

**COMMUNITY AID ABROAD
SUBMISSION TO THE
PARLIAMENTARY JOINT
COMMITTEE ON NATIVE TITLE.**

Contents

Introduction

- 1. Human Rights Issues**
- 2. The Right to Negotiate**
- 3. Ministerial Intervention**
- 4. Extension of Pastoral Lease Activities**
- 5. The Claims Process**
- 6. Access to Land**
- 7. Indigenous Land Use Agreements**
- 8. De Facto Extinguishment of Water and Fishing Rights**
- 9. Retrospective Extinguishment of Native Title Rights - Intermediate Grants**
- 10. Outright Extinguishment of Native Title**
- 11. Extinguishment of Inconsistent Native Title Rights on Pastoral Leases**
- 12. Sunset Clause**

Introduction.

Community Aid Abroad works with indigenous people in approximately 21 countries, including Australia where we have run a small community development programs for many years.

Given the breadth of our international experience, what is striking to Community Aid Abroad is the similarity of underlying problems that confront indigenous people; usually they are the most marginalised of the poor, have the least political power and, because of their prior ownership of land, find themselves in conflict with commercial interests wishing to exploit their natural resources.

Reluctance by dominant cultures to acknowledge often complex indigenous land ownership systems is nearly universal, and Australia is no exception. It is to Australia's shame that it took over two hundred years to legally acknowledge prior occupation and ownership of Australia by Aboriginal people. The difference between Australia and the situation in, say the Philippines, is that Australia is a very wealthy country and could easily afford much more generous settlements, both in compensation and in provision for traditional rights.

With the Mabo decision, and the Native Title Act, Australia had the makings of a just settlement within its grasp, (although Community Aid Abroad would argue that without some formal kind of treaty, or equivalent document, Aboriginal people will never have the capacity to argue from a position that gives them legal rights, as do the Maori in New Zealand or the indigenous peoples of Canada).

The Amendments to the NTA that flow from the Wik decision, do not, as the Prime Minister claims, "swing the pendulum back to the centre" - they reverse a small gain made under the original negotiations around the NTA. The new bill is a massive over reaction to Wik. It significantly diminishes the rights of Native Title claimants and holders, fails to deliver the much sought after certainty for miners and pastoralists and has the potential to divide the country on the basis of race.

The failure of the government to negotiate properly with Aboriginal interests is a national disgrace. It is hard to conceive of a more lopsided process, whereby one set of interests are closely involved in formulating the legislation - with some National and Liberal Party members in the government actually having significant pastoral interests - as against the virtual lock-out of Aboriginal people in developing a solution. A generous and reasonable offer for negotiated settlements, made by the National Indigenous Working Group, has not been treated with the seriousness it deserves.

The last one hundred years have been a disaster for indigenous peoples around the world as their lands and cultures have been wiped out for narrow commercial gain, with devastating social and environmental consequences. This bill continues in that nineteenth century tradition and will perpetuate the tragedy for our own indigenous people.

The following comments relate to specific elements of the Bill;

1. Human Rights Issues.

Community Aid Abroad is concerned that the new amendments raise numerous human rights concerns. As a signatory to the major international instruments on human rights, Australia's previously sound reputation of respecting human rights will be drawn into detailed examination if many of the proposed amendments are enacted.

For example, the International Covenant on Civil and Political Rights provides that groups must not be denied the right to enjoy their own culture. Indigenous culture depends on access to traditional lands and the capacity to control what happens on that land. The Universal Declaration on Human Rights prohibits States from arbitrarily depriving people of property.

Even though Australia has acted on its obligations under the Convention on the Elimination of All Forms of Racial Discrimination by enacting the Racial Discrimination Act 1975, the new amendments may conflict with the principles underlying that Act. It is clear that any of the amendments contained in the Bill which appear to cross the Racial Discrimination Act 1975 will be challenged in the courts, resulting in ongoing uncertainty and possible subsequent amendments to the Act.

For example, legislation which directly or indirectly extinguishes the property rights of only one race, namely Aboriginal and Torres Strait Islander people, is racially discriminatory legislation. It is unlikely that any compensation paid will take into account the entirety of the special loss to Aboriginal people of the land on which the existence of their culture depends. In addition, it could be argued that removing the right to negotiate removes the ability of Aboriginal people to safeguard the special cultural and spiritual significance to them of their traditional land.

To date Australia has been an active and positive participant in the United Nations Working Group on the Draft Declaration on the Rights of Indigenous Peoples. Although the Draft Declaration is yet to be submitted to the UN General Assembly, Community Aid Abroad notes that Australia could suffer international criticism where elements of the Native Title Act Amendment bill are clearly inconsistent with the Draft Declaration. It is clear that the Draft Declaration will be a powerful tool in changing attitudes, laws and policies and that the Draft Declaration is an accurate reflection of global concern about the rights of indigenous peoples.

In particular, Community Aid Abroad draws the committee's attention to Articles 7, 20 and 26 of the plain language version of the UN Draft Declaration on the Rights of Indigenous Peoples, circulated by ATSIC, as follows;

Article 7 of the UN Draft Declaration, dealing with cultural integrity issues, broadly states that governments shall prevent the taking of rights to land and resources from

indigenous peoples, their removal from land and actions which take away their distinct cultures and identities.

Article 20 of the Draft Declaration affirms the rights of Indigenous peoples to participate in law and policy making that affects them and places the onus on Governments to obtain the consent of indigenous peoples before adopting these laws and policies.

Article 26 of the Draft Declaration states that indigenous peoples have the right to own and control the use of their land, waters and other resources and that governments must recognise indigenous laws and customs in these matters.

It is clear to Community Aid Abroad that elements of the Native Title Act Amendment Bill in its current form will be viewed as inconsistent with these Articles of the Draft Declaration.

2. The Right to Negotiate.

Community Aid Abroad believes that the right to negotiate is one of the cornerstone of the Native Title Act and fundamental to broader community recognition of Aboriginal people's cultural and spiritual attachments to land. In this light, Community Aid Abroad welcomes the current provisions of the Native Title Act providing native title claimants and holders with a right to negotiate over some permissible proposed developments and vigorously opposes the diminution of these rights in the amendments. The right to negotiate allows the exercising of the rights of native title holders to be recognised under common law as part of the statutory process.

Specifically, native title claimants and holders should maintain the right to negotiate with respect to public or private infrastructure facilities (eg electricity structures and pipelines) and should not have their rights to negotiate with respect to exploration and mining dramatically restricted as proposed in the amendments.

The argument put forward by some elements of the mining industry that the industry will be crippled by the current right to negotiate provisions of the Native Title Act is a fallacy. The fortunes of the mining industry are based on responses to international commodity price movements and not the right to negotiate provisions of the Native Title Act. The Act simply defines a process for access to resources.

This has been emphatically proven in the Northern Territory, where traditional owners have a right of veto (as opposed to the right to negotiate) over exploration and mining activity under Part IV of the Aboriginal Land Rights Act (Northern Territory) 1976. Here, more than 80% of the value of minerals extracted within the Northern Territory come from Aboriginal land accessed by the industry through negotiated agreements with traditional owners through the Land Councils. By January 1995, the Northern Territory Land Councils had entered mineral exploration agreements covering more than 73,000 square kilometres of land and mining agreements for the establishment of nine

operating mines, together injecting more than \$300 million into the Northern Territory economy.

Community Aid Abroad supports the current provisions under the Native Title Act under which the right to negotiate applies at both the mineral exploration stage and again at the production stage. We oppose the proposed amendments whereby a fresh right to negotiate will no longer be available where the proposal is to extend, renew or regrant a mining lease which has already been through the right to negotiate process or has been the subject of an earlier agreement or determination.

The amendments will eliminate the right to negotiate where the regrant will dramatically increase the overall physical impact on land of exploration or mining activities than the original grant. Also, it may be difficult to say precisely what was envisaged within the scope of the earlier negotiations. What native title parties saw as a short exploration project might later become a huge and lengthy one, without any further right to negotiate.

Community Aid Abroad also opposes the increases in the powers of Ministers, including State and Territory Ministers, to intervene in negotiations as outlined in the amendments. The amendments will allow the Minister to remove the right to negotiate from "approved...acts," such as granting exploration or prospecting licenses, where certain preconditions are met. The Minister already has this power, but these new amendments weaken the preconditions, making it easier for the Minister to remove the right to negotiate. The current precondition, that the Minister must show that the "approved...act" will have "minimal effect on any native title concerned," will be reduced to "is unlikely to have a significant impact on land or waters." For example, mineral prospecting may easily satisfy the new test, but still have a major effect on native title.

Community Aid Abroad opposes the amendment whereby the right to negotiate given by the current NTA will no longer apply where the Commonwealth Minister is satisfied that a State or Territory is providing alternative procedures. Community Aid Abroad would only support this amendment where further amendments make it binding on the Commonwealth Minister to be satisfied that these procedures will provide at least an equivalent level of protection in comparison to the right to negotiate provisions in the current Native Title Act.

3. Ministerial Intervention

Community Aid Abroad supports the current legislative framework whereby the Minister may only intervene after negotiation between parties to the claim has failed and an arbitrated decision has been made.

We believe that amendments to allow not only the Commonwealth but, for the first time, State or Territory Ministers to intervene, and to intervene earlier in the negotiation process, will discourage a genuine commitment to negotiation on the part of non-indigenous stakeholders. Such stakeholders are likely to form the view that they will get

a more favourable result from Ministerial intervention than they would get from concerted negotiation.

We anticipate that this will create enormous difficulties for claimants in States and Territories with governments hostile to native title rights. This is compounded by the fact that the amendments require the Minister to consider the benefits to native title holders but not the detriments. Moreover, State and Territory Ministers will be required to exercise these new powers in "the national interest" rather than in the interest of their Aboriginal constituents.

The amendments also raise complex legal questions about the nature of discrimination. Reducing or removing the right to negotiate will contravene the principles of the Racial Discrimination Act. This is because effective and genuine equality will only be possible through measures - like the right to negotiate - which enable Aboriginal people to safeguard the special cultural and spiritual significance to them of their traditional land. Reducing or removing the right to negotiate and leaving claimants with rights which are equal to freehold owners leaves them, in fact, with less than full recognition of their legal rights.

4. Extension of Pastoral Lease Activities.

Community Aid Abroad is opposed to amendments permitting States and Territories to extend lease activities ("upgrades") to full primary production on pastoral leasehold land without having to acquire the native title rights or to negotiate with native title holders.

Currently, the NTA does not permit activities beyond those permitted under a pastoral lease without formal negotiations being conducted with native title holders. However, State and Territory Governments do have the power to extend lease activities through compulsorily acquiring any inconsistent native title rights, so long as they do not breach the Racial Discrimination Act.

More intensive land use for primary production may not involve outright extinguishment of native title but it is likely to increase the inconsistencies between the two sets of rights, giving rise to de facto extinguishment of native title. For example, farmstay tourism could involve the construction of major tourist facilities which could be inconsistent with native title rights, particularly in the area of the development. Large scale agribusiness operations could see vast tracts of land turned over to cotton or rice production, which again could be inconsistent with native title rights.

It is clear that the new amendments will offer a cheap, powerful incentive for the States and Territories to extinguish native title given the commitment by the Commonwealth to pay 75% of the compensation to which native title holders may be entitled where their rights are extinguished as a result of these upgrades. Legislating to permit compulsory acquisition of native title rights alone is a gross act of racial discrimination.

Community Aid Abroad is concerned that this amendment will in practice be akin to de-facto mass upgrading of pastoral leases to grant leasees rights in many ways similar to the rights of landowners holding freehold title. Although this amendment does not go so far as to permit conversion to freehold title, it is clear that, at some stage, an upgrade will "cross the boundary" and become a conferral of rights of exclusive possession, identical to freehold in all but name.

Community Aid Abroad notes the environmental implications of upgrading permissible pastoral lease activities to full primary production as defined under the Income Tax Act. On any view, the amendments will permit more intensive land use of often fragile, already seriously degraded rangelands. In cases where Native Title claims or agreements lead to a conferring of rights of access to or ownership of land by Native Title holders, such damage to land arising from the upgrading of permissible activities will reduce the claimants enjoyment of their Native Title.

5. The Claims Process.

Community Aid Abroad is concerned about the impact of the amendments to the claims process. In particular, we oppose proposed changes to the threshold test for registering claims.

Although it is widely accepted that there is a need to tighten the threshold test, this must be done so in such a way that does not disadvantage applicants. The new test, requiring claimants to make out a "prima facie" case for each individual native title right claimed at the time of registration, will force otherwise sound claims to fail the threshold test.

Community Aid Abroad opposes changes to the ways in which evidence is to be dealt with in native title claim hearings in so far as the Court being required to take into account cultural and customary concerns of claimants. By no longer requiring the Court to take these concerns into account, the amendments fail to reflect the fundamental spiritual and cultural relationship Aboriginal people have to land.

6. Access to Land.

Community Aid Abroad believes that it is a basic human right for Aboriginal people to have access to their traditional lands for cultural and spiritual purposes. We therefore strongly oppose amendments that allow only claimants who can demonstrate that they have "current physical access" when a native title claim is first registered to have their access rights to pastoral leasehold land confirmed for the period of the hearing. Physical access has been only one of a number of ways that indigenous people have maintained connection to their traditional lands. Under these amendments access to land may still be denied while a claim is progressing through the court system.

Experience of land claims under the Aboriginal Land Rights Act (Northern Territory) 1976 shows that many adversarial claims may remain unresolved for long periods of

time during which entire generations of claimants may be denied access to their traditional country and, in many instances, pass away prior to settlement of claims. For example, the Warumungu Land Claim surrounding Tennant Creek in the Northern Territory remains partially unresolved 16 years after lodgement with the Aboriginal Land Commissioner. During this time entire generations of claimants have been denied access to their traditional country, many passing away during the intervening period.

This amendment also fundamentally fails to reflect the historical realities of the deliberate dispossession of land from Aboriginal people which has occurred and continues to occur throughout Australia. The amendment takes no account of the difficulties which many Aboriginal people have experienced, despite their best efforts, in maintaining a physical connection with their land.

Thousands of Aboriginal people were shut out or forcibly removed from their traditional country by the first waves of pastoral leasees and did not choose to leave their traditional lands. Those who were able to stay on their traditional land as a cheap source of labour for pastoralists were generally removed following the equal wages case of 1968. The forced dispersal of Aboriginal people, particularly after the equal wages case of 1968, has left gates locked on pastoral leases throughout Australia, shutting out traditional landowners whose religious and cultural responsibilities to their traditional country do not stop at pastoral lease boundaries. It is therefore hypocritical for the Act to place requirements on claimants to prove current physical access where they have been forcibly denied continuing access rights, in many cases for generations.

7. Indigenous Land Use Agreements.

Community Aid Abroad welcomes the fact that the amendments contain provisions allowing for regional agreements to be formally negotiated between all stakeholders.

Community Aid Abroad supports the model of coexistence of Native Title, pastoral and other activities proposed by the National Indigenous Working Group. The fact is that the Wik decision held that native title rights and pastoral activities may coexist and under the National Indigenous Working Group model, claimants, pastoralists, exploration and mining interests and other stakeholders would negotiate their own local or regional land use agreements. Only this process will generate real and meaningful communication between all parties.

However, whilst this is a commendable step, other amendments referred to above will serve to drastically reduce the attraction of such negotiated regional agreements to non indigenous stakeholders. Widespread extinguishment of native title and restrictions on legal rights to negotiate will provide little incentive for non indigenous parties to constructively engage in the negotiation processes required to formulate workable regional agreements.

The indigenous land use agreements process should be fully researched by the Commonwealth Government and the agreements themselves should be backed up by statute, as proposed in the amendments to the Native Title Act.

The negotiated agreements process recognises and respects the rights and interests of all stakeholders. The proposal, based on certainty for all, provides certainty for pastoralists to carry out pastoral activities and certainty of rights for native title holders to hunt, fish, camp, visit sites of significance, protect cultural heritage and engage in traditional ceremonial activities.

8. De Facto Extinguishment of Water and Fishing Rights.

Community Aid Abroad opposes the fact that the new amendments pave the way for effective extinguishment of native title to waters by ensuring that the grant of future commercial and other interests over the use of water or water resources will prevail over native title rights to the extent of any inconsistency.

The question of whether common law native title rights exist over waters should be left to the courts as under the present Native Title Act. The Croker Island and Yorta Yorta claims, now before the Federal Court, are likely to clarify the law.

We point out that indigenous fishing rights have been recognised over both onshore and offshore waters in overseas jurisdictions, including New Zealand, Canada and the United States. Recognition of these rights has enabled Indigenous people to negotiate as stakeholders, to protect their subsistence fishing, to prevent pollution and overfishing and to protect certain species.

9. Retrospective Extinguishment of Native Title Rights - Intermediate Grants.

Community Aid Abroad opposes the new amendments which will retrospectively validate intermediate period grants and allow for compensation to native title claimants for any loss of rights. Because the action was unlawful, any intermediate period grant is invalid if native title exists over the land affected.

The fact that some State governments continued to grant mining licenses and other interests over pastoral leasehold land between the time the Native Title Act came into force (1 January 1994) and the handing down of the High Court's Wik decision (23 December 1996) reflects a blatant disregard by the states' for the rights of Aboriginal people under the Act. The states' justification of these illegal acts, based on a belief that native title had been extinguished by the grant of pastoral leases, does in no way justify such ill considered policy.

It was widely understood during the three year period before Wik that the law on this point would not be known for certain until such time as the High Court handed down its decision. The states were aware that acting on an assumption that native title had been

extinguished was a risky strategy and we believe that such an assumption could not have been made in good faith on the basis of competent legal advice.

This action was unlawful because the States did not follow the procedures set out by the Commonwealth in the NTA - that is, the parties should have entered into formal negotiations. In this light, Community Aid Abroad opposes the new amendments which will retrospectively validate intermediate period grants and allow for compensation to native title claimants for any loss of rights. Because the action was unlawful, any intermediate period grant is invalid if native title exists over the land affected.

We also oppose the fact that the new amendments go further than simply making valid intermediate period grants on existing pastoral leases. The amendments also make any intermediate period grant valid if it was done in relation to land which has ever been the subject not only of a lease (other than a mining lease), but of a grant of freehold or had a public work constructed on any part of it. This includes land over which there are no private interests other than native title interests - for example, land once subject to a pastoral lease which expired long ago, or land on which a memorial of some sort was once erected.

These amendments are blatantly racially discriminatory. Only native title will be affected, not other forms of title. There must also be serious doubt as to whether compensation paid would really be on just terms.

10. Outright Extinguishment of Native Title

Community Aid Abroad opposes amendments to retrospectively ensure that any pre Wik grant giving a right to "exclusive possession" over land will be valid and will have permanently extinguished native title.

Government claims that these amendments are essentially to confirm and codify the existing common law are misleading. In reality, the amendments go beyond the common law in that they extend the scope of acts which are to permanently extinguish native title. In all cases where people own their land as freehold or hold a lease which grants them the right to exclusive possession, a residential lease or a community purpose lease, native title will have been extinguished permanently over that land. Also included are leases to statutory authorities where the authorities can deal with the land as if they own it and public works.

For example, some community purpose leases may not give exclusive possession at all. In addition, not all public works would extinguish native title - stock routes are not covered by structures and it would still be possible to exercise native title rights on them. Similarly, underground gas pipelines would not necessarily impede native title rights at all.

Community Aid Abroad also opposes the removal of the right to negotiate within town boundaries. In most cases this amounts to dispossessing those Aboriginal people who have already suffered the greatest dispossession since European settlement.

11. Extinguishment of Inconsistent Native Title Rights on Pastoral Leases.

Community Aid Abroad strongly opposes the fact that the amendments will permanently extinguish any native title rights which are inconsistent with pastoralists' rights, thereby partially extinguishing native title rights over the relevant pastoral lease.

The Federal Government has wrongly claimed that its amendments merely confirm the common law when, in fact, by permanently extinguishing inconsistent native title rights, the amendments dramatically change the common law to the everlasting detriment of Aboriginal people.

The fact is that in *Wik*, the High Court held that native title rights must "yield" to the rights of pastoralists to the extent of any inconsistency. The Court did not say that inconsistent native title rights would be permanently extinguished.

Moreover, the amendment refers not only to current pastoral leases but also to former ones. This means inconsistent native title rights will be permanently extinguished on any land over which a pastoral lease has ever been granted. This would include land over which economically unviable pastoral leases expired perhaps 100 years ago and on which Aboriginal people have lived continuously ever since. This will be particularly detrimental in areas of the Northern Territory and Western Australia where numerous unviable leases have been vacated.

12. Sunset Clause.

Community Aid Abroad is opposed to the introduction of the six year sunset clause under which no native title claims will be accepted later than six years after the commencement of the new Bill as law.

It is hard to see what the Government plans to achieve by this amendment. This change is unlikely to prevent claims being made because native title rights are common law rights which do not depend on the NTA for their existence. Under this amendment, claims after the cut-off date will have to be run in the Federal Court, without any of the essential procedural assistance which the NTA rules give to both the parties and the courts, hindering the effective conduct and settlement of claims.

Community Aid Abroad believes that one of the major benefits to the Government of the existing NTA process for determining native title is that it provides the necessary procedural apparatus for dealing with claims through the NNTT.