Briefs

NATIVE TITLE

Act delivered on schedule

GARTH NETTHEIM reports on the quick, chaotic and stormy enactment of the Mabo decision.

The Commonwealth's *Native Title Bill* was introduced into Parliament on 16 November 1993, the culmination of a process which had commenced on 27 October 1992. In a press statement that day in 1992, the Prime Minister, Mr Keating, announced a process of consultation with representatives of States and Territories, industry groups, and Aborigines and Torres Strait Islanders. The objective was to fashion, by September 1993, a national response to the decision of the High Court of Australia on 3 June 1992. The effect of that decision was that the pre-contact land-rights of indigenous Australians survived the assertion by Britain of sovereignty over Australia, and might still survive provided that the people concerned maintained their traditional links with the land in question, and that their 'native title' had not been extinguished by acts of governments (*Mabo v Queensland (No. 2)* (1992) 175 CLR 1).

In October 1992 Mr Keating expressed a hope that problems of accommodating native title might be resolved by negotiated settlements and even by strategic test cases. In the event, the process took the form of separate one-to-one consultations with the various stakeholders, with the aim of resolving all key issues through legislation. Possible test cases were shunted aside when mining companies persuaded governments that big dollar investments were at risk. Politics became heated in the middle of 1993 when, on the anniversary of the High Court decision, the Commonwealth published a Discussion Paper accompanied by 33 principles approved by Cabinet. Politics then became overheated as a number of Aboriginal claims were perceived to threaten 'backyards', and as industry groups and various politicians clamoured for an end to uncertainty. The Federal Opposition in particular castigated the Commonwealth Government for its delay in producing its plans for legislation. (This seems ironic in the light of the Opposition's later move to refer the Bill for some months to a Select Committee, and its attempts to filibuster debate in the Senate.)

On 2 September 1993, right on schedule, the Commonwealth published its *Outline of Proposed Legislation.* This was widely seen as excessively biased in favour of non-indigenous interests and as conceding so little to indigenous Australians as to risk violation of Australia's international human rights obligations. Particularly relevant in this connection was the International Convention on the Elimination of All Forms of Racial Discrimination translated into Australian law by the *Racial Discrimination Act* 1975 (Cth).

Some Aboriginal and Torres Strait Islander people were so angered by the September proposals that they resolved at a meeting in Canberra to have nothing to do with any further consideration of the legislation, and to resort to international political action. Others, however, remained at the table on the instructions of their constituencies, in an attempt to minimise the damage to Aboriginal and Islander interests. They succeeded to a surprising degree, although some causes of concern remained in the Bill when it was published in November.

This 'Coalition of Aboriginal Organisations' (mainly the Aboriginal and Torres Strait Islander Commission (ATSIC) plus four Land Councils – Northern, Central, Cape York and Kimberley) was assisted by the growing perception that the best prospect for the Government to secure the passage of legislation through the Senate lay in winning the support of the Australian Democrats and the two Green Senators from WA. Without that support the Government did not have the numbers in the Senate. For this purpose, the Bill needed to be more supportive of Aboriginal interests. It had become evident that the Opposition parties would not support even the September proposals as long as WA Premier Richard Court refused to accept them.

The main features of the *Native Title Bill* are summarised in (December 1993) 3(65) *Aboriginal Law Bulletin.* Amendments are summarised in (February 1994) 3(66) *Aboriginal Law Bulletin* published with this issue of the *Alt.LJ.* The Bill passed through the House of Representatives on 20 November, but in the meantime battle lines were being drawn in the Senate. On 24 November 1993 the Opposition Leader in the Senate, Senator Robert Hill, gave notice of a motion to appoint a Select Committee to enquire and report by 1 February 1994 on various aspects of the Bill. The WA Green Senators, Ms Chamarette and Ms Margetts, declined at the time to say whether or not they would support such a move, despite strong urgings by many Aboriginal organisations that such delay would allow political pressures to build towards weakening of the Bill's provisions from the Aboriginal perspective. Eventually they did not support Senator Hill's motion and it was lost.

In response to Senator Hill's motion, the Government and the Australian Democrats combined to pass a motion to refer the Bill to the Senate Standing Committee on Legal and Constitutional Affairs. The Committee took evidence in Brisbane, Darwin, Perth and Canberra during the first week of December 1993, and published a report soon after in which Committee members divided along party lines.

In the meantime, many amendments were formulated by Governments (Commonwealth, State and Territory), industry groups, and Aboriginal and Torres Strait Islander organisations. These organisations included not only the 'Coalition' group but also an 'Alliance' representing the NSW Aboriginal Land Council and Aboriginal Legal Service organisations from Western Australia, South Australia, Victoria and Tasmania.

At the same time, the Western Australian Government had rushed to enact Premier Court's *Land (Titles and Traditional*

Usage) Act on 2 December 1993. The Act extinguishes native title without compensation, and substitutes statutory 'rights of traditional usage' which have negligible legal strength. (See Richard Bartlett, 'Inequality Before the Law in Western Australia' (December 1993) 3(65) *Aboriginal Law Bulletin.*) This Act is likely to be invalid due to inconsistency with the *Racial Discrimination Act* 1975 (Cth) and with the *Native Title Act* 1993 (Cth), and a challenge has already been launched.

By contrast, in Queensland Premier Goss introduced legislation designed to be complementary to the Commonwealth's *Native Title Bill.*

On 18 November 1993 Mr Hewson, Leader of the Federal Opposition, committed the Opposition to opposing the Bill. The Opposition announced that it was ready to accept the existence of native title as declared by the High Court, that validation of existing titles must be accompanied by 'just terms' compensation to native title holders, that the principles of the *Racial Discrimination Act* should apply to ensure that native title holders were treated on a non-discriminatory basis, but that the responsibility for 'land management' should remain with States and Territories. In other words, the only need perceived by the Opposition was for Commonwealth legislation to facilitate the validation of past grants of interests over native title land. The Government's proposal, they said, went beyond that limited objective and represented 'a grab for control over the constitutional responsibility for land management'.

The debate in the Senate was the longest in its history, before being brought to a close on 21 December 1993. Senate amendments which generally improved the position of Aboriginal and Torres Strait Islander people were agreed to by the House of Representatives on 22 December. The Bill received the Royal Assent on Christmas Eve and commenced operation as the *Native Title Act* 1993 on 1 January 1994.

Constitutional challenges to the *Native Title Act* are possible. Political opposition from some State and Territory Governments, mining companies and others are likely to ensure that the Act does not have a smooth time in 1994. At least the legislative process heralded in October 1992 was completed by the end of 1993, the International Year of the World's Indigenous Peoples.

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IMMIGRATION

A brighter horizon for refugees

Things are looking better for many onshore asylum seekers. ANTHONY REILLY comments.

The establishment of the Refugee Review Tribunal (RRT) in the middle of 1993, and Minister Nick Bolkus's 1 November 1993, announcements mean that 1994 will be a much brighter prospect for many refugee applicants than any year since 1989. Nonetheless there are areas of concern which need to be addressed to ensure a just and equitable system, including the continuing detention of undocumented boat arrivals.

The Refugee Review Tribunal (RRT) was established in 1993 to review a refusal of refugee status to a person who applied after arriving in Australia. The RRT now has permanent Registries in Sydney and Melbourne, each with around 20 full-time Members and additional part-time members.

The RRT replaces the Refugee Status Review Committee (RSRC), the unwieldy multi-headed monster that previously made recommendations to the Minister on refugee review applications. The RSRC's membership included representatives from the Department of Immigration and Ethnic Affairs and the Department of Foreign Affairs and Trade, thus rendering it subject to political influences. There were no hearings or interviews of applicants prior to decisions being made. Many applicants felt extremely frustrated and uncertain about how and why their futures were being decided.

The RRT promises to be a vast improvement on this situation. Section 166C of the *Migration Act* 1958 states that:

> The Tribunal in carrying out its functions under this Act is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

With a view to pursuing this objective, s.166C further states that in reviewing a decision the Tribunal:

> (a) is not bound by technicalities, legal forms or rules of evidence; and
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> (b) must act according to substantial justice and the merits of the case.

Early signs indicate that the Tribunal is sticking to the above aims. For example, a number of former community legal centre workers have been appointed as members of the Tribunal including John Vrachnas, Ros Smidt and Jonathon Duignan from the Immigration Advice and Rights Centre in Sydney, Lesley Hunt from the South Brisbane Immigration and Community Legal Service, and Phillipa Macintosh of the Refugee Advice and Casework Service in Sydney. While I may be accused of naivete in thinking they won't all have degenerated into fascist mad dogs by next Chinese New Year, the inclusion of such reformist tendencies in the Tribunal augurs well for the development of a compassionate and expansive body of refugee law in Australia.

The first RRT hearings in Brisbane were held in early November 1993. The conduct of the hearings was simple – after an initial explanation by the member to the applicant of what lay ahead, any outstanding procedural matters were dealt with. The member then proceeded to question the applicant and any witnesses. Opportunities were provided to witnesses to discuss matters about which they had not been questioned. Submissions were invited from the applicant's legal representative at the conclusion of each witness's evidence and of the hearing itself.

During the hearings the Tribunal proved flexible in providing additional time for applicants to submit documentary evidence they had not been able to obtain by the date of hearing. A welcome initiative was the provision to the applicant and his legal representative of any adverse official country information, with the opportunity to provide a written