Tracking the DRIP

How the United Nations’ Declaration on the Rights of Indigenous Peoples (DRIP) is being implemented in Australia

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# Glossary

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<td>ATSIEB</td>
<td>ACT Aboriginal and Torres Strait Islander Elected Body</td>
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<td>CERD</td>
<td>Committee on the Elimination of Racial Discrimination</td>
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<td>COAG</td>
<td>Council of Australian Governments</td>
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<td>Congress</td>
<td>National Congress of Australia’s First Peoples</td>
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<td>EMRIP</td>
<td>(UN) Expert Mechanism on the Rights of Indigenous Peoples</td>
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<td>FPIC</td>
<td>Free, prior and informed consent</td>
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<td>HRC</td>
<td>Australian Human Rights Commission</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
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<td>OAS</td>
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<td>PFII or UNPFII</td>
<td>(UN) Permanent Forum on Indigenous Issues</td>
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<td>Standard</td>
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<td>TSRA</td>
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<td>UN DRIP or Declaration</td>
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1. Introduction

In September of 2007, after more than two decades of working with and assessing the issues affecting indigenous communities worldwide, the UN adopted a landmark document affirming the inalienable rights and humanity of indigenous people around the world. The 15-page document was the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP) and contained 46 articles affirming the UN’s support and commitment to indigenous communities.

Under the DRIP:

- Indigenous people are equal to all others and should be respected as such
- “All doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.” (p. 2, Section 4 of Preamble, March 2008)
- Indigenous people should be free from discrimination of any kind
- “Indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.” (p. 4, Section 23 of Preamble, March 2008)
- “Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.” (p. 5, Article 8)

The statement and purpose of the DRIP is clear but on the almost six year anniversary of its adoption, has the Declaration affected any real change in Australia? How are human rights groups, indigenous communities, and governments using the rights so clearly articulated in the DRIP to improve the quality of life for Indigenous Australians?

This report will examine the ways in which the DRIP has been, and is being used to address the myriad human rights violations that have occurred against Indigenous communities in Australia beginning with European colonization in the 1700’s, forced removals and separations, genocide, and other incidents. I will also provide a series of recommendations intended to raise awareness and improve the DRIP’s implementation within Australia.

What is the Declaration on the Rights of Indigenous Peoples and why is it different?

Since the mid-1950’s, the UN through its various organs has attempted to address the complex and far-reaching issues affecting indigenous peoples in the areas of employment, education, right to land and other areas. International Labour Organization (ILO) Conventions 107 and 169, adopted in 1957 and 1989 respectively, sought to protect indigenous cultures as well as increase indigenous

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1 “UN Declaration on the Rights of Indigenous Peoples” United Nations, accessed September 2012
involvement in matters that directly affect their communities. Convention No. 107 was ratified by twenty-seven countries, but a Committee of Experts convened in 1986 by the Governing Body of the ILO concluded that “the integrationist approach of the Convention was obsolete and that its application was detrimental in the modern world.”  

It was revised in 1989 through the adoption of Convention No. 169. Convention No. 169 only describes the criteria for those it seeks to protect and identifies the principles of non-discrimination and safeguards needed to ensure the human rights and cultural protections for indigenous peoples. Convention No. 169 has been ratified by twenty countries and has faced a number of implementation challenges related to the consultation and participation of indigenous peoples in matters that directly affect them.

The eighty-six States that ratified the International Convention on the Elimination of All Forms of Racial Discrimination adopted by the General Assembly in 1965, “condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races” (Article 2). The Convention specifically references the UN’s condemnation of “colonialism and all practices of segregation and discrimination associated therewith” in its Preamble and its governing body, the Committee on the Elimination of Racial Discrimination (CERD), has recognized and protected the rights of indigenous people through the release of periodic reports monitoring the implementation of the Convention by ratifying States. CERD has been in existence since 1969, and though its reports have been used by a relatively small number of indigenous people and organisations with much success, CERD’s procedures are not well-known by large majorities of indigenous peoples and organizations.

The International Covenants on Economic, Social and Cultural Rights (ICESCR), and Civil and Political Rights (ICCPR), both adopted in 1966 by the UN General Assembly, enforced the rights of all peoples to “self-determination” including the right to “freely pursue their economic, social and cultural development” (Article 1 of both ICESCR and ICCPR) which directly relate to the lives of indigenous peoples. However, many rights established in these Covenants are not absolute and are subject to reasonable limitations. For example, it may be legitimate to limit a right in order to protect national security or public order in a democratic society.

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Though each of these documents are important human rights declarations, as they relate to solving the specific issues afflicting indigenous communities, each has been either ineffective, too broad, too malleable, or has escaped the notice and use of indigenous groups. A comprehensive, global effort addressing the needs of the world’s indigenous communities was needed, and the indigenous individuals and groups working with UN agencies since the 1980s to address their concerns sought to change that with the development of the UN DRIP.

On September 13, 2007, after more than two decades of deliberation involving the participation, consent, and support of indigenous people from around the world, the UN DRIP was passed by overwhelming consensus in the United Nations General Assembly. For many, the DRIP is an unprecedented, unparalleled UN document because it was the first document that involved the very people that would be most affected by it. According to Andrea Carmen, one of the two members of the Global Indigenous Peoples Steering Committee representing the North American Region in coordinating the adoption of the Declaration: “In 1996, most of the indigenous delegates “walked out” of [DRIP] negotiations in protest at being relegated to the position of “observers” in the debate over our own survival, rights and dignity. As a result of the walk-out, for which we received considerable international and UN attention, we achieved a ground-breaking and confidence-building victory, ensuring that indigenous peoples would be equal participants in reaching consensus on the Text. It also made it clear that the negotiation process would not garner any legitimacy without the participation of indigenous peoples. We made history in UN standard-setting: for the first time the so-called “beneficiaries” of rights were playing an active and equal role in their development.”

The DRIP was born from advocacy by indigenous, Aboriginal, and First Nations people worldwide. In 1971, the United Nations Economic and Social Council appointed a Special Rapporteur, Mr. José Martínez Cobo of Ecuador, to study patterns of discrimination against indigenous peoples around the globe. In 1982, upon receipt of his reports documenting a wide range of human rights issues, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities established a Working Group on Indigenous Populations with the instructions to: (1) review national developments pertaining to the protection of the human rights and freedoms of indigenous peoples; and (2) to develop international standards concerning the rights of indigenous peoples.

In 1985, this Working Group began drafting a declaration on the rights of indigenous peoples using the comments and suggestions of participants in its sessions, particularly representatives of indigenous peoples and governments. In July 1993, the Working Group agreed on a final text for the draft declaration and submitted it to the Sub-Commission. In August 1994, the Sub-Commission adopted the draft declaration and submitted it to the Commission on Human Rights for consideration.

By a vote of thirty in favour, two against, and twelve abstentions, on 9 June 2006 the Human Rights Council approved the draft Declaration with the final version being adopted in September 2007. The

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DRIP is widely viewed as “the first international standard focusing primarily on the recognition of collective rights rather than individual human rights.”

The sentiment of the landmark day was encapsulated in the comments from Victoria Tauli-Corpuz, the then-chair of the PFII who declared “this day will be remembered as a day when the United Nations and its Member States, together with Indigenous peoples, reconciled with past painful histories and decided to march into the future on the path of human rights.”

The Declaration was heralded as providing a detailed list of rights that constitute the “minimum standards for the survival, dignity and well-being of indigenous peoples of the world.” While the Declaration covers all areas of human rights as they relate to indigenous peoples, some believe it also incorporates fundamental foundational human rights principles that can be categorised into four key areas:

- self-determination
- participation in decision-making, free, prior and informed consent, and good faith
- respect for and protection of culture
- equality and non-discrimination.

To some legal analysts, the Declaration is the first declaration that assigns its application to a body not created by treaty. In this respect, Bartolomé Clavero, Expert Member of the UN Permanent Forum on Indigenous Issues (UNPFII) argues that the Declaration “is certainly not a Convention or a Treaty among States, but it constitutes a treaty, convention, or covenant between States and Peoples” (author’s emphasis).

Forty-three countries ratified the DRIP in September 2007 and four voted against. The four votes against were Australia, Canada, New Zealand, and the United States. Eleven states abstained, including the Russian Federation, as well as three African states – Burundi, Kenya, and Nigeria. Almost all of the European and Latin American states voted in favour except for Colombia which also abstained.

The main criticism made by Australia, New Zealand and the United States against the Declaration concerned the right to self-determination (Article 3) and the requirement for indigenous peoples’ consent to certain decisions (Article 19). More generally, they claimed that the provisions on lands, territories and resources were particularly unworkable and unacceptable, “by appearing to require the recognition of indigenous rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous (Article 26)”.

While taking the floor to explain its position on voting on the Declaration, Australia espoused the view that the reference to self-determination in the Declaration was tantamount to a declaration of

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11 Charters and Stavenhagen, *Making the Declaration Work* p. 93
12 “Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An Introductory Handbook,” Indigenous Bar Association (Canada) p. 6
13 “Rights of indigenous peoples: Note by the Secretary-General,” United Nations General Assembly 10 August 2011
14 Mick Gooda and Katie Kiss, “Declaration Dialogue Series: Discussion Paper 4 - Ensuring the ongoing survival of the oldest living culture in the world” p. 1
15 Charters and Stavenhagen, *Making the Declaration Work* p. 317
16 Charters and Stavenhagen, *Making the Declaration Work* p. 40
secession, and other dissenting States such as New Zealand agreed. However, the preponderance of evidence from statements by other States when voting indicated that there was near universal consensus that the express reference to territorial integrity in Article 46(1) is sufficient to exclude the right of indigenous peoples to secede.17

In 2009, Australia changed its position and moved to endorse the UN DRIP 18. In April 2010, New Zealand also indicated their support. On November 12, 2010, Canada issued a Statement of Support endorsing the UN Declaration and finally, on December 15, 2010, the United States also indicated they would support the UN Declaration in order. 19

By adopting the Declaration, States have committed to recognizing indigenous peoples rights under international law, with the right to be respected as distinct peoples and the right to determine their own development according to their culture, priorities, and customary laws. The Declaration further affirms that Governments shall consult indigenous peoples with a view to obtaining their free, prior and informed consent prior to approval of any project affecting their lands, any potential displacement and relocation of populations, and adoption or implementation of administrative or legislative measures which may affect them.20

**Impact of the DRIP**

The Declaration holds a special place within the UN system, primarily because of the way it was negotiated with its primary beneficiaries – indigenous peoples – directly engaged in every stage of the standard-setting process.

In the Preamble to the Declaration, the General Assembly emphasized that the United Nations has an important and continuing role in promoting and protecting the rights of indigenous peoples. In view of this special role, the Declaration states in Articles 41 and 42 that the organs and specialized agencies of the United Nations system and other inter-governmental organizations should contribute to the realization of the provisions in the Declaration through financial and technical assistance; that ways of ensuring the participation of indigenous peoples on issues affecting them should be established; and that the United Nations, its bodies and agencies and Member States should promote respect for and application of the Declaration as well as follow-up on its effectiveness. 21

The United Nations Permanent Forum on Indigenous Issues (PFII) is one of the mechanisms in place to oversee the Declaration. The establishment of the UNPFII in 2001 established the special importance the United Nations has given the situation of the world’s indigenous peoples. A

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18 I was unable to locate any explanation or reason for the change in position.
19 “Understanding and Implementing the UN Declaration” p. 6
subsidiary body of the UN Economic and Social Council (ECOSOC), the PFII has a broad mandate to coordinate the work of ECOSOC and the international agencies relating to indigenous peoples, in six specific areas including: social and economic development; culture; health; education; and human rights. In addition, the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) was established by the Human Rights Council, the UN’s main human rights body, in 2007 as a subsidiary body of the Council. The main function of the EMRIP is “to provide the Council with thematic expertise on the rights of indigenous peoples”, focusing mainly on “studies and research-based advice”. The EMRIP is an expert body composed of five members, representing different regions.22

The emphasis within the DRIP on terms such as “free, prior and informed consent” and “self-determination” has had a profound impact on indigenous communities worldwide and seems to be a catalyst for action and reinforcing indigenous self-worth. As Kenneth Deer, Mohawk and former co-chair of the Indigenous Peoples’ Caucus, states, “All our rights either flow from or are linked to our right of self-determination. These include our right to land, our right to natural resources, our right to our language and culture, our right to our songs... ‘Free, prior and informed consent’ (FPIC) also flows from the right to self-determination.”

Though there seems to be no overstating the importance of the Declaration to many indigenous communities, unfortunately many in the dominant cultures have chosen to focus primarily on its “non-binding” nature. For instance, the United Kingdom, a country that voted in favour of the DRIP, emphasized that the Declaration “is not legally binding” but will constitute “an important policy tool” for states. The representative of the Australian government similarly stated that the Declaration is “an aspirational declaration with political and moral force, but no legal force” which “is not intended itself to be legally binding or reflective of international law”.23 UN declarations — as opposed to Treaties and Conventions — are by definition non-binding, but Australia has adhered to other declarations, including the Universal Declaration on Human Rights passed by the UN General Assembly in 1948. The Universal Declaration recognises “that the inherent dignity of all members of the human family is the foundation of freedom, justice and peace in the world” (Preamble) and states that human rights are to be enjoyed by all people, regardless of where they live or their culture.24 The Universal Declaration has had significant influence in the area of international human rights law including within Australia, and Australia was one of eight nations involved in its creation.

Many indigenous advocates don’t see the “non-binding” framework of the Declaration as a contradiction to its global importance. In the view of James Anaya, UN Special Rapporteur on the rights of indigenous peoples, implementation of the Declaration should be regarded as a “political, moral and yes, legal imperative”.25 He and many others also state that the significance of the Declaration should not be diminished by assertions of its technical status as a resolution that is not legally binding. In fact, many of the rights articulated in the Declaration come from existing – and

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22 Charters and Stavenhagen, Making the Declaration Work p. 334
23 Charters and Stavenhagen, Making the Declaration Work p. 315
binding – UN human rights organs such as the ILO Conventions 107 and 169 that first attempted to codify international obligations of States regarding indigenous populations. These Conventions are not only binding but have been adopted by dozens of countries as well.

With passage in the General Assembly and the support of the overwhelming majority of the world’s nations, implementing the Articles, principles and ideals of this important document within the world’s governments remains its last and most critical hurdle. This paper will now examine the ways organizations, businesses, and Indigenous groups in Australia are implementing the Declaration and suggest recommendations to increase both exposure and implementation of the DRIP.
2. Australia and the DRIP

The DRIP is the culmination of years of hard work for many indigenous peoples worldwide, including Indigenous Australians. European colonization ravaged the First Peoples of Australia and many have fought for decades to improve the lives of their families and their communities. This section will touch on the history of this struggle in Australia, and how Australian organizations, companies and government agencies can and are using the DRIP to assist in the fight to improve the lives of Aboriginal Australians.

In order to get a more detailed sense of how Australian groups, governments and organizations are using the UN DRIP, I interviewed 10 Australian public servants, members of the business and academic communities, and Indigenous rights activists over a four month period in 2013 in order to gauge their level of activity in implementing the DRIP as well as educating the public of its existence. Approximately 5 others were contacted for participation in this research, but I was unable to enlist their participation in a timely manner. Participants were interviewed by phone or by email using a prepared list of questions designed to measure their awareness of and use of the Declaration.

Background on the battle for Indigenous rights in Australia

It is long believed that Aboriginal and Torres Strait Islander people occupied Australia for tens of thousands of years before British colonization. The first records of European mariners sailing into 'Australian' waters occurs around 1606, and includes their observations of the land known as Terra Australis Incognita (unknown southern land). 26

In 1788, the British claimed sovereignty over parts of Australia and established a penal colony. In 1889, British courts applied the doctrine of terra nullius to Australia, a Latin term meaning “land that belongs to no one,” which allowed British citizens to establish settlements with no consideration or recognition of the land’s indigenous inhabitants. In 1979, the High Court of Australia reinforced this belief saying that Australia was a territory which, ‘by European standards, had no civilised inhabitants or settled law’ (Coe v. Commonwealth (1979).27

In June 1992, the High Court of Australia reversed the Court’s previous decisions and affirmed the native title rights of Aboriginal and Torres Strait Islander people by upholding the claims that Australia was occupied prior to British occupation and that the ‘native title’ of the indigenous communities to land survived the Crown’s annexation (Mabo v Queensland (No 2). 28

Australia is currently home to hundreds of Aboriginal and Torres Strait Islander nations. Because of these communities’ experiences with European infringement upon their land and traditions, terms such as “self-determination” and “free, prior and informed consent” – which are the foundation of the Declaration – are given particular importance. The fight for indigenous rights in Australia has been long, bloody, and often fruitful, but it is by no means over. Today, Indigenous groups are still

working towards improving educational and economic opportunities for Aboriginal Australians, eliminating racism, preserving the right to their culture, practices and language, and the recognition of Indigenous Australians within the Australian Constitution. The UN DRIP can be an important tool to use in each of these areas as well as the overall fight to improve the lives of indigenous Australians.

**What the DRIP can do in Australia**

In 2010, the Australian Human Rights Commission (HRC) under the direction of Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, created a Community Guide to provide Aboriginal communities and groups with information on ways that they can use the Declaration in their normal functions and operations.

In the guide, Mick Dodson, Director of the National Centre for Indigenous Studies at The Australian National University and a major contributor to the development of the Declaration having served as a member of the Australian delegation to the UN Working Group on Indigenous Populations in the late 1980s and early 1990s, provided specific advice on ways that the DRIP can be implemented in Australia by indigenous Australians:

> I think people should use the Declaration at every opportunity. If you are writing to government, quote articles of the Declaration. If you’re involved in health quote the health articles, if you are involved in native title or land rights quote the lands, territories and resources articles, if you are in education quote the articles about education and language. If you are on about political organisation talk about self-determination and our right to be autonomous and govern ourselves. For any aspect of Aboriginal or Torres Strait Islander life there is something in the Declaration that you can use and utilise to reinforce your arguments and what you and your mob are trying to do.  

The HRC has reinforced the suggestion of promoting and referencing the Declaration at every available opportunity including “using the Declaration as a point of reference in the Government’s Human Rights Framework and the Parliamentary Joint Committee on Human Rights.” The UN DRIP serves as the “foundation and guide” for the National Congress of Australia’s First Peoples, the national representative body for Aboriginal and Torres Strait Islander Australians incorporated in 2010, and the Congress is committed to building a policy platform underpinned by the Declaration. Both the Congress and HRC have announced that they will be coordinating joint workshops called the Declaration Dialogue Series aimed at educating the public on the Declaration and developing strategies for implementation.

According to HRC documents, a national conversation progressed through a series of dialogues is necessary to ensure that the principles and rights outlined in the Declaration are fully integrated into

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30 Mick Gooda and Katie Kiss, “The United Nations Declaration on the Rights of Indigenous Peoples: Giving full effect to the Declaration – a National Strategy” p. 4

the Australian Indigenous policy landscape. These dialogues have recently commenced and are considered integral to developing an agreed understanding of the key principles of the Declaration, as well as a coordinated response based on these principles and rights in an Australian context. The anticipated results of this conversation would culminate in a National Implementation Strategy on the Declaration on the Rights of Indigenous Peoples. 32

However, as we are sometime away from the creation of this National Implementation Strategy, this means that currently Australia does not have a formal strategy in place for implementing the Declaration. Australia has cited its 2009 National Apology to Australia’s indigenous peoples, in particular to the stolen generations, as a symbolic gesture signalling its commitment to implementing the Declaration, 33 but there has been no formal strategic plan for implementing the DRIP within the Commonwealth or at the state level. James Anaya described this scenario perfectly when he said that the adoption of the Declaration:

…will not in itself change the everyday lives of the men, women and children whose rights it champions. For this we need the political commitment of states, international cooperation, and the support and good will of the public at large, to create and implement a range of intensely practical programmes, designed and undertaken in consultation with indigenous peoples themselves. 34

What is being done in Australia to implement the goals, aims and principles of the Declaration throughout society?

**Implementation of the DRIP in Australia**

As part of this research project, I approached 15 individuals who either work on behalf of or work directly with Indigenous communities in order to ascertain their understanding and commitment to the UN DRIP. The 15 were selected due to their broad and diverse work addressing various Indigenous issues in Australia.

Although I was unable to speak directly to representatives of the Indigenous Land Corporation, the National Congress of Australia’s First Peoples, or Sovereign Union, information gathered during other interviews provided a snap shot of the strengths and weaknesses of national knowledge about the Declaration, as well as of any implementation strategies.

**Who’s using the DRIP?**

Knowledge and understanding of the DRIP and its overall goals ranged from expert to fairly general. Among those interviewed, unsurprisingly those with the most knowledge of the Declaration were also the ones implementing it most heavily.

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32 Mick Gooda and Katie Kiss, “Declaration Dialogue Series: Discussion Paper 3 - We have a right to participate in decisions that affect us – effective participation, free, prior and informed consent, and good faith” p. 2
34 Gooda and Kiss, “Giving full effect to the Declaration – a National Strategy” p. 3
Mick Dodson, NCIS Director at ANU and an important voice in the development of the Declaration, encourages PhD and Master’s students at NCIS to regularly refer to the DRIP when discussing indigenous issues:

As far as we’re concerned, it’s part of the international legal regime for human rights. It’s something that ought to be taught, something that I encourage students [to refer to] in their writings. I know from time to time we [also] get government consultancies and we emphasize the Declaration when they’re relevant, [and we also] try to encourage indigenous organizations to use the Declaration. 35

As well as creating the Community Guide, Mick Gooda explained that the HRC has also:

...started a series of round tables around the country over the next 18 months where we’ll be talking to the community about the Declaration and the principles and see if the approach we’ve suggested is okay or what other approaches could be taken to make sure that we get to the point where the Declaration is making a difference in Australia.... there’s a whole lot of things [that we’re doing]. Every speech I do, I will mention the Declaration. 36

John Ramsay, Program Manager for Governance and Leadership with the Torres Strait Regional Authority (TSRA), revealed that TRSA has already taken great steps to implement the UN DRIP in its regular operations and the ways that it works with and represents members of the Torres Strait community. As John noted:37

We have very recently conducted a review of governance structures in the Torres Strait as they relate to how the TSRA works and one of the outcomes from that governance review was a change in legislation [in] how the members of the TSRA were appointed in order to give them greater autonomy and greater self-determination.... And one of the very strong messages from the people in the region was that they wanted to be able to independently elect their own members or representation at the Commonwealth level. [S]o we had the Act changed, and the change took place in 2011 and it was the Indigenous [Affairs] Legislation Amendment Bill No.1, 2011 [that] created the ability to have independent elections conducted. [T]he first independent election took place in 2012 and [this] directly aligns with Article 3 [of the Declaration which focuses on self-determination].

John went on to note that TSRA, which is the only “Indigenous group that has representation at the federal level through an elected board” in Australia, will also be implementing the UN DRIP in its future programs as well. In terms of implementation, John noted that the TSRA was,

...in the process of aligning the articles in the Declaration to our next development plan. [T]he next plan takes effect from the first of July 2014 and runs through to 2018, and in the next version of our plan, we will be aligning all of the outcomes from our programs to the Articles of the UN DRIP and there’ll be a very specific mapping.

35 Mick Dodson, interviewed 2 July 2013
36 Mick Gooda, interviewed 2 May 2013
37 John Ramsay, interviewed 26 June 2013
At the moment, we map our outcomes to the Torres Strait and Northern Peninsula Area Regional Plan, which is a 20-year plan. But in this next version, the plan is as well as [mapping to the Council of Australian Governments (COAG) right services delivery and the targets for closing the gap on indigenous disadvantage], each program will show what they do specifically [as] aligned to various Articles of the Declaration. For example, in my own program, governance and leadership, I’ve identified there are 11 Articles that directly run on to my program.

When asked what led the TSRA to become so committed to aligning its operations – current and future – with the Declaration, John noted it was the great amount of political savvy and awareness of the TSRA Board of Directors which is comprised of representatives from all of the 20 communities in the Torres Strait. 38

At many of our Board meetings, specific Articles of the resolution are tabled and a lot of our discussion is around ‘what is the TSRA doing as the Commonwealth representative of the Torres Strait towards meeting those Articles’. We’ve found that most elected leaders, most leaders in the Torres Strait are familiar with the Declaration. It’s something that’s been of great interest in the Torres Strait.

The ACT Aboriginal and Torres Strait Islander Elected Body (ATSIEB) is also taking significant steps to implement the Declaration into policy. ATSIEB is a lobbying arm for indigenous communities throughout the ACT and was established to “enable Aboriginal and Torres Strait Islanders in the ACT to have a strong democratically elected voice.” 39 The group also holds representatives of the ACT government to account in its efforts to be more inclusive and respectful of Aboriginal communities.:

As Rod Little, ATSIEB Chairperson noted: 40

We’ve just partnered up with the Human Rights Commission to have the UN DRIP embedded in the ACT Human Rights Act.... [The] Declaration...is not binding, but we saw an opportunity to...embed this in the Human Rights Act, [which would make it] binding.

That’s the impetus for us to be putting more pressure on the ACT government and I think that community organizations that provide services to our people, they’re becoming more and more aware of the Declaration because they’re so compatible with the [ACT] Human Rights Act.

We have lots of Senate estimate hearings each year where we challenge their directors [and] Director Generals of each directorate about their claims to achieve outcomes in their annual reports. We ask the questions... particularly around free, prior and informed consent because quite often, the budget that gets developed is not consistent with our priorities [or] they haven’t got our consent or our people’s consent to develop the policy or the programs. And our Act [the ACT Aboriginal and Torres Strait Islander Elected Body ACT 2008 which established the Body] says that we’re responsible for developing policy and programs, so

38 John Ramsay, interviewed 26 June 2013
39 ACT Aboriginal and Torres Strait Islander Elected Body (ATSIEB) web site, accessed July 2013
40 Rod Little, interviewed 16 July 2013
that’s our way of checking to see whether [the ACT government’s] policies and programs match up with our priorities. If they don’t, then we need to change that.

Assimilating the UN DRIP within the ACT Human Rights Act which affirms among other rights that “everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind” (Section 8.2) and that “everyone is equal before the law and is entitled to the equal protection of the law without discrimination” (Section 8.3)\(^\text{41}\) is just the beginning. ATSIEB is also looking to conduct research on ways to implement the Declaration even further. According to Diane Collins, ATSIEB Deputy Chair:

A lot of [the UN’s] language from lots of countries is around the UN DRIP and people’s rights, but then I come back here and we certainly don’t quote that a lot even though it is part of who we are and [what] we do. And I see that gap there and for me it was around, ‘well, we need to do something in the ACT to identify who is using it, who’s not using it and how we might implement a plan of using it for government, for us as an elected body, for other community organizations, for individuals and for non-government organizations.’

So, I’ve spoken with the elected body about how we can get someone to do some research around that to develop a plan of how to implement [the Declaration] over this next five years because we’ve got to have a defined time frame but it’s so important that nothing’s been done to that level here in the ACT.

In addition to implementing a five-year plan to implement the UN DRIP further into ACT public policy, Diane noted that the group was exploring ways to strengthen implementation of the DRIP at the federal level as well.

I see that there’s a role that we can play as indigenous people who work in [federal] government. I really see an untapped area that if we can enable our mob to raise some meetings, whether it’s through our networks or wherever, then there’s another opportunity. That needs to happen, because that’s only going to strengthen the development and delivery of programs and policies and services for our people.\(^\text{43}\)

Though Diane is not sure that her colleagues at work would enthusiastically welcome this conversation, she still feels that it is an important dialogue that needs to happen.

Informal meetings with federal policy makers would be a welcome addition to the awareness campaign, but getting federal policy makers to begin referring to and even more importantly, begin implementing the Declaration will take a coordinated effort by Indigenous and/or human rights groups country wide. Ideally, federal lawmakers would be invited to and attend the Declaration Dialogue Series discussions on the UN DRIP as put forth by the Congress and HRC, and each session should have custom made recommendations to federal government staff on how to implement the Declaration within their respective capacities and offices.

\[^{42}\] Diane Collins, interviewed 16 July 2013
\[^{43}\] Diane Collins, interviewed 16 July 2013
Rod noted that the principles of the Declaration have far-reaching aims and affect far more than the Aboriginal community in Australia.

The Declaration is in my view, pertinent to the multi-cultural community as well because of where they’ve come from and back in their countries where they are the First Peoples. So in my view, trying to have some allies with others that are versed on the Declaration and have a good understanding which is really, I think, where we’re going to convince government that they need to put [the Declaration into policy] more.44

As the work at ATSIEB, TSRA, NCIS and the HRC show, there has been significant movement within specific groups to implement the DRIP into the routine operations of indigenous groups and policies within Australia and more work is being done regularly. It is also apparent that some Articles and principles within the Declaration appear to be more easily or enthusiastically implemented than others.

Which articles or principles in the DRIP are most referred to and referenced?

The Declaration’s broad and sweeping Articles touch on many important issues, from health, education, employment, natural resource management, and many others. Depending on what issue an organization or individual may represent, there may be several Articles within the Declaration that are directly relevant to a group’s work to improve the lives of Indigenous Australians.

Without question, the Article that was most referred to and mentioned as a guiding principle for those interviewed for this research was Article 3 which states:

**Article 3 - Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.**

The issue of self-determination is typically identified as the right of indigenous peoples to determine their own economic, social and cultural development and to manage, for their own benefit, their own natural resources.45 In addition to Article 3, the UN DRIP refers to self-determination in several other places (see Figure 1).

<table>
<thead>
<tr>
<th>Article Number</th>
<th>States that:</th>
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<tr>
<td>Preamble</td>
<td>Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,</td>
</tr>
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</table>

44 Rod Little, interviewed 16 July 2013
45 “Final report of the study on indigenous peoples and the right to participate in decision-making” p. 26
Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Figure 1: Articles within the UN DRIP that address self-determination

Mick Dodson noted that Article 3 along with the Articles that refer to the right of indigenous peoples to have free, prior, and informed consent (FPIC) of any actions or decisions that affect them are the “golden thread through the whole Declaration.”

“It’s all important,” said Dodson. “But those two things are the foundation, [the] pillars. They hold everything else up.”

Free, prior and informed consent (FPIC)

FPIC is generally understood to pertain to the right of indigenous people to approve or reject proposed actions or projects that may affect them or their lands, territories or resources. The definition of each of these terms follows: free from force, intimidation, manipulation, coercion or pressure by any government or company; prior to government allocating of land for particular land uses and prior to approval of specific projects, [those affected] must be given enough time to consider all information and make a decision; informed [those affected] must be given the relevant information to make a decision about whether to agree to the project or not; and consent requires that the people involved in the project allow indigenous communities to say “Yes” or “No” to the project and at each stage of the project, according to the decision-making process of their choice. The right to give or withhold consent is the most important difference between the rights of Indigenous Peoples and other project-affected peoples.

The International Law Association (ILA) suggests that there are four particular situations envisaged by the Declaration where consent will be required:

- Where Indigenous peoples might be forcibly removed from their lands or territories.
- When taking Indigenous peoples’ cultural, intellectual, religious and spiritual property.
- When there is a plan or intention to confiscate, take, occupy, use or damage lands, territories and resources traditionally owned or otherwise occupied or used by Indigenous peoples.

46 Mick Dodson, interviewed 2 July 2013
There are seven Articles within the UN DRIP that address FPIC (Figure 2):

<table>
<thead>
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<th>Article Number</th>
<th>States that:</th>
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<tbody>
<tr>
<td>10</td>
<td>Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.</td>
</tr>
<tr>
<td>11.2</td>
<td>States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.</td>
</tr>
<tr>
<td>19</td>
<td>States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.</td>
</tr>
<tr>
<td>28</td>
<td>Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.</td>
</tr>
<tr>
<td>29.2</td>
<td>States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.</td>
</tr>
<tr>
<td>30.2</td>
<td>States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.</td>
</tr>
<tr>
<td>32.2</td>
<td>States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.</td>
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Figure 2: Articles within the UN DRIP that address FPIC

FPIC within the area of indigenous rights is a hotly contested principle. Though there have been several other UN documents related to indigenous issues, the UN DRIP is the first to require FPIC when dealing with indigenous communities and some states and industries, particularly in the resources sector, are hesitant to support FPIC. Australia, New Zealand, and the United States all referenced the potentially contentious issue of “consent” (i.e. veto power) when voicing their initial disapproval of the Declaration.

Much of the hesitation to fully support FPIC can be attributed to the fact that there is no universally accepted definition of FPIC. In some interpretations, the principle is effectively viewed as a right of veto, for example, the right to refuse or to stop a natural resources development. Other

49 Gooda and Kiss, “We have a right to participate in decisions that affect us” p. 10
interpretations of FPIC focus on engagement, consultation and participation, emphasising that consultations with Indigenous peoples must be undertaken in good faith and with the aim of reaching consent, but that the requirement of consent does not constitute a veto. The International Council on Mining and Metals (ICMM) – which includes companies such as Rio Tinto and BHP Billiton among its members – notes that “a blanket endorsement of the right to FPIC is not currently possible, particularly given the difficulties entailed in applying the concept in practice.” But considering that according to the Minerals Council of Australia, 60% of mining operations neighbour Aboriginal communities, this is clearly an area where consensus on the accepted definitions of terms such as self-determination and FPIC needs to be reached quickly and inclusively.

So, while some companies or business areas are struggling with practical ways to adopt the principles of FPIC and self-determination, indigenous groups around the world already have, and enthusiastically. Mick Gooda strongly reiterated this point:

> Whether we’re talking about health or incarceration or housing or whatever… first and foremost, Aboriginal people have got to have a say. We’ve got to understand how self-determination works in each of those areas. Then we’ve got to understand that we have a right to participate in decisions.

Gooda also stated that he regularly uses Article 18 of the Declaration:

> Article 18 - Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

> I’m not an expert on everything. So, my job is to make sure that the people who are experts, who are community members, are heard. And that’s why I think that Articles related to the participation and decision-making and self-determination are the ones that I use the most.

For those interviewed for this report, the “golden threads” of the UN DRIP – the principles referring to FPIC and self-determination – were by far the most heavily referred to and more frequently implemented components of the Declaration. The groups and organizations implementing these tenets of the Declaration are utilizing innovative and creative measures to make the Declaration more binding and more relevant to Indigenous communities in-country.

**Who’s not using the Declaration?**

As noted, many of those interviewed with the most knowledge of the Declaration were also those developing policies and processes that heavily implement the DRIP into their regular operations. However, there were groups and/or individuals that I spoke with that work directly with or on behalf

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52 “Community Standards,” Rio Tinto 2011

53 Mick Gooda, interviewed 2 May, 2013
of indigenous communities that either knew little about the Declaration, or were very knowledgeable of it but were not using it as part of their normal operations.

Elizabeth Bradshaw, Principal Advisor for Communities and Cultural Heritage with Rio Tinto, a mining company that does extensive work in indigenous communities throughout Australia, responded to my interview questions via e-mail. She noted that she was aware of the Declaration but saw it more as a document that establishes the relationship “between Indigenous Peoples (IPs) and sovereign governments” and “establishes a framework for discussion and dialogue between IPs and States.”

As such, she stated that Rio Tinto “seeks to operate in a manner consistent with the UN DRIP” but that the mining company “strives to achieve the FPIC of affected Indigenous communities as defined in IFC (International Finance Corporation) Performance Standard 7 (2012) and supporting guidance.” 54

This perspective was reiterated by Sean Kildare, Darwin General Manager for the INPEX Corporation, a Japanese energy company with extensive business ties throughout Australia, including in indigenous communities: 55

As a document in its own right, we don’t refer to it. How we manage our daily affairs in our dealings with indigenous people is entirely consistent with the principles and the objectives of the UN DRIP, [but we adhere] to the IFC guidelines. We, the person borrowing, and we, the operator of the project, have to demonstrably comply with these guidelines which include many things such as dealings with indigenous people. They are highly descriptive and we are independently checked and audited against our compliance with these guidelines. And these audits are arranged by the financing and lending institutions. 56

Sean also noted that INPEX has its own various policies around corporate social responsibility.

**IFC Performance Standard Number 7**

IFC Performance Standard Number 7 is the IFC standard that directly relates to business practices involving indigenous communities. The objectives of the Standard include the abilities:

- To ensure that the development process fosters full respect for the human rights, dignity, aspirations, culture, and natural resource-based livelihoods of Indigenous Peoples.
- To anticipate and avoid adverse impacts of projects on communities of Indigenous Peoples, or when avoidance is not possible, to minimize and/or compensate for such impacts.
- To promote sustainable development benefits and opportunities for Indigenous Peoples in a culturally appropriate manner.
- To establish and maintain an ongoing relationship based on Informed Consultation and Participation (ICP) with the Indigenous Peoples affected by a project throughout the project’s life-cycle.

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54 Elizabeth Bradshaw, interviewed 16 June 2013 via e-mail
55 Full disclosure: The author was employed as an independent Research Consultant for the INPEX Corporation for four years from 2007 until 2011.
56 Sean Kildare, interviewed 17 May 2013
• To ensure the Free, Prior, and Informed Consent (FPIC) of the Affected Communities of Indigenous Peoples when the circumstances described in this Performance Standard are present.
• To respect and preserve the culture, knowledge, and practices of Indigenous Peoples.  

The Standard also notes that “adverse impacts on Affected Communities of Indigenous Peoples should be avoided where possible” (author’s emphasis) and that “where alternatives have been explored and adverse impacts are unavoidable, the client will minimize, restore, and/or compensate for these impacts in a culturally appropriate manner commensurate with the nature and scale of such impacts and the vulnerability of the Affected Communities of Indigenous Peoples.” The Standard also requires companies to involve indigenous communities or their representatives in every step of the planning, consultation and participation stage of a project.

Documents from Rio Tinto also state that “resettlement of communities will only be undertaken in complete compliance with the IFC Performance Standard Five” which states that companies should seek: “to avoid, and when avoidance is not possible, minimize displacement by exploring alternative project designs; to avoid forced eviction; to anticipate and avoid, or where avoidance is not possible, minimize adverse social and economic impacts from land acquisition or restrictions on land use by (i) providing compensation for loss of assets at replacement cost and (ii) ensuring that resettlement activities are implemented with appropriate disclosure of information, consultation, and the informed participation of those affected; to improve, or restore, the livelihoods and standards of living of displaced persons; and to improve living conditions among physically displaced persons through the provision of adequate housing with security of tenure at resettlement sites.”

When asked why organizations or companies would use the IFC standards when the Declaration was developed with the consent and participation of indigenous groups worldwide, Sean stated that “my read is the UN DRIP does read a lot more as though it is directed at states and countries rather than corporations because if you look at some of the statements in it such as the right to self-determination, the right to education, non-discrimination, these are very clear references as to what the governments of states and countries must do.” Sean also noted:

Governments are governments, corporations are corporations. What our duty is, as a good corporate citizen, is to ensure that we perform to those expectations and those objectives in the UN DRIP no matter where we operate.

But even though he clearly believed that the Declaration was aimed at states instead of corporations, Sean noted that he was open to “buffing up” INPEX documents to make them more closely aligned to specific principles within the Declaration.

http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845f4aa8c6a8312a/PS7_English_2012.pdf?MOD=AJPRES
http://www.ifc.org/wps/wcm/connect/3d82c70049a79073b82cfaa8c6a8312a/PS5_English_2012.pdf?MOD=AJPRES
59 Sean Kildare, interviewed 17 May 2013
Ron Brew, Manager for Social Responsibility with Newcrest Mining Limited, was another business voice that noted a preference for other standards addressing interaction with indigenous communities over the UN DRIP.

I think [the Articles of the UN DRIP] sit at a fairly high level. So we’re conscious of them but we don’t apply them on a daily basis. What we tend to work to more directly [to] are things like the ICMM (International Council on Mining and Metals) principles and the IFC operating standards which recognize and sit under [the] UN global declaration [as well as] our own internal community policies.  

**ICMM Commitments**

According to the ICMM “Indigenous Peoples and Mining” position statement published in May 2013, there are six ICMM Commitments regarding working with indigenous communities including:

- Understand and respect the rights, interests and perspectives of Indigenous Peoples regarding a project and its potential impacts.
- Agree on appropriate engagement and consultation processes with potentially impacted Indigenous Peoples and relevant government authorities as early as possible during project planning, to ensure the meaningful participation of Indigenous Peoples in decision making.
- Work to obtain the consent of indigenous communities for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of Indigenous Peoples and are likely to have significant adverse impacts on Indigenous Peoples, including where relocation of Indigenous Peoples and/or significant adverse impacts on critical cultural heritage are likely to occur.

When asked why the preference was made to adhere to IFC and ICMM standards that, unlike the UN DRIP, were not created with the participation of indigenous communities, Ron noted a now-common theme.

I think most of us, speaking for myself there, most of us see the UN level as being more orientated towards the state or government level whereas the IFC has got more of a commercial link.

I supposed there’s a natural tendency to work to that which you’re closest to and more familiar with. Part of the issue I think is that it then brings into play potential conflicts with national legislation, particularly around resource ownership and rights. This is probably the single most controversial element of it all in that...indigenous peoples certainly tend to view themselves as the resource owners as well as land owners, but...almost always the state retains ownership of resources. [S]o there’s an inherent conflict between the way people think and the legal framework within which you operate. And clearly as foreign companies investing in jurisdictions, we are bound to follow the law.

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60 Ron Brew, interviewed 28 June 2013
After a subsequent discussion in which I mentioned that many Articles within the UN DRIP could easily be used to address corporations, specifically Article 8 which declares that “states shall provide effective mechanisms for prevention of and redress for any action which has the aim or effect of dispossessing indigenous people of their lands, territories or resources,” Ron noted that:

…from a social responsibility point of view, if a company finds itself in a position where there is a resource potentially there but it’s only available [by] going through a government that’s prepared to trample on someone else’s rights to make that opportunity available, it then comes down to a value judgement or an ethical judgement for the board of that company about whether you proceed on that basis. So we [Newcrest Mining] have statements that say ‘we will respect people’s rights’ or ‘treat them appropriately’ without necessarily making a specific commitment to an Article in a UN Declaration. 62

Ron commented that with the abundance of standards, guidance and rules that have been recently developed with regard to corporate interaction with indigenous communities, it was becoming an increasingly difficult field to navigate:

There’s quite a population of standards, guidelines, best practices and things. There is a veritable library of stuff and in fact, it’s becoming increasingly difficult to map one’s way through it because if you try to follow everything you would literally disappear.

The preference exhibited by the resources sector in favour of IFC Performance Standard Number 7 over the Declaration is a matter that may need to be addressed by the PFII and others working to keep the Declaration current and relevant. A rephrasing or reinterpreting of certain relevant sections or simply highlighting the particular Articles and principles that would seem to directly affect the business community may go far in encouraging businesses to adopt the Declaration and use it more regularly.

Simon Gordon, General Manager for Policy, Research and Government Affairs with Reconciliation Australia (RA), gave a unique and fairly compelling reason for not regularly using the UN DRIP in RA’s regular operations despite being one of Australia’s largest indigenous rights and advocacy groups.

I think, in Australia, linking to things like [the UN DRIP]… can be seen as a bit of a barrier to getting people to sign on because it makes [things] more political. What we have found is the more prescriptive we are the less likely organizations will get involved.

We completely support the Declaration and we use it as a guide, but we don’t necessarily feel it’s the best way to engage other organizations in the work [that] we do.”63

RA is among other things, responsible for creating Reconciliation Action Plans (RAPs) for organizations and companies throughout Australia to improve relations between Indigenous and non-Indigenous Australians and increase awareness of Indigenous issues. Each respective organization has a great deal of autonomy in how its individual RAP will be created.

If you mention how the RAP is related to the Declaration for instance, and [the company] download[s] it and look at all of the Articles, most corporations would probably then have to

62 Ron Brew, interviewed 28 June 2013
63 Simon Gordon, interviewed 9 May 2013
run it through a legal team and they’d be quite concerned. They’d have to work out ‘what does this actually mean’ because obviously there’s a lot packed into [the Declaration].

[The Australian public] won’t engage with a document like this. The United Nations is a turn off. Anything that’s political is a turn off. Anything that looks slightly academic is a turn off. That’s just Australia.  

Overcoming any perceived national unwillingness towards the Declaration, and the UN as a whole, is a critical, first step in full implementation of the DRIP within Australia and the Australian public and media can play a huge role in assisting with this goal. Initial reporting in the mainstream Australian media on the release of the Declaration in 2007 was significant, as was the coverage of Australia’s decision to endorse the Declaration in 2009. But despite this coverage, many Australians are still unaware of the Declaration’s existence meaning that subsequent attempts to raise awareness on the Declaration should be diverse, far-reaching, and multi-faceted. Utilizing social media, school projects or assignments, other UN agencies and relevant NGOs in the region, guest editorials in major newspapers from human rights and Indigenous activists, billboards, public service advertisements, and the creation of a single image to represent the UN DRIP that can be incorporated into many different uses could all be effective tools to raise awareness. A nation-wide media campaign positioned in both the mainstream and Aboriginal media utilizing the resources of Aboriginal and human rights organizations throughout Australia could also do immeasurable good in raising the Declaration’s profile nationally.

But despite believing that UN-related initiatives will automatically alienate the Australian public, Simon noted that much of the work done by RA is fully compliant with the goals of the UN DRIP.

If you look at some of the things [such as] Article 2, the stuff around discrimination and various other points around discrimination, a key objective of ours [is] to reduce prejudice and discrimination and having a lot of actions which we think will contribute to that is, of course, informed by... the Declaration but [is also] consistent with it.

All of the Articles ... all of those things are embedded into the framework of the RAP program. We do make sure that what we’re doing isn’t inconsistent with what’s in the Declaration. So, I think... for us, that’s probably enough at this point for us to feel like we’re on the right track.

However, Dianne Clare, Interim Senior Consultant for Indigenous Employment at ANU, does not agree that Australian aversion to all things UN is the root cause for the lack of implementation of the Declaration.

It’s not that Australians don’t support the [Declaration]. They don’t know where to start the dialogue.

Australia is not against the UN. I think it’s the subject matter. It’s a very complex and difficult subject matter. There’s no one language. There’s no one unifying cultural practice.

64 Simon Gordon, interviewed 9 May 2013
65 Simon Gordon, interviewed 9 May 2013
There’s great diversity amongst the hundreds of indigenous groups. There’s no one simple solution.

...I think it’s a symptom of ‘we don’t know how to have the dialogue’. ...Some people don’t actually care about indigenous issues... it’s not part of their world. Others are curious and are frightened of... being demonized or of putting a foot wrong and offending people. There’s no simple answer.

[This is] why the “Sorry” speech by Kevin Rudd was really significant. It gave a framework and it’s where cultural trainers like (NSW Aboriginal consultant) David Widders are very good because his approach isn’t ‘let’s just shovel out the blame and we’re going to attach monetary figures to it.’ And there is nervousness in the non-Indigenous community that that will happen. 66

As the interim ANU Indigenous Employment consultant, Dianne is responsible for developing policy and providing strategic advice to the broader ANU community regarding Indigenous employment recruitment and retention initiatives. In spite of her job function and its direct connection to an important issue affecting Indigenous Australians, Dianne says that she does not use the UN DRIP in any capacity in her normal job function.

Officially and formally, it’s never mentioned or referred to. There’s no pinup of it around the wall. And it’s not built into any of the position descriptions [for indigenous staff recruitment]. It’s not mentioned in the ANU RAP. It’s not a document that’s referred to, [or that I’ve heard referred] to in any official capacity in any of my roles, working cross-culturally in under a decade.

And it’s not just ANU. It’s not referred to anywhere. DEEWR (the Department of Education, Employment and Workplace Relations) hosted a national conference in Canberra 20 odd months ago, in 2010. It was all about indigenous employment, how to make it happen. ...There were people saying ‘well, this is what we do,’ ‘this is what worked’... at that conference hosted by the primary funding body for a lot of indigenous programs, this [Declaration] wasn’t mentioned.67

Dianne noted that like other organizations, ANU uses other documents, including its own RAP and Vision Statement to detail its commitment to Indigenous issues and define how it wants to engage with Indigenous communities. Additionally, ANU uses the Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People which recently recommended that “funding contracts between the government and universities [be] tied to achieving Indigenous staff employment targets,” said Dianne. “They’ve been tied to Indigenous student targets, student number targets for a while and for the first time, this year, as a result of this review they’ve now been tied to staff targets.”

Despite very little opportunity to use the Declaration herself, Dianne believes that the DRIP can be used among other things to spur the dialogue on Aboriginal history and disadvantage that she believes so many Australians are afraid to have.

66 Dianne Clare, interviewed 6 June 2103
67 Dianne Clare, interviewed 6 June 2103
People aren’t going to know the detail of it, generally or widespread. But I think it can provide a context for ‘here’s a global framework. Where do we sit within here?’ And it provides a context for starting some of the dialogues.

As shown, knowledge and use of the UN DRIP is sporadic at best. Implementation of the Declaration is inconsistent, visibility is limited, and the Declaration is poorly utilized even by many who work closely on issues affecting indigenous communities.

The interviews for this research clearly show that much work needs to be done to further increase knowledge of the DRIP within the larger Australian community, particularly within the business community, and even within a number of organizations and groups whose focus is on Indigenous issues. The reconciliation “dialogue” mentioned by Dianne Clare would be an excellent way to begin the process of educating the public on the Declaration and other matters affecting Indigenous Australians, and hopefully the fear of this important conversation will recede after it has begun and its impact begins to take root. Increasing awareness of and knowledge of the Declaration is a critical first step in increasing its implementation and impact on Australian society.

The final section will seek to address these concerns with a series of recommendations intended to broaden Australia’s implementation of the Declaration and increase public awareness and understanding.
3. Increasing Implementation of the DRIP in Australia

James Anaya has said that he believes the “implementation of the Declaration should be regarded as a political, moral and yes, legal imperative.” 68 Using statements from those interviewed for this research, a series of recommendations can be made to further increase implementation of the UN DRIP throughout Australia.

**Recommendation One: Develop a Widespread and Thorough Public Awareness Campaign to Increase Understanding of the Declaration**

As noted by Dianne Clare, many groups and organizations directly involved in improving the lives of indigenous Australians are unaware of the UN DRIP and it is not a document that is often referred to.

The Declaration Dialogue Series with the National Congress of Australia’s First Peoples and the HRC, as well as the HRC Community Guide to improve local knowledge of the Declaration are an excellent start in increasing local awareness of the Declaration. However, several individuals interviewed for this research were unaware of the Community Guide or that it is accessible on the HRC web site, so there needs to not only be an intensified campaign to create awareness of the Declaration, but there should be more publicity for the educational materials that have already been created.

The development of a web site linked from the HRC web site that focuses solely on the UN DRIP and its implementation in Australia and which could be directly linked to from other web sites would also be immensely helpful.

**It is also important that this media campaign be tailored not only for the general public, but for government and businesses as well.**

As evidenced in the interview section, a number of business people felt that the Declaration was a high-level dialogue aimed at governments and that it did not necessarily address the business community. While that is certainly understandable given some of the language within the Declaration, there are still numerous principles within the Declaration that are applicable to corporations and other non-government entities such as:

- States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment. (Article 17, Section 2)
- Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, *inter alia*, employment or salary (Article 17, Section 3)
- Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and

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68 “Rights of indigenous peoples: Note by the Secretary-General,” 10 August 2011
social programmes affecting them and, as far as possible, to administer such programmes through their own institutions (Article 23)

- Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. (Article 26)

The public awareness campaign MUST clarify that the Declaration has specific Articles and principles that can be easily targeted to improve interactions between corporations and Indigenous communities. Businesses cannot be allowed to continue to believe that the Declaration doesn’t address them, and even though documents like the Declaration or the UN Guiding Principles on Business and Human Rights declare that States are the primary standard bearers for human rights, there is no question that businesses play a huge part in ensuring that the human rights of communities, indigenous or not, are respected as well.

**A third tack of the public awareness campaign should be aimed at state and federal governments.**

Some countries have indicated that a lack of information on how to implement the Declaration has been a challenge that they've experienced. In particular, there was an identified need to improve mechanisms for dialogue and information exchange between the State and indigenous peoples as well as a lack of definitional consensus on the meaning of terms such as self-determination, sovereignty, and free, prior and informed consent. A lack of definition of who qualifies as indigenous was another challenge affecting states as well as companies doing business in indigenous communities.

This lack of clarity and direction almost certainly applies to Australia as well. Australia may be clear on the definition of terms such as ‘sovereignty’ and ‘free, prior and informed consent’ and have fairly clear cut ways of identifying who is and is not Indigenous according to the working definition of the term, but the lack of attention shown towards the Declaration within Australian federal policy show a distinct lack of knowledge of what the Declaration entails. As noted by Diane Collins, Deputy Chair of ATSIEB, establishing formal and informal meetings with federal policy workers will allow groups to “strengthen the development and delivery of programs and policies and services for our people.”

**Recommendation Two: Develop Policies based on the Declaration and Find Ways to Assimilate the UN DRIP into current policy**

TSRA and ATSIEB are already implementing ways to solidify use and implementation of the Declaration. ATSIEB is looking to embed the UN DRIP in the ACT Human Rights Act as early as August 2013, and TSRA has used the Declaration to alter the way members are elected to the Authority, giving Torres Strait Islanders more say in who represents them at the Commonwealth level.

Actions such as these are the most definitive, convincing steps that can be taken to implement the UN DRIP. By incorporating the Articles and/or principles of the Declaration into existing state or

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69 “Summary of responses from the questionnaire seeking the views of States on best practices regarding possible appropriate measures and implementation strategies” 16 August 2012, p. 12

70 “Indigenous Peoples and Mining,” ICMM p. 7

71 Diane Collins, interviewed 16 July 2013
federal policy or changing policies to make them more consistent with the Declaration, these groups have shown tremendous commitment to the Declaration’s goals.

But even organizations that don’t have the jurisdiction to change state or federal policy can still utilize this aim. Groups and organizations can recommend policies, for example a National Indigenous History Policy that could ensure that schools include a curriculum that teaches all Australians about the contributions of Indigenous communities throughout history. In fact, Expert Mechanism Advice No. 3 (2012) requires that States “work with Indigenous peoples to design, develop and implement legislation, policies and programs that promote the maintenance, practice, revitalisation, use, development and transmittal of our cultures and languages.” Implementing the Declaration would also be a natural complement to already established policy programs such as Australia’s nation-wide ‘Closing the Gap’ strategy implemented by COAG which is designed to “improve the lives of Indigenous Australians, and in particular provide a better future for Indigenous children” by achieving reform targets related to Indigenous life expectancy, infant mortality, early childhood development, education, and employment.

Another tactic that could be implemented is, much like the hearings that ATSIEB conducts to gauge whether government agencies in the ACT are adhering to the standards laid forth by the elected body, the creation and use of an ad hoc DRIP Commission or research body to perform a gap analysis on how other state and federal policies aimed at Indigenous communities fare against the principles of the Declaration could be developed. This Commission could even make recommendations in an effort to align state and federal policies more closely to the Declaration if they are found to be inconsistent with the Declaration. The Commission would likely work closely with government agencies such as the HRC and TSRA, as well as Indigenous-focused NGOs and community groups in order to determine how effectively the Declaration is being used.

This gap analysis could be a critical component in articulating Australia’s strengths and weaknesses in implementing the Declaration and would be a strong complement to current plans within the UNPFII to establish a Chamber on the Declaration within its functional structure, with powers to “promote a constructive dialogue with Governments on the achievements, challenges and future action required in relation to indigenous peoples’ issues in each country under the Declaration”, on a periodic basis.

**Recommendation Three: Engage in ‘Whole of Society’ Reviews as well as Research to Gauge Further Implementation**

UN Special Rapporteur James Anaya believes that it would be valuable for the UNPFII to undertake a comprehensive review of the work of international institutions that deal with issues relating to indigenous peoples, both at the international and country levels, to assess the extent to which their

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72 Gooda and Kiss, “Ensuring the ongoing survival of the oldest living culture in the world” p. 13
74 Charters and Stavenhagen, *Making the Declaration Work* p. 335
programming conforms to the standards expressed in the Declaration on the Rights of Indigenous Peoples. 75

Closer to home, Ron Brew, Social Responsibility Manager for Newcrest Mining, Ltd, made a similar point during our interview.

It would seem to me that having promulgated a fairly sweeping policy, [the] UN DRIP which is [a] fairly fundamental and foundational federalized document, that a fairly serious attempt to review its impact involving a global dialogue amongst all of the parties – not just indigenous groups – NGO groups, the governments, resource companies and everyone else might be a useful way of condensing all of the issues around it, because they are many and nuanced, into a sort of revision of the document to give it a bit more focus and functionality. Rather than someone just go[ing] off into a room and write a report about it, actually have a comprehensive public debate. 76

Mick Dodson echoed the importance of developing a plan and implementing it.

Well, I would like to see everybody who endorsed or who voted for [the Declaration], either in the General Assembly or subsequently endorsed it to, say within the next five years, have a plan for its implementation. [And] [w]ithin the next ten years to be implementing that plan ...and within 20 years, it’s standard practice across the UN membership. 77

Indigenous groups and organizations in Australia should be instrumental in constructing these plans and conducting the research as well as initiating the “comprehensive public debate” around the implementation of the Declaration.

**Analysing the ways in which local indigenous groups and communities interact with state and federal governments and using this information to develop a framework for further implementation of the Declaration within both state and federal policy is a critical step in raising awareness of the Declaration and furthering its implementation.**

As an example of this type of analysis, Article 18 of the Declaration states that: “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.” 78

This could be interpreted within Australia to mean that indigenous organizations could work with state and federal government representatives to ensure that “States should enact and implement constitutional and other legal provisions that ensure indigenous peoples’ participation in decision-making consistent with the [DRIP], in particular where that is sought by affected indigenous peoples.” 79

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75 “Rights of indigenous peoples: Note by the Secretary-General,” 13 August 2012 p. 9  
76 Ron Brew, interviewed 28 June 2013  
77 Mick Dodson, interviewed 2 July, 2013  
79 “Final report of the study on indigenous peoples and the right to participate in decision-making” p. 28
And again, these assessments can also be tailored to the business community. Assessing the ways in which indigenous communities interact with businesses and developing a blueprint based on this information to further the implementation of the UN DRIP within Australian businesses is a critical step in furthering the DRIP’s implementation and ensuring the protection of Indigenous communities.

**Recommendation Four: Provide comprehensive training for members of the public, particularly government policy makers, on the Declaration and how it can be further implemented**

According to James Anaya, State officials and indigenous leaders should receive training on the Declaration and the related international instruments and on practical measures to implement the Declaration. In addition, seminars and conferences should be organized at the national and local levels to bring together State officials and indigenous leaders to develop strategies and initiatives for implementation, including measures to address historical grievances.80

State human rights commissions around Australia have also begun providing training courses on the UN DRIP. The courses are open to anyone interested in learning about the Declaration, but they should be mandatory for state and federal government staff members that do any work with, for or on behalf of indigenous communities.

**Recommendation Five: Initiate a Comprehensive and Diverse Public Discussion on the Declaration**

Implementing this recommendation will not only raise public awareness of the UN DRIP even further, but as implementation becomes more ingrained, members of the public can become more aware of how other organizations and communities are using the Declaration and seek to increase or improve their own implementation based on this feedback.

Additionally, as more people talk about the DRIP and the ways in which it can be used, this will further the development of the Declaration as a human rights instrument at both the state, federal and international level.

Documents from HRC note that a national conversation progressed through a series of dialogues is necessary to ensure that the principles and rights outlined in the Declaration are fully integrated into the Australian Indigenous policy landscape. The anticipated results of this conversation would culminate in a National Implementation Strategy on the Declaration on the Rights of Indigenous Peoples aimed at developing an agreed understanding of the key principles that underpin the Declaration and seeking to implement these key principles throughout Australian state and federal public policy.81

It is important that these national dialogues and conversations include a diverse representation of the Australian public. In keeping with Dianne Clare’s comments that many Australians are afraid to even begin the conversation for fear of being demonized, it is important that as wide a net as possible is cast for inclusion in these dialogues. The conversations should not only include Aboriginal

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80 “Rights of indigenous peoples: Note by the Secretary-General,” 10 August 2011
81 Gooda and Kiss, “We have a right to participate in decisions that affect us” p. 2
activists and academics, but Australian historians of all backgrounds, public servants, students of all levels, and a broad range of Australian citizens.

**Recommendation Six: Promote the Declaration at Every Given Opportunity**

Mick Dodson, Director of NCIS, has said, “I think people should use the Declaration at every opportunity. ...For any aspect of Aboriginal or Torres Strait Islander life there is something in the Declaration that you can use and utilise to reinforce your arguments and what you and your mob are trying to do.” ⁸²

Dodson also noted that he and his staff at NCIS routinely encourage NCIS PhD and Master’s students to regularly refer to the DRIP when discussing Indigenous issues in their research.

Rod Little with ATSIEB stated that his group is looking to assimilate the Declaration more in the legislation responsible for creating ATSIEB, the ACT Aboriginal and Torres Strait Islander Elected Body ACT of 2008.

“We’ll certainly be discussing [the Declaration] when we’re having the review of our Act. I think this is an opportunity for us to refer to the Declaration in all of our documentation.” ⁸³

Mick Gooda has also expounded on the virtue of ‘promoting the Declaration at every available opportunity’ including using the Declaration as a point of reference in the Government’s Human Rights Framework and the Parliamentary Joint Committee on Human Rights. ⁸⁴

He also noted his plan is to reference and promote the Declaration at every chance. “Every speech I do, I will mention the Declaration,” he said.

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⁸² “Community Guide to the UN Declaration on the Rights of Indigenous Peoples” p.65
⁸³ Rod Little, interviewed 16 July 2013
⁸⁴ Gooda and Kiss, “Giving full effect to the Declaration – a National Strategy” p. 4
5. Conclusion

The UN Declaration on the Rights of Indigenous Peoples is an unprecedented, unparalleled declaration of human rights of, for, and by some of the world’s most oppressed and marginalized peoples. Appendix A for this research report will show how the UN DRIP is being implemented and its impact around the world.

The Declaration touches on every aspect of Aboriginal and Torres Strait Islander life and has been embraced by indigenous communities worldwide. But as with every sweeping social movement, now that the document has been created and supported, implementing its principles and ideals remains the more challenging goal.

It is apparent that some Articles of the Declaration have been more readily embraced and implemented than others within Australia. Articles that relate to “self-determination” and “free, prior and informed consent” have been a lifeline for Indigenous communities as they seek to take more control over their futures. Given indigenous communities’ experiences around the globe with colonialism including genocide, theft of land, forced assimilation, and even the forced separation of family members, their embrace of the principles designed to give them more power over their own lives, communities and cultures needs little explanation.

Australia is home to active, informed, and engaged Indigenous populations eager to see the Articles and tenets of the Declaration implemented on the local, state, and federal level. But even the most hopeful among them realize that this will not happen without some fairly significant cultural changes.

“Most of [the culture changes need to happen] in the public sector and that’s what we’re aiming for,” said Mick Gooda. He went on to add:

I’m old enough to remember when a whole lot of acting law came into the public service, [such as] things like review all decisions, freedom of information, equal employment legislation. And I remember [that] people had the same scepticism of those changes when they came in but they absolutely changed the public service forever. I think we should aim for a similar change in how the public sector operates around the country. So, the more we get used to people [talking about and using the Declaration] the better it’s going to be.  

Regardless of whether they were regularly using the Declaration or not, educating the public about the Declaration was one of the most oft-repeated and important comments of those interviewed for this research.

[An] educational campaign is critical because we ...need to enlist our supporters and enlist our allies black and white, [the] whole of community, to gain the support for the Declaration and that comes through in education, said Rod Little. Fundamentally, we have the same rights as everyone else but we want to have our rights in the Declaration valued. Recognized and valued.

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85 Mick Gooda, interviewed 2 May, 2013  
86 Rod Little, interviewed 16 July, 2013
Educating the public of the Declaration should be a top priority. The Australian public should be aware first and foremost of the unprecedented level of support that the United Nations and the countries of the world have given to the UN DRIP. Knowing that the vast majority of the world’s nations have endorsed this Declaration may go a long way in causing reluctant or disinterested members of the Australian public to rethink their involvement or position on Indigenous issues.

Of the recommendations made in this report, one of the most important is the creation of an ad hoc commission or research group that will perform a gap analysis of the UN DRIP against Australia’s federal and state implementation of it. Further analysis is critical to making the Declaration part of Australia’s federal and state policy.

However, the recommendations to begin a public, well-funded, and diverse public awareness campaign and set the stage for a far-reaching national conversation on the Declaration are the most pressing.

It will take time to educate the public on the Declaration and then create the policies and procedures needed to implement it. In fact, many believe that it will be a while before Australia has implemented the Declaration in any meaningful way.

“I think will take at least ten years before we get this working properly,” said Mick Gooda. “I don’t think we understand it [yet]. I think we’re just starting to understand it.” 87

Full and far-reaching implementation of the Declaration is an opportunity for Australia to affirm its commitment to improving the lives and opportunities of its Indigenous population as well as putting itself on the international stage as a vocal and committed proponent of Aboriginal and human rights. Treatment of its Indigenous communities has always dogged Australia’s oft-stated commitment to human rights and social justice. A comprehensive, long-term and well-publicized plan to implement the Declaration would be a meaningful step for Australia in demonstrating that it is ready, willing and determined to improve the economic and social conditions of some of its most vulnerable citizens.

87 Mick Gooda, interviewed 2 May, 2013
ACT Aboriginal and Torres Strait Islander Elected Body (ATSIEB) web site, accessed July 2013


Audrey Petit, “Nowhere to Turn for China’s Uyghurs,” IPS, June 4, 2013 accessed July 2013 http://www.ipsnews.net/2013/06/nowhere-to-turn-for-chinas-uyghurs/


———, “Implementation of the United Nations Declaration on the Rights of Indigenous Peoples – Declaration Dialogue Series: Discussion Paper 3 - We have a right to participate in decisions that affect us – effective participation, free, prior and informed consent, and good faith”


Rio Tinto, “Community Standards” 2011


