

Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

Committee Inquiry – Native Title Amendment Bill 1997

1. INTRODUCTION

1.1 The Independent Education Union appreciates the opportunity to put its views to the parliamentary joint committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund which is conducting an enquiry into the Native Title Amendment Bill 1997.

1.2 The IEU is the federally registered organisation which represents the industrial and professional interests of teachers, trainers and support staff in all non-government education interests across Australia. This includes early childhood centres, schools and post secondary private training and ELICOS institutions. It has a current membership of approximately 44,000 members nationally.

1.3 The IEU is strongly committed to taking a leadership role in educating its members through its policy development and publications regarding the truth of the history of indigenous Australians and their long struggle to achieve land rights and self determination. The IEU wishes to work cooperatively with Aboriginal and Torres Strait Islander peoples and their representative organisations to overcome the legacy of their sad history, most particularly within educational and trade union contexts.

1.4 It is within this context that the IEU makes this submission to strongly oppose the federal government's proposed amendments to the existing Native Title Act.

2. EXISTING LEGISLATIVE FRAMEWORK

2.1 The IEU strongly supports the existing legislative framework, noting that the Racial Discrimination Act 1975 (RDA) was the first piece of anti-discrimination legislation passed by the Commonwealth Parliament, with further amendments to the RDA being effected by the Racial Hatred Act 1995. This legislation has been supplemented by the enactment of comprehensive anti-discrimination legislation by all states and territories.

2.2 The central proscription in Section 9 of the RDA makes unlawful "any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin" which nullifies the enjoyment of fundamental rights or freedoms. It deals specifically with racial discrimination in relation to access to places and facilities; the provision of goods and services; employment; and the right to join trade unions.

2.3 The IEU believes this legislative framework is fundamental for the development of a tolerant, decent, fair and democratic society and that the proposed amendments to the Native Title Act represent a fundamental attack upon the

existing legislative framework and a diminution of the basic human rights of Australia's indigenous people.

3. PRINCIPLES ENDORSED BY THE IEU COEXISTENCE – NEGOTIATION AND CERTAINTY

3.1 The IEU supports the principles set out in the document “Coexistence – Negotiation and Certainty” as the basis for achieving a fair resolution of Wik and Native Title issues for all Australians.

3.2 The principles of coexistence are:

- respect for property rights of all title holders on a non-discriminatory basis and in the spirit of coexistence
- the principles of non-discrimination, as set out in the Racial Discrimination Act 1975, must be respected
- continuing protection of native title under the existing Native Title Act
- Native title holders have a right to negotiate changes over development on native title land and acquisition of native title rights and interests
- Indigenous people must have the right to negotiate changes which affect their fundamental rights
- No de facto extinguishment of native title by:
 - “confirming” the extinguishment of native title;
 - minimising native title rights through codification;
 - expanding the range of activities carried out on pastoral and other leases to coincide with the primary production definition and allowing those activities to be carried out on off-farm land;
 - applying ‘physical’ connection tests
 - imposing an unreasonable threshold test for the acceptance of native title applications
 - precluding towns, cities and water and air from the right to negotiate of other procedural process
 - removing or impairing the right to negotiate and other procedural rights from many categories of government activity where native title coexists with other tenures
 - imposing a sunset clause on applications lodged under the Native Title Act
- recognition that native title is a unique interest in property and respect for its cultural and spiritual basis
- compensation cannot adequately replace native title rights
- processes for the recognition of native title should accommodate indigenous laws, customs and culture to the greatest possible extent

- Native title holders should always have the choice of pursuing their rights in the Commonwealth system, (without a national interest clause) and not be confined to State-Territory processes
- Native title on coexisting tenures should be able to be enjoyed to the maximum extent possible

4. PROPOSED BILL

In supporting the above principles, the IEU makes the following points of objection to the proposed Native Title Amendment Bill 1997:

- 4.1 The Bill is racially discriminatory in that it provides for the substantial extinguishment of the property rights of only Australia's indigenous people. In so doing it severely undermines the gains achieved for Aboriginal and Torres Strait Islander peoples by the High Court's 1993 Mabo decision and threatens to destabilise the Racial Discrimination Act. The Bill will permit the States and Territories to convert leasehold to freehold regardless of the Racial Discrimination Act (unlike the current situation where it must occur in strict compliance with the Native Title Act and the Racial Discrimination Act) with the Prime Minister pledging to cover 75% of the compensation payable thus giving a massive incentive for such conversion to occur.
- 4.2 The Bill provides for a cut off date of 6 years for claims under the Native Title Act, thus giving Aboriginal communities and organisations insufficient time to research and organise the substantial body of material and evidence required to advance their very many legitimate native title claims. Access to land pending the hearing of native title claims will be restricted to people with current physical access with the consequent loss of rights for those forced off their land in the past. The Bill increases very significantly the difficulty of proving native title and decreases the obligation of the Court to have respect for customary laws, for example, in relation to the disclosure of confidential information.
- 4.3 The Bill provides for the primacy of pastoralists' rights over and above native title rights and will therefore result in the substantial extinguishment of native title. Further, the Bill provides for the right of States and Territories to allow a number of activities which are inconsistent with native title, including the existence of full primary production activities on pastoral leases, and the extinguishment of native title in relation to government held land.
- 4.4 The Bill provides for the gradual abolition of the important "right to negotiate" over proposed developments, leaving traditional owners with negligible ability to protect their heritage. The right to negotiate by indigenous people exists under the current Native Title Act. It enables them to participate along with other interested parties in the negotiation as to development on land subject to native title.

The "right to negotiate" over proposed mining on native title land will be eliminated on pastoral lease lands, and the Bill will limit the right with respect to mining leases on vacant crown land to a once only right during the life of any mining operation.

4.5 The Bill is divisive and will undermine the tentative but developing cooperative relationships being established between pastoralists, miners and indigenous Australians. It gives credence to a view that native title can exist only at the expense of economic and rural development, when in fact recent experience shows that all the parties can successfully negotiate outcomes which satisfy their rights and needs.

Indigenous groups have consistently made clear their understanding of the need for pastoralists and miners to be certain of their continued pastoral and mining enterprises and indigenous groups are willing to support legislation confirming those rights. The leaders of Australia's indigenous community have continually restated their desire to negotiate with all the parties, including state/territory and federal governments. In the same way, it is right and fair that native title holders should have certainty regarding their rights – to hunt, fish, camp, visit sites of significance, protect cultural heritage, engage in traditional ceremonial activities, and to have recognised the special spiritual relationship which indigenous Australians have with their traditional lands. The IEU believes there is no reason that multiple use of pastoral lands should not continue as it has for over the past 100 years.

4.6 Advice from very experienced and eminent constitutional lawyers indicates that the Bill will bring about uncertainty, legal challenge and confrontation. The complexity of detail in the Bill means that all parties will be required to seek expensive legal advice and suspicion, division and frustration will govern the dialogue between the parties. Instead of improving the operation of the current Act, the Bill focuses on depriving indigenous Australians of native title. The coexistence alternative, which is the only workable and fair option, is essentially ignored.

5. RECOMMENDATIONS

5.1 The IEU believes that the federal government should demonstrate its bona fides by consulting in good faith with indigenous people about all issues of principle regarding native title. Such negotiations should operate from the basis that the rights of all parties can and should be respected.

5.2 The IEU believes that the federal government should demonstrate national leadership on the issue of national reconciliation by committing to developing a resolution based on coexistence supported by a fully resourced structure for negotiated agreements.

5.3 The IEU believes that the federal government should fully support the Native Title Act and the principles which it embodies and remain committed to legislation which is racially non-discriminatory.