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COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of
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of Minorities
Working Group on Indigenous Populations
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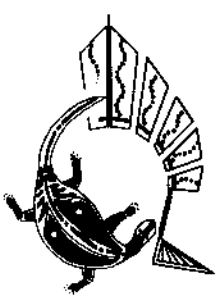
REVIEW OF DEVELOPMENTS PERTAINING TO THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS PEOPLE

Statement by Mr Mick Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Australia

Madam Daes

In the past twelve months I have produced my first annual report on the operation of the *Native Title Act 1993* (Cth).

In 1992, the decision in *Mabo [No:2]* was delivered by the High Court of Australia. Recognition of native title in that case was a monumental step forward for the protection of Indigenous interests in land and for Indigenous rights generally. However, a crucial feature of that decision was the finding that the sovereign government carries the right to extinguish native title. The manner in which a government can remove the property interests of its citizens raises a number of human rights issues. This is particularly so where the interference of property interests threatens the cultural heritage of those being dispossessed.



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It is my view that native title must be recognised and protected in a manner that is consistent with Australia's international obligations. Unfortunately this is not occurring at present.

The issue of extinguishment is currently the most crucial of the unresolved legal issues arising from *Mabo [No:2]*.

The approach of the majority of the judges in *Mabo [No:2]* is in my opinion troublesome. The extent of these problems is highlighted when you consider Indigenous perspectives and international human rights standards. The right to equality before the law and freedom from discrimination, the human right of freedom from arbitrary deprivation of property and the right to protection of culture are particularly relevant to the extinguishment of native title.

The common law treatment of native title in *Mabo [No:2]* is discriminatory. It does not deliver equality before the law to Indigenous people nor does it provide the equal protection of property interests. To my knowledge no other form of title is extinguished by an executive action without the authorisation of parliament. It is certainly difficult to think of any property interest which could be extinguished by a wrongful act. It is not clear why native title should receive lesser protection than other property interests.

Since 1975 the discriminatory treatment of our property interests has been remedied by the *Racial Discrimination Act 1975 (Cth)*. This principle of non-discrimination is further entrenched by the *Native Ttitle Act* with regard to the future protection of native title interests.[1] Neither of these legislative measures will assist Indigenous peoples whose titles have been deemed to be extinguished by some administrative act which occurred prior to 1975.

The right to own property free of arbitrary deprivation has been expressed in a number of international instruments. The most fundamental of these is Article 17 of the *Universal Declaration on Human Rights*. The human right not to be arbitrarily deprived of property was central to the protection of native title rights belonging to the Meriam people in *Mabo [No:1]*.[2] in that case the High Court noted that arbitrary does not only mean illegally, it also includes 'unjustly'.[3]

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[1] Sees7and 235, *NTA*. It should be remembered however, that the *NTA* also allows for the discriminatory validation of past grants at the expense of native title rights. See Aboriginal and Torres Strait Islander Commissioner, *op. cit.*, pp.67-68.

[2] *Mabo v Queensland* (1988) 166 CLR 186 per Brennan, Toohey and Gaudron JJ., p.218.

[3] *Ibid.* See also *State of Western Australia v The Commonwealth, op. cit.*, per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ., pp.25-28.

In my opinion, discriminatory extinguishment of native title at common law amounts to an arbitrary deprivation of property. This is particularly so given that the majority of the court held that extinguishment of native title would not give rise to compensation. Furthermore, the reasoning of the majority appears to lead to a situation where native title can be extinguished by an executive act without clear and unambiguous legislative authority to do so. Indeed, that native title will be deemed to be extinguished even where there is a wrongful act, is certainly within the meaning of arbitrary as is any deprivation of property without authority.

Interference with our titles to land directly affects and damages our cultural heritage. This is a natural consequence of the special relationship that Indigenous societies have with our land. Land is essential not just to ensure economic subsistence, but it is also central to Indigenous religious and social activities. Our human right to have our cultural heritage recognised and protected is intertwined with our need to have our land ownership recognised and protected.

At present, the legal construction of native title risks authorising the infringement of our right to enjoy our culture. The common law approach to extinguishment is removed from the reality of the existence of our laws and customs and only recognises native title where no inconsistent extinguishing act has occurred. This is exacerbated by the broad definition given on what is inconsistent.

As I noted in my *Native Title Report*, in many cases, despite past dealings with various parcels of land, we have continued the exercise of our laws and customs. The present construction of extinguishment can not cater for this on-going attachment in such a context. It renders it and the laws and customs upon which it is based - invisible.

The word 'extinguishment' is a misnomer. As long as our laws and customs exist, native title is not extinguished in Indigenous law. The common law may not recognise those rights, but governments and lawyers should not fool themselves that a declaration that extinguishment has occurred will make our laws and customs disappear. Nor will it dispose of the grievances of Indigenous peoples. The simple reality is that it will not. A fence is not so grand a structure that it can destroy our relationship to our land. A piece of paper cannot destroy our culture, except perhaps in the perverse imaginings of lawyers.

At present the courts are relying on legal theory in order to turn a blind eye to Indigenous realities. The absurd extreme of this is that a lease could be granted and never used by the grantee, but it will still be deemed by the courts to destroy rights based on thousands of years of culture. It is understandable that Indigenous peoples have difficulty in comprehending the justice in processes which operate in such an arbitrary manner.

The test for extinguishment should be whether the laws and customs are still being recognised by Indigenous peoples. Even if it is to be accepted that a subsequent grant can affect native title interests even without the clear and unambiguous authority of Parliament, then it is not necessary for native title to be deemed 'extinguished' as a result. In my opinion it is more equitable and appropriate to view valid grants affecting native title as only having a regulatory effect on native title for the period of the interest rather than construing such grants as extinguishing acts. This would be particularly relevant to a more just approach to leases. Native title rights should be recognised and continue in full when the leasehold expires, provided that the laws and customs which give content to native title continue to be observed. Likewise there should be greater flexibility to accommodate the co-existence of various interests in land where there is no actual conflict in land use.

Aboriginal grievances will continue despite the assertion of the legality of the extinguishment. Indeed it is the continuing observance of traditional laws and customs, despite the non-recognition of those systems in Australian courts, that has made native title claims possible today. This must be borne in mind by those who seek to deem native title extinguished in as many instances as possible. Our laws and customs do not disappear at the whim of Western jurisprudence. They will continue to be observed regardless what the common law says and we are entitled to have those laws and customs protected. Claims for protection of culture are no less legitimate where tribunals assert that the title to land was 'extinguished' in some distant legal past by an obscure administrative transaction. Failure to protect those laws and customs will amount to a breach of Australia's international obligations.

It is important not to lose sight of what extinguishment of native title is. It is an act of colonialism. It is the racist appropriation of property by the dominant culture on the basis that it has the power to do so. It is no less an act of colonial racism today than it was 207 years ago and the mere fact that

it has been sanctioned by the common law will add little to the legitimacy of the exercise of that power in the eyes of those being dispossessed.[4]

Avoidance of this issue will not make it go away. There may be nothing that can be done to remedy the perception that, for Indigenous people, the foundations of the Australian legal system is power and not justice, force and not consent. But human rights standards provide a basis for working out principles of extinguishment that may be perceived as a legitimate compromise between the interests of Indigenous and non-Indigenous people. An approach to extinguishment based on respect for human rights provides a way to reconcile the two laws and produce decisions on extinguishment that do not merely repeat the gestures of colonialism.

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Finally, Madam Daes, I wish to advise you and members of the Working Group that the South Australian Government has embarked on a Royal Commission into the spiritual beliefs of the Ngarrindjeri women of Hindmarsh Island in that State:

'This quasi judicial examination of the religious beliefs of these women constitutes in my opinion a breach of all peoples' right to freedom of thought and religion. I appeal to the South Australian Government to abandon this nonsense.'

In closing it would delight us enormously if the French President Mr Chirac announced the abandonment of his proposal to test nuclear weapons in the Pacific.

Thank you for your indulgence.

[4] Aboriginal and Torres Strait Islander Social Justice Commissioner, *op. cit.*, pp.78-79.