NATIVE TITLE ACT OF 1993

The *Native Title Act* of 1993 posed specific problems for the Paul Keating Federal Labor government.

The Government sought to overcome this "racial discrimination" problem of a *Native Title Act* by legal engineering and subterfuge.

Certainly, if the same legislation had been attempted by a State Government, it undoubtedly would have come to the fate suffered by Queensland in 1988 when on **8 December** that year, the High Court in *Mabo v Queensland (No 1)* found that the *Queensland Coast Islands Declaratory Act 1985,* which sought to deal with a matter on the bases of *race* **was not valid** according to the principles of the Commonwealth's *Racial Discrimination Act 1975,* thus in conflict with Commonwealth legislation and under the Commonwealth constitution, was therefore unlawful.

Without the facility of an exemption, the application of the *Native Title Act* would have, not only been "actual racial discrimination" but, would have been 'unlawful racial discrimination' under Australian law.

The only problem with this solution was that the chosen method had a fatal flaw.

The provisions that were used to "exempt native title" from "unlawful racial discrimination" had their roots in *Article 1 Paragraph 4* the *International Convention on Racial Discrimination* (*Convention*) to which Australia became a signatory in 1975.

The problem for Australia was that while *Section 8* of the *Racial Discrimination Act* made racial discrimination action lawful (in accordance with the exemption provision of the *Convention*) the type and reason for the racial discrimination that resulted from the proclamation of the *Native Title Act* - did not fit with the exemptions, provided for by the *Convention*.

THE PROCESS

Let us now go through the process step by step

The Australian Labor Government in 1993 inserted *Section 7* into the *Native Title Act*

This section did 3 things:

(1) It called up the 'exemption provisions' of *Section 8* of the *Racial Discrimination Act* (which called up the 'exemption provisions' within the *Convention*);
(2) it applied those exemptions to the provisions to the *Native Title Act;*
(3) it put in place retrospective legislation to overcome racial discrimination that may have occurred in the native title arena since 1975.

The Racial Discrimination Act 1975

Section 8 – Exceptions

Provides that

(1) This Part ['Prohibition of Racial Discrimination'] *does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies -*

except** (special?) **measures** in relation to which subsection 10(1) applies by virtue of **subsection 10(3).

AND

(2) Charity activities

*This portion of *subsection 1 of section 8* and *subsection 2* are not relevant to the application of the exemptions directed to *Native Title Act* - So I will not discuss them any further.

Convention means the

> *International Convention on the Elimination of All Forms of Racial Discrimination that was opened for signature on 21 December 1965 and entered into force on 2 January 1969, being the Convention (a copy of the English text is set out in the Schedule to the Act together with a preamble).*

Australia become a signatory to the *Convention* in 1975 when the *Racial Discrimination Act* was proclaimed.

What Type of Discrimination is Exempt

Let's now have a forensic look at what type of the 'discriminatory activities' enjoy the 'exemptions' provided for by the Convention.

In Paragraph 4 of Article 1 in the *Convention* *'special measures'* is defined as thus:

> 4. *Special measures* taken for the **sole purpose** of securing
> - adequate advancement of certain racial or ethnic groups or individuals
>   - requiring such protection as may be necessary in order to **ensure**
>   - such groups or individuals
>   - **EQUAL enjoyment** or **exercise** of
>   - HUMAN RIGHTS and
>   - FUNDAMENTAL FREEDOMS
>
> **shall not be deemed** *racial discrimination*
>
> **Provided, however:**
> - that such *special measures* **do not**, as a consequence, lead to the **MAINTENANCE OF SEPARATE RIGHTS** for different racial groups; and
> - that they (*such special measures*) shall not be continued after the **objectives** for which they were taken **have been achieved.**

So, in order to elicit exemption status *special measures* must exhibit 3 components

(1) They must be directed **SOLELY** to the purpose of securing advancement in equality in two defined areas:
   a. *human rights* and
   b. fundamental freedoms
(2) They **must not** result in the maintenance of *separate rights* and
(3) They **must not** continue **after** meeting the *objectives* for which they were introduced

So!

In 1992 the High Court of Australia proclaimed that under the common law of Australia, land title existed prior to the colonising event of the British Empire of 1879 and demonstrated that, providing

the requisite standard of proof can be displayed, the common law of Australia, will acknowledge ownership of land to those in possession of that land, prior to colonisation.

When making that determination of the High Court made no statement as to 'race' being a requisite for land ownership but did identify that, in the case before it, the plaintiffs were identified as "*members of the Meriam people".*

The court also labelled 'native title' as the name awarded for that type of land title. A title which would stand alongside all the other types of land title, evolved over the long history of British common law.

In **1993**, at the time the *Native Title Act* was proclaimed, there was no 'lawful discrimination' of the ownership of land under 'native title' for any Australian. **(The High Court had just disposed of that issue)** Nor was there any discrimination specifically peculiar to those Australians with aboriginal heritage from obtaining such outcomes other than those which all Australians face in exercising legal rights, that of:-

- the difficulties of the passage of time,
- the onus to meet the standard of proof required by law courts, and
- the financial resources to pursue litigation.

The Commonwealth government in 1993 had at its disposal the non-discriminatory option of funding 'legal aid' sufficiently to allow ALL Australian of limited financial resources to have access to sufficient funds required for the purposes of litigation.

This would have had the same result in achieving the objectives of the Commonwealth *Native Title Act* legislation

In 1993 what were the *human rights* and the *fundamental freedoms* that the ethnic/racial group of 'Australian aboriginals' did not enjoy equally with all other Australians and what could form the basis for an argument that there needed to be *special measures* to support just this group, in order to place them on an equal footing with any other Australian regarding the litigation of legal rights that could not be remedied by a policy to enhance the support in general for underprivileged Australians.

The now even if an argument could be mounted that the ethnic/racial group of Australians aboriginal were exclusively 'disadvantaged' in relation to 'litigation' and 'discrimination' in their favour was not only necessary but the only option to advance their circumstances, where is the application of the required provisions to ensure that the *special measures*

- WILL NOT "*result in the maintenance of separate rights*" and
- WILL be automatically removed when the objective of the *special measures* has been achieved.

In other words where are the caveat and sunset clauses in the legislation?

So, it just again demonstrates what you can do when you have the ultimate power and how in the final analysis the '*might is right'* principal is still alive and well even to this day

Warren Bolton

Tuesday, 20 June 2023