UNITED
NATIONS

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Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/1997/42
18 August 1997

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Forty-ninth session
Agenda item 7

HUMAN RIGHTS OF INDIGENOUS PEOPLES:
(a) INDIGENOUS PEOPLES AND THEIR RELATIONSHIP TO LAND

Note verbale dated 15 August 1997 from the Permanent Mission of Australia to the United Nations Office in Geneva addressed to the Centre for Human Rights

The Permanent Mission of Australia to the United Nations Office and other International Organizations in Geneva presents its compliments to the Centre for Human Rights and has the honour to refer to the preliminary working paper on indigenous people and their relationship to land (E/CN.4/Sub.2/1997/17) submitted to the Working Group on Indigenous Populations at its fifteenth session by the Special Rapporteur on indigenous people and their relationship to land, Mrs. Daes.

The Australian delegation to the fifteenth session of the Working Group submitted, on behalf of the Government of Australia, a paper containing updated information on the paragraphs in Mrs. Daes's preliminary working paper concerning the situation in Australia.

The Government of Australia requests that the Australian paper be made available 1/ as a background document to the members of the Sub-Commission and to observer delegations under agenda item 7 and that it form part of the record of the forty-ninth session of the Sub-Commission.

1/ The attachment is reproduced as received in the original language only.

Working Group on Indigenous Populations
Fifteenth session
28 July-1 August 1997

REVIEW OF DEVELOPMENTS PERTAINING TO THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS PEOPLE

Preliminary working paper on Indigenous People and their relationship to land submitted by Australia Delegation

COMMENTS ON REFERENCES TO AUSTRALIA

1. Paragraph 24

Paragraph 24 is possibly ambiguous in its reference to the 'assumed and unfounded state authority to extinguish land rights recognized in the *Mabo* decision' - it could be taken to be referring to the Native Title Act itself. In fact, the High Court recognised in the *Mabo* decision the power of the state to extinguish native title. This view is taken by courts in other parts of the world, a fact adverted to in paragraph 31 of the draft Working Paper. The Native Title Act in fact limits the ways in which Australian Parliament or governments can extinguish native title thus giving greater protection than the courts or the common law.

Possible replacement sentences are:

> 'This decision gave rise to the Native Title Act, adopted by the Australian Parliament in December 1993, which established a framework for the recognition and protection of the common law native title rights of Aboriginal peoples and Torres Strait Islanders in Australia. The Act also reflected the finding by the Australian High Court that legislative or executive actions by the Parliaments and governments of the States and Territories and of the Commonwealth of Australia may have extinguished native title. The Act did however provide greater protection for native title than the common law by limiting the ways in which native title could be extinguished in the future. Australian Aboriginal peoples have reported to the Working Group the great difficulties with the Act, as well as concern at that aspect of the *Mabo* decision which recognised the capacity of state authority to extinguish the common law land rights.

To remove legal uncertainty about the validity of some acts of governments prior to 1994 (in particular grants to third parties) the Native Title Act did provide for the validation of such acts and in some cases (eg where the invalid act was the grant of a freehold title) extinguishment of native title. If there are any situations in which native title has been extinguished by this statutory validation, just terms compensation is provided. Whether there are in fact any invalid acts requiring validation under these provisions is yet to be demonstrated.

2. Paragraph 37

To the extent that the context of paragraph 37 suggests that the Native Title Act or any proposed amendments would allow for extinguishment of native title without proper compensation, it is incorrect. The Native Title Act provides 'just terms' compensation for the extinguishment of native title and compensation for any impairment of native title by acts of government.

The paragraph is also inaccurate to the extent that it -

(a) implies that the legislation being considered by the Australian Government is a reaction to the 1992 *Mabo* decision; or

(b) states that legislation is proposed to extinguish land rights recognised in *Mabo*.

The proposed legislation is in fact a response to the 1996 decision of the High Court in *Wik* which found that, contrary to the views of many at the time that the Native Title Act was passed by the Australian Parliament in 1993, native title is not necessarily extinguished by the grant by a government of a pastoral lease to a third party. The proposed legislation does not involve extinguishment of native title in these circumstances, nor generally on Crown land (Crown land represents over 30% of Australia's land area). The legislation will preserve the potential for native title rights to co-exist with the rights of pastoralists over another 40% of Australia but ensure that some of the uncertainties arising from the *Wik* decision are addressed. The proposed legislation does however, for the sake of greater certainty for all, seek to confirm the position recognised by the High Court in both the *Wik* and *Mabo* decisions, that native title is extinguished where a right of exclusive possession of land has been given to a third party (such as land used for residential or commercial purposes and grants of 'freehold' which constitute the majority of land in towns and cities).

3. Paragraph 48

Paragraph 48 states that the criteria under the Native Title Act make it difficult to bring land claims. There are in fact currently few criteria applicable to the acceptance of claims under the Act - a claim must be accepted unless frivolous or vexatious or *prima facie* the claim cannot be made out. The fact that over 550 native title claims have been accepted by the National Native Title Tribunal (the first step in the process of recognition of native title) since the beginning of 1994 makes it clear that the criteria do not present any 'great difficulty' in bringing claims.

Moreover, the Australian Government, through the Aboriginal and Torres Strait Islander Commission (ATSIC) funds indigenous organisations to assist claimants bring claims, funding which has increased substantially in the last 18 months.. The Government has also provided legal aid to claimants directly and through ATSIC. However, in order to address the problems with the management of underprepared and overlapping claims (in some cases there are up to 10 claims over the same area), the Government is proposing a number of amendments to the Native Title Act. These are intended to streamline the claims process and ensure that all claims must be accompanied by sufficient information to ensure that all those involved (including non-indigenous Australians with interests in the area under claim) have a clear idea of the nature of the claim and the land to which it relates.

4. Paragraph 72

Two sentences in paragraph 72 indicate a possible lack of appreciation of the circumstances in Australia:

> 'Politicians and judges are fearful of the unknown cost of resolving these issues. Hence, many of them ensure that openings for interpretation remain.'

Under the Australian legal system, the courts can only deal with the situation in dispute between the parties before them and the legal issues it raises. They have no advisory jurisdiction to speculate on what the legal situation would be if a different set of facts was under consideration. Thus it was not open for the High Court in the Mabo decision to make a finding that native title could exist on the mainland of Australia (the case involved an island in the Torres Strait off the north coast of Queensland); nor for the Court in the Wik case to determine whether as a matter of fact, native title actually existed on the pastoral leases in question. (The Court merely decided the question at issue - did the grant of the pastoral leases give the lessee exclusive possession thereby extinguishing any native title that may exist. The issue of whether there is any native title and whether is has been extinguished or impaired by the leases remains to be determined in another court.) In order to get a comprehensive description of what constitutes native title and its relationship with other interests in the land and to get answers to the many other legal issues arising from the *Mabo* and *Wik* decisions, further judicial consideration will be essential.

So far as politicians are concerned, the Native Title Act - **with the agreement of indigenous groups at the time** - merely provided a framework for the recognition and protection of native title - it did **not** purport to determine where it exists in Australia, what it might consist of and who might have it, leaving these for the common law to determine through the judicial process.

The paragraph also contains the sentences:

> 'This case [the *Wik* case], combined with the *Mabo* decision, has prompted the federal government to put beyond the Australian Parliament proposals to amend the Native Title Act. The legislation focuses on the extinguishment of native title by pastoral leases.'

It was in fact the *Wik* case itself at the end of 1996 (as well as a number of earlier judicial decisions impacting on the administrative parts of the Native Title Act) which prompted the Government to consider amendments to the Native Title Act (the Act was only enacted after the *Mabo* decision). Some amendments were introduced into the Parliament in 1996 but not passed and are now to be combined with those responding to the *Wik* decision itself. The amendments do **not** provide for the extinguishment of native title by pastoral leases. They confirm extinguishment **only** where a title given to a third party conferred exclusive possession on that party (in line with the *Mabo* decision). In relation to pastoral leases, the amendments reflect the common law in the *Wik* case that said native title would be extinguished to the extent of any inconsistency with the grant of the lease.

More generally, it is true that as with any other common law right, it is open in the Australian legal system for the Parliament to make laws which impact on native title common law rights, just as the Parliament can change the common law, or legislation, creating rights for non-indigenous Australians. This concept of the supremacy of Parliament is one of the fundamental tenets of Australian system of government. The Commonwealth Parliament is however, bound by the Australian Constitution to provide for the payment of just terms compensation to ensure the legal validity of legislation under which property is acquired (whether native title rights or any other property). To the extent that any such acquisition is possible under the Native Title Act (under the amendments it will remain the case that native title can only be extinguished through the normal government acquisition legislation) it will require payment of just terms compensation.