



United Nations Permanent Forum on Indigenous Issues
Tenth Session
New York, 16- 27 May 2011.

Agenda Item 4(a): Implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*.

INTERVENTION by the New South Wales Aboriginal Land Council, delivered by Councillor for the Sydney-Newcastle Region, and member of the Wiradjuri Peoples, Cr Roy Ah-See.

Thank you Mister / Madam Chairperson

Despite Australia's belated endorsement of the *Declaration on the Rights of Indigenous Peoples*, the Australian Government has continued to show passivity in its implementation, in law and in policy, of the rights promoted in the *Declaration*.

We are particularly concerned with the Government's efforts in regards to one fundamental right of the Declaration, that which can also be seen as central to the *International Convention on the Elimination of All Forms of Racial Discrimination* – the right of Indigenous peoples to live free from discrimination.

As the only western democracy without a bill of rights, Australia has left the legal protection of this fundamental freedom to the *Racial Discrimination Act 1975*. However, as recent history has shown, without Constitutional protection this Act of parliament and the rights it protects are vulnerable to discriminatory actions of Governments, and can be repealed or restricted in its operation.

Furthermore, instead of providing protection for the country's first peoples, the Australian Constitution enables the parliament to take such discriminatory actions.

Tellingly, the foundation of Australia's relationship with its first peoples is cemented in Australia's founding document. Excluded from the drafting process, and all but excluded from any mention in the text, the Aboriginal peoples of Australia were denied even the most basic principle of citizenship – being counted as part of the nation's population. This exclusion extended to the so called 'race power' of the Constitution. This power enabled the Australian Government to make laws in respect to 'the people of any race, *other than the Aboriginal race...*, for whom it is deemed necessary to make special laws'.

These exclusions endured up until the historic constitutional referendum of 1967, where over 90% of the Australian public voted in favour of their removal. The overwhelming goodwill and good intentions behind this historic vote was to redefine the place of Aboriginal peoples in the Australian nation.

However, in regards to the race power at least, the good intentions of the Australian people appear to have been replaced by a mere expansion of the power of the Australian Government to act upon the inherent racism of the race power.

The discriminatory use of this power to the detriment of Aboriginal peoples of Australia was confirmed by the highest court in Australia as recently as 1998. In the Hindmarsh Island Bridge Case the Australian Government successfully argued that the Constitutional 'race power' gave it the authority to enact legislation expressly removing the Hindmarsh Island area from the protections provided by the *Racial Discrimination Act 1975* and the *Aboriginal Heritage Protection Act 1984*. This action by the Government, detrimentally affected the rights of the local Aboriginal peoples in respect to protecting their culture and heritage as well as their fundamental right to live free from discrimination.

The recent paternalistic measures of the 2007 Northern Territory Emergency Response have demonstrated that the Australian Government is still willing to use the race power to detrimentally discriminate against Aboriginal peoples. The measures enacted as part of this intervention, including income management, and law and order measures restricting access to services, were described by the Government of the day as being non-discriminatory or 'special measures' when they were introduced into Parliament. Yet it is noteworthy that the suspension of the *Racial Discrimination Act 1975* was deemed a necessary and integral component of the intervention when it was initiated.

More recently, despite the expansion of many of these measures to capture other than Aboriginal peoples, and the reinstatement of the *Racial Discrimination Act*, these measures which are widely criticised for not meeting the requirements of 'special measures' as allowed under the *International Convention on the Elimination of All Forms of Racial Discrimination*, continue to this day, and continue to affect Aboriginal peoples only or disproportionately so.

With the Australian Government's endorsement of the *Declaration on the Rights of Indigenous Peoples* in 2009, the efforts of the Government to implement the rights, principles and obligations it documents, into laws, policies and most significantly practical measures have become a key focus for Indigenous rights advocates.

With the increasing call for Constitutional recognition for Australia's first peoples, we at the New South Wales Aboriginal Land Council, are calling for Australia's foundational document to include protections for our, and all peoples' fundamental human right to live free from discrimination.

The enduring legacy of racism, that continues through the ongoing use of the race power must, and can only be, absolved through amendment of the Constitution, to bring the race power into conformity with the accepted international standard for 'special measures' as allowed under the *Convention on the Elimination of Racial Discrimination*. It must no longer allow Governments of Australia to enact laws that detrimentally discriminate against Indigenous and other peoples on the basis of race.

An amendment that merely provides recognition of Australia's first peoples in the preamble to the Constitution is simply not going far enough. While such symbolism is to be applauded for what it is, to

fully implement the rights, principles and obligations of the *Declaration*, the Australian Government must make more fundamental changes to our nation's foundational document.

We recommend that the Permanent Forum urges:

- **All states to fully implement the rights, principles and obligations promoted in the United Nations Declaration on the Rights of Indigenous Peoples into domestic laws, policies and most importantly practical measures; and**
- **Australia to take steps to amend section 51(xxvi) of the Constitution, so that it conforms with the accepted international standard for 'special measures' as allowed under the Convention on the Elimination of Racial Discrimination. So that the Australian Constitution can no longer be used to enact laws that detrimentally discriminate against Indigenous and other peoples on the basis of race.**

Thank you Chairperson and members.