Catholic Bishops claim Native Title holders under-represented in the proposed amendments to the Native Title Act

The Catholic Bishops of Australia claim the balance of proposed amendments to the Native Title Act strongly favours industry rather than native title holders.

The Submission to the Parliamentary Secretary to the Prime Minister, Senator Minchin, on amendments proposed to the Native Title Act, was endorsed by the Australian Catholic Bishops' Conference and supported by the Australian Conference of Leaders of Religious Institutes at its November plenary meeting.

In essence, the submission focuses upon matters of principle, such as equality of all Australians before the law, and the importance of the Mabo decision to the process of reconciliation. The submission urges all governments and parties to co-operate and negotiate in good faith as the Native Title Act itself resulted from an historic agreement by which Aborigines and all other parties made some gains and concessions.

The submission also claims that the proposed amendments to the Native Title Act will further complicate a document which is already purported by some sectors of the community to be 'unworkable'.

In their summary the Catholic Bishops make the following observations:

"Given that the balance of the amendments strongly favours industry rather than native title holders, it is essential that we re-commit ourselves as a nation to reconciliation through recognition, respect and justice....The national settlement concerning native title must be based on a faithful implementation by our parliaments of the spirit and principles of the High Court's Mabo decision which ensured that Australian law should not be frozen in an era of racial discrimination".

Please find a copy of the submission attached.

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Submission: Amendments to the Native Title Act 29 November 1996 Preamble:

1.

Over the last decade, we, the Catholic Bishops of Australia, have been guided in our statements on Aboriginal land rights by the remarks of Pope John Paul II when he met with Aborigines and Torres Strait Islanders at Alice Springs on 29 November 1986. He said:

Let it not be said that the fair and equitable recognition of Aboriginal rights to land is discrimination. To call for the acknowledgment of the land rights of people who have never surrendered those rights is not discrimination. Certainly what has been done cannot be undone. But what can now be done to remedy the deeds of yesterday must not be put off till tomorrow.

2.

We take as understood, too, that the principle of the equality of all Australians before the law must be upheld, and be seen to be upheld, in amendments proposed to the Native Title Act. In this regard, we note the Prime Minister's remarks, contained in a press release of 22 May 1996 entitled "Native Title Amendment Proposals", that "the Government is committed to establishing a system of determining native title which is both workable and fair to all parties." (emphasis added)

Comment

3.

We welcomed the passage of the Native Title Act at Christmas 1993. Rightly, in our view, the Coalition went to the last election with commitments to retain the Native Title Act, and to respect the provisions of the Racial Discrimination Act 1975. The new Government reserved the right to amend the Native Title Act `to ensure its workability.' Its Discussion Paper (May 1996) states that its proposals are "in keeping with the principles established by the High Court in Mabo (No 2)...." It would be helpful if the Government stated precisely what it understood those principles to be. In the absence of the articulation of those principles, it is all too easy to justify amendments on the basis of the existing legislation not being "workable." We note the Government's assurance that any amendments would be preceded by wide consultation.

4.

The President of the National Native Title Tribunal, Justice Robert French, notes in his Report, in the National Native Title Tribunal's Annual Report (1995/96), that:

The decision of the High Court of Australia in Mabo v The State of Queensland (No.2) (1992) 175 CLR 1 represented a watershed in the relationship between Australia and its indigenous people. It was the voice of one system of law speaking to and recognising another. It provided a basis for indigenous people to assert and claim recognition of their native title in the common law courts.

In our terms, the Native Title Act was a federal response to the uncertainties and new challenges raised by the High Court's Mabo decision, requiring co-operation between Commonwealth, State and Territory governments. It also sought resolution of conflicting claims through negotiation and mediation. Both these approaches were sound. We regret that some State and Territory governments and industry groups have found the detail of the Native Title Act unworkable.

5.

It is well documented that much of the detail of the Native Title Act was negotiated by Aborigines, the government of the day and members of the Senate in what Aboriginal leaders described at the time as "a remarkable settlement and historic agreement." In return for the Aboriginal acceptance of the Government's decision to validate all non-Aboriginal titles granted since the passage of the Racial Discrimination Act, Aborigines were to obtain a right to negotiate with developers wanting access to native title land. The right to negotiate was a substituted compromise for the right of veto sought by native title holders in view of Justice Woodward's time-honoured 1974 observation: "I believe that to deny Aborigines the right to prevent mining on their land is to deny the reality of their land rights." More recently, the High Court has observed in the Waanyi case ((1996) 135 ALR 225 at p.236):

If it be practicable to resolve an application for determination of native title by negotiation and agreement rather than by the judicial determination of complex issues, the Court and the likely parties to the litigation are saved a great deal of time and resources. Perhaps more importantly, if the persons interested in the determination of those issues negotiate and reach an agreement, they are enabled thereby to establish an amicable relationship between future neighbouring occupiers.

6.

Justice Robert French observed further in his President's Report:

The decision in Mabo and the passing of the [Native Title] Act initiated an historical process in which indigenous people, on a scale and in a way which has never happened before, claim formal recognition of their law and culture and rights to traditional country arising under that law and culture.

Their claims pose challenges for all Australians.

In the light of the President's observations, we regret particularly that Government and industry have decided that a right to negotiate at both the exploration and development phase is unworkable. It seems to us that to restrict significantly the rights of native title owners in favour of developers whose corporate objective, understandably, is maximum profitability as a return for its investment, is not a satisfactory approach to meet the particular challenges posed "for all Australians." We are concerned that Aborigines will have to comply with a much stricter registration test before being eligible for the once-only right to negotiate. If these are determined to be the preconditions for gaining co-operation from state governments and industry, it must be ensured that the detail of changes do not further curtail the capacity of native title holders to make decisions about development on their land in their own good time.

7.

The Government must be attentive to the strong objections of the Indigenous Representatives who have taken issue with what they describe as "the attack on the right to negotiate, ministerial intervention in all levels of commercial negotiation and arbitration, and the political interference and administrative overkill in relation to the role of representative bodies." Further, it is recognised that if a developer fails to negotiate access to land, there is a guaranteed avenue to an independent tribunal, and should the tribunal agree with Aborigines opposed to development, the State minister has power to override the tribunal in the State interest.

8.

We recognise the Federal Government's prerogative to formulate proposals acceptable to state governments and industry groups. Nevertheless, we have strong reservations with the following proposed amendments concerning the right to negotiate, especially given that it will not be exercisable at the exploration phase:

(a) The reduction of the time for negotiation from 6 months to 4 months (s.35)

(b) The power of the Minister to stop negotiations and authorise an immediate development that will have substantial economic benefit to Australia provided the Minister "considers that there will be significant benefits to native title holders in relation to the land or waters concerned." (s.34A)

This is legislated paternalism.

(c) The power of the Minister to cut short consideration of an application by the independent tribunal.

(d) The proposal to stop a court or tribunal from having regard to the Aboriginal spiritual attachment to land when deciding whether to grant a developer access to the expedited procedure for determining a development application. (s.237(a))

We think the law should treat seriously the Aboriginal spiritual perspectives on land. As religious leaders in a pluralistic society, we are disturbed to read in the Government's Explanatory Memorandum: "Amendments to the expedited procedure will make it clear that it is physical interference with the community, rather than spiritual interference, that should be considered." (p.16) Such a proposal runs counter to existing federal legislation such as the Australian Heritage Commission Act 1975, with its references to the national estate including "...the cultural environment of Australia, that [has] aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community." (s.4) More relevantly, the stated object of the Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984 is "to preserve and protect places, areas and objects of particular significance to Aboriginals, and for related purposes." S.3 of the same Act provides that "Aboriginal tradition" means "the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships." Clearly, the intent of such legislation is to embrace and to protect matters which are wider than only "physical interference with the community."

(e) The decision not to permit an independent tribunal to make a determination which included a condition that a payment be made calculated by reference to the profit or income to be derived from the development. (s.38(2))

In its own Discussion Paper, the Government said:

As a further encouragement to successful negotiation, ...this would merely give the arbitral body a discretion to determine such a payment, not oblige it to do so. Such a change could give parties a stronger incentive to reach a negotiated agreement and it would not impact on the obligations of miners to make payments under State and territory royalty regimes. (p.17)

(f) The decision to allow the Minister to exempt from the right to negotiate an acquisition of land by government for a third party which is privately developing a public infrastructure development. (ss.26(2)(d); 214(a); 253)

In New Zealand, the privatising of public assets (including the fishing resource) provided the opportunity for the principles of the Treaty of Waitangi to be expanded. Here in Australia, Government is anxious to cut back the Aboriginal entitlement to negotiate. There has already been a successful negotiation for the building of a pipeline in South East Queensland.

(g) The stricter new registration test is now to be applied retrospectively, in that applications made before 27 June 1996 (the date of introduction of the first amendment bill), and complying with the existing registration test, will be subjected to

the new test once a development application is made. (Schedule 3, Part 2, Division 2, s.7(3))

9.

We are concerned also with the unnecessary proposal to ensure that compulsory acquisition of land by a State government will extinguish native title forever. The existing law whereby native title is suspended for the period of public use of the land is fairer to native title holders and more "in keeping with the principles established by the High Court in Mabo (No.2) in 1992."

10.

Given that pastoralists are guaranteed the right to renew their pastoral leases on identical terms and conditions without having to negotiate with native title holders, and given that any native title has no effect on a pastoralist's capacity to mortgage land, we object strongly to the proposal to permit an increase of pastoralists' rights and a corresponding reduction of native title rights (s.25(1)-(1F)).

11.

We welcome the Government's decision not to seek parliamentary extinguishment of native title on pastoral leases. Parliament should await the High Court's judgment in the Wik case before deciding to grant additional rights to pastoralists. We note Commissioner Dodson's report quoting legal advice that the proposal to increase the rights of pastoralists in this fashion would be in breach of the Racial Discrimination Act.

12.

We welcome the general principles of the amendments for Indigenous Land Use Agreements which are a response to the discussions between industry and indigenous groups sponsored by the Council for Aboriginal reconciliation and supported by ATSIC. In our view, Government should not weigh down representative bodies with accountability provisions more burdensome than those imposed on other statutory bodies.

Conclusion

We regret that the already complex Native Title Act of 127 pages is to be complicated further by 161 pages of amendments. We urge all governments and parties to co-operate and negotiate in good faith once the rules for engagement are settled. Given that the balance of the amendments strongly favours industry rather than native title holders, it is essential that we re-commit ourselves as a nation to reconciliation through recognition, respect and justice.

The recently negotiated settlement at Crescent Head, NSW, provides a model for living together under the rule of law which extinguishes terra nullius for all time from this continent. It is a timely and significant settlement which should be considered in more detail so that assertions as to the alleged unworkability of the existing native title regime can be considered. Concerns for rapid economic development and State government control of land management should not be allowed to threaten the possibilities for a just and proper settlement of outstanding land grievances.

The national settlement concerning native title must be based on a faithful implementation by our parliaments of the spirit and principles of the High Court's Mabo decision which ensured that Australian law should not be frozen in an era of racial discrimination. Pope John Paul reminded us that negotiated agreement is the key to our resolution of these questions which are part of our national inheritance: The establishment of a new society for Aboriginal people cannot go forward without just and mutually recognised agreements with regard to these human problems, even though their causes lie in the past.