

**SECRETARIAT OF THE PACIFIC COMMUNITY****FORTY-THIRD MEETING OF THE
COMMITTEE OF REPRESENTATIVES OF GOVERNMENTS AND ADMINISTRATIONS**
(Suva, Fiji, 12–15 November 2013)**AGENDA ITEM 5.1 A: UPDATING THE CANBERRA AGREEMENT TO GIVE LEGAL EFFECT TO
PREVIOUS CONFERENCE DECISIONS AND INTRODUCE PROVISIONS FOR OTHER
MEMBERSHIP CATEGORIES**

(Paper presented by the Secretariat)

SUMMARY

1. The 2012 independent external review of SPC suggested that ‘...*SPC may want to review whether it wants to expand its membership or develop alternatives to full membership for parties that would like to work more closely with SPC for further consideration by CRGA*’.¹
2. At CRGA 42, the secretariat presented a paper considering the expansion of SPC’s current policy on membership. After discussing the paper, CRGA decided to establish a Working Group on Membership to work with the secretariat to develop a more detailed report for CRGA 43 and the 8th Conference in 2013.
3. This paper covers a number of issues arising from preparatory work undertaken while developing the paper requested by CRGA,² including *inter alia*:
 - the necessity to give legal effect to the 1997 conference resolution to change SPC’s name from ‘the South Pacific Commission’ to ‘the Pacific Community’ and the 1983 conference resolution expanding and granting full and equal membership to all current members of SPC;
 - issues relating to expanding the territorial scope and boundary of SPC to cater for potential applications for new membership; and
 - the implications for the Canberra Agreement of creating new membership categories.
4. Following consultations with the Chair of the Working Group and the remaining founding members of SPC, the secretariat proposes several solutions for each of the issues mentioned above for consideration by CRGA 43 and the 8th Conference of the Pacific Community.
5. Taking into account both the provisions of the Canberra Agreement and the need for pragmatic solutions to a number of these issues, the secretariat has formed the view that:
 - there is sufficient state practice to preclude the need to formally amend the Canberra Agreement to give legal effect to the Conference’s 1997 resolution (the paper defines this as ‘the alternative approach’).

¹ Independent External Review of SPC, paragraph 85.

² The paper referred to is tabled under agenda item 5.2 B.

- for those states that have been considered as full members since 1983 but that have not deposited an instrument of accession with the Government of Australia, pursuant to the provisions of the Agreement, there is also sufficient state practice to preclude the necessity of formally acceding to the Canberra Agreement.
- the Canberra Agreement's provisions on full membership are sufficiently clear and need no further elaboration.
- it will be necessary to amend the Canberra Agreement to create any new category of membership, such as associate member or observer.

RECOMMENDATIONS

6. CRGA is invited to:

- i. consider and approve the secretariat's proposal to give legal effect to the 1997 Conference resolution to rename the 'South Pacific Commission' the 'Pacific Community', as proposed by the draft resolution in Annex A;
 - ii. consider and approve the secretariat's proposal to legally recognise the status of current members of SPC in accordance with the intent of the 1983 South Pacific Conference resolution that expanded the membership of SPC and granted equal and full membership status to all members, as proposed by the draft resolution in Annex B;
 - iii. consider and approve the establishment of a category of associate member and a category of observer in line with the secretariat's proposal outlined in Annex C (I, II and II);
 - iv. direct the secretariat and the CRGA Working Group on Membership to further develop the draft amendments to the Canberra Agreement relating to associate membership and observer status, together with the draft Policy on Membership and Observer Status, and to present a finalised proposal to CRGA 44.
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UPDATING THE CANBERRA AGREEMENT TO GIVE LEGAL EFFECT TO PREVIOUS CONFERENCE DECISIONS AND INTRODUCE PROVISIONS FOR OTHER MEMBERSHIP CATEGORIES

Purpose

1. This paper presents important policy issues for consideration by CRGA 43 and the 8th Conference of the Pacific Community relating to the urgent need to make some amendments to the Canberra Agreement to (i) give legal effect to two previous landmark conference decisions, (ii) further define the territorial scope of the organisation under its provisions for full membership, and (iii) make relevant provisions for the creation of other categories of membership and observers at SPC.

Background

2. The independent external review (IER) of SPC in 2012 suggested that '*...SPC may want to review whether it wants to expand its membership or develop alternatives to full membership for parties that would like to work more closely with SPC for further consideration by CRGA*'.³
3. The secretariat presented a paper to CRGA 42 in November 2012 seeking CRGA's consideration and approval of expanding the provisions of SPC's current policy on membership⁴ to include a new category of 'associate member'.
4. CRGA 42 considered the paper and '*agreed to establish a working group, to be chaired by France as the chair of CRGA, and to include French Polynesia, Marshall Islands, Papua New Guinea, Samoa and the United States, to work with the secretariat to examine a number of issues raised by members during the discussion and submit a more detailed report to CRGA 43 and the 8th Conference in 2013*'.³
5. In the course of preparatory work on developing a new SPC membership policy to augment the Tahiti Nui Declaration, it became apparent that it is necessary to update certain aspects of SPC's founding treaty, 'the Canberra Agreement', to give legal effect to any proposed new categories of members and observers.

Discussion

6. The question of expanding the membership of SPC to establish a new category of 'associate member' and make provision for observer status is both a policy and legal matter.
7. The international treaty establishing SPC, the 'Agreement Establishing the South Pacific Commission' (Canberra Agreement) has provisions for full membership. It does not however have provisions for other categories of members or observers. Therefore, CRGA and Conference need to consider how best to proceed to allow members to establish such new categories.
8. In the course of assessing the issue of establishing new membership and observer categories, it also became apparent to the secretariat that two landmark decisions by previous Conferences had not yet been given legal effect through the appropriate amendments to the Canberra Agreement. These were the 1997 Canberra Conference resolution to change the name of the organisation from the 'South Pacific

³ Independent External Review of SPC, paragraph 85.

⁴ Tahiti Nui Declaration (2011), paragraphs 11–16.

Commission' to the 'Pacific Community' (with the organisation's secretariat to be known as the 'Secretariat of the Pacific Community'), and the 1983 Saipan Conference resolution to expand the membership of SPC through granting full and equal membership to all Pacific Island countries and territories at the time.

9. Due to the importance of these issues and their likely implications for the Canberra Agreement, the secretariat has liaised with the Chair of the Working Group on Membership (France) and with his agreement has developed this paper and a draft paper on the 'SPC membership policy' (Paper 5.1 B) for consideration by CRGA and Conference. The secretariat will also consult with SPC's remaining founding members and will table both papers for consideration by the CRGA Working Group before they are considered by CRGA.
10. Given the complexity of dealing with legal matters relating to probable amendments to SPC's founding instrument, and given that there are several related matters, the secretariat proposes to deal with each matter separately to be supported by a separate resolution for consideration and approval by CRGA 43 and the 8th Conference. In adopting this approach, the secretariat hopes that the matters that are relatively straightforward can move ahead with minimal effort, and those that could require more work can be dealt with through processes to be decided by CRGA and Conference. The next section of the paper deals with the proposed next steps.

Proposed way forward

A. *Giving legal effect to the decision by the 37th South Pacific Conference held in Canberra in 1997 to rename the 'South Pacific Commission' the 'Pacific Community'*

11. The 37th South Pacific Conference held in Canberra in 1997 renamed 'the South Pacific Commission' the 'Pacific Community'⁵.
12. For the past 16 years, the organisation has operated under this name with the full acceptance of SPC's members, partners and stakeholders to the effect that it is also accepted that any new member of the organisation if accepted is admitted to 'the Pacific Community'. This understanding has been the case since the 1997 SPC Conference adopted the resolution to rename the organisation. In effect, while the conference resolution has been administratively implemented, it has not yet been legally implemented. Legal implementation can only be achieved by making the required amendment to the Canberra Agreement.
13. As a consequence, any new members, associate members or observers would, if accepted now, in a strictly legal sense be admitted to the South Pacific Commission and not the Pacific Community because the Canberra Agreement has not yet been amended to give legal effect to the new name.
14. The secretariat therefore considers, as a matter of urgency, that appropriate steps must be taken to give legal effect to the name change decided by Conference in 1997.
15. The secretariat initially considered drafting an amendment to the Canberra Agreement in order to enact the decision made by Conference in 1997 and to formally establish the Pacific Community as a legal entity under international law. However, acknowledging the fact that the new name has been accepted and used for 16 years, and that the procedure for formally amending an international treaty is generally lengthy, the

⁵ Paragraph 3 – Tahiti Nui Declaration.

secretariat proposes an alternative approach, which would preclude the need to modify the Canberra Agreement on this specific point.

16. The basis for this alternative approach is what is referred to in international customary law as ‘sufficiently dense state practice’. This ‘state practice’ is itself based on the systematic and uniform recognition of the Pacific Community over the last 16 years, together with the absence, since 1997, of any use of the name ‘the South Pacific Commission’, when referring to the international organisation created by the Canberra Agreement.
17. Under this alternative approach, the secretariat invites members to acknowledge that there is sufficiently dense state practice as regards recognition and use of ‘the Pacific Community’ since 1997. As a consequence of this state practice, the ‘Pacific Community’ has, in both a practical and now legal sense, supplanted the ‘South Pacific Commission’ as a subject of international law and the Canberra Agreement should henceforth be read in that light.
18. If CRGA and Conference accept and endorse the alternative approach:
 - a. all references to the ‘South Pacific Commission’ or to ‘the Commission’ contained in the Canberra Agreement, its amendments and annexes, should now be read as the ‘Pacific Community’ or ‘the Community’; and
 - a. all references to ‘the South Pacific Conference’ contained in the Canberra Agreement, its amendments and annexes, should now be read as ‘the Conference of the Pacific Community’.
19. The secretariat proposes the attached resolution (Annex A) giving legal effect to the name change for consideration and approval by CRGA 43 and the 8th Conference.
- B. ***Giving legal effect to the decision by the 23rd South Pacific Conference held in Saipan in 1983 granting equal membership status to all Pacific Island countries and territories***
20. Before the 1983 Conference, other than SPC’s founding members, only eight countries had acceded to full membership of the organisation through depositing their formal instruments of accession with the depository (Australia). These countries are Samoa (1965), Nauru (1969), Fiji (1971), Papua New Guinea (1975), Tuvalu (1978), Solomon Islands (1978), Niue (1980) and Cook Islands (1980).
21. The 23rd South Pacific Conference held in Saipan in 1983 agreed on a resolution enlarging the membership of SPC to comprise all current members (26), thereby granting full and equal membership of SPC to all the countries and territories that had not formally deposited their instruments of accession. This Conference resolution has been implemented administratively and uniformly observed since 1983. For the past 30 years, the full and equal membership of all 26 members has been accepted fact and practice and all countries and territories have, in every way, acted as full members of the organisation since 1983. Furthermore, each has been accepted as such by all other members of SPC, the secretariat and SPC’s international partners and donors. As such, there is today sufficiently dense state practice to consider that those countries are in fact, under international law, members of the Pacific Community as if they had followed the procedure outlined in article XXI§66 of the Canberra Agreement.
22. The secretariat considers that it is fundamental and urgent that appropriate steps be taken to give legal recognition to the decision of the 23rd South Pacific Conference to expand the membership of the organisation and grant equal status to its members.

23. The secretariat proposes for consideration and approval by CRGA 43 and the 8th Conference the attached resolution (Annex B) to legally recognise the status of the current members of SPC in accordance with the intent of the 1983 South Pacific Conference resolution that expanded the membership of SPC and granted full and equal membership to all current members.

C. *Membership categories and observers*

24. The Canberra Agreement caters only for full membership under articles II and XXI. There is no provision for other categories of membership or observers. However, it is clear there are countries and partners that wish to engage seriously and genuinely with SPC. It is also clear that many SPC members support this development. The IER heard this view in their consultations and brought it to the attention of CRGA. It is now time to consider how best to proceed.
25. The secretariat is of the view that CRGA and Conference are able to make a policy decision to establish other categories of membership and observers. The Secretariat suggests that the two categories should be considered separately, since the rights and obligations of each category are distinct. The policy decision then needs to be given legal effect in order to formalise such categories.
26. The secretariat will present under agenda item 5.1 B a draft 'SPC membership policy' for consideration by CRGA and Conference. The policy will guide CRGA and Conference in their decision-making on membership issues.
27. For this paper, the secretariat proposes that the subject be considered in three separate parts: full membership; associate membership and observers.

a. Full membership

28. The secretariat considers that the current criteria for full membership are sufficiently clear: the provisions of the Canberra Agreement, particularly articles II and XXI, provide the legal basis and conditions for admission as a full member of SPC.

b. Associate membership

29. The secretariat recommends that CRGA and Conference approve a resolution establishing a category of associate membership at SPC.
30. The secretariat attaches under Annex C (I) a draft resolution seeking consideration and approval by CRGA 43 and the 8th Conference of the creation of a category of associate membership of SPC and suggests concluding the process with the support of the CRGA Membership Working Group.

c. Observer status

31. The secretariat considers that the category of observer status would provide an excellent means of enhancing engagement and outreach with countries or territories that do not qualify for full or associate membership. It could include multi-lateral, international, regional, private sector agencies or non-state actors that work in partnership with SPC and participate in its activities, including *inter alia* attending SPC meetings.
32. The secretariat recommends that CRGA and Conference approve a resolution establishing an observer category at SPC.

33. In Annex C (II), the secretariat proposes a draft resolution seeking consideration and approval by CRGA 43 and the 8th Conference of the creation of a category of observers of SPC and suggests concluding the process with the support of the CRGA Membership Working Group.

d. Draft policy for associate membership and observer status at SPC

34. The secretariat has prepared a draft 'Conference Policy on Membership and Observer Status' that will be discussed in detail under agenda item 5.1 B. However, for completeness the secretariat attaches under Annex C (III) a draft resolution seeking consideration and approval in principle by CRGA 43 and the 8th Conference of the draft Policy on Membership and Observer status at SPC. The secretariat suggests concluding the process with the support of the CRGA Membership Working Group.

D. Next steps

35. The secretariat is of the view that:
- a. the resolution to give legal effect to the 1997 Conference Resolution to rename the 'South Pacific Commission' the 'Pacific Community' (Annex A) is straightforward and therefore recommends that CRGA 43 and the 8th Conference of the Pacific Community consider and approve it.
 - b. the resolution to give legal recognition of the status of all current members of SPC in accordance with the intent of the 1983 South Pacific Conference Resolution⁶ (Annex B) is also straightforward and therefore recommends that CRGA 43 and the 8th Conference of the Pacific Community consider and approve it.
 - c. the resolutions relating to the creation of new categories for associate membership and observers will require more analysis. The secretariat recommends that CRGA 43 and the 8th Conference consider and approve in principle the creation of these two new categories and the associated draft resolutions presented in Annex C (I); C (II) and C (III).
36. As mentioned in paragraph 26 above, it should be noted by members that the policy guidelines underpinning the two potential new categories of associate member and observer will be dealt with in further detail under agenda item 5.1 B.

Recommendations

37. CRGA is invited to:
- i. consider and approve the secretariat's proposal to give legal effect to the 1997 Conference resolution to rename the 'South Pacific Commission' the 'Pacific Community', as proposed by the draft resolution in Annex A;
 - ii. consider and approve the secretariat's proposal to legally recognise the status of current members of SPC in accordance with the intent of the 1983 South Pacific Conference resolution that expanded the membership of SPC and granted equal and full membership status to all members, as proposed by the draft resolution in Annex B;

⁶ The resolution expanded the membership of SPC and granted equal and full membership status to all current members.

- iii. consider and approve the establishment of a category of associate member and a category of observer in line with the secretariat's proposal outlined in Annex C (I, II and II);
 - iv. direct the secretariat and the CRGA Working Group on Membership to further develop the draft amendments to the Canberra Agreement relating to associate membership and observer status, together with the draft Policy on Membership and Observer Status, and to present a finalised proposal to CRGA 44.
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ANNEX A

RESOLUTION FORMALLY CHANGING SPC'S NAME TO THE PACIFIC COMMUNITY

The Conference of the Pacific Community,

Wishing to formally give legal effect to the 1997 decision of the 37th Conference of South Pacific Commission to change the organisation's name from 'the South Pacific Commission' to 'the Pacific Community',

Considering the generalised recognition and use of 'the Pacific Community' by members, stakeholders and partners in the international community to refer to SPC,

Noting that this recognition and use has been systematically and continuously observed over the last 16 years,

Has resolved the following:

1. There is sufficiently dense state practice to consider that the 'Pacific Community' has, in both a practical and legal sense, supplanted the 'South Pacific Commission' as a subject of international law;
 2. As a consequence, the Agreement Establishing the South Pacific Commission (Canberra Agreement) is amended as follows:
 - (a) all references to the 'South Pacific Commission' or to 'the Commission' contained in the Canberra Agreement, its amendments and annexes, shall be read as the 'Pacific Community' or 'the Community'; and
 - (b) all references to 'the South Pacific Conference' contained in the Canberra Agreement, its amendments and annexes, shall be read as 'the Conference of the Pacific Community'.
 - 3 This Resolution shall take immediate effect upon its adoption by the Conference. The Secretariat of the Pacific Community shall provide members with an updated and consolidated version of the Canberra Agreement taking into account the modifications mentioned at paragraphs 1 and 2 above.
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**RESOLUTION ON RECOGNISING THE LEGAL STATUS OF
CURRENT MEMBERS OF SPC**

The Conference of the Pacific Community,

Accepting the 1983 Resolution of the 23rd South Pacific Conference (Saipan Resolution) that expanded the membership of SPC to include all current members including some countries and territories that had not at the time individually acceded to the Canberra Agreement,

Wishing to accord legal recognition to the status of all current members of SPC, in particular those that had not individually acceded to the Canberra Agreement prior to the 1983 Resolution,

Resolves as follows,

1. For the last 30 years, the countries and territories mentioned in the 1983 Saipan Resolution have been systematically and uniformly accepted as full members of the Pacific Community by all other members of SPC, by the Secretariat and by SPC's international partners and donors.
 2. This basis constitutes sufficiently dense state practice to confirm that, notwithstanding the absence of some individual members' formal accession to the Canberra Agreement, all 26 current members of the Pacific Community are under international law full members of the Pacific Community.
 3. All such members are, therefore, henceforth bound by the provisions of the Canberra Agreement.
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ANNEX C

**RESOLUTION ON ASSOCIATE MEMBERSHIP AND OBSERVER STATUS
OF THE PACIFIC COMMUNITY**

The Conference of the Pacific Community,

Acknowledging that there are countries and partners that wish to engage seriously and genuinely with the Pacific Community,

Taking into account the wish by the membership to welcome new members and establish new categories of membership and observers,

Wishing to provide such countries and partners with a formal means of engagement,

Resolves as follows:

I – On Associate Membership

1. The creation of a category of Associate Member of the Secretariat of the Pacific Community is approved.
2. The Agreement establishing the Pacific Community (Canberra Agreement) will be amended to give legal effect to this Resolution.
3. The draft amendment to the Canberra Agreement establishing the category of Associate Member of SPC is approved in principle.
4. The Secretariat and the CRGA Working Group on Membership are mandated to further develop this draft amendment and to present the finalised instrument to members no later than CRGA 44 in 2014.

II – On Observer Status

1. The creation of a category of Observer to the Secretariat of the Pacific Community is approved.
2. The Agreement establishing the Pacific Community (Canberra Agreement) will be amended to give legal effect to this Resolution.
3. The draft amendment to the Canberra Agreement establishing the category of Observer to SPC is approved in principle.
4. The Secretariat and the CRGA Working Group on Membership are mandated to further develop this draft amendment and to present the finalised instrument to members no later than CRGA 44.

III – On the draft Policy for Membership and Observer Status of the Pacific Community

1. The draft Policy for Membership and Observer Status of the Pacific Community is approved in principle.
 2. The Secretariat and the CRGA Working Group on Membership are mandated to further develop this draft policy and to present the finalised document to members no later than CRGA 44.
 3. Once formally endorsed by members, the Policy on Membership and Observer Status of the Pacific Community will become SPC's formal policy guideline when considering any request for full membership, associate membership or observer status.
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