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The Concept of Free, Prior and Informed Consent: From Global to Local

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Introduction

At the international level, the year 2004 has brought substantial progress in the exercise by Indigenous peoples of the right to self-determination over traditional territories and resources. This has been facilitated through the application of the principle of free, prior and informed consent ('PIC').

This paper will discuss the decision by the United Nations Permanent Forum on Indigenous Issues ('UNPFII') to begin a dialogue on PIC. It will also address standard setting by the Working Group on Indigenous Populations concerning PIC. Finally, the adoption by the Seventh Conference of Parties to the United Nations ('UN') *Convention on Biological Diversity and Sustainable Development* ('CBD') of the *Akwe Kon Voluntary Guidelines on the Conduct of Cultural, Social and Environmental Impact Assessments* ('the Akwe Kon Guidelines'), which utilise PIC in the implementation of the Convention, will be examined. The implications of these developments will be discussed in the context of the continuing campaign by Indigenous Australians for broader rights recognition in domestic legislation and public policy.

Australia's Rights-Based Indigenous Policy Framework

For over three decades, with the exception of the last seven years, Indigenous public policy in Australia has evolved within a rights-based framework. That is, policy and law-makers and the Indigenous lobby accept that the socio-economic disadvantage suffered by Indigenous Australians is a symptom of a systemic denial of rights to Indigenous communities, for example, in land, housing, education and health. This framework asserts that special measures need to be taken in legislation, policy and funding to guarantee Indigenous communities their rights. This would begin to redress disadvantage and enable Indigenous peoples to participate (and add value) more equitably in the broader society.

A fundamental platform of the rights-based approach is the effective exercise by Aboriginal Australians of the right to self-determination.^[1] This right cannot be effectively exercised without proper respect for the PIC principle. Inherent to the principle is the right to say 'no'.

The United Nations Permanent Forum on Indigenous Issues

The United Nations Permanent Forum on Indigenous Issues was set up four years ago with a mandate^[2] to integrate and coordinate Indigenous issues across the UN system. In its second report,^[3] the UNPFII identified PIC as an emerging issue. A workshop of UN agencies, Indigenous peoples' representatives and member states was arranged to develop a common understanding of the concept and to promote its implementation. This meeting will address international policy frameworks relevant to PIC and discuss specific issues including cultural diversity and development, rights-based development, gender equity, traditional knowledge, natural resources, health, education and relocation. This understanding of PIC as a methodological issue has been helpful in entrenching the concept in the work of international agencies. It has been a catalyst for other issues relating to PIC within the UN system.

The Working Group on Indigenous Populations

The Working Group on Indigenous Populations ('WGIP') - a UN human rights body - decided to undertake a legal commentary on PIC as part of its mandate to 'set standards'. It also sought to enable governments to more comprehensively 'operationalise' PIC, that is, to define and implement the practice. A common understanding of PIC is necessary if Indigenous peoples are to access the process and to ensure full enjoyment of the right to self determination.

In Australia, the Indigenous lobby, as well as governments and their agencies, have understood the relationship between PIC as a principle and its application at national, state and local levels. While clearer PIC definitions are developing through human rights fora like the WGIP and the Working Group on the Draft Declaration on the Rights of Indigenous Peoples ('WGDD'), domestically our focus must be on building on what we already have in legislation and policy.

Following its election in March 1996, the Howard Government launched a concerted attack on the *Native Title Act 1993* (Cth) ('NTA'). Among other issues, the Government sought to remove PIC (interpreted in the NTA as a 'right to negotiate') from large swathes of the Future Act provisions of NTA. The *Native Title Amendments Act 1998* (Cth) removed native title holders' (or prospective native title holders') right to negotiate over future developments in areas under certain types of leases. This is despite significant and far-reaching guidelines adopted in February by the Seventh Conference of Parties to the CBD ('COP 7'), which seek to protect the interests of Indigenous peoples where developments are proposed on their traditional lands and waters.

The Convention on Biological Diversity ('CBD')

Article 8(j) of the CBD acknowledges the importance of Indigenous heritage and cultural expressions to the environment and the process of sustainable development. Further, the Akwe Kon Guidelines advise governments regarding social and cultural impact assessments of developments proposed on traditional Aboriginal lands and waters. These guidelines advise that such assessment should include the PIC processes for the relevant Indigenous communities.^[4]

The *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of their Utilisation* ('the Bonn Guidelines') set out how governments should broker access to biological resources on traditional lands and waters, in particular, through the PIC processes. Both the CBD and the Bonn Guidelines are unequivocal in their requirement for PIC processes if there is any proposed change to the terms mutually agreed upon in the first instance. We make this point because the Australian Government now seeks to lead the CBD processes, particularly in operationalising PIC for Indigenous communities.

The task for the Indigenous lobby in Australia is to ensure the government and its agencies are accountable. Internationally, the aim must be to strengthen PIC provisions in the operational guidelines, operational templates and other documents flowing from significant international instruments (such as the CBD), such bodies as UNPFII and the WGIP, and the plethora of UN agencies (such as UNDP, WHO and UNCTAD)^[5] engaged in activities that impact upon Indigenous peoples. If the Australian Government wishes to lead in the CBD processes, its rhetoric at the international level – and the instruments it has taken a lead role in developing – must be interpreted with integrity in Commonwealth and state legislation, policy and programs.

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^[1] Both the International Covenant on Economic, Social and Cultural Rights ('ICESCR') and the International Covenant on Civil and Political Rights ('ICCPR') identify self-determination as the right of all peoples.

^[2] The UNPFII mandate includes: social and economic development, education, environment, health, culture and human rights (E/2000/22).

[3] E/2003/43.

[4] Another positive to the CBD tools are the capacity-building aspects that surround the PIC principle. These aspects gain greater importance for Aboriginal Australians with the demise of ATSIC as a significant source of funding for community development.

In order to make informed decisions and to grant 'informed consent', Indigenous people and communities may require capacity building. The AKG put it thus: 'Early identification by the State and affected Indigenous or local communities and, as circumstances warrant, provision of necessary human, financial, technical and legal resources, particularly to those Indigenous and local communities, to support Indigenous and local expertise, will facilitate effective Indigenous and local community participation in the impact assessment process. In general, the larger the proposed development, the greater and more widespread the potential impacts and therefore potentially greater are the requirements for support and capacity building.' The AKG state further that '...consultation about and meaningful participation in all aspects of assessment, planning, implementation, monitoring and closure of a project...Indigenous peoples have the right to identify the persons, communities or other entities that may require special measures in relation to consultation and participation.'

[5] The UN Development Program, World Health Organisation and UN Conference on Trade and Development.