

**Mining Certification Evaluation Project (MCEP)**  
**Workshop on Free, Prior and Informed Consent**

**Friday, 11 February 2005: 10 a.m. - 4 p.m.**  
**BHP-Billiton**

**Participants:**

Durham Davis, WMC Resources  
Francis Grey, Sustainable Asset Management  
Ian Wood, BHP Billiton  
James Ensor, Oxfam Community Aid Abroad  
Kristina Ringwood, Rio Tinto  
Leah Horowitz, WWF  
Margaret Donaldson, Office of the Aboriginal and Torres Strait Islander Social Justice  
Commissioner  
Martha Macintyre, University of Melbourne  
Melanie Stutsel, Minerals Council of Australia  
Nick Currey, Placer Dome Asia Pacific  
Peter Colley, Construction Forestry Mining and Energy Union

**Guests:**

Ingrid Macdonald, Oxfam Community Aid Abroad  
Peter Rush, BHP Billiton

**Facilitator:**

Chris Burnup, Jacquard Projects

**Apologies:**

Andrew Minns, Newmont  
Andrew Rouse, WWF  
Malcolm Forbes, Environment Australia  
Michael Rae, WWF  
Nick Chipman, PricewaterhouseCoopers

**Summary of main points of discussion**

**1. International standards for FPIC**

- (a) A presentation was given on international and national efforts to develop a standard for FPIC. These initiatives include Article 1 of the International Covenant on Economic, Social and Cultural Rights; ILO Convention No. 169 (Indigenous and Tribal Peoples Convention), especially Articles 6, 7 and 15; the Draft UN Declaration on the right of indigenous peoples; General Recommendation XXIII on Indigenous Peoples of the UNHCHR Committee on the Elimination of Racial Discrimination; concluding observations of the UNHCHR Committee on Economic, Social and Cultural Rights; cases adjudicated by the Inter-American Court of Human Rights; norms proposed by

- the UN Subcommission on the Protection and Promotion of Human Rights; a ten-step process for impact assessment outlined by the Convention on Biological Diversity, Article 8J; a workshop of the UN Permanent Forum on Indigenous Issues; as well as the acknowledgement of the right of FPIC by the Inter-American Development Bank, the World Commission on Dams, and the Economic and Social Council Commission on Sustainable Development.
- (b) Additionally, national legislation on FPIC includes the Philippines Indigenous Peoples Rights Act 1997 and the Aboriginal Land Rights Act 1976 (Commonwealth).
  - (c) Copies were also distributed of a preliminary working paper on the principle of FPIC for indigenous peoples, commissioned by the UN Economic and Social Council Commission on Human Rights. This document contains definitions of the terms “free”, “prior”, “informed”, and “consent”.
  - (d) It was indicated that although many of the initiatives cited above were addressed to States, companies were actually leading the way on this issue. However, they often appeared to prefer voluntary efforts over legal requirements.

## **2. The mining industry’s position on FPIC**

- (a) Next, a text was distributed that outlined the mining industry’s position on FPIC. This document, which had been previously sent to the Working Group, advocated nine key steps to achieve FPIC.
- (b) It was noted that the industry definition of consent was consistent with that of international law. Elements of this characterisation of consent included the formalisation of the consultation process throughout the development phase, provision of opportunities for negotiation around the conditions of project development, and the encouragement of free engagement in discussions on an informed basis.
- (c) This presentation prompted a discussion of the degree to which the principle of FPIC applied to non-Indigenous peoples.
- (d) It was argued that Indigenous peoples’ rights to FPIC rested on their right to self-determination, while the rights of non-Indigenous local communities referred to the importance of participative planning for development.
- (e) It was noted that, in international law, Indigenous peoples are defined primarily through self-identification.

## **3. A rights-based approach to FPIC**

- (a) Next, a presentation was given that described a rights-based approach to FPIC.
- (b) It was noted that FPIC was at the centre of an important debate in international development, across industries.
- (c) A rights-based approach emphasised the rights of all communities to control their own form of development.
- (d) However, it was noted that the principle of FPIC in regard to Indigenous peoples is different from that for local communities. As outlined in the earlier discussion (see 2. (d) above), the principle of FPIC of Indigenous peoples is based on the right of Indigenous peoples to self-determination and to control of their own lands, resources and territories.

- (e) It was observed that there was a strong business case for recognition of the principle of FPIC as operations had a greater risk of failure if communities were not given adequate information on potential impacts from the operation.
- (f) It was noted that the MCEP had the potential to create a market premium through a reputational advantage which could ultimately lead to an economic advantage for certified sites. It was argued that this would rely on clear market differentiation, which would be achieved by setting the bar for certification high.
- (g) It was indicated that achievement of “consent” did not necessarily mean that one person could stop an entire project, or that State sovereignty would be undermined. Rather, international forums were in the process of deciding what consent would consist of.
- (h) Additionally, consent could not simply be obtained at the start of the project; instead, negotiation and consultation would have to be on-going for its whole life.
- (i) The question of whether, in the face of opposition, mining projects would continue nonetheless was flagged as crucial to the discussion.
- (j) Also, it was noted that the exchange of information could not be one-way; instead, companies would also have to seek information from local communities. This might be difficult to obtain, especially when there were intellectual property considerations.
- (k) It was observed that it would be important to rely on Indigenous people’s own definitions of the issues surrounding FPIC. These were in progress through international initiatives such as the UNHCHR Working Group on Indigenous Populations.
- (l) It was noted that it is important for Indigenous peoples and local communities to represent themselves and to participate in discussions concerning FPIC . While there were no Indigenous representatives at the workshop, the initiatives mentioned above could inform the MCEP Working Papers and Audit Protocol.
- (m) Moreover, international agreements were applicable to transnational corporations in addition to States and processes such as the UNCHR sub-commissions draft Norms for Transnational Corporations would further extend human rights duties to corporations in the future.

#### **4. Defining the community**

- (a) The subsequent discussion made mention of other marginalised people in addition to Indigenous people. These groups might be landless, but their concerns were nonetheless important.
- (b) Additionally, it was noted that communities could be dispersed and hard to define.
- (c) Temporal issues were also significant; the question was raised as to whether the community should be defined at the commencement of the operation, or whether consideration should also be made of people attracted to the area because of the resultant economic development.
- (d) One response was that all citizens of a nation would normally be granted certain human rights, and in most places they would also have the right to freedom of movement. Thus, their rights would be determined in laws and conventions.

- (e) However, this could create problems in places such as West Papua, where the Indonesian government has undertaken programs of transmigration. Also, in instances where there has been intermarriage between groups with different rights, the rights of the offspring may be ambiguous.
- (f) One answer to the question of time-dependent definitions of a community would be that, given the constant transformation of communities, it is necessary to have a continual process that allows for the incorporation of additional people.

### **5. The role of governments**

- (a) It was pointed out that sovereignty is an important issue in discussions of FPIC.
- (b) Mention was made of the fact that many countries are not adopting international conventions on this issue and that Indigenous peoples do not have particular rights in the eyes of many host governments.
- (c) It was argued that transnational corporations could respect and protect rights that surpassed those recognized by governments, and that no one was aware of any case where it is illegal to respect the right of FPIC.
- (d) Moreover, certification standards would not be in competition with government legislation because they would not be binding but aspirational.
- (e) However, the counter-argument was that host governments often made it clear that they did not want communities to be given the right to decide whether a project would proceed.
- (f) It was noted that companies were making efforts to surpass governments on FPIC.
- (g) However, the concern was raised that if one company pulled out of a project because of community dissent, it might be replaced by another, less ethical company.

### **6. One mining company's perspective on FPIC**

- (a) A representative of one of the mining companies on the Working Group gave a presentation on that company's experience with FPIC.
- (b) The company did not have a formal position on FPIC, but had made efforts to obtain it in many operations.
- (c) It was noted that the role of government was critical as governments set conditions and gave rights to companies. Where FPIC was not enshrined in legislation, it would be impossible for companies to exclude governments from the decision-making process as the latter want to reserve the ultimate power of consent.
- (d) The example was given of Peru, where FPIC is included in the national legislation but is not normally implemented. The company has made a commitment to grant the right to FPIC in its operation there, according to the procedure outlined in the legislation.
- (e) A spectrum of public participation was sketched, ranging from little to much engagement of the community: Advise – Consult – Negotiate – Consent.
- (f) Over time, there has been a gradual drift to the right-hand side of this spectrum. Mining company practices generally fall somewhere between Consult and Negotiate.

- (g) The practical application of FPIC is difficult. One problem is that communities are not homogeneous, so that it is often unclear who should be given the right to give or withhold consent.
- (h) There are also questions around the proportionality of impacts to rights. For instance, does the right of FPIC apply less to less-impacted communities?
- (i) Additionally, there are large numbers of rights represented in legislation concerning environmental management, heritage management, and other aspects of mining. Where should FPIC sit in relation to these – should it complement or replace these rights?
- (j) This company seeks community support but does not grant the right to FPIC unless it is embedded or sanctioned in the national legislation.
- (k) Two examples were given of instances in which the company has pursued FPIC in local communities. These examples highlighted certain potential complications.
- (l) For instance, FPIC may be difficult to disentangle from other issues such as expectations of service provision, which may cloud the negotiation process.

#### **7. Proportionality of impacts to rights**

- (a) The subsequent discussion addressed the question of whether people who were impacted to different degrees would have similar rights regarding FPIC.
- (b) It was pointed out that downstream communities have rights to the river, so that impacts, rather than simply land rights at the site, needed to be considered.
- (c) The same held true for communities through which chemicals would be transported; they had to be informed of this activity, and should have the opportunity to be consulted and to negotiate.
- (d) In setting the bar for certification, the MCEP would have to decide what process the MSO would need to have gone through in identifying and addressing issues relevant to FPIC, and how rigorous its efforts would have to be.
- (e) The question was raised as to what should occur if downstream communities opposed the project while upstream ones were in favour of it.
- (f) It was proposed that the downstream communities should also have the right of FPIC as the community would consider the river their resource. Their concerns would have to be addressed, and the company might have to modify its activities through negotiations with those communities.

#### **8. Negotiations with the community**

- (a) The point was made that people sometimes want to negotiate if they perceive the possibility of claiming compensation for environmental impacts, regardless of whether these impacts are actually significant.
- (b) These demands may be in excess of what the company can feasibly provide.
- (c) Additionally, the process of seeking FPIC is resource-extensive and time-consuming, whether negotiations are over a major or a minor issue.
- (d) However, someone purchasing a certified product would need to know that no-one in the local community was unfairly treated.

- (e) One solution would be to ask a third party to adjudicate. This would prevent communities from “holding the project hostage” but would also ensure that people’s concerns were not ignored.
- (f) One such third party could be the national government. However, that proposition begged the question of whether governments were truly independent and disinterested parties.
- (g) Another solution would be for the community and company to negotiate conflict resolution processes from the outset of the project.

## **9. Setting the bar**

- (a) It was proposed that it would be necessary to set a high bar in order for certification to be credible.
- (b) However, setting criteria for certification also implied endorsing standards for best practice. Therefore, mining company representatives on the Working Group would need to be sure that they could agree to these standards.
- (c) It was noted that the MCEP would need to bridge the gap between the utopian and the practical.
- (d) It would be important to decide what level of performance was adequate, while setting a realistic bar for certification.

## **10. Determining whether there is consent**

- (a) It was proposed that criteria would need to be set as to how consent could be determined.
- (b) Questions to address would include how consent should be measured, whether there could be degrees of consent, and what a mine site operator (MSO) would need to achieve in order to obtain certification.
- (c) The company would need to have processes to allow the participation of all involved people in the communities as well as other stakeholders.
- (d) It would also have to recognise that the community was constantly changing.
- (e) It was suggested that companies would have to acknowledge the rights of people who had been absent from an area where they had land rights and had recently returned.
- (f) The opinion was expressed that FPIC would be a necessary precondition to development but would not be sufficient because the community would change over time.
- (g) It was noted that the certifier would have to request documentation of the processes used to obtain and determine consent.
- (h) The question was raised as to whether consent would also have to be obtained for expansions and other changes.

## **11. Defining terms**

- (a) As noted above, a working paper on the principle of FPIC for indigenous peoples, commissioned by the UN Economic and Social Council Commission on Human Rights, had been distributed to the participants.

- (b) It was decided to review the definitions of “free”, “prior”, “informed” and “consent” contained within that document to determine whether they could be adopted by the MCEP.
- (c) The definition of “free” as “not valid if obtained through coercion or manipulation” was generally accepted.
- (d) The definition of “prior” as “sought sufficiently in advance of any authorisation by the State or third parties or commencement of activities by a company that affect indigenous peoples and their lands, territories and resources” was generally accepted.
- (e) The definitions of “informed” and “consent” generated some debate, as outlined in the following sections.

## **12. Defining “informed”**

- (a) The UN text stipulates the “full and legally accurate disclosure of information”.
- (b) This sparked the question as to how much information should be provided, and how this information should be generated – by the company itself or by independent parties.
- (c) Additionally, the point was made that it would be difficult to transmit complex technical information to people who were uneducated. However, it was noted that there are recent examples where community groups, NGOs and companies had worked together to develop materials to communicate complex information to communities.
- (d) Also, it would be difficult to ensure that people had understood the information provided. Their understanding might have to be tested by the auditor.
- (e) The question was raised as to whether commercial-in-confidence information should be provided.
- (f) It was suggested that only information that had implications for the community would need to be provided.
- (g) This would include both risks and the planned management thereof.
- (h) It was suggested that a neutral person should communicate the information.

## **13. Defining “consent”**

- (a) It was noted that the UN text refers only to the rights of Indigenous people, whereas the rights of affected communities and marginalised people are also important.
- (b) The text states that the process should be “time bound”. It was suggested that a negotiated timeframe could be set at the beginning of the project.
- (c) The text states that “any intended change of activities will require a new appeal for prior informed consent”. It was suggested that consent should be sought before each “triggering event” rather than at regular time intervals, which would not be feasible.
- (d) It was suggested that consent would also need to be re-established in the event of unforeseen impacts, or new information about existing hazards.

- (e) It was noted that the type of events that would lead to a new process of seeking consent could be discussed with the body of community representatives with whom the operator was consulting.
- (f) The view was expressed that this community consultation should not concern whether or not the project could proceed but rather the terms of the impact benefit agreement.
- (g) The importance of on-going effective consultation was stressed.
- (h) The difficulty of deciding who had the right to give or withhold consent was noted.
- (i) The opinion was expressed that some people claim rights that they do not genuinely possess.
- (j) The view was expressed that some rights are not recognised by host governments, which begs the question of what constitutes “legitimate” rights.
- (k) The UN text states that FPIC is “dependent on clear recognition and protection of indigenous peoples’ rights” and emphasises the importance of “participation in impact assessment processes”. There was some debate about whether the section of Working Paper 1 on FPIC should include similar wording, or whether this was best left in other sections of the Working Paper, where these issues are addressed.
- (l) It was noted that to attain certification, the MSO would have to demonstrate that it had not manipulated the consent process.

#### **14. Addressing a potential lack of consent**

- (a) The question was raised as to what the MSO should do if the community’s consent cannot be obtained.
- (b) It was proposed that the operator should attempt to resolve any issues preventing consent from being granted.
- (c) If unable to do so, the MSO could rely on independent arbitration to attempt to resolve these disputes.
- (d) It was suggested that this was the most extreme measure to which the mining companies on the Working Group would agree.
- (e) The issue of whether broader public interest could over-ride local community opposition was raised.
- (f) It was noted that in developing nations, a single mining operation could represent a significant proportion of the GDP.
- (g) It was pointed out that much literature exists on the issue of what should occur if consent cannot be obtained, including sources such as the World Commission on Dams, and that this literature could inform the MCEP’s efforts.
- (h) It was suggested that the last paragraph of a text circulated by the Project Officer in May 2004 could serve as a basis for progress on the MCEP position on this issue.
- (i) This paragraph suggests that, where it is unclear whether or not it would be appropriate to proceed, companies would need to make decisions on a case-by-case basis, with the advice of community relations staff and social scientists hired as consultants.
- (j) It was noted that this option still left the ultimate decision with the MSO.

- (k) It begged the question of how the MSO should decide that it was in the “grey area” and, once it had reached this conclusion, how it should decide whether or not to proceed.
- (l) It was suggested that the auditor should determine if proper decision-making processes had occurred.
- (m) The opinion was expressed that the MCEP was simply an R&D project, and that its role was to flag issues rather than resolve them.

## **15. Actions**

- (a) The Project Officer will:
  - Draft a revised version of Working Paper 1, incorporating the results of the workshop on FPIC.
  - Seek input on the issue of FPIC from the Community Relations team member for the Waihi field trial, who is an independent auditor.
- (n) The Working Group will:
  - Provide comments on the revised version of Working Paper 1.