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Analysis of the Native Title Amendment Bill 2009

The Sydney Centre for International Law is a leading legal research and policy centre with a focus on the Asia-Pacific region. This analysis addresses international and related legal issues relevant to the potential operation of the Bill. In particular, it considers the effect of the Bill upon the rights or interests of Indigenous people, as enshrined in international law, in relation to native title claims.

Relevant Indigenous Rights under International Law

Australia's endorsement of the *UN Declaration on the Rights of Indigenous Peoples* on 3 April 2009 represents a recognition of an emerging, albeit limited, concept of self-determination for indigenous people. The Declaration recognises the importance of engaging Indigenous people in government policy on Indigenous affairs, including interests in land. Relevantly, the Declaration:

- Recognises that indigenous peoples have the right to 'maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas' in article 25.
- Upholds the right of indigenous peoples to their traditional lands, and requires legal recognition and protection of these lands by the state (article 26).
- Supports just and equitable redress for indigenous peoples, where traditionally-owned lands have been confiscated, occupied, used, or damaged, without the free and informed consent of the relevant indigenous individuals (article 28).

While we acknowledge the significance of enacting native title legislation in Australia, considerable further effort is required to ensure equitable outcomes for the land rights of indigenous people.

Relevant views of international human rights bodies

We also point to the concerns raised by the United Nations Human Rights Committee in their Concluding Observations in 2000. The Committee raised its concerns about Australia's compliance with self-determination requirements as enshrined in the *International Covenant on Civil and Political Rights* (Article 1). The Committee noted that many regions in Australia were yet to resolve native title rights and interests, and that subsequent amendments to the *Native Title Act* had restricted effective participation of indigenous people in matters affecting land ownership and use.

The recent 2009 Concluding Observations note the lack of sufficient steps taken by Australia to implement the recommendations of 2000. In particular, the Committee expressed regret at the high cost, complexity and strict rules of evidence applying to claims under the *Native Title Act*. To this extent, we view that some of the amendments in the Bill are a positive response to these concerns.

Positive Features of the Bill

We support attempts to streamline the native title system, by liberalising the rules of evidence, expanding mediation assistance, improving the operation of representative body provisions and changing the powers of the Federal Court. Giving the Federal Court the role of managing all native title claims may address one of the chief concerns raised by the National Native Title Tribunal, that is, the resolution of overlapping claims.

In addition, in allowing the exceptions to the hearsay and opinion rule to apply to native title proceedings, as contained in the amended *Evidence Act,* the Bill acknowledges the oral tradition of Indigenous Australians. This is despite the legal emphasis on determining land title and ownership in Australia through written documentation. These amendments may alleviate the evidentiary obstacles encountered in *Yorta Yorta* (2002), where there was insufficient evidence of an 'uninterrupted connection to the land'. Furthermore, the amendment may assist in relieving what National Native Title Tribunal recently identified as a large and time-consuming obstacle to resolution: the 'timely preparation and assessment of native title connection materials'.

The amendments also allow the court to direct a witness to give evidence wholly or partly in narrative form, addressing the concern that the standard question and answer format is an inappropriate method of soliciting information from Indigenous Australians.

Both the exceptions to the hearsay rule and the opinion rule will allow evidence of traditional laws and customs to be submitted by virtue of membership of an indigenous community, recognising the manner in which some Indigenous Australians communicate their knowledge and customs.

Criticisms of the Bill

The Bill shifts the focus away from the initial technical barrier to admitting evidence and onto the substantive question of the reliability of the evidence. Reliability will be assessed by considering the source of the representation, the persons to whom it has been transmitted, and the circumstances surrounding the transmission. Although these changes may improve the flexibility of native title proceedings, the practical impact of the amendments should not be exaggerated. The requirements in ss 55 and 56 of the *Evidence Act* may operate to exclude opinions and hearsay which do not satisfy the given threshold of reliability. Opinion and hearsay evidence may be excluded at the court's discretion under s 135 if its probative value is substantially outweighed by the danger that the evidence might be misleading or confusing or result in undue waste of time.

The changes in mediation assistance provisions may short-circuit lengthy litigation. But while mediation has been hailed as a cost and time effective alternative dispute resolution mechanism, it has been criticised for also often being protracted. Approximately 54% of the current applications have been referred by the Federal Court to the National Native Title Tribunal for mediation and are described as being 'in mediation', but are not expeditiously resolved. Also, caution must be exercised in relation to balancing expedience with fair and just outcomes.

Furthermore, although proposed s 94Q and existing s 136GB are acknowledged as requiring good faith from the government in mediation, some past cases point to a need for additional assurances of good faith from the government in particular contexts.

Finally, we note that while the Bill states that it has no direct financial impact upon Government revenue, we would caution that representative bodies require further resources to resolve native title claims. The ongoing cuts to Land Council budgets ought to be recalled, as it becomes clearer that native title processes are being stagnated by a lack of funding.

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