Human Rights and Equal Opportunity Commission

Aboriginal Torres Strait Islander Social Justice Commissioner

14 August 2001

The Executive Officer
"Wand Review"
Governor Sterling Tower
26th Floor
197 St Georges Terrace
PERTH WA 6000

Dear Sir / Madam,

RE.: Comments on draft "General Guidelines - Native Title Determinations and Agreements"

Thankyou for this opportunity to comment on the Western Australian Governments' "General Guidelines - Native Title Determinations and Agreements".

Guidelines such as these are a significant part of establishing the framework in which native title rights and interests are to be recognised and given effect.

Given the failure of litigated determinations to give content to the practice of native title rights and interests, especially where there are co-existing interests, and the increasing focus on native title agreements to fill this gap, it is vital that the frameworks in which these negotiations are conducted ensure just and equitable outcomes for all parties.

I applaud the attempt of the Western Australian Government to identify and adopt appropriate *processes* for negotiating agreements. However, a "process approach" in itself is no guarantee of equitable outcomes. The "process approach" must be based on minimum standards that *require* outcomes that are consistent with human rights standards.

This is particularly important because the legislative framework that currently governs native title outcomes does not provide adequate minimum standards. As explained in the *Native Title Reports* 1998, 1999 and 2000 the benchmarks contained in the amended NTA are racially discriminatory in significant ways. In the four sets of provisions which these *Native Title Reports* identify as

discriminatory, nthe validation, confirmation, primary production and right to negotiate provisions, any conflict that arises between native title interests and non-Indigenous interests is resolved by ensuring that non-Indigenous interests always prevail over Indigenous interests.[1] The failure of the NTA to provide to native title-holders the same level of protection of their interests as that provided to non-Indigenous interests is racially discriminatory. Moreover these provisions were adopted in July 1998 without the informed consent of Indigenous people.

The 'process approach' thus takes place within a context of discriminatory laws. Unless the draft guidelines themselves provide minimum standards that level the playing field, there is no guarantee that the 'process approach' will provide just and equitable outcomes.

The WA government guidelines are an opportunity to provide *minimum* standards that *require* that negotiated outcomes are consistent with human rights standards.

The major human rights standards elaborated at international law with regard to Indigenous people are the rights to:

- equal protection of property interests before the law; as required by the International Convention against the Elimination of Racial Discrimination (ICERD), article 5 and the Universal Declaration of Human Rights (UDHR), article 17;
- protection of the right to maintain and enjoy a distinct culture; as required by International Convention on Civil and Political Rights (ICCPR), article 27; and
- the right of Indigenous people to effective participation in decisions affecting them, their lands and territories: as required by ICCPR, article 1 and the International Covenant on Economic Social and Cultural Rights (ICESCR), article 1.

Minimum standards that comply with these human rights standards should include the following principles:

- Native title interests are entitled to the same level of protection as non-Indigenous interests;
- Non-extinguishment of native title;
    - Native title-holders should not be required to give up native title in order to access or enjoy benefits that arise from negotiations based on the existence or prior existence of their native title. Negotiations that respect the equality of Indigenous peoples' property rights with

[1] The Acting Aboriginal and Torres Strait Islander Social Justice Commissioner argued to the Committee on the Elimination of All Forms of Racial Discrimination that the validation, confirmation, primary production upgrade and the amendments to the right to negotiate provisions are discriminatory see: HREOC CERD submission, paras 43 – 90. **www.hreoc.gov.au** An analysis of these provisions and their application by State and Territory governments is also contained in the *Native Title Report 1999*, pp49 – 67. The Committee on the Elimination of Racial Discrimination also found these four sets of provisions to be discriminatory in March 1999. Committee on the Elimination of Racial Discrimination, *Decision (2)54 on Australia – Concluding observations/ comments*, 18 March 1999. UN Doc CERD/C/54/Misc.40/Rev.2.

other property rights will not seek further extinguishment of native title. Furthermore, where the legal question of prior extinguishment is uncertain, but native title parties maintain a relationship with the land based on traditional law and custom, negotiations should proceed as if native title continues to exist. Even where native title has been extinguished in a part of the claim area, this should not preclude negotiations regarding that land if the interest that extinguished the native title has ceased (and the land has reverted to Crown title) and the native title claimants maintain a connection with that land based on the observance of traditional law and custom;

- Negotiation of agreements that encourage and allow continued observance of Indigenous laws and customs;
  - The international human rights treaties recognise that all peoples have an equal right to practice and enjoy their distinctive culture. Native title negotiations should not require native title parties to breach their laws and customs in order to obtain the benefits of their native title interests;
- Negotiation of agreements that encourage and allow Indigenous governance within their traditional lands;
  - International human rights principles recognise that Indigenous peoples have a right to effective participation in decisions affecting their traditional lands. In relation to native title negotiations, this right may lead to:
    - Recognition of native title holders as owners or joint-owners and managers of the land;
    - Provision for joint-management arrangements in national parks;
- Recognition that native title is a group right and that the inter-generational aspect of the right must be protected;
- Recognition that native title is a unique interest;
  - Native title has cultural, religious and social significance. Furthermore, its economic value to Indigenous people is limited by the fact that it is inalienable. Consequently, purely economic assessments of land value are not appropriate for the calculation of compensation. Negotiated agreements should reflect this;
- Native title parties' "connection" to land should not be interpreted restrictively;
  - It must be recognised that, just as non-Indigenous Australian culture has changed since the British acquisition of sovereignty, so have Indigenous cultures. 'Connection' to land may include contemporary cultural beliefs and practices forming a distinct indigenous culture that has developed from an earlier traditional culture as it existed at the time of the acquisition British sovereignty.

The *process* for negotiation of agreements should also reflect these principles.

While some elements of the current Draft General Guidelines reflect a principled basis for the negotiation of native title agreements, others do not.

I support those general policies stated in the WA Government's "Draft Negotiation Guidelines – Native title Determinations and Agreements" (the Draft General Guidelines) that support:

- full recognition of native title rights [paragraph 1.2]
- negotiating agreements with native title claimants as the preferred and primary way of achieving native title outcomes [paragraph 1.2]
- negotiation processes that aim to achieve consent determinations of native title [paragraph 1.2]
- negotiation processes that lead to native title and non-native title outcomes [paragraph 1.2]

The aspirations to foster good relationships between all stakeholders in land, promoting certainty and avoiding costly litigation are also appropriate. In total, these policies promote the establishment of a set of stable and equitable relationships (legal and otherwise) between native title and non-native title parties through agreements.

However, while the initial paragraphs of the Draft General Guidelines refer to appropriate policies, there is no explicit statement regarding the relationship between these policy objectives and some of the major processes adopted. In particular, there is little explanation of the rationale for the inclusion of a requirement that native title parties provide the government with a connection report prior to the Government engaging in negotiations.

There are clearly some matters that need to be clarified early in the native title negotiation process. Unlike interests created by the general law, native title is (until determined) largely undescribed within the general legal system. Consequently, the process of building a long-lasting, stable and equitable set of relationships between all stakeholders will require that some basic issues about the nature of native title claims be established early in the negotiation process. These issues include ensuring that negotiations are conducted with the right native title parties, establishing what country they can speak for and establishing basic information about the nature of the native title interests that they claim. The processes established to clarify these matters must be consistent with the human rights-based principles outlined above. The negotiation process must ensure that all parties' interests are fairly represented, and importantly, that all parties are able to effectively participate in the process by speaking for their own interests.

However, as the Draft General Guidelines currently stand, the primary purpose of the connection report requirement appears to be to satisfy the Government as to the *legitimacy* of the native title claim in order to protect the non-native title parties. When *legitimacy* is the purpose for requiring the connection report there is a danger that connection reports will take on a psuedo-evidential character that is more appropriate for a court than a negotiation.[2]

[2] While negotiations may result in a consent determination, there is no guarantee that this will in fact occur. Native title parties should not be required to produce substantial evidence of their native title claim until and unless a contested hearing eventuates.

If, as I have proposed, the primary goal of the Draft General Guidelines is to help build a set of stable and equitable relationships (legal and non-legal) between all stakeholders, the production of connection reports (as described in the Recommended Guidelines for the preparation of Connection Reports) may not contribute and indeed may detract from this process.

Connection reports are reports written about Indigenous people, culture and land by non-Indigenous people. They contribute very little to intra-Indigenous agreement regarding who speaks for what country or about the basis of the native title claimed. In fact, the production of connection reports using prescriptive and culturally inappropriate criteria for establishing membership of the group (such as genealogies) has in some communities greatly increased division regarding how to pursue native title interests. Furthermore, the assumption that native title parties' claims must be 'legitimised' through the production of 'connection reports' takes away native title parties capacity to speak for themselves.

What is required to build the stable, equitable relationships that will provide certainty and rights to all parties is a more fundamental engagement with native title parties themselves. In fact, the process of building a stable set of relationships between all stakeholders *relies upon the existence of stable agreement between and within Indigenous communities* about these issues. Where these are unclear it is essential that Indigenous communities themselves are involved in sorting out the issues.[3] Building this agreement requires that, as a first and fundamental step to all negotiation processes, Government must engage directly with Indigenous communities and resource Indigenous people to work out amongst themselves how they wish to pursue their native title rights. This may involve:

- empowering Indigenous people to resolve disputes over native title issues, and to this end:
    - allocating resources (time, money and personnel) for Indigenous institution building,
    - allocating resources (time, money and personnel) for capacity-building in Indigenous communities, and
    - resourcing Indigenous people to effectively participate in negotiation processes within their own communities and with other stakeholders in land.

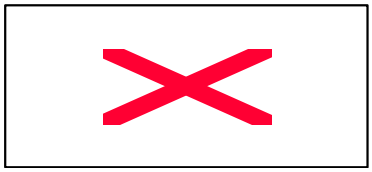
There are various ways in which these processes could be incorporated as part of the Draft General Guidelines being formulated by the Western Australian Government. As a result of these processes, native title parties themselves could produce a negotiation report such as that suggested by the Western Australian Aboriginal Native Title Working Group (WAANTWG) "Submission to the Review of the State Government's General Guidelines" of 16th May 2001.[4] In this way, it may be possible to clarify issues that are central

[3] This is to some extent recognised in the Draft General Guidelines, which seek to support intra-Indigenous resolution of issues such as claim overlaps - see Paragraphs 2.5 & 2.6

[4] page 7

to all native title negotiations and are fundamental to establishing stable, equitable relationships between all parties, while ensuring that the processes according to which the negotiations are conducted respect the fundamental human rights of all parties.

Yours faithfully



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