



The Declaration Dialogue Series:  
Paper No.3- We have a right to participate in  
decisions that affect us – effective  
participation, free, prior and informed  
consent, and good faith

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**Please be aware that this publication may contain the names or images of Aboriginal and Torres Strait Islander people who may now be deceased.**

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## 1 Introduction

The adoption of the Declaration by the General Assembly of the United Nations in September 2007 was the culmination of more than 20 years of negotiation between the Indigenous peoples and governments of the world. The adoption of the Declaration strengthened and reinforced the international human rights framework.

The Declaration does not contain any new human rights or international standards. Rather it reflects existing legal obligations sourced in international human rights treaties. It simply provides the lens through which to apply these rights and standards to the lives and circumstances of Indigenous peoples and their communities.

It enshrines our right to be different as peoples and affirms the minimum standards for the survival, dignity, security and well-being of Indigenous peoples worldwide. The Declaration therefore provides Australia with an opportunity to move beyond the stalemate that is currently frustrating positive development for Aboriginal and Torres Strait Islander peoples and communities.

While the Declaration covers all areas of human rights as they relate to Indigenous peoples, we believe it also incorporates fundamental foundational human rights principles which could be categorised into four key areas:

- self-determination
- participation in decision-making, free, prior and informed consent, and good faith
- respect for and protection of culture
- equality and non-discrimination.

Although the Declaration was endorsed by the General Assembly in 2007, little action has taken place to incorporate it into policy frameworks in Australia.

The Aboriginal and Torres Strait Islander Social Justice Commissioner considers that the Declaration is the most comprehensive tool available to advance the rights of Indigenous peoples and to address the contemporary effects of oppression and colonisation. As such, he has committed to promote its full implementation during the term of his appointment.<sup>1</sup> The National Congress of Australia's First Peoples has also committed to building a policy platform underpinned by the Declaration.<sup>2</sup>

However, if we are serious about support for the Declaration, an overarching policy framework based on human rights standards is essential to ensure a holistic approach that addresses the needs and priorities identified by Aboriginal and Torres Strait Islander peoples and communities.

A national conversation progressed through a series of dialogues is necessary to ensure the principles and rights outlined in the Declaration are fully integrated into the Australian Indigenous policy landscape. These dialogues are considered integral to a process aimed at developing an agreed understanding of the key principles that underpin the Declaration; and the development of a coordinated response based on these principles to realise the rights outlined in the Declaration in an Australian context. The anticipated results of this conversation would culminate in a National Implementation Strategy on the Declaration on the Rights of Indigenous Peoples.

By encouraging dialogue between Aboriginal and Torres Strait Islander peoples, governments and other stakeholders, we can move beyond the rhetoric of ‘support’ for the Declaration and work towards achieving its purpose: to improve the lives of Aboriginal and Torres Strait Islander peoples, Australia’s Indigenous peoples.

This Dialogue Series will be informed by a set of focused discussion papers, and it will be supported by other consultative mechanisms including:

- an Aboriginal and Torres Strait Islander Declaration Survey
- high level dialogue meetings with governments and key industry stakeholders
- Aboriginal and Torres Strait Islander community dialogues
- a national summit.

#### *This Paper*

Principles of self-determination; participation in decision-making, free, prior and informed consent and good faith; respect for and protection of culture and; equality and non-discrimination must underpin relevant legislation, policy, programs and service delivery to ensure that these mechanisms empower rather than disempower communities to address the challenges they face.

While these key principles are inextricably linked and indivisible, this paper focuses specifically on participation in decision-making and the principles of free, prior and informed consent and good faith.

It considers the key elements necessary to ensure our effective participation in decisions affecting us. It sets out some of the international standards supporting our right to participate in decision-making and considers whether the exercise of this right amounts to a ‘right to veto’. It also considers the views of Aboriginal and Torres Strait Islander peoples, Australian governments and human rights advocates in order to frame the starting point for a constructive dialogue.

## **2 Our right to participation in decision-making**

The right to participate in decisions affecting Indigenous peoples is critical to communities determining our priorities for development, owning the solutions to the challenges we face, and consequently improving our quality of life.

The consequences of decisions often ripple across the community and beyond, along extensive Indigenous social and cultural networks. Outcomes invariably affect Indigenous people who may not be directly involved in making the decisions and issues under consideration are often influenced by, and not to be seen as separate from, other issues in the community.<sup>3</sup>

Effective participation in decision-making has been confirmed as essential to ensuring non-discriminatory treatment and equality before the law, and recognises the cultural distinctiveness and diversity of Indigenous peoples. The right to participate in decision-making is foundational to Aboriginal and Torres Strait Islander people’s capacity to exercise our right to self-determination and other rights set out in the Declaration.

The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) considers that:

...indigenous participation in decision-making on the full spectrum of matters that affect their lives forms the fundamental basis for the enjoyment of the full range of human rights...Without this foundational right, the human rights of indigenous peoples, both collective and individual, cannot be fully enjoyed.<sup>4</sup>

### The Declaration:

contains more than 20 general provisions pertaining to indigenous peoples and decision-making. These rights range from the right to self-determination encompassing a right to autonomy or self-government, to rights to participate and be actively involved in decision-making processes. Other provisions establish specific duties for States to ensure the participation of indigenous peoples in decision-making; to obtain their free, prior and informed consent; to consult and cooperate with indigenous peoples; and to take measures in conjunction with them.<sup>5</sup>

Specifically, the right of Indigenous peoples to participate in decisions that affect us is affirmed in Article 18 of the Declaration. It states that:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.<sup>6</sup>

In order to ensure our effective participation in decisions that affect us, three key elements must be met. The key elements are:

- a duty to consult
- free, prior and informed consent
- good faith.

The three key elements and the process to achieve effective participation are clearly outlined in Article 19 of the Declaration:

States shall consult and co-operate in good faith with the 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.

In many instances our free, prior and informed consent is required before decisions are made or implemented. So States have a duty to consult with Indigenous peoples in good faith to ensure our effective participation is achieved.

However, the Special Rapporteur on the rights of indigenous peoples (Special Rapporteur), Professor James Anaya, argues that while understanding the principles of consultation and consent 'is of critical importance...neither consultation nor consent is an end in itself, nor are consultation and consent stand-alone rights.'<sup>7</sup> In fact, the Special Rapporteur argues that consultation and consent must be considered as the standard to give effect to the primary substantive rights outlined in the Declaration. Primary substantive rights include for example the right to health, the right to education or the right to property.

In the example of natural resource development and extractive industries, affected substantive rights include:

rights to property, culture, religion, and non-discrimination in relation to land, territories and natural resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; and rights to set and pursue their own priorities for development, including development of natural resources, as part of their fundamental right of self-determination.<sup>8</sup>

In order to safeguard and protect these primary substantive rights, the three elements of effective participation outlined above must be applied as a *minimum* standard.

## 3 The Human Rights Framework

The international human rights framework provides clear guidance for governments to ensure that they can facilitate effective Indigenous participation and engagement at all levels, including the national, regional or local community level.

The *International Covenant on Civil and Political Rights* states at Article 25 that:

Every citizen shall have the right and the opportunity...

- a) To take part in the conduct of public affairs, directly or through freely chosen representatives.

### 3.1 Duty to consult – meaningful and effective consultation

The duty to consult is firmly grounded in international human rights law, namely:

- *International Convention on the Elimination of All Forms of Racial Discrimination*<sup>9</sup>
- *United Nations Declaration on the Rights of Indigenous Peoples*<sup>10</sup>
- *International Labour Organisation (ILO) Convention 169*<sup>11</sup>.

These documents provide guidance to the practical nature of consultations with Indigenous peoples, including that they are to be held in good faith, with the objective of achieving agreement or consent between the parties.

Governments have a duty to consult with Indigenous peoples ‘whenever a State decision may affect indigenous peoples in ways not felt by others in society’, even if their rights have not been recognised in domestic law.<sup>12</sup>

The Special Rapporteur has affirmed in his most recent report to the Human Rights Council that the duty to consult forms a key part of a States duty to protect.<sup>13</sup> The Declaration provides clear guidance as to how States can protect the rights of Indigenous peoples, giving particular consideration to consultation, consent and good faith. For example the Declaration outlines that States shall take effective measures:

- that protect our rights and ensure that Indigenous peoples can understand and be understood in political, legal and administrative proceedings (Article 13)
- in consultation and cooperation with the Indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance,

understanding and good relations among Indigenous peoples and all other segments of society (Article 15)

- in conjunction with Indigenous peoples, to ensure that Indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination (Article 22)
- in consultation and cooperation with Indigenous peoples, including legislative measures, to achieve the ends of the Declaration (Article 38).

The Special Rapporteur also draws on the Guiding Principles on Business and Human Rights endorsed by the Human Rights Council in 2011 to demonstrate how a State's duty to protect operates, including by ensuring that regulatory frameworks that recognise Indigenous peoples rights are established. The Guiding Principles incorporate the 'protect, respect, and remedy framework' and confirm that:

States have a duty to protect human rights, including against abuses by business enterprises and other third parties, through appropriate policies, regulation and adjudication. The second pillar of the Guiding Principles is the responsibility of corporations to respect human rights by acting with due diligence to avoid infringing or contributing to the infringement of human rights. The third is the need for effective remedies to redress violations when they occur.<sup>14</sup>

This framework provides additional guidance to governments concerning consultation, consent and related safeguards necessary to securing, promoting and protecting human rights, including the rights of Indigenous peoples.

A critical step to achieving meaningful improvement in the lives of Indigenous peoples is for governments and others to recognise, endorse and treat Indigenous peoples as substantive players and major stakeholders in the development, design, implementation, monitoring and evaluation of all policy and legislation that impacts our health and wellbeing.

To do this, the current requirement to consult must be extended to reflect in a practical sense a requirement to effectively negotiate. Features of a meaningful and effective consultation process are provided at Appendix 1. In summary, a State's duty to consult requires:

- that consultation processes be framed 'in order to make every effort to build consensus on the part of all concerned'<sup>15</sup>
- the promotion, provision, and respect for traditional and contemporary forms of Indigenous peoples' governance, including collective decision-making structures and practices<sup>16</sup>
- the promotion and respect for 'indigenous peoples' right to participate in all levels of decision making, including external decision-making, if the Indigenous peoples concerned so choose and in the forms of their choosing, including where appropriate, in co-governance arrangements<sup>17</sup>.

The General Assembly of the United Nations concluded at its 50<sup>th</sup> session that the absence of meaningful consultations with Indigenous communities about matters that concern them constitutes a denial of their cultural rights under Article 27 of the *International Covenant on Civil and Political Rights*.<sup>18</sup>

## 4 Free, prior and informed consent

Free, prior, and informed consent is the right to give – or not give – our consent before certain actions affecting us can occur. It is one of the most important principles to protect the right to participate in decision-making and ensure it is expressed in a way that builds community cohesion.<sup>19</sup>

Free, prior and informed consent recognises Indigenous peoples' inherent and existing rights, and respects our legitimate authority to require that third parties enter into an equal and respectful relationship with us, based on the principle of informed consent. This principle applies not only to administrative acts and decisions, and the exploitation of our resources and lands, but also to the legislative process itself.

### 4.1 Applying free, prior and informed consent

When applying the principle of free, prior and informed consent the following criteria should be met as a minimum:

- no coercion or manipulation is used to gain consent
- consent by governments or third parties must be sought well in advance of commencing an activity or implementing legislation that affects the rights of Indigenous peoples
- full and legally accurate disclosure of information relating to the proposal must be provided in a form that is understandable and accessible for communities and affected peoples
- communities and affected peoples have meaningful participation in all aspects of assessment, planning, implementation, monitoring and closure of a project
- communities and affected peoples are able to secure the services of advisers, including legal counsel of their choice and have adequate time to make decisions
- consent applies to changes to a proposal – this will renew the requirement for free, prior, and informed consent
- consent includes the right to withhold consent and say no to a proposal.<sup>20</sup>

The key elements of a common understanding of free, prior and informed consent are attached at Appendix 2.

The Committee on Economic Social and Cultural Rights has confirmed that parties to the *International Covenant on Economic and Social Rights* 'should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights'.<sup>21</sup>

In particular, effective participation must ensure that decisions reflect the aspirations and worldviews of the Indigenous peoples affected. The Declaration elaborates on the process of participation with reference to the principle of free, prior and informed consent as it relates to the realisation, promotion and protection of the rights of Indigenous peoples.<sup>22</sup>

## 4.2 Does free, prior and informed consent amount to a right of veto?

The principle of free, prior and informed consent should underpin the development of all frameworks for engagement with Indigenous peoples as it is fundamental to ensuring our effective participation in decision-making on issues that affect us. However, the ability of Indigenous peoples to say no to development that they have not consented to has been contentious for a number of States including Australia. The concern being that this could amount to a right of veto in favour of Indigenous communities, purportedly challenging State sovereignty or territorial integrity.

Kenneth Deer, an Indigenous leader from Canada who actively participated in the drafting of the Declaration, confirms that the principle of free, prior and informed consent was not intended to be an automatic veto because the rights of Indigenous peoples ‘exist relative to the rights of others’; hence there is no reference to a veto right in the Declaration. However, Deer argues that ‘free, prior and informed consent is a means of participating on an equal footing in decisions that affect [Indigenous peoples]’.<sup>23</sup>

International debate is developing on this issue prescribing that the strength or importance of the objective of achieving free, prior and informed consent varies according to the circumstances and the Indigenous interests involved.<sup>24</sup> It suggests that there is a scale by which governments and others can assess the level of consent required.

International institutions, such as the Inter-American Court of Human Rights (IACtHR) and the Committee on the Elimination of all Forms of Racial Discrimination (CERD) have used language suggesting that in some cases a ‘veto’ right, or right to withhold consent, exists.<sup>25</sup> For example, the IACtHR held in the *Saramaka* case that in circumstances where ‘large-scale development or investment projects...have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions’.<sup>26</sup>

In considering the recommendations from the CERD, the International Law Association (ILA) concluded that there appears to be a range of circumstances where States have an obligation to obtain the free, prior and informed consent of those affected. These circumstances range from cases in which States seem to have a simple duty to consult with Indigenous peoples, to cases where consent is required with respect to development projects or projects concerning the extraction of natural resources on their lands, to contemplating a more general duty to require consent before taking any ‘decisions directly relating to their rights and interests’.<sup>27</sup>

The ILA suggests that in considering the overall context of the Declaration, and in light of its object and purpose:

...although States are not obliged to obtain the consent of indigenous peoples before engaging in *whatever kind* of activities which may affect them – this obligation exists any time that the lack of such a consent would translate into a violation of the rights of indigenous peoples that States are bound to guarantee and respect.<sup>28</sup>

The Special Rapporteur also suggests that:

'[a] significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent'.<sup>29</sup>

For example, with respect to cultural rights, '[w]hen the essence of their cultural integrity is at significant risk, obtaining the free, prior and informed consent of the indigenous peoples concerned becomes mandatory'.<sup>30</sup>

#### **4.3 When to apply the principle of free, prior and informed consent?**

The Special Rapporteur argues that the objective of consultations 'should be to obtain the consent or agreement of the indigenous peoples concerned'.<sup>31</sup> As discussed above, he further considered that the 'strength or importance' of this objective will vary 'according to the circumstances and the indigenous interests involved'.<sup>32</sup>

In some cases, States will be required to obtain the free, prior and informed consent of the affected Indigenous peoples before proceeding with a proposed measure.<sup>33</sup> This is because:

this right is often violated when there are large-scale development projects – like a mine, dam, highway, plantation or logging. Often Indigenous Peoples and other community members are left out of the planning and decision-making process in these projects. The outcome can be devastating. Indigenous Peoples and project-affected communities risk a permanent loss to their livelihoods and cultures. Lands can be damaged or taken without their consent. Resettlement is often forced on communities with inadequate compensation offered.<sup>34</sup>

The ILA suggests there are four particular situations envisaged by the Declaration where consent will be required. These include:

- Where Indigenous peoples might be forcibly removed from their lands or territories. The Declaration states that 'no relocation shall take place without the free, prior and informed consent of the Indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return' (Article 10).
- When taking Indigenous peoples' cultural, intellectual, religious and spiritual property. Where this property is taken without the free, prior or informed consent or in violation of the owner's laws, traditions and customs, States are to provide effective redress mechanisms which may include restitution, developed in conjunction with Indigenous peoples (Article 11(2)).
- When there is a plan or intention to confiscate, take, occupy, use or damage lands, territories and resources traditionally owned or otherwise occupied or used by Indigenous peoples. If this occurs without free, prior, and informed consent Indigenous peoples have the right to redress by means that can include restitution or, when this is not possible, fair and equitable compensation (Article 28(1)).
- When there is a plan or intention to store or dispose of hazardous material on the lands or territories of Indigenous peoples. States shall take effective

measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of Indigenous peoples without their free, prior and informed consent (Article 29(2)).<sup>35</sup>

While each of these circumstances relates directly to impacts on Indigenous peoples lands and territories, as the Special Rapporteur points out, this principle should also apply where there is a proposed ‘significant, direct impact on indigenous peoples’ lives’<sup>36</sup>. The Declaration provides guidance in this regard at Article 19 where it states that the free, prior and informed consent of Indigenous peoples should be obtained before States adopt ‘legislative or administrative measures that may affect them’.

Given the Declaration ‘requires ‘effective’ participation, not pro forma consultations, the goal is to obtain the free, prior and informed consent of indigenous peoples’.<sup>37</sup>

## 5 Good Faith

In the context of human rights law, good faith as an international human rights standard applies more generally to States who are parties to international treaties. The duty of good faith is secured in international human rights law at Article 26 of the *Vienna Convention on the Law of Treaties*:

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.<sup>38</sup>

In fulfilling their human rights obligations:

a State cannot avoid responsibility under international law by invoking the provisions of its internal laws to justify its failure to perform its international legal obligations.<sup>39</sup>

This also applies to the Declaration which contains existing human rights standards enshrined in international law and interprets them as they apply to Indigenous peoples.<sup>40</sup>

Articles 19 and 32(2) of the Declaration clearly articulate States obligations ‘to consult indigenous peoples in good faith, through appropriate procedures, with the objective of obtaining their agreement or consent when measures that may affect indigenous peoples are considered’.<sup>41</sup> Article 46(3) of the Declaration specifically states that ‘the provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith’.

There are two aspects of good faith; cooperation and fairness:

Good faith as cooperation requires co-operation from contracting parties in order to facilitate successful performance of the contract. Good faith as fairness qualifies the decision of a party to exercise her or his contractual powers in order to ensure some level of consideration for the interests of the other party to the contract.<sup>42</sup>

The EMRIP explains that consultations should be undertaken in good faith:

This requires that consultations be carried out in a climate of mutual trust and transparency. Indigenous peoples must be given sufficient time to engage in their own decision-making process, and participate in decisions taken in a manner

consistent with their cultural and social practices. Finally, the objective of consultations should be to achieve agreement or consensus.<sup>43</sup>

Acting in good faith ensures that decision-making processes are fair, cooperative and consistent with our cultural practices. This means that all parties – Indigenous and non-indigenous – involved in the decision-making need to be respectful of each other's needs and priorities, and be prepared to engage with the intent of reaching an agreed outcome.

The duty of good faith is a standard that should contribute to 'levelling the playing field' between governments and Indigenous peoples. However, in effect it does not fully address the power imbalance that exists between governments and Indigenous peoples. As a legal construct that applies to corporate negotiations based on competitive processes, good faith in itself does not enable Indigenous people to engage or negotiate on an equal footing. As such it must be applied in conjunction with the other two key elements of our right to participate: a duty to consult, and free, prior and informed consent; as well as the other core principles contained within the Declaration: self-determination, respect for and protection of culture, and equality and non-discrimination.

In all cases, States should engage in '[a] good faith effort towards consensual decision-making'.<sup>44</sup>

The Australian Government has acknowledged that further clarity is required, particularly with regard to good faith negotiations in accordance with the *Native Title Act 1993* (Cth). At the 2012 Annual Native Title Conference in Townsville, the Attorney General voiced concerns that 'under the right to negotiate, native title agreements must be negotiated in 'good faith'.<sup>45</sup>

In response, the Government announced their intention to 'legislate criteria to outline the requirements for a good faith negotiation as it applies to native title'.<sup>46</sup>

## 6 Aboriginal and Torres Strait Islander peoples' participation

Our experience in Australia suggests that governments interpret their obligation to consult with Aboriginal and Torres Strait Islander peoples as a duty to tell us what has been developed on our behalf and what eventually will be imposed upon us. While we have seen some changes to social policy in Australia since the 1970s, there is still a perception – and a practice – that reinforces the view that governments hold the solution to the so-called 'Aboriginal problem'.

Since colonisation, Aboriginal and Torres Strait Islander peoples have not had genuine decision-making authority and power over our lives and futures. That power and authority continues to rest in the hands of governments.<sup>47</sup> The exclusion of Aboriginal and Torres Strait Islander peoples in the broader societal structures of Australia, including our national Constitution; in addition to the often unnecessary over-administration of our affairs creates significant barriers to our effective participation in decision-making.

For example, the capacity of communities to engage in consultative processes is often hindered by:

- inadequate resources to effectively participate in decision-making processes as equals
- unreasonably short timeframes for responding to discussion papers and draft legislation that directly relate to the rights of Aboriginal and Torres Strait Islander peoples
- an absence of good faith on governments' and communities' behalf to effectively engage due to the toxicity of the relationship between the two.

There are currently hundreds of organisations that have been established by Aboriginal and Torres Strait Islander peoples to represent our interests. However, in most cases the reliance on government funding and the legislative requirements concerning purpose and accountability severely restrict our effective participation in the decision-making processes of those organisations, and the extent to which they are self-determining and self-governing.<sup>48</sup>

When Australia formally endorsed the Declaration on 3 April 2009, the Minister for Families, Community Services and Indigenous Affairs stated that:

The Declaration gives us new impetus to work together in trust and good faith to advance human rights and close the gap between Indigenous and non-Indigenous Australians.<sup>49</sup>

While it is critical that States draw on best practice to assist them in improving engagement with Indigenous peoples, they must also strive to break down the existing systemic barriers to the effective engagement and participation of Indigenous peoples in decision-making.

The establishment of the new national representative body for Aboriginal and Torres Strait Islander peoples, the National Congress of Australia's First Peoples in 2008 provides for a point of contact with regard to national policy development. However, the level of exclusion experienced by Aboriginal and Torres Strait Islander peoples in decisions that affect them more broadly has resulted in a failure of the Australian Government to fulfill its international obligation to facilitate the right to participate, particularly in the context of its duty to meaningfully consult on issues affecting us.

The diversity of Aboriginal and Torres Strait Islander peoples and their communities also requires tailored consultation and engagement mechanisms to facilitate our right to participate in decision-making. While human rights experts provide clear guidance on many of these questions, local solutions will need to be developed to fulfil Indigenous people's right to participate in decisions that affect them.

Essentially this means that a rigid checklist will be inappropriate in assessing whether our participation and free, prior and informed consent on issues affecting us was achieved. Rather we should aim to ensure that engagement frameworks are clear and comprehensive in their design, achieve the highest possible standard of engagement that respects our human rights and are based on good faith consultations and negotiations.

## 7 Conclusion

The duty to consult and the related principle of free, prior and informed consent are ‘designed to build dialogue in which both States and indigenous peoples are to work in good faith towards consensus and try in earnest to arrive at a mutually satisfactory agreement’.<sup>50</sup>

Effective and appropriate Indigenous participation in decision-making will be crucial to resetting the relationship between Aboriginal and Torres Strait Islander peoples and the Australian Government.

The framework outlined above can assist governments in areas addressing Indigenous issues, private corporations working with Indigenous people and their communities, and Indigenous peoples advocating their rights and strengthening their own internal structures.

However, there are a number of questions that need to be sorted out before we can productively work together to achieve this including:

1. What does obtaining consent mean? Does it mean all or nothing? Does it mean a right of veto, where one person can overturn a decision of the group or alternatively that the group has the veto over the government on decisions that affect us? Does it mean a majority and if so how many?
2. How do we determine what this looks like, and how do we enforce it internally and externally?
3. What is good faith? What does this look like in a consultation or negotiation with Aboriginal and Torres Strait Islander peoples?
4. How do we expect Government to work with us to facilitate the right to participate?
5. How does Government think they could work with us to facilitate this?

## APPENDIX 1

### **Features of a meaningful and effective consultation process<sup>51</sup>**

#### **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’.<sup>52</sup> Consultation processes should therefore be framed ‘in order to make every effort to build consensus on the part of all concerned’.<sup>53</sup>

#### **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.

In this way, governments can ensure that consultation processes are more ‘in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures’<sup>54</sup> rather than mere information sessions.

#### **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.

The Declaration affirms:

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.<sup>55</sup>

Such assistance is, in many instances, essential to ensure that they are able to enjoy their right to participate in decision-making. The UNPFII has even suggested that the

principle of free, prior and informed consent, combined with the notion of good faith, may therefore be construed as incorporating a duty for States to build Indigenous capacity.<sup>56</sup>

## **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.<sup>57</sup>

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 the consultation process**

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. Consultations 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. Consultations 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. Consultations need to respect representative structures and decision-making processes**

The Declaration requires consultation to be undertaken with ‘the indigenous peoples concerned through their own representative organisations’.<sup>58</sup> The UNPFII has emphasised that free, prior and informed consent must ‘be sought from genuinely representative organisations or institutions charged with the responsibility of acting on their behalf’.<sup>59</sup>

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**

The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) has observed that ‘[c]onsistent and wide dissemination of information to indigenous peoples in culturally appropriate ways, and in a timely manner, is often lacking’.<sup>60</sup>

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 them with full and accurate information about the proposed measure and its potential impact.<sup>61</sup>

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

## APPENDIX 2

### Elements of a common understanding of free, prior and informed consent<sup>62</sup>

#### 1. What

- **Free** should imply no coercion, intimidation or manipulation.
- **Prior** should imply that consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes.
- **Informed** should imply that information is provided that covers (at least) the following aspects:
  - the nature, size, pace, reversibility and scope of any proposed project or activity
  - the reason(s) for or purpose(s) of the project and / or activity
  - the duration of the above
  - the locality of areas that will be affected
  - a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle
  - personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others)
  - procedures that the project may entail.

#### • **Consent**

Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest-holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women are essential, as well as participation of children and youth, as appropriate. This process may include the option of withholding consent.

Consent to any agreement should be interpreted as indigenous peoples have reasonably understood it.

## **2. When**

- FPIC should be sought sufficiently in advance of commencement or authorization of activities, taking into account indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project.

## **3. Who**

- Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. In free, prior and informed consent processes, indigenous peoples, United Nations organizations and Governments should ensure a gender balance and take into account the views of children and youth, as relevant.

## **4. How**

- Information should be accurate and in a form that is accessible and understandable, including in a language that the indigenous peoples will fully understand. The format in which information is distributed should take into account the oral traditions of indigenous peoples and their languages.

## **5. Procedures / mechanisms**

- Mechanisms and procedures should be established to verify free, prior and informed consent as described above, *inter alia*, mechanisms of oversight and redress, including the creation of national ones.
- As a core principle of free, prior and informed consent, all sides in a FPIC process must have equal opportunity to debate any proposed agreement/development/project. 'Equal opportunity' should be understood to mean equal access to financial, human and material resources in order for communities to fully and meaningfully debate in indigenous language(s), as appropriate, or through any other agreed means on any agreement or project that will have or may have an impact, whether positive or negative, on their development as distinct peoples or an impact on their rights to their territories and/or natural resources.
- Free, prior and informed consent could be strengthened by establishing procedures to challenge and to independently review these processes.
- Determination that the elements of free, prior and informed consent have not been respected may lead to the revocation of consent given.
- It is recommended that all actors concerned, including private enterprise, pay due attention to these elements.

<sup>1</sup> M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010* Australian Human Rights Commission (2011), p 12. At

[http://www.humanrights.gov.au/social\\_justice/sj\\_report/sjreport10/index.html](http://www.humanrights.gov.au/social_justice/sj_report/sjreport10/index.html) (viewed 20 October 2012); and M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 2. At

[http://www.humanrights.gov.au/social\\_justice/nt\\_report/ntreport10/index.html](http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html) (viewed 20 October 2012).

<sup>2</sup> National Congress of Australia's First Peoples, *National Congress Report 2011*, (2011), p 5. At <http://nationalcongress.com.au/wp-content/uploads/2011/08/ReportPart1.pdf> (viewed 20 October 2012).

<sup>3</sup> T Bauman, Australian Institute of Aboriginal and Torres Strait Islander Studies, *Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation*, Report No. 6 (2006) p 13. At <http://www.aiatsis.gov.au/ntru/docs/researchthemes/negmedfac/ifamp/IfampReport.pdf> (viewed 9 September 2011).

<sup>4</sup> Human Rights Council, *Progress report on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/EMRIP/2010/2 (2010), para 2. At <http://daccess-ods.un.org/TMP/9299995.30315399.html> (viewed 5 December 2012).

<sup>5</sup> Human Rights Council, *Final study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/EMRIP/2011/2 (2011), Annex para 3. At <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/AEVfinalreportStudyIPRightParticipate.pdf> (viewed 12 October 2012).

<sup>6</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex) UN Doc A/RES/61/295 (2007), Article 18. At [www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) (viewed 19 October 2012).

<sup>7</sup> J Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples*, Report to the Human Rights Council 21<sup>st</sup> session, UN Doc A/HRC/21/47 (2012), paras 48 – 49.

<sup>8</sup> J Anaya, note 7, para 50.

<sup>9</sup> *General Recommendation 23: Rights of indigenous peoples*, UN Doc A/52/18 (Annex V) (1997). At [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/73984290dfa022b802565160056fe1c?OpenElement](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/73984290dfa022b802565160056fe1c?OpenElement) (viewed 11 October 2011).

<sup>10</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, note 6, Articles 11, 15, 17, 19, 27, 30, 31, 32, 36, 38.

<sup>11</sup> *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO 169), 1991, Article 6 (1). Note that at the time of writing Australia was not a party to ILO 169.

<sup>12</sup> J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Report to the Human Rights Council 12th session, UN Doc A/HRC/12/34 (2009), paras 43–44. At <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/145/82/PDF/G0914582.pdf?OpenElement> (viewed 2 December 2010).

<sup>13</sup> J Anaya, note 7, para 62.

<sup>14</sup> J Anaya, note 7, para 54.

<sup>15</sup> J Anaya, note 11, para 48.

<sup>16</sup> Human Rights Council, note 5, Annex para 30.

<sup>17</sup> Human Rights Council, note 5, Annex para 29.

<sup>18</sup> Human Rights Council, note 4, para 12.

<sup>19</sup> Human Rights Council, note 4, para 34.

<sup>20</sup> United Nations Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples* (New York, 17–19 January 2005), UN Doc E/C.19/2005/3 (2005), paras 46–49. At <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/243/26/PDF/N0524326.pdf?OpenElement> (viewed 2 December 2012).

<sup>21</sup> See, Committee on Economic Social and Cultural Rights, General Comment No. 21 *Right of everyone to take part in cultural life (art 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/21 (2009), para. 37. At:

<http://www2.ohchr.org/english/bodies/cescr/docs/gc/E-C-12-GC-21.doc> (viewed 2 December 2012).

<sup>22</sup> United Nations Declaration on the Rights of Indigenous Peoples, note 6, Articles 10, 11, 19, 28, 29, 32.

<sup>23</sup> K Deer, 'Reflections on the Development , Adoption, and Implementation of the UN Declaration on the Rights of Indigenous Peoples' in J Hartley, P Joffe & J Preston (eds), *Realising the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action* (2010), p 18 and 27.

<sup>24</sup> J Anaya, note 11, para 46.

<sup>25</sup> International Law Association, *Sofia Conference (2012) Rights of Indigenous Peoples* (2012), pp 4-5. At: <http://www.ila-hq.org/en/committees/draft-committee-reports-sofia-2012.cfm> (viewed 5 December 2012).

<sup>26</sup> J Anaya, note 11, para 47. See also International Law Association, note 25, p 4.

<sup>27</sup> International Law Association, note 25, p 5.

<sup>28</sup> International Law Association, note 25, p 7.

<sup>29</sup> J Anaya, note 11, para 47.

<sup>30</sup> International Law Association, note 25, p 7.

<sup>31</sup> J Anaya, note 11, para 65.

<sup>32</sup> J Anaya, note 11, para 47.

<sup>33</sup> J Anaya, note 11, para 47. For example, free, prior and informed consent must be obtained when the measure involves relocating Indigenous peoples from their lands or territories; or the storage or disposal of hazardous materials in the lands or territories of Indigenous peoples: *United Nations Declaration on the Rights of Indigenous Peoples*, note 6, Articles 10 and 29(2).

<sup>34</sup> Oxfam Australia, *Guide to Free Prior and Informed Consent* (2010) p 1. At

<http://resources.oxfam.org.au/pages/view.php?ref=528&k=> (viewed 5 December 2012).

<sup>35</sup> International Law Association, note 25, p 7.

<sup>36</sup> J Anaya, note 11, para 47.

<sup>37</sup> Human Rights Council, note 4, para 89.

<sup>38</sup> Vienna Convention on the Law of Treaties, 1980, Article 26. At:

[http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) (viewed 2 December 2012).

<sup>39</sup> University of Minnesota, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, ch 1, p7. At:

<http://www1.umn.edu/humanrts/monitoring/adminchap1.html> (viewed 2 December 2012).

<sup>40</sup> For a discussion of the legal status of the Declaration, see P Joffe, 'Canada's Opposition to the UN Declaration: Legitimate Concerns or Ideological Bias?' in J Hartley, P Joffe & J Preston (eds), note 23, pp 85–93. See also Permanent Forum on Indigenous Issues, *Report on the eighth session*, UN Doc E/C.19/2009/14 (2009), Annex, General Comment 1, paras 6-13.

<sup>41</sup> Human Rights Council, note 5, Annex para 10.

<sup>42</sup> J Paterson, A Robertson, and P Heffey (eds), *Principles of Contract Law*, (2<sup>nd</sup> ed, 2008), p 305.

<sup>43</sup> Human Rights Council, note 5, Annex para 9.

<sup>44</sup> J Anaya, note 11, para 50.

<sup>45</sup> N Roxon, Federal Attorney-General, *Echoes of Mabo*, (Speech delivered at the AIATSIS Native Title conference, Townsville, 6 June 2012. At

<http://www.attorneygeneral.gov.au/Speeches/Pages/2012/Second%20Quarter/6-June-2012---Echoes-of-Mabo---AIATSIS-Native-Title-Conference.aspx> (viewed 10 August 2012).

<sup>46</sup> N Roxon, note 46.

<sup>47</sup> D Smith and J Hunt, *Do They Get It? Indigenous Governance: The Research Evidence and Possibilities for a Policy Dialogue with Australian Governments* (Presentation delivered at the Inaugural National Indigenous Policy and Dialogue Conference, University of New South Wales, Sydney, 18 November 2010). At [http://nipdc.arts.unsw.edu.au/assets/Powerpoints/Smith\\_Hunt.pdf](http://nipdc.arts.unsw.edu.au/assets/Powerpoints/Smith_Hunt.pdf) (viewed 17 September 2011).

<sup>48</sup> For a discussion on effective governance in Aboriginal and Torres Strait Islander communities see: M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2012*, Australian Human Rights Commission (2012), ch 2. At

[http://www.humanrights.gov.au/social\\_justice/sj\\_report/sjreport12/chapter2.html](http://www.humanrights.gov.au/social_justice/sj_report/sjreport12/chapter2.html) (viewed 2 December 2012) ; and M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2012*, Australian Human Rights Commission (2012), ch 2. At:

[http://www.humanrights.gov.au/social\\_justice/nt\\_report/ntreport12/chapter2.html](http://www.humanrights.gov.au/social_justice/nt_report/ntreport12/chapter2.html) (viewed 2 December 2012).

<sup>49</sup> J Macklin, Minister for Families, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009). At <http://www.jennymacklin.fahcsia.gov.au/node/1711> (viewed 13 August 2012).

<sup>50</sup> J Anaya, note 11, para 49.

<sup>51</sup> Excerpt from M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, app 4, Australian Human Rights Commission (2011). At:

[http://www.hreoc.gov.au/social\\_justice/nt\\_report/ntreport10/appendix4.html](http://www.hreoc.gov.au/social_justice/nt_report/ntreport10/appendix4.html) (viewed 10 August 2012).

<sup>52</sup> J Anaya, note 11, para 50.

<sup>53</sup> J Anaya, note 11, para 48.

<sup>54</sup> J Anaya, note 11, para 46.

<sup>55</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, note 6, Article 39.

<sup>56</sup> United Nations Permanent Forum on Indigenous Issues, *A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No 169 and International Labour Organisation Convention No 107 that relate to Indigenous land tenure and management arrangements*, UN Doc E/C.19/2009/CRP.7 (undated), p 21. At [http://www.un.org/esa/socdev/unpfii/documents/E\\_C19\\_2009\\_CRP\\_7.doc](http://www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_7.doc) (viewed 30 September 2010).

<sup>57</sup> United Nations Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples* (New York, 17–19 January 2005), UN Doc E/C.19/2005/3 (2005), para 46. At <http://www.un.org/esa/socdev/unpfii/en/workshopFPIC.html> (viewed 30 September 2010).

<sup>58</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, note 6, Article 19.

<sup>59</sup> United Nations Permanent Forum on Indigenous Issues, *A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No 169 and International Labour Organisation Convention No 107 that relate to Indigenous land tenure and management arrangements*, UN Doc E/C.19/2009/CRP.7 (undated), p 21. At [http://www.un.org/esa/socdev/unpfii/documents/E\\_C19\\_2009\\_CRP\\_7.doc](http://www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_7.doc) (viewed 30 September 2010).

<sup>60</sup> Human Rights Council, note 4, para 99.

<sup>61</sup> See Appendix 3: 'Elements of a common understanding of free, prior and informed consent' for examples of the information that should be provided to Aboriginal and Torres Strait Islander peoples.

<sup>62</sup> Extract from United Nations Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples* (New York, 17–19 January 2005), UN Doc E/C.19/2005/3 (2005), paras 46–49. At

<http://social.un.org/index/IndigenousPeoples/UNPFISessions/PreviousSessions/Fourth.aspx> (viewed 6 August 2012).