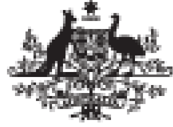

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Cabinet Memorandum 1322 - Mabo - responses to the outline of legislation - update - Decisions 2289 and 2291

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STATEMENT OF REASONS FOR DECISION UNDER SECTION 40(5) OF THE *ARCHIVES ACT 1983*

Series: A14217
Control 1322
Barcode: 32229347
Title: Cabinet Memorandum 1322 - Mabo - responses to the outline of legislation - update - Decisions 2289 and 2291
Decision Maker: Susan Selleck
Designation: Access Examiner APS 6
Date: 1 January 2017

In accordance with requirements of subsection 8(1) of the Archives Act 1983, I am a person authorised by the Director-General, pursuant to an Instrument of Delegation, to make a decision in relation to access to the requested record.

Basis for decision

In making my decision, I considered:

- the content of the record requested
- the relevant provisions of the *Archives Act 1983*
- policy and guidelines of National Archives of Australia that relate to the access examination of Commonwealth records
- information provided by the Attorney-General's Department

Decision

I have decided that this item is Open with Exception under s 33(2) of the Archives Act for the reasons set out below.

Four folios (13, 15-17) have been partially exempted from public access.

The findings of facts

Section 33(2) of the *Archives Act 1983* provides that:

(a) it would be privileged from production in legal proceedings on the ground of legal professional privilege; and

(b) disclosure of the record would be contrary to the public interest.

This record contains:

- Information and arguments which may have contemporary relevance, and which could prejudice the legal position of the Commonwealth in the event of future legal proceedings.

Reasons for decision

- If legal proceedings were undertaken the legal advice that was provided to the client would be privileged from being tendered in evidence on the grounds of legal professional privilege.
- There is no evidence that the legal professional privilege has been waived or withdrawn by the client in the intervening period. Nor has the advice been made public.
- The information continues to be sensitive despite the passage of time and the information has enduring confidentiality.
- The public's interest to know about the decisions of government is outweighed by the need for the information to be protected from release because of ongoing sensitivities. Therefore it would be contrary to the public interest for information to be disclosed.

Review of decision

The National Archives of Australia (the Archives) carefully examines records before deciding to exempt any part of them. As part of that process we may consult with other agencies which have expertise on specific national and international matters.

If you do not agree with the decision, you can formally appeal within 28 days of receiving:

1. by first applying to the Archives for an internal reconsideration of my decision; and
2. if you still do not agree with the decision, you can apply to the Administrative Appeals Tribunal for a review.

For more information please read the **National Archives Fact Sheet 12** *What to do if we refuse you access* (www.naa.gov.au/about-us/publications/fact-sheets/fs12.aspx).

CABINET-IN-CONFIDENCE

CABINET MINUTE

Copy No. 79

Canberra, 7 October 1993

No. 2291

Memorandum 1318 - Mabo - Responses to Outline of Legislation

Memorandum 1322 - Mabo - Responses to Outline of Legislation - Update

Further to Cabinet Minute 2289 of 6 October 1993, the Cabinet agreed that:-

(a) the points set out in the Attachment to this Minute are acceptable and can form the basis, in conjunction with the earlier papers at Attachment 1 and 2 of Cabinet Minute 1322, of an agreement with certain States and Territories;

(b) the Prime Minister continue discussions with Aboriginal people, including in relation to the points referred to in sub-paragraph (a) above;

(c) officials put counter proposals to the States regarding the reimbursement of compensation by the Commonwealth on the basis set out below, with the Prime Minister having the latitude to adjust

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CABINET-IN-CONFIDENCE

the offer upward if necessary in order to finalise the agreement;

(i) compensation for past grants: 75 per cent Commonwealth reimbursement;

(ii) compensation for future grants: 0 per cent Commonwealth reimbursement; and

(iii) administrative and legal costs: 75 per cent Commonwealth reimbursement for the first 5 years and 50 per cent thereafter;

(d) taking into account the points set out in the Attachment to this Minute and the outcome of discussions and negotiations with the stakeholders, drafting of the Commonwealth Bill be finalised on the basis of the Outline released on 2 September 1993, with the Attorney-General and the Special Minister of State to oversee the drafting and to resolve, in consultation with other Ministers as necessary, any minor matters which arise in that process;

(e) up to $6 million be allocated in 1993-94 for the implementation of the native title legislation, including the operation of an Implementation Task Force of seconded staff from relevant portfolios, with details to be settled between the Prime Minister and the Minister for Finance in consultation with relevant Ministers; and

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CABINET - IN - CONFIDENCE 3

No. 2291 (contd)

(f) initial steps be taken to consider how the Native Title Bill might best be processed through the Senate, including through discussion of the matter in the Legislation Strategy Committee.

2. The Cabinet noted that further negotiation, combined with the very complex task of drafting this Bill, will make the 18 October date for the introduction of the Bill into the House of Representatives extremely difficult to meet and that later introduction at the end of October is likely to be necessary.

Michael Keating

Secretary to Cabinet

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CABINET - IN - CONFIDENCE 4

ATTACHMENT TO
MINUTE 2291

PROPOSALS BY CO-OPERATIVE STATES

1. Jurisdiction of State and Territory Bodies and the Federal Court

The Federal Court should only have jurisdiction for areas where the Commonwealth is a party to an action or where there is no recognised State/Territory body.

Where there is a recognised State/Territory body, the body shall have sole jurisdiction.

There should be no requirement for consultation on judicial appointments.

Appeals will be heard in the same stream (State or Federal) as the primary adjudication.

The Commonwealth will be notified of all native title claims which are lodged with recognised State/Territory bodies.

The Commonwealth Attorney-General, after consultation with her/his State/Territory counterpart, may intervene in any native title claim lodged with a recognised State/Territory body, provided the Commonwealth Attorney-General is satisfied that the claim raises a matter of national interest. A matter of national interest would include matters which have significant implications for Australia as a whole and/or raise matters of national legal significance.

Upon intervention (which must occur prior to the commencement of the hearing of evidence), the Commonwealth Attorney-General will request the removal of the matter to the Federal Court.

Upon its removal to the Federal Court, the Federal Court will satisfy itself that the claim raises a matter of national interest:-

(a) if not satisfied that it does, the claim will be remitted to the recognised State/Territory body;

(b) if satisfied that it does, the Federal court may either:

    (i) hear the claim; or

    (ii) remit the claim to the recognised State/Territory body if it believes there are justifiable grounds for doing so.

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ATTACHMENT TO
MINUTE 2291 (CONTD)

2. The Racial Discrimination Act 1975

The following amendments to the previously agreed paragraph 21(a-c) of the published Commonwealth "Outline" of 2 September 1993:

(a) The Act or a law of a State or Territory is able to validate past grants affecting native title (and acts and laws) where such grants were in whole or in part invalidated by the combination of the existence of native title and the operation of any law, provided that the principles set out below are followed;

(b) Grants and acts affecting native title that are validated or made under or in accordance with the Commonwealth Act, or a State or Territory Act scheduled under clause x of the Commonwealth Act, and the operation of the Commonwealth and State and Territory Acts, are to be taken to comply and be consistent with the Racial Discrimination Act 1975;

(c) Paragraph 21(a) and (b) as per original Commonwealth "Outline";

(d) a new paragraph 21(c) as follows:

> "In line with paragraph 69, such negotiations may extend to proposals for non-monetary compensation. Such negotiations would be with the grantor and could be for a period not exceeding up to four months, unless otherwise agreed".

(e) the old paragraph 21(c) becomes the new paragraph 21(d).

3. Physical Attachment as Proof of Native Title

Native title holders should be required to demonstrate that they or their ancestors had a physical connection with the land in question in the past.

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Copy No. 76

CABINET MINUTE

Canberra, 6 October 1993

No. 2289

Memorandum 1318 - Mabo - Responses to the Outline of Legislation

Memorandum 1322 - Mabo - Responses to the Outline of Legislation - Update

Further to Cabinet Minute 2228 of 1 September 1993, the Cabinet noted:-

(a) the documents at Attachments 1 and 2 to Memorandum 1322 as the outcome of negotiations between Commonwealth and State and Territory officials; and

(b) that the position set out in Attachments 1 and 2 to Memorandum 1322 is close to the terms of a possible agreement with the States and Territories.

2. The Cabinet agreed that:-

(a) officials ascertain the degree of support from States and Territories for propositions put by State officials to Commonwealth officials earlier on Wednesday, 6 October 1993; and

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CABINET-IN-CONFIDENCE

CABINET - IN - CONFIDENCE 7

No. 2289 (contd)

(b) the Prime Minister be authorised to undertake negotiations with a view to reaching a satisfactory agreement with States and Territories, subsequent to seeking the further views of Aboriginal representatives.

3. The Cabinet also agreed that the Prime Minister, as a next step, seek the views of Aboriginal representatives on the following propositions:-

(a) in relation to paragraph 21 of the Outline of the proposed Legislation on Native Title ('the Outline'):-

(i) delete the first part of existing paragraph 21 of the Outline down to the end of line 4 ("The Bill will provide that, notwithstanding any other law (including the Racial Discrimination Act)....... and the operation of any law,");

(ii) insert the following formulation:- "It is the intention of the Parliament that grants and acts affecting native title, consistent with this Act and with such State and Territory Acts as are scheduled in accordance with clause ....., are consistent with the RDA"; and

.../3

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No. 2289 (contd)

(iii) insert a new sub-paragraph between existing (b) and (c):-

"In line with paragraph 69, such negotiations may extend to proposals for non-monetary compensation. Such negotiations would be with the grantor and could be for a period not exceeding up to four months, unless otherwise agreed";

(b) in relation to the jurisdiction of the Federal Court, the following should apply:

(i) the Federal Court should only have jurisdiction for areas where the Commonwealth is a party to an action or where there is no recognised State/ Territory body;

(ii) where there is a recognised State/Territory body, the body shall have sole jurisdiction;

(iii) there should be no requirement for consultation on judicial appointments;

(iv) appeals will be heard in the same stream (State or Federal) as the primary adjudication;

(v) and in addition:-

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No. 2289 (contd)

(1) the Commonwealth will be notified of all native title claims which are lodged with recognised State and Territory bodies;

(2) the Commonwealth Attorney-General will have a right to intervene (upon her/his own initiative) in any native title claim lodged with a recognised State and Territory body, provided the Commonwealth Attorney-General is satisfied that the claim raises a matter of national interest;

(3) upon intervention (which must occur prior to the commencement of the hearing of evidence), the Commonwealth Attorney-General will request the removal of the matter to the Federal Court; and

(4) upon its removal to the Federal Court, the Federal Court will satisfy itself that the claim raises a matter of national interest;

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(A) if not satisfied that it does, the claim will be remitted to the recognised State and Territory body; and

(B) if satisfied that it does, the Federal Court may either:-

(aa) hear the claim; or

(bb) remit the claim to the recognised State or Territory body if it believes there are justifiable grounds for doing so; and

(c) that the cut-off date for validation of grants be extended from 30 June 1993 to 30 June 1994 provided the States agreed that there would be no artificial means taken to accelerate the rate at which grants were made in the period before 30 June 1994.

4. The Cabinet further agreed to resume discussion on Thursday, 7 October 1993 in the light of the Prime Minister's further discussions with the Aboriginal groups and any additional advice on the position of States and Territories.

Secretary to Cabinet

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MEMORANDUM No. 1322

FOR CABINET

COPY No. 55

Title	MABO - RESPONSES TO THE OUTLINE OF LEGISLATION - UPDATE
Date	5 October 1993
Originating Department(s)	Prime Minister and Cabinet
Cabinet or Ministerial Authority for Memorandum	Cabinet Minute No 2228 of 1 September 1993
Purpose of Memorandum	To provide an update on the views of States/Territories and Aboriginal representatives.
Program Context	
Legislation involved	
Consultation: . Departments consulted	AG's, DPIE.
. Is there agreement?	
Cost: . This fiscal year . year 2 . year 3 . year 4	

RECEIVED 6 OCT 1993 CABINET OFFICE

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BACKGROUND

Cabinet Memorandum 1318 undertook that an update would be provided for Cabinet on (a) negotiations with the States and Territories and (b) discussions with Aboriginal representatives.

STATES AND TERRITORIES

2. The documents at Attachments 1 and 2 are the product of the negotiations held on 30 September and 1 October with senior State/Territory officials from Queensland, NSW, Victoria, South Australia, the Northern Territory and the ACT.

3. The outcome was of course *ad referendum* to the respective Heads of Government.

4. Attachment 1 is a draft joint announcement of agreement between the Prime Minister and the cooperating Premiers/Chief Ministers.

5. Attachment 2 would be the substantive content to be put into the "packaging" given at Attachment 1. It comprises a series of understandings and variations to the Commonwealth Outline of 2 September 1993 which State, Territory and Commonwealth officials agreed to put to their Heads of Government for consideration.

6. Necessarily this is a fairly finely balanced compromise designed to bridge the remaining gap between the Commonwealth and State/Territory approaches to Mabo. It is important to recognise that it has emerged from a genuine process of negotiation, with give and take on both sides. It is based heavily on the Commonwealth Outline. On several important issues the States have, since the Outline was released, conceded to us or compromised with us. For example the States have stepped back from their positions that:

(a) all leases extinguish native title

(b) some mining leases extinguish native title

(c) reservation of land to the Crown and all public works extinguish native title

(d) acceptance of State processes for dealing with grants should be a "central principle" rather than a case by case possibility

(e) compensation should be on the normal State/Territory basis, with a cap

(f) assistance should be to Aboriginal claimants, not prescribed organisations

(g) there should be a sunset period on claims

(h) claimants should have to demonstrate a past physical connection with the land.

7. Equally, however, there are some points in the package which are other than the Commonwealth would wish. The Prime Minister has examined Attachment 2 and considers that:

(a) the main point which is unacceptable is 7 i.e. the Federal Court not having jurisdiction to determine claims for native title and compensation where there is a State/Territory body which we recognise. "Forum shopping" should be provided for on this matter

(b) also of some concern is the third paragraph in point 4. This permits renewal of valid grants (e.g. a short term pastoral lease) in the future, without these having to go through the whole "right-to-negotiate" procedure

(i) it should be noted, however, that this approach would be consistent with the Government's commitment to protect existing grants of interests in land and would ensure that all existing interests, validated or originally valid, are treated in a comparable manner. Such a provision would only apply where the renewal did not involve any further extinguishment of native title.

(c)

8. We have had feedback from State and Territory officials on the reaction of Premiers/Chief Ministers. They are generally positive and believe that the documents provide the basis for an agreement. Tasmania is coming on board, which would mean that only WA. would be outstanding if the proposal were agreed. Mr Kennett has spoken to Mr Court, suggesting he reconsider his position, and has indicated preparedness to talk to the mining houses in Melbourne and to the Federal Opposition. At the same time, we are told that

(a) the prohibition on forum shopping between the Federal Court and recognised State institutions is non-negotiable

(b) the proposed formula for sharing of costs (namely the Commonwealth to pay all compensation for past grants, the States to pay for all future compensation, and legal and administrative costs to be equally shared) is a bottom line

(c) a couple of States want to reinsert either a sunset clause on claims, or a requirement that the claimants prove past physical attachment to the land (preferably the latter).

9. The States/Territories also see the disapplication of the RDA, to permit absolute certainty about the validation of grants, as being a lynch pin of any agreement.

Conclusion

10. (a) that the Prime Minister be authorised to undertake negotiations with the States/Territories with the objective of achieving a satisfactory agreement based upon Attachments 1 and 2 but taking into account the concerns expressed above

(b) that Ministers note, however, that:

(i) there is, in the judgement of officials, little "ambit" left on either side, so that if an agreement with the States is to be struck it will need to be close to Attachments 1 and 2

(ii) further negotiation, combined with the very difficult drafting job required on this Bill, effectively delays its introduction into the House until end October

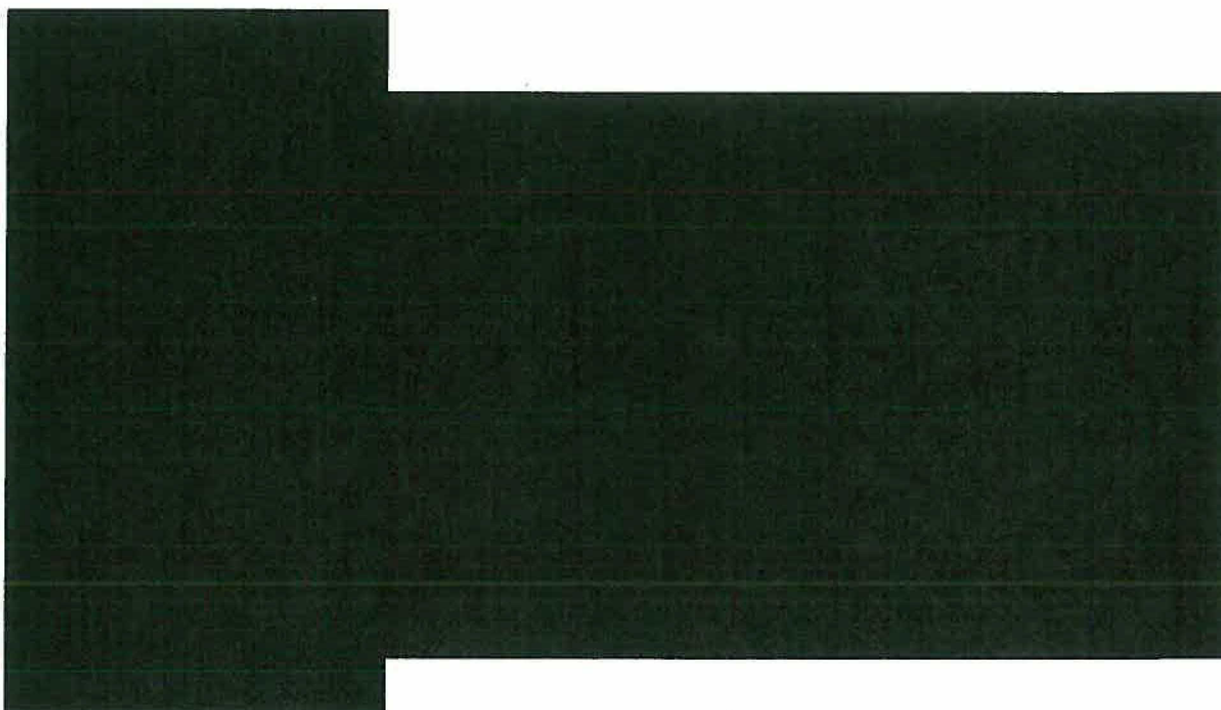
ABORIGINAL AND TORRES STRAIT ISLANDER REPRESENTATIVES

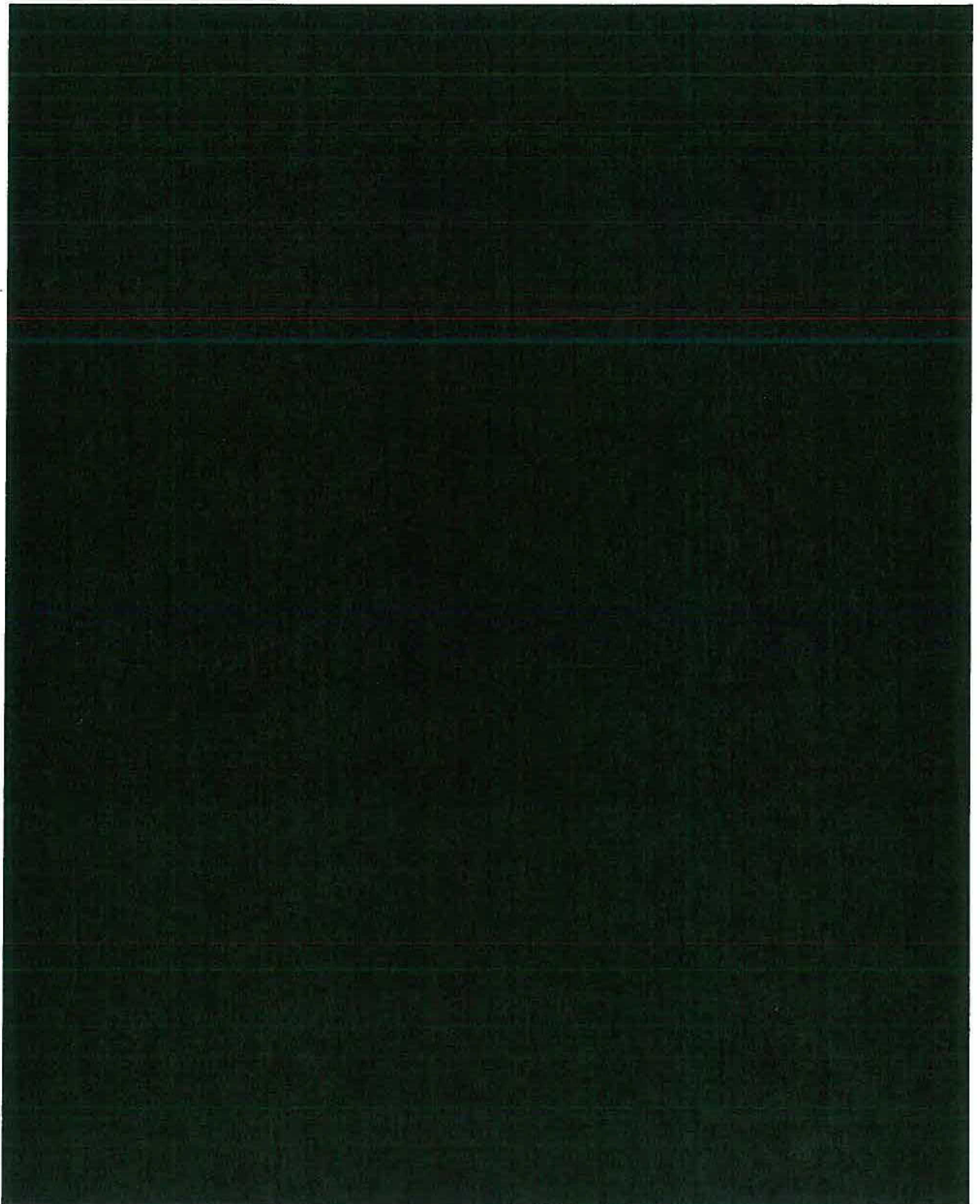
General

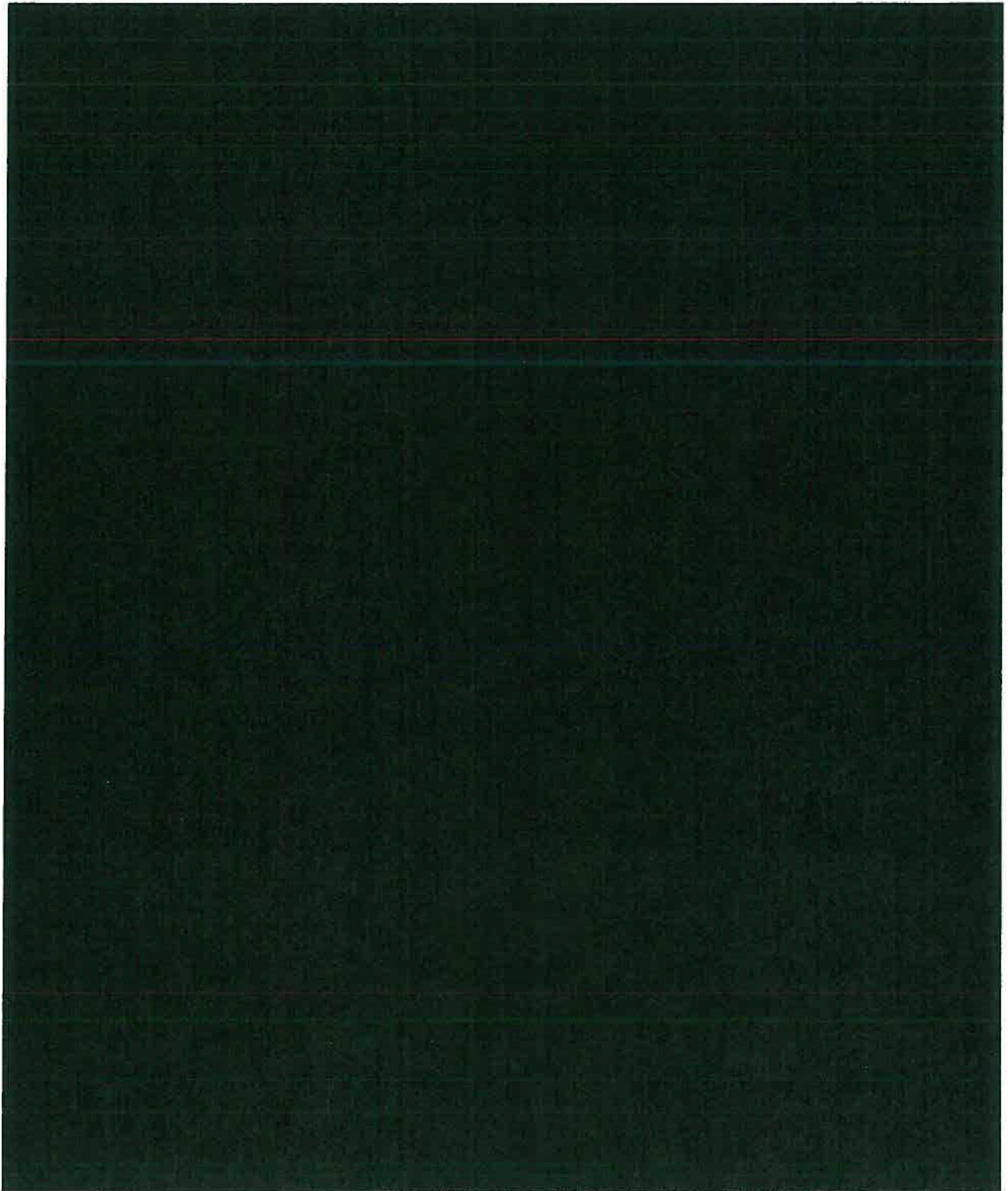
11. The key document on the table in talks between the Prime Minister and Aboriginal and Torres Strait Islander representatives, is that at Attachment 3 (amendments to the Commonwealth Outline of legislation sought by the ATSIC Commissioners). The response passed to them is at Attachment 4.

12. To some extent, some of the points in the ATSIC document can be accommodated in the drafting of the Bill, e.g. that there should be notification before the Minister decides to exclude any category of grant (for instance very low impact exploration permits) from the right-to-negotiate procedures. Again, it should be possible in the drafting to give some more explicit recognition to traditional hunting and gathering rights.

13. However, to require substantive concessions from the States to meet most of the ATSIC points would certainly be seen by them as introducing, at the last minute, new and difficult issues. We judge the chance of agreement would disappear. **The key strategic judgement for Ministers to make is therefore whether to try to nail down the agreement with the States.** If Ministers do not favour this, or if such an attempt failed, then some of the ATSIC points could be revisited.







Attachment 1

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WORKING DOCUMENT

The Prime Minister and Premiers and Chief Ministers of Queensland, NSW, Victoria, South Australia, the Northern Territory and the ACT have agreed upon a detailed outline of Commonwealth legislation for determining claims to native title, validation of past grants and acts of government, the recognition and protection of native title, and the setting of standards for dealing with native title.

State and Territory legislation in relation to native title will complement and be consistent with the Commonwealth Bill.

This major breakthrough reflects recognition by the Prime Minister, Premiers, and Chief Ministers of the importance of the Mabo decision establishing native title in Australian common law, and their commitment to the dual goals of just treatment of native title and the preservation of a secure and workable system of land management in Australia.

The agreed outline of legislation very largely mirrors the Commonwealth document released for comment by the Prime Minister on 2 September. The principles embodied in that outline have been maintained:

- recognition of native title in Australian law
- the need to determine who has native title, where, and what the key attributes of that title are in particular cases
- the requirement for a regime under which dealings in land can go on, and which provides clear processes within which our vital land based industries can operate
- the right of Aboriginal and Torres Strait Islander people to be asked about proposed actions affecting native title land, but without any special veto or "locking–up" of the land;
- full security for people holding grants of interests in land provided by governments in the past, and at no cost to them
- fair compensation for any extinguishment or impairment of native title rights, and
- the Commonwealth, States and Territories to manage dealings in land in their own jurisdictions in accordance with common national standards.

The additional understandings which have now been reached between the Prime Minister, Premiers and Chief Ministers and the variations they have agreed to the document of 2 September, will enhance the practical operation of the scheme and clarify a number of specific aspects of it:

[list of agreed variations and understandings reached]

Both the Commonwealth and State/Territory governments have important responsibilities to Aboriginal and Torres Strait Islander people. In recent years, their joint recognition of this has been reflected in a number of ways, notably the national response to the Royal Commission into Aboriginal Deaths in Custody and the National Commitment agreed by Heads of Government at COAG in December 1992.

The achievement today of agreement on a legislative approach for dealing with the complex implications of the High Court's Mabo decision reflects a further major demonstration of the capacity of the two levels of government, working together, to address these responsibilities.

The Prime Minister, Premiers and Chief Ministers believe that this agreement between them opens the way for a truly national approach capable of adoption by all jurisdictions across Australia.

The process of analysing the ramifications of the High Court decision, developing a response to it and reaching the agreement announced today has necessarily been an arduous one. The issues are extremely complex and a range of strongly held views exist in the community. The Prime Minister, Premiers and Chief Ministers consider that the achievement of the agreement testifies to the capacity of Australia to come to grips with an exceptionally challenging issue of major and enduring importance for our country.

1. The definition of category 1 grants to include industrial, commercial, farming (or agricultural), utilities, telecommunications, recreational leases in addition to leases for charitable purposes (this latter category in order to pick up eg NGO funded child care centres, aged centres).

2. The definition of Crown acts or acts of a statutory authority that extinguish native title to be "acts of a long term nature, such as the establishment of a road, railway, stock route in use, school or other public work (in respect of such land as is necessary within the Crown reserve to give effect to the public work) and such other acts as are agreed and prescribed in regulations under this Act".

   The Commonwealth to make clear in the second reading speech that this includes eg stock routes used intermittently.

3. In relation to future dealings, the regime to include the main features of the four step process with the proposed revision of paragraph 101 of the Commonwealth Outline (at Annex A). This would allow for the Government to obtain an expedited determination of whether a non mining grant may go ahead in the absence of knowing whether native title exists. Failure to comply with either process would not of itself be a source of invalidity. In addition, the capacity for compulsory acquisition is not affected.

4. In relation to mining, modified State/Territory processes such as that at Annex B are acceptable in principle.

   Acceptance in principle of the exemption from the right to negotiate procedure of prospecting permits and exploration permits of the kind contained in the Queensland legislation, as being purely for exploration and involving minimal disturbance of the land.

   Where native title survives or may survive in whole or in part, an existing valid grant can be renewed in the future without having to comply with the right to negotiate procedures or the freehold test, so long as the renewal operates in substantially the same terms, ie there is no further extinguishment of native title.

5. Existing compensation regimes (for mining) to apply to any impairment of native title.

   Just terms to apply to the extinguishment of native title

- existing State/Territory criteria for the assessment of just terms to apply to the extinguishment of native title

- if existing State/Territory regimes do not include just terms, they may be amended to provide just terms or the Commonwealth law will operate to do so.

6. In relation to the designation of Aboriginal organisations to represent native title claimants the following principles to apply

   - designation would only be undertaken after a consultation process with the Aboriginal people in the relevant area

   - funding conditional upon the organisations undertaking to accept the instructions of their clients

   - the Minister to review the designations, say every three years, in consultation with the relevant State government

   - Aboriginal people in a given State or Territory should always have a choice of designated groups

   - designation of existing organisations which have already been established with like statutory functions could proceed following consultation by the Minister

   - designation of new organisations would require the support of the majority of Aboriginal people, as established by a ballot organised by ATSIC, who affiliate on the basis of common cultural principles or traditions (eg language)

7. The Federal Court should only have jurisdiction for areas where the Commonwealth is a party to an action or where there is no recognised State/Territory body

   Where there is a recognised State/Territory body, that body shall have sole jurisdiction.

   There should be no requirement for consultation on judicial appointments.

   Appeals will be heard in the same stream (State or Federal) as the primary adjudication.

8. There will be no sunset clause on claims.

9. In relation to the question of proof of native title, the Act to contain no express requirement to establish physical connection to the land.

10. There should be a mutually agreed specific date which will apply to the commencement of the operation of the new Commonwealth and State/Territory system and the cut off date for validation of past grants.

    Such extension of the cut off beyond 30 June 1993 to be on the basis of a commitment that there will be no rush of grants and that Governments will in the interim undertake best endeavours to operate on a non discriminatory basis.

    On initial examination of the time required to get the system operating, a possible date would be 30 June 1994.

11. On a range of sundry issues

    - the Crown has the right to confirm such ownership of any natural resources as already exists

    - Commonwealth States or Territories to be able to confirm any existing public access to and enjoyment of beaches etc (para 18) without payment of compensation;

    - the outline to include a capacity for the Commonwealth to schedule and designate complying State legislation as consistent with Commonwealth law.

    - miners not to be subject to unknown or additional rehabilitation costs as a result of the revival of native title

    - Clause 12 of the Commonwealth Outline to make clearer the intention that native title holders are subject to laws and regulations on the taking of wild life etc as are all Australians, but that their native title is not extinguished.

12. Appropriate arrangements for sharing by Commonwealth and State/Territory Governments of compensation and legal and administrative costs associated with the regime.

System by which future dealings (other than mining dealings) can occur over land where no native title exists.

Step 1 Notify the public of the intention to process a particular dealing in particular land (e.g. land whose previous tenure was other than category 1) over a period of 1 month.

Step 2 Any claim for native title should be referred to the *National Native Title Tribunal* (or an approved State/Territory court/tribunal).

Step 3 The Registrar of the *National Native Title Tribunal* (or an approved State/Territory court/tribunal) to be satisfied within 1 month that the claim represents an arguable case. Under these circumstances it would be registered and the dealing would not proceed until there was a determination of the matter. If native title was ultimately proven not to exist then the dealing could proceed. If native title was proven to exist then the rights of the title holder would be recognised according to the law.

Step 4 If the Registrar was not satisfied that the claim represented an arguable case then the dealing would proceed. If native title was subsequently proven to exist in the land then any native title rights which were extinguished or impaired by the dealing would be converted into a right to compensation as currently contemplated by the Commonwealth *Outline* for grants made before 1 July 1993.

All titles issued through adherence to this regime would be valid under the proposed Commonwealth legislation. In the event that native titles were subsequently proven over the land, (regardless of whether or not a claim was asserted in response to the notification process) compensation would be claimable but the validity of the grant would not be in doubt.

"101. Governments and other interested parties, in this case those with interests in the land, should be able to apply for a determination whether any native title exists in relation to particular land. Where no claims of native title interest are made within the prescribed time after notification of the application, or the Judge is satisfied that there is no native title claim which should be registered, the Judge shall make a determination that no native title exists. The Government may assume that native title does not exist, and any action based on that assumption will be valid. If native title is later found to exist, the native title holder will be entitled to compensation."

Annex B

The right to negotiate in respect of a mining lease where native title has been determined.

Step 1 Native title holders or their nominated representative will be notified of the application for a mining lease. The native title holders will be entitled to negotiate with the applicant. Mediation between the parties will be assisted by both the Mining Registrar and the Registrar of the Queensland Aboriginal Land Tribunal (the Native Title Tribunal).

Step 2 Where the parties are unable to agree within 4 months, and the parties do not agree to an extension, the issue as to whether the grant is to be made is to be determined by the Mining Warden's Court. In addition to issues normally considered by the Mining Warden, the resolution of issues which pertain particularly to native title will be assisted by a member of the Native Title Tribunal who will sit with the Mining Warden.

Step 3 The Mining Warden's Court will determine within 3 months whether the grant should be made. The Mining Warden's Court will be able to recommend conditions for the grant to proceed, and not merely whether or not a grant should be made. The Mining Warden will be required to take into account all grounds of objection which any title holder is able to put, including those matters set out in Clause 37 of the Commonwealth Outline; generally consider section 7.20 of the *Mineral Resources Act 1989*.

Step 4 Ordinarily the Mining Warden is required to recommend to the Minister whether, and upon what conditions, or not mining should proceed; generally consider section 7.26 of the *Mining Resources Act 1989*. The Queensland Government shall only be able to overturn the recommendation of the Mining Warden in the State or national interest.

Clause 48 of the Commonwealth Outline provides that where a State has enacted complementary legislation which meets the standards for the recognition and protection of native title, the Commonwealth may agree to suitably modified State processes for the handling of native title land in place of the processes set out in the Commonwealth Outline.

Clause 49 of the Commonwealth Outline provides that in order to agree to suitably modified State processes in place of the processes set out in the Commonwealth Outline the Commonwealth will need to be satisfied that the State processes meet certain criteria:

(a) satisfactory procedures for the notification of proposed grants (see Step 1 above);

(b) capacity of native title holders to object, and for those objections to be heard by persons with legal qualifications and at least five years experience (see Steps 2 and 3 above);

(c) provision for bona fide negotiation (see Step 1 above);

(d) capacity to assist resolution of differences through mediation (see Step 1 above);

(e) the hearing of objections to be able to take into account a sufficiently wide range of considerations (see Step 3 above);

(f) suitable involvement of the Commonwealth Tribunal or recognised State Tribunal in the consideration of the matter by an appropriate State body (see Steps 1 and 2 above);

(g) the decision of the State tribunal or body only to be able to be overruled on grounds of State or national interest (see Step 4 above).

Accordingly, the Commonwealth should agree to the modified State processes for the handling of native title land in place of the processes set out in the Commonwealth Outline.

ATTACHMENT 3

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ATSIC'S POSITION ON CURRENT KEY ELEMENTS OF THE COMMONWEALTH'S PROPOSED LEGISLATION.

1. ATSIC IS STRONGLY OF THE VIEW THAT THE **RACIAL DISCRIMINATION ACT 1975** SHOULD NOT BE SUSPENDED AND, INDEED, SHOULD BE EXPRESSED POSITIVELY TO APPLY

2. WE SUPPORT THE ESTABLISHMENT OF A COMMONWEALTH TRIBUNAL TO DETERMINE NATIVE TITLE CLAIMS AND DETERMINE COMPENSATION

3. WE SUPPORT PROPOSALS TO ENABLE NATIVE TITLE CLAIMANTS TO USE THIS TRIBUNAL TO MAKE CLAIMS NO MATTER WHAT THE STATES DO

4. WE SUPPORT THE INTENTION NOT TO PROVIDE FOR A SUNSET CLAUSE FOR THE MAKING OF CLAIMS

5. WE SUPPORT THE **CO-EXISTENCE** OF NATIVE TITLE WITH ALL MINING LEASES, WITH NO DESIGNATION OF SOME MINING LEASES AS "MAJOR OR MAXIMUM IMPACT" LEASES

6. WE SUPPORT COMPENSATION FOR **ALL** PAST EXTINGUISHMENTS, BEFORE OR AFTER 1975, AND COMPENSATION, WHERE PAYABLE, TO BE AT LEAST ON **JUST TERMS** IN ALL CASES

7. WE SUPPORT NEGOTIATION RIGHTS IN RELATION TO DEVELOPMENT ON NATIVE TITLE LAND IN RELATION TO **ALL CATEGORIES** OF GRANT (ALTHOUGH WE WANT THESE PROVISIONS STRENGTHENED - SEE OVER)

8. WE SUPPORT THE RECOGNITION OF NEGOTIATION RIGHTS ON THE PART OF REGISTERED NATIVE TITLE **CLAIMANTS**

9. WE AGREE WITH THE NEED TO FUND PRESCRIBED ABORIGINAL AND TORRES STRAIT ISLANDER BODIES TO ASSIST NATIVE TITLE CLAIMANTS

   - ATSIC REITERATES ITS POSITION THAT SUCH FUNDING MUST BE OVER AND ABOVE ATSIC'S EXISTING GLOBAL ALLOCATION

10. WE ARE OF THE VIEW THAT THE CUT OFF DATE FOR VALIDATION PURPOSES SHOULD BE 3 JUNE 1992

11. WE SUPPORT A SITUATION IN WHICH FUTURE GRANTS MAY ONLY BE MADE OVER NATIVE TITLE LAND **WHERE THEY COULD BE MADE OVER FREEHOLD LAND**

   - ATSIC DOES NOT WANT PROVISIONS WHICH WOULD ALLOW GOVERNMENTS TO ISSUE NEW GRANTS SUCH AS FREEHOLDS AND LEASEHOLDS OVER WHAT **MAY** BE NATIVE TITLE LAND, **WITHOUT A THOROUGH INVESTIGATION BY A JUDGE** AS TO WHETHER OR NOT NATIVE TITLE EXISTS

12. THE COMMONWEALTH SHOULD HAVE EXCLUSIVE JURISDICTION WITH RESPECT TO ASSESSING CLAIMS FOR NATIVE TITLE AND WHETHER GRANTS CAN BE MADE OVER NATIVE TITLE LAND

   - IF THIS IS NOT ACCEPTABLE, THEN

   - ALL ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE MUST AT LEAST BE ABLE TO CHOOSE WHICH TRIBUNAL IN WHICH THEY MAKE THEIR NATIVE TITLE CLAIM

   - THERE SHOULD BE PROVISION FOR AN APPEAL FROM A STATE BODY TO THE FEDERAL COURT ON A DECISION WHETHER OR NOT A GRANT SHOULD GO AHEAD

   - STATE MINING WARDENS COURTS ARE TOTALLY UNACCEPTABLE AS BODIES TO MAKE DECISIONS OR RECOMMENDATIONS ON PROPOSED GRANTS OVER NATIVE TITLE LAND

   - WE WOULD WANT **ANY** DECISIONS ON WHETHER A NATIVE TITLE CLAIM SHOULD BE REGISTERED OR ON WHETHER A GRANT SHOULD GO AHEAD ON LAND WHICH IS **OR MAY BE** NATIVE TITLE LAND, TO BE MADE BY A LEGALLY QUALIFIED PERSON OF AT LEAST FIVE YEARS' STANDING AS A BARRISTER OR SOLICITOR

13. WE CALL FOR SPECIFIC RECOGNITION OF **HUNTING, GATHERING AND FISHING RIGHTS** FOR TRADITIONAL PURPOSES, WITH NO REQUIREMENT TO OBTAIN EXPENSIVE LICENCES OR PERMITS, WITH SUCH RIGHTS SUBJECT ONLY TO REGULATION FOR CONSERVATION PURPOSES

14. LEASES **IN GENERAL** SHOULD NOT, IN OUR VIEW, EXTINGUISH NATIVE TITLE UPON VALIDATION, BUT NATIVE TITLE SHOULD **CO-EXIST** WITH THE LEASE. NATIVE TITLE SHOULD BE SUBJECT TO ANY LEASE *ONLY FOR ITS DURATION*, NOT FOR ANY EXTENSIONS, WHICH WOULD NEED TO BE NEGOTIATED WITH NATIVE TITLE HOLDERS.

15. NATIVE TITLE HOLDERS' CONSENT RIGHTS SHOULD ONLY BE ABLE TO BE OVERRIDDEN IN THE **NATIONAL** INTEREST, WITH PROVISION FOR THE NATIONAL INTEREST TO BE DECLARED ONLY BY THE GOVERNOR GENERAL-IN-COUNCIL. WE URGE THE COMMONWEALTH TO DISCARD THE NOTION OF "STATE INTEREST" AS CAPABLE OF OVER-RIDING NATIVE TITLE INTERESTS.

16. WE URGE THE COMMONWEALTH TO EXTEND THE TIME FOR NEGOTIATIONS FROM 3 OR 4 MONTHS TO 6 MONTHS IN CLAUSES 36 AND 64

17. WE ARE IMPLACABLY OPPOSED TO THE EXCLUSION OF CERTAIN CATEGORIES OF GRANTS (SUCH AS EXPLORATION LICENCES) FROM THE NEGOTIATION REQUIREMENTS OF THE LEGISLATION

18. COMPENSATION SHOULD BE PAYABLE FOR **ALL PAST IMPAIRMENTS** AS WELL AS ALL PAST EXTINGUISHMENTS

19. WE REITERATE OUR LONG STATED VIEW THAT COMPENSATION PROVISIONS SPECIFICALLY RECOGNISE **SPECIAL ATTACHMENT** TO LAND, WITH NO CAP ON THIS COMPENSATION

20. GOVERNMENTS SHOULD NOT BE ABLE TO ACQUIRE NATIVE TITLE LAND UNDER COMPULSORY ACQUISITION STATUTES - THE USE OF THIS LEGISLATION WOULD ALLOW THE NEGOTIATION PROCEDURES IN THE LEGISLATION TO BE AVOIDED

21. ATSIC DOES NOT FAVOUR THE CROWN ASSERTING ITS OWNERSHIP OF MINERALS - BUT WE ARE **STRONGLY OPPOSED** TO ANY MOVE TO ASSERT OWNERSHIP OF ABOVE-GROUND PARTS OF LAND SUCH AS **TREES, OR NATURAL RESOURCES SUCH AS FISH**

    - UNLESS SUCH ASSERTION OF OWNERSHIP IS MERELY AFFIRMING AN EXISTING SITUATION WHERE THE CROWN HOLDS "RADICAL" BUT NOT BENEFICIAL TITLE TO THESE

    - OTHERWISE, THIS MAY GREATLY REDUCE THE AREAS OVER WHICH NATIVE TITLE MAY BE CLAIMED, FOR EXAMPLE, NATIONAL PARKS OR LAND RESERVED FOR FUTURE PURPOSES

    - AND IS CERTAINLY LIKELY TO IMPACT BADLY ON FOOD GATHERING RIGHTS

Attachment A 4

COMMENTS ON ATSIC'S KEY ISSUES

(ATSIC's points are in bold type)

1. DISAPPLICATION OF THE RDA FOR VALIDATION AND THE CUT-OFF DATE FOR VALIDATION

- WE HAVE LOOKED CLOSELY AT THIS, IN VIEW OF ABORIGINAL AND TORRES STRAIT ISLANDER CONCERNS
- WE SHOULD BE INTERESTED IN YOUR REACTIONS TO A SHORT PAPER ON POSSIBLE OPTIONS, INCLUDING THE OPTION MENTIONED TO US BY ATSIC. THE PAPER HAS NO PARTICULAR STATUS, BUT MIGHT FOCUS DISCUSSION
- AS YOU KNOW, WE NEED TO PROVIDE CERTAINTY FOR THE VALIDATION OF PAST GRANTS
- AS WELL AS PROTECTING NATIVE TITLE TO THE EXTENT POSSIBLE, AND DISCRIMINATING IN FAVOUR OF NATIVE TITLE HOLDERS IN SEVERAL IMPORTANT WAYS.

2. THE COMMONWEALTH TO HAVE EXCLUSIVE JURISDICTION WITH RESPECT TO ASSESSING CLAIMS FOR NATIVE TITLE AND WHETHER GRANTS CAN BE MADE OVER NATIVE TITLE LAND

- IT IS BETTER TO HAVE THE STATES TIED IN – BUT ON OUR TERMS – AS PER THE OUTLINE.
- EXCLUDING THE STATES ALTOGETHER FROM THEIR TRADITIONAL FUNCTION OF LAND MANAGEMENT WOULD BE BOUND TO CREATE A MAJOR ADMINISTRATIVE AND CONSTITUTIONAL CONFRONTATION.

IF THIS NOT ACCEPTABLE, THEN:

- **ALL ABORIGINAL PEOPLE MUST BE ABLE TO CHOOSE WHICH TRIBUNAL IN WHICH THEY MAKE THEIR NATIVE TITLE CLAIM**

- IT MAY BE POSSIBLE TO ALLOW FOR FORUM SHOPPING ON DETERMINATION OF TITLE IN THE COURTS, BUT NOT ON CONSIDERATION OF GRANTS IN THE TRIBUNAL.

- APPEAL FROM A STATE BODY TO THE FEDERAL COURT ON WHETHER A GRANT GOES AHEAD OVER NATIVE TITLE LAND

- WE THINK STATE OR TERRITORY APPEALS PROCESSES SHOULD BE GONE THROUGH – IF THEY ARE PART OF A REFORMED SYSTEM WHICH IS UP TO OUR STANDARDS

- STATE MINING WARDENS' COURTS ARE TOTALLY UNACCEPTABLE AS BODIES TO MAKE DECISIONS OR RECOMMENDATIONS ON PROPOSED GRANTS OVER NATIVE TITLE LAND

- WE AGREE UNLESS WE CAN GET WARDENS' COURTS OR OTHER STATE PROCESSES REFORMED TO OUR STANDARDS – WHICH IS THE IDEA

- MANY PROBLEMS WITH WARDENS COURTS HAVE OCCURRED BECAUSE THEY HAVE TOLD ABORIGINAL PEOPLE THEY DID NOT HAVE STANDING: THEY NOW HAVE THAT STANDING

- IT IS ENTIRELY IN OUR CONTROL WHETHER WE DO OR DO NOT ACCEPT A STATE PROCESS

- ANY DECISIONS ON WHETHER A NATIVE TITLE CLAIM SHOULD BE REGISTERED OR WHETHER A GRANT SHOULD GO AHEAD ON LAND WHICH IS OR MAY BE NATIVE TITLE LAND, TO BE MADE BY A LEGALLY QUALIFIED PERSON OF AT LEAST FIVE YEAR'S STANDING AS A BARRISTER OR SOLICITOR

- WE AGREE, AND THE LEGISLATION PROVIDES FOR THIS

  - THE ONLY EXCEPTION IS WHERE NO OBJECTION IS MADE BY A REGISTERED CLAIMANT WITHIN 30 DAYS OF NOTIFICATION OF AN APPLICATION FOR A GRANT – IN THIS CASE, NO DETERMINATION OF NATIVE TITLE IS MADE

  - WE CAN LOOK AT THE PRACTICAL IMPLICATIONS OF REMOVING THIS EXCEPTION

3. SPECIFIC RECOGNITION OF HUNTING, GATHERING AND FISHING RIGHTS FOR TRADITIONAL PURPOSES, WITH NO REQUIREMENT TO OBTAIN EXPENSIVE LICENCES OR PERMITS, WITH SUCH RIGHTS SUBJECT ONLY TO REGULATION FOR CONSERVATION PURPOSES.

- I SEE THAT YOU ACCEPT REGULATION OF TRADITIONAL HUNTING, FISHING AND GATHERING RIGHTS FOR CONSERVATION REASONS

- THE LEGISLATION RECOGNISES THESE RIGHTS, AND PROVIDES THAT PROHIBITIONS FOR CONSERVATION REASONS APPLY TO NATIVE TITLE

HOLDERS BUT DO NOT EXTINGUISH NATIVE TITLE, THUS ALLOWING REVIVAL OF RIGHTS WHEN THE PROHIBITION IS LIFTED

- NOTHING IN OUR PROPOSALS WOULD PRECLUDE PEOPLE FROM ASSERTING THEIR NATIVE TITLE RIGHTS AND CLAIMING COMPENSATION
  - BUT WE WOULD NOT BE IN A POSITION TO CONTEMPLATE COMMONWEALTH LEGISLATION TO LIMIT STATE AND TERRITORY LICENCE FEE STRUCTURES AS THEY APPLY TO ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE
  - THIS IS A MATTER FOR THE STATES, BUT WE WOULD SUPPORT THE REVIEW OF THIS LEGISLATION, COMMONWEALTH AND STATE, SO THAT THE IMPACT ON NATIVE TITLE IS LIMITED: THIS IS ALREADY DONE UNDER THE TORRES STRAIT FISHERIES ACT

4. LEASES IN GENERAL NOT TO EXTINGUISH NATIVE TITLE UPON VALIDATION, BUT NATIVE TITLE TO CO-EXIST WITH THE LEASE, NATIVE TITLE TO BE SUBJECT TO ANY LEASE ONLY FOR ITS DURATION, NOT FOR ANY EXTENSIONS, WHICH WOULD NEED TO BE NEGOTIATED WITH NATIVE TITLE HOLDERS.

- WE HAVE RESISTED THE VIEW THAT ALL LEASES EXTINGUISH (EVEN THOUGH THAT IS PROBABLY THE COMMON LAW POSITION)
- WE HAVE PROVIDED THAT MINING LEASES SHOULD NOT EXTINGUISH NATIVE TITLE, WHICH IS A CONSIDERABLE EXTENSION OF THE COMMON LAW
- THE COMMONWEALTH PROPOSES THAT, WHERE A LEASE IS VALIDATED AND COMPENSATION PAID, THAT GRANT HOLDERS BE ABLE TO GAIN EXTENSIONS (PARA 126(3)) WHERE RIGHTS OR INTERESTS HAVE BEEN CREATED BY AN EARLIER GRANT. SUCH A RENEWAL WILL NOT EXTINGUISH NATIVE TITLE.

IF THIS IS NOT ACCEPTABLE

- THEN VALIDATION OF EXTENSIONS TO LEASES OR OTHER INTERESTS TO EXTEND ONLY TO LEGALLY ENFORCEABLE RIGHTS, NOT ' UNDERTAKINGS ETC SUPPORTED BY CONTEMPORARY WRITTEN DOCUMENTS'.

- NOTE THE WORDS ' IN GOOD FAITH' IN PARA 126(2): THIS HAS BEEN INSERTED TO PROVIDE AN ADDITIONAL SAFEGUARD AGAINST THE STATES' ABUSING THIS PROVISION

- POLICY HAS TO DEAL WITH THE FACT THAT THERE ARE PEOPLE WHO DO NOT HAVE A LEGALLY ENFORCEABLE RIGHT, BUT HAVE A LEGITIMATE EXPECTATION. WE HAVE REQUIRED THAT THIS BE PROVED ON THE BASIS OF SOME WRITTEN DOCUMENT. THIS IS A RESULT OF CASUAL LAND MANAGEMENT PRACTICES IN THE PAST, BUT IS WRONG THAT INNOCENT LEASEHOLDERS SHOULD BE PENALISED FOR BAD STATE LAND MANAGEMENT PRACTICES

- FURTHER, COMPENSATION WOULD NEED TO BE PAYABLE TO NATIVE TITLE HOLDERS FOR ANY EXTENSION

- COMPENSATION WOULD BE PAYABLE IF THE NATIVE TITLE WAS NOT EXTINGUISHED BY THE VALIDATION

- IN ADDITION, THERE SHOULD BE PROVISION FOR REGULATIONS TO BE MADE WHICH WOULD ENABLE NATIVE TITLE TO REVIVE OVER SOME EXPIRED LEASEHOLDS WHICH WOULD OTHERWISE HAVE EXTINGUISHED THE NATIVE TITLE, FOR EXAMPLE, PASTORAL AND TOURIST LEASES WHICH HAVE BEEN ABANDONED

- IF SUCH LEASES WERE VALID, THEY ARE NOT AFFECTED BY THE PROPOSED LEGISLATION

  - BUT ACCORDING TO THE HIGH COURT'S DECISION, VALID LEASES WOULD PROBABLY HAVE EXTINGUISHED ANY NATIVE TITLE;

- IF A LEASE WAS INVALID AND HAS EXPIRED AS AT THE TIME SPECIFIED IN THE LEGISLATION, ANY NATIVE TITLE IS NOT EXTINGUISHED

- IT MAY ALSO BE POSSIBLE TO PROVIDE THAT SUCH ABANDONED LEASES COULD BE DEEMED NOT TO HAVE EXTINGUISHED NATIVE TITLE IF THEY ARE PRESCRIBED OR IF THE TRIBUNAL DETERMINES.

5. NATIVE TITLE HOLDERS' CONSENT RIGHTS ONLY ABLE TO BE OVERRIDDEN IN THE NATIONAL INTEREST, NOT THE STATE INTEREST.

  - WE HAVE REJECTED "PUBLIC INTEREST". WE THINK STATE OR NATIONAL INTEREST IS A REASONABLE TEST.

IF THIS IS IMPOSSIBLE;

- THEN ANY STATE OVERRIDE SHOULD ALWAYS BE DISALLOWABLE BY THE COMMONWEALTH GOVERNMENT

  - THIS WOULD ADD AN EXTRA LAYER OF UNCERTAINTY. STATES WILL ONLY GET THE OVERRIDE POWER IF THEY CONFORM TO THE COMMONWEALTH PROPOSALS. UNREASONABLE USE OF THE

OVERRIDE POWER WOULD BE SUSCEPTIBLE TO JUDICIAL REVIEW AND THE COMMONWEALTH CAN ALWAYS WITHDRAW RECOGNITION OF THE STATE PROCESSES.

6. THE TIME FOR NEGOTIATIONS TO BE EXTENDED FROM 3 OR 4 MONTHS TO 6 MONTHS IN CLAUSES 36 AND 64.

- WE BELIEVE THE 3/4 MONTH PERIODS AVAILABLE FOR NEGOTIATION ARE REASONABLE. THERE IS PROVISION FOR EXTENSION BY AGREEMENT BETWEEN THE PARTIES.

7. NO EXCLUSION OF CERTAIN CATEGORIES OF GRANTS (SUCH AS EXPLORATION LICENCES) FROM THE NEGOTIATION REQUIREMENTS OF THE LICENCES

- THESE EXCLUSIONS ARE ONLY AVAILABLE IF THE GRANTS WILL HAVE A MINIMAL IMPACT ON THE LAND (PARAS 50 AND 62) WITHOUT THEM THERE IS A SERIOUS DANGER THAT THE SYSTEM WILL BECOME CLOGGED UP WITH THE HUGE NUMBER OF MINOR APPLICATIONS.

8. COMPENSATION TO BE PAYABLE FOR ALL PAST IMPAIRMENTS AS WELL AS ALL PAST EXTINGUISHMENTS.

- SEE PARA 70 WHICH REFERS TO COMPENSATION FOR IMPAIRMENT. COMPENSATION IS PAYABLE WHERE COMPENSATION WOULD BE PAYABLE IF THE ACT HAD BEEN VALID. THIS SEEMS A FAIR TEST, AND WOULD PUT THE NATIVE TITLE HOLDER ON AN EQUAL FOOTING WITH HOLDERS OF OTHER TITLES.

9. SPECIFIC RECOGNITION OF SPECIAL ATTACHMENT TO LAND IN THE COMPENSATION PROVISIONS, WITH NO CAP ON THIS COMPENSATION.

- SEE PARA 68. WE BELIEVE THAT 'JUST TERMS' ALLOWS SCOPE FOR ASSERTION OF SPECIAL ATTACHMENT. THERE IS NO CAP.

10. GOVERNMENTS NOT TO BE ABLE TO ACQUIRE NATIVE TITLE LAND UNDER COMPULSORY ACQUISITION STATUTES – THE USE OF THIS LEGISLATION WOULD ALLOW THE NEGOTIATION PROCEDURES TO BE AVOIDED.

- **IF COMPULSORY ACQUISITION LAWS ARE TO APPLY, THIS SHOULD ONLY BE IN THE NATIONAL INTEREST, AND THE SAME NEGOTIATION**

RIGHTS SHOULD APPLY AS ARE SPECIFIED IN CLAUSES 35-39 OF THE OUTLINE

- THIS WOULD MEAN FOR EXAMPLE STATES WERE POWERLESS TO BUILD HOSPITALS, SCHOOLS AND ROADS WITHOUT NATIVE TITLE HOLDERS' CONSENT;
- COMPULSORY ACQUISITION WILL ONLY AVAILABLE WHERE IT WOULD BE GENERALLY AVAILABLE;
- COMPULSORY ACQUISITION POWERS NORMALLY ALLOW FOR A PERIOD OF OBJECTION AND DISCUSSION.
- THE HIGH COURT REITERATED THE RIGHT OF GOVERNMENTS TO EXTINGUISH NATIVE TITLE.

11 ATSIC DOES NOT FAVOUR THE CROWN ASSERTING ITS OWNERSHIP OF MINERALS - BUT WE ARE STRONGLY OPPOSED TO ANY MOVE TO ASSERT OWNERSHIP OF ABOVE GROUND PARTS OF LAND SUCH AS TREES, OR NATURAL RESOURCES SUCH AS FISH

- THIS MAY GREATLY REDUCE THE AREAS OVER WHICH NATIVE TITLE MAY BE CLAIMED, FOR EXAMPLE NATIONAL PARKS OR LAND RESERVED FOR FUTURE PURPOSES
- AND IS CERTAINLY LIKELY TO IMPACT BADLY ON FOOD GATHERING RIGHTS

- WE ARE ONLY TALKING ABOUT CONFIRMATION OF EXISTING OWNERSHIP: ANY EXTENSION OF OWNERSHIP WILL MEAN COMPENSATION ON JUST TERMS
- THUS IF STATES HAVE ALREADY RESERVED TREES, THAT CAN BE CONFIRMED. IF TREES HAVE NOT ALREADY BEEN RESERVED, THIS CAN ONLY BE DONE IF IT APPLIES EQUALLY TO ALL LAND OWNERS IN FUTURE.
- A CROWN FOREST RESERVATION WOULD NOT EXTINGUISH NATIVE TITLE; AND, AS THE HIGH COURT STATED, THE CREATION OF A NATIONAL PARK IS NOT INCONSISTENT WITH CONCURRENT ENJOYMENT OF NATIVE TITLE
- FOR FISHING RIGHTS, NATIVE TITLE HOLDERS WOULD BE SUBJECT TO FISHERIES REGULATIONS AND WHEN FISHING RIGHTS ARE GRANTED, THEY WILL HAVE TO BE TREATED IN THE SAME WAY AS HOLDERS OF ANY OTHER FISHING RIGHT
- FOOD GATHERING RIGHTS WILL BE SUBJECT TO THE GENERAL LAW (11)