HUMAN RIGHTS COUNCIL OF AUSTRALIA

NATIVE TITLE AND ABORIGINAL AUSTRALIANS

SUBMISSION TO THE JOINT COMMITTEE ON NATIVE TITLE AMENDMENT BILL

Section 1: Overview

The Human Rights Council of Australia is of the view that the amendments to the Native Title Act 1993 (the NT Act) proposed by the Native Title Amendment Bill 1997 (the NTA Bill) will bring greater legal uncertainty and more litigation, not the greater certainty which the Government claims. The Bill is misleading in that it will not achieve what lease holders have been led to expect while at the same time its provisions cloak an attempt at nationalisation of native title for the benefit of Commonwealth and State governments.

The uncertainty arises from:

I. doubt about the validity of the legislation on constitutional grounds

II. the possibility that the amending legislation will operate to invalidate the NT Act itself

III. reduction in mediation and negotiation under the NT Act and an increase in litigation at common law

IV. inconsistency and lack of clarity in the provisions which purport to confirm the common law as stated in Mabo and *Wik*

Moreover, what is attempted to be legislated by the NTA Bill has potentially far reaching and deleterious effects on

V. the observance of human rights domestically

VI. Australia's consequent ability to influence human rights observance in our region and

VII. our standing as a responsible and bona fide member of the international community and our relationship with trading and diplomatic partners.

The responses of State and Commonwealth governments to the High Court's decisions on native title raise some of the most important human rights issues to face Australia since Federation. The legislative response to *Wik* represented by a number of the provisions of the Bill is divisive within the Australian community and damaging to our interests internationally, without any countervailing benefit.

The co-existence of interests in property is well known to Australian law and a concept well understood by the public at large—trusts, remainders, mortgages, easements, profits à prendre, leases and mining rights are common examples. *Wik* did not introduce a new concept in recognising the co-existence of interests in land. Co-existence does not need to lead to uncertainty in this any more than in other situations where several interests exist in relation to the same property. The Ten Point Plan, and its legislative expression, in so far as it seeks to extinguish the rights of native title holders rather than to clarify the manner in which the co-existing rights of native title holders and pastoralists may be exercised, represents a disproportionate response to *Wik*.

The decision of the High Court in *Wik* protects the rights of pastoralists to continue using and developing their properties in accordance with the terms of their leases. The legitimate concerns of pastoralists as to the day to day exercise of their rights can be addressed by amendments to the NT Act which spell out more clearly the respective rights of pastoralists and native title holders and claimants, so that pastoralists can get on with running their businesses without constant and costly reference to lawyers. Such amendments, the effects of which are outlined in the final section of this submission, need not involve an upgrading of the property rights of one section of the community—the pastoralists—to the detriment of another section—the indigenous people—to be financed by the taxpayers. They need not involve a breach of Australia's international human rights obligations nor a threat to the opportunity for all Australians to live together in the future in a peaceful, prosperous and just community.

Section 2: Provisions of the Bill

The provisions of the Bill which most give rise to our concerns are:

Confirmation of Past Extinguishment (Division 2B of Part 2)

Provision for the compulsory acquisition of native title rights to permit upgrade of pastoralists' interests to a right of exclusive possession (Subdivision M of Division 3 of Part 2)

Restrictions of the Right to Negotiate (Subdivision P of Division 3 of Part 2)

Reduction in the right to Make Claims

Sunset clauses (ss 13(1A) and 52(A)

Overly restrictive threshhold test (ss 190B and 190C)

Loss of guaranteed access to the National Native Title Tribunal (ss 207A and 207B) d.

Other procedural obstacles

The concerns raised by these provisions are set out in more detail below.

Section 3: Reasons for Concern - Lack of Certainty

3.1 Constitutional Issues

The Race Power

The Government relies on legal advice that the amendments to the Native Title Act will be supported constitutionally by the race power (s 51(xxvi) of the constitution). It was held by the High Court in *Koowarta* (*Koowartha v Bjelke-Petersen (1982) 153 CLR 168*) in 1982 that it is possible for the race power to be utilised in either direction in relation to a particular racial group (ie. beneficially or detrimentally) Since then, however, some members of the High Court have stated that, in the light of the 1967 referendum, the primary object of the power is beneficial. There seems to be no doubt that the intention of the constitutional amendment brought about by that referendum was to grant authority to the Commonwealth to legislate for the benefit of indigenous peoples. .In addition, Australia's ratification of international instruments, which oblige Australia to ensure that legislative action does not discriminate on the grounds of race to the detriment of a particular racial group, would make it seem more likely the Court would interpret the power as requiring it to be exercised in the beneficial direction. This issue will be considered by the Full Court of the High Court in a matter currently before it involving the Hindmarsh Island Bridge Act. It is unlikely that that case will be heard before February 1998.

The External Affairs Power

It is possible, although less likely, that s.51(xxix) of the constitution might be relied on to support the amendments proposed by the Bill.

The High Court has been of the view that the government should have a great deal of leeway in deciding how to frame domestic legislation to implement the intentions of an international instrument. However, it has been said that the legislation must be "reasonably" able to be said to give expression to the terms of the treaty on which it is purportedly based, "appropriate and adapted to achieving what is said to impress it with the character of a law with respect to external affairs" and proportionate to the intended end of the international instrument (*The Commonwealth v Tasmania (1983) 158 CLR 1 at 259,260*).

To be supported by the external affairs power, the amendments would have to be argued to promote the objects of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD). As is discussed below the amendments in general, far from implementing the objects of CERD, contradict them. They could only be supported as a "special measure," protected by s 8 of the Racial Discrimination Act 1975 (RDA) and supported by Article 1(4) of the CERD. To qualify as a "special measure", however, legislative provisions must "confer a benefit" on and "secure adequate advancement" of the people to whom the "special measures" are directed and, in determining whether they do this, "the wishes of the beneficiaries ..... are of great importance (perhaps essential)" The proposed amendments do not meet these requirements and therefore, cannot qualify as a "special measure."

It must be concluded that, as the provisions of the NTA Bill do not benefit or advantage indigenous people and are opposed by them, they would be open to challenge in the High Court on constitutional grounds, in relation to the race power and/or the external affairs power.

Just terms

S.51(xxxi) of the constitution confers power on the Commonwealth Parliament to make laws with respect to the "acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws." New s 22 seeks to validate "intermediate period acts" i.e acts by governments between 1st January 1994 and 23rd December 1996 where the government proceeded on the basis that native title had been extinguished by a non exclusive pastoral lease. The future acts provision of the Native Title Act was not complied with in relation to these acts and consequently there was no notice given to potential native title holders. The provision designed to validate these acts, together with the sunset clause, which prevents claims for native title and compensation being made after six years from the date of the legislation coming into force, may well operate to deprive native title holders of their rights and render them unable subsequently to obtain "just terms" compensation.

The legislation may well be challenged on the basis that its enactment has led to the acquisition of property on other than "just terms".

3.2 Effect on the Native Title Act

The Native Title Act also depends on S. 51(xxvi). If the amending legislation (which, once enacted, does not stand alone but becomes part of the Act it amends and changes it in the direction of the amendments) is open to challenge, then so too may be the Native Title Act as a whole. The High Court has judged the Native Title Act to be a proper evercise of the race power on the basis of containing provisions both positive and negative as far as indigenous people are concerned, but on balance for their advancement. If the positive aspects are removed, the whole Act may be invalidated.

The Mabo case took ten years from start to finish. Cases involving native title are complex, potentially lengthy and expensive. Because the Court in Mabo gave only broad statements of principle and native title cases raise issues which have not hitherto been considered in detail by the courts, it was likely that many of the cases following Mabo would have to go on appeal to higher courts to rule on these issues. The cost of this would be beyond the reach of most Aboriginal communities.

Mabo gave Aboriginal communities the right to veto developments on land where native title existed, if those dealings or developments might extinguish or impair their native title. While the long process of deciding whether native title existed was taking its course, anyone wishing to develop or deal with the land would have to await the outcome. If native title were established then tne native title holders could at their discretion veto that development on their land.

It was clearly in the interests of all parties to have claims processed relatively quickly with minimum cost, through conciliation and agreement rather than litigation. It was in the interests of the wider community for procedures to be put in place to enable land to be made available for future development. That is the purpose of the Native Title Act 1993. The Act embodies a trade off by Aboriginal people of their right to veto and possible rights in post 1975 Crown grants which may have been invalid as contrary to the Racial Discrimination Act 1975 (RDA), in return for simpler procedures for making a claim and having it determined and a right to negotiate in certain circumstances.

The very considerable advantages to all parties brought about by the the enactment of the Native Title Act, the result it should be noted of negotiation involving all interests concerned, may be lost if the Act itself is threatened by the enactment of the proposed amendments.

The loss of the Act would inevitably bring greater uncertainty for all parties for greater lengths of time, in relation to native title claims and proposals for development.

3.3 Uncertainty in the Provisions of the Bill

Proposed Division 2B of Part 2 of the NT Act is entitled, "Confirmation of past extinguishment of native title by certain valid or validated acts". It is apparent from the title of Division 2B that it is intended to **confirm** the past extinguishment of native title rather than to **effect** extinguishment by legislation. The Attorney-General's second reading speech makes this clear. In paragraph 26 under the heading "Confirmation" the Attorney said:

> "It needs to be clearly understood that the Government does not seek to extinguish native title in this process. We do not seek to go beyond what can be inferred from the decisions of the High Court as to what acts have already extinguished native title."

Faced with such clear statements of the intention behind the Division a Court would be bound to hold that native title was not extinguished by the Division. Therefore, regardless of whether or not an interest is included in the schedule or is within the definition of "previous exclusive possession act", it will be necessary to ascertain whether native title had previously been extinguished at common law. Proposed s 23C and s 23E, relating to "previous exclusive possession acts", therefore, adds nothing to the common law. They will leave us precisely in the same position as we are in today. To determine whether native title has been extinguished in the past it will be necessary for there to be litigation on a parcel by parcel approach. The Division when enacted will provide no greater certainty to land owners than they have today.

A similar problem affects proposed s 23G and s 23I, which relate to "previous non-exclusive possession acts". It cannot be said with any certainty whether any particular act, such as the granting of a pastoral lease, "involves the grant of rights and interests that are inconsistent with the native title rights and interests" until that issue is determined by a court. Pastoralists who believe that these provisions will provide them with the certainty that they complain they lost as a result of **Wik** are sadly deluded.

Two qualifications need to be mentioned. Firstly, proposed s 23A(4) provides:

> "(4) This Division also allows States and Territories to legislate, in respect of certain acts attributable to them, to extinguish native title in the same way as is done under this Division for Commonwealth acts."

Does the reference to the States having power to legislate "to extinguish native title" indicate that although the Commonwealth may only confirm past extinguishment, the States may effect extinguishment. If this is so, then it would amount to a "Trojan horse" given what the Attorney has said about the purpose of the Division. Also, it would constitute an implied repeal of the Racial Discrimination Act 1975 because at the present time that Act prevents the States from extinguishing native title in a discriminatory way as was held in Mabo v The State of Queensland (No. 1) (1988) 166 CLR 186.

The second qualification is that the Attorney made clear in his second reading speech that the Government does propose to extinguish native title in so far as the common law may provide that native title is not permanently extinguished by the grant of a pastoral lease (paragraph 30). Whether proposed ss 23G and 23I are effective to achieve that result is moot. However, assuming they are, then given the view of the majority of the High Court in *Wik* that pastoral leases are sui generis and are not common law leases with a reversion expectant on expiration of the term, then the government which granted the lease will pick up what in effect is a reversion while the relevant native title holders will lose such an interest. Of course compensation will be payable as provided in proposed s 23J. These provisions will amount to the nationalisation of all land currently under Crown lease with just terms compensation payable to the native title holders. This will not assist the pastoralists as their rights already prevail over the native title holders. It merely means that the wider community will have to buy the country from the native title holders.

Section 4: Reasons for Concern - Human Rights Issues

4.1. The provisions of the Bill breach Australia's obligations under international human rights law.

The provisions of the Bill that distinguish potential Native Title holders (by necessity defined in terms of race) from holders of other property title, so as to diminish the rights of native title holders, are in violation of two covenants to which Australia is a Party - the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of all forms of Racial Discrimination (CERD). As a Party to these two conventions Australia's obligation is to ensure that State acts (including legislation) conform with the terms of the conventions,

> Article 26 of the ICCPR provides that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law." It has long been accepted that this refers only to detrimental discrimination and also does not preclude unequal treatment in unequal circumstances.
>
> Article 27 of the ICCPR provides protection against the denial of the enjoyment or exercise by ethnic, religious or lingistic minorities of their cultural rights. The relationship between land use and culture in the case of indigenous peoples has been specifically recognised by the Human Rights Committee in commenting on the scope of this Article.
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> Article 1(1) of the CERD also prohibits discrimination on the grounds of race "which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social and cultural, or any other field of public life" Article 4(1) provides for "special measures" mainly intended to cover what might be popularly referred to as "positive discrimination," which better allows particular groups to exercise rights on an equal footing with other members of the community.

There is no doubt that the provisions of the Native Title Act amendments do not advantage indigenous people and contravene Australia's obligations as signatory to both covenants. A right of petition to the supervising committees of the CERD and the ICCPR would no doubt arise for individuals from indigenious communities.

The Universal Declaration of Human Rights (UDHR) provides, under Article 17, that :

> "Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property,"

The UDHR is a proclamation of the General Assembley of the United Nations. The incorporation of this particular provision into the dometic law of so many countries has led Kirby J. in a recent High Court decision to conmclude that it can now be "recognised as international customary law" As such it is binding on Australia at international law.

4.2. The provisions of Bill contradict domestic racial discrimination legislation.

By expressly distinguishing Indigenous and Torres Strait Islander people (i.e. potential native title holders) from holders of other types of property title holders in Australia and, on the basis of that distinction, treating them differently, the Bill contradicts the "formal equality" requirements of s 9 and 10 of the Racial Discrimination Act 1975 (RDA)

Discriminating provisions may be excepted if they can fall within the protection of s.8 of the RDA, which provides for "special measures." For reasons dicussed above the provisions of this Bill do not qualify S.

24MD deals with the acquisition of native title lands by States for the purpose of transferring them to a third party (i.e. leaseholders) so that party's lease can be upgraded to freehold or other exclusive tenure, with the payment of compensation by the state and not the lessee. As this sort of compulsory acquisition applies only to native title holders (by definition people of a particular race) it will be possible only if the NTA Bill rolls back the operation of the RDA or the State legislation is non discriminatory on its face and is applied in a non discriminatory way. There is currently no provision in the Bill to ensure this latter, despite the precedent of the insertion of a similar provision by amendment in the Social Security amendments cutting back the availability of welfare benefits to newly arrived migrants.

4.3. The enactment of the Bill would imply the repeal of the Racial Discrimination Act 1975 (RDA)

The amendments are designed to allow the States to take actions (S23A(4)) which the High Court said clearly they could not do under the RDA. i.e "to legislate in respect of certain acts attributable to them, to extinguish native title."

If the NTA Bill is enacted in its current form, therefore, its inconsistency with central provisions of the RDA (S.9 the right to non discrimination, s 10 the right to equality, s 8 the provision for special measures) could be held to constitute repeal of those provisions of the RDA, by operation of the principle of implied repeal by any subsequent Act.

4.4. In order to support the amendment provisions under the race power in the Constitution, the Government would have to argue that this power may be used to the detriment of a particular racial group within the Australian population as well as to their benefit.

The amendments can be supported constitutionally by either the race power or (less likely) the external affairs power.

Reliance on the external affairs power for authority for the amendments will depend on arguing successfully that they promote the objects of CERD. On the basis of what has been said above, this will be difficult.

The prospect of the Commonwealth and/or the States arguing in the High Court (at taxpayer expense) for the validity of the legislation, on the basis of the race power being able to be utilised

for the detriment of indigenous people (or any racial group), leaving aside the questionnable success of such an argument, is not one to be lightly contemplated. Such an action would be domestically divisive and very damaging to Australia's reputation and interests regionally and internationally.

4.5. The extinguishment of native title and removal of the right to negotiate will be damaging to the reconciliation process

Many of the proposed amendments to the right to negotiate are likely to lead to an undermining of Aboriginal self determination which is inimical to the reconciliation process.

To date negotiation has lead to the conclusion of a number of agreements which

* ensure the rights of farmers, miners, indigenous people, taxpayers and governments are all respected.

* bring training, employment, infrastructure and services to rural Australia, which will benefit the whole community

* ensure efficient resource development processes which are essential to regional economic development

*discourage litigation, which is expensive and essentially non productive, as the primary mode of dispute resolution

The removal of native title rights as a basis for negotiation and the curtailment of the right to negotiate itself will deprive indigenous people and the Australian community generally of these potential benefits. Although the Bill facilitates agreements being reached outside the court and tribunal system,. the widespread extinguishment of rights proposed by the Bill will remove the incentive for industry and government bodies to come to a consensual resolution on native title issues and could well result in weakened cooperation beteween industry and indigenous people. The Government itself has recognised that blanket extinguishment would risk permanent disaffection between indigenous and non indigenous Australians, would mean the elimination of the rights of a particular group, thus widely being seen as unfair, and could mean more difficulty for the mining industry in gaining agreements and cooperation of Aboriginal people. With its clear attempts at extinguishment, this proposed legislation risks having the same effects.

The recognition of property rights for Aboriginal people has offered the prospect of independence and dignity for Aboriginal communities - an essential prerequisite for overcoming the widely acknowledged disadvantage suffered by Aboriginal people, a result which has so far proved elusive for even the best intentioned public policy intitiatives and allocation` of resources.

Section 5: A Way Forward

Coexistence of Property Rights

Native title is a right recognised by the common law as stated by the High Court in the *Wik* and Mabo cases. It is consistent with, and now part of, Australia's property law regime, which has evolved over time through common law and statute. It should be recognised by the Government as a legitimate aspect of Australian property law which has been recognised in the normal course of the evolution of the common law, in a way precisely similar to the way that many aspects of our law have developed. The coexistence of interests in land exists in both common law and statute.

What enables a system of concurrent interests to work is

- the clear definition of each interest so that they do not conflict and;

- a means for determining conflict which does arise. There is no reason why native title, along with other interests, should not be fully integrated into a system which has these features. The suggestions made in this section are aimed at assisting this to occur.

Mabo and *Wik* have made it clear that pastoralists' rights will prevail to the extent of inconsistencies with native title rights. This should be sufficient to protect the business of pastoral lease holders. However, there could also be provision for leaseholders to be compensated for any loss which they can substantiate has occurred from their inability to conduct authorised activities because of the continuation of native title rights over the land. This would provide a "safety net" for the safeguarding of any interests, in the unlikely event that they are not appropriately protected by the principles enunciated in Mabo and *Wik*. This is likely to be significantly less costly than, and avoid the constitutional uncertainties of, the current proposals, whilst providing safeguards for legitimate pastoralist claims and interests.

The Native Title Act could also be amended to ensure that

(1) holders of other interests also have the widest opportunity to seek a determination of the extent of native title rights which exist in relation to any particular land;

(2) any activity by pastoral lessees relating to the use or development of their land for pastoral purposes would be valid as long as the activity was not prohibited by the terms of the lease;

(3) surviving native title rights could only be validly exercised if they did not interfere with the activity referred to in (2);

(4) if pastoral leases were surrendered or expired at some point in the future, any native title rights which still existed as at 1 January 1994 would fully revive over the land in question.

The debate around native title has also highlighted the difficulties in the property regime of a Federal system and the urgent need to review and restate Australian property law in the form of a uniform real property code. Such a project would be an appropriate celebration of a century of Federation and the activities necessary for its implementation could be properly funded from the

Federation Fund. Native title would take its place alongside other interests which would be provided for in such a code.

In the meantime, the Human Rights Council supports the suggestion to the Attorney General that the Native Title Tribunal be requested under S. 137 of the NTA to consider existing practices reflecting co-existence between pastoralists and Aboriginal people and the operation of existing statutory access clauses; the development of workable codes of practice for pastoral lessees and traditional owners in relation to access to and use of pastoral leasehold land, and the enforcement and dispute mechanisms that ought to be embodied in such codes; and the possibility of standard statutory access rights being provided on existing pastoral leases as an alternative mechanism for the enjoyment of native title rights.

See also

Native Title: A Simple Guide - A Paper for those who wish to understand *Mabo*, the *Native Title Act*, *Wik* and the Ten Point Plan

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