Federation of Victorian Traditional Owner Corporations

24 June 2022

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100 Parliament House
Canberra ACT 2600

Dear Committee Secretary,

Submission from the Federation of Victorian Traditional Owner Corporations regarding the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia.

The Federation of Victorian Traditional Owner Corporations (**Federation**) welcomes the opportunity to provide a submission to the Committee Secretary of the Senate Legal and Constitutional Affairs Committee.

The Federation is the Victorian state-wide body that convenes and advocates for the rights and interests of Traditional Owners while progressing wider social, economic, environmental, and cultural objectives. We support the progress of agreement-making and participation in decision-making to enhance he authority of Traditional Owner Corporations on behalf of their communities. On this basis we make the following submission, drawing on previous work undertaken by the Federation (Treaty Paper 3 – *Enshrining Aboriginal Rights*). Our submission does not address all questions raised by the Committee and has a particular focus on the experience of Traditional Owners in Victoria.

Please contact Jill Webb jill.webb@fvtoc.com.au if you would like to discuss our submission further.

We thank you for considering our submission and we would be happy to provide further assistance as required.

Yours sincerely

Paul Paton
Chief Executive Officer

Introduction

The past few decades have seen the rights of Indigenous people increasingly recognised in international human rights law. The most prominent instrument recognizing such rights, the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), was adopted by the General Assembly in 2007 by an overwhelming vote of 143 nations in favour, with only four against.[1] Subsequently each of the four opposing nations, Australia, Canada, New Zealand, and the United States, have changed their position and now also endorse the declaration.

Despite this strong and now almost universal support, the terms of the UNDRIP have not, with a recent exception in Canada, been adopted into domestic law. As United Nations declarations are not legally binding on a nation-state, they will have no legal effect unless directly adopted within the domestic legal system. This means that signatories, including Australia, are free to ignore the terms of the declaration internally, while still espousing support in international forums.

Indeed, since first endorsing the declaration in 2009 no Australian government, nor any state or territory government, has moved to legislate the rights set out in the declaration into law, or even to implement the rights in any structured way. However, the various Treaty processes now underway in Australia and the prospect of the new Federal Government implementing the recommendations from the Uluru Statement from the Heart provides a new environment through which Indigenous rights, such as those set out in the UNDRIP, could be enshrined within the laws of Australia, or otherwise made directly enforceable.

This submission will explore these issues in five parts:

Part 1: What is the UNDRIP? This part explores the UNDRIP itself, its history and its basic terms.

Part 2: Why is the UNDRIP not legally binding? This part examines the UNDRIP in the context of international law and looks generally at the weakness in international law which prohibit it from being directly enforced to assist Aboriginal and Torres Strait Islander people in Australia.

[1] There were also eleven abstentions. Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17, 27.

Part 3: Enshrining Aboriginal rights: examples from Victoria, New Zealand and Canada. This part looks at different methods used to try and implement the UNDRIP, exploring:

a) incremental attempts of implementation, through embedding UNDRIP terms and concepts into individual agreements with government, and within the negotiation protocols and processes in larger settlement schemes; and

b) wider attempts at implementation across the whole of government, adopted either as government policy as in New Zealand, or as legislation, as has recently occurred in the Canadian Province of British Columbia (**BC**)**.**

Part 4: Lessons from the situation in Victoria. This part examines the opportunities and limitations of the Victorian Government's attempts to incorporate and embed principles of the UNDRIP through an overarching state policy framework including the Victorian Aboriginal Affairs Framework (**VAAF**)[2] and the Victorian Government's Self- Determination Reform Framework (**SDRF**).[3]

Part 5: How could UNDRIP be enshrined in Australian law through Treaty processes? Finally, and informed by international examples, we will explore two possible methods by which the UNDRIP could be enshrined in Australia:

a) **Enacting legislation affirming the application of the UNDRIP -** This proposal draws on developments in BC, in particular legislation enacted in November 2019 known as the *Declaration on the Rights of Indigenous Peoples Act* (**DRIP Act**).

   This submission will suggest that similar legislation be adopted in Australia, that not only will review and amend current legislation that is inconsistent with the UNDRIP, but, similar to the Victorian *Charter of Human Rights and Responsibilities Act 2006* (**Human Rights Charter**), will also examine proposed legislation for compatibility.

[2] Victorian Aboriginal Affairs Framework 2018-2-23, State of Victoria, 2018 https://www.firstpeoplesrelations.vic.gov.au/victorian-aboriginal-affairs-framework-2018-2023
[3] Self-Determination Reform Framework, State of Victoria 2019 https://www.firstpeoplesrelations.vic.gov.au/self-determination-reform-framework

b) **Including UNDRIP rights as enforceable and justiciable rights within treaties -** the proposal considered by this submission is not drawn from any direct international example, and is, as far as we can ascertain, untried anywhere in the world. This would see the inclusion of UNDRIP rights as justiciable rights within a national treaty. While there are certainly benefits and opportunities with having rights recognised as justiciable, there are also potential risks to be mitigated. Of particular concern to Traditional Owners may be the risk of allowing rights to be interpreted by the courts, which could see rights developed in ways contrary to Indigenous understandings or may even mean rights are watered down over time.[4]

Finally, this submission will conclude that while the proposals above could be introduced individually, there is greater benefit in enacting them together. Together, they provide a complimentary system for the enactment of the UNDRIP, which in our view, provides a solid and established legal underpinning.

Part 1: What is the UNDRIP?

The special status of Indigenous peoples in international human rights law has long been recognised. However, according to Marcia Langton, "[t]here is no single concept of Indigenous rights, but rather an ever-growing body of law, opinion and practice, much of it developed during the twentieth century and arising from both the demands of Indigenous peoples themselves and from the concessions made by governments, international bodies and others to recognise various rights and interests, and to accommodate them."[5]

Notwithstanding the difficulty in defining the set of rights that adhere to all Indigenous people around the world, there have been attempts to record a basic set of rights in international law as far back as the 1950s. In particular, the *Indigenous and Tribal Populations Convention, 1957,* a convention created by the International Labour Organization (**ILO**), an agency of the United Nations. A product of its time, this convention adopted an assimilationist lens to Indigenous rights, but nevertheless sought (among other things) to prohibit discrimination and to recognize rights to traditional lands.[6] The *Indigenous and Tribal Peoples Convention, 1989* (also known as **ILO 169**), sought to revise the earlier convention "with a view to removing the assimilationist orientation of the earlier standards."[7] This new convention asserted the right of Indigenous and tribal peoples to maintain their cultural and political independence.

Unlike the UNDRIP, which is a declaration, and therefore not legally binding, ILO 169 is a 'convention.' Under international law where a nation-state ratifies a convention it indicates its intention to be legally bound, while a declaration has no such effect.

Perhaps because of this, ratification of ILO 169 was low, with only 23 nations, almost all from Latin America, agreeing to its terms. Outside of Latin America only Nepal, Norway, and the Central African Republic agreed to ratify the convention. From all former British colonies, only Fiji was a signatory.

---

[5] Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 3.
[6] Indigenous and Tribal Populations Convention, 1957 (No. 107) (26 June 1957) Articles 2, 3, and 11 – 15 <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107>
[7] Indigenous and Tribal Peoples Convention, 1989 (No. 169) (27 June 1989) Preamble <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314>.

Given this low level of support, attempts were made to find an instrument that would be endorsed by the wider international community, and after almost two decades of negotiation, the UNDRIP was tabled and adopted by the United Nations General Assembly on 13 September 2007.[8]

Australia was one of the 4 countries who voted against its adoption. At the time, the then Prime Minister John Howard said "[w]e do not support the notion that you should have customary law taking priority over the general law of the country."[9] He stated the decision to vote against the UNDRIP's adoption: "wasn't difficult at all, because it is wrong to support something that argues the case of separate development inside one country."[10] However, under the Rudd Government, Australia shifted its position on 3 April 2009 in support of the UNDRIP.[11]

What does the UNDRIP say?

The UNDRIP contains 46 articles recording the rights of Indigenous peoples and communities. It affirms "the minimum standards for the survival, dignity and well-being of Indigenous peoples worldwide,"[12] and recognises "the urgent need to respect and promote the inherent rights of Indigenous peoples."[13] The articles in the UNDRIP include (without limitation) Indigenous peoples' rights to:

- self-determination;[14]
- self-government in matters relating to internal and local affairs;[15]
- free prior and informed consent on matters that will affect them;[16]
- practicing and revitalising cultural traditions and customs;[17]

---

[8] Kim Landers, 'Australia opposes UN rights declaration' *ABC News (Sydney)* (online, 14 September 2007) <https://www.abc.net.au/news/2007-09-14/australia-opposes-un-rights-declaration/669612>.
[9] 'PM defends refusal to sign UN Indigenous bill' *ABC News (Sydney)* (online, 15 September 2007) <https://www.abc.net.au/news/2007-09-15/pm-defends-refusal-to-sign-un-indigenous-bill/670644>.
[10] Ibid.
[11] Emma Rogers, 'Australia adopts UN Indigenous declaration' *ABC News (Sydney)* (online, 3 April 2009) <https://www.abc.net.au/news/2009-04-03/aust-adopts-un-indigenous-declaration/1640444>.
[12] *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP'), GA Res 61/295, UN GAOR, 61st Sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (13 September 2007) art 43.
[13] Ibid preamble.
[14] Ibid arts 3, 4.
[15] Ibid art 4.
[16] Ibid arts 10, 11, 19, 28, 29, 32.
[17] Ibid arts 11, 12, 26, 27, 33, 34, 40.

- maintaining and strengthening distinct political, legal, economic, social and cultural institutions;[18] and
- ownership and control of traditional lands and resources.[19]

While the UNDRIP is a significant accomplishment and considered by many to be the pinnacle of Indigenous rights activism in international politics,[20] it is not without flaws or critics. For instance, during negotiations:

> "English-speaking states frequently objected to the draft declaration, re-writing over a dozen articles and even removing some. These changes were made despite boycotts and hunger strikes by Indigenous delegates at the United Nations."[21]

Particularly objectionable is the revised Article 46(1) which states that nothing in the declaration should be interpreted as implying any right to any:

> "action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[22]

The interpretation of what is meant by "territorial integrity or political unity" is largely left to individual nation-states and provides an avenue to avoid compliance with the declaration when it doesn't suit them. Indeed, when Australia finally endorsed the UNDRIP in 2009, then-Prime Minister Kevin Rudd noted that the free, prior and informed consent elements would be "interpreted in accordance with Article 46."[23]

Further, some commentators have expressed more general reservations about the UNDRIP and the broader rights-based approach. For example, it has been argued that the UNDRIP has failed to promote challenges to structures of exploitation and domination.[24] Additionally, Jeff Corntassel has noted that a

---

[18] Ibid art 5.
[19] Ibid art 26.
[20] Hayden King, 'UNDRIPs fundamental flaw', *OpenCanada* (Web Page, 2 April 2019) <https://www.opencanada.org/features/undrips-fundamental-flaw/>.
[21] Ibid.
[22] UNDRIP (n 16) art 46(1).
[23] King (n 24).
[24] Peter Kulchyski, 'Aboriginal Rights Are Not Human Rights' (2011) 36 *Prairie Forum* 33; Fiona MacDonald and Ben Wood, 'Potential through paradox: indigenous rights as human rights' (2016) 20(6-7) *Citizenship Studies* 710; Michael Mansell, "Will the Declaration make any Difference to Australia's Treatment of Aborigines?" (2011) 20(3) *Griffith Law Review* 659; Irene Watson, "The 2007 Declaration on the Rights of Indigenous Peoples" (2011) 20(3) *Griffith Law Review* 507; Steven T Newcomb, "The UN Declaration on the Rights of Indigenous Peoples and the Paradigm of Domination" (2011) 20(3) *Griffith Law Review* 578.

quest for state recognition of rights has previously entrenched some Indigenous Peoples "within the colonial status quo."[25] Several challenges relating to the implementation of the UNDRIP have also been identified. This includes the limitations of working with a document that universalises Indigenous peoples' rights,[26] and the risks of having domestic courts interpret the UNDRIP in ways that are not be aligned with Indigenous understandings.[27]

The principle of free prior and informed consent (**FPIC)** is embedded in several of the UNDRIP's articles and is a critical process in decision making relating to the exercise of rights, especially where there is an incursion on property rights. However, the exercise of FPIC assumes that consent will be given, and the UNDRIP does not provide a mechanism for veto which arguably leaves a vacuum in situations where consent is not given.

Nevertheless, these criticisms are not the majority view, and there is a general consensus that the UNDRIP is a remarkable achievement, that sets out a basis of Indigenous rights well in advance of the political thinking in countries like Australia. It also provides a clear and instructive reference point of the accepted basis of Indigenous rights as recognised by the international community.

[25] Jeff Corntassel, 'Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse' (2008) 33(1) *Alternatives* 121.
[26] *UNDRIP Implementation* (n 8) 4.
[27] Ibid.

Part 2: Why is the UNDRIP not legally binding?

As we have already stated, even though the UNDRIP was endorsed by Australia, it is not automatically enforceable under Australian law or international law. To understand why this is the case, it is necessary to understand some of the basics of the international legal system.

What is international law?

The United Nations defines international law as "the legal responsibilities of States in their conduct with each other, and their treatment of individuals within State boundaries."[28]

However, unlike a nation-state (such as Australia) there is no parliament to make legislation that can apply internationally. For instance, the "United Nations General Assembly has no power to legislate for the international community; its resolutions are not legally binding."[29]

As such, international law is generally said to come from a range of other sources. These include what is known as customary law, which comes from international customs that have built up over time, and have become so entrenched, that they begin to be thought of as 'laws'. Also, many of the general or basic principles of law, as recognised in most modern nations, will be considered to apply internationally, as will, in some cases, the writings and interpretations of respected international institutions, lawyers and academics on particular points of law. However, one of the major, and for the purposes of this submission, the primary source of international law, is international treaties (sometimes also called covenants, conventions, or protocols).[30]

International treaties can be entered into between nation-states, or sometimes between nation-states and international organisations. Entry into such treaties or conventions is voluntary, and in doing so a nation-state shows that it agrees to be legally bound, and that it will submit to the jurisdiction of the relevant international courts or tribunals overseeing the treaty or convention if a dispute arises.

However, while this may be international law, it does not mean that the terms of the treaty or convention apply within the boundaries of Australia. This cannot occur unless those terms are first adopted as law by

[28] United Nations, 'Uphold International Law' (online, 18 August 2020) <https://www.un.org/en/sections/what-we-do/uphold-international-law/>
[29] Christopher Greenwood, *Sources of International Law: An Introduction* (2008) United Nations – Office of Legal Affairs <https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf>.
[30] Ibid.

an Australian parliament. Instead, it remains a law at the international level, and if the law is breached, the complaint would be heard at an international level.

Binding versus non-binding international law

An example of a legally binding 'treaty' or 'covenant' is the *International Covenant on Civil and Political Rights* (**ICCPR**), which guarantees the right to life, individual liberty, and freedom of expression, among other rights. Another example is the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**), which seeks to guarantee rights around work, social security, education and health among other things. As already mentioned, another and perhaps more relevant example, is the ILO 169, the precursor to the UNDRIP referred to above.

All these documents are entered into as 'covenants' (another term for treaty) indicating an intention to create binding legal obligations on their signatories. This is to be differentiated from a 'declaration' such as the UNDRIP. In international forums the term 'declaration' is "often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations."[31]

At the time it was created the UNDRIP was never intended to be legally binding, or enforceable in international law. Instead, as an 'aspirational' document it was hoped that it would set out best practice, and possibly over time lead to international norms for how States deal with their domestic Indigenous populations. In turn, this may further develop over time and achieve the status of customary international law in the future.[32]

While it may seem to be an inherently weaker position in moving from the legal binding covenant of ILO 169 to a non-binding declaration in the UNDRIP, the true picture is perhaps more complex. For example, by adopting a non-binding status, the UNDRIP has achieved almost universal international support, compared with very low support for ILO 169. In addition, even when it is supposedly binding, international human rights law is notoriously difficult to enforce. This is because the international bodies set up to

[31] United Nations, 'Glossary of terms relating to Treaty actions' (online, 18 August 2020): https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml

[32] Indeed, there is already argument that some aspects of the UNDRIP have achieved the status of international law. This is complicated by the fact that the UNDRIP includes terms that were already binding international law before inclusion in the declaration. One counter to the position that rights finding novel expression in the UNDRIP may now be customary international law is that it represents the "over-eager approach of some scholars [acting] prematurely" (Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17, 27). In any event, many of these complex questions remain unresolved, and a full examination of this debate is beyond the scope of this paper.

police these rights have very limited powers to penetrate a nation-state's sovereignty and ensure compliance.

At Appendix 1 is a table summarising the dispute or complaint processes under the ICCPR, ICESCR and ILO 169 as they are available to Australian citizens. As this table makes clear these processes are unlikely to result in any direct or meaningful change for Aboriginal and Torres Strait Islander Peoples in Australia for at least two reasons; the first is that these processes can be difficult to access; the second is that once accessed the various committees are only empowered to make recommendations and cannot force nation-states to comply.

For instance, with respect to access, most international law is only concerned with the dealings between nation-states, so often it is only nations-states that can bring complaints. This means that individual and non-government groups are completely excluded. By way of example, only nation-states can access the dispute processes of the International Court of Justice. For complaints under the ICCPR and ICESCR, individuals and non-government groups can bring complaints, but only if their home government has 'opted in' to the process. Australia has opted into the process for the ICCPR, but not the ICESCR, meaning that even though it is a party to the convention, its citizens cannot bring complaints to the committee overseeing the convention. Access to the complaints process for the ILO 169, the only legally binding international covenant on Indigenous rights, is also not straightforward. Because of the ILOs particular history and socialist origins, it is principally focused on the rights of labour and workers. This is reflected in its governance which is based on a "principle of tripartism"[33] involving government, employers, and worker organizations (i.e. trade unions). As a result, only employer or worker organizations can lodge complaints, and individuals, or Aboriginal and Torres Strait Islander groups do not have direct access.

Another issue limiting access to complaint procedures is a general requirement that all domestic remedies have been exhausted, which in practice usually means that the matter has been pursued through the lower and higher courts without a satisfactory result. Complaints at the international level are expected to be made as a last resort and will likely need to be litigated for many years before a complaint to an international forum becomes an option.

[33] International Labour Office, *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents* (Handbook, 2013) 8.

Then, once of all these issues are navigated, if there is finding that a breach of rights has occurred, the committee may only make various recommendations as to how the breach may be rectified. These recommendations cannot be enforced and must be voluntarily adopted by the nation-state.

Using international law to increase rights at home

Given these limitations there are other strategies, separate from trying to enforce rights through international forums, that human rights activists have adopted. This involves advocating to have such rights enacted into domestic legislation. Examples in Australia would include recent campaigns for a Bill of Rights, or in Victoria, the enactment of the *Charter of Human Rights and Responsibilities Act 2006* (**Human Rights Charter**).

Of course, advocates can seek to have both binding and non-binding international instruments implemented, or otherwise embedded into law. Indeed, Article 38 of UNDRIP says:

> "States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration."

Where human rights are embedded in domestic legislation, they can have far reaching consequences. For instance, "the *Racial Discrimination Act 1975* (Cth) (**RDA**)—the domestic expression of the *International Convention on the Elimination of All Forms of Racial Discrimination*—has been more critical to the realisation of Indigenous peoples' rights than much else conceived of by the Australian state; the Mabo litigation being sustained by its very enactment."[34]

Many Indigenous rights activists around the world have fought, and are fighting, for the implementation of UNDRIP within their home countries. However, despite the UNDRIP being first adopted by the United Nations in 2007, there have been regrettably few meaningful attempts to implement it at the national level.

[34] Megan Davis, Community control and the work of the National Aboriginal Community Controlled Health Organisation: Putting meat on the bones of the UNDRIP' (2013) 8(7) *Indigenous Law Bulletin* 11, 11.

Part 3: Enshrining Aboriginal rights: examples from Victoria, New Zealand and Canada

While the UNDRIP is not legally binding, and there are significant limitations in seeking to enforce even binding international law, international declarations and conventions can still play an important role in driving the development and recognition of Indigenous rights within nation-states.

This is because such documents, and particularly the UNDRIP, represent a clear expression of international opinion on the rights of Indigenous peoples. As such it sets a standard, even if aspirational, against which the actions of nation-states can be judged. When a national government falls below this standard, it can be used to expose, and to pinpoint their failure in precise and legal terms.

However, there are also uses beyond measuring failure, and the UNDRIP can be a proactive tool used to extend rights. This can be seen in moves within nation-states to implement the terms of the UNDRIP. As we examine below, this can be done incrementally, through seeking to embed UNDRIP concepts and rights within particular processes or agreements, or it can be attempted on a larger scale, through reviews of policy across the whole of government as is currently occurring in New Zealand, or even embedded in law, as we have recently seen in British Columbia.

Incremental implementation: Embedding the UNDRIP in agreements and processes

Throughout the world, wherever there exists the dynamic of coloniser and colonised, governments are forced into negotiations with their Indigenous peoples.

These negotiations may involve specific projects, such as access to natural resources, for example to extract minerals or to access forests for logging, or where infrastructure development may otherwise impact on established rights of Indigenous people. These negotiations can, and often do, result in binding contracts, setting out each party's rights and responsibilities, including any compensation payable for the particular project to proceed.

However, in addition to individual agreements, settler states may also pursue more ambitious programs to comprehensively resolve issues between the State and Indigenous peoples. Examples would be the Treaty process in British Columbia, or in Victoria the *Traditional Owner Settlement Act 2010* (**Settlement Act**), or indeed the current Victorian Treaty process.

In negotiating both the terms of individual agreements, and the content and processes of larger comprehensive settlement programs, it is sometimes possible to try and embed aspects of the UNDRIP.

Implementation through individual agreements

An example of embedding UNDRIP concepts directly into an agreement can be seen in Victoria in the Natural Resource Agreement (**NRA**), a standard agreement forming part of a settlement package under the Settlement Act.[35] The purpose of the NRA is to set out Traditional Owners rights to take and use natural resources, though hunting, fishing, gathering and so on, and to establish strategies to facilitate ongoing Traditional Owner employment and management of natural resources.[36] This agreement, along with other standard form agreements under the Settlement Act, was recently renegotiated by a committee of Traditional Owners.[37] This committee was able to negotiate that under the NRA a Partnership Forum is established, consisting of two representatives of the State, and three representatives of the Traditional Owner group. The role of the Partnership Forum is, in broad terms, to ensure that the use of natural resources by Traditional Owners is practiced in a sustainable manner, but also to avoid unilateral restriction of Traditional Owner rights.[38] It has a further role in developing the strategies for Traditional Owner participation in employment and ongoing management of natural resources.[39] In doing so, and as negotiated by the Traditional Owner committee, the Partnership Forum is required to comply with the "Decision Making Principles," defined to mean:

> "…the principle that prior to approving any project, making any decision, or entering any Further Agreement … the State will obtain the free and informed consent of the Traditional Owner Group through its Representative Structures, in accordance with international law and Article 32(2) of the UNDRIP".[40]

By so doing the NRA has imported a well-established UNDRIP concept, and ensured that the State, in any dealings with the Partnership Forum, will need to comply with this international legal principle. That is, to

[35] *Traditional Owner Settlement Act 2010* (Vic) pt 6.
[36] Ibid, ss 80, 82.
[37] The Template Review Committee was brought together and assisted by the Federation of Traditional Owner Corporations. For more information see here: https://www.fvtoc.com.au/blog/5pmaug18. This committee has now reformulated as the First Principles Review Committee to undertake a more detailed review of Settlement Act outcomes. For more information see here: https://www.theage.com.au/national/victoria/state-flags-new-native-title-deal-for-spiritual-and-cultural-loss-20200214-p540z0.html.
[38] Clause 10, 2019 Template Natural Resources Agreement.
[39] Clause 4.2, 2019 Template Natural Resources Agreement.
[40] Clause 1.1, 2019 Template Natural Resources Agreement.

seek the approval of the Partnership Forum on any proposal, the State will need to ensure there is not undue pressure, that all relevant information has been provided and released, and that Traditional Owners positively consent to the proposal, which they are free to withhold at their discretion.

Implementation through negotiation processes

An example of embedding UNDRIP into the processes of broader or comprehensive negotiation regimes is evident in the experience of British Columbia. Here, the British Columbia Treaty Commission (**BC Treaty Commission**) is tasked with facilitating treaty negotiations between the individual First Nations, the province of British Columbia, and the federal government of Canada.[41] In this role, it may be described as the independent umpire in such negotiations, a role comparable to that envisaged for the Treaty Authority under the Victorian Treaty Act. [42]

The role of the BC Treaty Commission was established in the British Columbia Treaty Commission Agreement, between representatives of BC First Nations, Canada and British Columbia in 1992.[43] This was later enacted in both federal Canadian and provincial British Columbian legislation in 1995 and 1996 respectively,[44] and as such pre-dated the UNDRIP.

However, in 2016 the role and functions of the BC Treaty Commission underwent a review. This was the same year that Canada withdrew its objection, and fully endorsed the UNDRIP.[45] Through the review, the BC Treaty Commission was able to have its mandate extended "to include supporting the implementation of the UN Declaration."[46]

Following this change to its mandate, treaty negotiations are now overseen by an "umpire" committed to the principles of the UNDRIP, ensuring that the concepts and terms of the declaration will likely be embedded in, and flow through, all parts of the negotiation process.

---

[41] For an overview of the BC Treaty Commission functions, see generally: BC Treaty Commission, *Mandate* (Web Page, 2020) <http://www.bctreaty.ca/mandate>.
[42] *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) s 28 ('*Treaty Act*').
[43] The Solon Law Archive, *British Columbia Treaty Commission Agreement* (Web Page) <https://www.solon.org/Aboriginal/Canada/bctca.html>.
[44] *British Columbia Treaty Commission Act,* SC 1995, c 45; *Treaty Commission Act,* RSBC 1996, c 461.
[45] Maham Abedi, 'Why a UN declaration on Indigenous rights has struggled to become Canadian law', *Global News* (online, 2 November 2019) <https://globalnews.ca/news/6101723/undrip-indigenous-relations-canada/>.
[46] British Columbia Treaty Commission, *Discussion Paper for Panel Discussion On Implementation Mechanisms For Indigenous Rights And Agreements With States* (18th United Nations Permanent Forum On Indigenous Issues, 23 April 2019).

However, the BC Treaty process went further again in September 2019, when the province of British Columbia, the federal Canadian government and representatives of BC First Nations, adopted a new policy for treaty negotiations.[47] In this policy the BC and Canadian governments endorsed the UNDRIP "as a foundation of the British Columbia treaty negotiations framework,"[48] and agreed that treaty negotiations are to be "guided"[49] by, and that the treaties ultimately entered into, will provide for implementation[50] of the declaration.

By such methods the UNDRIP has been effectively incorporated into the BC Treaty process and will now likely infuse every aspect of negotiations and outcomes. While there is (as yet) no comparable example in Australia of the UNDRIP being incorporated into a government mandated process, it should be noted that the preamble to the Victorian Treaty Act makes the following statement:

> "…the State recognises the importance of the treaty process proceeding in a manner that is consistent with the principles articulated in the United Nations Declaration on the Rights of Indigenous Peoples, including free, prior and informed consent."

While the preamble to legislation has no direct legal effect, this presumably foreshadows the State's openness to adopting processes to incorporate the UNDRIP in a way that is similar to the BC Treaty process. This view is further reinforced because, many of the principles adopted in the Treaty Act to guide negotiation of the treaty structures, closely mirror rights within the UNDRIP, even if they are not expressly referenced.

Implementation across whole of government: legislated and policy approaches

While implementing aspects of the UNDRIP through individual agreements and negotiation processes is useful, it is ultimately only a partial and limited implementation of the aspirations in the declaration. To fully implement the UNDRIP, it would need to apply against all government policy and legislation, with a process to rectify any inconsistencies.

---

[47] Government of Canada, *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* (British Columbia, First Nations Summit, Canada, 4 September 2019) <https://www.rcaanc-cirnac.gc.ca/eng/1567636002269/1567636037453>.
[48] Ibid [8].
[49] Ibid [16(b)].
[50] Ibid [18(h)].

Until the last few years, there have not been any meaningful attempts by governments in the English-speaking world to commit to such a project.

However, this is changing with recent developments in both New Zealand and Canada who are both now taking increased steps towards active implementation. The approach taken by both nations has similarities, as they both intend to develop 'action plans' to map existing progress, as well as plan for future measures. However, while New Zealand has adopted this as a policy position, Canada has pursued a legislative response, with a recent and notable success in the province of British Colombia.

The approach in New Zealand

The Māori Development Minister, Nanaia Mahuta, announced in March 2019 that the New Zealand Government would develop a "plan of action" regarding the implementation of the UNDRIP within New Zealand.[51]

Unfortunately, since this initial announcement there has been little further detail, perhaps because the intention is to design the process and the plan following consultation with both a technical working group and the Māori community over the course of 2019.[52]

However, while the full details of the proposal are still unavailable, we do have insight into the thinking behind the adoption of this policy. This is because the New Zealand government has adopted a program of proactively releasing its Cabinet papers,[53] and the Cabinet papers with respect to this proposal (**Cabinet Papers**) are publicly available.[54]

What the Cabinet Papers make clear is that the New Zealand government expects that a "[d]eclaration plan could be a national plan of action, a strategy, or some other tool that provides a map that demonstrates and guides progress across government."[55] The Cabinet Papers give the impression that the "plan of action" is more a tracking mechanism or a method of co-ordinating existing projects, than a plan

[51] Te Puni Kōkiri, Ministry of Māori Development, *UN Declaration on the Rights of Indigenous Peoples* (Web Page) <https://www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples>.
[52] Ibid.
[53] Department of the Prime Minister and Cabinet, *Proactive Release of Cabinet Material* (Web Page) <https://dpmc.govt.nz/publications/proactive-release-cabinet-material>.
[54] Office of Te Minita Whanaketanga Māori, Cabinet Māori Crown Relations: Te Arawhiti Committee ('Office of Whanaketanga'), *Developing A Plan On New Zealand's Progress On The United Nations Declaration On The Rights Of Indigenous Peoples* (Web Page, 18 March 2019) <https://www.tpk.govt.nz/en/a-matou-mohiotanga/cabinet-papers/develop-plan-on-nz-progress-un>.
[55] Ibid [21].

to commit to further direct implementation of UNDRIP. Of course, such a plan may identify weaknesses and blind spots, but does not, in and of itself, appear to result in full implementation of the declaration. Some of the reasons put forward in the Cabinet Papers in support of adopting a plan of action include that:

- the UNDRIP is being raised and applied in New Zealand's domestic courts and the Waitangi Tribunal,[56] without the government taking up the opportunity to help shape the discussion around what the declaration means in New Zealand.[57]

- the UNDRIP is being considered in an ad hoc manner by government agencies, and while there are activities taking place across government that are making progress towards the aspirations of the declaration, there is often no line of sight between these activities and New Zealand's international commitments, meaning this progress is not reported to international forums.[58]

- A national action plan will provide a clearer narrative about New Zealand's Indigenous rights journey, strengthening their ability to participate in and influence leadership on Indigenous rights internationally.[59]

- A national action plan is an opportunity to establish greater coherence across government in delivering beneficial outcomes for Māori.[60]

While all the matters above deal with existing issues and do not commit to an expansion of rights, the direction of the plan was not set during the Cabinet process and may be significantly altered during the consultation processes. In any event, even if it is limited to a planning tool, such a process may produce meaningful outcomes, and the government may utilise the plan for greater ends, particularly if, as Minster Mahuta has stated, it will result in a plan of action "that includes time-bound, measurable actions that

[56] Interestingly, while the UNDRIP is not legally binding on New Zealand (for reasons already explained in this paper) the Cabinet Papers reference the Waitangi Tribunal's findings in 'Whaia Te Mana Motuhake: Report on the Māori Community Development Act Claim,' in which the Waitangi Tribunal found that the UNDRIP could be taken into account in assessing the Crown's actions in relation to the Treaty of Watiangi.
[57] Office of Whanaketanga (n 67) [12].
[58] Ibid [13].
[59] Ibid [16].
[60] Ibid [17].

show how [New Zealand] are making a concerted effort towards achieving the Declaration's aspirations."[61]

Indeed, even in establishing this process New Zealand has shown a commitment in advance of its international peers, and as being responsive to international opinion and best practice. As stated in the Cabinet Papers:

> "[d]eveloping a Declaration plan would demonstrate our ongoing commitment to the international framework with respect to indigenous issues. Since its adoption, international experts and forums have highlighted an 'implementation gap' that persists in action towards the realisation of indigenous peoples' rights. National action plans and other measures have been identified internationally as an important mechanism for concrete actions improving outcomes for indigenous peoples."[62]

As we will explore below in part 4, the implementation gap in Victoria is having a significant impact on Traditional Owner rights in that jurisdiction.

The approach in Canada

While Canada was late to endorse the UNDRIP it has since made greater attempts than any other English-speaking nation to implement its terms into domestic law. These attempts first commenced in 2016 when Romeo Saganash, a member of the federal Canadian parliament and a member of the Cree nation, introduced a private member's bill seeking to implement the UNDRIP. Known as Bill C-262, the proposed legislation contained only four operative sections:

- First, it clearly stated that the UNDRIP is "hereby affirmed as a universal international human rights instrument with application in Canadian law;"[63]

- It then required the government, to take all measures necessary to ensure that the laws of Canada are consistent with the UNDRIP;[64]

[61] Te Puni Kōkiri (n 64).
[62] Office of Whanaketanga (n 67) [16].
[63] Bill C-262, s 3.
[64] Ibid s 4.

- It also required the government to develop and implement a national action plan to achieve the objectives of the UNDRIP; and[65]

- Finally, it required annual reporting to the parliament on the progress of the above.[66]

While much of the Bill envisaged the gradual implementation of UNDRIP, it was criticised with respect to the immediate affirmation of the UNDRIP as an "instrument with application in Canadian law." It was argued that this:

> "…could have unpredictable effects. The particular legal language here is unprecedented in the operative section of a Canadian statute. The way that it is ultimately interpreted can't be known, but it could have unexpected effects of invalidating parts of other Canadian laws."[67]

In any event, while it passed the House of Representatives in 2018, Bill C-262 was ultimately blocked by conservatives in the Senate, who prevented it being voted on before the end of the parliamentary term, effectively killing the bill in June 2019.[68]

However, shortly after this failure at the federal level, the provincial government in British Columbia introduced very similar legislation into their parliament in October 2019. Known as Bill 41, it adopted an almost identical structure to that of Bill C-262 and was enacted into law in November 2019 as the *Declaration on the Rights of Indigenous Peoples Act* **(DRIP Act)**.

This is the first time that any Canadian province, and indeed any legislature in the English common-law world, has established a legislative framework for putting the UNDRIP standards into practice.[69] As with the earlier federal bill, the DRIP Act:

- "affirm[s] the application of the Declaration to the laws of British Columbia";[70]

---

[65] Ibid s 5.
[66] Ibid s 6.
[67] David Newman and John C Major, 'Implementing UNDRIP is vital. But Bill C-262 is flawed, and the Senate cannot rush its work', *The Globe and Mail* (online, 24 June 2019) <https://www.theglobeandmail.com/opinion/article-implementing-undrip-is-vital-but-bill-c-262-is-flawed-and-the-senate/>.
[68] Canadian Friends Services Committee, *Bill C-262 will not pass thanks to undemocratic delay tactics* (Web Page, 24 June 2019) <https://quakerservice.ca/news/bill-c-262-will-not-pass-thanks-to-undemocractic-delay-tactics/>.
[69] Sheryl Lightfoot, 'B.C. takes historic steps towards the rights of Indigenous Peoples, but the hard work is yet to come' *The Conversation* (online, 14 November 2019) <https://theconversation.com/b-c-takes-historic-steps-towards-the-rights-of-indigenous-peoples-but-the-hard-work-is-yet-to-come-126311>.
[70] *Declaration on the Rights of Indigenous Peoples Act* SBC 2019, c 44, s 2(a).

- requires a process that "the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration";[71]

- requires the government "prepare and implement an action plan to achieve the objectives of the Declaration";[72] and

- establishes a process of annual reporting to the parliament on the progress of the above.[73]

Given that this legislation is so new, there is still some uncertainty about how it will operate, particularly how the government will address inconsistency in its laws, or what form the action plan will take. As the DRIP Act commits the government to undertaking this process in "consultation and cooperation with the Indigenous peoples in British Columbia,"[74] there will likely now be a long period of consultation on these issues.

As with Bill C-262, the DRIP Act has been controversial, and subject to criticism by some conservative commentators who raise concerns about its language of affirming the application of the UNDRIP to British Columbian law, which they say is ambiguous and of unknown legal effect.[75] Somewhat ironically, it seems that within these debates, those opposed to the DRIP Act tend to assert it has greater impact and power than those who support it. Those in opposition tend to catastrophise the implications of the legislation, while its supporters take a more restrained approach, emphasising its purpose to implement UNDRIP in an orderly way.[76] Indeed, supporters of the legislation argue that "the fears and anxiety that have been stirred up around implementation are overblown and unwarranted."[77] In their view the:

> "…implementation of the declaration is already well under way, albeit in a patchwork and uncertain way. Courts, human rights tribunals and environmental impact assessment panels have already referenced and applied its provisions.

[71] Ibid s 3.
[72] Ibid s 4.
[73] Ibid s 5.
[74] Ibid ss 3, 4(2)
[75] Tom Flanagan, 'Squaring the Circle: Adopting UNDRIP in Canada', *Fraser Institute* (Web Page, 10 March 2020) <https://www.fraserinstitute.org/studies/squaring-the-circle-adopting-undrip-in-canada>.
[76] In this way the response appears to resemble to some extent the 'Mabo Madness' that followed the introduction of the *Native Title Act 1993.*
[77] Lightfoot (n 82).

The importance of Bill 41 is that it provides a framework for the province to now engage more proactively so that implementation can unfold in a more predictable and consistent way. Bill 41 requires the province to develop a co-ordinated action plan "to achieve the objectives of the Declaration" and to report regularly to the legislature on the progress being made."[78]

In any event, and notwithstanding conservative opposition, it seems that the success in enacting the DRIP Act is only the start of such legislative provisions within Canada. For instance, the government of the North Western Territories has announced its intention to bring forward similar legislation,[79] and the Trudeau government has indicated it intends to make another attempt at federal legislation.[80]

It's clear that giving meaningful effect to Australia's signature to the UNDRIP is not going to occur without a more practical and determined approach to implementation and monitoring. There are moments in time when structural change is more possible than others, a coalescence of overdue advocacy from First Nations People coupled with the political will at a national level. Until the Federal election of May 2022, there was not a strong appetite for federal led reform and in response, various states were undertaking their own steps towards treaties and agreement making. It is yet to be seen whether a national opportunity presents itself under the new Federal Labor government. Although significant advances have been made in both British Columbia and Aotearoa, not enough time has passed to ascertain whether the different approaches to embed UNDRIP in those jurisdictions will have a meaningful impact on the rights of First Nations people in those countries.

[78] Ibid.
[79] John Last, 'What does 'implementing UNDRIP' actually mean?', *CBC News* (Web Page, 2 November 2019) <https://www.cbc.ca/news/canada/north/implementing-undrip-bc-nwt-1.5344825>.
[80] Jorge Barrera, 'Trudeau government moving forward on UNDRIP legislation, says minister', *CBC News*, (Web Page, 4 December 2019) <https://www.cbc.ca/news/indigenous/trudeau-undrip-bill-1.5383755>.

Part 4: Lessons from the situation in Victoria

The Victorian Aboriginal Affairs Policy Framework and the Self-Determination Reform Framework

The current Victorian Labor government regularly points to its commitment to the State's treaty process and accompanying legislation to support the claim that they are a national leader in understanding and enabling self-determination for Victoria's Traditional Owners and Aboriginal Peoples. The backbone to the government's commitment is captured in Victorian Aboriginal Affairs Framework 2020-2023 (**VAAF)** and the Self-Determination Reform Framework (**SDRF**). These two strategic foundational policy documents are intended to complement and relate to one another and provide clarity on the State's broad approach to Aboriginal affairs policy and its commitment to implement reforms to enable self-determination and transfer power, control and resources to Traditional Owners and Aboriginal Victorians.

With the VAAF over halfway through its tenure and due for imminent refresh, this moment in time is an opportunity for the Federation to evaluate how effective these strategies have been in guiding government and its agencies to enable Traditional Owner self-determination in Victoria.

Alongside the VAAF and the SDRF, over the last 4 years the Victorian government has partnered with Traditional Owners in the development of policy strategies that commit the State of Victoria to systematically empowering and enabling the activation of the rights and interests of Traditional Owners and Aboriginal Victorians. Of particular interest to Victorian Traditional Owners are a suite of strategies that have provided Traditional Owners with the opportunity to clearly articulate on paper what legislative, regulatory and policy reform is needed to commence and properly implement Traditional Owner led reform of land management.[81] Along with financial resources, often articulated in budget bids for implementation once the strategies are launched, this structural reform is the key ingredient. The launch of strategies are often accompanied with one off funding programs or resourcing of short term positions within Traditional Owner corporations to enable Traditional Owners to participate in a particular sector, develop pilot programs or undertake economic development.[82] As we will explore below, Traditional Owners are still waiting for these significant policy signals to flow through into the longer term structural reform (regulatory and legislative) that's required to more fully enable any of the strategies, give life to

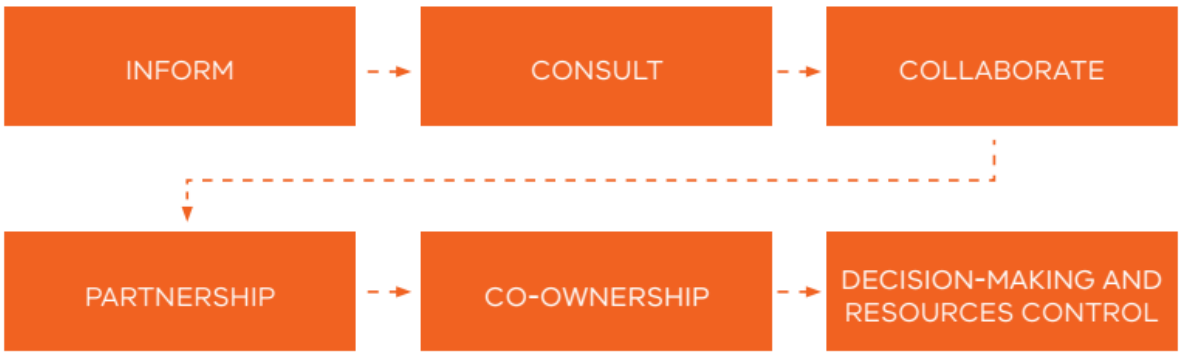
[81] The Victorian Traditional Owner Cultural Fire Strategy, The Victorian Traditional Owner Cultural Landscapes Strategy, The Victorian Traditional Owner Native Foods and Botanicals Strategy, The Traditional Owner Game Management Strategy, Aboriginal Access to Water Roadmap.
[82] Djakitjuk Djanga Grants, Nation-building Resource Pool.

the core principle of self-determination and commit the State of Victoria to repositioning its relationship to Traditional Owners and Aboriginal Victorians.

Our submission goes into some detail listing the initiatives, legislation, policies, strategies and reviews undertaken in Victoria as they provide context and some legitimacy to the State government's claims as a national leader in enabling self-determination. They demonstrate that there has indeed been significant investment and commitment to this process.

While there is much that the Victorian State government is to be congratulated for, there is much more to be done to move beyond the current consult and inform paradigm and get to the stage where decision making and control of resources are transferred as shown in the diagram below from the VAAF that sets out the continuum towards Aboriginal self-determination.[83] Developing strategies without delivering the structural and legislative reform and the shift of resources, power and control is not self-determination. We argue below that self-determination cannot be properly realised in a vacuum without the backing of the full suite of rights set out in the UNDRIP. The implementation of the UNDRIP through legislation is needed to ensure Traditional Owners can activate their rights in their everyday lives, rather than relying on strategies that don't deliver substantive change.

Continuum towards Aboriginal self-determination



[83] Victorian Aboriginal Affairs Framework, p23.

Traditional Owner-led strategies and the need for implementation

Since 2018, the Victorian State Government has funded the development of a number of important Traditional Owner led strategies; *the Victorian Traditional Owner Cultural Fire Strategy*,[84] the *Traditional Owner Game Management Strategy*,[85] *the Cultural Landscapes Strategy*[86] the *Native Foods and Botanicals Strategy*[87] and *the Victorian Aboriginal and Local Government Strategy*.[88] After long calls for reform to address the lack of Traditional Owner access to planning, management and economic development of water, the State has agreed to develop *Water is Life: Traditional Owner Access to Water Roadmap* which is currently ongoing and scheduled to be completed in the second half of 2022.

The above strategies are often developed through a nested governance approach led by Traditional Owners. This structure centres cultural authority through an Elders and knowledge group and positions them to inform a Technical Working Group that operates through a co-governance model with Traditional Owner and government representatives which is linked to a project control group. This approach has resulted in radical documents that connect the healing and management of Country to creation and dreaming stories and traditional ecological knowledge by laying out strategic and systemic long-term plans to implement and achieve the outcomes in partnership with government. These strategies are endorsed by government, launched by the responsible Minister and have frequently attracted initial funding for projects and project officers. These actions and their conduct during development suggest they will be accountable to the outcomes.

In particular, the development of the land management strategies and their content give practical effect to the Victorian government's commitment to self-determination as set out in the VAAF, the SDRF and the Department of Environment, Land, Water and Planning (**DELWP**)'s *Pupangarli Marnmarnepu 'Owning Our Future',*[89] *Aboriginal Self-Determination Reform Strategy 2020-2023*; all are an attempt to shift power, resources and control to Traditional Owners, particularly in relation to the exercise of inherent rights.

[84] The Victorian Traditional Owner Cultural Fire Strategy
[85] The Traditional Owner Game Management Strategy
[86] The Victorian Traditional Owner Cultural Landscapes Strategy
[87] The Victorian Traditional Owner Native Foods and Botanicals Strategy
[88] Victorian and Aboriginal Local Gov Strategy
[89] Pupangarli Marnmarnepu, State of Victoria 2020, https://www.delwp.vic.gov.au/aboriginalselfdetermination/self-determination-reform-strategy

However, instead of committing to implementation through adequate funding and structural (legislative, regulatory or departmental) reform, a pattern is emerging where government's commitment to self-determination seems to dissipate once the strategies are developed. Since being completed, few of these strategies have received ongoing implementation funding or the necessary structural reform to effectively realise the agreed outcomes. The funds that have so far been committed to implementation are clearly inadequate when compared to the resources needed to enable the long-term goals of the strategies. For example, although the government provided $22.5m over four years for 11 Traditional Owner groups to resource cultural fire outcomes in the 2021 budget, the budget bid for implementation of the Cultural Fire Strategy, approved by the Victorian Traditional Owner Cultural Fire Knowledge group who authored the strategy, was for $132m over 5 years. Further to the inadequate financial resources, very little of the government department and regulatory reform outlined in the strategy that is required to enable Traditional Owners to heal Country through the reintroduction of cultural fire to Country has occurred in the 3 years since the strategy was developed.

In the introduction to the recent *Victorian Aboriginal and Local Government Strategy*, the Victorian Government claims its commitment to self-determination through the VAAF goes beyond Australia's commitment as a signatory of UNDRIP[90] yet in the recent 2022 budget there was only $400,000 committed to the implementation of the strategy across the state which commits local and state governments as well as Traditional Owners and Aboriginal Victorians to a large number of outcomes under the strategy.

The *Cultural Landscapes Strategy* (CLS) was launched in August 2021 and is arguably the most ambitious strategy in terms of its approach to reforming and expanding the role of Traditional Owners in the management of land and water.

The CLS is a strategic foundation for Traditional Owner Nations to articulate an Indigenous management paradigm that is underpinned by cultural values, practices, and knowledge. It elevates the role of Traditional Owners in the policy, planning and management of Country by setting out key strategic themes to be respectfully integrated into Government policy, planning and processes, as part of decolonisation.

[90] Victorian and Aboriginal Local Gov Strategy, p13.

The outcomes in the CLS are also dependent on overdue reform to Victoria's Public Land Legislation, a lengthy process which is currently ongoing.[91] However there are concerns that, while the strategy was devised and written through a collective co-governance group made up of Traditional Owners and representatives from the state, this co-governance group and the Traditional Owner Technical Working Group have not received any further funding to continue meeting and to plan towards implementation since the launch of the strategy. The 2022 State budget also contained no further funding for implementation of the CLS despite strong advocacy from the Federation.

Although aware of the collective Traditional Owner approach to the CLS and the impact the reform of the Public Land Act has on its success, DELWP's engagement with Traditional Owner groups around the progress of the reform has been undertaken group by group. This embeds the power and resourcing differential often experienced by Traditional Owners, where under resourced Traditional Owner Groups are consulted by dedicated teams of Government agency staff. This approach reduces transparency, collective accountability and a leadership role for Elders and Traditional Owner Community members. The process to reform one of the most vital pieces of legislation for enabling Traditional Owner rights is not enabling of self-determination or many of the other rights included in UNDRIP.

It will be some time before the complex reform of Victoria's Public Land Legislation is resolved, however, there is some evidence that, like other recent strategies, the implementation of the CLS will not be properly resourced. Additionally, recent experience indicates that enduring collaborative governance structures will not be maintained to ensure a strong and ongoing commitment to implementing these reforms in partnership.

Opportunities for legislative reform

The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) (**Treaty Act**), the ground-breaking legislation passed in Victoria to lay the foundation of the State's treaty process, includes in its Preamble:

> '…the State recognises the importance of the treaty process proceeding in a manner that is consistent with the principles articulated in the United Nations Declaration on the Rights of Indigenous Peoples, including free, prior and informed consent.'

[91] https://engage.vic.gov.au/renewing-victorias-public-land-legislation

The Treaty Act requires the State, and the First Peoples' Assembly of Victoria (**Assembly**,) to design and negotiate the structures that will underpin future treaty negotiations. These structures are the dispute resolution process, the Treaty Authority, the Framework and the self-determination fund.

The Treaty Act sets out its own principles to apply to the negotiations. Despite the statement in the preamble to the Treaty Act, recognising the importance of the principles in the UNDRIP, the principles in the Treaty Act are not strictly drawn from the declaration, although there appears to be significant overlap. For instance, Part 3 of the Treaty Act lists among the guiding principles to negotiation; the right to self-determination; empowerment for Traditional Owners to freely determine their participation and their form of representation; fairness; the promotion of equality; and good faith, each of which have counterparts in the UNDRIP.

Another Victorian example of attempts to embed the UNDRIP into legislation can be found in the 2021 report from the Victorian Aboriginal Heritage Council *Taking Control of our Heritage.*[92] Following rigorous consultation with the Victorian Traditional Owner community, this report provides clear guidance and recommendations to the Victorian Government about required reform to the *Aboriginal Heritage Act 2006* (Vic) that would 'fully realise' the principles and rights contained in the UNDRIP. To date, these comprehensive recommendations have not been taken up by the Victorian Government.

While the Victorian Government has a stated commitment to implement reforms to enable self-determination and transfer power, control and resources to Traditional Owners and Aboriginal Victorians, enabling self-determination requires both adequate financial resources and structural reform, both of which are missing from the current policy landscape in Victoria. Making UNDRIP rights justiciable has the potential to level the playing field to ensure that the rights contained in the UNDRIP are not at the mercy of government's good faith. Further, it would enable direct and ongoing participation by Traditional Owners and Aboriginal Victorians in the processes of systemic reform through approaches that align with culturally strong ways of doing business.

[92] Victorian Aboriginal Heritage Council, *Taking Control of Our Heritage*, 2021 https://www.aboriginalheritagecouncil.vic.gov.au/taking-control-our-heritage-recommendations

Part 5: How could UNDRIP be enshrined in Australian law through a future Treaty process?

While the UNDRIP is now over a decade old, the attempts mentioned in Part 3 are among the regrettably few efforts to implement the declaration within nation-states, and as previously mentioned, there have been no meaningful attempts to do so in Australia. Indeed, outside of the partial adoption in a few legal agreements, and a mention in the preamble to the Victorian Treaty Act, there have been no attempts at all by Australian State or federal governments.

However, the UNDRIP stands as a ready-made international standard, and one already endorsed by Australia internationally. In those circumstances, it would appear only to require the right political moment for the declaration to move from aspiration to enforceable rights. It would seem apparent that such a moment now presents itself in Victoria through the Treaty process and that the recent change in Federal government may provide an opportunity for options to be explored as the new Federal Government works with First Nations people to implement the Uluru Statement from the Heart.[93]

As we have seen in the examples explored in Part 3, there are several models by which the UNDRIP can be systematically and structurally implemented. Informed by the above, we will explore two such models:

a) legislation affirming the application of the UNDRIP to the laws of Australia, with a requirement to rectify any inconsistency between the law and the declaration, and to prepare an action plan to achieve the objectives of the declaration (**the Canadian Model**); and

b) to include UNDRIP rights as enforceable and justiciable rights in treaties.[94]

While the above processes are not mutually exclusive, and could be implemented as individual measures, we argue that ideally both would be adopted as a comprehensive measure towards implementation. As we will explore further below, each of these proposals are complementary to the other, and together represent an inclusive implementation of the UNDRIP.

[93] https://ulurustatement.org/the-statement/view-the-statement/

[94] This term is defined in: Federation of Victorian Traditional Owner Corporations, 'Understanding the Landscape: *The Foundations and Scope of a Victorian Treaty* (Discussion Paper No 1, 2019).

Enacting the Canadian Model

As discussed, the approach taken in British Columbia is to enact legislation which both affirms the application of the UNDRIP to domestic law and requires an action plan to rectify inconsistencies between domestic law and the UNDRIP. While the implications and implementation of this approach is yet to play out, it would seem to be a ready-made model for adoption within Australia. Victoria may hope to adopt such a model as part of its ongoing treaty process, building on their Human Rights Charter, the only one of its kind in the country.

We suggest it remains open for the Australian Government to introduce legislation based on the Canadian Model, which could be both backwards and forwards looking. That is, like the Canadian Model it could adopt an action plan to seek out inconsistencies in existing legislation. It could also affirm the application of the UNDRIP to the laws of Australia, and like the Human Rights Charter in Victoria, ensure Public Authorities comply with its terms when developing policy, delivering services and making decisions, and also require that all new laws be assessed against the terms of the UNDRIP in a "Statement of Compatibility."

Enforceable and justiciable rights in a State-wide Treaty

Some critics of the Victorian Human Rights Charter have often described it as a shield and not as a sword. We now turn to consider how the UNDRIP could be entrenched as a sword (or perhaps, a spear) and used to actively promote and enforce the rights of Aboriginal people.

This could be realised through the direct and express recognition of the UNDRIP rights, as justiciable rights, either as a standalone project or within a national treaty. This would mean that whenever these rights were infringed, whether by government action, or inaction, they could be challenged through the courts or some other forum, resulting in enforceable orders against the State with which they are compelled to comply.

What are justiciable rights?

In the context which it is discussed here, the term justiciable:

> "refers to the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur. Justiciability implies access to mechanisms that

> guarantee recognized rights. Justiciable rights grant right-holders a legal course of action to enforce them, whenever the duty-bearer does not comply with his or her duties."[95]

In other words, justiciable rights are simply those rights you can have enforced by court. In human rights law not all rights are considered justiciable. For instance, civil and political rights like those in the ICCPR, which guarantees the right to life, individual liberty, and freedom of expression, are considered to be justiciable. However, economic, social and cultural rights, like those in the ICESR, which guarantees rights around work, social security, education and health, are often considered to be non-justiciable. This is because the different nature of these is thought to impose different levels of obligations upon nation-states.

> "Take, for example, freedom of religion; this right imposes a negative duty on the state to avoid interference with an individual's right to belong to and practice her religion. Conversely, the right to education may require the establishment of schools, the training of teachers, and access to learning materials, etc. … they are making decisions about the allocation of resources and are therefore effectively making policy decisions…"[96]

In western legal systems such as Australia, it is not the role of courts to make policy decisions. Instead, this is to be done by democratically elected governments. Accordingly, governments will be reluctant to endorse rights as justiciable where they may be forced, through a court order, to carry out some positive obligation that they have not freely adopted. Certainly, many of the rights set out in the UNDRIP, if adopted as justiciable rights, would expose government to this possibility. For instance, an open-ended right to self-determination, if justiciable, could be interpreted by the courts to mean a requirement for all sorts of measures that might not be supported by the government of the day.

However, this uncertainty and potential constraint on parliamentary power has not always discouraged law makers. For example, when considering "domestic legal systems which have embraced a greater role for justiciable socioeconomic rights, none have done so more extensively than South Africa."[97] The South African Constitution was adopted in 1996, following a process which:

---

[95] International Commission of Jurists ('ICJ'), *Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability* (Human Rights and Rule of Law Series No 2, 2008).

[96] Right to Education Initiative, *Justiciability* 2018 (Web Page, 2018) <https://www.right-to-education.org/issue-page/justiciability>.

[97] Rebecca Young, 'Justiciable Socio-economic Rights? South African Insights into Australia's Debate (2008) 15 *Australian International Law Journal* 181, 196.

> "...embodied a desire to legally address the legacy of the apartheid era. Unsurprisingly, therefore, the Constitution's founding values include democracy, social justice, improving quality of life, fundamental human rights, the rule of law and constitutionalism. Protected socio-economic rights include freedom of trade, occupation and profession, labour relations rights, property ownership, housing, health care, food, water and social security…"[98]

As such there are international examples of nation-states embracing the justiciability of all human rights, as a means of addressing brutal and longstanding historical injustice. Indeed, it would seem intuitive that in moments of transition, where there is little faith in the state apparatus to protect the interests of the marginalised, that fully securing rights would be an attractive safeguard for the more vulnerable party

Justiciable rights in the context of Treaty

Whether the entirety of the UNDRIP could be adopted as justiciable, or whether it is more appropriate to only adopt some specific rights is a matter for negotiations. However, by way of example, a treaty could include provisions stating that Traditional Owner groups have a positive and justiciable right to:

- self-determination;
- self-government;
- free prior and informed consent;
- practice and revitalise cultural traditions and customs; and
- maintain and strengthen distinct political, legal, economic, social and cultural institutions.

If these rights were adopted in this manner, it would mean that the government had an obligation to ensure their implementation. If they failed to adequately act to meet this obligation, they could be taken to court, and an order made forcing them to carry out the appropriate actions.

Of course, this leads to the further question of what does it mean, in practical and real terms, for the Government to adequately act to meet these obligations? While a treaty may recognise and establish such rights, it does not automatically resolve the manner and form by which they are implemented, and it is possible, and indeed likely, that the Government and Traditional Owners could disagree about the extent of the Government's obligations. For instance, what is the Government required to do to

[98] Ibid.

implement a right of self-determination, and exactly how far does such a right extend? Under such a model, it's likely that these questions will ultimately be answered in the courts.

Risk of undefined rights - who decides?

As we discussed above, governments can be reluctant to endorse positive right obligations, such as rights to housing, education and health, as justiciable, because they may be forced through the courts to carry out actions, or adopt policy, that they would not otherwise support.

Likewise, there may be a similar risk for Traditional Owner groups in relying on Australian courts to interpret and define the scope of their rights. While the concept of justiciability requires that claims are able to be brought before "an independent and impartial body,"[99] the task of identifying such a body in a post-colonial context may not be so easy. While there are both risks and opportunities in having domestic courts engage with, and interpret, the UNDRIP,[100] as Charters has noted, they "are not well designed to recognise or give effect to"[101] Indigenous rights. As Charters further argues:

> *"The particular conundrum, or paradox, with respect to the courts' attempts to realize the rights set out in the declaration is that it is exactly the courts that have developed the state-dominant constitutional myths, and the courts have the primary authority and responsibility to uphold them. In other words, is asking the courts to uphold Indigenous peoples' rights rather like asking the fox to protect the chickens?"*[102]

One possible solution could be to create a joint forum which could take on the role of determining questions around the breach of rights. The proposed Treaty Authority in Victoria would seem to be such a body that could come under the shared sovereignty of the Government and Traditional Owner groups. Such a body could be given jurisdiction to hear complaints with respect to alleged breaches of UNDRIP rights and make binding and enforceable orders. Those sitting in judgement of such matters could be equally appointed by First Peoples and the Government and drawn from retired or currently sitting members of the judiciary, and potentially from senior Aboriginal lawyers from around the country

However, even if granted such a role, the Treaty Authority would presumably need to be positioned within the existing and wider judicial hierarchy and would require a system for decisions to be appealed. This

[99] ICJ (n 115).
[100] *UNDRIP Implementation* (n 8) 4.
[101] Ibid 51.
[102] Ibid 51.

would likely mean that decisions could be appealed to the Supreme Court, and from there to the Court of Appeal, and potentially the High Court. This would mean that more difficult questions, (for instance '*what is the full scope of a right to self-determination?*') would likely be resolved in ordinary domestic courts.

By making rights justiciable, it presents the opportunity that they can be enforced by the courts, and also that courts may interpret and develop them over time in positive ways. It also presents the risk that they will not be developed in accordance with Indigenous understandings or may even be watered down over time.[103]

Conclusion

Around the world, several different jurisdictions are beginning to take positive steps to embed UNDRIP within their processes and legislation. Given the commitment to Treaty in Victoria, it would seem likely that Victoria may soon join their number. As we have seen, there are many and various ways this can be done, however this paper has focused on two methods, as follows:

a) legislating to affirm the application of the UNDRIP to the laws of Australia, with a requirement to rectify any inconsistency between the law and the declaration; and

b) including UNDRIP rights as enforceable and justiciable rights within future treaties, with the treaty terms (particularly those that transfer decision making and revenue generating power) as the minimum obligations of the Government.

We suggest that the enactment of the Canadian Model is not ambitious and, we would hope, could be adopted by the Government without reservation.

The proposal of adopting UNDRIP terms as enforceable rights within a national or state treaties, is untried anywhere in the world, arguably because nowhere else has a treaty process come into being following the creation of the declaration. As the preeminent representation of international standards for Indigenous rights, it is natural that it should now be considered for adoption in this way.

As we have discussed above, the recognition of such positive rights free of a practical framework, would see them likely interpreted and defined by the courts, posing some risk for the Government, but also for Traditional Owners, who may see rights grow or be curtailed in ways contrary to their understanding.

[103] Ibid 4.

However, by negotiating the practical building blocks of Treaty, and then defining these as the minimum obligations owed by the Government, Traditional Owners retain a role, through Treaty negotiation, in designing and shaping the implementation of their rights.

It is the exercise of rights, and not their simple recognition that is the ultimate goal, and this will be achieved by the practical measures contained in treaties that transfer decision making and control. In this way, the UNDRIPs rightful role in this process is, in our view, to underpin and to protect those measures freely negotiated by Traditional Owners.

Finally, we reiterate that while each of the proposals above could be introduced individually, it would be more beneficial to enact them together.

Together, they provide a complimentary system for the enactment of UNDRIP, which in our view, provides a solid basis to underpin Treaty, and a logical, moral and legally coherent footing for all future dealings between the Government and the Traditional sovereigns within Australia.

Appendix 1.

Summary of international law remedies available to Australian citizens

Forum	International Court of Justice (**ICJ**)	UN Human Rights Committee	UN Committee on Economic, Social and Cultural Rights (**CESCR**)	ILO Committee of Experts on the Application of Conventions and Recommendations (**CEACR**)
Relevant instrument	*Statute of the International Court of Justice*	*International Covenant on Civil and Political Rights* (**ICCPR**)	*International Covenant on Economic, Social and Cultural Rights* (**ICESCR**)	*Indigenous and Tribal Populations Convention, 1989* (**ISO 169**)
Purpose	The ICJ is the principal judicial organ of the UN. The Court's role is to settle disputes between State in accordance with international law, and give advisory opinions on questions of international law.	To receive and assess regular reports from nation-states on how the rights under the ICCPR are being implemented.	To receive and assess regular reports from nation-states on how the rights under the ICESCR are being implemented.	To receive and assess regular reports from nation-states on how the rights under the ISO 169 are being implemented
Is there a complaints process.	Yes. Operates as a court to settle disputes, but only among consenting nation-states.	Yes. Nation-states need to 'opt in'. Australia has opted into this process.	Yes. Nation-states need to 'opt in'. Australia has <u>not</u> opted into this process.	Yes. Heard by a tripartite committee (of government, workers and employers) set up by the ILO Governing Body.
Can individuals or non-govt. groups access?	No. Only nation-states can access the ICJ to resolve disputes, and only specific UN agencies may seek advisory opinions.	Individuals can access and make complaints about alleged breaches of the ICCPR.	Individuals and non-government groups can access and make complaints about alleged breaches of the ICESCR.	The ILO is concerned with labour and working conditions. Its governance rules only allow worker or employer organizations to bring complaints.
Possible outcomes	No outcomes for non-nation-states.	The Committee may make find that the ICCPR has been breached, and make **recommendations**.	No outcomes for Australian individuals and groups.	The tripartite committee may make findings that the ILO 169 has been breached and make **recommendations**.

A NOTE ON LANGUAGE CONVENTIONS: The terms ‘First Peoples’, ‘First Nations’, ‘Indigenous’ and ‘Aboriginal and Torres Strait Islander’ may be used interchangeably throughout this submission, particularly when referring to the broader Australian context.

When focusing on Victoria, the terms ‘Aboriginal people’ or ‘Aboriginal Victorians’ are used to refer to the diaspora of First Peoples living in Victoria, inclusive of Aboriginal people from across Australia and those with genealogical ties and/or connection to Country in Victoria. Traditional Owner is used to denote the latter, a person connected to Country and belonging to an Aboriginal group in the regions now known as Victoria.

The Federation uses the terms ‘settler’ and ‘non-Indigenous’ for any individual or group of people who came to Australia at any time after the first invasion in 1788. Settlers are the dominant majority in Victoria.