

**Submission of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund**

Inquiry into:

- (a) whether the finding of the Committee on the Elimination of Racial Discrimination (CERD Committee) that the *Native Title Amendment Act 1998* is inconsistent with Australia's international legal obligations, in particular the Convention on the Elimination of all Forms of Racial Discrimination, is sustainable on the weight of informed opinion;
- (b) what amendments are required to the Act, and what processes of consultation must be followed in effecting those amendments, to ensure that Australia's international obligations are complied with; and;
- (c) whether dialogue with the CERD Committee on the Act would assist in establishing a better informed basis for amendment to the Act.

## **(a) The findings of the CERD Committee**

### **Introduction**

The Committee on the Elimination of Racial Discrimination (the CERD Committee), acting on its early warning and urgent action procedure, considered the amended *Native Title Act 1993* (Cth) (NTA) in March 1999. Australia provided both written and oral submissions to the Committee arguing that the Act did not breach Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Representatives of the Australian government appeared before the CERD Committee in Geneva on 12 and 15 March 1999 to present the Government's position. On 18 March 1999, the Committee found that significant amendments to the NTA were contrary to Australia's obligations under CERD. Having considered these amendments the Committee expressed concern that the amended NTA, taken as a whole, was incompatible with Australia's international obligations. The Committee also found that, on the basis that the amendments were enacted without obtaining the informed consent of Indigenous people, Article 5 of CERD was also contravened. The March findings were reaffirmed at the Committee's fifty-fifth session on 16 August 1999.

The Human Rights and Equal Opportunity Commission made submissions to the CERD Committee in March 1999 and August 1999 copies of which are annexed hereto and marked A and B respectively. These submissions are consistent with the CERD Committee's findings, expressed above. The Aboriginal and Torres Strait Islander Social Justice Commissioner advised the government in his 1997 *Native Title Report* that the amended NTA breached Australia's obligations under CERD.<sup>1</sup> He also criticised the amendments to the right to negotiate as a violation of CERD in the 1996 *Native Title Report*.<sup>2</sup> Thus, in relation to the first term of this Inquiry as to whether the CERD decision is sustainable on the weight of informed opinion, my position clearly is that the CERD decision is sustainable. Before dealing with the decision itself and the basis of that decision it is helpful to set out the background to the decision and the committee that made it.

### **Background; the CERD Committee and its decision to adopt the 'early warning' procedure in relation to the amendments to the NTA**

The CERD Committee was the first human rights committee established within the United Nations structure. It consists of 'eighteen experts of high moral standing and acknowledged impartiality.'<sup>3</sup> Members are nominated by States Parties to the CERD

<sup>1</sup> *Native Title Report*, July 1996 – June 1997, Chapter 5

<sup>2</sup> *Native Title Report*, July 1995 – June 1996, p18

<sup>3</sup> International Convention on the Elimination of All Forms of Racial Discrimination (Herein CERD), Article 8(1).

Committee<sup>4</sup> and elected through a secret ballot. To ensure their independence, members serve in a personal capacity and cannot be dismissed during their term. In order to ensure that the Committee is representative, membership is intended to be equitably distributed according to 'geographical distribution and to the representation of the different forms of civilisation as well as of the principle legal systems.'<sup>5</sup>

The CERD Committee monitors and reviews the actions of States who are signatories to the CERD to ensure that they comply with their obligations under the Convention.<sup>6</sup> The Committee introduced the early warning and urgent action procedure in 1993 to improve mechanisms by which it could scrutinise the compliance of States Parties with the Convention, and to ensure greater accountability of States Parties.

The need for such mechanisms was identified by the then Secretary-General of the United Nations, and the Security Council in 1992. The Security Council observed in 1992 that international peace and security is not assured solely by the absence of military conflicts among States. It is also influenced by non-military sources of instability in the economic, social, humanitarian and ecological fields.<sup>7</sup> The Secretary-General noted that the stability of States would be enhanced by the commitment to human rights standards, with a special sensitivity to the rights of minorities, and by increasing the effectiveness of the United Nations human rights system.<sup>8</sup>

On 11 August 1998, acting under its early warning and urgent action procedure, the CERD Committee requested Australia to provide it with information relating to the amendments to the *Native Title Act 1993* (Cth) (NTA), any changes of policy in relation to Aboriginal land rights, and the functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner.<sup>9</sup> The request was as a result of the concern of members of the Committee that the situation in Australia 'was clearly deteriorating'<sup>10</sup> since Australia's previous appearance before the Committee in 1994.

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<sup>4</sup> The terminology of CERD refers to States Parties, or States. States in this sense refers to nation states, ie the nation state of Australia, and not to internal states and territories within a nation.

<sup>5</sup> CERD, Article 8(1).

<sup>6</sup> The convention entered into force in Australia on 30 October 1975. For an overview of the Committee's functions and procedures see United Nations High Commissioner for Human Rights, *Fact Sheet No.12: The Committee on the Elimination of Racial Discrimination*, < <http://www.unhchr.ch/html/menu6/2/fs12.htm>>

<sup>7</sup> Security Council Summit, 31 January 1992, cited in Committee on the Elimination of Racial Discrimination, *Annual Report of the Committee on the Elimination of Racial Discrimination*, UN Doc A/48/18 (1993), Annex 3, para 1.

<sup>8</sup> Secretary-General of the United Nations, *An agenda for peace*, cited in the CERD Committee's *Annual Report of the Committee on the Elimination of Racial Discrimination*, *op.cit.*, Annex 3, paras 2-4.

<sup>9</sup> Committee on the Elimination of Racial Discrimination, *Decision 1(53) concerning Australia*, 11 August 1998. UN Doc CERD/C/53/Misc.17/Rev.2.

<sup>10</sup> Committee member Mr Wulfrum, in Committee on the Elimination of Racial Discrimination, *Summary record of the 128<sup>th</sup> meeting (53<sup>rd</sup> session)*, 14 August 1998, UN

Australia is the first 'western' nation to be called to account under the early warning procedure. Other countries that were placed under the procedure at the same time as Australia were the Czech Republic, the Congo, Rwanda, Sudan and Yugoslavia. Countries previously considered under the procedure include Papua New Guinea, Burundi, Israel, Mexico, Algeria, Croatia, Bosnia and Herzegovina.

The Committee's decision to consider the situation in Australia under the procedure is highly significant. It indicates that the Committee was concerned that the situation in Australia might involve serious violations of Australia's obligations under CERD, which ought to be given immediate consideration. As one Committee member commented, 'the issues in question were so important that they deserved to be dealt with in their own right, and not merely in terms of Australia's regular reporting obligations under the Convention.'<sup>11</sup>

### **The CERD Committee's Decision of 18 March 1999 on Australia**

On 18 March 1999 the CERD Committee delivered its concluding observations on Australia, which included the following.

3. The Committee recognizes that within the broad range of discriminatory practices that have long been directed against Australia's Aboriginal and Torres Strait Islander peoples, the effects of Australia's racially discriminatory land practices have endured as an acute impairment of the rights of Australia's indigenous communities.
4. The Committee recognizes further that the land rights of indigenous peoples are unique and encompass a traditional and cultural identification of the indigenous peoples with their land that has been generally recognized.
5. In its last Concluding Observations on the previous report of Australia... the Committee welcomed, further, the Native Title Act of 1993, which provided a framework for the continued recognition of indigenous land rights following the precedent established in the Mabo case.
6. The Committee, having considered a series of new amendments to the Native Title Act, as adopted in 1998, expresses concern over the compatibility of the Native Title Act, as currently amended, with the State Party's international obligations under the Convention. While the original Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act. While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title.
7. The Committee notes, in particular, four specific provisions that discriminate against indigenous title-holders under the newly amended Act. These include: the Act's "validation" provisions; the "confirmation of extinguishment" provisions; the primary

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Doc CERD/C/SR.1287, para 32. See also comments by Mr Van Boven, Ms McDougall and Mr Garvalov at paras 29, 38 and 42 respectively.

<sup>11</sup> Mr Garvalov, *Summary record of the 1287<sup>th</sup> meeting (53<sup>rd</sup> session)*, *op.cit.*, para 42.

production upgrade provisions; and restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses.

8. These provisions raise concerns that the amended Act appears to wind back the protections of indigenous title offered in the Mabo decision of the High Court of Australia and the 1993 Native Title Act. As such, the amended Act cannot be considered to be a special measure within the meaning of Articles 1(4) and 2(2) of the Convention and raises concerns about the State Party's compliance with Articles 2 and 5 of the Convention.

9. The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention...

11. The Committee calls on the State Party to address these concerns as a matter of utmost urgency. Most importantly, in conformity with the Committee's General Recommendation XXIII concerning Indigenous Peoples, the Committee urges the State Party to suspend implementation of the 1998 amendments and re-open discussions with the representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention.

12. In light of the urgency and fundamental importance of these matters, and taking into account the willingness expressed by the State Party to continue the dialogue with the Committee over these provisions, the Committee decides to keep this matter on its agenda under its early warning and urgent action procedures to be reviewed again at its fifty-fifth session.<sup>4</sup>

In summary the Committee expressed concern that:

- Provisions that extinguish or impair the exercise of native title pervade the amended NTA. The Committee considered that the amended Act favours non-Indigenous interests at the expense of Indigenous title, and consequently, does not strike an appropriate balance between Indigenous and non-Indigenous rights;<sup>12</sup>
- In particular, the validation, confirmation, and primary production upgrade provisions, and restrictions and exceptions to the right to negotiate, discriminate against native title holders.<sup>13</sup> In doing so, these provisions raise concerns that Australia is not acting in compliance with its obligations under Articles 2 and 5 of the Convention (the non-discrimination principle and the requirement to provide equality before the law);<sup>14</sup>
- The amended NTA cannot be characterised as a special measure under Articles 1(4) or 2(2) of the Convention;<sup>15</sup> and

<sup>12</sup> CERD Decision, para 6.

<sup>13</sup> CERD Decision, para 7.

<sup>14</sup> CERD Decision, para 8. For an analysis of these obligations see Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, HREOC, Sydney, 1999, pp 30-51.

<sup>15</sup> *ibid.*

- The lack of ‘effective participation’ of Indigenous people in the formulation of the amended Act was a breach of Australia’s obligations under Article 5(c) of the Convention and contrary to the Committee’s General Recommendation XXIII on Indigenous People.<sup>16</sup>

The Committee called on Australia to address their concerns ‘as a matter of utmost urgency.’<sup>17</sup> They urged the Government to immediately suspend implementation of the amendments to the NTA and re-open discussions with Indigenous representatives ‘with a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia’s obligations under the Convention.’<sup>18</sup>

The Committee reaffirmed its decision at its fifty-fifth session on 16 August 1999. The Committee stated that it was:

prompted by its serious concern that, after having observed and welcomed over a period of time a progressive implementation of the Convention in relation to the land rights of indigenous peoples in Australia, the envisaged changes in policy as to the exercise of these rights risked creating an acute impairment of the rights thus recognized to the Australian indigenous communities.<sup>5</sup>

The Committee also decided to ‘continue consideration of this matter together with the Tenth, Eleventh and Twelfth period reports of the State party, during its fifty-sixth session in March 2000.’<sup>6</sup>

The findings of the CERD Committee are highly significant. They vindicate the position maintained over the past two and a half years by many Indigenous organisations, human rights advocates, lawyers and community leaders that the amended NTA is racially discriminatory. They provide international recognition of the human rights of native titleholders.

### **The basis of the Committee’s decision**

Australia has an obligation under Articles 2 and 5 of CERD to treat all people equally and in a non-discriminatory manner.

- i) Article 2 of CERD places an obligation on States Parties to the Convention not to discriminate, as well as to prevent others within their jurisdiction from discriminating.
- ii) Article 5 requires that, in accordance with the principle of effective participation, States guarantee the right of everyone to equality before the law, including in relation to political rights, the right to own property (individually or communally), the right to inherit and the right to equal

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<sup>16</sup> CERD Decision, para 9.

<sup>17</sup> CERD Decision, para 11.

<sup>18</sup> *ibid.*

participation in cultural activities.<sup>19</sup> The principle of effective participation is set out in General Recommendation XXIII of the CERD Committee and requires that the informed consent of Indigenous people be obtained in decisions that affect them,

The Committee found that Australia had breached these obligations on the following bases;

**i) *The principles of non-discrimination and equality***

The CERD Committee adopted an approach to equality which requires States to redress past racially discriminatory practices.<sup>20</sup> States must also give equal respect and protection to different cultural values and ensure these values are protected.

In contrast to this substantive approach to equality is the formal equality approach which merely requires that everyone be treated in an identical manner regardless of such differences.

The substantive approach to racial equality requires that differences be treated differently if such treatment seeks to overcome past discrimination or to protect cultural values.

In its oral submission to the CERD Committee in March 1999 and in its submissions before this Committee on 9 March 2000, the government's representatives have stated that the standard of equality adopted in CERD is one of substantive equality.

More recently, the concept of substantive equality has been used to consider issues of equality and non-discrimination in international law. In relation to substantive equality, the concept encompasses treating like groups or like things alike, but treating different groups differently, in accordance with the differences between them, provided that the differences you focus on are ones that are legitimate ones to focus on in relation to the objects of the convention, and provided that the different treatment is proportional to the nature of the difference between the groups. We speak in the submission about the application of those concepts to the situation of native title.<sup>21</sup>

This is consistent with the definition of racial discrimination in Article 1 of the Convention referring to a distinction on the basis of race 'which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal

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<sup>19</sup> The meaning of these principles has been considered in detail in previous Native Title reports: Acting Aboriginal and Social Justice Commissioner, *Native Title Report 1998, op.cit.*, Chapter 2; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996-97*, HREOC, Sydney, 1997, Chapter 6; and in the HREOC CERD Submission, paras 92 – 126 [www.hreoc.gov.au](http://www.hreoc.gov.au)

<sup>20</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation XX on Article 5*, UN Doc CERD/48/Misc.6/Rev.2 15/03/96, para 2 and Committee on the Elimination of Racial Discrimination, *General Recommendation XIV – Definition of discrimination*, 19/03/93, para 2.

<sup>21</sup> *Proof Committee Hansard*, Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Renee Leon, 9 March 2000, p154

footing, of human rights...’ It is also consistent with the Committee’s General Recommendation XIV which excludes from the definition of discrimination, differential treatment which is consistent with the objectives and purposes of the Convention.<sup>22</sup>

A differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate... In seeking to determine whether an action has an effect contrary to the Convention, it (the Committee) will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race...<sup>23</sup>

A special measure is defined under Articles 1(4) or 2(2) of the Convention. Special measures would be legitimate differential treatment, as would measures aimed at recognising and protecting the traditions and customs of Indigenous people. The distinction between these two types of differential treatment is significant.

I indicated to the Joint Parliamentary Committee in response to a series of questions put to me when I appeared before it on 22 February 2000 that the amended NTA as a whole could not be considered a special measure but to the extent that the amended NTA recognises and protects the traditions and customs of Indigenous people then this recognition and protection was a non-discriminatory differential treatment of Indigenous people. This latter description arises from the High Court’s identification of the original NTA in *Western Australia v Commonwealth* (1995) 183 CLR 373 as either a special measure or ‘a law which, although it makes racial distinctions, is not racially discriminatory so as to offend the *Racial Discrimination Act* or the International Convention on the Elimination of All Forms of Discrimination’ (p483 – 484)

This matter was also dealt with by the Acting Social Justice Commissioner in her submission to the CERD Committee in March 1999.

Native title cannot be described as a special measure. It is not a remedial measure taken for the purpose of overcoming the effect of historical patterns of racism. Native title does lead to the maintenance of separate rights for Indigenous people. Native title is not a temporary measure which can be removed once its objective has been achieved. The recognition of native title involves accepting a form of land title that derives from the traditional laws and customs of indigenous people. The protection of native title must reflect the substance of those traditional rights and customs. Different rights require different forms of protection to achieve substantive equality of treatment.<sup>24</sup>

The significance of the distinction between differential treatment which can be characterised as a special measure and differential treatment that arises from the unique cultural identity of a distinct cultural group was illustrated during the

<sup>22</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation XIV – Definition of discrimination*, 19/03/93, para 2. See Acting Aboriginal and Social Justice Commissioner, *Native Title Report 1998*, *op.cit* pp 32-34.

<sup>23</sup> *ibid*, para 2.

<sup>24</sup> HREOC CERD Submission, *op.cit* para 110. A copy of this submission is on the HREOC web page at [www.hreoc.gov.au](http://www.hreoc.gov.au)

parliamentary and public debates over the amendments to the NTA and in particular over the amendments which sought to remove the right to negotiate from the Act. Having identified the right to negotiate as a special measure the government argued that amendments which remove a special measure are not discriminatory because they merely take away an additional right extended to Indigenous people. By removing the right to negotiate it was argued that Aboriginal people are put in the same position as other titleholders and are thus not discriminated against. It is also suggested in the government's written submission to the Joint Parliamentary Committee that the removal of a special measure is permissible at international law and does not require the consent of Indigenous people.

There is no authority at international law however to suggest that the consent of the racial group that is to benefit from the special measure is necessary... Nor is there authority to suggest that amendment of a special measure requires consent.<sup>25</sup>

The Acting Social Justice Commissioner dealt with these arguments in chapter 3 of the 1998 Native Title Report. In summary, her response to these arguments was twofold. Firstly she argued that the right to negotiate was not a special measure but was a reflection, albeit a poor one, of the traditional mechanisms used by Indigenous people to control access to their land. Moreover a statutory measure, like the right to negotiate, which protects the customs of Indigenous people from the devastating effect of mining and other developments is not a special measure but a recognition and protection of cultural difference. It is not a gift to Indigenous people from government but arises from the identity of Indigenous people themselves and the recognition that this identity is entitled to protection.

Secondly she argued that even if it is assumed that the right to negotiate is a special measure its removal cannot be justified by reference to a notion of equality. Where the basis of the implementation of a special measure is to redress the inequalities created by past discriminatory practices and enable Indigenous people to enjoy their human rights equally, the removal of such a measure can only be justified where such equality has in fact been achieved. This argument is supported by the wording of Article 1(4) of CERD.

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 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 from different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

The CERD Committee has recognised that State Parties have a positive obligation to recognise and protect Indigenous cultures and identity.

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<sup>25</sup> Attorney General's Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Submission No: CERD 24, paragraphs 55 & 56, 29 February 2000

Through General Recommendation XXIII the Committee has recognised that the culture of Indigenous peoples worldwide needs to be recognised and protected against ongoing discrimination:

...Indigenous peoples have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources... Consequently the preservation of their culture and their historical identity has been and still is jeopardised.<sup>26</sup>

The Committee has called on States to:

- a) recognize and respect Indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- b) ensure that members of Indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on Indigenous identity;
- c) provide Indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- d) ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent;
- e) ensure that Indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs, to preserve and to practice their languages;<sup>27</sup>

The Committee especially called on States Parties:

to recognize and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources...<sup>28</sup>

The Committee's decision of March 1999 reflects these factors. Paragraph 4 of the decision states:

4. The Committee recognizes... that the land rights of indigenous peoples are unique and encompass a traditional and cultural identification of the indigenous peoples with their land...

Members of the Committee also made it clear that the Committee 'links the obligation of non-discriminatory respect for Indigenous culture to the question of control over land.'<sup>29</sup> One member of the Committee stated the issue as follows:

To what extent were the traditional rights of indigenous peoples affected by the provisions of the Act? That was the Committee's starting point: the special relationship between the Aboriginals, their culture and way of life, and the land. Native property rights should not simply be given the same protection as any other property rights but should be subject to special protection measures; anything else was tantamount to not protecting them.<sup>30</sup>

This influenced the Committee's findings in paragraph 7 of the Decision that the amended NTA, particularly those provisions relating to confirmation, validation,

<sup>26</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII – Indigenous Peoples*, 18 August 1997, Un Doc CERD/C/51/Misc.13/Rev.4, para 3.

<sup>27</sup> *ibid*, para 4.

<sup>28</sup> *ibid*, para 5.

<sup>29</sup> Ms Ali, in FAIRA, CERD Transcript, p 19; Ms McDougall, *op.cit.*, p 60.

<sup>30</sup> Mr Diaconu in CERD Summary Record, para 45.

primary production upgrades and changes to the right to negotiate, raised concerns about Australia's compliance with Articles 2 and 5 of the Convention.

*A substantive equality approach to native title*

The test of equality which the government applies to the amended NTA is whether the rights of Indigenous titleholders are afforded the same protection as non-Indigenous interests. This test should not be confused with the question of whether the protective mechanisms applied to Indigenous interests are the same as the protective mechanisms applied to non-Indigenous interests. Rather the test is whether the two sets of interests are equally protected.

Further, the committee's view appears to be that the assessment of the balance should be undertaken by reference only to a comparison between the interests of indigenous people under the 1993 act when compared with the interests of indigenous people under the amendment act. The government's view is that approach is wrong; that, rather, the assessment should be between the position of indigenous interests on the one hand and non-indigenous interests on the other, and that applying the law as described by Ms Leon, that where analogous existing rights exist, the protection given to indigenous rights should be comparable to those of existing interests. Given the different nature of native title interests from other interests, the protection will not always be the same, but on balance, it should be comparable. The fact that the provisions under the act as amended may be different in some cases to the provision in the 1993 act cannot itself amount to discrimination.<sup>31</sup>

There is no dispute by the Aboriginal and Torres Strait Islander Social Justice Commissioner that the test proposed by the government is consistent with a substantive approach to equality. What is disputed is that the amended NTA satisfies the test of equal protection.

*Application of the principles of equality to the amended Native Title Act*

Whether the amended NTA provides the same level of protection to native title as is provided to non-Indigenous title holders is most clearly discerned where the full enjoyment of native title and the full enjoyment of non-Indigenous interests are inconsistent. What an analysis of the amended NTA reveals is that, in every situation in which there is an inconsistency between Indigenous interests and non-Indigenous interests, the Act provides that non-Indigenous interests will prevail. The four sets of provisions which the Committee identified in paragraphs 7 & 8 as a cause for concern are precisely those provisions in the Act which deal with such an inconsistency.<sup>32</sup>

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<sup>31</sup> *Proof Committee Hansard*, Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Ms Horner, 9 March 2000, p156

<sup>32</sup> For reasons why the Acting Social Justice Commissioner had argued to the Committee that the validation, confirmation, primary production upgrade and the amendments to the right to negotiate provisions are discriminatory see: HREOC CERD submission, paras 43 – 90. An analysis of these provisions and their application by State and Territory governments is also contained in the *Native Title Report 1999*, pp49 – 67.

In relation to the validation provisions, the inconsistency is between the legal rights of Indigenous title holders and the enjoyment by non-Indigenous titleholders of rights illegally obtained (either because of the invalidity of past acts under the *Racial Discrimination Act, 1975, (Cth)* or because of the invalidity of intermediate period acts, under the original NTA). In relation to the confirmation provisions the inconsistency is between Indigenous interests on the one hand and non-Indigenous interests specified by way of a schedule to the Act or referred to generically as either 'exclusive possession acts' or 'non-exclusive possession acts'. In relation to the primary production upgrade provisions, the inconsistency is between the exercise of native title rights and the carrying out of a range of activities that the leaseholder may wish to pursue, in addition to the rights granted under the lease. In relation to the right to negotiate provisions the inconsistency is principally between the exercise of native title rights and the interests of miners to explore and exploit the land. They also involve a conflict between native title holders and third parties benefiting from the compulsory acquisition of native title land.

In each of these instances where an inconsistency or potential inconsistency exists between the full enjoyment of Indigenous interests and the full enjoyment of non-Indigenous interests, the amended NTA ensures that non-Indigenous interests prevail over the Indigenous interests. The CERD Committee recognised the failure of the Act to give native title holders equal protection to that provided to non-Indigenous interests.

While the original Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act. While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title.<sup>33</sup>

The subordination of native title interests to non-Indigenous interests whenever a conflict arises cannot pass the government's own test of equal protection.

#### *The government's arguments against a finding of discrimination*

The government's response to the Committee's decision that the amended NTA is discriminatory is fourfold. Firstly, it maintains that the purpose behind the amendments to the NTA are legitimate and that insufficient attention was paid by the Committee to the reasonableness of the government's objectives and the proportionate means by which these objectives were achieved.<sup>34</sup> Secondly, it maintains that the Committee's analysis fails to take account of the range of measures contained in the whole of the act that 'purport to treat native title in a way that is different or takes account of the special nature of native title'.<sup>35</sup> Instead it focuses on the amendments to the original NTA and in particular the four sets of provisions which prefer non-Indigenous interests over Indigenous ones. Thirdly, and particularly in relation to the NTA's response to past acts of dispossession, it

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<sup>33</sup> CERD Decision, para 6.

<sup>34</sup> *Proof Committee Hansard, Ms Horner, op.cit.* p156

<sup>35</sup> *ibid*

maintains that the Committee failed to allow the government a margin of appreciation in meeting its obligations under the Act.<sup>36</sup> Finally it argues that, to the extent that the Act merely confirms past acts of dispossession, as it does through the validation and confirmation provisions, this is not discriminatory under CERD.

1. In relation to the first point, the government's representative emphasised to the CERD Committee when he appeared before it in March 1999 that the government's purpose in enacting the validation, confirmation and primary production upgrade provisions as well as the amendments to the right to negotiate provisions was legitimate in that it sought to balance a range of interests affected by the legislation using proportionate means to do so.

Of course Australia recognises that in determining if a particular case complies with CERD it is important to have to regard that decisions regarding treatment are not arbitrary. In other words, they must have an objectively justifiable aim and proportionate means. And, that's another reason why in my introductory remarks I went to some length to explain the objective, the justifiable objective that some of the measures in the Native Title Amendment Act seek to meet and the proportionate means by which they seek to meet them.

Now I understand from some of your comments that you're uncomfortable with some of those; both as to the objectives and as to the proportionate means and again I'll come back to that when we look at the particular areas of concern that the committee has expressed in relation to the Amendment Act but suffice it to say at this stage that Australia is aware of the need to have objectively justifiable aims and proportionate means in dealing with this issue.<sup>37</sup>

The justifiable aims proposed in relation to the amendments included the need to provide certainty to non-Indigenous and Indigenous titleholders; the need to deal with the High Court's decision in the *Wik* case; and the need to balance the interests of all the stakeholders in the legislation, including farmers, miners, developers, governments, and native title holders.

The government's argument that where particular provisions within the Act have an objectively justifiable purpose or adopt proportionate means then they are not discriminatory arises from their interpretation of the CERD Committee's General Recommendation XIV quoted above. In my view General Recommendation XIV makes it clear that where differential treatment on the basis of race addresses the disadvantage suffered by a particular racial group as a result of discriminatory practices or where the cultural identity of a particular racial group is recognised and protected by differential treatment, such beneficial measures will not constitute discrimination within the Convention. The purpose of General Recommendation XIV is to rebut the argument, not unfamiliar in domestic deliberations within Australia on the meaning of discrimination in the *Racial Discrimination Act*, that all differential treatment on

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<sup>36</sup> *ibid*

<sup>37</sup> *Transcript of Australia's Hearing before the CERD Committee*, Mr Orr, Australian representative in FAIRA, CERD Transcript, pp21-22.

the basis of race is discriminatory. The definition of discrimination under General Recommendation XIV allows differential treatment if its objectives and purposes are consistent with those of the Convention.

In seeking to determine whether an action has an effect contrary to the Convention, it (the Committee) will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race...<sup>38</sup>

General Recommendation XIV is not a means by which the implementation of government policy which results in a negative disparate impact on a particular racial group can, nonetheless, be acceptable if it is a reasonable in all the circumstances and adopts proportionate means. Nor does General Recommendation XIV provide a margin of appreciation to States in meeting their obligations under the Convention. Its purpose is to ensure that measures which do recognise and protect cultural identity and practices are not classified as discrimination merely because they treat people differently. It cannot be said, and the government has not demonstrated in either its submissions to the CERD Committee or its submissions to the present Committee, that the disparate impact of the four abovementioned sets of provisions can be justified by reference to the aims of CERD ie to overcome racial discrimination and to protect the cultural identity of Indigenous people.

2. The government's second point of rebuttal against the CERD Committee's decision is that the Committee failed to take account of the range of measures contained in the whole of the act that 'purport to treat native title in a way that is different or takes account of the special nature of native title'<sup>39</sup>. Rather the Committee merely focused on the way in which the original NTA had been amended as a result of the *Native Title Amendment Act, 1998*, (Cth). While I do not intend to deal with each of the differential measures identified in the government's submission as 'provisions that recognise the unique nature of native title rights and go beyond the requirements of formal equality'<sup>40</sup> it is important to establish the criterion by which these measures can be assessed against Australia's international obligations under CERD.

As discussed above, the fundamental criterion put forward by the CERD Committee in General Recommendation XIV as to whether differential treatment complies with CERD is whether its objectives and purposes are consistent with the aims of the Convention; namely overcoming racial discrimination and protecting cultural identity.

Many of the measures identified by the government as responding to the unique nature of native title rights, fail to address this criterion. The majority of the measures identified in the government's submission provide the machinery by which native title is incorporated into the property law of Australia. Thus in relation to measures that establish 'special tribunals to deal with native title

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<sup>38</sup> *Ibid*, para 2.

<sup>39</sup> *Proof Committee Hansard*, Ms Horner, *op.cit*, p156. The range of measures referred to by the government can be found at Submission No 24(b), *op. Cit*, pp 2-4

<sup>40</sup> Submission No 24(b), *op.cit*, p2

matters',<sup>41</sup> there is no particular requirement that these tribunals meet Australia's obligation to overcome racial discrimination or protect the cultural identity of Indigenous people. Measures that emphasise 'low cost, expeditious and informal proceedings to reduce the cost of establishing claims and encourage the use of agreements'<sup>42</sup> similarly have no substantial impact upon the level of protection afforded native title interests compared with non-Indigenous interests but merely ensure that the machinery is in place to incorporate native title into the legal system.

Measures that emphasise 'agreements through negotiation and mediation' and provide the machinery for enforceable agreements between parties to a native title claim<sup>43</sup>, do not in themselves meet Australia's international obligation. What is significant in terms of Australia's international obligations is whether the bargaining power of Indigenous parties to a native title agreement is equal to that of non-Indigenous parties. There is no measure in the amended NTA identified in the government's submission which addresses this requirement.

In relation to measures identified in the government's submission that are intended to protect native title interests the significant question is whether the level of protection provided to native title under the amended NTA is sufficient to meet Australia's international obligations. In order to determine this question two factors need to be taken into account. Firstly, the nature of the interest requiring protection and secondly the extent of the threat affecting the interest.

The provision 'to those who claim native title as well as those who have established they have native title'<sup>44</sup> of 'special national procedural rights (that are not available in relation to other forms of property) to ensure there is consultation about mining and other activity on native title land'<sup>45</sup>, will only meet Australia's international obligation if it effectively protects native title interests against mining and other developments.

In determining whether the right to negotiate provisions as amended provides sufficient protection to native title from the destructive impact of mining and other developments, the Committee was entitled to compare the amended right to negotiate provisions with the level of protection that was previously provided to native title in the same situations under the original NTA.

The Government report explains that the right to negotiate provisions were merely being 'streamlined' or 'reworked' but I think this may mask the substantial nature of the changes made in those provisions. The amended Act alters the right to negotiate in, I believe three fundamental ways and I would like to hear the Government's response.

First of all, it rescinds altogether the right to negotiate in certain circumstances.

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<sup>41</sup> *ibid* point 4, p2

<sup>42</sup> *ibid*, point 5, p3

<sup>43</sup> *ibid*, points 4,5 & 6, p3

<sup>44</sup> *ibid*, point 2, p3

<sup>45</sup> *ibid* point 1, p3

Second, it reduces the scope of the right to negotiate to a right of consultation and objection in certain other circumstances, and it authorises States and Territories to replace the right with their own regimes. Mr Orr you spoke of this.

The amended Act effectively rescinds the right to negotiate in certain instances, the amendments allow States and Territories to introduce an alternative provisions replacing that right with a lesser right of consultation and objection – where this provision applies, native title claimants are provided with a right to object to various land use activities and they have a corresponding right to be consulted when determining whether there may be ways to minimise environmental and other land use impacts.

Unlike the right to negotiate, however, the government is not required to act in good faith, a very specific standard which can otherwise invalidate actions when there is a right to negotiate attached to it.

Nor does the validity, as I said, of the grant being sought depend on proper consultation having taken place – the right to consult and object is clearly a lesser procedural right.<sup>46</sup>

On the basis of a comparison of the right to negotiate before and after the amendments, the Committee was able to measure the extent to which, under the amended NTA, native title is exposed to the threat posed by mining and other developments. It concluded that the amended right to negotiate provisions did not provide sufficient protection to native title and failed to meet the standards set by CERD. The Committee's view concurs with the view expressed by the acting Aboriginal and Torres Strait Islander Social Justice Commissioner in chapter 3 of the 1998 *Native Title Report* and chapter 3 of the 1999 *Native Title Report*.

Another protective measure identified in the government's submission is the provision of 'organisations to assist native title holders to establish and deal with native title'<sup>47</sup>. As indicated previously the provision of machinery to deal with native title is not of itself sufficient to meet the aims of the Convention in overcoming racial discrimination and protecting Indigenous culture. What needs to be established is that such organisations are adequately funded and managed in order to provide protection to native title interests. This is not demonstrated in the government's submission.

A further category of measures, which the government identifies as addressing 'historical extinguishment of native title rights', includes the restitution of native title pursuant to s47B of the NTA. Section 47B provides that in certain circumstances native title claimants may apply for a determination on land where native title would otherwise have been extinguished (including scheduled interests under the Act<sup>48</sup>) because of previous Crown grants. The section will

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<sup>46</sup> *Report by Ms G McDougall, Country Rapporteur, to the 1323<sup>rd</sup> meeting of the Committee in the Elimination of Racial Discrimination, 12 March 1999*

<sup>47</sup> Submission No 24(b), *op.cit.*, point 5, p2

<sup>48</sup> That is, grants which are included in the Schedule to the Act as a result of the 1998 Amendment Act

only apply where the area is presently vacant Crown land and is not subject to a reservation etc for a public or particular purpose or subject to a resumption order.<sup>49</sup> In addition native title claimants must occupy the land at the time of application.<sup>50</sup>

There is no doubt that s47B provides protection to native title where it may otherwise be vulnerable to permanent extinguishment at common law or through the confirmation provisions of the NTA (where the confirmation provisions extend beyond the common law). The issue that concerned the CERD Committee is whether the protection of native title through the NTA is sufficient to meet Australia's international obligations. The fact that the provision may provide some protection against extinguishment of native title at common law is not itself determinative of this issue.

Because much of the government's argument is that its actions have been justified because they meet the standard of the common law, it is important to note that the common law itself is racially discriminatory.

As defined by the High Court in the Mabo decision, under common law, native title is a vulnerable property right, it is inferior to sovereign title which has the power to extinguish native title without notice, consent or compensation...<sup>51</sup>

As indicated previously, the level of protection required to meet Australia's international obligations under CERD depends on the nature of native title and the extent of the threat that is posed to its existence. The extent to which native title is vulnerable to extinguishment at common law is a relevant factor in determining the appropriate level of protection required by the legislation. As yet this issue has not been finally decided by the High Court although the majority Full Federal Court decision in *Western Australia v Ben Ward & Ors* [2000] FCA 191 constructs native title as a very vulnerable bundle of rights each of which is extinguished permanently where its enjoyment is inconsistent with the enjoyment of non-Indigenous interests.

Rather than seeing this development in the common law as a basis for alleviating governments of their duty to Indigenous titleholders under international law, it places a greater onus on governments to provide additional protection to native title in order to overcome the discriminatory effect of the common law.

Section 47B allows for the restoration of native title on vacant Crown land when specific criteria are met by claimants. There is of no benefit from s47B to claimants who have been forced off their land by historical grants, and are therefore unable to occupy their land. The protection of 47B is not available to claimants where the government has any proposal for use of the land, either for public benefit or for the benefit of third parties. Claimants whose title co-exists on pastoral leasehold land will receive no benefit from the provision.

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<sup>49</sup> Section 47B(1)(a)&(b), NTA

<sup>50</sup> Section 47B(1)(9c), NTA

<sup>51</sup> Australian Country Rapporteur, *op. Cit*, Opening Remarks, pp 4-5.

3. The third point of rebuttal by the government to the CERD decision is that the Committee did not allow a margin of appreciation in legislating in such a novel area of the law. This argument is dealt with in the submission of Ernst Willheim. I wish only to add a further decision which, although concerning a State's obligations under Article 27 of ICCPR, is relevant to the extent to which States are permitted a margin of appreciation where the pursuit of economic activities is inconsistent with the culture and tradition of Indigenous people. In relation to Article 27 the Human Rights Committee expressed the following view.

A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27.<sup>52</sup>

4. The fourth point of rebuttal against the CERD Committee's finding of discrimination is that past discrimination cannot be undone and the recognition and acknowledgment of past discriminatory practices is not, in itself, a discriminatory act.

In dealing with this point it is necessary to understand the significance that the Committee placed on overcoming past discrimination against Indigenous people. Paragraph 3 of the decision states:

3. The Committee recognizes that within the broad range of discriminatory practices that have long been directed against Australia's Aboriginal and Torres Strait Islander peoples, the effects of Australia's racially discriminatory land practices have endured as an acute impairment of the rights of Australia's indigenous communities.

Comments by Committee member Mr Van Boven reflect the Committee's view that, in formulating the amendments to the NTA, the Australian Government did not recognise or acknowledge the impact of the historical treatment of Indigenous people.

I would have liked in fact if the government would have made an explicit recognition and acknowledgment that the Aboriginals have been marginalised and disadvantaged over the years and over the decades and over the centuries. And that their rights and their entitlements should be recognised in that light, in that perspective. So we can raise a smokescreen of definitions but we have to relate it to people... when we deal with human rights after all and issues of discrimination, it relates to people and that should have been more explicitly stated.<sup>53</sup>

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<sup>52</sup> Communication No. 511/1992: Finland. Ilmari Lansman et al. 08/11/94. CCPR/C/52/D/511/1992.

<sup>53</sup> Mr Van Boven in FAIRA, CERD Transcript, *op. Cit*, p 43.

In contrast to the Committee's views that past discrimination should be addressed, the Australian government representatives appearing before the Committee argued that the injustices of the past cannot be undone and that a State Party is not required to do this under the Convention. Accordingly, it was argued, the validation and confirmation provisions of the amended NTA were not discriminatory:

There is an issue for Australia as to whether it can go back and undo discriminatory actions which have taken place in the period since settlement and before the Mabo decision in 1992... I think it's an issue that needs to inform our discussion about the validation regimes and the confirmation regime...<sup>54</sup>

It is necessary to recognise that past acts, historical acts and the effects of these cannot be undone... Past acts, however discriminatory, which have resulted in dispossession of Australia's Indigenous people cannot be undone, though of course, present and future policies can remedy the effects, the current effects, of such acts....<sup>55</sup>

(The validation regime)... is much more limited than the regime in the (original Native Title Act)... (This regime) only provides for validation of acts between 1993 and 1996... with regard to this validation regime we are talking about things that happened in the past, between 1993 and 1996. In acknowledging and recognising things that happened in the past the government doesn't believe that it is acting discriminatorily.<sup>56</sup>

(The Native Title Act) protects native title much more than the common law does but what the Native Title Act doesn't and Australia believes that it is not obliged to do is to go back and undo the past....<sup>57</sup>

The government's position is that the confirmation regime provides no divestment of native title rights. It is simply a recognition of the historical position that native title has been extinguished by grants of freehold and leasehold... over the past 200 years... The Australian government believes it is not contrary to CERD to confirm this historical position... The provisions are simply an acknowledgment of past dispossession and extinguishment and the government does not believe that this is contrary, as I said, to CERD.<sup>58</sup>

The Australian Country Rapporteur<sup>59</sup> noted that there is some merit in the view that one cannot undo that which has already been done.<sup>60</sup> However the acknowledgment and recognition that one gives to past acts of injustice are quite another matter.

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<sup>54</sup> FAIRA, CERD Transcript, *op. Cit*, Mr Orrp 21.

<sup>55</sup> *ibid*, p 23.

<sup>56</sup> *ibid*, pp 28-29.

<sup>57</sup> *ibid*, p 31.

<sup>58</sup> *ibid*, p 33. See also Australia's written report: Committee on the Elimination of Racial Discrimination, *Additional information pursuant to Committee Decision: Australia, op.cit.*, para 37.

<sup>59</sup> The Country Rapporteur is the committee member who leads the Committee in its consideration and questioning of the country.

<sup>60</sup> FAIRA, CERD Transcript, *op. Cit*, Ms McDougall, p 60.

The Australian government believes that it cannot go back and cure the injustices of the past. Of course there is some merit in that view. What concerns me however is that the validation and confirmation of extinguishment provisions in the amended Act... are provisions that do not only apply to the distant past. They appear to also apply to actions that in some cases took place as recently as 1994 and 1996...<sup>61</sup>

I would welcome a discussion within the Committee about how we might continue our urgent deliberations on Australia's Native Title Amendment Act... before other rights get extinguished in such a way that they would be referred to as the injustices of the past which cannot now be rendered right.<sup>62</sup>

In its justification of the provisions of the amended NTA which validated intermediate period acts the government sought to draw an analogy with the validation provisions in the original NTA. However, the bases of the enactment of each of these sets of provisions were quite different. One of the effects of the High Court rejecting terra nullius in *Mabo (No.2)* as a past discriminatory practice, and recognising native title as a pre-existing right was that acts of dispossession which failed to recognise the procedural or substantive rights of native title holders were, after the implementation of the *Racial Discrimination Act (Cth)* (RDA) in 1975, unlawful. The purpose of the validation provisions in the original NTA was to validate these otherwise unlawful acts. Far from being a recognition that past injustices cannot be undone, the validation provisions were a response to the discontinuity which is created when injustices of the past are, for the first time, legally recognised as such.

The validation of intermediate period acts in the amended NTA took place in very different circumstances. The failure of states and territories to observe the substantive and procedural rights of native title holders between 1994 and 1996 cannot be seen as an anomaly created by the belated denunciation of past injustice. In granting mining tenements on pastoral leaseholds without negotiating with native title holders, states knowingly took a risk that these acts would be unlawful if the High Court found (as it did) that native title co-existed on pastoral leasehold land.<sup>63</sup> The Committee did not accept that acts that took place between 1994 and 1996 could conveniently be dismissed as 'actions of the past'.

The Government's argument that the confirmation provisions comply with the standards of the common law was also considered to be unacceptable to the

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<sup>61</sup> Ms McDougall in FAIRA, CERD Transcript, *op. Cit*, p 60.

<sup>62</sup> *ibid*, p 61.

<sup>63</sup> Prior to the High Court's decision in *Wik v Queensland*(1996) 187 CLR 1, (Wik), state governments carried out many acts on pastoral leasehold land without negotiating with native title holders. As a result of the Wik decision, which found that native title co-existed on pastoral leasehold land, these acts were invalid. The amended NTA validated these invalid acts, called intermediate period acts. (Part 2 Division 2A) The effect of the validation of intermediate period acts depended on whether they were category A, B, or C intermediate period acts. (see ss203A – 232E) The grant of a freehold or exclusive leasehold had the effect of extinguishing native title. The grant of a non-exclusive lease has the effect of extinguishing native title to the extent of the inconsistency. The grant of a mining lease does not extinguish native title.

Committee. The importance of acknowledging the historical treatment of Indigenous people as unjust was influential to the Committee in this regard. As the Australian Country Rapporteur noted:

Since... European settlement... the native land rights of Aboriginal peoples have been systematically undermined... (Terra nullius) completely discounted the cultural value of Aborigines traditional and complex land distribution system...

Because much of the government's argument is that its actions have been justified because they meet the standard of the common law, it is important to note that the common law itself is racially discriminatory.

As defined by the High Court in the Mabo decision, under common law, native title is a vulnerable property right, it is inferior to sovereign title which has the power to extinguish native title without notice, consent or compensation...<sup>64</sup>

As indicated above the Committee rejected the argument that the common law is the standard against which actions by Government should be judged as discriminatory or non-discriminatory. The common law cannot constitute a benchmark of equality where it fails to meet Australia's obligations under the Convention. As discussed previously s47B of the amended NTA is an example of a provision which does seek to undo the discriminatory practices, upheld by the common law, of the past extinguishment of native title by inconsistent acts of the Crown. The issue is not whether past discriminatory practices can be undone but whether the measures taken to do this in the amended NTA are sufficient to meet our international obligations. The Committee's decision was that the amended NTA does not provide sufficient protective measures to ensure that native title interests are equal to those of non-Indigenous interests.

## **ii) *The principle of effective participation of Indigenous peoples***

In determining whether the amendments to the NTA were discriminatory the Committee was not only concerned with the standards of equality and non-discrimination contained in the Convention, but also with the procedure by which the amendments were settled. In this regard the Committee asked whether Indigenous people had participated in the formulation of the amendments and whether the amendments were acceptable to the Indigenous people whose rights are directly affected by them. The unequivocal answer to these questions was that Indigenous people did not give their consent to the amendments and that their participation in the process 'had not been given the legitimacy by the Australian Government that [they] expected.'<sup>65</sup> This was made quite clear by the National Indigenous Working Group the day before the legislation passed through Federal Parliament on 8 July 1998.<sup>66</sup>

...We confirm that we have not been consulted in relation to the contents of the Bill, particularly in regard to the agreement negotiated between the Prime Minister and Senator

<sup>64</sup> Australian Country Rapporteur, Opening Remarks, *op. Cit*, pp 4-5.

<sup>65</sup> *Hansard*, Senate, 7 July 1998, p 4352

<sup>66</sup> *ibid*, pp 4352-54

Harradine, and that we have not given consent to the Bill in any form which might be construed as sanction to its passage into Australian law.

We have endeavoured to contribute during the past two years to the public deliberations of Native Title entitlements in Australian law.

Our participation has not been given the legitimacy by the Australian Government that we expected, and we remain disadvantaged and aggrieved by the failure of the Australian Government to properly integrate our expert counsel into the lawmaking procedures of government....<sup>67</sup>

In finding that Australia had not allowed effective participation by Indigenous people in the formulation of the amendments to the NTA, the Committee was concerned that the power to approve or disapprove of the legislation was not appropriately located with Indigenous people whose rights were directly affected by it. Even the Committee could not usurp the final responsibility which Indigenous representatives had in deciding whether their people could live with the amendments. In 1993 the Committee's decision to support the original NTA was largely as a result of the consent of Indigenous representatives. In 1999 it was obvious to the Committee that this consent had been withdrawn.

Significantly, the original 1993 Act was the subject of extensive negotiations with indigenous groups and attracted the support from key members of some of those groups.

Indigenous groups have made it clear that they would not have supported the discriminatory provisions of the Act relating to the past, had the Act not been balanced by the beneficial provisions of the freehold standard and the right to negotiate in the future.

The original 1993 Act was considered in Australia's periodic report in 1993.

The Committee accepted that the original Act was compatible with the Convention....

Let me say again that in raising these questions concerning the application of the amended Act, it is also important to evaluate the overall effect of these amendments in light of the initial compromises that were reached in the original 1993 Act between the rights of Native title holders and the rights of non-Native Title holders.<sup>68</sup>

The Committee's decision concerning the native title amendments criticises both the exercise of the Government's power in removing native title rights and the location of that power within the non-Indigenous arena. The Committee made it clear that unless the legislative regimes which affect native title are negotiated with Indigenous people the Committee will continue to criticise and scrutinise State Parties at an international level.

The Committee also expressed its concern that Australia had not complied with Article 5(c) of the Convention and General Recommendation XXIII concerning Indigenous Peoples:

The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention. Calling upon States Parties to "recognise

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<sup>67</sup> *ibid*, p 4352

<sup>68</sup> Australian Country Rapporteur, Report, *op. Cit*, pp5-8

and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources,” the Committee, in its General Recommendation XXIII, stressed the importance of ensuring “that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent”.<sup>69</sup>

The government representatives presented a very different view of what was required of State Parties under the Convention in ensuring that Indigenous representatives participated in the formulation of legislation and policies which directly affect them:

I note also that the CERD's general recommendation in Paragraph 4d goes on to say that no decisions directly relating to the rights of Indigenous People are to be taken without their informed consent. This is a higher level of responsibility, a higher level of obligation than simply providing equal rights. This is a requirement to provide for the informed consent of Native Title holders. Australia admits that the informed consent of Native Title holders and Indigenous Peoples was not obtained in the Native Title Amendment Act. Australia regrets this. As I said at the beginning on Friday, the government attempted to obtain a consensus with regard to the Act but despite a lengthy process, that consensus was not possible and in the end the parliament had to make the laws which it judged were appropriate. In this case, much of the Native Title Amendment Act is concerned with balancing rights, balancing rights of Native Title holders with pastoral lessees and others. As I also said on Friday there was no consent to these provisions neither from Indigenous People nor from pastoralists and miners. Australia regards this requirement essentially as aspirational and it tried to meet and aspire to this requirement but it admits honestly before this Committee that the requirement was not met.<sup>70</sup>

The Committee disagreed with this interpretation of the Convention:

(I)n our general recommendation 23, we referred to the informed consent... it was said that this requirement of informed consent is only aspirational. Now it is not understood by this committee in that sense. I think there we tend to disagree.<sup>71</sup>

In mediating an outcome in native title the Government claims to have given Indigenous interests the same weight as the interests of other stakeholders such as miners, pastoralists, governments and other industries. So long as the balancing exercise has an ‘objectively justifiable aim’ and adopts ‘proportionate means’, then, in the Government’s view, the Convention is not contravened. The outcome of such an approach is that Indigenous interests will always be overwhelmed by the combined force of non-Indigenous interests who, on the whole, seek to contain native title.

The responsibility of a government undertaking this ‘balancing exercise’ does not extend to ensuring that the native title legislation, which so fundamentally affects Indigenous people is directly negotiated with and agreed to by Indigenous people.

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<sup>69</sup> CERD Decision, para 9

<sup>70</sup> FAIRA, CERD Transcript, *op. Cit*, Mr Orr, p 38.

<sup>71</sup> FAIRA, CERD Transcript, *op. Cit*, Mr Van Boven, p 43.

The Committee's response to the government's position on the extent of their obligations under CERD is reflected in paragraph 6 of the decision. The Convention requires that State Parties balance the *rights* of different groups identifiable by race.<sup>72</sup> An appropriate balance based on the notion of equality is not between miners, pastoralists, fishing interests, governments and Indigenous people, but between the rights – civil, political, economic, cultural and social - of Indigenous and non-Indigenous titleholders. Paragraph 6 states:

While the original Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for government and third parties at the expense of indigenous title.

The justification for making a commitment towards a negotiated outcome with Indigenous people is the recognition that the relationship between Indigenous and non-Indigenous people should be an equal one. A relationship of equality is not one in which Indigenous people take their place, as just another interest group, among the vast range of non-Indigenous interest groups with a stake in native title. Rather, it is one where Indigenous interests are equal to the combined force of non-Indigenous interests, in all their forms and manifestations. A legislative regime which is imposed rather than negotiated with the Indigenous people it directly affects is not based on a relationship of equality.

The Chairman of the Committee pointed out the implications for Indigenous people of the Government seeing its role as the mediator of interest groups, rather than as a negotiator with Indigenous people who had equal bargaining power in the negotiation process.

We were told that consultations took place. Alright, the first point that you were under pressure. By who? Consultations took place. Wonderful. That proves that the government is doing a wonderful job. We were told about equal rights. There was no spelling out of which rights we are talking about. Can the government say that there are equal rights on every human right which exists – all five of them – social, political, etc. All the five sets of rights?

Mr Van Boven spoke about substantive right and I'm not going to elaborate on this. Then we were told that we were not able to achieve consensus. So? The parliament acted. That means what in lay man's words? That the point of view of the Indigenous population was not accepted? No consensus was achieved. So the parliament which is the white man again took the matter into their hands and they decided and they imposed on the indigenous people, so what consensus resulted? You put it in such a way, in a legal way as a good lawyer, but as someone who is working in the field of human rights the conclusion that I achieve is that the Indigenous population's point of view is not taken into consideration. The pressure was not felt. Consultation with them did not achieve anything, of course, why should it achieve anything? Equal rights were mentioned. Few rights and not all rights we were not told about that. Consensus was not achieved so parliament imposed whatever they want to impose. I must say that this is a little bit of an alarming picture.<sup>73</sup>

The Committee's decision concerning the native title amendments criticises both the exercise of the Government's power in removing native title rights and the location of that power within the non-Indigenous arena. The Committee made it clear that

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<sup>72</sup> See also Mr Aboul-Nasr, in FAIRA, CERD Transcript, *op. Cit*, p 44.

<sup>73</sup> FAIRA, CERD, *op.cit*, The Chairman, p 44.

unless the legislative regimes which affect native title are negotiated with Indigenous people the Committee will continue to criticise and scrutinise State parties at an international level.

**(b) Amendments to the Act**

Consultation and negotiation with Indigenous representatives and native title representative bodies is the most essential component of establishing legislation which meets Australia's obligations under CERD.<sup>74</sup> The importance of informed consent to ensure effective participation by Indigenous people is recognised in international human rights standards. Domestically, a recent review of the operation of Northern Territory land rights legislation named informed consent as the most effective means of decision-making concerning land use issues.<sup>75</sup>

Standards for consultation, the first step in negotiation, are set out in the document prepared by the Social Justice Commissioner for the Australian Heritage Commission appended to this submission, and provided to this Committee at the Public Hearing. This document deals specifically with heritage issues, however, the standards are consistent with those set out by the CERD.

Without pre-empting the outcome of negotiations with Indigenous representatives, amendments which require most urgent attention are those identified by the CERD Committee as discriminatory.

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<sup>74</sup> Committee on the Elimination of Racial Discrimination *General Recommendation XXIII – Concerning Indigenous Peoples*, 18 August 1997, UN Doc CERD/C/51/Misc.13/Rev.4, para 4(d).

<sup>75</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs "Unlocking the Future" August 1999, para 1.29

**(c) Dialogue with the CERD Committee**

The CERD Committee members could have an invaluable role in assisting in such a dialogue. They would certainly benefit from first hand experience and knowledge of the situation in Australia. The first priority however, is to establish a better informed basis for amendment through consultation and negotiation with Indigenous people.

### **Question taken on Notice**

Senator Ferris addressed the following question to the Social Justice Commissioner when he appeared before the Committee on 22 February 2000.

CHAIR - Dr Jonas, we had some evidence last Thursday night from ATSIC in which they called for a scrapping of the Native Title Act and suggested that we should start again. Clearly, that is not your position, but would you like to comment on the suggestion that we should abandon the current Native Title Act and begin again? How would you see that operating in the Australian community if it were to occur?

In answering this question it is important to understand that, in meeting its international obligations a State party is required to ensure that the rights of indigenous people are equal to the rights of non-indigenous people. Where the common law does not adequately protect Indigenous interests then the legislature is under a duty to rectify any discrimination that exists. What has happened in relation to the NTA is that the legislature has failed to provide the additional protection that would bring about equality between Indigenous and non-indigenous interests in land.

If the amended NTA were 'scrapped' then the rights of Indigenous people would be left to the common law. The common law of native title is still in a stage of development. The High Court has not resolved the nature of native title, nor the circumstances in which it is able to be extinguished. Until these matters are resolved it is impossible to tell whether the rights of Indigenous people are better protected under the common law compared with the legislature. What is important at this stage is that as a result of consultation and negotiation with Indigenous representatives, the Native Title Act be further amended so as to conform with the principles of equality and non-discrimination.<sup>76</sup> Amendment of those provisions would require a process which could be referred to as "unravelling"<sup>77</sup> but this does not require "scrapping of the Act".

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<sup>76</sup> Committee on Elimination of Racial Discrimination. Decision 2(54) on Australia: Australia 18/3/99 CERD/C/54/Misc.40/Rev.2 para 7

<sup>77</sup> Mr Geoff Clark, Chairman of ATSIC suggested that the amendments could be "unravelling" rather than "scrapped". Proof Committee Hansard. Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund. Consistency of the Native Title Amendment Act 1998 with Australia's international obligations under the Convention on the Elimination of all Forms of Racial Discrimination, Thursday February 2000, Canberra page NT 10 – 11.

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- <sup>4</sup> Committee on the Elimination of Racial Discrimination, *Decision 2(54) on Australia*, 18 March 1999, UN Ref: CERD/C/54/Misc.40/Rev.2 (Herein *CERD Decision 2(54)*). The decision can be accessed through the FAIRA webpage, see note 1 above.
- <sup>5</sup> CERD/C/55/Misc.31.Rev.3, 16 August 1999, para 2.
- <sup>6</sup> *ibid*, para 4.