Lawyers for Reconciliation

NT Lawyers for Reconciliation *have produced the following 'plain language' information on native title and their views on related issues for public information.*

Native Title – your step-by-step guide

WHAT IS THE MABO CASE?

- *It recognised the rights of indigenous Australians to their land.*

The Mabo case was brought by Eddie Mabo and other people from Murray Island in the Torres Strait seeking recognition of their traditional ownership of land on the island. In 1992, the High Court decided that the legal concept of Australia as an empty land - or "terra nullius" - before Europeans arrived was wrong. That concept has previously underpinned a refusal to recognise the rights of indigenous Australians to their land. The Court decided that Australian common law should recognise those rights. The rights of indigenous people to their land had previously been recognised in Africa, Canada, NZ, the USA and other countries.

However, the Court also decided that the rights of indigenous Australians to their land could be lost if **either** those rights were taken away (extinguished) by a Government **or** their connection with that land was broken.. If the rights to their land was lost, indigenous Australians generally have no right to compensation (under Australian common law).

WHAT IS NATIVE TITLE?

- *It is the right of indigenous Australians to their land, as recognised by Australian common law.*

Native title is made up of traditional or customary rights to occupy and use land. It may include traditional rights to hunt, gather, fish and conduct ceremonial activities.

WHEN IS NATIVE TITLE EXTINGUISHED?

- *Native title is lost when rights wholly inconsistent with the rights of indigenous Australians to their land are granted.*

Native title is lost when freehold is granted. It is also lost when leasehold giving exclusive possession is granted e.g. most commercial or residential leases. It is generally not lost when there has been no grant (vacant Crown land) or when leasehold which does not give exclusive possession is granted.

WHAT IS THE NATIVE TITLE ACT?

- *It is an Act passed by the previous Commonwealth Government which strikes a balance between the rights of native title claimants and holders, and those of other Australians.*

The Native Title Act (NTA) was passed by the previous Commonwealth Government in 1994 after extensive negotiation and consultation with indigenous Australians and other interested groups. It did two important things. First, it guaranteed the validity of all existing rights to land, including those of lessees and miners. It confirmed the extinguishment of native title where freehold and leasehold giving exclusive possession had been granted in the past. Secondly, it set up a system for native title claimants or holders to negotiate about development on land claimed or held e.g. mining projects. It also provided for arbitrated resolution if agreement was not reached through negotiation. However, the NTA does not give veto over development because State, Territory and Commonwealth governments may override native title in favour of development. If native title claimants then prove the existence of native title, they have a right to compensation for their loss of rights.

WHAT IS THE WIK CASE?

- *It decided that native title is not extinguished by most pastoral leases.*

On 23 December 1996, the High Court handed down its decision in the Wik case. It was a test case brought by the Wik people of Cape York about whether native title could exist on pastoral leases. They argued that their native title rights had not been extinguished when pastoral leases were granted over their land. The Court decided that pastoral leases generally did not give exclusive possession and that native title rights and pastoralists' rights can coexist. In the event of any inconsistency, pastoralists' rights will prevail to the extent of the inconsistency.

WHY NOT JUST EXTINGUISH NATIVE TITLE ON PASTORAL LEASES?

- *It would be illegal.*

To extinguish the rights of just one racial group in Australia would be racially discriminatory and is prohibited by the Racial Discrimination Act. That Act would not prevent the extinguishment of native title rights if there was no racial discrimination e.g. if the rights of both indigenous and non-indigenous Australians were taken away so roads could be constructed.

WHAT DO PASTORALISTS WANT?

- *Their attitudes vary.*

Many pastoralists want native title to be extinguished. Others say that native title does not pose a threat. They are willing to negotiate with indigenous Australians.

WHAT DO MINERS WANT?

- *Their attitudes vary.*

Miners want access to land so than can explore for minerals and mine them. Some miners object to negotiating with native title claimants or holders. Others already negotiate with indigenous Australian over mining projects.

WHAT DO INDIGENOUS AUSTRALIANS WANT?

- *They want the balance struck by the NTA to cover pastoral leases.*

Indigenous Australians object to the extinguishment of their native title rights. They want to keep the right to negotiate over development on pastoral leases. They do not object to amendment of the NTA to confirm pastoralists' rights.

Indigenous Australian say the best way to sort out any problems with native title and pastoral leases is to negotiate regional agreements which recognise and protect pastoralists' rights as well as native title rights. Such agreements would control their access to pastoral leases for hunting and fishing etc. A regional agreement has already been made between indigenous Australians and pastoralists in Cape York.

WHAT DOES THE COMMONWEALTH GOVERNMENT WANT?

- *It wants to amend extensively the NTA*

The current Commonwealth Government's 10 point plan has been presented as a compromise between the competing interests of pastoralists, indigenous Australians and miners. It involves extensive amendment of the NTA. The proposed amendments will extinguish native title rights to the extent of any inconsistency with past and present pastoral leases, including those which ceased to exist long ago, e.g. pastoral leases which were never taken up. They will take away the right of indigenous Australians to negotiate over development on past or present pastoral leases (instead, they will give an inferior right to be consulted and object, such as are given by various State and Territory mining laws). They will also take away the right to negotiate over government-type infrastructure projects e.g. construction of roads and railways.

WHEN WILL THE 10 POINT PLAN BECOME LAW?

- *Possibly later this year.*

The Senate has rejected the proposed amendments of the NTA twice. The Prime Minister may now call a double dissolution election with a view to bypassing the Senate

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WHY ARE THE AMENDMENTS IN THE 10 POINT PLAN UNFAIR?

- *For various reasons.*

NT Lawyers for reconciliation say that the most important reason is that in practice the proposed amendments will leave indigenous Australians with almost no say over development even though their native title rights are put seriously at risk. They will have no say when development is to occur on (a) past or present pastoral leases; (b) forestry, water or mining reserves; (c) defence areas; or in (d) towns, the sea or parks. They will keep the right to negotiate over very little of Australia, possibly less than 10%.

The right of indigenous Australians to negotiate over development on their land is the most important right which recognition of native title has given them. The right to compensation for the loss of native title rights in much of arid and remote Australia will often be worth very little. The right to negotiate may result in employment, better health and education, and cultural security for communities of indigenous Australians, and gives them a stake in development (so that they are partners rather than mere bystanders).

The proposed amendments also promote the wholesale destruction of native title by allowing upgrading of pastoral leases to freehold at public expense. They also provide for a 6 year time limit in which to bring all native title claims. In a country as large as Australia, with scattered and diverse communities of indigenous Australians, this deadline is simply impractical.

Some indigenous Australians argue that the proposed amendments will mean the Racial Discrimination Act does not apply to the NTA, and that the tests for the right of native title claimants to negotiate for access to pastoral leases for ceremonial activities etc may be made too difficult.

IF YOU WANT MORE INFORMATION please contact John Duguid (8981 5544 or Tony Young (8981 8322) during business hours.

Work Health – Achievements and Plans for the Future

The Minister for Work Health, Mr Denis Burke, MLA has provided the Law Society with a copy of a statement outlining the government's work health achievements to date and plans for the future.

The paper includes strategies aimed at preventing workplace injury, which he expects that the Work Health Authority will implement.

Whilst the Minister identifies workplace safety and fair compensation as key concerns of the NT Government, he notes that the cost of workers compensation in the NT last year was $25 million.

Practitioners interested in the text of Mr Burke's statement may obtain a copy from the Law Society.

High Court Rules – Amendments to Second Schedule – 4.5% Rise

The Second Schedule to the High Court Rules specifies the amount which solicitors who are entitled to practise in the High Court, may charge and be allowed on taxation of costs by the Taxing Officer of the Court in respect of proceedings in the Court.

The amounts in the Schedule were last varied by Statutory Rule No 11, made on February 1997 and which came into operation on 3 March 1997.

The Federal Costs Advisory Committee, in its report to the Justices dated February 9 1998 recommended an increase of 4.5% to the solicitors' costs as set out in the Second Schedule.

The Court has agreed to the recommendation of the Committee and the increase, which came into operation on Monday 4 May 1998, will apply in respect of all work done and services performed by solicitors after 3 May 1998.

A copy of the Schedule may be obtained from the Law Society.

Commencement of Legislation

The NT Attorney-General's Department advise that the *Real Property (Unit Titles) Amendment Act* will commence operation on the date of publication in the Northern Territory Gazette of the notice signed by the Administrator on 13 May.

It was anticipated that this would appear in Gazette G19 of 20 May 1998.

The Department advises further that the *Local Court Amendment Act* and *Small Claims Amendment Act* which will, amongst other things, increase the jurisdiction of the Local Court and Small Claims Court to $100,000 and $10,000 are to commence on 1 June 1998. New Local Court Rules and Small Claims Rules will also commence on that date.

Practitioners are reminded an "unofficial" version of the Rules may be obtained from the Law Society by providing a disk on to which they may be copied. Printed copies of the Rules will be available from the Government Information Centre shortly.

Mediation

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misunderstood by an intelligent, well educated and dynamic society; perhaps there is no 'alternative' to lawyers engaging as leaders in consensual dispute resolution!

The next LEADR Mediation Training Workshop in Darwin will be conducted between 15th and 18th July 1998.

Please contact LEADR Sydney on telephone (02) 9233 2255 Fax 02 9232 3024 to register.

For those for whom that is an inconvenient time, the Accord Group will deliver its training 11th – 13th August 1998 (Tel: 02 9264 2327). Alternatively, the Institute of Arbitrators and Mediators will in 1999 offer its arbitration and mediation training through various Australian universities (For details please contact Christine Cureton at Clayton Utz 8943 2555).