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**REPORT TO**  
**THE EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES**

by

**Mr Brian Wyatt, National Native Title Council, Australia**

**NATIVE TITLE AND LAND REFORM**

This report provides an outline of the current situation in Australia in relation to native title and land tenure reform. This report, whilst it may not mention specific articles within the United Nations Declaration on the Rights of Indigenous People (the Declaration), it does relate in a general way to Articles 8, 11, 27, 28 and 32 and possibly others to a lesser extent.

On 3 April this year the Australian Minister for Indigenous Affairs made a statement on behalf of the Australian Government formalising its support for the Declaration. The Minister's statement reversed the previous Government's opposition to the Declaration, reflecting a willingness to re-set the relationship between Indigenous and non-Indigenous Australians and for building trust between the Government and Indigenous people and their communities.

Indigenous peoples of Australia welcomed the Minister's statement and believe this action marked a historical shift for the human rights of Indigenous peoples and their communities.

Australia's Indigenous people now believe it is therefore time for the Australian Government to act decisively to change measures that inhibit the rights to land of Indigenous Australians and this means reforming the land regime and making improvements to the native title system. For Indigenous peoples, native title and land are a fundamental element of cultural obligation and identity.

The Australian Government has been strongly criticised by the United Nations Committee on the Elimination of Racial Discrimination (CERD) for its approach to native title since the 1998 amendments.

In 2005 CERD raised concerns that:

the Mabo case and the 1993 Native Title Act constituted a significant development in the recognition of Indigenous peoples' rights, but that the 1998 amendments wind back some of the protections previously offered to Indigenous peoples, and provide legal certainty for government and third parties at the expense of Indigenous title ...<sup>1</sup>

<sup>1</sup> Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Australia, 66<sup>th</sup> Session of the Committee on the Elimination of Racial Discrimination, Document No CERD/C/AUS/CO/14, 21 February-11 March 2005

The Committee recommended that Australia should:

not adopt measures withdrawing existing guarantees of indigenous rights and that it should make all efforts to seek the informed consent of Indigenous peoples before adopting decisions relating to their rights to land. It further recommends that the State party reopen discussions with Indigenous peoples with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all.<sup>2</sup>

The Committee also raised concerns about the high standard of proof required for the Courts to demonstrate continuous observance and acknowledgement of the laws and customs of Indigenous people, resulting in Traditional Owners not being able to obtain recognition of their relationship with their traditional lands.

These concerns have been raised by CERD since the 1998 amendments to the Native Title Act, concerns that are shared by Native Title Representative Bodies and Native Title Service Providers around Australia. Australia's support for the UN Declaration will be a step forward to addressing these criticisms and through its implementation, and acting in accordance with its principles, the rights of Indigenous people can be upheld.

It is for this reason that Native Title Representative Bodies and Native Title Service Providers, through the National Native Title Council, are commencing a campaign for fundamental changes to be made to the *Native Title Act*.

The original spirit of the *Native Title Act* is clearly set out in its preamble:

It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. ... A special procedure needs to be available for the ***just and proper ascertainment of native title rights and interests*** which will ensure that, if possible, this is done by conciliation, and if not, in a manner that has due regard to their unique character (emphasis added).

Unfortunately, traditional owner groups who have revitalized their traditions in recent years cannot be recognized as native title holders under Australian law *unless* those traditions have been observed, substantially without interruption, since the assertion of British sovereignty. In order to get back to the original spirit of the Native Title Act, significant reform to the requirements of proof need to be addressed.

Many commentators in Australia have now begun championing more substantial amendments to the Native Title Act. Most prominent among them, Chief Justice of the High Court of Australia RS French and Justice AM North of the Federal Court of Australia both argue strongly for a significant shift in the burden of proof. Native title jurisprudence has developed over the 16 years since the Mabo decision in such a way that means traditional owners bear the burden of proving their connection to

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<sup>2</sup> *ibid.*

country. As stated by Justice North, "so long as [the current] situation is left to persist the nation's moral standing is diminished".<sup>3</sup>

The fabric of what is now the native title system goes to the very core of Aboriginal disadvantage and can only be truly resolved through a significant shift in the balance of power in all types of negotiations from small level future act agreements to native title Court determinations. Substantial amendments to the Native Title Act can significantly shift the balance of power for a more favourable and just position for traditional owners.

The major issue for the native title party is discharging the crushing burden of proof as required by the *Ward*<sup>4</sup> and *Yorta Yorta*<sup>5</sup> tests. Having to establish concepts of society and continuity and then having to particularize each law and custom and right and interest to the requisite standard borders on cruelty. When Respondents insist upon a strict linear approach in negotiations that the applicant must prove connection to almost a trial standard and then respondents deal with extinguishment in this very long convoluted process, the system is going to and does exact a toll; often to the detriment of the native title party.<sup>6</sup>

This process virtually accepts that respondents can hang back, and wait to see if the native title party either implodes from the burden of proving connection or is struck out by the Court.<sup>7</sup>

No fair-minded person can say this is fair.

One possible mechanism for attenuating the burden of making a case for determination is a change to the law so that some of the elements of the burden of proof are lifted from applicants. This could be satisfied by introducing a rebuttable presumption of continuity, reversing the onus of proof so that the State (or other respondent parties to a claim) bears the burden of rebutting such a presumption.

Slowly, and occasionally, change is felt in Australia. By way of example, a recent decision by the National Native Title Tribunal determined that a proposal for mining potash on Western Australia's Lake Disappointment should not be granted. The Indigenous Traditional Owners had successfully argued that the Lake was a significant site for Aboriginal culture and therefore should not be disturbed.

The industry party requested the Commonwealth Attorney General to make a declaration under the Native Title Act that the production at Lake Disappointment was in the national interest, and in the interests of the State of Western Australia, in effect requesting that the original decision be overruled.

The Attorney General declined to interfere.

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<sup>3</sup> Justice North and T Goodwin, *Disconnection – the Gap Between Law and Justice In Native Title: A Proposal for Reform*, 5 May 2009.

<sup>4</sup> *Western Australia v Ward* (2002) 213 CLR 1.

<sup>5</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

<sup>6</sup> Smith, K., *Minefields, Minor Amendments and Modest Changes: an outline of the inherent dangers in native title negotiations and the opportunities to sweep them away*, Negotiating Native Title Forum, Melbourne, 19 February 2009

<sup>7</sup> *ibid*

We have been reliably informed that the reasons for the Attorney General's decision were that the proposal was not a matter that, if not granted, would affect either the national interest or the interests of the state of Western Australia. Further, even if it were, the Attorney General would have been minded not to overrule the National Native Title Tribunal's original findings and determination in any event.

In such times as the global financial crisis and the seeming 'development at any cost' approach occurring in Western Australia, this refusal by the Attorney General to adjudicate in favour of the extractive industry is a welcome reminder that Australia's Indigenous people can, in certain instances at least, be on the receiving end of a favourable decision.

All too often the opposite is the case.

In Australia's north-west, for example, Indigenous peoples' rights have recently been put at risk with the State Government threatening to compulsorily acquire land if the Traditional Owners didn't reach an agreement on a suitable site for the development of an industrial hub. Traditional Owners have given conditional approval to the proposed site, however such a coercive approach by the State Government rides roughshod over the rights of Indigenous peoples and seriously contravenes the principles under the UN Declaration on the Rights of Indigenous Peoples.

The Declaration should be fully implemented in Australia and its principles upheld to ensure the rights of Indigenous peoples are protected. The Native Title Act was intended to be beneficial legislation, with a strong preference for outcomes to be negotiated rather than litigated. Amending the Native Title Act to alleviate the burden of traditional owners will bring the legislation back to its original intent as well as align native title more harmoniously with the UN Declaration.

We look forward to providing further update reports to the Expert Mechanism on the Rights of Indigenous People, to share our journey with you. We thank you for your support.