

**Pacific Indigenous Peoples Preparatory meeting for the
World Conference on Indigenous Peoples
19 - 21 March 2013, Sydney Australia**

Agenda Item: Lands, Territories and Resources

**Paper submitted by the Office of the Aboriginal and Torres Strait Islander
Social Justice Commissioner.**

Introduction

In Australia on 3 June 2012, we acknowledged the passing of 20 years since the High Court of Australia handed down its decision in *Mabo v Queensland (Mabo)* rejecting the common law myth of *terra nullius*. It was the legacy of this decision that created the unique form of land tenure set out in the *Native Title Act 1993 (Cth)* (the Native Title Act) that recognises our native title rights and interests in our traditional lands, territories and resources.

The process of recognising our native title has been frustrating. While on the one hand, native title brings us hope and expectation for the return of our country, on the other hand it is a process fraught with difficulties. It opens up wounds around connections to country, family histories and community relationships inflicted as a result of colonisation.¹

The Declaration affirms that we have rights to the lands, territories and resources that we have traditionally owned, occupied or otherwise used or acquired. For example, we have the right to:

- maintain and strengthen our spiritual relationship with our lands, territories and resources
- control, own, develop and use our lands, territories and resources
- redress for our lands, territories and resources which have been confiscated, taken, occupied, used or damaged without our free, prior and informed consent.²

While the Native Title Act provides a process to recognise our native title rights and interests in our traditional lands, territories and resources, a gap exists between the rights affirmed in the Declaration and the realisation of these rights for Aboriginal and Torres Strait Islander peoples.

Participation in decision-making regarding our lands, territories and resources, form a fundamental part of the Declaration. In my 2010 Native Title Report I developed practical steps that States can take to ensure consultation processes are meaningful and effective in relation to measures that affect our rights to our lands, territories and

resources. The Features of a Meaningful and Effective Consultation Process paper is attached in Appendix 1.

I note that the Australian Government has not ratified International Labour Organisation *Indigenous and Tribal Peoples Convention 1989 (No. 169)* (ILO 169). ILO 169 provides that governments establish procedures to consult with Indigenous peoples before undertaking or permitting programmes involving the exploration or exploitation of resources relating to their lands.³

Recommendations

As the Social Justice Commissioner, I recommend:

1. The World Conference on Indigenous Peoples recommend states to work in partnership with Indigenous peoples to develop strategies to ensure the full implementation of the United Nations Declaration on the Rights of Indigenous Peoples.
2. That the World Conference on Indigenous Peoples recommend all states ratify ILO 169.
3. That the World Conference on Indigenous Peoples recommend states to work in partnership with Indigenous peoples to develop a consultation and engagement framework that is based on the standards affirmed in the United Nations Declaration on the Rights of Indigenous Peoples.

Appendix 1

Appendix 4: Features of a meaningful and effective consultation process⁴

1. The objective of consultations should be to obtain the consent or agreement of the Aboriginal and Torres Strait Islander peoples affected by a proposed measure

In all cases, States should engage in '[a] good faith effort towards consensual decision-making'.⁵ Consultation processes should therefore be framed 'in order to make every effort to build consensus on the part of all concerned'.⁶

2. Consultation processes should be products of consensus

The details of a specific consultation process should always take into account the nature of the proposed measure and the scope of its impact on indigenous peoples. A consultation process should itself be the product of consensus. This can help ensure that the process is effective.

3. Consultations should be in the nature of negotiations

Governments need to do more than provide information about measures that they have developed on behalf of Aboriginal and Torres Strait Islander peoples and without their input. Further, consultations should not be limited to a discussion about the minor details of a policy when the broad policy direction has already been set.

Governments need to be willing and flexible enough to accommodate the concerns of Aboriginal and Torres Strait Islander peoples, and work with them in good faith to reach agreement. Governments need to be prepared to change their plans, or even abandon them, particularly when consultations reveal that a measure would have a significant impact on the rights of Aboriginal and Torres Strait Islander peoples, and that the affected peoples do not agree to the measure.

4. Consultations need to begin early and should, where necessary, be ongoing

Aboriginal and Torres Strait Islander peoples affected by a law, policy or development process should be able to meaningfully participate in all stages of its design, implementation and evaluation.

5. Aboriginal and Torres Strait Islander peoples must have access to financial, technical and other assistance

The capacity of Aboriginal and Torres Strait Islander communities to engage in consultative processes can be hindered by their lack of resources. Even the most well-intentioned consultation procedure will fail if Aboriginal and Torres Strait Islander peoples are not resourced to participate effectively. Without adequate resources to attend meetings, take proposals back to their communities or access appropriate expert advice, Aboriginal and Torres Strait Islander peoples cannot

possibly be expected to consent to or comment on any proposal in a fully informed manner.

6. Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision

Aboriginal and Torres Strait Islander peoples should be able to participate freely in consultation processes. Governments should not use coercion or manipulation to gain consent.

In addition, Aboriginal and Torres Strait Islander peoples should not be pressured into decisions through the imposition of limited timeframes.

7. Adequate timeframes should be built into consultation processes

Consultation timeframes need to allow Aboriginal and Torres Strait Islander peoples time to engage in their decision-making processes and cultural protocols.

Aboriginal and Torres Strait Islander peoples need to be given adequate time to consider the impact that a proposed law, policy or development may have on their rights. Otherwise, they may not be able to respond to such proposals in a fully informed manner.

8. Consultation processes should be coordinated across government departments

Governments should adopt a ‘whole of government’ approach to law and policy reform, pursuant to which consultation processes are coordinated across all relevant departments and agencies. This will assist to ease the burden upon Aboriginal and Torres Strait Islander peoples of responding to multiple discussion papers and reform proposals.

9. Consultation processes need to reach the affected communities

Government consultation processes need to directly reach people ‘on the ground’. Given the extreme resource constraints faced by many Aboriginal and Torres Strait Islander peoples and their representative organisations, governments cannot simply expect communities to come to them.

Governments need to be prepared to engage with Aboriginal and Torres Strait Islander peoples in the location that is most convenient for, and is chosen by, the community that will be affected by a proposed measure.

10. Consultation processes need to respect representative and decision-making structures

Governments need to ensure that consultations follow appropriate community protocols, including representative and decision-making mechanisms.

The best way to ensure this is for governments to engage with communities and their representatives at the earliest stages of law and policy processes, and to develop consultation processes in full partnership with them.

11. Governments must provide all relevant information and do so in an accessible way

To ensure that Aboriginal and Torres Strait Islander peoples are able to exercise their rights to participate in decision-making in a fully informed way, governments must provide full and accurate information about the proposed measure and its potential impact.

This information needs to be clear, accessible and easy to understand. Information should be provided in plain English and, where necessary, in language.

¹ M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2012*, Australian Human Rights Commission (2012), pp 18-19. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport12/index.html (viewed 8 March 2013).

² M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 4. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 8 March 2013).

³ M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2012*, Australian Human Rights Commission (2012), p 20. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport12/index.html (viewed 8 March 2013)

⁴ This Appendix summarises the 'Features of a meaningful and effective consultation process' set out in Chapter 3 of the *Native Title Report 2010*.

⁵ J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 50. At <http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm> (viewed 8 March 2013).

⁶ J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 48. At <http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm> (viewed 8 March 2013).