RECENT DEVELOPMENTS

NATIVE TITLE ISSUES: Legislative Reform and Current Issues

QUESTIONS AND ANSWERS

Question – David Olsson (Mallesons Stephen Jaques, Melbourne):

I would just like to compliment both speakers on bringing a remarkable degree of clarity to what I think is a very complex subject, certainly to me, and I gained a lot from them. My question is to Michael and perhaps Bryan as well, and it really relates to the political process that is coming up in front of us. Michael has highlighted the very difficult times that are likely to be coming up in relation to passing the ten point plan through the Senate, if it gets that far. What do you see as the political outcome over the next few months?

Response – The Hon Michael Lavarch (Speaker):

I think it is pretty hard to predict. My reading of it is that 50% or 70% of the totality of the government package (and by that I mean the ten point plan overlaid on the amendments announced prior to the *Wik* decision – that is the amendments of last year) would be the subject of pretty easily achieved bipartisan support. Where there will be difficulties, obviously, is in this clash of the government attempting to placate its rural constituency with measures which simply are not necessary in order to achieve that legal outcome. So you can give people the necessary certainty that they need, assurance that they can undertake ongoing activities on their land without paring back or extinguishing native title in the way which is largely being proposed. And at that point those measures will strike considerable resistance out of the Senate. Now overlaid upon that is the political dynamics of it. The Opposition in particular will know that there are no votes to be won in standing up for the concerns of Aboriginal Australians who are supposed lost in it – that is the harsh political reality of it. There is however a strong commitment to the Native Title and *Mabo* on behalf of the Labor Party. They went through a lot pain in getting to the thing originally and they are not going to walk away from it. So there are a number of different competing pressures being applied.

My assessment is that a workable package would be able to be passed by the Parliament, but that will be somewhat short of what the Government is now proposing and considerably short of what the Queensland Government or the National Farmers Federation and elements of the National Party are demanding. So against that scenario whether that then goes down to the wire with a sort of a double dissolution scenario or whether the Government accepts what it can get through and moves on with life, your guess honestly is probably as good as mine.

Question – Michael Goss (Middletons Moore & Bevins, Brisbane):

I have a question for Bryan that may be in two parts. Bryan, you mentioned early on in your discussion the suggestion that lawyers might be looking at warranties and indemnities to put in their security documents. I just wondered whether you could expand on that a little bit about how truly effective you think anything in that way might be? And secondly, you made much of the point of a continuing association with the land by claimants. What effect or observations would you make about forced removal from the land that might militate against proving a continued association.

Response – Bryan Horrigan (Speaker):

In relation to warranties and indemnities, my only comment would be that I would put them in the category of "try ons". I think other provisions like notice provisions are different, but in terms of warranties and indemnities, if you can try to get the other side to agree to giving some sort of warranty about title in case there is any implication that is unforeseen at that time then do it, but the reality is that it is going to be hard to get the other side, no matter who they are, to agree. They are going to say that they are not going to give that sort of warranty. And particularly if you are dealing with government-type enterprises, they are not going to give that sort of warranty about passage of title and security of rights. So try it and see how you go. It is one of the things I would put in there, in my "try on" list.

In relation to the connection, my preliminary view is that if you have an Aboriginal group which has been removed forcibly from an area and it is still together as a group maintaining its traditional ways and it is living elsewhere and the only factor which shows why they do not have a physical connection with that land any more is their forcible removal, it will not take much for (as the Deputy Prime Minister called them this week) the "Wik Four" to say that in those circumstances there is still a sufficient connection notwithstanding that there has been momentarily the absence of a physical connection with that particular area of land.

I might also add that I think that Michael's comment about the danger of all of us thinking about compensation purely in terms of compensation for loss of property rights is an extremely important point. I have not thought it through properly yet, but it seems to me that that has to be addressed. At the moment people are talking, particularly after the Crescent Head agreement in New South Wales, about whether or not the value of all native title rights can be capped to say freehold value, with maybe something for spiritual attachment to land. But that is through the paradigm of compensating for loss of property rights. If the paradigm is compensation for other things, we are not dealing with that sort of boundary any more.