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RECENT PUBLICATIONS

Native Title Report 2002.

By Dr B. Jonas

Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission.

The Human Rights and Equal Opportunity Commission recently released the *Native Title Report 2002* by the Aboriginal and Torres Strait Islander Social Justice Commissioner. It is the fourth report written by Dr Bill Jonas, and possibly the final one (in this form), if abolition of Dr Jonas' position, as currently proposed by the Howard Government, proceeds.

Ten years after Mabo, the Report investigates the principles of recognition and extinguishment of native title as enunciated by Australian courts. Dr Jonas notes the broad possibilities opened up by the recognition of native title have been sidelined in favour of 'practical reconciliation'. Despite this diversion, there is widespread agreement in two areas. Firstly that for policy to assist in alleviating deprivation, Indigenous people must participate in its formulation and implementation. Secondly, Indigenous people need a sustainable economic base.

The Report suggests native title still has an important role to play in addressing disadvantage. This importance lies in remembering that the essence of native title refers to relationships between Aboriginal people and their land. In aiming to increase Aboriginal participation in policy formulation and implementation we must be cognisant of the political structures emanating from relationships with land which continue to shape communities. As for economic development, the Report suggests land can be viewed as an asset for development, as seen with the Burup Peninsula, where agreements have been made protecting culture and gaining benefits

as a result of native title. Dr Jonas also points out the limitations imposed by restrictive legal definitions of title, and the failure of governments to implement native title into policy options.

Chapter One focuses on these legal restrictions via a reading of the *Yarmirr*, *De Rose*, and *Yorta Yorta* cases. As to the question of recognition, Dr Jonas suggests these cases show the law has evolved not as a vehicle of, but a barrier to recognition. These barriers specifically refer to a failure to recognise sovereignty, the conceptualisation of native title as rights and interests separate from the laws and customs which create them – the bundle of rights – and the statutory definition of title.

Following the question of recognition, Chapter Two and Three address the issue of extinguishment. Dr Jonas importantly points out there is no possibility of co-existence in the 'hard and driving logic' of the inconsistency test. Chapter Four looks at the implications of *Miriuwung Gajerrong* and *Wilson v. Anderson* for the question of extinguishment, as well as some possibilities for ameliorating its effects.

In looking at 'the way forward', Chapter Five outlines the way human rights principles can be used to alter our domestic law to be consistent with international law. Possible options canvassed by the Report include legislative change, treaty, constitutional reform, or even, as raised by Justice McHugh, a new arbitral system. Given the view of the Court that it is the Act rather than the common law which directs the native title process, Dr Jonas is surely correct in his call for a new process of political evaluation – a process which must look to maximise the potential of native title to benefit Indigenous peoples.

Following those of his predecessor, Professor Mick Dodson, Dr Bill Jonas has produced another important critique of native title in Australia. The *Native Title Report 2002* should be required reading for all those with an interest in the field. The fact that ten years on the promise of Mabo remains largely unfulfilled indicates we need more, not less creative thinking on issues of native title. That the position of Aboriginal Social Justice Commissioner may soon be abolished is

further indication of the loss of bipartisan support for Aboriginal self-determination. It would not just be 'premature' as Dr Jonas has suggested, but another backward step in Indigenous affairs in Australia.

The Native Title Report 2002 is available from the HREOC website at: www.hreoc.gov.au/social_justice/index.html or by contacting the Commission on 02 9284 9600.

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