Senate Standing Committee on Legal and Constitutional Affairs inquiry
into
Native Title Amendment (Reform) Bill 2011

Question on Notice

At the Committee's hearing in Canberra on Friday 16 September 2011, Senator Siewert asked Mr Graeme Neate, President of the National Native Title Tribunal, whether he thought the concept of free, prior and informed consent could be usefully looked at and interpreted through the lens of some of the comments from the Aboriginal and Torres Strait Islander Social Justice Commissioner in his latest report (*Native Title Report 2010*) (see proof *Hansard* pages 20-21).

Approach of the Aboriginal and Torres Strait Islander Social Justice Commissioner

Chapter 3 of the *Native Title Report 2010* is titled 'Consultation, co-operation and free, prior and informed consent: The elements of meaningful and effective engagement'. In that chapter, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Mick Gooda, set out in detail his view of the features of a meaningful and effective consultation process.

The Commissioner's report contains the following statements by him:

- There is an urgent need for governments to improve their approach to engaging with Aboriginal and Torres Strait Islander peoples. (page 57)
- In this chapter, I examine how the Australian Government could improve its consultation processes in relation to measures that affect our rights to our lands, territories and resources. Specifically, I explore the practical steps that governments can take to ensure that consultation processes are meaningful and effective. (page 58)
- Aboriginal and Torres Strait Islander peoples have the right to participate in decision-making in matters that affect our rights. Governments are under a duty to consult 'whenever a State decision may affect indigenous peoples in ways not felt by others in society', even if our rights have not been recognised in domestic law. This duty requires governments to consult effectively with us before adopting or implementing measures that may affect our rights. (page 58)
- I am concerned that governments do not fully understand what genuine and effective consultation looks like. Unless this issue is addressed, governments will continue to impose laws and policies upon us in order to 'solve' our problems. (page 59)
- The key features of a duty to consult and the standard of free, prior and informed consent have been set out in several international and domestic studies. For example, the United Nations Permanent Forum on Indigenous Issues (UNPFII) convened an international workshop on 'free, prior and informed consent' in 2005. In Appendix 3, I have extracted a list of the 'elements of a common understanding of free, prior and informed consent' that was developed at this workshop. (pages 59-60)
- Based on the perspectives and experiences of [various nominated] organisations, and informed by international standards, I consider that at a minimum:
    - consultation processes should be products of consensus
    - consultations should be in the nature of negotiations
    - consultations need to begin early and should, where necessary, be ongoing
    - Aboriginal and Torres Strait Islander peoples must have access to financial, technical and other assistance

- Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision
- adequate timeframes should be built into consultation processes
- consultation processes should be co-ordinated across government departments
- consultation processes need to reach the affected communities
- consultation processes need to respect Aboriginal and Torres Strait Islander representative and decision-making structures
- governments must provide all relevant information and do so in an accessible way. (page 60)

- I am aware that a rigid consultation 'checklist' would not be conducive to relationship-building or to effective consultation. Nor would it be consistent with the right of the Indigenous peoples to self-determination. Further, as the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) emphasises, the Declaration 'requires "effective" participation, not pro forma consultations, the goal of which is to obtain the free, prior and informed consent of indigenous peoples'. (page 60)
- I believe that there is a clear need for a framework to guide governments in the development of consultation processes regarding reforms to law, policies, programs and development processes that may affect our rights. ... I believe that the elements of effective and meaningful consultation identified in this Chapter provide a useful starting point for discussions. Further, this framework should explicitly acknowledge the minimum standards affirmed in the Declaration. In this way, the framework would be a powerful way of implementing the Declaration. (page 99)

Appendix 3 to the *Native Title Report 2010* sets out what 'free', 'prior', 'informed' and 'consent' should imply, when such consent should be sought, who should be entitled to express consent on behalf of the affected peoples or communities, how information should be presented, and the procedures/mechanisms that should be established to verify free, prior and informed consent.

The Commissioner formally recommended:

> 3.3 That the Australian Government work with Aboriginal and Torres Strait Islander peoples to develop a consultation and engagement framework that is consistent with the minimum standards affirmed in the *United Nations Declaration on the Rights of Indigenous Peoples*. Further, that the Australian Government commit to using this framework to guide the development of consultation processes on a case-by-case basis, in partnership with the Aboriginal and Torres Strait Islander peoples that may be affected by a proposed legislative or policy measure.

The Australian Government appears to be acting consistently with this recommendation in relation to the Native Title Amendment (Reform) Bill 2011 (the Bill). The submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Bill prepared by the Commonwealth Attorney-General's Department states:

> The Government will only undertake significant amendments to the *Native Title Act 1993* ... after careful consideration and full consultation with affected parties to ensure that amendments do not unduly or substantially affect the balance of rights under the Act. (page 2)
>
> ...
>
> For the reasons outlined above, the Government submits that the Committee should recommend that detailed consideration of the full implications of the proposed amendments and consultation with stakeholders be undertaken. (page 4)

It might be inferred from that submission that Indigenous peoples would have a significant role in any consultation undertaken by the Government, which consultation might be influenced by Commissioner Gooda's recommendation.

Submission by the National Native Title Tribunal

The extracts quoted above from the *Native Title Report 2010* give an indication of the Commissioner's rationale for seeking to develop a consultation and engagement framework and some practical features of what, in his view, appropriate consultation processes should involve.

In that context, and in response to the request from Senator Siewert, the Tribunal notes that the Commissioner's views and recommendations provide a useful insight into what he (apparently informed by international literature on the topic and the views of NTRBs, NTSPs, PBCs and other Aboriginal and Torres Strait Islander peoples' organisations) considers to be a 'meaningful and effective consultation process'.

However, it cannot be assumed that others necessarily would take the same approach as the Commissioner if the proposed s 3A were to be enacted. Nor can it be predicted how the criteria he identified (or a framework of the type he recommended) would be applied in particular sets of circumstances. That much is acknowledged in his statement, quoted earlier, to the effect that a rigid consultation 'checklist' would not be conducive to effective consultation nor would it be consistent with the right of Indigenous peoples to self-determination. Rather, in his view, there needs to be 'effective' participation in a process with the goal of obtaining the relevant people's free, prior and informed consent. (In that sense, the same assessment could be made of attempts to list indicia of negotiations in good faith. See the Tribunal's written submission in relation to proposed s 31(1A) in the Bill.)

Given the new object set out in proposed s 3A(1), particularly paragraphs (a) to (c), and the obligation that would be created by proposed s 3A(2), the outstanding question is not whether the Commissioner's 'lens' is useful. Rather, it is how an arbitral body (such as the Tribunal) or a Court (primarily the Federal Court) would interpret the expression 'free, prior and informed consent' and how a requirement for free prior and informed consent would be applied in any particular circumstance under the Native Title Act. The answer to that question cannot be predicted with any precision.

In saying this, it should be noted that the Tribunal takes the view that the effect of proposed s 3A(2) is such that this principle (among others) would have to be applied in decision-making. It would not merely be an 'object' to guide the interpretation of the decision-making provisions of the Native Title Act. This is apparent not only from the terms of proposed s 3A(2) but from s 4(a) of the Bill (part of its 'Objects' clause), which states that:

> The objects of this Act are ... to refer to the United Nations Declaration on the Rights of Indigenous Peoples and **provide for principles** of the Declaration **to be applied in decision-making** under the *Native Title Act 1993* (emphasis added).