

**Submission to Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous peoples (Submission 33)**

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## **Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous peoples**

**Senate Legal and Constitutional Affairs References Committee**

**Castan Centre Submission – June 2022**

**Dr Katie O’Bryan, Associate Professor Kate Galloway, Associate Professor Melissa Castan and Scott Walker**

### **Summary**

1. There is presently little evidence in Australia of enactment of UNDRIP principles at the Commonwealth level.
2. There is some evidence of UNDRIP principles at the State level through diverse means.
3. UNDRIP principles contain well-established and desirable legal mechanisms for expression of First Nations’ peoples’ ongoing aspirations for self-determination.
4. There are three feasible means for enactment by the Commonwealth of UNDRIP principles: interpretive provisions; a Human Rights Act specifically enumerating the principles; embedding principles of self-determination and free, prior and informed consent into specific legislation (eg *Native Title Act 1993* (Cth)).
5. Given the effect of the *Constitution*, a Commonwealth Human Rights Act will likely affect the operation of State legislation to the extent of any inconsistency.
6. There are many examples of legislative programs in need of urgent revision in light of UNDRIP principles, including: Northern Territory Intervention, Cashless Welfare Card, native title, heritage legislation and the *Migration Act* (following *Love, Thoms v The Commonwealth*)
7. There are various models that would be instructive for the Commonwealth in enacting UNDRIP principles including the framework in Canada, the treaty process in Victoria, Uluru Statement from the Heart, the Coalition of Peaks Closing the Gap Agreement, and the South West Settlement.
8. Implementation requires close attention to the ongoing effects of colonisation, but will benefit also from revisiting the recommendations of multiple Royal Commissions and Inquiries addressing diverse priority matters.

- A. We are non-Indigenous lawyers and legal academics whose research interests include the law affecting First Nations peoples. We do not purport to speak for the Traditional Owners of the land, nor for First Nations peoples. We speak rather concerning the capacity of the law to deliver justice.
- B. We address aspects of the Inquiry terms of reference, focusing on two aspects of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP):
  - a. The right to self-determination (arts 3 and 4)
  - b. The right to free, prior, informed consent (FPIC) (arts 10, 11(2), 19, 28(1))

## 1. Australia's support for and application of the UNDRIP

- 1.1. The Commonwealth expressed support for UNDRIP (2009) but it has not been introduced into legislation.
  - 1.1.1. The Commonwealth Parliament rejected incorporation of UNDRIP into the *Native Title Act 1993* by a bill to amend the Act introduced into the Senate in 2011 by Senator Rachel Siewart.<sup>1</sup> The Senate Legal and Constitutional Affairs Legislation Committee recommended (2011) that the Senate should not pass the bill.<sup>2</sup> It then lapsed.
- 1.2. State legislation has incorporated UNDRIP in various ways, summarised in Table 1 of the Appendix. Of note, the principal occurrence is contained in state legislation concerning:
  - 1.2.1. Human rights;
  - 1.2.2. Treaty making; and
  - 1.2.3. Children and young people.

## 2. The potential to enact the UNDRIP in Australia

- 2.1. While some states and territories have incorporated UNDRIP principles within some legislation, for the principles to become part of Commonwealth law requires legislative provision.
- 2.2. The Commonwealth is empowered to make legislation enacting UNDRIP by virtue of the 'external affairs power' in the *Constitution*.<sup>3</sup>
- 2.3. There are three principal methods of enacting UNDRIP or UNDRIP principles within Commonwealth purview.
  - a) Amendment of the *Acts Interpretation Act 1901* (Cth). This approach would provide for a beneficial interpretation of Commonwealth legislation to conform to principles of UNDRIP but would not provide for substantive rights.
  - b) Amendments to specific legislation enshrining substantive rights that reflect UNDRIP principles, for example as attempted by the Native Title

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<sup>1</sup> Native Title Amendment (Reform) Bill 2011 (Cth) cl 3A.

<sup>2</sup> Senate Legal and constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Reform) Bill 2011* (Final Report, November 2011) 51-2 [1.6]-[1.8].

<sup>3</sup> *Australian Constitution* s 51(xxix). See also, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dams Case*').

Act Amendment Bill 2011 (see above) that provided for UNDRIP principles to be applied in decision-making under the *Native Title Act 1993*.

- c) Enactment of a Commonwealth Human Rights Act enshrining UNDRIP as part of a suite of human rights that are protected by:
    - i) Substantive rights
    - ii) Interpretive provisions
    - iii) Detailing compliance by all commonwealth legislation
    - iv) Systems of redress for breach of rights.
- 2.4. By way of example of enactment, existing legislative human rights instruments in the ACT, Victoria, and Queensland protect human rights in several ways:
- a) They require public authorities to consider human rights in their work and to act compatibly with human rights.<sup>4</sup>
  - b) They require that new legislation introduced to the Parliament is assessed against human rights principles, and although Parliament may pass the legislation in the face of possible human rights breaches, the process works to draw attention to possible human rights conflicts through publicly available compatibility statements.<sup>5</sup>
  - c) They provide that courts must interpret laws consistently with human rights and also provide complaints mechanisms for the resolution of disputes, although none of the human rights instruments give individuals the ability to bring stand-alone human rights complaints before the courts.<sup>6</sup>
- 2.5. A recent report by the Human Rights Law Centre has highlighted that Human Rights Acts ‘make a difference to people’s lives in small and big ways’ by ensuring that people’s human rights are respected, protected, and fulfilled by governments.<sup>7</sup>

### **3. International experiences of enacting and enforcing the UNDRIP**

- 3.1. While there are other experiences internationally, we refer the committee to the Canadian *United Nations Declaration on the Rights of Indigenous Peoples Act 2021* which sets out a staged approach to implementing UNDRIP.<sup>8</sup>
- 3.2. This process might usefully inform an Australian approach.

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<sup>4</sup> See, eg, *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38 (‘Victorian Charter’).

<sup>5</sup> For an explanation of the consideration of human rights in the parliamentary legislative process under the Victorian Charter see, Chris Humphreys, Jessica Cleaver and Catherine Roberts, ‘Considering Human Rights in the Development of Legislation in Victoria’ in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australian Jurisdictions* (Thomson Reuters Lawbook Co, 2020) 209.

<sup>6</sup> See, eg, *Human Rights Act 2009* (Qld) s 48, sub div 3 (‘Queensland Human Rights Act’).

<sup>7</sup> Human Rights Law Centre, *Charters of Human Rights Make Our Lives Better: Here Are 101 Cases Showing How* (Report, 2 June 2022) 8.

<sup>8</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

- 3.3. Note that the Canadian enactment is predicated on a consultation process with First Nations people, which is our recommendation for Australia.

#### 4. Legal issues relevant to ensure compliance with the UNDRIP, with or without enacting it

##### 4.1. With enactment

- 4.1.1. An interpretive provision would generally operate by requiring Parliament to account for UNDRIP considerations in enacting legislation.<sup>9</sup>
- 4.1.2. It would also frame the Courts' interpretation of legislation, encompassing the UNDRIP rights. An example of this has occurred in Queensland, where the Land Court has made orders concerning the taking of evidence on Country through the application of the *Human Rights Act 2019* (Qld).<sup>10</sup>
- 4.1.3. The Executive would likewise be bound to account for the application of UNDRIP principles in the promulgation of subordinate legislation and in Executive decision-making.<sup>11</sup>
- 4.1.4. As with other human rights based legislation in Australia, a Commonwealth Human Rights Act would require provision for a properly funded investigatory and enforcement agency to provide education, facilitate dispute resolution, and to make recommendations for enforcement.
- 4.1.5. UNDRIP principles embedded within specific statutes will require provision for substantive rights for First Nations people and communities with adequate enforcement provision. Without substantive rights, First Nations people will be left without recourse.<sup>12</sup>

##### 4.2. Not enacted

- 4.2.1. Without enacting UNDRIP there may be a gradual development of self-determination principles within Australian jurisprudence and Executive policy.<sup>13</sup> However, this abandons the imperative of setting up

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<sup>9</sup> See, eg, *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

<sup>10</sup> See, eg, *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 5)* [2022] QLC 4.

<sup>11</sup> The Queensland Human Rights Act and the Victorian Charter both bind the Executive: Queensland Human Rights Act (n 8) s 5; Victorian Charter (n 7) s 6.

<sup>12</sup> Kate Galloway, Submission to Joint Standing Committee on Northern Australia, Parliament of Australia, *Inquiry into the Destruction of 46,000-year-old Caves at the Juukan Gorge in the Pilbara Region of Western Australia* (29 July 2020) 1-2 ('2020 Submission'); Kate Galloway, Addendum Submission to Joint Standing Committee on Northern Australia, Parliament of Australia, *Inquiry into the Destruction of 46,000-year-old Caves at Juukan Gorge in the Pilbara Region of Western Australia* (10 March 2021) 2;; Kate Galloway and Melissa Castan, 'Many Interests, One Place: The Unsustainability of a Hierarchy of Rights to Land' (2021) 27 *Pandora's Box* 1, 6 ; Kate Galloway, 'A Legal Lacuna: Between Cultural Heritage and Native Title' 35(4) (2020) *Australian Environment Review* 110 ('A Legal Lacuna'); Kate Galloway, 'Courts of the Conqueror: Adani and the Shortcomings of Native Title Law' (2020) *Australian Quarterly* 91(1) 14-20.

<sup>13</sup> This is especially so at the State level: see Table 1.

institutional frameworks by which to remedy the absence of proper legal relations between First Nations peoples and the Australian State.

**5. Key Australian legislation affected by adherence to the principles of the UNDRIP**

- 5.1. In representing human rights, and given First Nations people in Australia will encounter the law in all aspects of their lives, we submit that all legislation will or should be informed by UNDRIP principles.
- 5.2. Without undertaking a full inventory of legislation that concerns First Nations people in particular, the following Commonwealth legislation demands urgent attention with reference to UNDRIP principles. See Table 2 in the Appendix for details.
  - a) Northern Territory Intervention
  - b) Cashless Welfare Card
  - c) *Native Title Act 1993* (Cth)
  - d) *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)
  - e) *Environment and Biodiversity Conservation Act 1999* (Cth)
- 5.3. Given the majority decision in *Love, Thoms v The Commonwealth*<sup>14</sup> and the current High Court challenge in *Minister for Immigration v Montgomery*<sup>15</sup> the *Migration Act* will be affected by UNDRIP principles<sup>16</sup> until the Commonwealth legislates to regularise the rights of non-citizen non-aliens who are Aboriginal and Torres Strait Islander people.
- 5.4. The operation of s 109 of the *Constitution* will mean that upon implementation of UNDRIP, provisions in State legislation that conflict with Commonwealth provisions might be struck down.<sup>17</sup> Therefore, the implementation of UNDRIP will likely affect legislation in all jurisdictions.
- 5.5. State legislation concerning the following matters (in particular) would be affected:
  - a) Child protection legislation
  - b) Age of incarceration
  - c) Bail, sentencing and detention, especially juvenile detention

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<sup>14</sup> *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152;; Kate Galloway and Melissa Castan, 'High Court Rules Indigenous People Cannot be Deported as Aliens, but the Fight for Legal Recognition Remains', *The Conversation* (online, 11 February 2020) <<https://theconversation.com/high-court-rules-indigenous-people-cannot-be-deported-as-aliens-but-the-fight-for-legal-recognition-remains-131377>>; Kate Galloway and Melissa Castan, 'Indigenous People Cannot be Aliens in their Own Land. Why Challenging this Fact (Again) is So Concerning', *The Conversation* (online, 21 October 2021) <[indigenous-people-cannot-be-aliens-in-their-own-land-why-challenging-this-fact-again-is-so-concerning-170203](https://theconversation.com/indigenous-people-cannot-be-aliens-in-their-own-land-why-challenging-this-fact-again-is-so-concerning-170203)>; Kate Galloway and Melissa Castan, 'Constitution, Land, and Sovereignty: *Love* as a "Race Relations" Case?' (2022) *Public Law Review* (in press).

<sup>15</sup> This case is currently before the High Court of Australia for which decision is reserved: *Minister for Immigration, Citizenship, Migrant services and Multicultural Affairs & Anor v Montgomery*, High Court of Australia, Case S192/2021.

<sup>16</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007), arts 10 and 26 ('UNDRIP').

<sup>17</sup> *Tasmanian Dams Case* (n 6) 140-1 (Mason J), 161 (Murphy J), 207-8, 213 (Brennan J).

- d) Legislation concerning Aboriginal and Torres Strait Islander land titles (in whatever form)
- e) State heritage legislation

## **6. Australian federal and state governments' adherence to the principles of the UNDRIP**

- 6.1. Generally there is criticism over governments' failure to engage First Nations people and communities in matters that affect those communities. Such engagement can be considered to represent both FPIC and self-determination as core principles of UNDRIP.
- 6.2. This failure has resulted in the recommendations of the Referendum Council including a constitutionally enshrined Voice to Parliament<sup>18</sup> as an institutional mechanism towards both FPIC and constitutive self-determination.<sup>19</sup>
- 6.3. Despite the general absence of adherence to UNDRIP principles, the Closing the Gap Agreement (2020) was both informed by First Nations engagements<sup>20</sup> and has its origins in self-determining Aboriginal Community Controlled Health Organisations (ACCHOs).
- 6.4. Both ACCHOs and the resulting 2020 agreement are useful case studies of the positive outcomes arising from UNDRIP principles.

## **7. The track record of Australian Government efforts to improve adherence to the principles of UNDRIP**

- 7.1. We provide three examples of the Government's track record: (1) general attitude to UNDRIP; (2) free prior informed consent; (3) self-determination. In all three instances, the Government to date has shown little enthusiasm for embracing UNDRIP principles.

### **7.2. General Attitude**

- 7.2.1. In March 2022, Senator Lidia Thorpe introduced a Bill into the Senate to implement the UNDRIP in Australia's domestic law.<sup>21</sup> The Bill was subsequently referred to the Senate Legal and Constitutional Affairs Reference Committee. During debate on the motion to refer the Bill to the Committee, comments made by Senator Ann Ruston in response are indicative of ambivalence towards UNDRIP by (then) Government members. Her comments raise two misunderstandings about the nature and effect of UNDRIP. Senator Ruston stated:

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<sup>18</sup> Referendum Council, *Final Report of the Referendum Council* (Final Report, June 2017) 2 (Recommendation 1), 14 ('Referendum Council Final Report').

<sup>19</sup> S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2000) 192-4.

<sup>20</sup> Coalition of Peaks, *A Report on Engagements with Aboriginal and Torres Strait Islander People to Inform a New National Agreement on Closing the Gap* (Report, 2020) 10.

<sup>21</sup> United Nations Declaration on the Rights of Indigenous Peoples Bill 2022 (Cth).

The Declaration on the Rights of Indigenous Peoples is a *non-legally-binding* resolution of the UN General Assembly. It sets out the rights of Indigenous peoples and the application of states' human rights obligations to Indigenous peoples. Australia supports the Declaration on the Rights of Indigenous Peoples and gives practical effect to the declaration through programs and policies. *Australia and many other states have expressed reservations due to the lack of clarity on the meaning and application of 'self-determination' and 'free, prior and informed consent.'*<sup>22</sup>

- 7.2.2. The question of UNDRIP being 'legally binding' has two facets.
- a) First, UNDRIP is not a treaty. However, as international human rights scholar Martin Scheinin and Ohredahke Sami Indigenous rights law expert Mattias Åhrén have noted, 'several of the Declaration's provisions and general provisions, including its Article 3 [right to self-determination] must be understood to be reflective of customary international law' and therefore binding.<sup>23</sup> Scheinin and Åhrén also note that the right of peoples' to self-determination has long been recognised under binding international treaties, including under common article 1 of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights.<sup>24</sup> While some parts of the UNDRIP may be properly considered as *binding* international law, it would be wrong to suggest that 'UNDRIP in its totality' or the 'instrument as such has become legally binding'.<sup>25</sup> Nevertheless, the UNDRIP is a standard-setting instrument under international law that signifies States' willingness to abide by its terms. Australia can be held accountable by the international community of nations in terms of its implementation (or not) of the principles.
  - b) Secondly, as a dualist legal system international law and its norms are not considered to form part of domestic law until enacted into law by Parliament. To that extent, enactment will resolve this point. In any event, as the international law norms of self-determination and FPIC develop, they will inevitably become part of Australian law also, absorbed through operation of common law

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<sup>22</sup> Commonwealth, Parliamentary Debates, Senate, 29 March 2020, 400 (Anne Ruston, Minister for Families and Social Services, Minister for Women's Safety and Manager of Government Business in the Senate) (emphasis added).

<sup>23</sup> Martin Scheinin and Mattias Åhrén, 'Relationship to Human Rights, and Related International Instruments' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 63, 64.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid* 65.



principles.<sup>26</sup> It is therefore not a binary question of being ‘non-legally-binding’.

7.2.3. Australia’s official statement in support of UNDRIP explicitly notes that UNDRIP, Article 46(1) provides:<sup>27</sup>

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.’

Contrary to the kind of assertion reported in Hansard, there is a settled jurisprudence around both self-determination and free prior informed consent.<sup>28</sup>

7.3. *Free, Prior and Informed Consent*<sup>29</sup>

7.3.1. This part addresses both representative institutions, and a sample of legislative provisions that fail to adhere to FPIC.

7.3.2. Representative Institutions

- a) Aboriginal and Torres Strait Islander-run institutions have been established in the past (eg ATSIC). However, experience shows that such institutions can easily be dismantled by the government of the day.<sup>30</sup>
- b) Treaty processes in Victoria have been developed through the First People’s Assembly. While forming part of the state’s statutory institutions, the Assembly might be described as ‘their own representative institution’. The Assembly provides an institutional mechanism for engaging Aboriginal people in FPIC concerning treaty negotiations.<sup>31</sup>
- c) The Victorian institutional landscape is due to change with the introduction of the Treaty Authority and Other Treaty Elements Bill (2022) in what will be an Australian first.
- d) At the Commonwealth level, the Referendum Council’s current proposal for a ‘representative institution’ is a constitutionally enshrined Voice to Parliament. As with Victoria’s Assembly, the institution would be

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<sup>26</sup> The High Court has expressed a willingness to draw on international human rights norms in the development of the common law: see, eg, *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (Brennan J).

<sup>27</sup> Jenny Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), ‘Statement on the United Nations Declaration on the Rights of Indigenous Peoples’ (Statement, 3 April 2009).

<sup>28</sup> See, eg, Anaya (n 19).

<sup>29</sup> UNDRIP (n 21) art 19 provides that: ‘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’.

<sup>30</sup> See, Angela Pratt and Scott Bennett, ‘The End of ATSIC and the Future Administration of Indigenous Affairs’ (2004) 4 *Parliamentary Library Current Issues Brief*; Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart Publishing, 2021) 118-56.

<sup>31</sup> *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) pt 2.

established by statute pursuant to a constitutional amendment. However, the intention is for the Voice to provide an embedded institutional mechanism to facilitate FPIC.<sup>32</sup>

- e) In a more specific context, the *Native Title Act* constitutes Indigenous organisations - native title representative bodies and prescribed bodies corporate - that may satisfy the 'own representative institution' requirement. Yet the processes of FPIC are not uniformly provided under the Act (see below).<sup>33</sup>
- f) While the organisations may satisfy the requirement to some extent, corporate decision-making structures are generally foreign to First Nations people. Their establishment pursuant to strict legislative requirements itself calls for FPIC in the re-negotiation of how these corporations should operate in a culturally appropriate manner.

Table 3: Example of Commonwealth Legislation falling short of FPIC

UNDRIP Provision	Law/Policy	Problems
Redress for cultural, intellectual, religious and spiritual property taken without FPIC <sup>34</sup>	<p>The Australian government 'supports repatriation':</p> <ul style="list-style-type: none"> <li>• policy on Indigenous Repatriation refers to appropriate principles.<sup>35</sup></li> <li>• Australian Government Advisory Committee for Indigenous Repatriation composed of Indigenous membership.</li> <li>• Over 1600 ancestors have been repatriated over 30</li> </ul>	Commonwealth Policy relates only to the return of ancestral remains and secret sacred objects and does not include other important artifacts or significant artworks. <sup>38</sup>

<sup>32</sup> Referendum Council Final Report (n 23) 28.

<sup>33</sup> Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (Final Report No 126, April 2015) 54 [1.101], 85 [2.117]-[2.119]. ALRC Report on NTA reform.

<sup>34</sup> UNDRIP (n 21) art 11(2) provides that: 'States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs'.

<sup>35</sup> Australian Government Department of Communications and the Arts, 'Australian Government Policy on Indigenous Repatriation' (Policy Paper, September 2016) 8. <https://www.arts.gov.au/documents/australian-government-policy-indigenous-repatriation>, in particular Indigenous Repatriation Policy (2016), p 8.

<sup>38</sup> See, eg, works by William Barak, recently bought at auction by his descendants, with donations and help from the Victorian Government: Margaret Paul, 'Descendants of William Barak Buy Two of His Works at New York Auction', *ABC News* (online, 26 May 2022) <<https://www.abc.net.au/news/2022-05-26/william-barak-art-auction-new-york/101100606>>. See also 7:30 (ABC Television) (26 May 2022).

	<p>years from around the world (as at 28 November 2019).<sup>36</sup></p> <ul style="list-style-type: none"> <li>• There is a museum grants program in relation to domestic repatriation.<sup>37</sup></li> </ul>	
UNDRIP, art 12, and the right of repatriation of human remains. <sup>39</sup>	The Australian Government seeks the unconditional return of Aboriginal and Torres Strait Islander ancestral remains from overseas collecting institutions and private holders. <sup>40</sup>	There is no way to compel the return of ancestral remains from overseas. <sup>41</sup>
Consultation under the <i>Native Title Act 1993</i> (Cth)	Amendments were suggested to the <i>Native Title Act</i> in 2011, requiring consultation that would satisfy the UNDRIP requirement of FPIC. However, they did not pass into law.	There are only limited requirements to consult with First Nations people in various respects under the <i>Native Title Act</i> , in some cases amounting to only notification or an opportunity to comment. <sup>42</sup> Nor is consent required for administrative action.
Compensation for matters concerning land	Compensation under the <i>Native Title Act</i> is available for post-1975 activities on native title land.	Despite the availability of compensation, the <i>Timber Creek Case</i> <sup>44</sup> is the only publicly available record of a successfully litigated compensation claim, coming

<sup>36</sup> Australian government Department of Infrastructure, Transport, Regional Development and Communications Office for the Arts, 'Domestic Repatriation' (Web Page) <<https://www.arts.gov.au/what-we-do/cultural-heritage/indigenous-repatriation/domestic-repatriation>>. Fact Sheet: Indigenous Repatriation – International (Australian Government, Department of Communications and the Arts) <https://www.arts.gov.au/what-we-do/cultural-heritage/indigenous-repatriation/international-repatriation>.

<sup>37</sup> *Ibid.* <https://www.arts.gov.au/what-we-do/cultural-heritage/indigenous-repatriation/domestic-repatriation>.

<sup>39</sup> 'Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains' (emphasis added).

<sup>40</sup> Australian Government 'International Repatriation' <<https://www.arts.gov.au/what-we-do/cultural-heritage/indigenous-repatriation/international-repatriation>>.

<sup>41</sup> See, eg, Chris Davies and Kate Galloway, 'The Story of Seventeen Tasmanians: The Tasmanian Aboriginal Centre and Repatriation from the Natural History Museum' (2009) 11 *Newcastle Law Review* 143.

<sup>42</sup> See eg, s24HA of the *Native Title Act 1993* (Cth) concerning water.

<sup>44</sup> *Northern Territory v Griffiths* (2019) 269 CLR 1.

<p>undertaken without FPIC<sup>43</sup></p>		<p>nearly three decades after the <i>Mabo (No 2)</i> decision signifying the failure of the compensation systems to afford redress.</p> <p>The loss of native title rather than compensation for the loss of land per se, dramatically limits the availability of compensation for dispossession. Implementation would support revisiting the long-abandoned social justice package first proposed immediately post-Mabo.<sup>45</sup></p>
	<p>Settlement agreements as part of a consent determination may include compensation in the form of funding, land transfers, and are generally seen as the final word on compensation.</p>	<p>Although this is not intended to limit the right for compensation flowing from as-yet unknown future acts under the <i>Native Title Act</i>, it tends to be final.</p>
<p>Storage and disposal of hazardous materials.<sup>46</sup></p>		<p>There are multiple Australian examples of the failure to engage the FPIC of First Nations people concerning the storage and disposal of</p>

<sup>43</sup> UNDRIP (n 21) art 28 provides that: 'Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent'.

<sup>45</sup>The social justice package was first proposed by then prime minister Paul Keating in 1994. For a summary of the history of such proposals see: Australian Law Reform Commission, *Review of the Native Title Act 1993* (Discussion Paper No 82, October 2014) 63-5. Cite

<sup>46</sup> UNDRIP (n 21) Article 29(2) provides that: 'States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent'. Examples of circumstances in which UNDRIP art 29(2) would be engaged include nuclear waste dump proposals in South Australia: see, eg, Gillian Aeria et al, 'Radioactive Storage Bill Amendments Welcomed by Traditional Owners, Pave Way for Legal Challenges', *ABC News* (online, 23 June 2021) <<https://www.abc.net.au/news/2021-06-23/kimba-radioactive-storage-bill-amendments-passed/100237046>>; Declan Gooch and Emma Pedler, 'Napandee Chosen as Nuclear Waste Storage Site After "Six Years of Consultation"', *ABC News* (online, 29 November 2021) <<https://www.abc.net.au/news/2021-11-29/napandee-radioactive-waste-storage-facility-nuclear-kimba/100657832>>; Douglas Smith, 'A Unanimous "No" Vote from Traditional Owners on SA's Proposed Nuclear Waste Dump', *NITV News* (online, 21 November 2019) <<https://www.sbs.com.au/nitv/article/2019/11/21/unanimous-no-vote-traditional-owners-sas-proposed-nuclear-waste-dump>>.

		hazardous materials, contrary to UNDRIP.
FPIC before approval affecting lands <sup>47</sup>	The <i>Native Title Act</i> affords traditional owners a right to negotiate in relation to 'future acts'.	This right does not involve consent at all. This is widely considered to be a fundamental deficiency in the native title scheme. <sup>48</sup>
	Indigenous heritage legislation aims to protect Indigenous heritage.	It is framed around administrative rights vesting in the Crown, rather than vesting any substantive rights in First Nations people to engage in FPIC concerning heritage determination or development over declared areas. <sup>49</sup>
	The <i>Traditional Owner Settlement Act</i> (Vic) provides that agreement must be reached with Aboriginal people in relation to certain activities on their land, providing a stronger right than that in the <i>Native Title Act</i> . <sup>50</sup>	Falls short of FPIC.

#### 7.4. Self-Determination<sup>51</sup>

7.4.1. Self-determination per se is not currently a stated or apparent policy objective of the Commonwealth government.

<sup>47</sup> UNDRIP (n 21) Article 32(2) provides: 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources'.

<sup>48</sup> See, eg, Kate Galloway, 'Courts of the Conqueror: Adani and the Shortcomings of Native Title Law' (2020) 91(1) *Australian Quarterly* 14.

<sup>49</sup> Galloway, 'A Legal Lacuna' (n 15); Galloway, 2020 Submission (n 15); Galloway and Castan (n 15). Kate Galloway, 'A legal lacuna: between cultural heritage and native title' (2020) *Australian Environment Review* 110; Kate Galloway and Melissa Castan, 'Many Interests, One Place: The Unsustainability of a Hierarchy of Rights to Land' (2021) *Pandora's Box* 1; Kate Galloway, 'Submission to An inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia by The Joint Standing Committee on Northern Australia, Submission 27 (Parliament of Australia, 2020).

<sup>50</sup> See, eg, *Traditional Owner Settlement Act 2010* (Vic) Part 4, Div 3.

<sup>51</sup> UNDRIP (n 21) preamble, Articles 3, 4.

- a) However, the Albanese Government has stated its support for the *Uluru Statement from the Heart*, which refers to self-determination.<sup>52</sup>
  - b) It is widely accepted that the self-determination elicited by a constitutionally enshrined Voice to Parliament is *constitutive self-determination*.<sup>53</sup>
  - c) There is no provision for funding to support self-determination in furtherance of Article 4 although there may be funding provided as part of implementing settlement agreements within native title processes.
- 7.4.2. Self-determination appears as a guiding principle in some State processes, and funding may be available in some instances.
- a) 'Self-determination' is the guiding principle for Indigenous affairs in Victoria.<sup>54</sup>
  - b) Self-determination is the first of the guiding principles for treaty negotiations in the *Advancing the Treaty Process with Victorian Aboriginals Act 2018* (Vic).<sup>55</sup>The treaty negotiation framework must provide for the negotiation of treaties that 'promote the fundamental human rights of Aboriginal peoples, including the right to self-determination'.<sup>56</sup>
  - c) The First Peoples Assembly of Victoria is negotiating for the establishment of a self-determination fund.<sup>57</sup>

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<sup>52</sup> The *Uluru Statement from the Heart* provides that: 'Makaratta is the culmination of our agenda: *the coming together after a struggle*. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination': *Uluru Statement from the Heart* (National Constitutional Convention, 26 May 2017). This was recently affirmed by those involved in the Uluru dialogues: see, *Yarrabah Affirmation* (First Nations Delegates Meeting, 20 April 2022).

<sup>53</sup> The Voice to Parliament is intended to 'redistribute public power via the Constitution' and create and institutional relationship between governments and First Nations that will compel the state to listen to Aboriginal and Torres Strait Islander peoples in policy and decision-making': Megan Davis and George Williams, *Everything You Need to Know About the Uluru Statement from the Heart* (NewSouth Publishing, 2021) 151-2. See also, Melissa Castan, Katie O'Bryan and Kate Galloway, Submission to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018 (8 June 2018); Katie O'Bryan and Melissa Castan, Castan Centre for Human Rights Law Submission to the United Nations Expert Mechanism on the Rights of Indigenous Peoples regarding Report on Self-Determination (1 March 2021); Scott Walker et al, Castan Centre for Human Rights Law Submission to the United Nations Expert Mechanism on the Rights of Indigenous Peoples regarding Treaties, Agreements and Other Constructive Arrangements between Indigenous Peoples and States (January 2022).

<sup>54</sup> See, Pupangarli Marnmarnepu (n 3); Victorian Government Department of Jobs, Precincts and Regions, Victorian Aboriginal and Local Government Strategy 2021-2026: Pathway to Stronger Partnerships (Policy Paper, 2020).

<sup>55</sup> *Advancing the Treaty Process with Victorian Aboriginals Act 2018* (Vic) s 22.

<sup>56</sup> *Advancing the Treaty Process with Victorian Aboriginals Act 2018* (Vic) s 30(3)(g).

<sup>57</sup> See, *Advancing the Treaty Process with Victorian Aboriginals Act 2018* (Vic) pt 6; First Peoples' Assembly of Victoria, 'Self-Determination Fund' (Policy Paper) <<https://www.firstpeoplesvic.org/wp-content/uploads/2022/04/fpav-self-determination-fund-FA.pdf>>.

- d) *Traditional Owner Settlement Act 2010* (Vic) settlement agreements can (and do) include funding agreements which may serve to facilitate self-determination.<sup>58</sup>
- e) Queensland Government Treaty Statement of Commitment has self-determination as one of its guiding principles.<sup>59</sup>
- f) The South West Settlement in Western Australia grew out of an unsuccessful native title claim, and ended in legislatively enacted settlement terms including substantial funding.<sup>60</sup>

## **8. Community, stakeholder efforts to ensure application of UNDRIP principles in Australia**

- 8.1. Aboriginal and Torres Strait Islander peoples have not stopped in their fight to be self-determining peoples—whether with specific reference to UNDRIP principles or not.<sup>61</sup>
- 8.2. Recent examples of the fight for self-determination and FPIC include:
  - a. Tent Embassy<sup>62</sup>
  - b. Uluru Statement from the Heart<sup>63</sup>
  - c. Victorian First Peoples Assembly<sup>64</sup>
  - d. Closing the Gap Agreement (Coalition of Peaks)<sup>65</sup>
  - e. NACCHO<sup>66</sup>

## **9. The current and historical systemic and other aspects to take into consideration regarding the rights of First Nations people in Australia**

- 9.1. We acknowledge the ongoing systemic effects of colonisation and violence against First Nations people in Australia. It is vital to recognise not only the history and the legacy of violence and their contemporary manifestations, but also the ongoing and renewed forms of dispossession, racism and disenfranchisement that are enacted by Australian law and governance.
- 9.2. Without taking an inventory of specific aspects of this experience to consider, we point to the unrealised potential of various State and Commonwealth Royal Commissions as a rich source of guidance for early and appropriate action.

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<sup>58</sup> *Traditional Owner Settlement Act 2010* (Vic) s 7.

<sup>59</sup> Queensland Government, Treaty Statement of Commitment and Response to Recommendations of the Eminent Panel (August 2020).

<sup>60</sup> *Land Administration (South West Native Title Settlement) Act 2016* (WA).

<sup>61</sup> For an overview of more recent entreaties, see, eg, Dani Larkin and Kate Galloway, 'Uluru Statement from the Heart: Australian Public Law Pluralism' (2018) *Bond Law Review*, 30(2).

<sup>62</sup> Bronwyn Carlson and Lynda-June Coe, 'A short history of the Aboriginal Tent Embassy – an indelible reminder of unceded sovereignty' (13 January 2022) *The Conversation* <<https://theconversation.com/a-short-history-of-the-aboriginal-tent-embassy-an-indelible-reminder-of-unceded-sovereignty-174693>>.

<sup>63</sup> *Uluru Statement from the Heart* (National Constitutional Convention, 26 May 2017).

<sup>64</sup> *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic).

<sup>65</sup> Coalition of Peaks, *A Report on Engagements with Aboriginal and Torres Strait Islander People to Inform a New National Agreement on Closing the Gap* (Report, 2020).

<sup>66</sup> National Aboriginal Community Controlled Health Organisation, 'About Us' <<https://www.naccho.org.au/about-us/>>.

- 9.2.1. The Royal Commission into Aboriginal Deaths in Custody<sup>67</sup>
- 9.2.2. The Bringing Them Home Report<sup>68</sup>
- 9.2.3. Multiple constitutional reform proposals and inquiries<sup>69</sup>
- 9.2.4. Inquiries into juvenile detention, foster care and child removal

## APPENDIX

Table 1: State Incorporation of UNDRIP principles

State/territory	Legislation	Notes
Northern Territory	Burunga Agreement: Appendix to the <i>Treaty Commissioner Act 2020</i> (NT)	Calls on the government to recognise the rights of First Nations peoples of the Northern Territory 'in accordance with the universal declaration of human rights [sic] and other human rights principles
Victoria	Department of Environment, Land, Water and Planning, Pupangarli Marnmarnepu 'Owning Our Future': Aboriginal Self-Determination Reform Strategy 2020 – 2025 <sup>70</sup>	Not legally binding
	Victorian Government Self-Determination Reform Framework <sup>71</sup>	Not legally binding
	Yoorrook Justice Commission Letters Patent <sup>72</sup>	References the UNDRIP as containing relevant human rights

<sup>67</sup> *Royal Commission into Aboriginal Deaths in Custody* (Final Report, April 1991) vol 1-5.

<sup>68</sup> Australian Human Rights Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Report, April 1997).

<sup>69</sup> See, eg, Larkin and Galloway (n 60).

<sup>70</sup> Victorian Government Department of Environment, Land Water and Planning, *Pupangarli Marnmarnepu 'Owning Our Future': Aboriginal Self-Determination Reform Strategy 2020-2025* (Strategy, 2019) ('*Pupangarli Marnmarnepu*').

<sup>71</sup> Victorian Government, *Self-Determination Reform Framework* (Policy Paper, July 2019).

<sup>72</sup> Governor of Victoria, *Letters Patent for the Establishment of the Yoorrook Justice Commission* (12 May 2021) 1.



	<i>Advancing the Treaty Process with Aboriginal Victorians Act 2018 (Vic)</i>	Preamble: 'the State recognises the importance of the treaty process proceeding in a manner that is consistent with the principles articulated in the <u>United Nations Declaration on the Rights of Indigenous Peoples</u> , including free, prior and informed consent.' (emphasis added)
<b>South Australia</b>	<i>Children and Young People (Oversight and Advocacy Bodies) Act 2016 (SA) ss 4, 5</i>	Section 5: Each State authority must, in carrying out its functions or exercising its powers, protect, respect and seek to give effect to the rights set out from time to time in the <i>United Nations Convention on the Rights of the Child</i> , the <u>United Nations Declaration on the Rights of Indigenous Peoples</u> and any other relevant international human rights instruments affecting children and young people.' (emphasis added)
<b>Tasmania</b>	<i>Children, Young Persons and their Families Act 1997 (Tas) s 8</i>	Provides that the legislation is to be interpreted and exercised in accordance with 'any international convention relating to children to which Australia is a signatory and which is in force'. A Note to this section specifically provides UNDRIP as an example.
<b>Australian Capital Territory</b>	<i>Human Rights Act 2004 (ACT) s 27</i>	A Note to s 27 recognises that the primary source of the cultural rights of Aboriginal and Torres Strait Islander peoples to maintain, control, protect and develop their cultural heritage

		and practices, language and knowledge and kinship ties is arts 25 and 31 of UNDRIP.
<b>Queensland</b>	<i>Human Rights Act 2019 (Qld)</i>	Paragraph 6 of the Preamble provides that: 'Although human rights belong to all individuals, human rights have a special importance for the Aboriginal peoples and Torres Strait Islander peoples of Queensland, as Australia's first people, with their distinctive and diverse spiritual, material and economic relationship with the lands, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition and Ailan Kastom. Of particular significance to Aboriginal peoples and Torres Strait Islander peoples of Queensland is the right to self-determination'

Table 2: Summary of Commonwealth legislation demanding urgent review

<b>Commonwealth legislation</b>	<b>UNDRIP principles</b>
The package of legislation authorising and maintaining the Northern Territory Intervention <sup>73</sup>	<ul style="list-style-type: none"> <li>- Article 2: freedom from discrimination on the basis of their indigenous origin</li> <li>- Article 3: right to self-determination</li> <li>- Article 4: right to autonomy and self-government as an aspect of self-determination</li> <li>- Article 10: freedom from forced removal without free, prior and informed consent</li> <li>- Article 14: right to establish own educational</li> </ul>

<sup>73</sup> Northern Territory National Emergency Response Act 2007 (Cth); Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth); Families, Community Service and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth).

	<p>systems and institutions</p> <ul style="list-style-type: none"> <li>- Article 18: right to participate in decision-making in matters which would affect their rights</li> <li>- Article 21: right to improvement of economic circumstances</li> </ul>
Legislation implementing and maintaining the Cashless Welfare Card <sup>74</sup>	<ul style="list-style-type: none"> <li>- Article 2: freedom from discrimination on the basis of their indigenous origin</li> <li>- Article 3: right to self-determination</li> <li>- Article 4: right to autonomy and self-government as an aspect of self-determination</li> <li>- Article 18: right to participate in decision-making in matters which would affect their rights</li> <li>- Article 21: right to improvement of economic circumstances</li> </ul>
<i>Native Title Act 1993 (Cth)</i>	<ul style="list-style-type: none"> <li>- Article 3: right to self-determination</li> <li>- Article 4: right to autonomy and self-government as an aspect of self-determination</li> <li>- Article 24: right to traditional medicines and conservation of vital medicinal plants, animals and minerals</li> <li>- Article 25: right to maintain and strengthen distinctive spiritual relationship with traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources</li> <li>- Article 26: right to lands, territories and resources traditionally owned, occupied, or otherwise used or acquired and related rights to develop that area</li> <li>- Article 28: right to redress regarding lands, territories and resources confiscated, taken, occupied, used or damaged without free, prior and informed consent</li> <li>- Article 32: right to determine and development strategies for use of traditional lands</li> </ul>
<i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)</i>	<ul style="list-style-type: none"> <li>- Article 31 right to maintain, control, protect and develop cultural heritage, traditional cultural knowledge and expression</li> </ul>
<i>Environment and Biodiversity Conservation Act 1999 (Cth)</i>	<ul style="list-style-type: none"> <li>- Article 29: right to conservation and protection of the environment</li> </ul>

<sup>74</sup> *Social Security (Administration) Act 1991 (Cth)* incorporating amendments under the *Social Security (Administration) Amendment (Continuation of Cashless Welfare) Act 2020 (Cth)*.