Free, prior and informed consent:

a review of free, prior and informed consent in Australia

An Independent Research Report by Mark Rumler

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Oxfam Australia
132 Leicester Street Carlton
VIC Australia 3053
ABN 18 055 208 636

Telephone: +61 3 9289 9444

Author: Mark Rumler

Editor: Jacqui Lee

Proof reader: Christina Hill

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Foreword

The growth of the mining sector in developing countries, particularly on local community and Indigenous lands, has increased the importance of ensuring that local people take part in mining-related decisions.

The opportunity to give or withhold free, prior and informed consent is both a principle that is central to the rights of local community members and a distinct right of Indigenous Peoples.

Participation in decision-making is a core tenet of a range of human rights, including the right to development. It is central to achieving sustainable development.

Free, prior and informed consent envisages that local communities and Indigenous Peoples must be informed about development projects in a timely manner and given the opportunity to approve (or reject) a project prior to the commencement of operations.

This includes participation in setting the terms and conditions that address the economic, social and environmental impacts of all phases of mining and post-mining operations.

Free, Prior and Informed Consent: The Role of Mining Companies, Oxfam Australia[1]

This paper on free, prior and informed consent in Australia is based on research conducted by an independent consultant, Mark Rumler, for Oxfam Australia. The research methodology includes legal analysis and draws on the researcher's own experience.

The paper describes legislation that applies in the Northern Territory of Australia, in particular the Aboriginal Land Rights (Northern Territory) Act 1976 (Commonwealth) (ALRA), which provides for special rights related to indigenous land ownership and mining. The legislative provisions and related practice are considered in terms of how, and the degree to which, they give effect to the right to 'free, prior and informed consent' (FPIC).

Mining on Aboriginal land contributes more than $1 billion each year to the Northern Territory economy and equates to 80 per cent of the Northern Territory's mining income.

FPIC has wide application and the ALRA applies to a range of matters concerned with the use of communal land. However, this paper focuses only on those aspects that relate to mining.

Too often mining companies focus on what they believe to be the 'practical difficulties in applying the concept of consent where it is not legally mandated'.[2] While many leading companies do commit to achieving 'broad-based community support' (or words to this effect) for mining projects, most companies stop short of endorsing FPIC unless specifically required to do so by national law because of the 'difficulties entailed in applying the concept in practice'.[3] However, this may change now that the International Finance Corporation's Performance Standards require FPIC in some circumstances.

This paper is intended as a contribution towards understanding how FPIC can be implemented and to overcoming so called 'difficulties' in applying FPIC in practice. The paper is intended also as a contribution to understanding what constitutes good practice in this area.

The research found that good practice implementation of FPIC can be learnt from provisions of the ALRA even where they fall short of the commonly agreed standard.[4] Good practice demands the need for information, the importance of community capacity and the means for ensuring capacity, and the need for enforceable and comprehensive legal agreement which provides for the terms and conditions to which consent is given. These aspects of good practice may inform the implementation of FPIC by companies in other cultural and legal contexts, including those where FPIC is not required by national law.

Christina Hill and Serena Lillywhite
Oxfam Australia

1. Introduction

Free, prior and informed consent (FPIC) is recognised as a corollary to various fundamental international human rights and norms[5] and is explicitly recognised in the United Nations Declaration on the Rights of Indigenous Peoples.[6] FPIC is particularly relevant to mining, minerals and other extractive industries development.

To begin it is worth contrasting FPIC with lesser and different forms of community rights relating to mining development. FPIC is not a mere right to be consulted so as to be informed of project matters and to comment in relation to them. Neither is FPIC equivalent to the process for determining compensation for economic impacts and use of land. Consultation is a necessary, but not sufficient, condition for the implementation of FPIC. Community "participation" in project design and implementation is viewed as one of the key features of a good and effective project. The FPIC standard mandates the highest standard of decision-making in relation to matters that affects a community, and also requires and facilitates on-going community participation. FPIC is the right to consent or withhold consent to development which is realised through processes consistent with consultation and participation.

Given the role of government as the grantor of the right to develop as the owner of the underlying resources in many countries, and given its regulatory capacity, government should recognise the right of communities to FPIC and ensure that this right is upheld. Industry should also recognise the rights of affected communities to FPIC.

Mining development involves profound local environmental and socio-economic impacts. Without specific legal protections or without government and industry adherence to rights-based norms, local communities stand to lose significantly. The vulnerability of communities in this situation is widely appreciated and this is in spite of the fact that there is a significant overlap of interests at play: government as a protector of its own communities' interests and as facilitator of development, industry in risks it bears should it fail to achieve or maintain community consent to its activities, and community in the potential positive benefits of development and participation in the processes of its own development.

The right to FPIC resides in the communities that will experience the direct, primary impact from mining development. It could be asserted that FPIC requires unanimity of consent to the same standard for all communities that experience either primary or secondary impacts. However, this risks making the primary-impact communities' decision to agree to development subject to the decisions of communities that may experience a lesser impact. The FPIC standard in these circumstances may be best realised by according primary decision-making to the former community and, to the latter, a subsidiary right to be consulted. This involves an opportunity for the secondary-impact communities to be informed and express their views. Community identification is fundamental, and baseline studies, against which impacts can be measured, must be undertaken.

In principle, the communities possessing the right to FPIC are not only traditional or indigenous. However, given the particular international concern for the integrity of indigenous communities and the unique status of indigenous peoples under various international instruments, the applicability of FPIC is most apparent in relation to indigenous peoples.

Other local communities may also experience similar impacts from mining and have a weak bargaining position that underpins the right to FPIC. Communal ownership of lands is not necessary for FPIC to apply.

2. Framework for free, prior and infromed consent

One means of defining the concept of FPIC is proposed in the Framework for Responsible Mining[7] which was developed by Non-Government Organisations (NGOs), retailers, investors, insurers and technical experts working in the minerals sector to create a basis for developing responsible sourcing and investing policies.

The Framework proposes the following definitions for FPIC:

- consent that is obtained free of coercion or manipulation;
- securing such consent prior to any authorisation by the government or third parties, and prior to commencement of activities by a company affecting Indigenous Peoples' lands, territories and resources; and
- consent that is informed by meaningful participation and consultation of Indigenous Peoples and local communities based on the full disclosure of relevant aspects of the proposed project by the company and permit-granting authority in a form that is understandable and accessible to those Indigenous Peoples and local communities.

This definition encapsulates both the substantive principle of consent but also the procedural conditions for that right to be meaningful.

A number of related principles arise about the meaning and scope of FPIC.

2.1 The right to withhold consent

Consent implies the capacity to withhold consent. Without community specific awareness of its right to withhold consent, which is respected in letter and spirit by government and industry, any consent given cannot be judged freely given. Consent also implies a 'veto' right, that is, the right to say "no" absolutely and unfettered by significant procedural conditions.

2.2 Interactions

The notion of "free" consent relates to the process by which consent is sought. Free implies freedom from coercion and manipulation[8] and freedom from conduct deemed inappropriate as a result of unequal power. For example, the process of obtaining consent must be structured. Meetings should be conducted under an agreed agenda. Interactions between company and government officials should be limited to meetings with the community as a whole and their freely chosen representatives and advisors, rather than ad hoc interactions with individuals who may be vulnerable to manipulation or undue pressure. The equal participation of women and men should be ensured. Meaningful consent also requires that communities have the right to obtain independent legal and other specialist representation and advice, if requested, because community capacity to engage these processes is fundamental.

The processes for obtaining consent should not be rushed and it should be acknowledged that unless it is clear that the community refuses consent to the proposed project early on, these processes could take years. The development of a clear protocol for the process of seeking consent is therefore necessary.

2.3 Grant of rights to develop is conditional on FPIC

The definition above provides for FPIC prior to the commencement of activities. One interpretation is that developers possess a right to develop but this right is suspended until consent is forthcoming. This interpretation is weak because the developer possesses the right to develop subject only to the terms and conditions of consent being agreed leaving no room to withhold consent. This creates an unhelpful legal tension.

Alternatively, the fundamental legal conditions for development to proceed should not be given until consent has been given. Further, the given rights to develop must be conditional on the terms and conditions to which consent is given. In other words, neither should the developer develop nor government grant applicable rights other than in accordance with the terms of an agreement providing expressly for the conditions to which consent has been given. Where exploration rights are easily converted into development rights, the grant of the exploration rights should also be subject to the same standard.

2.4 Agreements

If the community gives its consent, the question becomes what are they consenting to? Where consent to a project is given it should be given in exchange for a binding agreement between community, company and government. The agreement must be both comprehensive and enforceable and it should provide for the conditional nature of the grant of the right to develop. Such an agreement must provide for relevant matters over the life of the project, including closure, and some sufficient time post closure. The agreement must specify ongoing rights of participation in project decision-making and include a default clause allowing for the suspension of the project should serious default be committed. Where fundamental project changes involving significant additional impact are sought, an agreement should provide for further community consent.

An agreement should provide a framework for the realisation of real development benefits to future generations – it should facilitate sustainable development. This must be recognised as implicitly underlying the bargain that a community makes when it consents to massive and intrusive development on its lands. This aspect is perhaps the most difficult to realise and to enforce.

2.5 Preconditions to FPIC: information

Provision of sufficient information is a necessary condition for FPIC. Information should be accessible and tailored. Accessibility of information is partly a function of the form of information provided and of the provision of community advisors who can explain the significance of information. Consent cannot be obtained or sought without provision of sufficiently reliable information for the community to assess the nature and risks of the project. Information may include, but should not be limited to, raw data presented in a tailored manner with sufficient explanation, as well as presentations by senior persons able to answer questions relating to it and accountable for the accuracy of the information. Any consent given is given to the project as reasonably described for the purposes of obtaining consent.

2.6 Revised framework for FPIC

With these points in mind the FPIC definition presented at the start of this section could be expanded as follows:

- consent obtained free from coercion, according to transparent procedures consistent with community integrity, and with the equal participation of women and men, on condition of the availability of sufficient professional advice for communities to appreciate both the nature of FPIC, including the right to withhold consent, and the proposed project;
- consent obtained prior to the grant of mining rights and prior to the commencement of activities. These rights are granted subject to the terms and conditions to which consent has been given, including terms and conditions that provide for ongoing ‘life-of-project’ procedural rights, including how consent is obtained for any changes to the project involving significant additional impact; and
- consent as a result of meaningful participation and consultation, based on full disclosure of the nature and likely impacts of the project, with the clear intent that the basic consent given is given to the project as described unless changes sought are either insignificant or are covered by agreed procedural rights.

All of these points are realised, with qualifications, in the Aboriginal Land Rights (Northern Territory) Act 1976 (Commonwealth) (ALRA) and established practice in the Northern Territory of Australia under this Act as it relates to mining development. Among other things the ALRA sets down detailed procedures for the negotiation of mining agreements on Aboriginal land. Relevant features of this Act are the subject of the next section of this paper.

3. The Aboriginal Land Rights (Northern Territory) Act 1976

3.1 Nature of land rights under the ALRA

The ALRA creates and provides for a unique kind of freehold: Aboriginal freehold, the underlying title to which is inalienable and which is held by relevant community interests. It is communal inalienable freehold. Freehold represents the most complete kind of land interest known to common law systems.

3.2. Surface and sub-surface rights

In relation to mining development, the ALRA represents compromises based on competing policy interests. The ALRA does not provide for traditional communal ownership of the underlying mineral resources. Therefore under the Act, traditional land owners do not have mineral rights falling short of indigenous aspirations to ownership of resources on traditional lands.[9]

3.3. Land Councils

Land Councils under the ALRA have the exclusive role to determine the identity of "traditional Aboriginal owners"[10] ("TAOs") for the Act's purposes and to facilitate decisions of traditional owners as a group.

The ALRA prescribes the functions of Land Coucils.[11] These functions include:

- determining and expressing the wishes and opinions of Aboriginal people living in the area subject to a Land Council on the management of Aboriginal land in that area;
- protecting the interests of TAOs;
- consulting with TAOs with respect to any proposal relating to the use of Aboriginal land; and
- assisting Aboriginal people pursue any claims they may have to land, including providing legal assistance to those people.

Further to above, the ALRA does not allow Land Councils to give consent or withhold consent as it relates to Aboriginal land unless the Land Council is satisfied that the TAO of that land understands the nature and purpose of the proposed action and, as a group, consents to it.[12] Additionally, consent cannot be given or withheld unless any other Aboriginal community or group that may be affected by the proposed action has been consulted and has had an opportunity to express its view to the Land Council.

3.4. Basic rights – veto and the right to negotiate

Generally, where a non-TAO party seeks an "estate or interest" in Aboriginal land they require the consent of the Land Council and the TAO.[13] Various kinds of leases are routinely granted, for example for infrastructure and commercial purposes. The ALRA has always provided for the capacity to grant leasehold rights. In relation to these matters the existence of an effective 'veto' right is not generally considered problematic. Further, in contrast to the mining provisions in Part IV of the ALRA, there is no other procedural machinery involved in these kinds of matters such as timelines or default mechanism available to a party when they don't get what they seek. Mining is an exception.

Exploration and mining are provided for separately and distinctly under Part IV of the ALRA. Part IV is a "mandatory or obligatory" legislative scheme relating to the grant of valid exploration/mining tenement on Aboriginal land, out of which parties cannot contract.[14] That is, in relation to its mandatory requirements, it is a complete statement of the law applicable to those mandatory requirements – principles of contract law cannot override or qualify Part IV's mandatory requirements once they have been determined. The basic scheme of Part IV involves a single right only to consent or refuse consent to exploration and mining.[15]

Under Part IV different rights apply at the exploration and mining stages and, unexpectedly, weaker rights apply at the mining stage than at the exploration stage in spite of the disproportionately greater impact involved in mining. The policy underlying the single veto in this regard can be explained in two ways:

1. the ALRA provides for a conditional link between exploration and mining;[16] and
2. the industry was able to successfully argue that the high risks involved in exploration are exacerbated by a second veto potentially undercutting investment in exploration.

It could be argued that the absence of the second veto – that is, a single right only to consent or refuse consent – has resulted in the reasonable requirement to negotiate conjunctive agreements (that provide for both exploration and mining) at the exploration stage which are considerably more complicated. Further TAOs are less willing to agree to exploration because of uncertainties relating to control of mining that fairly arise given the absence of a mining veto power.

The application of the "veto" is limited, and the term is to some degree misleading, in that:

1. the "national interest" case exception may apply;[17]
2. the veto is effective only for the moratorium period[18] after which the original applicant has priority to re-apply to the Land Council for the grant (albeit on the re-application the same standard of consent and provisions apply); and
3. where Part IV did not apply given an historical grant of exploration or other tenement, but where subsequent mining tenement to which the ALRA is applicable is sought, there is not an applicable "veto" right.

No "veto" right is applicable to the grant of mining tenement. The only conditions under ALRA necessary for grant of mining tenement are the existence of an agreement or terms determined by arbitration[19] and the further consent of the Commonwealth Minister for Indigenous Affairs.[20]

Under the ALRA it is the grant of tenement that attracts the basic veto and right to negotiate rights. The grant of regulatory approvals that authorise the doing of certain specified works does not generally attract these rights. There is a basic tension in this scheme because the tenement, or the mining right, is the right to explore and/or mine whereas regulatory approvals provide the detail of the nature and scope of the operations authorised. The FPIC framework effectively recognises the issues involved with this distinction by requiring consent prior to the commencement of activities. The agreement that the ALRA contemplates as an outcome is the means for resolving this tension – the right to have an agreement is converted into a set of specific contractual rights embodied in the agreement which include rights relating to how subsequent post-tenement regulatory approvals are obtained. In this way the implementation of FPIC involves both a single general consent right and ongoing subsequent rights relating to how the project is conducted.

The "validity" of the tenement, or exploration and mining right, is one of the fundamental requirements of the mining industry. Conversely matters relevant to "invalidity" are also matters of concern to the industry. This aspect of the legislative scheme is fundamental; it provides significant motivation "to get things right" and provides an important insight into how FPIC should be implemented.

3.5. Role of governments

The ALRA provides for Commonwealth ministerial oversight of aspects of the Part IV process.[21] Additionally, the consent of the Northern Territory Mining Minister is necessary to allow an applicant to proceed through direct application to the relevant Land Council.[22] Neither the Northern Territory nor Commonwealth Governments have a negotiation role under the ALRA in relation to Part IV processes. The Governments do however have a role to ensure the validity of agreements entered into under Part IV, as is clear in the Stockdale case,[23] which was brought by the Northern Territory Government.

3.6. Procedure

There are a number of key common themes and features of the procedure for grant of exploration and mining tenement under the ALRA. These are information requirements, time lines, the availability and nature of arbitral jurisdiction, and the nature of Land Council decision-making. In addition, there is the issue of how money paid to or on behalf of the community under relevant agreements is to be dealt with.

3.7. Application and information

Significantly, the ALRA prescribes the content of an application to the Land Council. The application to the Land Council for its consent to exploration must set out a comprehensive proposal which includes, among other things, details of the applicant, the affected land, the various methods for the recovery of minerals found as a result of exploration and an outline of the proposed exploration program. This must include the location of proposed exploration works and their likely effect, the time period and proposed exploration techniques, among other things.[24] The exploration proposal must also describe some matters specifically relevant to mining.

Similarly, in relation to mining, an "intending miner" must submit to the Land Council a detailed statement that sets out a comprehensive proposal and identifies the persons authorised to negotiate on behalf of the applicant.[25] The proposal must include information regarding the period of anticipated mining, mining methods, likely environmental impact, methods for minimising environmental and social impact and for rehabilitation of the subject area, and terms and conditions relating to payment.[26]

Importantly, that part of the application to the Land Council for consent for grant of an exploration licence that describes the various mining methods continues to be operative in relation to the grant of a mining interest.[27]

3.8. Timelines

Section 42 of the ALRA provides for the response of the Land Council to a valid application for its consent to exploration. The Land Council must either consent or refuse consent within the negotiation period.[28] The standard period is a period of 22 months starting on 1 January following the year in which the application is made, however, this is extendable by agreement between the applicant and the Land Council. It is suggested that any FPIC process be structured by agreeing timelines for the negotiation of specified matters based on the provision of specified information.

In relation to mining, the ALRA provides for an initial negotiation period of 12 months followed by any agreed extension[29] limited only by the making of a reference for arbitral determination.[30]

3.9. Arbitration

Under the ALRA the terms of an exploration agreement may be determined by arbitration where the Land Council and applicant agree to arbitration, or where the national interest case applies and therefore no 'veto' right applies,[31] or if the parties have not agreed within the applicable timeline.[32] In making a determination the arbitrator must determine "terms and conditions that are fair and reasonable" and "should have been negotiated by the parties in commercial arm's length negotiations conducted in good faith".[33] It is the right to control surface access that is bartered by and on behalf of traditional interests for the beneficial terms of a mining agreement given that the sub-surface rights are owned by the Crown.

The right of FPIC should not be subject to any circuit-breaker process, including arbitration, which effectively renders FPIC meaningless. Where circuit-breaker processes exist it is important that practitioners acting for communities appreciate the points of leverage that will be relevant to such circuit-breaker processes.

3.10. Consultations

Consultations under the ALRA are conducted as "on-country" meetings, that is, on Aboriginal land. The ALRA provides for rights of attendance, to the intending explorer and miner at those portions of meetings where certain subject matters are discussed, and Ministerial representatives for oversight purposes.[34]

Under the ALRA, the Land Council can only consent to exploration where it is satisfied that the traditional owners both understand the "nature and purpose" of the terms and conditions to which exploration would be subject and "as a group consent to them",[35] and it considers the terms and conditions are reasonable.[36] The provision for mining is the same.[37]

In addition to the obligation to consult to determine whether the TAOs of the land subject to a grant give their consent or not, the Land Council must also consult with all Aboriginal groups that may be affected by the grant so that they have an adequate opportunity to express their views related to the grant.[38] The ambit of "affected" varies with the circumstances. The TAOs of the land subject to a grant have the fundamental decision-making power in relation to their land, and other affected interests take second place. This is how Part IV deals with the issue of primary, direct, and secondary-impact communities. The key determinant is the grant of tenement; it is the traditional owners of the land subject to a grant that possess the veto right under Part IV. However because significant impacts may occur on the other side of the tenement boundary, agreements must take these impacts, and those affected, into account. Most often, within and immediately outside the tenement-boundary, traditional owners will be the same. However, the issue of defining primary and secondary-impact communities and their respective rights is not entirely resolved by Part IV. The issue remains to be resolved in a case-by-case manner.

The key questions are who makes the determination and on the basis of what process of identification. The key requirement is that the Land Council satisfies itself that a decision of a TAO is made "as a group". The rights at issue are group rights. The group consensus at issue is determined "to the satisfaction of the Land Council".[39] Neither unanimity, majority, decision of any one individual or any other principle is determinative. The task is one that "vests in the Land Council, being … an Aboriginal body with access to expert advice and recognised by the Act as the only determinative body".[40] Further, under the ALRA it is left to the Land Council to determine whether "after due consultation" a majority decision should be accepted or rejected as a consensus.[41] In addition, the Land Councils have a statutory duty to conciliate disputes between Aboriginals relating to land in the area of the Land Council.[42]

Consultations always include senior traditional law men and women who, by virtue of their ceremonial position and as recognised possessors of traditional ceremonial knowledge, are key decision-makers, often at a regional level. By virtue of

the gender-based divisions of traditional Aboriginal ceremony, where sacred sites on land are associated with either male or female responsibility, group decisions related to land typically have a gendered dimension.

The Northern Land Council, for example, has adopted a procedure relating to exploration where it first consults the traditional owners to ascertain whether they are in principle opposed to exploration and mining. If TAOs decide to refuse, the Land Council effectively considers it has consulted the traditional owners to the "extent practicable" and the Land Council accordingly refuses its consent. Any straight unqualified refusal of TAOs to contemplate exploration and mining on their lands should however be sufficient and any additional processes imposed on the TAOs are inappropriate and unnecessary.

If TAOs do not refuse, negotiations may proceed between the Land Council and the explorer for the terms and conditions of an enforceable agreement. A draft is then verbally presented to a meeting of traditional owners to ascertain whether they consent or not to exploration and mining on the terms of the draft agreement. The "yes" to negotiations does not preclude a "no", at the subsequent meeting where the terms and conditions are considered.

3.11. Terms and conditions of agreements

The ALRA does not prescribe the contents of the agreements. The ALRA provides that a Land Council cannot consent unless it is also satisfied the terms and conditions are reasonable. Furthermore, certain matters cannot be in a conjunctive agreement under the ALRA: for example such an agreement cannot provide for a further consent or right to veto to mining.[43] By implication, the character of the traditional interests protected by the ALRA, and the matters specified to which an arbitrator must have regard, give guidance for the content of these agreements.

Some of the key provisions of a typical Northern Land Council conjunctive exploration agreement are:

- the nature of consent given and its conditions (including those terms providing for the conjunctive form, that is the procedure regarding the negotiation of a mining agreement, the establishment of a development committee, and matters agreed to be included in a subsequent mining agreement);
- process and substantive provisions for the protection of culturally significant areas of land (ie sacred sites) and the related processes for work program clearances;
- environmental protection principles, substantive provisions and related processes for Land Council input into regulatory processes;
- benefits including exploration payments, and for mining, royalties and other financial participation terms (employment, training and business development preferences and related processes);
- establishment and functions of exploration and mining liaison committees;
- provision for the consequences of serious default by the mining company including the suspension of the project; and
- provisions for the agreement's term, its renegotiation and review.

The ALRA conjunctive agreement provides for exploration and also for the principles and much of the content of a mining agreement. Traditional owners are primarily concerned about the impacts of mining and given the single veto seek certain terms from the outset of a grant of an exploration interest if they desire exploration and mining on their lands. Although the scheme of the ALRA involves exhausting the fundamental consent right in an agreement, the agreement itself provides for continuing procedural rights enabling meaningful participation and significant control over project design and implementation.

3.12. Money paid under an agreement

The ALRA requires that money paid to the Land Council is to be paid either as required by the relevant agreement or is to be paid to any Aboriginal corporation whose members are affected by the agreement, within six months of receipt of the money.[44] The mechanisms designed to ensure sustainability of funds and their application to meet communal needs should be the subject of discussion from relatively early in the overall process, and consideration should be given as to whether the outcome agreements are also to provide for a specific vehicle to receive, and deal with, financial benefits.

4. Lessons from the Aboriginal Land Rights Act

A negotiation protocol should be developed as the first step in the process. Such a protocol expresses basic commitments to the process between the community, company and government. Such a protocol should:

- commit to FPIC especially where consent rights are not protected by national legislation and acknowledge that the community has a right to say “no”;
- identify how and when consent or refusal can be given;
- identify the nature of the agreements intended as an outcome on condition of consent, including identifying the subject matters to be covered by the agreements;
- itemise the kinds of information to be provided, and commit to the principle that the provision of sufficient information is a necessary condition for negotiations;
- commit to fund environmental and social baseline studies and acknowledge the importance of baseline studies for determining relevant impacts;
- identify funding and acknowledge that funding for community advisors is essential;
- identify timelines and mechanisms for extension;
- identify community decision-making processes;
- commit to ensuring the equal participation of women and men;
- identify the roles of national and international NGOs, including non-party status to facilitate integrity of process and for circuit-breaker purposes; and
- commit to confidentiality of certain commercially sensitive information only, otherwise commit to the principle of transparency.

More than one agreement could, where consent is given, be entered into.[45] The basic substantive agreement in which, among other things, financial participation terms are contained, should be between company and community only. Two additional agreements, one providing for environmental matters, and the other for employment, training and business development benefits to the community and the broader region may also be entered into, and may also include government as a party. By including government as a party to such agreements government resources are able to be earmarked and, as a party, government is also able to enforce the terms of the agreement.

Finally, the respective roles and mutual obligations of community advisors and consultants, steering committees and the community as a whole should be agreed to in writing. This is not so much an issue of enforceability as of clarity and expectations management.

5. Conclusion

There are aspects of the legal regime relating to indigenous land rights and mining in the Northern Territory of Australia that do not provide for the principle of consent. Where the principle of consent is provided for, notably in relation to the exploration veto under the ALRA, the legislative provisions and practice together provide a good model for the implementation of the principle of FPIC.

The model is relevant elsewhere even in the absence of the basic features of the legislative scheme, including the primary role of the Land Councils. The legislative scheme highlights the basic structural issues whilst providing universal insights into good practice. Community capacity to engage in these processes is fundamental and can be achieved via alternative means such as the direct engagement by communities of specialist advisors.

Mining companies should act consistently with the principles of FPIC even in the absence of specific domestic legislative requirements. The legislative provisions of the ALRA and related practice offer some guidance. Implementation of FPIC optimises the parties' mutual interests in extractives resources development, as projects built on foundations lacking community consent are weak. The best foundation for social and economically sustainable development therefore, is one in which FPIC is given foremost prominence.

6. References

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7. Endnotes

1 Martin 2007, *Free, Prior and Informed Consent: The Role of Mining Companies*, Oxfam Australia.
2 International Council on Mining & Minerals 2010, *Good Practice Guide: Indigenous Peoples and Mining*.
3 Ibid
4 See for example, Miranda, Chambers and Coumans 2005, *Framework for Responsible Mining: A Guide to Evolving Standards*.
5 Martin 2007, Miranda et al 2005.
6 http://www.un.org/esa/socdev/unpfii/en/drip.html
7 Miranda et al 2005.
8 Martin 2007.
9 Under the ALRA mineral rights are reserved to the Crown on grant of land to a land trust: Section 12(2).
10 The phrase "traditional aboriginal owners" (TAOs) is also used herein to refer to native title holders/claimants unless otherwise specified.
11 ALRA, Section 23.
12 ALRA, Section 23(3).
13 ALRA, Sections 19 and 19(5) on Land Council's obligations to consult.
14 *Northern Territory v Northern Land Council* (1992) 81 NTR 1, "*Stockdale*", at 11.
15 ALRA, Section 40. A provision of an agreement entered into for the purposes of Pt IV therefore that purports to override the single veto is inoperative – ie a provision in a conjunctive agreement that provides for a further subsequent consent without which mining cannot be undertaken is inoperative.
16 ALRA, Section 46(1). Because a person must be an "intending miner" (Section 3: definitions, defined as person holding, among other things, an exploration or exploration retention licence under a law of the Northern Territory) as a condition of being granted a mining interest the applicability of the 'veto' right relating to exploration and *therefore* mining is preserved. This overrides Northern Territory law, which does not provide for a conditional link between the two phases.
17 ALRA, Section 40(b) and Section 43.
18 ALRA, Section 48.
19 Where terms and conditions are determined by arbitration and the Land Council refuses to enter into an agreement containing the determined terms and conditions, the Commonwealth Minister must enter into the agreement on behalf of the Land Council: ALRA, Section 46(13).
20 ALRA, Section 45.
21 The Commonwealth Minister must provide or withhold consent to the grant of an exploration licence if the Land Council has also consented: ALRA, Section 42(8). Section 42(8) does not specify the matters to which the Minister is to have regard in giving or withholding consent. The practice has been that information related to the integrity of process (ie information regarding the nature and fact of consultation meetings held) has been required. It is arguable that this oversight role is redundant and inconsistent with the basic scheme of the ALRA.
22 ALRA, Section 41(1). Under this provision the NT Mining Minister could actively vet applicants and have regard to the overall administrative burden that the Land Councils face in processing matters. Having received consent by the NT Mining Minister the applicant may then apply directly to the Land Council for its consent to grant of an exploration licence within timeframes that ensure the applications remain fresh: ALRA, Section 41(2)(a) or as extended by Section 41(2)(b).
23 *Northern Territory v Northern Land Council* (1992) 81 NTR 1, "*Stockdale*".
24 ALRA, Sections 41(6)(a) to (f).
25 ALRA, Section 46(1).
26 ALRA, Section 46(1)(a), paras (i) to (xiii).
27 ALRA, Sections 47(3) and (4).
28 ALRA, Section 42(1).
29 ALRA, Section 46(3).
30 ALRA, Section 46(7).
31 ALRA, Sections 42(7) and 44(1) and (2).
32 ALRA, Section 46(7).
33 ALRA, Section 46(11).
34 ALRA, Sections 42(4) and 46(5) for exploration and mining respectively.
35 ALRA, Sections 42(6)(a) and (b) respectively.
36 ALRA, Section 42(6)(c).
37 ALRA, Section 46(4).
38 ALRA, Section 42(2)(b).
39 See *Alderson v Northern Land Council* (1983) 20 NTR 1 *("Alderson")* at 10 where the plaintiff sought and failed to obtain orders that the Land Council lacked power to pursue negotiations over a mining matter having allegedly not obtained a relevant consensus to do so.
40 *Alderson*, at 8.
41 *Alderson*, at 9.
42 ALRA, Section 25.
43 *Stockdale*.
44 ALRA, Section 35(3).
45 See for example in relation to the Diavik diamond mine in the North West Territories of Canada. See a description of the agreements involved at the ATNS (Agreements, Treaties and Negotiated Settlements Project) at the University of Melbourne, http://www.atns.net.au/agreement.asp?EntityID=1873

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Victoria (National office): 132 Leicester Street, Carlton, VIC, 3053. Phone: 03 9289 9444.
New South Wales: Level 3 / 25 Cooper Street, Surry Hills, NSW, 2010. Phone: 02 8204 3900.
Australian Capital Territory: Level 2, 161 London Circuit, Canberra, ACT, 2600. Phone: 02 6230 1177.
Queensland: Level 6 / 269 Wickham Street, Fortitude Valley, QLD, 4006. Phone: 07 3637 4600.
South Australia: 5-7 Hutt Street, Adelaide SA 5000. Phone: 08 8236 2100.
Western Australia: 5 King William Street, Bayswater, WA, 6053. Phone: 08 9262 8200.

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