

REPORT ON PROCEEDINGS BEFORE

PORTFOLIO COMMITTEE NO. 7 - PLANNING AND ENVIRONMENT

RATIONALE FOR, AND IMPACTS OF, NEW DAMS AND OTHER WATER INFRASTRUCTURE IN NSW

Thursday 29 October 2020

ANSWER TO QUESTION ON NOTICE BY MR RAY WOODS:

The Hon. BEN FRANKLIN: Mr Woods, I am trying to find a way to make some recommendations here that are really going to be helpful and effective. In terms of previous processes you have been through, previous projects or consultation periods for the last 20 years, are there any actual projects or individuals which you can point to and say, "You know what? That was where consultation was actually pretty good and worked." so that we have some best practice examples?

Mr RAY WOODS: Can I take that question on notice?

The Hon. BEN FRANKLIN: Yes, absolutely.

1. The short answer to the question is that I cannot point to best practice examples of consultation because I have not seen examples where governments show the care that is required and take the time needed to ensure that they are meeting with the right people and are actually listening to what they have to say.
2. In particular, I have not seen governments support Traditional Owners to build their own decision-making bodies so that they can speak with legitimate cultural authority for their nation. This is the only way that consultation can really be genuine is for governments to support Traditional Owners to create our own decision-making institutions so that we can assert our sovereignty and exercise our rights to self-determination. It's only then that we can engage with governments as equals and fulfill our obligations to Country and our communities.
3. The reason that I took this question on notice is that I wanted to do some research on what the UN Declaration on the Rights of Indigenous Peoples says is best practice consultation with Indigenous peoples.
4. In 2009, the former Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya, wrote a report outlining what State Parties are required to do to fulfil their obligations to effectively consult with Indigenous peoples on decisions that affect us.¹

¹ Special Rapporteur, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (15 July 2009)
<<http://www2.ohchr.org/english/issues/indigenous/rapporteur/annualreports.htm>>. (Duty to Consult)

5. Professor Anaya explained that the obligation to consult in good faith with Indigenous peoples is “firmly rooted in international human rights law”² and is expressly stated in a range of international instruments including the UN Declaration, and is fundamental to the core United Nations human rights treaties: the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, to which Australia is a party.
6. Professor Anaya explained that consultation was not a formality but must be undertaken with the intention of achieving agreement or consent. This is explicit in the Declaration in articles 18 and 19.
7. Article 18 of the Declaration says that Indigenous peoples have the **right to participate in decision-making in matters which would affect our rights**, through **representatives that we choose according to our own procedures**, as well as to maintain and develop our own Indigenous decision-making institutions.
8. Article 19 of the Declaration says that States shall **consult and cooperate in good faith** with the Indigenous peoples concerned through our own representative institutions in order to obtain our free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect us.
9. In other words, Australian governments, including the NSW government, is obliged to consult in good faith with Traditional Owners about matters that affect their Country.
10. In this case in relation to the intention to enlarge the Wyangala Dam, it will be the people of the Lachlan River who will be impacted, especially on the Lower Lachlan. The NSW government is obliged to consult with Wiradjuri people from that region. Ultimately, it is our responsibility to care for that Country. Saying that the government has consulted other Aboriginal and Torres Strait Islander people who are not Traditional Owners of the relevant area is meaningless. They have responsibilities for their own Country but cannot speak for ours.
11. Professor Anaya explained that meaningful consultation that can lead to consent showed certain features, including that it:
 - a. is conducted in good faith towards consensual decision-making in a climate of confidence;
 - b. includes Indigenous participation in designing and implementing the consultation process itself;
 - c. addresses power imbalances by ensuring that Indigenous peoples are given financial, technical and other assistance;
 - d. must give Indigenous peoples the ability to genuinely influence the decision-making process and should not be just a mechanism to impart information.
12. The consultation process in this case did not comply with any of these elements. Consultation is not genuine when government comes with its own agenda and tells people what it intends to do. They’re trying to sell an idea that they have already

² Special Rapporteur, Duty to Consult, [38].

come up with. Consultation is having a genuine discussion about the best way to go forward.

13. Where the decision is in relation to land, as is the case with the proposal to enlarge the Wyangala Dam, the Declaration requires that States ensure that Traditional Owners' rights are respected. Article 32.1 of the Declaration says that Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of our lands or territories and other resources.
14. Article 32.2 says that states shall consult and cooperate in good faith with the Indigenous peoples concerned **through their own representative institutions** in order to obtain their **free and informed consent prior to the approval** of any project affecting their lands or territories and other resources, **particularly in connection with** the development, utilization or exploitation of mineral, **water** or other resources.
15. In other words, where the proposed project will affect our water rights, as this project does, consultation is supposed to occur directed at obtaining the free, prior and informed consent of the Traditional Owners through our own representative institutions. That has not been the case with this consultation at all.
16. Article 26.1 states that Indigenous peoples have the right to the lands, territories and resources which we traditionally owned, occupied or otherwise used or acquired. Further, we also have the right to maintain and strengthen our distinctive spiritual relationship with our traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard (article 25). Article 29.1 says that Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
17. Destroying our Country has an impact on our spiritual connection to Country and once the damage has been done it cannot be repaired.
18. According to article 26.3 of the Declaration, states are supposed to give legal recognition and protection to these lands, territories and resources that respects the customs, traditions and land tenure systems of the relevant Indigenous peoples.
19. As I said when I spoke to the Committee, I haven't seen any evidence that Australian governments are going to adhere to the Declaration and Australia's agreement to abide by the Declaration seems like tokenism.
20. We don't have a say about how business is done on our own Country and we struggle to maintain our sovereignty. In order for development on our Country and for our people to proceed in the proper way, more needs to change than consultation processes. What is needed is a reframing of relations between Traditional Owners and governments in ways that respect our sovereignty and right to self-determination.

21. Governments need to support us to create our own decision-making and governance institutions so that we can engage as equals. Governments would then know who they need to consult and we can be properly prepared to speak with them.