

Informed consent in Australia's Northern Territory

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Northern Land Council

Under the Aboriginal Land Rights Act, Aboriginal people now hold inalienable title to 49% of Australia's Northern Territory. The Northern Land Council is one of four Government bodies created to help Aboriginal people fulfill their aspirations through effective management of their land and culture. This may, but does not necessarily include embracing industrial developments, because the right to veto projects applies where Aboriginal people hold title. An important part of making a decision whether or not apply the right to veto requires the Northern Land Council to fulfill its statutory responsibility and ensure that the affected landowners are fully informed of the nature of the project and its impacts on their land, culture and society.

This paper primarily describes the processes and protocols used by the Northern Land Council to ensure that maximum exchange of information occurs prior to Aboriginal people making decisions about developments on their land. Using the Ranger Uranium Mine as an example, it also seeks to outline initiatives to provide Aboriginal people with a stronger voice in decisions being made during operational and closure phases of projects. A special focus on tying together traditional and western scientific knowledge is applied.

Introduction

Countries that have endorsed the United Nations Declaration on the rights of Indigenous People are required to ensure that where the interests and lands of indigenous people are affected, the principle of free, prior and informed consent (FPIC) is applied before that project can be approved (UNDRIP, 2007). Although the Declaration is non-binding, Australia endorsed the Declaration in 2009 and has now committed to working towards meetings its aims. As one of the premier bodies representing Aboriginal rights, the Northern Land Council (NLC) plays an important role in administering this principle in Australia's Northern Territory. To be effective, FPIC must play a role at all levels of contract negotiations, impact assessment and the development of sustainable futures for Aboriginal people.

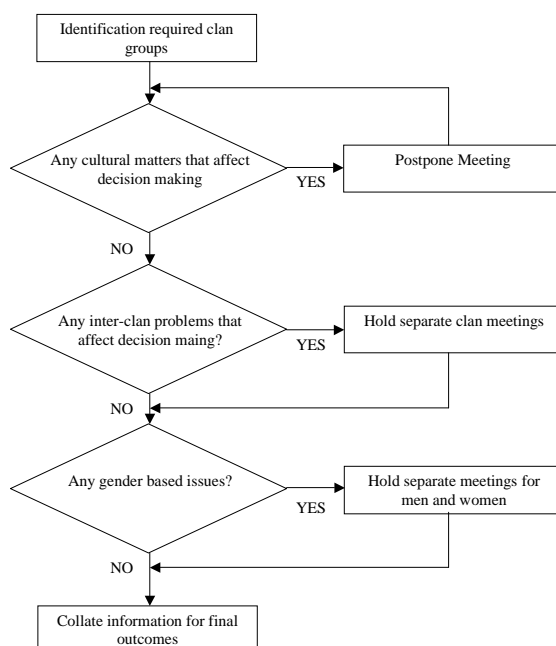
FPIC is an evolving process that has rapidly become an important part of governance, corporate social responsibility and the 'social licence to operate'. It requires people to have access to accurate information on potential economic, environmental and social costs and benefits of a project before decisions are made (Barnat et al, 2011). However, it has been observed that while many project developers and government regulators require community consultations to be held, they rarely require consent to be obtained (Herz et al, 2007). This is a problem that has still to be overcome in many aspects of the Northern Territory's governance, despite passage of legislation such as the Aboriginal Land Rights (Northern Territory) Act 1976 (Land Rights Act) that provides Aboriginal people communal rights to control significant areas of land.

Even though the resources industry has committed to improving its community engagement practices (ICMM, 2010; Australian Government, 2006), these do not always focus specifically on indigenous people; as consultations are often undertaken in a culturally inappropriate manner. Poor management of the process can lead to further complications because systems of indigenous decision-making are complex and can be prone to failure and manipulation (Colchester and Ferrari, 2007). Those of the Northern Territory's Aboriginal people are no exception, however the NLC has developed useful processes for dealing with FPIC. Using mining, oil and gas resource developments as examples, this paper seeks to describe those process and their application contract negotiations and as a means for ensuring effective input into the impact assessment process.

The NLC's decision-making processes

The NLC is one of four statutory bodies created under the Land Rights Act to administer communal lands on behalf of Aboriginal people. It also serves as the statutory Native Title Representative under the Native Title Act 1993. A significant part of the NLC's work is to negotiate on behalf of Aboriginal people, a wide raft of agreements with companies and individuals seeking to develop projects or undertake business on land subject to these Acts. It is here that the principle of FPIC is primarily applied.

Since its creation in 1976, the NLC has developed a series of culturally appropriate processes and protocols to ensure that not only are the requirements of legislation met, but that Aboriginal people have effective and meaningful input where decision-making is required. The general organization of a meeting is shown in Figure 1; while the decision-making processes for land subject to the Aboriginal Land Rights Act and the Native Title Act are shown in Figures 2 and 3, respectively. Figure 4 shows a process that has been used for the integration of traditional ecological knowledge with western science for application to minimization of environmental impacts – in this case, specifically for development of mine closure criteria (Smith 2008, Smith 2009) and cultural landscaping and risk assessment tools (Smith 2011, Smith 2012).



Successful completion of consultations is subject to external events, such as ceremony. Where these are likely to be detrimental to ensuring FPIC is achieved, consultations are postponed until the ceremony is complete and Aboriginal people feel comfortable with making decisions.

Where tensions and disputes exist between clan groups or projects cover multiple clan areas, separate clan meetings are held. Separate meetings may also be useful where one or more clans opt out of decision-making, but still need to be informed of outcomes as affected parties.

A further layer of complexity often exists where men and women feel uncomfortable discussing matters relevant only to the opposite gender. In the absence of separate gender based consultations, we find that only partial information is available. Under these circumstances, problems often arise during the operational phase of the business.

Figure 1: General process used for organizing meetings required for collection of information and obtaining free, prior and informed consent.

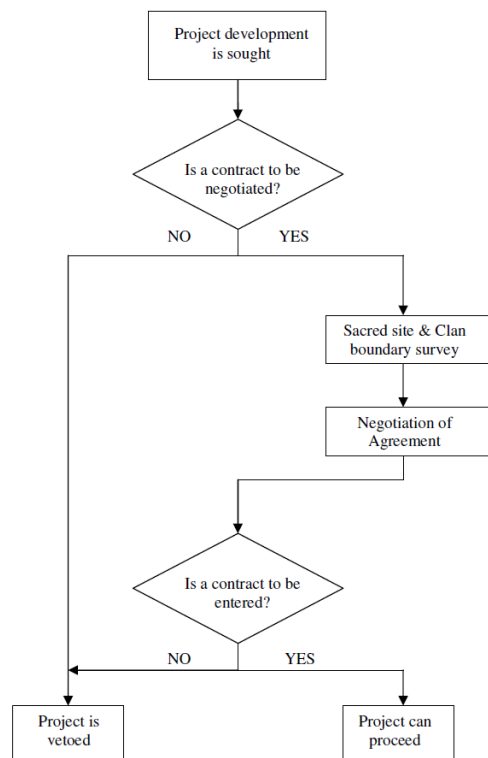


Figure 2: Decision making process on land subject to the Aboriginal Land Rights (Northern Territory) Act 1976.

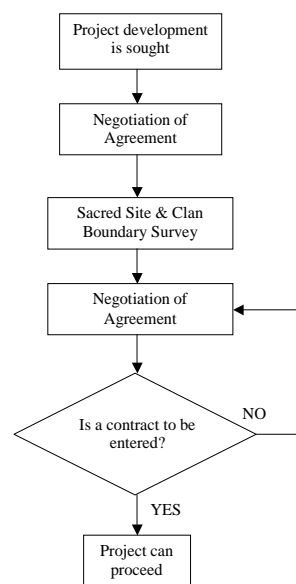


Figure 3: Decision making process on land subject to the Native Title Act 1993.

The NLC uses a three-part system for dealing with matters under the Land Rights Act. This process is designed to reduce costs in the event that Aboriginal landowners do not want to enter into an agreement.

The first, or Initial Consultation phase, is where Aboriginal landowners are advised of technical aspects of the project and consequences of allowing a project to be developed development. The second phase is used to define areas where the company is allowed to work and terms of the agreement.

During the third, or Final Consultation phase, the technical aspects and consequences of the project are revisited and the terms of the agreement presented. Aboriginal landowners can then make a final decision on whether to veto the project or commit to the terms of the agreement. Clan groups may out of the agreement at any time up until it is formally approved.

A similar three-part process is used under the Native Title Act. The first, or Information phase is where Native Title holders are advised of technical aspects of the project and consequences of allowing its development.

The second phase is identical to that for the Aboriginal Land Rights Act – where the terms of the agreement and work areas are defined.

The third phase is also identical to that used for the Aboriginal Land Rights Act, however, the agreement must be entered. Aspects of the agreement can be renegotiated, but there is a time limit that applies. Failure to meet this time limit may result in an arbitrated solution.

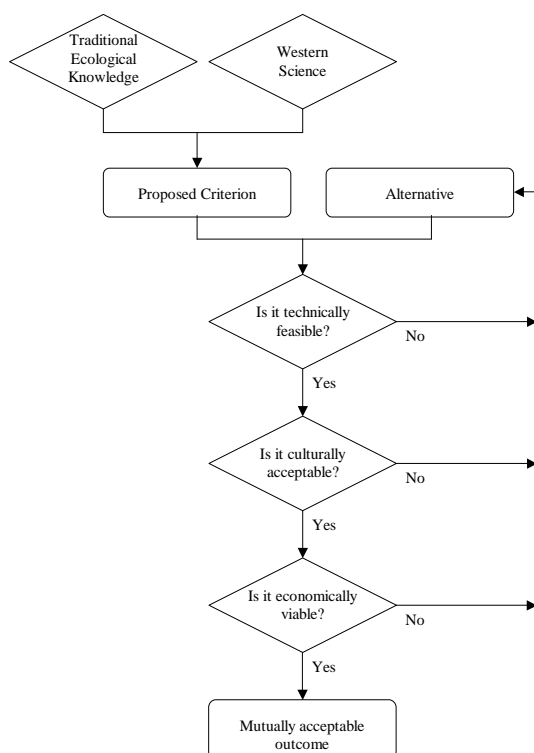


Figure 4: Decision making process for development of closure criteria for mining, oil and gas projects.

Effective consultation requires an extra dimension to be added to the principle of FPIC. It requires the Aboriginal voice to be heard and their knowledge to be valued and included in negotiations and the approvals process. The process requires detailed culturally based information to be revealed, but is a practical demonstration of consent through engagement.

The process represented in Figure 4 is specific to development of closure criteria but in practice could be readily adapted anywhere that traditional knowledge and western scientific precepts can be integrated. Tools to assess the successful integration of the two knowledge systems still need to be devised, but its acceptance by several major mining companies suggests that incorporation of traditional knowledge into environmental impact assessments may be of great future value.

The large numbers of people involved during consultations means that each of these processes is at times cumbersome, costly and time consuming but are necessary to ensure that free, prior and informed consent free, prior and informed consent and a social licence to operate are obtained. The preference is to hold single large meetings with all affected people present, however it is recognized that this is not always possible. Tensions between clans and a reluctance of men to speak about sacred matters in the presence of women (and vice versa) means that a series of meetings is often required.

Confidentiality is maintained throughout the process. Summary documents are presented to project developers following discussions where deemed appropriate. People are encouraged to discuss matters in their own language and accredited interpreters are used where required and/or available. The role of Northern Land Council staff is principally to facilitate the meeting, to ensure that decisions are reached according to Aboriginal customs and maintain accurate records of the outcomes.

Management of information

It is recognized that passage of information during negotiations and impact assessments is ideally a two-way process, but protection of culturally sensitive information is currently paramount. Information supplied by the company must be disseminated across all groups and persons involved to ensure FPIC, while much of that received from Aboriginal people is withheld because of its highly personal nature and to protect intellectual property rights. Information material to development of an approved project is released, but placed under strict control of confidentiality agreements.

In addition, physical systems have been put in place for maintaining and protecting cultural information. For example, where traditional knowledge has been used for cultural landscaping and development of closure criteria for the Ranger Uranium Mine; the information is stored using a GIS, held and maintained by its rightful owners – the Mirarr. The GIS has been constructed to permit various levels of access, effectively splitting the information according to gender and level of initiation; with only a limited amount made available to the general public. Negotiation of an Intellectual Property agreement for the sharing of information with the mining company is currently being progressed.

Problems with applying FPIC in the Northern Territory

The NLC's processes are not perfect and problems with consultation processes still occur. Despite the NLC's best endeavours, perceptions of lack of inclusion during consultation remain a principal cause for concern that can lead to a push for legal solutions. For example, some Aboriginal people have expressed dissatisfaction with the consultation processes related to the Rio-Tinto Alcan Gove Agreement (Federal Court of Victoria, 2011) and others with the establishment of a nuclear waste dump (Federal Court of Victoria, 2010). Resolutions to both matters were sought through court action.

Legislation and government policy provide other impediments to application of FPIC. Where land is subject to the Land Rights Act, Aboriginal people retain the right to withhold FPIC. However, the Land Rights Act requires exploration and mining agreement negotiations to be conducted in a conjunctive fashion – essentially forcing people to either reject the project outright, or commit to mining without prior, full knowledge of the type of material to be mined, its impacts or duration. Where the Native Title Act applies, rights to the land are diminished and mining is inevitable if an economically viable deposit is discovered. Both seem contrary to the principle of FPIC.

Government policy considers environmental impact assessment a consultation process only, with consent having already been obtained as a part of the approvals and contract negotiations process. Until recently, assessments have been skewed in favour of a euro-centric approach and traditional knowledge generally ignored. However, through close co-operation with the large mining companies, the NLC has been able to engender a heightened level of interest in Aboriginal engagement through the direct application of traditional knowledge to closure of mining projects (e.g. Jacobsen, 2012). Although the long-term aim is to translate this into a mandatory requirement of the impact assessment process; as is done in the Yukon (Yukon Government, 2002), there is still a long way to go.

Conclusions

The Northern Land Council has developed consultation processes and protocols that aim to ensure its Aboriginal constituents are afforded the right to free, prior and informed consent during project development. Although the decision making process amongst Aboriginal landowners may be complex, processes used for consultation are simple and culturally appropriate. They also hold potential to afford Aboriginal people opportunities for more meaningful input during impact assessments. However, the processes are not without difficulties and further work is required to ensure that effective outcomes can be both achieved and demonstrated.

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