NEW SOUTH WALES

NSW NATIVE TITLE LEGISLATION

[The following is a summary of a presentation by Michael Wright, solicitor, speaking on behalf of Aden Ridgeway, Executive-Director of the NSW Aboriginal Land Council ("NSWALC") at an evening seminar held by AMPLA at the offices of Clayton Utz on 2 June 1994.]

NSWALC is the peak Aboriginal land council under the *Aboriginal Land Rights Act* 1988 (NSW) and is also a representative body for the purposes of s 202 of the *Native Title Act* (Cth). The recently passed *Native Title Act* (NSW) recognises this additional status by amending the NSW *Land Rights Act* by adding to the statutory functions of NSWALC, a provision which acknowledges its position as a representative body. Aden Ridgeway has held the position of Executive Director since January, 1994. Prior to that he was employed for about eight months by NSWALC as Land Policy Manager. He was until recently a part-time Assessor of the Land and Environment Court and before taking up employment with NSWALC had been employed as a senior policy officer with the NSW Department of Minerals and Energy.

Aden is a member of the Gumbayyngirr people whose language or tribal area is around Nambucca Heads in New South Wales.

"CAN AUSTRALIA SURVIVE NATIVE TITLE?"

Aden believes that this question can be answered in the affirmative. In reaching that conclusion, he traverses a range of issues which may illuminate some matters of concern to Aboriginal people which directly or indirectly affect their attitudes to the Mabo decision and the legislative responses to it.

Aden observes that there are numerous dimensions to native title and that the commercial and economic dimensions have loomed largest in the public debate. He suggests however that the cultural and traditional dimensions and broader social and human dimensions cannot be overlooked by any of us.

In essence native title is a cultural title because its existence and content is dependent upon the laws, customs and traditions of the titleholders. It is impossible to speak of native title without touching upon matters which are integral to the very existence of the titleholders. You cannot talk about Aboriginal land without talking about Aboriginal people.

It is not simply a question of developing some understanding of the special relationship that Aboriginal people have to land but more importantly to have some appreciation for the fact that there has been a fundamental change in the way that Aboriginal and non-Aboriginal Australians must now relate to each other under the law. Over time some changes may have come about without the Mabo decision simply because there has been a gradual increase in the awareness in the non-Aboriginal community of the contribution that Aboriginal people are making to the cultural and economic well-being of the country as a whole. A graphic example of this is the willingness of the advertising industry to take advantage of the imagery of Aboriginal Australia to market various tourist destinations. Whether or not this is always done with the full permission, approval and commercial involvement of Aboriginal people is perhaps another question.

It is almost certainly now trite to observe that the aftermath of the Mabo decision has seen unprecedented attention paid by governments and the media

to a host of issues affecting Aboriginal Australia. It is to be hoped that in amongst all of this is some degree of recognition that there remains throughout Australia a rich and deeply resilient culture which hitherto received but cursory acknowledgment under the non-Aboriginal legal system.

At the core of the Aboriginal response to the Mabo debate is the continued existence and vitality of Aboriginal culture and a desire to see more than mere formal recognition of it by government and non-Aboriginal Australians.

The Commonwealth *Native Title Act* has as one of its objects the recognition and protection of native title but the Act is essentially a compromise between the recognition of the continued existence of native title and the effects of 200 years of European settlement. It needs to be understood that in many cases Aboriginal association with particular land may well continue even though native title may not now be asserted under the non-Aboriginal legal system by virtue of extinguishment. Aboriginal people may well still continue to have associations with land under their own laws and customs but it is quite another question whether it is possible to achieve recognition of Native title under the non-Aboriginal legal system. Native title is simply the means by which the non-Aboriginal legal system has chosen to give some limited and belated recognition to the continued existence of Aboriginal law and custom, particularly as it relates to land.

The Mabo debate has had other far reaching consequences beyond the enactment of the legislation.

There has been a fundamental change in the power relationship between Aboriginal people and government and Aboriginal people and industry including the mining and pastoral industries. Insofar as industry is concerned, this should not be seen as being confined to project specific questions such as access to land.

Far more significantly, Aden observes that native title has thrown into sharp focus a genuine desire of the federal government and many non-Aboriginal Australians to address the long outstanding grievances of Aboriginal people not only about issues relating to land but to a range of other matters.

The fact that native title legislation has now passed through the Commonwealth and New South Wales Parliaments does not mean that the challenge presented by Mabo has been met. In many ways the process is now just getting underway. There is little choice for industry but to participate and to accept the challenges that native title presents. Many miners already know that it is necessary to deal face to face with Aboriginal communities and anyone who believes that it is possible to rely on government action alone to address issues involving Aboriginal rights is living in the past.

The starting point for a consideration of Aboriginal grievances may be actions by or in the name of the Crown in relation to land and resources and other government policies and actions over the last 200 years. Whilst this may be the beginning, it is far from being the end. In a broad economic context, it must be accepted by all Australians that Aboriginal people should have the right to participate in the national economy and that settlement of grievances in relation to land (and other resources) must also involve directly a capacity in Aboriginal people to derive economic benefit from land and resources in relation to which they are able to assert rights. Aboriginal grievances never have and never will be solved simply by throwing buckets of money at them.

Native title has certainly forced people to give serious thought to the way in which Aboriginal people may participate in the broader economy.

Turning briefly to the Commonwealth legislation itself, there are numerous weaknesses from an Aboriginal point of view, for example, the time for negotiations is far too short and the express limitation in the capacity of the arbitral body to determine conditions which involve payments to the native title party worked out by reference to profits etc (s 38(2)).

It is a frequently expressed concern that there is no specific requirement that there be direct Aboriginal representation on the Tribunal. Such references as exist are regarded as mere tokenism especially where the function of the Tribunal is to determine whether or not native title exists.

If the native title legislation is to be seen as some form of beginning, then serious attention has to be payed to the form that broader reconciliation is to take. There is a real risk that this will be subsumed under the weight of general political debate and as a result the practical consequences of reconciliation may be ignored. If sufficient goodwill can be generated between Aboriginal and non-Aboriginal Australians, processes of negotiation and grievance resolution will provide a more realistic opportunity for achieving mutually satisfactory results than will be achieved, for example, by resort to litigation (even though this will inevitably occur on some occasions).

The public statements of the newly appointed President of the National Native Title Tribunal (NNTT) are very encouraging in this respect because it is clear he construes the purpose of the NNTT as providing a simple forum within which the interests of competing groups may be satisfied or conflict resolved by mediation with the very real potential prospect that people can get on with business.

It is to be hoped that over time processes such as that which will occur under the NNTT will engender in all non-Aboriginal Australians, including the business community, a genuine acceptance of the legitimacy of Aboriginal expectations and an understanding that such an acceptance will ultimately contribute to the greater economic wellbeing of the country as a whole.

At the same time, it must be remembered that Aboriginal people will always remain intimately concerned with issues such as the protection of sacred sites, cultural revival, the maintenance of cultural identity in a contemporary world and the ongoing obligation of government to address the appalling health, employment, housing, education and imprisonment status of Aboriginal people across the country. At the very least, one consequence of native title may be a recognition that such problems are not going to be solved by trying to make Aboriginal people more like us.

In economic terms, a serious attempt to resolve these issues can only work to the benefit of the country as a whole in the long term. Providing Aboriginal people with the means to manage their own lives, even if only in part allowing them to enjoy the fruits of their own land, appears to Aboriginal people to be a matter of simple common sense. Aboriginal people need to be seen as direct participants in the national economic mix. How these matters will be worked out, particularly as between industry and Aboriginal communities, largely remains to be seen. The responsibility is not just with Aboriginal people but with industry as well. There are many examples throughout the country where workable agreements have been reached between industry and Aboriginal communities and there is no reason why there should not be many more in the future. Equally, there are many examples from overseas from which we can all learn, such as North America or New Zealand.

In conclusion, Australia can survive native title but it will only do so and be enriched in the process if Aboriginal people are seen as welcome participants in the national economy, capable of making a contribution and of providing a depth and strength to the cultural and economic life of the country which they are uniquely able to make as indigenous Australians.

EXCLUSION OF THE GRANT AND RENEWAL OF EXPLORATION LICENCES FROM THE RIGHT TO NEGOTIATE PROVISIONS OF THE COMMONWEALTH NATIVE TITLE ACT 1994

Also canvassed at the AMPLA evening seminar on 2 June 1994 in the offices of Clayton Utz, was the possibility of excluding the grant and renewal of exploration licences from the "right to negotiate" provisions contained in the Commonwealth Native Title Act 1994 ("CNTA").

BACKGROUND

The CNTA requires that before a government creates a "right to mine" over native title land, the "right to negotiate" provisions of the CNTA (contained in Div 3, Subdiv B of the CNTA) must be pursued to completion. The definition of "right to mine" in the CNTA includes the right to explore.

Accordingly, the grant or renewal of an exploration licence arguably creates a "right to mine" and therefore the Department must pursue the right to negotiate provisions before granting or renewing any exploration licence over native title land.

The CNTA provides that the Commonwealth Minister may determine that an act (such as the grant of an exploration licence) shall be excluded from that right to negotiate provisions of the CNTA.

The NSW Department of Mineral Resources is lobbying the Commonwealth government to allow it to exclude exploration licences.

OUTLINE OF THE RIGHT TO NEGOTIATE PROCESS

The right to negotiate process applies when the Department proposes to grant or renew an exploration or mining title over native title land.

The procedures involved can be summarised as follows:

- identification of any registered native title holders or claimants;
- service of notices on relevant parties;
- publication of various newspaper notices;
- notification of local Aboriginal and general broadcasting services.

Following the notification period (two months), the grant/renewal may proceed provided there is no registered native title holder or claimant at that time. Any subsequent claimant would not be entitled to negotiation rights in relation to the proposed grant/renewal.

Where there is a registered native title holder or claimant, or where a claim is made during the notification period:

- the Department and the applicant/holder must negotiate with the native title holder or claimant unless the land to which the native title or claim relates is excluded from any title granted or renewed;

- if agreement cannot be reached, any negotiation party may, after six months from the service/publication of notices, apply to the arbitral body for a determination of the matter (the period is four months) for exploration titles.

DISCUSSION PAPER

The NSW Department of Mineral Resources recently released a discussion paper on the exclusion of the grant and renewal of exploration licences from the right to negotiate provisions.

The discussion paper sets out factors both for and against pre-grant negotiation. The factors in favour are as follows:

- certainty about exploration programmes — if, when an explorer lodges his application he knows what land he wishes to access, and what he wishes to do on it, there may be considerable value in pursuing the right to negotiate requirements as it would ensure that all necessary notifications and negotiations are conducted simultaneously, avoiding potentially costly delays at the time access is sought.
- substantial proportion of potential native title land — where the area covered by an exploration licence application includes a substantial area of potential native title land and an explorer surmises that he is likely to need to access some of that land, there may be advantages in pursuing the right to negotiate requirements before the grant, to avoid delays in gaining access later on.

The following factors are stated as being unfavourable to pre-grant negotiation:

- the number of exploration licence grants and renewals — if all applications and renewals were subject to the process, the Department's resources would likely be stretched to the point where grants and renewals would be significantly delayed;
- delays inherent in the right to negotiate process — there is also potential for unnecessary delays caused by the right to negotiate process itself. This process may well take eight months and depending on the arbitral body's work-load, considerably more;
- uncertainty about exploration programmes — many exploration licence applicants do not know exactly what land they will wish to enter or how long they might need to remain on any particular land parcel. To negotiate meaningfully in these circumstances is almost impossible.

OPTIONS FOR ACTION

The discussion paper sets out a number of prerequisites for exclusion from the right to negotiate procedure.

These include:

- the act must have minimal effect on any native title concerned;
- by way of appropriate notices, relevant Aboriginal/Torres Strait Island bodies and the public must be afforded an opportunity to make submissions to the Minister on the issues;
- the Minister must be satisfied that native title holders will be appropriately consulted about any access to native title land.

Additionally, activities might be limited to those which:

- do not disturb the service of the land;
- are of short duration;
- do not allow simultaneous access by more than a small number of people.

THE NEW SOUTH WALES POSITION

The *Mining Act* 1992 (NSW) satisfies the criterion that native title holders will be "appropriately consulted" about access to native title land. The major difficulty will be satisfying the requirement that the grant or the renewal of an exploration title has "minimal effect" on any affected native title.

The discussion paper concludes that the exclusion case would be supported by the development of "minimal effect" conditions and highlighting of those existing provisions in the *Mining Act* which serve to protect native title holder's interests in land.

The discussion paper also sets out a number of ways in which additional safeguards may be put in place to satisfy the Commonwealth government that native title interests will not be adversely affected by excluding the right to negotiate process.

CLOSURE OF THE COAL COMPENSATION SCHEME: DEADLINE 30 JUNE 1994

[Based on an article by Michael Burke which appeared in the NSW Law Society Journal, June 1994.]

The Coal Compensation Scheme, which was re-opened in 1992, will be permanently closed on 30 June 1994 after which no claim will be received. The Scheme will be completed within a few years and the Coal Compensation Fund will be finalised.

The *Coal Acquisition Act* 1982 ("CAA") vested in the State of New South Wales all coal not already vested in the Crown and came into operation on 1 January 1982.

The CAA was enacted in order to deal with land titles which, although derived from Crown grants, did not reserve coal to the Crown for the following reasons:

- The grants reserved coal but coal was released back to the grantees or their successors by the Proclamation of 29 January 1850 when the coal mining monopoly of the Australian Agricultural Company was unwound.
- The grants were issued before the *Crown Lands Act* 1884 which provided for all grants of land to contain a reservation of minerals (including coal).
- The grants were issued under conditions (usually for mining purposes) which by conversation or otherwise enabled the landowner to keep coal rights.

The Coal Acquisition (Compensation) Arrangements 1985 set up the Coal Compensation Fund administered by the Coal Compensation Board.

The Coal Compensation Scheme was originally closed to further claims on 30 April 1988 but development of new coal mines and extensions of collieries into areas not widely known as holding coal resulted in pressure from many people who belatedly realised that they had possessed coal rights which had become valuable.

ELIGIBILITY TO CLAIM

1. Unless minerals were reserved to the Crown in the Crown grant (if before 1850 coal was released back to the grantee by Proclamation) or later severed from the freehold, the landowner on 1 January 1982 probably held coal rights and could be eligible to claim.
2. Vast areas of New South Wales are underlain by coal seams which could be economic when good quality coal in sufficient quantity lies close to the surface in accessible locations. Even if the coal is not in an operating colliery it has a future value which can be calculated and compensation approximating the net discounted present value will be paid. If a claimant is eligible, a minimum compensation of $10 is usually paid.
3. Restitution of coal rights without cost is available after compensation has been advised if the claim area was outside a colliery between 1982 and 1986.
4. Claims may be not only for loss of coal rights but for pecuniary loss on discharge of a lease, contract, agreement or other interest. This covers persons who had derivative losses from the *Coal Acquisition Act* 1981.