

Bills unlikely to raise human rights incompatibility

Aboriginal Land Rights and Other Legislation Amendment Bill 2013

Introduced into the House of Representatives on 21 March 2013

Portfolio: Families, Community Services and Indigenous Affairs

Overview

1.1 This bill seeks to add the town of Jabiru and two adjacent portions of Northern Territory land to Schedule 1 to the *Aboriginal Land Rights (Northern Territory) Act 1976*. This will enable the land to be granted as Aboriginal land to the Kakadu Aboriginal Land Trust. The bill provides that the land will not be granted as Aboriginal land until leaseback arrangements for the Jabiru town land and for the two adjacent non-township portions are put in place.

1.2 The bill adds a further parcel of land for Patta to Schedule 1 to the *Aboriginal Land Rights (Northern Territory) Act 1976*. This will enable the land to be granted as Aboriginal land to the relevant Aboriginal Land Trust.

1.3 Finally, the bill makes amendments to the *Environment Protection and Biodiversity Conservation Act 1999* to ensure that the world heritage, natural and cultural values of Kakadu National Park continue to be protected in relation to Jabiru, as well as amending existing management plan and town plan requirements for development of towns in Commonwealth reserves.

Compatibility with human rights

1.4 The bill is accompanied by a self-contained statement of compatibility which notes that the bill engages and advances the right to self-determination of Aboriginal peoples,¹ the right to equality and non-discrimination and the right to enjoy and benefit from culture.²

1.5 In her second reading speech the Minister for Families, Community Services and Indigenous Affairs noted:

1 As guaranteed by article 1 of the International Covenant on Civil and Political Rights (ICCPR) (the right is also guaranteed by article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)).

2 The right to equality and non-discrimination is said to be guaranteed by article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and article 26 of the ICCPR (to which may be added article 2(1) of the ICCPR and article 2(2) of the ICESCR), and the right to enjoy and benefit from culture is said to be recognised in article 27 of the ICCPR (to which may be added article 15(a) of the ICESCR).

These amendments arise from the landmark agreement struck in November 2009 to resolve the Jabiru native title claim, which is the longest-running native title claim in the history of the Northern Territory. The intention of this measure is to give effect to the settlement agreement reached between the parties to the native title claim. Importantly, this bill recognises the traditional ownership of Jabiru by the Mirarr people.³

1.6 The statement of compatibility states:

This Bill is necessary to recognise and ensure that relevant Aboriginal people have the right to own and control their traditional Aboriginal lands. The limitation on the rights of non-Aboriginal Australians is reasonable, necessary and proportionate to the policy desire to promote the equal enjoyment of the engaged rights by Aboriginal Australians.⁴

Rights engaged and promoted

1.7 The implementation of the agreement with the traditional owners of the land advances the enjoyment of the right to self-determination, as control over their traditional lands is a central component of the enjoyment of that right. It also advances the right of Aboriginal people to participate in and practise their culture.

Right to equality and non-discrimination: land rights measures as 'special measures'

1.8 The statement of compatibility notes that under international and Australian law measures that involve differential treatment based on race may be permissible if they satisfy the criteria of being a 'special measure', that is if they are designed to 'secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms.'⁵ This is made clear by article 1(4) of the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁶ and the practice under that treaty, as well as jurisprudence under the ICCPR and the ICESCR.

3 Delivered in the House of Representatives on 21 March 2013.

4 Statement of compatibility p 2.

5 Statement of compatibility, p 2 (citing UN Committee on the Elimination of Racial Discrimination, General Recommendation No 32 on the Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination (2009), para 11).

6 '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 measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'

1.9 The statement of compatibility goes on to state:

The *Aboriginal Land Rights (Northern Territory) Act 1976* is discriminatory in nature as it confers rights and privileges upon Aboriginal Australians, which are discriminatory as against non-Aboriginal Australians. That discrimination is the essence of the Act; it is the foundation on which it is structured. However, the beneficial nature of this discrimination enables the *Aboriginal Land Rights (Northern Territory) Act 1976* and this Bill to be each classified as a 'special measure' within the meaning of paragraph 4 of article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (the CERD) (and subsection 8(1) of the *Racial Discrimination Act 1975*).

1.10 This approach to the analysis of land rights is similar to that adopted by the High Court of Australia in its influential 1985 decision in *Gerhardy v Brown*.⁷ In that case the court held that South Australian legislation which limited access to traditional lands was consistent with the *Racial Discrimination Act 1975* (RDA) and the ICERD. The court's reasoning was that, although the legislation involved differential treatment based on race and was therefore prima facie discriminatory, it constituted a 'special measure' within the meaning of both the RDA and the ICERD.⁸

1.11 The differential treatment of traditional owners in relation to their lands is more appropriately analysed in terms of substantive equality. In other words, although there is differential treatment based on race, that difference in treatment is based on objective and reasonable grounds and pursues a legitimate objective,⁹ namely the recognition of the relationship of Indigenous peoples to their land and the legitimacy of recognising this difference through a different legislative regime.

1.12 This analysis is supported by the views of the UN Committee on the Elimination of Racial Discrimination in relation to the meaning of the concept of 'special measures' under the ICERD:

Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as ... the rights of indigenous peoples, including rights to lands traditionally occupied by

7 *Gerhardy v Brown* [1985] HCA 11 (1985) 159 CLR 70.

8 The assumption of the court in *Gerhardy v Brown* that if rights conferred on traditional Aboriginal owners of land to exclude non-Indigenous persons from their land were not characterised as a 'special measure', then the legislation would have been racially discriminatory under the RDA and the ICERD, has been criticised by commentators, see Wojciech Sadurski, '*Gerhardy v. Brown v. The Concept of Discrimination: Reflections on the Landmark Case that Wasn't*' (1986) 11 *Sydney Law Review* 5 and Jonathan Hunyor, 'Is it time to re-think special measures under the Racial Discrimination Act? The case of the Northern Territory Intervention' (2009) 14(2) *Australian Journal of Human Rights* 39.

9 See CERD, General Recommendation, para 8 (2009).

them... Such rights are permanent rights, recognized as such in human rights instruments, including those adopted in the context of the United Nations and its specialized agencies. States parties should carefully observe distinctions between special measures and permanent human rights in their law and practice. The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures.¹⁰

1.13 The logic of a substantive equality analysis is underlined by the fact that articles 1(4) and 2(2) of the ICERD anticipate that there will come a time when measures which provide for beneficial or preferential treatment of one racial or ethnic group over another will have achieved their objective and will then be required to be discontinued. However, the recognition of Indigenous peoples' connection with their lands is something that would be envisaged as continuing indefinitely, as compared with, for example, a program of scholarships or employment targets to redress Indigenous underrepresentation which would be discontinued once reasonable proportions were achieved. Even accepting that such measures may take years or even decades to redress disadvantage, they are different in kind from recognition of Indigenous peoples' relationship to their lands.

1.14 The committee considers that the better approach to assessing the human rights compatibility of measures which recognise the rights of Aboriginal people over their traditional lands is that such measures are non-discriminatory because the racially based differential treatment involved is based on objective and justifiable criteria, and is a reasonable and proportionate means of pursuing a legitimate goal. Accordingly, such measures do not need to be justified as 'special measures', which provide another way of pursuing substantive equality but which require the special measures adopted to be discontinued once their goals of redressing disadvantage are achieved.

1.15 The committee considers that the bill does not appear to give rise to any human rights concerns.

10 CERD, General Recommendation No 32, para 15 (2009) (emphasis added, footnotes omitted).