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Labor to overhaul native title law

Patricia Karvelas and Padraic Murphy | *May 22, 2008*

FIFTEEN years after the passage of the historic Mabo legislation, the Rudd Government has flagged sweeping changes to native title to ensure the benefits of the mining boom flow to Aboriginal communities and are not locked up in trusts or frittered away.

Indigenous Affairs Minister Jenny Macklin, delivering the third annual Eddie Mabo Lecture in Townsville, said yesterday that native title legislation was toocomplex and had failed to deliver money to remote Aboriginal communities, despite lucrative agreements with mining companies.

She said changes to native title should be used "as part of our armoury to close the gap between indigenous and non-indigenous Australians".

Under the changes flagged yesterday, Ms Macklin wants direct payments to individuals minimised in favour of payments that create benefits for the whole community.

"It is not tenable for people to continue to live in overcrowded housing in dysfunctional, despairing communities while substantial funds, nominally allocated for their benefit, are either locked up in trusts or distributed as irregular windfalls to be frittered away with no long-term good," she said.

"The policy challenge is to both respect the rights of native title holders and claimants to make such agreements in relation to their land, and to make sure that the funds which flow are used to make a difference to their lives and to the lives of their children and grandchildren."

In what could be interpreted as a criticism of the first Native Title Act passed by Labor in the early 1990s, Ms Macklin said there was a need to look hard at the "structures and institutions we have put in place", and to make sure they were working effectively.

To that end, the Rudd Government would work up a reform package over the next six months in tandem with the development of its Indigenous Economic Development Strategy.

"We want to actively explore the scope to encourage the negotiation of comprehensive settlements as an alternative to the convoluted claims processes currently in place," Ms Macklin said. "We will need to look at encouraging stakeholders to change the ways payments are negotiated and structured to improve accountability and provide greater assurance to indigenous interests."

Ms Macklin said she and Attorney-General Robert McClelland would convene a small informal group of key players involved in native title to work through these issues, including leading indigenous academic Marcia Langton and Ian Williams, a member of the Argyle Native Title Trust.

Ms Macklin said at least three areas needed fundamental change: improving the "overly complex and exceedingly slow" native title claims process; improving representation for the indigenous people making claims; and ensuring that the income streams raised as part of native title agreements were properly distributed.

In 1992, the High Court overturned the legal concept that Australia was unoccupied, or terra nullius, when Europeans arrived. The so-called Mabo decision was followed by the creation of the native title regime in 1994 that has to date resolved 1200 claims.

But according to the National Native Title Tribunal, there are more than 550 live claims, including at least 120 that were lodged more than 10 years ago.

"The legal and anthropological processes in place defy comprehension," Ms Macklin said.

"In many cases, multiple external stakeholders are involved and scores of potential claimants."

The National Native Title Tribunal estimates it will take at least 30 years to resolve the outstanding backlog of claims under current processes.

Ms Macklin said the claims often revived conflicts within indigenous communities over traditional rights to land and that the claims process could cost millions of dollars in preparation, mediation and litigation.

She said those who framed the Native Title Act had not left the system with the best possible representation for native title claimants.

"Further thought needs to be given to the composition and nature of the native title representative bodies - and to the bodies which hold native title, the prescribed bodies corporate," she said.

Ms Macklin said there was an inadequate statutory framework for these bodies, weak accountability arrangements and not enough funding to get the job done.

The most controversial part of her Mabo speech was the suggestion of government interference or regulation in the distribution of funds raised through agreements between landholders and mining companies. But Ms Macklin was unapologetic about exploring the option. "There will be a need for hard-headed leadership from indigenous interests," she said. "We would all have cause for shame if the huge proceeds expected to flow to indigenous people from the mining boom are not harnessed to help close the gap between indigenous and non-indigenous Australians," she said.

Ms Macklin is concerned that arrangements for payments to indigenous landholders are largely left to the companies involved and the landholders themselves have little outside help. She is also worried about a failure to make the mining royalties last for future generations.

Professor Langton said there was a growing concern over the wording and implementation of some of the agreements. "Some agreements don't deliver benefits to future generations who won't have the benefit of the resource that's being removed, so there's a need for compensation for future generations," she said.

Professor Langton said there was also a need for changes to tax arrangements. Under current arrangements, the Australian Taxation Office allows the accumulation of charitable trust funds for only 10 years - after that the money has to be dispersed.

Ms Macklin gave the speech shortly after renaming the James Cook University library after Mabo, who was a 34-year-old gardener at the campus when he discovered he did not own his traditional homeland of Mer Island in the Torres Strait.

During the ceremony, Mabo's widow, Bonita, broke down and was comforted by Ms Macklin.

Kimberley Land Council executive director Wayne Bergmann said major structural changes were needed to the Native Title Act. He said the right-to-negotiate provisions in the Native Title Act needed to be reviewed to ensure Aboriginal people were treated equally to other interests over lands.

Minerals Council chief Mitch Hooke said major changes were needed to give Aboriginal people more resources with which to negotiate.

National Native Title Tribunal president Graeme Neate said the challenge was to work out "what sort of practical agreements can be negotiated which may not require some of the extensive work done by anthropologists and others".

"I think the current system can be made to work where parties are negotiating in good faith and being creative about the outcomes. In the claims area, it's not legislative change; it's making sure that parties are adequately resourced to negotiate properly," he said.