

14 July 2022

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for proactive release

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Tēnā koe Personal details removed for proactive

I refer to your email of 20 May 2022 in which you request the following under the Official Information Act 1982 (OIA):

Ministerial briefings provided by MFAT to the Minister of Foreign Affairs and Trade prior to the April 2010 decision in relation to the implications of the New Zealand government supporting the UN Declaration on the Rights of Indigenous People.

On 20 June 2022, due to the necessity for further consultation, the timeframe for responding to your request was extended by 15 working days, to 12 July 2022. Thank you for your patience while this process was concluded.

The information relevant to your request is attached. We have withheld some information under the following sections of the OIA:

- 6(a): to avoid prejudicing the security or defence of New Zealand or the international relations of the New Zealand Government;
- 6(b)(i): to protect the passing of information from another government on a confidential basis;
- 9(2)(a): to protect individuals' privacy;
- 9(2)(g)(i): to protect the free and frank expression of opinions by departments; and
- 9(2)(h): to maintain legal professional privilege.

Where the information has been withheld under section 9 of the OIA, we have identified no public interest in releasing the information that would override the reasons for withholding it.

If you have any questions about this decision, you can contact us by email at: DM-ESD@mfat.govt.nz. You have the right to seek an investigation and review by the Ombudsman of this decision by contacting www.ombudsman.parliament.nz or freephone 0800 802 602.

Nāku noa, nā



Sarah Corbett
for Secretary of Foreign Affairs and Trade



MINISTRY OF
FOREIGN AFFAIRS & TRADE
MANATŪ AORERE

22 January 2009

UNHC/IDG/2

Minister of Foreign Affairs

For action by 29 January 2009

UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Submission: Issues
Purpose: s6(a), s6(b)(i)

Comments:

Recommended Referrals

Prime Minister	For information by 5 February 2009
Deputy Prime Minister	For information by 5 February 2009
Attorney-General	For information by 5 February 2009
Minister of Justice	For information by 5 February 2009

Contacts

Caroline Forsyth	Deputy Secretary	s9(2)(a)
Peter Rider	Director, United Nations, Human Rights and Commonwealth Division	
Gerard van Bohemen	Director, Legal Division	

Minister's Office Comments

Signed / Noted / Referred / Agreed / Approved

Date: ____ / ____ / ____

UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Key Points

- On 13 September 2007 the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples (DRIP). New Zealand, Australia, Canada and the US were the only countries to vote against it. Eleven countries abstained and 143 countries voted in favour.

- s6(a), s6(b)(i)

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- s6(a), s6(b)(i)

there are two possible options for Ministers to consider - either to maintain New Zealand's current opposition to the DRIP or decide to undertake a review of our position.

- s6(a), s9(2)(g)(i)

- Should Ministers decide to review the Government's position on the DRIP, it would be advisable to establish an inter-departmental process to provide advice to Cabinet on the possible implications of supporting the DRIP, including for the review of the Foreshore and Seabed Act, the Treaty of Waitangi settlement process, and the pending report of the Waitangi Tribunal on the WAI 262 claim (the indigenous flora and fauna and cultural intellectual property inquiry).

- s6(a)

UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Recommendations

It is recommended that you:

1 s6(a) Yes / No

2 New Zealand could either maintain the status quo and continue to oppose the DRIP or decide to undertake a review of the Government's position on the DRIP. Yes / No

3 Either: Yes / No

Agree that New Zealand should continue to oppose the DRIP

or:

Agree that New Zealand should undertake a review of the Government's position on the DRIP. Yes / No

4 Agree that if there is a decision to review New Zealand's position on the DRIP then an inter-departmental group of officials should be established to provide advice to Cabinet on the possible implications of supporting the DRIP, including for the review of the Foreshore and Seabed Act, the Treaty of Waitangi settlement process, and the pending report of the Waitangi Tribunal on the WAI 262 claim (the indigenous flora and fauna and cultural intellectual property inquiry). Yes / No

5 s6(a) Yes / No

6 Yes / No

Caroline Forsyth
for Secretary of Foreign Affairs and Trade

UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Report

On 13 September 2007 the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples (DRIP). The DRIP contains 46 articles that cover a broad range of collective and individual rights and freedoms including the right to self-determination, cultural rights and identity, rights to education, health, employment, language and others.

2 New Zealand, Australia, Canada and the US were the only countries to vote against the DRIP's adoption. Eleven countries abstained and 143 countries voted in favour. At the time, the New Zealand Government's position attracted criticism from domestic and international NGOs, the Māori Party, the Green Party and the New Zealand Human Rights Commission.

s6(a)

4 In consultation with State and Territory governments and indigenous organisations, the Rudd Government has now completed its review of Australia's position on the DRIP. s6(b)(i)

s6(b)(i)

s6(b)(i)

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s6(b)(i)

Implications for New Zealand

s6(a)

How should New Zealand position itself on the DRIP?

9 As in September 2007, the legal and policy issues need to be considered as part of any decision to revisit New Zealand's position on the DRIP.

Legal Considerations

10 In 2007 Ministers were advised that the DRIP should be seen as a political rather than a legal instrument because such declarations are not of themselves legally binding. However, it would have been inconsistent with New Zealand's traditional stance on UN and other instruments to have supported or abstained on the adoption of a document with which New Zealand had significant legal difficulties.

s9(2)(h)

12 New Zealand, therefore, voted against the DRIP because some of its provisions bear on New Zealand's fundamental legal/constitutional arrangements and democratic processes. In specific terms, the major sticking points for New Zealand were:

- **Articles 19 and 32(2)** provide that States should obtain the free, prior and informed consent of indigenous peoples before adopting and implementing legislative or administrative measures that may affect them, and prior to the approval of any project affecting their lands, territories and other resources. s9(2)(g)(i)

UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

- **Article 26** states that indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. This effectively covers the whole of New Zealand. The right to lands and resources takes no account of the fact that in countries such as New Zealand much land that was traditionally "owned, occupied or otherwise used or acquired" by indigenous peoples is now occupied and/or owned by persons who acquired it lawfully and in good faith, for value. s9(2)(g)(i)
- **Article 28** provides for the right to redress or compensation for lands, territories and resources which have been traditionally owned or otherwise occupied or used and which have been confiscated, taken, used or damaged without their free, prior and informed consent. This compensation "shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation". s9(2)(g)(i)

s9(2)(g)(i)

Policy Considerations

14 In essence, the key considerations in favour of maintaining New Zealand's current position on the DRIP are:

s9(2)(g)(i)

- New Zealand takes its international commitments seriously and does not generally support texts which we are unable to implement domestically.

15 In contrast, a decision to reconsider New Zealand's position (with a view to supporting the DRIP) would receive a favourable reaction from Māori and

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human rights groups, ^{s6(a)}

New Zealand could also take a more pragmatic approach to seeking acceptable DRIP references in the documents produced at international meetings. ^{s6(a)}

16 Should there be a decision to review the Government's position on the DRIP, it would be advisable to establish an inter-departmental process led by a domestic agency to provide advice to Cabinet on the review process and the possible implications of supporting the DRIP, including for the review of the Foreshore and Seabed Act, the Treaty of Waitangi settlement process, and Government's response to the pending report of the Waitangi Tribunal on the WAI 262 claim (the indigenous flora and fauna and cultural intellectual property inquiry).

s6(a), s6(b)(i)

Consultation MFAT/NZAID

18 Consultation with NZAID was not required.

Consultation MFAT/EAB

19 Consultation with EAB was not required.

Released under the Official Information Act



13 May 2009

LGL/HR/IDG

Minister of Foreign Affairs

For action by 18 May 2009

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: ADDITIONAL INFORMATION

Submission: Issues

Purpose: Following the discussion at this week's Cabinet meeting, we provide a paper containing additional information relating to issues and potential risks associated with the proposed move to support the Declaration on the Rights of Indigenous Peoples.

Comments:

Recommended Referrals

Prime Minister	For consultation by 18 May 2009
Minister of Maori Affairs	For consultation by 18 May 2009
Associate Minister of Maori Affairs	For consultation by 18 May 2009
Minister of Justice	For consultation by 18 May 2009
Attorney-General	For consultation by 18 May 2009
Minister of Energy and Resources	For consultation by 18 May 2009

Contacts

Peter Rider Director, United Nations and
Commonwealth
Juliet Hay Deputy Director, Legal Division

s9(2)(a)

Minister's Office Comments

Signed / Noted / Referred / Agreed / Approved

Date: ___/___/___

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: ADDITIONAL INFORMATION

Key Points

- On 11 May 2009 Cabinet deferred the consideration of the paper on the Declaration on the Rights of Indigenous Peoples (DRIP) and invited you to convene a group of Ministers to give further consideration to the issues relating to possible New Zealand support for the DRIP and the options for mitigating any risks for New Zealand.
- We have met with officials from the relevant departments and prepared the attached paper which comprises a broad (but necessarily tentative, given the short time-frame) outline of the key issues and risks associated with the articles dealing with: prior informed consent; ownership of land and resources; and rights of redress. For completeness it also notes that the article on self-determination which was contentious during the negotiations in its final form was regarded as acceptable to New Zealand.
- s6(a)
- The Cabinet minute notes that following the discussion by the group of Ministers you may submit further information or a revised paper for Cabinet on 18 May 2009, if required.

Recommendations

It is recommended that you:

- 1 **Note** the attached paper which was prepared in consultation with other departments and outlines the main issues and risks on the articles of concern; Yes / No
- 2 **Refer** this submission and attachments to relevant Ministers for discussion prior to the next Cabinet meeting. Yes / No

Caroline Forsyth
for Secretary of Foreign Affairs and Trade

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: ADDITIONAL INFORMATION

Report

On 11 May 2009 Cabinet deferred the consideration of the paper on the Declaration on the Rights of Indigenous Peoples ('the Declaration') and invited the Minister of Foreign Affairs to convene a group of Ministers comprising the Prime Minister, Minister of Energy and Resources, the Minister of Justice, the Attorney-General, the Minister of Māori Affairs and the Associate Minister of Māori Affairs to give further consideration to the issues relating to possible New Zealand support for the Declaration and the options for mitigating any risks for New Zealand. After discussion by the group of Ministers, the Minister of Foreign Affairs was invited to submit further information or a revised paper for Cabinet on 18 May 2009, if required.

2 The paper already before Cabinet notes three particular areas of concern: the articles relating to prior informed consent; ownership of land and resources; and rights of redress. This paper provides more information about those areas and options for mitigating risks in the context of a statement announcing support for the Declaration. For completeness it also summarises issues relating to the article on self-determination which, although contentious in the negotiations, in its final form was regarded as acceptable to New Zealand.

Status of the Declaration

s6(a), s9(2)(h)

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: ADDITIONAL INFORMATION

6 Because the Declaration is not an instrument of treaty status, there is no formal process for signing or otherwise indicating support for it. This would be demonstrated simply by a government announcement. ^{s6(a)}

Such a statement could:

- Announce support for the Declaration
- Explain positively the approach that the Government intends to bring, and in some cases is already bringing, to the implementation of the Declaration
- ^{s6(a)}
- Reassure the wider public that New Zealand's legal arrangements will remain unaffected
- Condition expectations about how support for the Declaration might influence future policy development.

7 Such a statement would likely be taken into consideration by a domestic or international panel and would provide the strongest basis for countering an argument that by moving to support the Declaration the Government has commitment itself to implement it fully. However, ^{s6(a)}

Consultation MFAT/NZAID

Not required.

Consultation MFAT/EAB

Not relevant.

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: ADDITIONAL INFORMATION

ANNEX:

Issue: Free, prior and informed consent on legislative and administrative measures

Declaration: Article 19

States shall consult and cooperate in good faith with 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.

s9(2)(h)

Examples of current practice that give effect to this article

- Treaty settlement agreements are achieved with the consent of Māori, and implemented through legislation that in many cases involves a co-drafting process.
- Specific engagement processes that do not go as far as consent, are in place for some legislative and policy proposals that have a significant, but not exclusive, impact on Māori, for example, Emissions Trading and Fresh Water. The Resource Management Act (RMA) provides for specific participation processes to recognise and protect Māori customary interests.

Proposed caveat and comments:

- New Zealand already gives effect to this Article in a limited number of circumstances. However, it is not possible to give the Article full effect as New Zealand's constitutional and parliamentary arrangements do not afford any group in society a right of veto over all proposals.
- The Government recognises that Māori have an interest in all legislative proposals that impact on their interests.. It utilises a range of consultative mechanisms to afford Māori the opportunity for input, from early policy design through to the rights of citizens to participation in select committee processes, and co-drafting of some legislative proposals.

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: ADDITIONAL INFORMATION

Issue: Free, prior and informed consent on resource development

Declaration: Article 32

- (1) Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories or other resources.
- (2) 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.

s9(2)(h)

Examples of current practice that give effect to this article

- With regard to article 32(1), Māori can, and do, determine priorities for the use of lands and resources that they own
- Current practice that illustrates steps towards implementation of Article 32(2) includes co-management arrangements: These are not new in New Zealand, and provide mechanisms for shared decision making in respect of natural resources of interest to Māori. Co-management arrangements are designed to the specifics of individual circumstances. These arrangements include processes and funding for remedying adverse effects on water quality.
- Customary fishing regulations provide for cultural authority over some aspects of New Zealand fisheries management. Regulation of non-commercial fishing by iwi and hapū also allows for the establishment of mataitai reserves which cover traditional fishing grounds. Iwi and hapū appointed guardians can make bylaws relating to customary and recreational fishing.

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: ADDITIONAL INFORMATION

- There are existing mechanisms in the RMA for a level of consideration of Māori interests, eg, in achieving the purpose of the RMA, decision makers must recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, and also the protection of recognised customary activities. Decision makers must also have particular regard to kaitiakitanga and take into account the principles of the Treaty of Waitangi. Regional policy statements are prepared by regional councils and must state the resource management issues of significance to iwi authorities; regional councils must also take into account any relevant planning document recognised by an iwi authority and lodged with the regional council.
- The RMA also affords specific recognition and protection to Māori recognised customary activities in the coastal marine area.
- Ngāti Tuwharetoa have a vested interest in any decision which may impact upon Māori land in their area of customary interest. In January 2009, the Taupō District Council and Ngāti Tūwharetoa signed a Joint Management Agreement which provides for joint consideration of notified resource consents or proposed private plan changes by both Councillors and iwi appointees.

Proposed caveat and comments:

- Māori can and do determine development priorities over their own lands and resources, although on-going dialogue continues over rights and interests over natural resources, and Māori participation in natural resource management, allocation and decision making processes (notably fresh water).
- As with Article 19 it is not possible to give the Article full effect as New Zealand constitutional and parliamentary arrangements do not afford any group in society a right of veto over, or conversely approval of, development projects, regardless of location and land ownership status.
- The Declaration would not displace in any way New Zealand's fundamental framework of democratic principles, and the practical need to foster Crown-Māori engagement to reach positive agreements within that framework.

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: ADDITIONAL INFORMATION

Issue: Ownership of lands, territories and resources

Declaration: Article 26

- 1 Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
- 2 Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
- 3 States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

s9(2)(h)

Examples of current practice that gives effect to this article

- The principles of the Treaty of Waitangi, as articulated by the Waitangi Tribunal and the Courts, require the Crown to actively protect Māori interests, including their interests in lands, territories and resources.
- The Treaty settlement process provides for the transfer of agreed resources, including in some cases, the transfer of lands, territories and resources traditionally owned or occupied by Māori, and generally of special cultural significance to Māori where those lands and resources are now in Crown ownership.
- Under New Zealand's resource management legislation decision-makers must recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, and also the protection of recognised customary activities, regardless of whether they legally own those resources today.

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: ADDITIONAL INFORMATION

- Māori have the right to use, develop and control lands and resources they own.

Proposed caveat and comments:

- Māori currently have the right to use, develop, and control lands and resources that they own. New Zealand's policy and legislative framework also affords special rights to Māori to be consulted over potential impacts on lands and resources of special significance to them.
- Support for the Declaration does not override or in anyway impinge on the Crown's commitment to the Treaty of Waitangi or the Treaty settlement process.
- Support for the Declaration also does not signal an intention to change New Zealand laws relating to property ownership, including intellectual property.

s9(2)(g)(i)

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DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: ADDITIONAL INFORMATION

Issue: Redress and compensation

Declaration: Article 28(1)-(2)

- 1 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.
- 2 Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

s9(2)(h)

Examples of current practice that give effect to this article

- The Treaty of Waitangi provides the foundation for the relationship between the Crown and Māori, and the Treaty settlements process provides for the reconciliation and redress for past breaches.
- The current Treaty settlements process provides for redress for lands, territories and resources traditionally owned or occupied that are now owned by the Crown.

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: ADDITIONAL INFORMATION

Proposed caveat and comments:

- New Zealand has developed a unique process through the Waitangi Tribunal and through Crown Māori negotiation which have achieved the settlement of historical grievances relating to land and resource loss.
- The Declaration will not affect existing Treaty settlements, nor the Crown's approach to settlements yet to be completed.
- The Treaty settlements process provides for redress for the confiscation or acquisition of lands, territories and other resources in breach of Treaty principles, and involves negotiated political agreements between the Government and Māori. The process can not provide for the guaranteed return of lands traditionally owned or occupied by claimant groups, nor can it always take the form of "equal in quality, size and legal status" or equivalent monetary compensation.

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: ADDITIONAL INFORMATION

Issue: Self-determination

Declaration provisions:

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.

Article 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.

Article 46(1): Nothing in this Declaration may be interpreted as implying for any State, people, group or person the right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorising or encouraging any action that would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States.

s9(2)(h)

Proposed caveat and comments:

- The Treaty is a commitment to the rule of law including a single government and legal system. The Government tries to strike a balance between the three articles of the Treaty, none being absolute. Māori are able to exercise co-management and self-management within that legal system.
- Support for the Declaration should not be seen as encouraging any action which might threaten the territorial integrity or political unity of New Zealand.