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NEW SOUTH WALES ABORIGINAL LAND COUNCIL

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Working Group on Indigenous Peoples
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REVIEW OF DEVELOPMENTS PERTAINING TO THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS PEOPLES

GENERAL STATEMENTS

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Madam Chair,

The New South Wales Aboriginal Land Council (NSWALC) welcomes the opportunity to comment on recent developments in Australia in relation to the promotion and protection of Human Rights and Fundamental Freedoms of Indigenous Peoples.

Unfortunately the situation in Australia has deteriorated since the Working Group's meeting last year.

Before I outline these developments, I would like to draw your attention to Article 26 of the Draft Declaration on the Rights of Indigenous Peoples, which provides (amongst other things) that Indigenous Peoples have the right to own, develop, control and use the lands and territories and other resources that we have traditionally owned or otherwise occupied or used. Associated with these land and water rights is our right to full recognition of our laws and customs, land tenure systems and institutions for the development and management of resources. Moreover, States bear a responsibility to provide effective measures to prevent any interference with or encroachment on these rights. confiscated, occupied, used or damaged without our free and informed consent. The right to develop and manage the resources found on our lands and in our waters, and to have this right recognised and protected by non-Indigenous legal systems is particularly pertinent to the circumstances of Indigenous Peoples in Australia.

Only this month the Australian Government has passed legislation which has diminished the meagre rights which flowed from the landmark *Mabo* decision (*Mabo v Queensland (No. 2)* (1992) 175 CLR 1) and the *Wik* decision (*Wik Peoples v State of Queensland and Others* (B8 of 1996).

The *Mabo* decisions of Australia's High Court is remarkable in that it marked the first time the Australian legal system has recognised that the continent was inhabited by Aboriginal Peoples when the British first arrived in 1788. *terra nullius*, the legal concept that was used for over 200 years to legitimise the invasion of our lands and the dispossession of our Nations, which was exposed as no more than a legal fiction.

The High Court therefore recognised for the first time the property rights or 'native title' that Aboriginal and Torres Strait Islander Peoples have always enjoyed and possessed. It recognised that as Indigenous Peoples, we are "entitled against the whole world to possession, occupation, use and enjoyment" of our lands and in accordance with our laws and customs.

However, the Court also found that native title only continues to exist where firstly, we have maintained our connection with the land and/or waters, and secondly, where our title has not been 'extinguished' by legislation or any action of a government which shows a clear intention inconsistent with the continued existence of native title.

However, the High Court did not comprehensively outline all circumstances which could extinguish native title. In an effort to establish that native title and pastoral leases can co-exist, the Wik and Thayorre Peoples of Cape York in Far North Queensland took the State Government back to the High Court four years after *Mabo*.

In the *Wik* decision, the High Court found that pastoral leases did not necessarily give exclusive possession to the pastoralists, and that native title rights could co-exist with a pastoral lease. In effect, Aboriginal People won back the right to have access to our land under pastoral leases - some 40 % of Australia. We won back the right to be consulted about the changes to the use of this land and to receive compensation if these changes diminished our native title rights.

But the *Wik* decision did not restore our land and cultural rights. We still only have the right to negotiate about how our land is used - not to veto developments and other activities that impact on our land. The *Wik* decision also limits our ability to fully enjoy our native title rights through its finding that whenever there is any conflict between our rights and those of the leaseholder, our rights will always be overridden.

In recognising the common law native title rights of Indigenous Peoples in Australia, these two High Court decisions have sparked a very polarised debate in Australia. The present Australian Government has consistently condemned the decisions of the High Court and advocated national legislation to wind back the rights of Indigenous Peoples in Australia to ensure "certainty", facilitate "proper land management" and "promote economic development" on leasehold land.

Earlier this month, legislation was passed in Australia to give effect to the Government's "Ten Point Plan" to make the Wik decision "workable". The Government consulted with non-Indigenous agricultural, pastoral and mining interests during the legislative negotiations. The Government froze out the Indigenous representatives entirely. Although this legislation is very new and we are not yet certain of the extent to which it will erode Indigenous Rights in Australia, we are sure of the following points: -

- **Native Title holders only retain the right to negotiate over our land until the State (provincial) Governments put in place their own procedure that must accord with legislative standards that are broadly the same as rights for pastoralists in most States.** Our concerns here are:
  a. firstly, that pastoralists have limited legal rights at present and these rights are fundamentally different to the inherent rights of native title holders;
  b. secondly; the rights of pastoralists differ from State to State with the result that Indigenous Rights will differ accordingly; and
  c. thirdly, Indigenous Peoples are very concerned at the prospect of some of the State Governments legislating to determine the scope of Native Title Rights due to the overtly hostile and racist attitudes towards Indigenous Peoples that are evident in States such as Western Australia and Queensland where large tracts of land are subject to native title. The requirement that the Federal Minister for Aboriginal Affairs must approve each proposed State regime does not provide us with peace of mind, even where the Minister's decision is subject to judicial review.

- **Mining companies and State Governments will only be required to *consult* with Native Title holders and claimants about ways of minimising the impact of mining on their Native Title rights and interests.** Indigenous Peoples will no longer enjoy a *right* to *negotiate* - rather we merely can expect to be asked for our input, which the mining company or government may or may not listen to.

- **When agreement cannot be reached between the parties, the objection will be heard by an independent person of body. However, this independent decision can be overruled by the State Minister for Aboriginal Affairs if this is in the 'interests of the State'.** It is likely that the 'interests of the State' will correspond with the interests of pastoralists and miners whose well-being is, in the eyes of most politicians, tantamount to the health of the economy, as well as their own short-term political survival.

One of the most fundamental elements of the Wik decision that is conspicuous by its absence from this legislation is **the principle of co-existence**. This principle was identified by the National Indigenous Working Group on Native Title as being at the very heart of the Wik decision and the foundation on which reconciliation could be built in Australia. The Working Group on Native Title continues to recognise the legitimate rights of pastoralists and accepts the Wik position that the

existing rights of pastoralists' will prevail wherever they may conflict with native title rights.

To put it bluntly, the elements of greed, hysterical paranoia and racism in some sections of the Australian community have pressured a mean-spirited and ideologically-blinkered government into winding back the enlightened decisions of our highest court.

The Mabo and Wik decisions have recently been applied in a case brought by Mary Yarmirr and Others on behalf of a number of traditional Aboriginal groups on Crocker Island, which is situated off the coast of the Northern Territory of Australia near Darwin. In this case, the Australian Federal Court dealt with the question of Indigenous Rights to the sea and sea bed, dealing for the first time since the Mabo and Wik decisions with common and statutory law recognition of off-shore native title rights and interests.

The Court's decision in the Crocker (*Mary Yamirr & Ors v The Northern Territory of Australia & Ors* [1998] 771 FCA [6 July 1998]) case was particularly narrow. It did determine that:

1. communal native title exists in relation to the sea and sea-bed within the claimed area;
2. the native title rights and interests do not confer possession, occupation, use and enjoyment of the sea and sea-bed within the claimed area to the exclusion of all others;
3. the native title rights and interests which the Court considers to be of importance are the rights of the common law holders, in accordance with and subject to their traditional laws and customs to have free access to the sea and sea-bed within the claimed area for all or any of the following purposes:
    - to travel trough or within the claimed area;
    - to fish and hunt for personal, domestic or non-commercial communal needs including the purpose of observing traditional, cultural, ritual and spiritual laws and customs;
    - to visit and protect places which are of cultural and spiritual importance; and
    - to safeguard their cultural and spiritual knowledge.

Whilst these recent findings of the Federal Court are definitely a step forward for the recognition of Indigenous rights in Australia, they fail to recognise Indigenous economic rights - even though the Court found as a matter of fact that the Indigenous Peoples concerned traded with neighbouring Indigenous Nations and

Indonesian fishermen.

The Court did not take into account the evolutionary nature of Indigenous society. The Court failed to recognise that to survive in the modern context, Indigenous Peoples must adapt our traditions, cultures and lifestyles to take into account the reality of the impact of non-Indigenous invasion, intrusion and dominance. To deny as the Court did, the rights of Indigenous Peoples to the resources of the sea and sea-bed, and to use them as economic commodities in the national economy has the effect of denying them effective, meaningful and enduring rights to survive as a distinct culture.

The Crocker decision attempts to freeze Indigenous Rights in Australia on an historic legal island. The Australian decision does not provide the level of protection that Indigenous Peoples now enjoy in other common law jurisdictions such as Canada and New Zealand. The decision is another manifestation of the failure of the Australian political legal system to adequately deal with the Rights of Indigenous Peoples to ensure our survival as distinct and autonomous Peoples.

Thank you, Madam Chair

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