notice, opportunity to comment, reasoned outcomes, and so forth. In short, 'deep consultation' comprises substantive (demonstrable scope for changed or amended outcomes) as well as procedural (participatory) obligations.[43]

81. The UNDRIP formula however includes consultation directed toward the obtaining of consent of Indigenous peoples in actions and conduct affecting them (as for example actions and conduct touch on lands, territories or resources where Article 32 applies).

82. There is a body of debate on the content of rights and duties arising under FPIC principles or models.[44] The adjectival provisions ('free, prior, informed…') are certainly

---

[41] See *Haida Nation v British Columbia (Minister for Forests)* [2004] 3 SCR 511, at [25].
[42] *Gitxaala Nation v Canada* [2016] FCA 187.
[43] *Gitxaala Nation v Canada* [2016] FCA 187, [232]-]236]; Sossin ''The duty to consult and accommodate: procedural justice as Aboriginal rights' (2010) 23 *Canadian Journal of Administrative Law and Practice* 93.
[44] See eg Bass *Prior Informed Consent and Mining: Promoting Sustainable Development of Local Communities* (Environmental Law Institute, 2004); McGee 'The community referendum: participatory democracy and the right to free, prior and informed consent to development' (2009) 27 *Berkeley Journal of International Law* 2 570, 571: 'The concept of free, prior and informed consent is based on the rights of participation and consultation, self-determination, and indigenous property rights';

significant and should be tailored and designed for the context of Indigenous peoples circumstances, including for example the norms and requirements of Indigenous communities internal processes. Rights and duties embedded in 'consent' will be more controversial and, potentially, ambiguous, especially where framed as the sole condition on the exercise of a duty on states to consult. In particular, the question arises as to Indigenous peoples' right of veto over 'actions' (in the context of the EPBC Act, 'actions' affecting MNES). We respond to this proposition below, essentially to support an UNDRIP model of FPIC that requires high bar in relation to Indigenous participation and authority in processes attending environmental assessment and approval, tending to agreement or concurrence. A procedural duty to 'consult in order to obtain consent' highlights a process 'stringently' but not unambiguously confined by the requirement to achieve an outcome.[45]

83. Proper application of UNDRIP provisions to the EPBC Act clearly intends substantial strengthening of procedural rights available to Indigenous people across matters relating to the use, development, protection and conservation of their land, waters and resources. In our submission this strengthening should apply to key elements of action, conduct and decision-making under the Act, such as:

    a. Assessment under Part 8

    b. Approvals under Part 9 and specifically considerations operating under Subdivision B

    c. Planning and listing processes under Chapter 5.

84. The operational heart of the EPBC Act is the assessment and approval provisions under Parts 8 and 9. There are myriad examples where Indigenous people across Australia have sought to oppose 'actions' regulated under Parts 8 and 9 because of adverse impacts of those proposals (typically but not exclusively development projects) on significant parts of Country, tangible or intangible heritage, or as a results of poor or non-existent process for Indigenous engagement in project design or implementation. It is not uncommon for legal challenge to be directed against those projects, either where Indigenous communities challenge EPBC Act approvals or otherwise.

85. There are presently no grounds on which EPBC Act approvals can be challenged solely or primarily on the basis of failure to 'consult… in order to obtain the consent' of Indigenous peoples. In our view there should be.

86. A response to an UNDRIP-modelled procedural right to consultation under the approvals mechanisms of the EPBC Act would likely be that it would summarily halt development projects. In our view that is highly unlikely, not least because controversies over

---

Lindsay, Jaireth and Rivers *Democracy and the Environment: Technical Paper 8* (Australian Panel of Experts in Environmental Law, 2017), 25-29.

[45] Barelli 'Free, prior and informed consent in the aftermath of the UN Declaration of the Rights of Indigenous Peoples' (2012) 16 *International Journal of Human Rights* 1, 1-24, 6, DOI: 10.1080/13642987.2011.597746. Barelli and others are also influenced by the jurisprudence of the Inter-American Court of Human Rights on this issue.

development projects affecting the interests of Indigenous people frequently lie in project design or implementation rather than development *per se* and in imbalanced or sham engagement and interactions between proponents and Indigenous peoples.[46]

87. The UNDRIP model would require genuine legal and regulatory power to lie in the hands of Indigenous people where development would have an adverse impact on the environment (more precisely, on MNES) intersecting with Indigenous peoples' interest. In the context of Indigenous peoples' distinctive relationships to MNES (where these are components of Country), it is likely in our view that the exercise of such powerful consultation rights would provide the opportunity for emergence of distinctive, potentially preferable, development models, rather than anything approximating a veto power on development.[47] Such development models may enhance considerations of protection and restoration of Country (including MNES attached to Country) but they are, in our view, also likely to enable or precipitate economic and social development opportunities for Indigenous peoples. That is largely as UNDRIP intends. By its endorsement of the UNDRIP it is arguably what Australia intends.

88. By way of interim conclusion at this point, it is our submission that:

    a. Australia's principal environmental law (the EPBC Act) contains no reference to and does not implement Australia's obligations under UNDRIP or purport to do so

    b. The Samuels Review report sought to set out a model for Indigenous rights, using UNDRIP and other international treaties as a basis, of greater scope and effect in relation to national environmental laws and their administration.

    c. Arguably, UNDRIP sets out obligations which if applied and implemented in Australia go further than the Samuels Review recommendations, including through greater control, authority and agency in relation to protected areas and environmental planning and in relation to the operation of environmental assessment and approvals under the EPBC Act. UNDRIP infers a consent mechanism attached to consultation rights for EPBC Act approvals where Indigenous people choose to use it.

Water Act 2007 **(Cth)**

89. A second Commonwealth law of significance to the application of UNDRIP to environmental management and to land, waters and natural resources is the *Water Act 2007* (Cth). The *Water Act* establishes a framework for sustainable management of water resources in the Murray Darling Basin. As for the EPBC Act, its constitutional basis lies primarily the external affairs power and, specifically, it is grounded in the domestic

---

[46] For example, the impacts of the Adani coal development on specific natural features of cultural significant, such as groundwater-dependent wetlands: see Lyons and Brigg 'Traditional owners still stand in Adani's way' *The Conversation*, 17 April 2019, <https://theconversation.com/traditional-owners-still-stand-in-adanis-way-115454>.

[47] See eg O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Routledge, 2015); Langton et al (eds) *Settling with Indigenous People: Modern Treaty and Agreement-Making* (Federation Press, 2006).

implementation of international environmental treaties, including (but not limited to) the Ramsar Convention, Biodiversity Convention, the Framework Convention on Climate Change, and Convention Combatting Desertification. The UNDRIP is not enumerated as a 'relevant international agreement' under the *Water Act 2007*.[48]

90. For present purposes, we confine our submissions to opinions on:

    a. Indigenous consultation provisions in the Basin Plan 2012;

    b. Alternative and preferable approaches to Indigenous peoples' role in water resources management in the MDB.

91. The rivers and waters of the MDB are integral to identity, being, law and ancestral connection to Country of Indigenous peoples across the MDB. The impacts of water resources management consequently is central to those connections, given extensive and long-term interference in hydrological regimes (usually referred to as 'river regulation') for the purposes of irrigated agriculture, hydroelectric power generation and urban water supply.

92. Indigenous peoples' rights and interests in water are reflected in the *Intergovernmental Agreement on the National Water Initiative* of 2004, specifically in order that those interests should be reflected in water planning and where attached to native title interests accounted for in water resources management.[49]

93. The *Water Act 2007* requires regard to be had to Indigenous 'issues'[50] in preparation of the Basin Plan and water resources plans must be prepared with regard to 'social, spiritual and cultural matters relevant to Indigenous people' concerning water resources.[51]

94. The main operative provisions enabling recognition of Indigenous peoples' interests in relation to Basin water resources occur under the Basin Plan, specifically Chapter 10 Part 14, which regulates the making of water resources plans (subsidiary regional water plans). These provisions formally require Indigenous consultation in relation to making water resources plans. They require two main actions: identifying certain matters (such as a risk, objective or outcome affecting Indigenous interests)[52] and that regard is to be had to those matters in preparation of water resource plans (by the MDBA).

95. Consultation obligations functioning under the Basin Plan represent weak procedural obligations with limited benefit to Indigenous peoples in relation to the waters of the MDB.[53] This standard has substantially played out in practice where the making of water

---

[48] *Water Act 2007* (Cth), s 4 ('relevant international agreement'). It is arguable that UNDRIP, as a non-binding instrument, does not fall within the terms of (i) 'any other international convention to which Australia is a party…' By these provisions, UNDRIP could be prescribed in the regulations.
[49] Intergovernmental Agreement of the National Water Initiative (2004), [53]-[55].
[50] *Water Act 2007* (Cth), subs 21(4)(c)(v).
[51] Ibid, subs 22(3)(ca).
[52] Basin Plan 2012 (Cth), s 10.52.
[53] MDBA policy on interpreting 'having regard to' – which reflects the statutory terms in Chapter 10 Part 1 - classifies that applying to Indigenous consultation as 'class A', which is the weakest approach

resources plans incorporate matters identified by Indigenous people but that of itself has no consequence to outcomes in terms of benefits, preference or rights in water available to Indigenous peoples.[54] It is notorious that Indigenous peoples in the MDB have control, via the water rights system, of a miniscule proportion of the Basin's water resources and that proportion is actually declining.[55]

96. These obligations are in stark contrast to UNDRIP-modelled rights and duties. The centerpiece UNDRIP procedural right to FPIC (notwithstanding variation in legal formulae), such as that under Article 32, sets out duties on states, including Australia, far more 'stringent' than mere consideration. The process required of the UNDRIP model of state (government) engagement with Indigenous peoples is more akin to bilateral resolution of use and management of Basin water resources, at least as they affect the matters identified under Chapter 10 Part 14. That condition is far from the law or practice of water resources management under the Basin Plan.

97. Having said that, even in the absence of UNDRIP's reference in the Water Act, the statutory basis on which the Basin Plan is to be prepared arguably contains principles not dissimilar to those reflected in UNDRIP, such as Indigenous rights relating to resource use and management and strong participation rights. For example, the Basin Plan must 'promote the wise use of Basin water resources' and 'promote the conservation of designated Ramsar wetlands…' Both statutory obligations reflect foundational Ramsar principles. The pre-eminent Ramsar obligation to 'promote the conservation… and wise use of wetlands' is to be 'furthered' by the involvement of Indigenous peoples in wetland management.[56]

98. 'Promotion of wise use of all the Basin water resources' is to be read consistently with 'participatory management' of Indigenous peoples in wetlands, which is seen as analogous to co-management, collaborative or joint management.[57] This standard is not reflected in law and practice under the *Water Act* and *Basin Plan*. If it were so reflected the management of waters in the MDB would likely be closer to what UNDRIP requires.

99. Findings of the forensic and deft critique of the Royal Commissioner inquiring into the Murray Darling Basin in 2019 are comparable and to similar effect – namely, that involvement of Indigenous peoples in the use and management of the water resources of the MDB is a stark failure of law and policy:

---

of three identified, requiring 'proper, genuine and realistic' consideration accompanied by supporting evidence of 'regard' but not requiring any consequential outcome, action or addition to a water resource plan: MDBA *Position Statement 1B* (2015).

[54] See eg DELWP Wimmera Mallee Water Resource Plan (2018); DELWP Northern Victoria Water Resource Plan (2019), <https://www.water.vic.gov.au/mdb/mdbp/water-resource-plans>.

[55] Hartwig et al 'Australia has an ugly legacy of denying water rights to Aboriginal people. Not much has changed' *The Conversation*, 24 July 2020, <https://theconversation.com/australia-has-an-ugly-legacy-of-denying-water-rights-to-aboriginal-people-not-much-has-changed-141743>; Jackson et al 'Water injustice runs deep in Australia. Fixing it means handing control to First Nations' *The Conversation*, 17 February 2021, <https://theconversation.com/water-injustice-runs-deep-in-australia-fixing-it-means-handing-control-to-first-nations-155286>.

[56] Ramsar CoP *Guidelines for Establishing and Strengthening Local Communities' and Indigenous Peoples' Participation in the Management of Wetlands* (Resolution XII.8, 7th Meeting of the Conference of the Parties, 1999), [3].

[57] Ramsar Guidelines, [7].

> The overwhelming evidence of the Basin's traditional owners is that its waterscape is intrinsic to their cultural identity. They have deep, valuable cultural knowledge about the behaviour of its ecosystems that should be employed centrally in the co-operative Federal scheme established by the Water Act for its restoration and management. Key evidence from representative witnesses is that, not only is a central role their right and responsibility, it is essential to the well-being of their people.
>
> Both MLDRIN and NBAN [Indigenous organisations in the MDB] urged that a human rights-based approach to water resource management is called for in the Water Act and Basin Plan scheme; if not as a legal imperative then as a moral one.
>
> The absence in the Water Act and Basin Plan of any clear or express reference to the relevance of international obligations in the Biodiversity Convention to the role of Aboriginal people in the Basin's biodiversity is striking. The evidence received by the Commissioner indicates a failure to give real effect to these relevant international obligations.
>
> A stronger legal platform for the role of Aboriginal people in managing Basin water resources is required. In addition to embedding into the legislative scheme some stronger consultation provisions, aligned with the Akwé: Kon Guidelines, the Commissioner considers a legislated recognition and rationale for Aboriginal involvement in water resource management is required.[58]

100. The 'stronger legal platform' the Commissioner recommends is also necessary to application of UNDRIP to the management of water resources in the MDB – and indeed elsewhere across the continent. While the Commissioner refers to guidance prepared under the Biodiversity Convention (Akwe:Kon Guidelines), in our view the principles set out under UNDRIP are potentially more coherent and comprehensive. They do not displace measures and tools provided for under international agreements now informing the Water Act and Basin Plan, such as the Akwe:Kon Guidelines (which concern assessment processes) or Ramsar resolution XII.8 (which concerns co-management), but UNDRIP provides an overarching normative framework as well as the specific device of FPIC with which other mechanisms should accord.

101. In our view the application of key UNDRIP provisions, such as Article 32 and the 'consult… in order to obtain consent' mechanism, has clearly not occurred in the making of key instruments under the Water Act and the Basin Plan. Notably, the construction of consultation provisions under Chapter 10 Part 14 of the Basin Plan do not reflect the legal standard provide for in UNDRIP. In our view, neither are they consistent with legal provisions provided for under other international agreements, including the Biodiversity Convention and the Ramsar Convention.

102. Similarly, the making of water resource plans under the Basin Plan has not occurred in conformity with UNDRIP provisions, including for example the FPIC principle as set out in the UNDRIP under Article 32. This outcome is despite the fact that a textual note to section 10.53 of the Basin Plan provided that:

> For example of the principles that may be applied in relation to the participation of Indigenous people, see the document titled MLDRIN and NBAN 'Principles of Indigenous Engagement in the Murray-Darling Basin'.

---

[58] Walker *Murray Darling Basin Royal Commission Report* (2019), 500.

103. The MLDRIN/NBAN document referred to refers to MDBA conduct being 'in accordance with both the spirit and intent of the United Nations Declaration on the Rights of Indigenous Peoples'

104. EJA assisted certain Indigenous organisations in relation to their participation in consultation processes attending water resource plan preparation. The principle of FPIC was repeatedly advanced by Indigenous participants in those consultation processes. The consultation processes undertaken by Basin States (specifically Victoria and NSW) in no way amounted to conduct respecting Article 32 type obligations or other obligations contained in relevant UNDRIP provisions. As indicated above, that conduct did not and seemingly was not designed to 'consult… in order to obtain consent' from Indigenous peoples concerning water resources integral to their Country. Furthermore, effort by Basin States appeared largely directed to tokenism and appearance of engagement (and obtaining information on matters set out in section 10.52 and 10.54), with little or no serious attempt to establish procedural conditions capable of responding to:

a. The highly complex and technical nature of the planning instruments prepared (or to be prepared);

b. The capacity needs and constraints of Indigenous peoples and organisations affecting by those plans;

c. The internal decision-making and consultation processes of Indigenous communities themselves;

d. Accommodation to the positions, approaches or water resource interventions sought or identified by Indigenous communities and their representatives.

105. In our view, application of UNDRIP to the Commonwealth Water Act and Basin Plan properly requires, among other things:

a. Amendment to incorporate expressly UNDRIP as a relevant international agreement

b. Amendment of the Water Act to implement a FPIC mechanism, consistent with UNDRIP provisions, concerning the making of instruments and key decisions under the Act

c. Overhaul of Indigenous consultation provisions under the Basin Plan in order that they reflect UNDRIP procedural standards

d. A statutory requirement that the conduct of the Commonwealth, its agencies (including the MDBA) and Basin States in the performance of their functions and exercise of powers under the Water Act must accord with key relevant provisions of the UNDRIP including but not necessarily limited to the rights and obligations set out under Article 32.

e. The proper resourcing of Indigenous organisations in order that they can effectively discharge their own obligations to their communities, to their Country and as parties in water resource management.

For further information on this submission, please contact:

Dr Bruce Lindsay

Senior Specialist Lawyer

Environmental Justice Australia

T: 03 8341 3100

E: bruce.lindsay@envirojustice.org.au

Submitted to: legcon.sen@aph.gov.au or online at
http://www.aph.gov.au/Parliamentary_Business/Committees/OnlineSubmission