



(pm) May 22nd, 2006, Item 4.c.p.e # 185

MR. PETER VAUGHAN

**STATEMENT BY AUSTRALIA, NEW ZEALAND AND
THE UNITED STATES OF AMERICA
ON FREE PRIOR INFORMED CONSENT**

**PERMANENT FORUM ON INDIGENOUS ISSUES
22 MAY 2006**

CHECK AGAINST DELIVERY

MADAME CHAIR, I AM MAKING THIS STATEMENT ON BEHALF OF AUSTRALIA, NEW ZEALAND, AND THE UNITED STATES OF AMERICA.

AUSTRALIA, NEW ZEALAND, AND THE UNITED STATES OF AMERICA NOTE THE RECENT EFFORTS OF THE PERMANENT FORUM TO ATTEMPT TO DEFINE AND PROMOTE A PRINCIPLE OR "RIGHT" OF FREE, PRIOR INFORMED CONSENT IN RELATION TO INDIGENOUS PEOPLES (ALSO REFERRED TO AS A RIGHT OF PRIOR INFORMED CONSENT, OR INFORMED CONSENT OR SIMILAR). WE NOTE ALSO THAT OTHER INTERNATIONAL FORA ARE DISCUSSING FREE, PRIOR AND INFORMED CONSENT. THESE INCLUDE THE CONVENTION ON BIOLOGICAL DIVERSITY, THE WIPO IGC ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, THE WORKING GROUP ON INDIGENOUS POPULATIONS, UNESCO, UNCTAD, UNDP AND THE WORLD BANK.

AUSTRALIA, NEW ZEALAND, AND THE UNITED STATES OF AMERICA NOTE THAT THESE ISSUES ARE COMPLEX AND ARE SIGNIFICANT TO INDIGENOUS PEOPLES, PARTICULARLY IN LIGHT OF THE HISTORICAL EXPERIENCE OF MANY INDIGENOUS PEOPLES. AUSTRALIA, NEW ZEALAND, AND THE UNITED STATES OF AMERICA CONSIDER THAT DISCUSSIONS ABOUT ANY SUCH PRINCIPLE OR "RIGHT" ARE FAR FROM COMPLETE. THE INTERNATIONAL WORKSHOP ON FREE, PRIOR INFORMED CONSENT SPONSORED BY THE PERMANENT FORUM IN 2005

HIGHLIGHTED THAT THERE ARE WIDELY DIFFERENT VIEWS ABOUT THE CONTENT AND APPLICATION OF ANY SUCH PRINCIPLE AMONGST STATES AND INDIGENOUS PEOPLES, AND DISCUSSIONS ABOUT IT IN OTHER INTERNATIONAL FORUMS (SUCH AS WIPO AND THE CBD) ARE STILL ONGOING. IT IS THEREFORE PREMATURE TO REFER TO THE CONCLUSIONS OF THE WORKSHOP AS REFLECTING “A COMMON UNDERSTANDING OF FREE, PRIOR INFORMED CONSENT”, AS STATED IN THE REPORT.

INDEED IT IS RELEVANT TO RECALL THAT THE RECOMMENDATIONS OF THE WORKSHOP ARE EXPRESSED IN NON-MANDATORY LANGUAGE, AND RECOGNISE THAT THE CONSENT PROCESS “MAY INCLUDE THE OPTION OF WITHHOLDING CONSENT”, RATHER THAN “MUST”. THE RECOMMENDATIONS ALSO FOCUS ON “CONSULTATION” AND “PARTICIPATION” RATHER THAN “CONSENT”. NONETHELESS AUSTRALIA, NEW ZEALAND, AND THE UNITED STATES OF AMERICA CONSIDER THAT THE RECOMMENDATIONS ARE PREMATURE AND DO NOT REFLECT “COMMON UNDERSTANDING”. SOME ASPECTS OF THE RECOMMENDATIONS ARE ALSO VAGUE IN MEANING OR WOULD BE IMPOSSIBLE TO ACHIEVE IN MOST SITUATIONS, SUCH AS “EQUAL ACCESS TO FINANCIAL, HUMAN, AND MATERIAL RESOURCES” FOR “ALL SIDES IN A FREE, PRIOR INFORMED CONSENT PROCESS”.

IT IS OUR FIRM POSITION THAT THERE CAN BE NO ABSOLUTE RIGHT OF FREE, PRIOR INFORMED CONSENT THAT IS APPLICABLE UNIQUELY TO INDIGENOUS PEOPLES AND THAT WOULD APPLY REGARDLESS OF CIRCUMSTANCE. IN FACT TO EXTEND SUCH AN OVERRIDING RIGHT TO A SPECIFIC SUBSET OF THE NATIONAL POPULACE WOULD BE POTENTIALLY DISCRIMINATORY.

IT IS OF COURSE WIDELY ACCEPTED THAT INDIVIDUALS AND GROUPS SHOULD BE CONSULTED ABOUT DECISIONS LIKELY TO IMPACT ON THEM IN PARTICULAR. THIS INCLUDES THE OPPORTUNITY TO PARTICIPATE IN THE MAKING OF SUCH DECISIONS, AT THE VERY LEAST

THROUGH BOTH THE FORMAL AND INFORMAL PROCESSES OF DEMOCRATIC GOVERNMENT, AS RECOGNISED IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.

THE CONVENTION ON THE ELIMINATION OF RACIAL DISCRIMINATION ALSO GUARANTEES THAT THERE SHALL BE NO DISCRIMINATION IN THE EXERCISE OF SUCH RIGHTS, INCLUDING IN THE CONDUCT OF PUBLIC AFFAIRS (WHICH INCLUDES THE EXERCISE OF LEGISLATIVE, EXECUTIVE OR ADMINISTRATIVE POWER). BUT, AS ACKNOWLEDGED BY THE HUMAN RIGHTS COMMITTEE, THAT DOES NOT IMPLY A RIGHT TO CHOOSE THE MODALITIES OF PARTICIPATION IN THE CONDUCT OF PUBLIC AFFAIRS.

IT IS AN ENTIRELY DIFFERENT MATTER TO ASSERT, AS HAS BEEN DONE IN THE CONTEXT OF DEVELOPING THE DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, THAT PARTICULAR SUB-GROUPS OF CITIZENS HAVE A RIGHT OF VETO (IN THE FORM OF WITHHOLDING THEIR CONSENT) OVER THE ACTIONS OF GOVERNMENTS AND LEGISLATURES. IT HAS BEEN ASSERTED, FOR EXAMPLE, THAT THE ENACTMENT OF LAWS BY DEMOCRATICALLY ELECTED PARLIAMENTS SHOULD BE SUBJECT TO THE PRIOR CONSENT OR VETO OF A PARTICULAR SUB-GROUP OF THE POPULATION. AND, IN ADDITION, THAT THIS RIGHT SHOULD APPLY TO ANY LAW, POLICY, PROGRAM OR DECISION AFFECTING THE GROUP, EITHER DIRECTLY AND SPECIFICALLY OR EVEN INDIRECTLY BY VIRTUE OF BEING PART OF THE TOTAL POPULATION AFFECTED.

CLEARLY THIS IS NOT A POSITION THAT A GOVERNMENT, DEMOCRATICALLY CHOSEN TO REPRESENT THE INTERESTS OF ALL ITS CITIZENS, COULD ACCEPT. DEMOCRATIC GOVERNMENT IS ABOUT RECONCILING COMPETING RIGHTS AND INTERESTS.

AND INDEED THAT IS ALSO WHY EVEN MANY HUMAN RIGHTS (SUCH AS THE RIGHT TO FREEDOM OF EXPRESSION OR OPINION) ARE NOT

ABSOLUTES AND WHY THERE ARE GENERAL PROVISIONS IN THE KEY HUMAN RIGHTS INSTRUMENTS WHICH PROVIDE LIMITATIONS SUCH AS FOR NATIONAL SECURITY AND TO ENSURE RESPECT FOR THE RIGHTS AND FREEDOMS OF OTHERS.

REFERENCES HAVE BEEN MADE (SUCH AS IN THE REPORT OF THE INTERNATIONAL WORKSHOP SPONSORED BY THE PERMANENT FORUM) TO VARIOUS LEGAL OR OTHER SOURCES FOR SUCH A PRINCIPLE OF FREE, PRIOR INFORMED CONSENT. FOR EXAMPLE, THE RIGHT OF SELF-DETERMINATION OF ALL PEOPLES IN THE HUMAN RIGHTS COVENANTS, VARIOUS ARTICLES IN ILO CONVENTION 169 AND THE WGIP DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, CERTAIN RECOMMENDATIONS AND OBSERVATIONS OF HUMAN RIGHTS TREATY BODIES, AND INSTRUMENTS UNDER THE CONVENTION ON BIOLOGICAL DIVERSITY. HOWEVER, THE MEANING OF THE RIGHT OF SELF-DETERMINATION IN THE TWO COVENANTS HAS BEEN THE SUBJECT OF MUCH DISAGREEMENT IN THE WORKING GROUP ON THE DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES. ILO 169 HAS NOT BEEN RATIFIED BY MOST STATES, AND THE OTHER SOURCES MENTIONED ARE STILL UNDER DISCUSSION OR ARE OTHERWISE NON-BINDING. FURTHER DISCUSSION ABOUT THESE SOURCES AND ANY "RIGHT" OF FREE, PRIOR INFORMED CONSENT – AND AS TO WHEN IT MIGHT OR MIGHT NOT APPLY - IS THEREFORE NECESSARY.

AUSTRALIA, NEW ZEALAND, AND THE UNITED STATES OF AMERICA SUPPORT EFFORTS TO INCREASE INDIGENOUS PEOPLES' PARTICIPATION IN DECISIONS THAT AFFECT THEM, WHETHER IN THE FORM OF INTERNATIONAL PROCESSES, SUCH AS THIS FORUM ITSELF, OR DOMESTIC ARRANGEMENTS DESIGNED TO PROTECT AND ADVANCE INDIGENOUS INTERESTS. THIS APPLIES IN PARTICULAR TO SUCH AREAS AS LAND AND RESOURCES, CULTURE AND HERITAGE, TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY. BUT THE FUNDAMENTAL POINT IS THAT NEITHER INDIGENOUS NOR NON-INDIGENOUS PEOPLES ENJOY AN OVERARCHING OR EXCLUSIVE

RIGHT OF FREE, PRIOR INFORMED CONSENT, REGARDLESS OF CIRCUMSTANCE. AUSTRALIA, NEW ZEALAND, AND THE UNITED STATES OF AMERICA'S POSITION IS THAT DISCUSSIONS ABOUT INDIGENOUS PARTICIPATION IN DECISION-MAKING MUST RECOGNISE THAT DIFFERENT APPROACHES MAY BE NECESSARY IN DIFFERENT CIRCUMSTANCES, AND MUST BALANCE THE RIGHTS AND INTERESTS OF ALL THOSE AFFECTED, INCLUDING THE RESPONSIBILITY OF GOVERNMENTS TO ACT IN THE INTERESTS OF THE COMMON GOOD.