



AUSTRALIA



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General Assembly
13 September 2007

Declaration on the Rights of Indigenous Peoples

**Explanation of vote by the Hon. Robert Hill
Ambassador and Permanent Representative
of Australia to the United Nations**

(Check against delivery)

Madam Chair, Australia makes this statement in explanation of its vote on the Declaration on the Rights of Indigenous Peoples.

Australia has actively worked to ensure the adoption of a meaningful Declaration. Australia has taken every opportunity within the Commission on Human Rights Working Group on the Draft Declaration on the Rights of Indigenous Peoples, the Human Rights Council and the further consultation process mandated by General Assembly Resolution A61/178 to engage constructively to elaborate the Declaration.

Madam Chair, Australia has worked hard to ensure that any declaration can become a tangible and ongoing standard of achievement that would be universally accepted, observed and upheld. The text of the Declaration fails to reach this high standard and Australia continues to have many concerns with the text.

Australia and others repeatedly called for a chance to participate in negotiations on the current text of the Declaration and we are deeply disappointed that none were convened. Having had an opportunity to negotiate the text would have allowed us to work constructively with the entire UN membership to improve the Declaration and may have resulted in a text which enjoyed consensus.

Status of the Declaration

With respect to the nature of the Declaration, it was the clear intention of all states that it be an aspirational declaration with political and moral force, but not legal force. This text contains recommendations regarding how states can promote the welfare of Indigenous peoples. It is not in itself legally binding nor reflective of international law.

Further, Australia has continually expressed its view that fundamental parts of the text adopted by the Human Rights Council on 29 June 2006, and this current text, are unacceptable, as have other states.

As this Declaration does not describe current state practice or actions that states consider themselves obliged to take as a matter of law, it cannot be cited as evidence of the evolution of customary international law. This Declaration does not provide a proper basis for legal actions, complaints, or other claims in any international, domestic, or other proceedings. Nor does it provide a basis for the elaboration of other international instruments, whether binding or non-binding.

Self-determination

The Australian Government has long expressed its dissatisfaction with the references to self-determination in the Declaration.

Self-determination applies to situations of de-colonisation and the break-up of states into smaller states with clearly defined population groups. It also applies where a particular group with a defined territory is disenfranchised and is denied political or civil rights. It is not a right which attaches to an undefined subgroup of a population seeking to obtain political independence. The Government of Australia supports and encourages the full and free engagement of Indigenous peoples in the democratic decision-making processes in their country, but it does not support a concept that could be construed as encouraging action that would impair, even in part, the territorial and political integrity of a state with a system of democratic representative government.

Lands and resources

The Declaration's provisions on lands and resources could be read to require recognition of Indigenous rights to lands without regard to other legal rights existing in land, both indigenous and non-indigenous. It is important to stress that any right to traditional lands must be subject to national laws, otherwise the provisions would be both arbitrary and impossible to implement, with no recognition being given to the fact that ownership of land may lawfully vest in others, for example, through grants of freehold or leasehold interests in land. Many national legal systems, including Australia's, also provide for lawful compulsory acquisition of interests in land.

Australia will read the lands and resources provisions of the Declaration in line with its existing domestic laws, including the Native Title Act, which includes provision for compulsory acquisition of native title rights and interests with an entitlement to compensation.

Free, prior and informed consent

Australia has concerns that the Declaration expands any right to free, prior and informed consent too far.

For example, the Declaration provides that states shall obtain the free, prior and informed consent of Indigenous peoples before adopting or implementing certain measures that may affect them. The scope of this proposed right is too broad. It could mean that states are obliged to consult with Indigenous peoples about every aspect of law that might affect them. This would not only be unworkable, but would also apply a standard for Indigenous peoples that does not apply to others in the population. Australia cannot accept a right that allows a particular sub-group of the population to be able to veto legitimate decisions of a democratic and representative government.

The provisions relating to free, prior and informed consent are also potentially inconsistent with, and go well beyond, any concept of free and informed consent which may be developing in other international forums.

Intellectual property

Australia does not support the inclusion in the text of intellectual property rights for Indigenous peoples. Australia extends protection to Indigenous cultural heritage, traditional knowledge and traditional cultural expressions to the extent that it is consistent with Australian and international intellectual property law. However, Australia will not provide *sui generis* intellectual property rights for Indigenous communities as envisaged in the Declaration.

Third party rights

In seeking to give Indigenous people exclusive rights over property, both intellectual, real and cultural, the Declaration does not acknowledge the rights of third parties, in particular the rights of third parties to access Indigenous land, heritage and cultural objects where appropriate under national law. The Declaration fails to consider the different types of ownership and use that can be accorded to Indigenous people and fails to consider the rights of third parties to property.

Customary law

Australia is also concerned that the Declaration places Indigenous customary law in a superior position to national law. Customary law is not 'law' in the sense that modern democracies use the term; it is based on culture and tradition. It should not override national laws and should not be used selectively to permit the exercise of practices by certain Indigenous communities which would be unacceptable in the rest of the community. Australia will read the whole of the Declaration in accordance with domestic laws as well as international human rights standards.

Madam Chair, while the Declaration will not be binding on Australia and other states as a matter of international law, we are aware that its aspirational contents will be relied on in setting standards by which states will be judged in their relations with Indigenous peoples. Accordingly, the Government of Australia has been concerned throughout the negotiations to ensure that the Declaration is meaningful, is capable of implementation

and enjoys wide support in the international community. The Declaration fails in all these respects and Australia cannot support it.

Australia has concerns that the Declaration expands any right to free, prior and informed consent too far.

For example, the Declaration provides that states shall obtain the free, prior and informed consent of indigenous peoples before adopting or implementing certain measures that may affect them. The scope of this proposed right is too broad. It could mean that states are obliged to consult with indigenous peoples about every aspect of law that might affect them. This would not only be unworkable, but would also apply a standard for indigenous peoples that does not apply to others in the population. Australia cannot accept a right that allows a particular sub-group of the population to be able to veto legitimate decisions of a democratic and representative government.

The provisions relating to free, prior and informed consent are also potentially inconsistent with, and go well beyond, any concept of free and informed consent which may be developing in other international forums.

Intellectual property

Australia does not support the inclusion in the text of intellectual property rights for indigenous peoples. Australia extends protection to indigenous cultural heritage, traditional knowledge and traditional cultural expressions to the extent that it is consistent with Australian and international intellectual property law. However, Australia will not provide any general intellectual property rights for indigenous communities as envisaged in the Declaration.

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Moreover, while the Declaration will not be binding on Australia and other states as a matter of international law, we are aware that its aspirational content will be relied on in setting standards by which states will be judged in their relations with indigenous peoples. Accordingly, the Government of Australia has been concerned throughout the negotiations to ensure that the Declaration is meaningful, is capable of implementation