



# UNDRIP PRINCIPLES OF FPIC AND THE 'GAP' WITH NATIVE TITLE IN AUSTRALIA

Mineral General Assembly  
12 June 2019  
Holiday Inn  
Cairns, Queensland

# NQLC AND THE NATIVE TITLE ACT

- North Queensland Land Council (**NQLC**) is a recognised body under the *Native Title Act 1993* (Cth) (**Native Title Act**)
- Certain statutory functions include:
  - facilitation and assistance;
  - certification;
  - dispute resolution;
  - notification;
  - agreement making; and
  - internal review.

# UNDRIP AND FPIC

- No fixed and internationally accepted definition of FPIC, but broad and general characteristics.
- In 2004 the Environmental Law Institute (**ELI**) defined the principle of FPIC as:

*“the right of a local community to be informed about mining operations on a full and timely basis and to approve a mining operation prior to the commencement of operation.”*

# UNDRIP AND FPIC

- In 2005 the United Nations contributed an instructive definition of FPIC, which required that:
  - *"indigenous peoples are not coerced, pressured or intimidated in their choices of development;*
  - *their consent is sought and freely given prior to the authorization and start of development activities;*
  - *they have full information about the scope and impacts of the proposed development activities on their lands, resources and well-being; and*
  - *their choice to give or withhold consent over developments affecting them is respected and upheld."*

# UNDRIP AND FPIC IN AUSTRALIA

- Although Australia has now endorsed UNDRIP in 2009 which contains an express obligation in Article 32 for States to:

*"consult and cooperate in good faith with the indigenous peoples... to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of minerals, water or other resources,"*

this has not been adopted into domestic legislation in Australia and the Native Title Act rather sets up a framework for a 'right to negotiate'.

# SECTION 29 NOTICES AND THE RIGHT TO NEGOTIATE

- There is no right of veto
- Exploration/mining activities do not extinguish native title
- Section 29 of the Native Title Act says that before a government can grant an exploration permit, mining lease (etc.) it has to give notice to the Native Title Parties and the Native Title Representative Body where there is no Registered Native Title Body Corporate (**PBC**).
- Where those leases etc. relate to mining, the native title holders have the 'right to negotiate' where there is a registered claim or determination.

# SECTION 29 NOTICES – RIGHT TO NEGOTIATE

- Every notice is allocated a 'Notification Date' and that is the date that triggers the sequence of timeframes
- Where there is a registered native title claim or determination, there are some earlier timeframes that do not apply – a **registered native title claim or determination gives automatic 'right to negotiate'**
- The critical timeframe is 6 months from the 'Notification Date' – this is the period for negotiations

# NEGOTIATE IN GOOD FAITH

- The negotiation parties are: the government; the native title party/s and the grantee party (the miner)
- The negotiation parties “...must **negotiate in good faith** with a view to obtaining the agreement of each of the native title parties to...” the doing of the act or doing of the act subject to conditions
- Those ‘conditions’ are usually the ‘compensation’ terms negotiated by the parties and terms about protection of cultural heritage
- Negotiations should address the effect of the act on native title rights and interests - takes into account the size of the operations

# NEGOTIATE IN GOOD FAITH (cont'd)

- The Native Title Act doesn't tell the parties what can be negotiated, but it does say it may include payments to the native title party that may be worked out by reference to:
  - The amount of profits made; or
  - Any income derived; or
  - Any things produced
- If agreement can't be reached between the parties 6 months after the Notification Date – any party can apply to the arbitral body (National Native Title Tribunal - NNTT) for a determination (FADA).
- Any party can also ask the NNTT to mediate among the parties

# ARBITRATION PROCESS - NNTT

- An application for the NNTT to make a determination is called a Future Act Determination Application (FADA)
- The NNTT must take all reasonable steps to make a determination as soon as practicable (usually 6 months)
- The negotiation parties can continue to negotiate after an FADA has been filed
- The parties can also ask for a section 150 Conference while the FADA is being determined – this is where the NNTT holds a 'conference' (similar process as a mediation) to help the parties resolve the matter

# ARBITRATION DECISIONS - NNTT

- If a negotiation party satisfies the NNTT that another negotiation party did not negotiate in good faith – it can not make a determination (only 9 successful decisions to date in over 50 hearings)
- If good faith is not argued, or not won, the NNTT makes its determination on certain criteria (section 39)
- The kinds of determinations the NNTT **can** make are:
  - act must not be done
  - act may be done
  - act may be done subject to conditions
- The NNTT **must not** make a determination that native title parties are entitled to payments worked out by reference to profits made, income derived or things produced

# EXPEDITED PROCEDURE

- For exploration the State in issuing a Section 29 Notice can apply the 'expedited procedure' which will mean that there is no right to negotiate.
- The Native Title Party must then object to this applying and then the NNTT must determine if it applies taking into account various factors.
- The Native Title Party must prove:
  - that the future act will likely interfere with the carrying on of the community or social activities of the Native Title Parties; or
  - interfere with areas or sites of particular significance to the Native Title Parties, or
  - involve major trouble or create a right whose exercise is likely to involve major disturbance to any land or waters concerned.

# CONSULTATION AND CONSENT REQUIREMENTS FOR PBCs

- The *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) sets out how PBCs must make **certain decisions**, which involves:
  - **consult** with and **consider the views** of the **NTRB** (NQLC); and
  - **consult** with and get the **consent** of the **native title holders** (referred to as the 'common law holders' in the PBC Regs).
- If there is an agreement that gives effect to a 'native title decision' and the Regulations have not been complied with, the agreement has no effect.

# CONSULTATION AND CONSENT REQUIREMENTS FOR PBCs

- PBCs must ensure that the native title holders (not just members of the PBC – but the whole of the group) understand the nature and purpose of the proposed decision.
- A Native Title Decision –is defined as a decision:
  - to surrender native title rights and interests in relation to land and waters; or
  - to do, or agree to, any other act that would affect the native title rights or interests of the common law holders.