



National
Native Title
Council

Free, Prior and Informed Consent

Anirudha Nagar
Senior Advisor – Legal Policy
anirudha.nagar@nntc.com.au



We acknowledge the Traditional Owners of Country on the lands on which we work, and we pay our respects to Elders past, present and emerging.

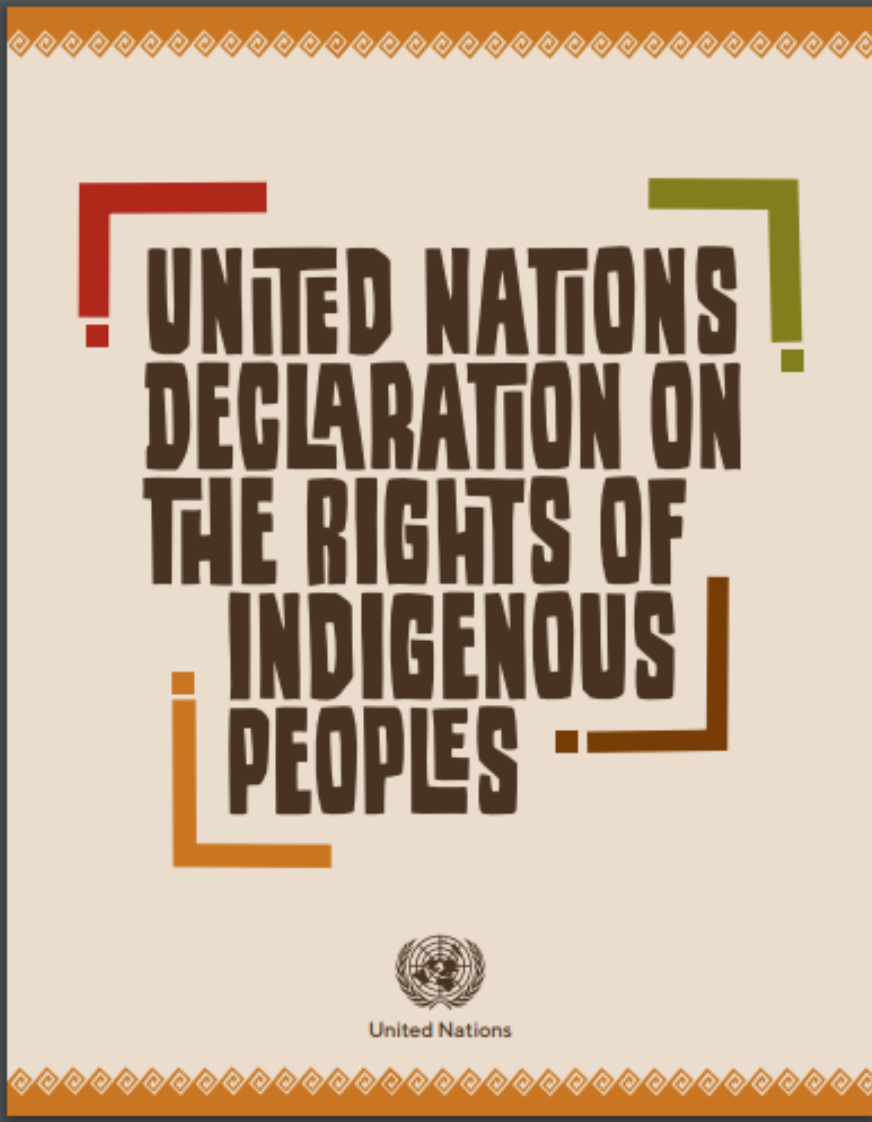


What is FPIC?

'free and informed consent prior to the approval of any project affecting ...[Indigenous] lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources'

UNDRIP

- **Free** refers to consent given voluntarily and without coercion. Also refers to a process self-directed by the community.
- **Prior** means consent is sought sufficiently in advance of any approval / commencement of activities
- **Informed** refers to the information that should be provided prior to and as part of the ongoing process.
- **Consent** refers to the collective decision made by affected First Nations communities and reached through their decision-making processes.



Consent includes the right to say no, or the right to veto



Why - the case for FPIC

For project developers, risk management and certainty, failing which there are financial, reputational and legal costs

For investors, FPIC protects against investment risks

- International Finance Corporation Performance Standards
- Equator Principles
- Due diligence of investors increasingly includes what policies companies have in place to respect the right of FPIC

Fortescue Metals could face paying traditional owners millions of dollars in native title compensation claim

By business reporter Sue Lannin

Posted Wed 25 May 2022 at 8:46am



Yindjibarndi traditional owners in the Pilbara have been asked to register for the compensation case against Fortescue Metals in the Federal Court. (Supplied: Fortescue Metals Group)

ABC News, 25 May 2022

Examples:

- Juukan Gorge
- Yindjibarndi compensation claim
- Federal Court Santos Barossa consultation decision

Evolving legal landscape

Australian law falls short of fully enshrining FPIC. UNDRIP has not been incorporated into Australian law.

But, the legal landscape is evolving. The Parliamentary Inquiry into the destruction at Juukan Gorge established a set of strong recommendations on FPIC including reform of

- Cultural heritage laws
- The Native Title Act's future acts regime
- There is a Senate inquiry on UNDRIP following introduction of a Bill

Examples of consent requirements in Australian law:

- Aboriginal Land Rights (Northern Territory) Act 1976
- Carbon Credits (Carbon Farming Initiative) Act 2011



Traditional owner Harold Ashburton at Juukan Gorge in 2015 (*PKKP Aboriginal Corporation*)

1. Identify who speaks for Country in the project area

Search the National Native Title Register to see if native title has been determined over the project area. If native title has been determined, the relevant Prescribed Body Corporate (PBC) is the main point of contact.

Get written confirmation of relevant contact people / organisations who may include Traditional Owners, board members, legal representatives.

2. Identify any appropriate local engagement and decision-making processes

Decision-making processes within PBCs or other representative bodies vary depending on its constitution, the nature of the land tenure, as well as cultural customs and protocols.

3. Agree on a process for consultation and consent

By whom and how will decisions on consent be made? Who will participate in meetings? If representatives, how will the negotiations be socialised with the broader community? What are the ground rules for negotiations? How will communities participate in social and environmental assessments, site selection, project design?

4. Establish timeframes and agree on how the costs of engagement will be covered

5. Undertake the negotiation and FPIC process throughout the project cycle



NIT, September 29 2022

Some key points

Free

Time: Allow adequate time for consultation and community decision-making throughout the process.

Don't use confidentiality clauses in agreements that prevent First Nations people from critiquing issues or having to obtain company consent before speaking out.

Prior

Engage with First Nations people as early as possible (and throughout the project cycle).

Too often companies start engaging with First Nations people once other approvals are in place and the project is ready to commence.

Informed

- Share all relevant information on an ongoing basis throughout the life of the project.
- All information should be translated into local languages and in a form communities understand
 - Transparency about negative impacts
 - Alternatives analysis - providing options for feedback not firm plans
 - People informed about how feedback is incorporated
- First Nations people must be sufficiently resourced to effectively negotiate. This includes resources for:
 - accessing independent legal advice
 - technical advice
 - community awareness, organising, strong representative structures
- Share agreements publicly as much as possible

Consent

Engage with recognised representatives of affected First Nations communities.

- In some cases, this may not be simple and require identification – transmission lines and linear projects

Companies should be careful not to contribute to divide and conquer dynamics

Agreements reached should clearly outline the terms and scope of consent provided by First Nations people.

- Defined time periods rather than open ended
- Contain review clauses that allow agreements to be re-negotiated including when there is a significant change in project plans or any change in impacts



National **Native Title** Council

Thankyou

nntc.com.au



We acknowledge the Traditional Owners of Country on the lands on which we work, and we pay our respects to Elders past and present.

