

Statement to the WGIP

By Mr Michael Dodson

On behalf of the

**Aboriginal and Torres Strait Islander
Social Justice Unit**

Agenda Item 5

MADAM DAES

THIS LAST YEAR HAS MARKED A VERY SIGNIFICANT TIME IN FURTHERING THE RECOGNITION OF HUMAN RIGHTS OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES IN AUSTRALIA. THE ESTABLISHMENT OF AN ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMMISSIONER WITH WIDE RANGING POWERS TO LOOK INTO THE HUMAN RIGHTS SITUATION OF INDIGENOUS AUSTRALIANS, HAS OPENED UP POSSIBILITIES FOR REAL CHANGE FOR MY PEOPLE THROUGHOUT AUSTRALIA.

I AM VERY PLEASED TO HAVE BEEN ABLE TO TAKE UP THE POSITION AS THE FIRST SOCIAL JUSTICE COMMISSIONER. MY APPOINTMENT WHICH FOCUSES EXCLUSIVELY ON THE HUMAN RIGHTS OF INDIGENOUS PEOPLES IN AUSTRALIA IS AN OVERDUE AND RIGHTFUL RECOGNITION OF THE URGENT NEED TO ATTEND TO AN AREA WHICH REMAINS THE GREATEST SCAR ON AUSTRALIA'S HUMAN RIGHTS RECORD.

MY MAJOR OBJECTIVE WILL BE TO ATTAIN SOCIAL JUSTICE IN BROAD AND SWEEPING TERMS FOR ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE, AND TO ENSURE THAT STRUCTURES ARE PUT INTO PLACE WHICH WILL SECURE THE CONTINUED RECOGNITION OF OUR HUMAN RIGHTS IN ALL RESPECTS. THIS IS AN AMBITIOUS AIM, AND I WILL BE WORKING CLOSELY WITH THE COUNCIL FOR ABORIGINAL RECONCILIATION, THE ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION AND OTHER ABORIGINAL AND TORRES STRAIT ISLANDER ORGANISATIONS TO GET A WIDE RANGING - CO-ORDINATED APPROACH.

IN ORDER TO MEET THE RANGE OF TASKS WITH WHICH I HAVE BEEN CONFERRED, MY UNIT IS COMPLETING A STRUCTURAL REVIEW AND DEVELOPING AN ESTABLISHMENT PROPOSAL WHICH WILL RECOMMEND ESSENTIAL STAFF AND RESOURCE LEVELS TO MEET WORKLOAD REQUIREMENTS COMPREHENSIVELY.

WE HAVE IDENTIFIED MANY OF THE KEY ISSUES. THE ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY COMPREHENSIVELY SET OUT THE EXTENT OF THE PROBLEMS FACING ABORIGINAL AND TORRES STRAIT PEOPLES, AND MADE WIDE RANGING RECOMMENDATIONS FOR ACTION AT A NUMBER OF LEVELS, AND IN MANY AREAS OF FEDERAL AND STATE GOVERNMENTS. IT IS NOW NECESSARY TO ENSURE THE FULL AND APPROPRIATE IMPLEMENTATION OF THOSE RECOMMENDATIONS, AND THAT THEY ACTUALLY HAVE THE EFFECT OF ACHIEVING THE FULL RECOGNITION OF THE HUMAN RIGHTS OF ABORIGINAL PEOPLE. THIS WILL BE A CRUCIAL PART OF OUR WORK.

ONE OF MY FIRST TASKS WILL BE TO SET ABOUT INFORMING ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE WHAT THEIR RIGHTS ARE, AND HOW BEST TO ATTAIN THEM.

MY MAJOR RESPONSIBILITY FOR THE COMING MONTHS WILL BE PRODUCING A STATE OF THE NATION REPORT. IT WILL BE LARGELY ASPIRATIONAL IN NATURE, AND LAY THE GROUNDWORK FOR FUTURE REPORTS AND ACTION.

ONE SPECIFIC PROJECT WHICH I SEE AS A PRIORITY, AND WILL BE COMMENCING SHORTLY IS THE EXAMINATION OF LEGISLATION WHICH MAY DISCRIMINATE AGAINST ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES. THIS WILL LEAD INTO A WIDER REVIEW OF ALL RELEVANT LEGISLATION AS IT IMPACTS UPON ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE. UNFORTUNATELY I NEED TO EXPRESS MY CONCERN THAT LEGISLATION ENACTED TO ESTABLISH MY COMMISSION DOES NOT PROVIDE FOR THE EXAMINATION OR REPORTING ON POSSIBLE BREACHES OF THE HUMAN RIGHTS OF INDIGENOUS AUSTRALIANS BY ENACTMENTS OR PROPOSED ENACTMENTS OF STATE AND TERRITORY LEGISLATURES. I URGE THE FEDERAL GOVERNMENT TO CONSIDER EXERCISING ITS CLEAR CONSTITUTIONAL POWER TO AMEND MY LEGISLATION TO MAKE THIS A POSSIBILITY.

THE LEGISLATION ALLOWS ME TO HAVE REGARD TO A NUMBER OF KEY INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, INCLUDING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, AND THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, AS WELL AS OTHER INSTRUMENTS WHICH I CONSIDER RELEVANT TO THE HUMAN RIGHTS OF INDIGENOUS PEOPLES. THIS REFERENCE TO INTERNATIONAL STANDARDS WILL BE AN IMPORTANT TOOL IN ENSURING THAT AUSTRALIA MEETS ITS INTERNATIONAL OBLIGATIONS, AND THAT ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE ENJOY THE HUMAN RIGHTS WHICH HAVE BEEN ESTABLISHED BY THE INTERNATIONAL COMMUNITY.

RECOGNISING THAT INDIGENOUS PEOPLES ALL OVER THE WORLD SHARE COMMON PROBLEMS AS OPPRESSED AND DISENFRANCHISED PEOPLES SEEKING RECOGNITION OF THEIR STATUS AS FIRST PEOPLES. I WILL CONTINUE TO MAINTAIN CONTACT AT AN INTERNATIONAL LEVEL, BOTH THROUGH THE WORKING GROUP ON INDIGENOUS POPULATIONS, INDIGENOUS NON-GOVERNMENT ORGANISATIONS AND OTHER SPECIALIST UNITED NATIONS BODIES AND AGENCIES.

THE WORK OF MY UNIT IS CLEARLY GOING TO BE AFFECTED BY THE CHANGES WHICH ARE TAKING PLACE IN RELATION TO THE RIGHTS AND POSITION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE IN OTHER CONTEXTS. DURING THIS LAST YEAR SINCE THE HIGH COURT DECISION ON NATIVE TITLE THE DEBATE HAS BEEN PARTICULARLY INTENSE AND ACRIMONIOUS WITH EXTREMISTS IN MANY QUARTERS. IT HAS REVEALED THE RED HOT UNDERBELLY OF RACISM, BIGOTRY AND PREJUDICE STAINING AND DIMINISHING THE NATION. REGRETABLELY THERE HAS BEEN MUCH HEAT BUT LITTLE LIGHT. ATTENTION MUST BE PAID TO ENSURING THAT THE DECISION IS USED TO MAXIMISE RECOGNITION OF THE LAND AND HUMAN RIGHTS OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE, AND THAT IT NOT BE PERMITTED TO PROVIDE AN OPPORTUNITY FOR FURTHER ABUSE OR DIVISION BETWEEN THE DIFFERENT COMMUNITIES.

MADAM DAES

I WISH NOW TO TURN MY ATTENTION TO THE RESPONSE BY NON INDIGENOUS AUSTRALIA TO THE HIGH COURT DECISION ON NATIVE TITLE. I WILL CONFINE MY REMARKS TO THE REACTION OF THE NORTHERN TERRITORY GOVERNMENT - WITH THE SUPPORT OF THE FEDERAL GOVERNMENT - IN ENACTING LEGISLATION TO LEGITIMISE THE GRANT OF MINERAL LEASES OF A MINING COMPANY DETERMINED TO EXPLOIT LEAD, ZINC AND SILVER ON TRADITIONAL GUDANJI LAND AT MCARTHUR RIVER IN THE NORTHERN TERRITORY.

IT IS MY VIEW THAT THE NORTHERN TERRITORY LEGISLATION BREACHES THE RIGHTS OF THE GUDANJI THAT AUSTRALIA HAS RECOGNISED AND UNDERTAKEN TO OBSERVE AND WHICH ARE HUMAN RIGHTS AS DEFINED IN THE STATEMENT OF MY STATUTORY FUNCTIONS UNDER THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION ACT 1986.

ARTICLE 2 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS SAYS:

"EACH STATE PARTY UNDERTAKES TO RESPECT AND TO ENSURE TO ALL INDIVIDUALS WITHIN ITS TERRITORY AND SUBJECT TO ITS JURISDICTION THE RIGHTS RECOGNISED IN THE COVENANT, WITHOUT DISTINCTION OF ANY KIND, SUCH AS RACE, COLOUR, SEX, LANGUAGE, RELIGION, POLITICAL OR OTHER OPINION, NATIONAL OR SOCIAL ORIGIN, PROPERTY, BIRTH OR OTHER STATUS".

IN MY VIEW, THE IMPACT OF THE GRANT BY THE NORTHERN TERRITORY ACT FALLS UNIQUELY ON ANY ABORIGINAL NATIVE TITLE HOLDERS - THE GUDANJI PEOPLES.

ON THE FACE OF THE ACT, THE RIGHT OF ABORIGINAL OWNERS TO ASSERT SOME FORM OF ENDURING TITLE IS EFFECTIVELY EXTINGUISHED. THIS NULLIFIES OR IMPAIRS THE RECOGNITION, ENJOYMENT OR EXERCISE, ON AN EQUAL FOOTING, OF ANY RELEVANT HUMAN RIGHT OR FUNDAMENTAL FREEDOM IN THE POLITICAL, ECONOMIC, SOCIAL, CULTURAL OR ANY OTHER FIELD OF PUBLIC LIFE. [CERD ART.1.1, RDA S.9]

THE RELEVANT HUMAN RIGHTS ARE THE RIGHTS TO OWN PROPERTY ALONE AS WELL AS IN ASSOCIATION WITH OTHERS, THE RIGHT TO INHERIT AND THE CORRELATIVE RIGHT OF THE GUDANJI TO ASSERT TITLE [CERD ART5(D) (V) + (VI)]. IF THESE RIGHTS ARE NOT EXTINGUISHED, THEY ARE SIGNIFICANTLY ERODED.

MOREOVER, THE PROVISIONS OF ARTICLES 5 AND 6 OF CERD IMPOSE AT LEAST AN EQUIVALENT OBLIGATION ON THE FEDERAL GOVERNMENT TO PROTECT PEOPLE FROM RACIAL DISCRIMINATION - IF ANYTHING IT HAS PROTECTED COMMERCIAL AND POLITICAL INTERESTS TO OBLITERATE OR NEUTRALISE THE RIGHTS OF THE GUDANJI.

SECTION 4A(4) OF THE NORTHERN TERRITORY ACT PURPORTS TO DENY NATURAL JUSTICE BY REMOVING THE REQUIREMENT OF GIVING NOTICE TO PERSONS WITH AN INTEREST IN THE LAND AND THEREBY DISENTITLES ABORIGINAL "OWNERS" FROM AGREEING TO OR CONSENTING TO OR NEGOTIATING IN ANY WAY AT ALL IN RELATION TO THE SUBJECT LEASE. THIS WOULD APPEAR TO EXCLUDE THE RIGHT TO PROCEDURAL FAIRNESS BY ANY DECISIONMAKER WHOSE DECISIONS AFFECTED THEIR INTERESTS.

IN ADDITION, SECTION 4B OF THE ACT PROVIDES THAT THE NORTHERN TERRITORY IS LIABLE TO PAY OR PROVIDE COMPENSATION IF THE LAND IS ACQUIRED BY IT OTHERWISE THAN ON JUST TERMS. IN THE CIRCUMSTANCES OF THIS MATTER IT SEEMS THE ONLY PROPERTY WHICH MIGHT BE THUS ACQUIRED IS THAT UNDER COMMON LAW NATIVE TITLE. IT APPEARS THAT 'COMPENSATION' RELATING TO 'ACQUISITION' UNDER THIS SECTION ALLOWS THE NATIVE TITLE HOLDERS TO BE TREATED DIFFERENTLY FROM TITLE HOLDERS TO ANY OTHER LAND ACTUALLY ACQUIRED BY THE CROWN. AGAIN IN TERMS OF THE PROCESS OF ADDRESSING THE ISSUE OF COMPENSATION, IT APPEARS THAT, PERSONS OF A PARTICULAR RACE, THE GUDANJI, DO NOT ENJOY A RIGHT THAT IS ENJOYED BY PERSONS OF OTHER RACES OR ENJOY THAT RIGHT TO A LIMITED EXTENT.

ARTICLE 2.1 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS STATES THAT HUMAN RIGHTS ARE TO BE 'RESPECTED AND ENSURED WITHOUT DISTINCTION OF ANY KIND SUCH AS RACE,PROPERTY, BIRTH OR OTHER STATUS' (EMPHASIS ADDED).

ARTICLE 2.3(A) OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS OBLIGES THE COMMONWEALTH GOVERNMENT 'TO ENSURE THAT ANY PERSON WHOSE RIGHTS OR FREEDOMS ARE HEREIN RECOGNISED ARE VIOLATED SHALL HAVE AN EFFECTIVE REMEDY, NOTWITHSTANDING THAT THE VIOLATION HAS BEEN COMMITTED BY PERSONS ACTING IN AN OFFICIAL CAPACITY'.

ARTICLE 26 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS REQUIRES THE COMMONWEALTH GOVERNMENT TO GUARANTEE TO ALL PERSONS EQUAL AND EFFECTIVE PROTECTION AGAINST ANY DISCRIMINATION ON ANY GROUND SUCH AS 'RACE,PROPERTY, BIRTH OR OTHER STATUS'. (EMPHASIS ADDED)

GIVEN THE PROBLEMATIC ASPECTS OF THE NORTHERN TERRITORY ACT OUTLINED IN THE FOREGOING, THE FEDERAL GOVERNMENT'S UNDERTAKING TO INDEMNIFY THE NORTHERN TERRITORY GOVERNMENT IN RELATION TO LEGAL COSTS IN THE EVENT OF ANY CHALLENGE TO THE VALIDITY OF THE BILL CONSTITUTES, A FURTHER BREACH OF THE GUDANJI PEOPLES RIGHTS.

I SUGGEST THAT THE GOVERNMENT HAS A CLEAR OBLIGATION UNDER THESE ARTICLES TO INDEMNIFY THE ABORIGINAL PEOPLE FOR THEIR LEGAL COSTS IF IT IS GOING TO INDEMNIFY OTHER POTENTIAL PARTIES TO LITIGATION ON THE IMPACT OF THIS LEGISLATION ON NATIVE TITLE.

I THEREFORE URGE THE AUSTRALIAN GOVERNMENT TO TAKE THESE CONSIDERATIONS INTO ACCOUNT AND TO BRING THEIR RELEVANCE TO BEAR IN ANY DISCUSSIONS OR NEGOTIATIONS THAT THEY ARE INVOLVED IN ON THIS ISSUE. IT IS CURRENTLY MY VIEW, ON THE INFORMATION BEFORE ME, THAT THE NORTHERN TERRITORY ACT IS RACIALLY DISCRIMINATORY AND THAT THE UNDERTAKING OF THE COMMONWEALTH ITSELF TO FINANCIALLY SUPPORT THE NORTHERN TERRITORY GOVERNMENT IN THE EVENT OF ANY LEGAL CHALLENGES TO THE LEGISLATION, MAY ALSO BREACH THE RACIAL DISCRIMINATION ACT. I THEREFORE URGE THAT THE COMMONWEALTH TAKE IMMEDIATE ACTION IN ORDER TO ADDRESS THESE CONCERNS RELATING TO THE NORTHERN TERRITORY ACT.

SADLY, MADAM DAES, THE AUSTRALIAN GOVERNMENT APPEARS INTENT ON REPEATING THIS SCENARIO ON A NATIONAL SCALE IN RESPONSE TO THE HIGH COURT'S DECISION.

JUST LAST WEEK THE VICTORIAN PREMIER INTRODUCED INTO THAT STATES' LEGISLATIVE ASSEMBLY A MEAN SPIRITED, NIGGARDLY AND TOTALLY MISERABLE BODY OF LEGISLATION IN RESPONSE TO THE HIGH COURT DECISION DESIGNED TO AFFIRM THE STATUS QUO AND TO DIMINISH AND DENY THE RIGHTS OF THE STATES' INDIGENOUS POPULATION.

REGRETTABLY AT THE FEDERAL LEVEL THE DEBATE HAS BEEN HIJACKED BY THE BUREAUCRATS. I WAS, MADAM DAES, COMPELLED TO DESCRIBE THE FIRST BUREAUCRATIC DISCUSSION PAPER ON THIS QUESTION AS MODERN DAY GUNS AND STRYCHNINE IN THE FORM OF THE PUBLIC SERVANTS WORD PROCESSOR. THE LATEST BUREAUCRATIC PRODUCTION HAS NOT CAUSED ME TO CHANGE MY OPINION.

THE RESPONSE TO THE HIGH COURT DECISION WILL JUDGE OUR NATION INTERNATIONALLY AS TO THE VALUES WE WISH TO LIVE BY. WILL WE BECOME A NATION IN LOVE WITH HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS PARTICULARLY FOR INDIGENOUS AUSTRALIANS OR WILL WE RELIVE THE DARKEST DAYS OF OUR HISTORY - THE DAYS OF OPPRESSION, DENIAL AND DISPOSSESSION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES.

AS THE PRIME MINISTER OF AUSTRALIA SAID LAST WEEK. THE JUDGEMENTS "..... CALLS FOR NOTHING MORE OR LESS THAN A MATURE NATIONAL RESPONSE.... IT OFFERS A CHANCE TO RAISE THE LEVEL OF DIGNITY ON BOTH SIDES.... THE NEED TO FIND SOLUTIONS IS A NATIONAL NEED IF THE WORD 'AUSTRALIA' STILL MEANS,.... A BELIEF IN DEMOCRACY AND SOCIAL JUSTICE, IF THAT REMAINS THE NATIONAL SENTIMENT, THEN A JUST NATIONAL SETTLEMENT MUST BE FOUND".

I URGE THE PRIME MINISTER TO STICK TO THIS COMMITMENT. ANYTHING THAT FALLS SHORT OF DELIVERING OUR LEGITIMATE ASPIRATIONS IS SIMPLY UNACCEPTABLE.