Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

Question for advice

Background

1.1 The Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples was established to inquire into and report on steps that can be taken to progress towards a successful referendum on Indigenous constitutional recognition.

1.2 Following its private briefing in Sydney on Monday 19 May 2014 the committee decided to seek legal advice including in relation to the possible impact of a non-discrimination clause in the Constitution.

1.3 The committee is considering options for constitutional recognition of Aboriginal and Torres Strait Islander peoples that include recommendations of the Expert Panel on Constitutional Recognition of Indigenous Australians (Expert Panel).

1.4 The relevant recommendations from the Expert Panel are extracted below and would repeal the existing section 51 (xxvi) of the Constitution and insert proposed new section 51A which consists of a preambular or introductory statement recognising Aboriginal and Torres Strait Islander peoples, linked directly to a power to make laws with respect to them.

1.5 The Expert Panel also recommended that a new proposed section 116A be inserted which would prohibit discrimination by the states and territories and the Commonwealth on the grounds of race, colour or ethnic or national origin.

Recommendations of the Expert Panel

1.6 The Expert Panel recommended the following constitutional changes:

> That a new 'section 51A' be inserted, along the following lines:
>
> **51A Recognition of Aboriginal and Torres Strait Islander peoples**
>
> **Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;
>
> **Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;
>
> **Respecting** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;
>
> **Acknowledging** the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

> the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

That a new 'section 116A' be inserted, along the following lines:

> **116A Prohibition of racial discrimination**
>
> (a) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
>
> (b) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

1.7 The committee has also considered proposals which would either replace section 51(xxvi) or repeal it and insert a proposed new section along the following lines:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples, but not so as to discriminate adversely against them.

Issues

1.8 The committee understands that the *Native Title Act 1993 (Cth)* (NTA), following amendments introduced by the *Native Title Amendment Act 1998*, creates a mechanism for the validation of past and intermediate period acts (Divisions 2 and 2A of the NTA, respectively).[1]

1.9 The committee understands that section 7(3) of the *Native Title Amendment Act 1998* made it clear that the validation of past or intermediate period acts was not affected by the application of the *Racial Discrimination Act 1975* (RDA), which would otherwise protect native title holders against discriminatory extinguishment or impairment of their native title.

1.10 Further, the committee understands that the NTA creates an entitlement to compensation for certain acts that have extinguished or impaired the native title rights and interests of Aboriginal and Torres Strait Islander peoples. This entitlement to compensation arises when the Commonwealth or state or territory validates certain acts that extinguish native title.[2] The NTA provides that compensation must be made on 'just terms',[3] taking into account any loss, diminution, impairment or other effect the act has had on native title rights and interests.

---

1 Validating these acts, including the making of legislation the grant of a licence or permit, the creation of any interest in land or waters and the exercise of executive power[1] reversed elements of the High Court's decision in *Wik*, with the effect of retrospectively extinguishing or impairing native title rights and interests.

2 *Native Title Act 1993 (Cth)*, s 7.

3 *Native Title Act 1993 (Cth)*, s 253.

1.11 Compensation is ordinarily payable by the government entity, Commonwealth, state or territory to which the act is attributable. Compensation is payable only to the extent (if any) that the native title rights and interests were not already extinguished at common law.

1.12 The committee also understands that other provisions of the NTA provide 'special measures' within the meaning of the Convention on the Elimination of all Forms of Racial Discrimination and the RDA.

1.13 In considering this issue the committee has had regard to relevant parts of the Explanatory Memorandum to the *Native Title Amendment Act 1997 (Cth)* which appear at Attachment A.

1.14 On this basis, the committee seeks advice as to whether the insertion of a section into the Constitution that prevents racial discrimination would affect the constitutional validity of the validation of past and intermediate period acts under the NTA and the relevant compensation arrangement currently in place.

Question for advice

Whether the insertion of a clause to prevent discrimination on the grounds of race, colour or ethnic or national origin, or to enable the Commonwealth to make laws with respect to Aboriginal and Torres Strait Islander peoples but not so as to discriminate against them, would put at risk the constitutional validity of:

(i) Divisions 2 and 2A of the NTA that operate to validate past and intermediate period acts;

(ii) Section 7 of the *Native Title Amendment Act 1998* which operates to limit the operation of the RDA;

(iii) the payment of compensation for extinguishment or impairment of native title rights and interests under the NTA;

(iv) provisions of the NTA that are considered 'special measures', including the right to negotiate provisions; and

(v) any other existing Commonwealth legislation made in reliance upon section 51(xxvi).

Attachment A

From *Explanatory Memorandum* to the *Native Title Amendment Act 1997 (Cth)*

3.5 A majority of the High Court held that extinguishment of native title by inconsistent Crown grant did not give rise to a claim for compensatory damages. It follows that the validity of such grants could not be challenged merely on the basis that they extinguished native title without compensation. However, this conclusion of the majority of the Court was made expressly subject to the operation of the *Racial Discrimination Act 1975* (RDA) of the Commonwealth. On one view, the RDA may in some cases render wholly or partly invalid past laws or grants.

…

4.3 Prior to the Wik decision, it was widely assumed (an assumption reflected in NTA provisions such as section 47) that native title had been extinguished on leasehold land (including land formerly the subject of a lease). The High Court said in Mabo (No. 2) (1992) 175 CLR 1 that '... native title has been extinguished by grants of ... leases...' (at 69). This view was adopted by the previous Government. The Second Reading Speech to the NTA stated:

> "the Government's view [is that]... under the common law past valid freehold and leasehold grants extinguish native title. There is therefore no obstacle or hindrance to the renewal of pastoral leases in the future..."

4.4 Governments believed, therefore, that they were free to do various acts over pastoral lease land (including converting it to freehold) without following the processes in the NTA. As a consequence of this belief, acts were done over leasehold land which we now know, on the basis of Wik, may have been invalid because of native title.

4.5 The Government does not believe that invalidity is the appropriate consequence for acts done on the basis of a legitimate assumption subsequently proved wrong. Division 2A makes intermediate period acts valid. It does not, however, validate acts over land where the only type of lease ever granted over that land was a mining lease or where the land has always been vacant Crown land. The reasons for this validation regime are very much the same as the reasons for the past act regime in the current NTA (Part 2 of Division 2). The form of the new regime follows that of the current NTA.

…

18.24 Some provisions of the NTA provide formal equality to native title holders. The RDA generally requires such formal equality, that is, equal treatment of all groups under law without distinction on the basis of race (see *Gerhardy v. Brown* (1985) 159 CLR 70). Other provisions of the NTA provide 'special measures' within the meaning of the Convention on the Elimination of all Forms of Racial Discrimination and the RDA. Special measures are allowed as an exception to the general principle of formal equality because they are designed to advance the human rights and freedoms of persons, such as Aboriginal people and Torres Strait Islanders, who have been historically disadvantaged groups. The right to negotiate provisions have been generally considered a 'special measure'. This understanding of the NTA and the right to negotiate provisions appears in the Preamble to the Act, and the Second Reading Speech and Explanatory Memorandum to the Native Title Bill 1993.