# United Nations Committee on the Elimination of Racial Discrimination: consideration of Australia under its early warning measures and urgent action procedures

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## Introduction

As a result of a meeting in July last year between Les Malezer[1] and Professor Thoedor van Boven, a member of the Committee on the Elimination of Racial Discrimination (CERD),[2] the CERD Committee took a decision in August 1998 to request information from the Australian Government on the changes recently projected or introduced to the *Native Title Act 1993* (Cth), as well as any changes of policy as to Aboriginal land rights and in the functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner.[3] This information was requested under the Committee's early warning measures and urgent action procedure[4] in order 'to examine the compatibility of any such changes with Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination'.[5] The Committee also requested the Australian Government to appear before it at its 54th session in March 1999.

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1 Les Malezer is the Deputy Chairperson of the National Indigenous Working Group on Native Title (NIWG) and General Manager of the Foundation for Aboriginal and Islander Research Action (FAIRA) and was in Geneva attending the 16th Session of the United Nation's Working Group on Indigenous Populations.

2 The Committee is made up of 18 independent experts elected by the States parties to the International Convention on the Elimination of All Forms of Racial Discrimination.

3 Decision 1 (53) on Australia: Australia. A/53/18.1, 11 August 1999, para IIB1, 1287th meeting of 11 August 1998.

4 The Committee developed this procedure in 1993, whereby it examines the situation in States where it considers that there is particular cause for concern on the basis of actual or potential circumstances. See O'Flaherty M 'The Committee on the Elimination of Racial Discrimination: non-governmental input and the early warning and urgent procedure' in Pritchard S (ed) *Indigenous Peoples, the United Nations and Human Rights* (Federation Press, 1998) pp 159-160.

5 Hereinafter called the Convention. The Convention entered into force on 4 January 1969 and was ratified by Australia on 30 September 1975.

The Australian Government provided the information sought on 13 January 1999[6] and appeared before the CERD Committee on 12 and 15 March 1999.

The CERD Committee's request provided an opportunity for indigenous and non-indigenous organisations to also present information to the Committee alleging in particular that the amendments to the *Native Title Act 1993* (Cth) which were passed by the Australian Parliament in 1998 were racially discriminatory and in breach of Australia's obligations under the Convention.

Major submissions were provided to the CERD Committee by:

- the Aboriginal and Torres Strait Islander Commission (ATSIC);
- the National Indigenous Working Group on Native Title (NIWG);
- the acting Aboriginal and Torres Strait Islander Social Justice Commissioner of the Human Rights and Equal Opportunity Commission; and
- Australians for Native Title and Reconciliation (ANTaR).

In addition, many other communications were forwarded to the CERD Committee from such bodies as the ACTU, NTEU and various individuals.

## 54th Session of the CERD Committee

Australian Government representatives were initially scheduled to appear for one and a half hours on 12 March 1999. This time proved to be insufficient and, with the consent of the Australian representatives, the time was extended to six hours — three hours on 12 March and three hours on 15 March.[7]

Ms Gay McDougall, an expert on the Committee from the US, was the Country Rapporteur on Australia. Ms McDougall provided the Committee with a lengthy report paying particular attention to the 1998 amendments to the *Native Title Act 1993* (Cth). Due to the importance of this study in gaining an appreciation of the matters of concern to the Committee, a complete transcript of her report is reproduced below:

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6 CERD/C/347 of 22 January 1999. Additional information pursuant to Committee Decision 1(53) on Australia, adopted on 11 August 1998.

7 See CERD/C/SR.1323. Summary Record of the 1323rd meeting held at the Palais des Nations, Geneva, on Friday 12 March 1999 at 3pm and CERD/C/SR.1324. Summary Record of the 1324th meeting held at the Palais des Nations, Geneva, on Monday 15 March 1999 at 10am. (Unfortunately the latter is only available in French.) For a full transcript of the meetings, see the FAIRA website: <www.faira.org.au>.

***Report by Ms G McDougall, Country Rapporteur, to the 1323rd meeting of the Committee on the Elimination of Racial Discrimination held at the Palias des Nations, Geneva, Friday 12 March 1999.***[8]

Thank you Mr Chairman.

I would like to join the Chairman in welcoming on behalf of the Committee, the detailed reply by the Government of Australia to our request for information and I would like to welcome further the presence today of the distinguished representatives of the Government, especially Mr Orr who travelled all the way from Canberra to discuss the Government's response.

I also would like to express my appreciation for the assistance and co-operation that I received from the Australian Attorney-General's Office as well as the Australian Embassy in the US in providing me with background material and information so that I could perform my function as country rapporteur.

Finally, the Committee has also received detailed and very useful submissions from the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner of the Australian Human Rights and Equal Opportunity Commission and from the Aboriginal and Torres Strait Islander Commission.

I would also like to recognise the presence here today of a number of Australian NGOs, their interest and concern has been readily apparent to the Committee, and the Committee has also received a number of useful NGO submissions concerning the issues that we are here today to discuss.

Mr Chairman and my colleagues, I am going to go over again some of the ground that Mr Orr has gone over for us from, at times, a slightly different vantage point.

This is very complex material and I think it bears repetition and certainly in-depth analysis.

Australia's two largest groups of indigenous peoples are the Aborigines and Torres Strait Islanders. Together they number approximately 372,000 or about 2 per cent now of Australia's total population of 18.3 million. As the original inhabitants of the continent, Aborigines have dwelt in Australia for at least 50,000 years — much longer by some estimates.

8 Disclaimer: This document has been compiled by the FAIRA Aboriginal Corporation from tapes of the 1323rd meeting of the Committee on the Elimination of All Forms of Racial Discrimination. FAIRA has endeavoured to provide a true and accurate record of the report by Ms McDougall, however there may be errors that remain undetected. FAIRA takes full responsibility for the accuracy of this report.

Torres Strait Islanders — who are closely related to the Papuan people of Papua New Guinea — have lived in islands north of Queensland for approximately 10,000 years.

Numbering between 300,000 and one million at the time of European settlement in 1788, the Aboriginal population dropped dramatically until the 20th century due to imported disease, widespread displacement, repressive and often brutal treatment by settlers, and socio-cultural disruption. For many years the Australian government pursued a policy of removing Aboriginal children from their parents in order that they might be brought up with supposedly 'civilised' values.

This resulted in the displacement of as many as 100,000 children known today as 'The Stolen Generation'.

Up until a 1967 Constitutional amendment, the first peoples of Australia were denied citizenship, had no voting rights[9] and were not even counted in the official population census.

Beginning at this time, the Government of Australia began in earnest to take steps to address the social, health and economic risk to the Aboriginal peoples.

The Government has established several agencies for this purpose, including the Office of Aboriginal Affairs, the Aboriginal and Torres Strait Islander Commission and the Human Rights and Equal Opportunity Commission.

The Committee welcomes these efforts.

Despite these progressive steps, all social indicators demonstrate that indigenous persons today continue to fare dramatically worse than the rest of the Australian population.

The Government of Australia itself acknowledged in its last State Party Report that the indigenous community continues to be disadvantaged with respect to the non-indigenous population in the critical areas of health, education, fair housing, criminal justice, employment and job training.

9 *Editor's note:* This is not, in fact, correct. Indigenous people had voting rights at a Commonwealth level from 1961, and in some exceptional cases had voting rights much earlier. It is nonetheless the case that, across jurisdictions, until 1989 the voting rights of Indigenous Australians were not identical to those of other Australians. See Jones M 'The Right to Vote and Participate in Political Processes' *Human Rights*, in *The Laws of Australia*, (Law Book Company Ltd, 1995) pp 11-29 and Gaze B and Jones M *Law, Liberty and Australian Democracy* (Law Book Company Ltd, 1990) pp 90-92.

Within the broad range of discriminatory practices long directed against Aboriginals and Torres Strait Islanders, the effects of Australia's racially discriminatory land practices have stood out as an acute impairment of the rights of Australia's native communities.

Since the time of European settlement in Australia in the late 18th century, the native land rights of Aboriginal peoples have been systematically undermined. The original inhabitants of the country could be displaced from their lands at the whim of the Crown. Australian courts sanctioned this status through the doctrine of *terra nullius* — the notion that the land at the time of European settlement belonged to no one. This allowed settlers to gain full legal recognition of their property rights with no regard to Aboriginal interests.

Clearly, this legal notion completely discounted the cultural value of Aborigines' traditional and complex land distribution system.

Although the Australian government pursued a policy in the 19th century of reserving some land for indigenous peoples, this hardly made up for the massive displacement of the continents' inhabitants from their homeland. The doctrine of *terra nullius* continued to be enforced until the landmark 1992 High Court case of *Mabo v Queensland* — which has been spoken to by Mr Orr — which held the doctrine both unconstitutional and violative of the Commonwealth *Racial Discrimination Act* of 1975.

According to the High Court, the *Racial Discrimination Act 1975* which was implemented in part to fulfil Australia's obligations under CERD, rendered the government's non-recognition of Aboriginal land rights — known as Native Title — unlawfully discriminatory. Whereas the legal system recognised British common law real property rights, it previously had accorded no value whatsoever to indigenous traditions of land tenure which had been established over many centuries.

To undervalue the indigenous law and custom to this extent, the Court held, violated the country's *Racial Discrimination Act 1975* which, again, specifically was put in place to implement CERD.

But 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. This can be achieved simply by the Crown granting an inconsistent title in the same land to someone else or using or setting aside native title land for its own purpose.

Mr Chairman, because so 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 is itself racially discriminatory.

Under it, land titles — other than native title — are better protected against interference and forced alienation. They are superior to native title.

The Australian government reacted to the landmark *Mabo* decision by passing the *Native Title Act* of 1993 which established a system to recognise native title claims through the national Native Title Tribunal, a measure that this Committee welcomed when we last considered Australia.

The original *Native Title Act* was delicately balanced between the interests of non-indigenous people and the interests of indigenous peoples. The original Act allowed validation of prior land dealings that might have been invalid because of the *Racial Discrimination Act* of 1975.

These validation provisions were racially discriminatory but to balance this discrimination, the original Act provided two key forms of protection for native title with respect to future land dealings. First, the freehold standard which required native title to be treated in the same way as freehold title and secondly, the right to negotiate about certain land use in the future, particularly interestingly, including mining. Significantly, the original 1993 Act was the subject of extensive negotiations with indigenous groups and attracted 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 by this Committee in Australia's periodic report in 1993. The Committee accepted that the original Act was compatible with the Convention.

The Act was characterised by the Australian delegation who met with the Committee at that time as a 'special measure' under Articles 1(4) and 2(2) of the Convention.

Now, I think that I'm in pretty good agreement with Mr Orr to this point, but I think it's at this point in the chronology of the legal and political history that my views diverge from the Government's presentation.

In the 1996 case, the *Wik Peoples v Queensland*, clearly a pivotal decision, the High Court held that a governmental grant of a pastoral lease over a given area does not necessarily extinguish native title over the same area — an apparent victory for native title holders.

This left open the question of what exactly constituted valid extinguishment under the Act.

After the *Wik* decision, various groups, notably including major mining interests, demanded clarification from parliament to establish 'certainty' with respect to the validity of their interests in land. A process was set in motion to amend the *Native Title Act*. After

several unsuccessful attempts to amend the Act, the Federal Parliament finally passed the *Native Title Amendment Act* of 1998.

The Acting Aboriginal and Torres Strait Islander Social Justice Commissioner and the Aboriginal and Torres Strait Islander Commission have both criticised the Act on multiple grounds. Criticisms have highlighted the fact that, as compared with the original Act, the majority of the provisions in the Amendment Act focus on the extinguishment and impairment of native title.

The government of Australia has presented its position that the amendments were required by the *Wik* decision and merely clarify procedural inefficiencies and create legal certainty while being faithful to *Mabo* and *Wik* and the original Act.

But based on my own reading of the cases and the statutes discussed in the Government's submission, it appears that the central goals and compromises that formed the basis of the original Act now bear little relationship to the amended *Native Title Act*.

The main aims of the original Act, namely the protection and recognition of native title, do not appear to be the central aims of the amended Act. The original Act sought to establish a mechanism by which to affirm the *Mabo* decision. In contrast, provisions that extinguish or impair the exercise of native title rights or interests pervade the amended Act. In many ways, therefore, the amended Act appears to wind back the protections of native title offered by the *Mabo* and *Wik* decisions.

I hope that the government of Australia will be able to address with more clarity some of these concerns in responding to the questions that I raise here today.

The Government report justified the scope of the amendments on its interpretation of the *Wik* decision so I think it makes sense for me to at least lay out how I read *Wik*.

*Wik* appeared to stand for the propositions that:

(1) a common form of land tenure in Australia — a pastoral lease — does not necessarily extinguish native title;

(2) native title is capable of co-existing on land with pastoral leases; and

(3) where there is a conflict between the pastoralists' rights and those of the Native Title holder, the pastoral lease rights shall prevail but only to the extent of the inconsistency.

I would like to ask the distinguished representative of the government:

- Is this a fair reading of the holding of the High Court?

- Given the limited nature of pastoral leases, why would the *Wik* decision cause a high degree of uncertainty?

It may be useful at this point to examine more closely some of the provisions in the amended Act that have come under criticism from Australia's indigenous communities.

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.

In the original Act, in exchange for an agreement to legitimise past actions by the Australian government in extinguishing native title interests, native title holders gained significant rights with respect to future acts affecting their property rights.

A central question that must be asked, therefore, is whether the amendments to the Act have significantly unsettled this negotiated compromise giving greater weight to the interests of non-native title holders, even with respect to future land uses.

Criticisms have focused in particular on four specific provisions of the amended Act:

- the provisions relating to the validation of past acts that were otherwise invalid;

- the confirmation of extinguishment provisions;

- the primary production upgrade provisions; and

- restrictions on the right to negotiate.

The amended Act also sets the registration test to be met by native title claimants at a high threshold which is likely to make it more difficult for claimants to assert their native title rights, including the right to negotiate on future uses of the land.

## Validation of past invalid acts

The Act as amended expressly validates certain encroachments on native title that occurred in the past between the date of the original Act, 1 January 1994 and the date of the *Wik* decision, 23 December 1996.

These acts are validated by the amended Act despite the fact that many of the acts in question may have been invalid under the original Act and under the *Wik* decision.

I would like to put the following questions to the distinguished representative of the Government.

- Is it correct that many of these actions validated by the amendment may well have been invalid under the *Wik* decision?

- Isn't it fair to say that the *Wik* decision is saying that co-existing non-native title extinguishes native title only to the extent of inconsistency, and that that required a case by case analysis, and would be contrary to the blanket validation approach established in the amendments?

- If the non-native title holders in question acquired their rights after *Mabo*, and after the original Act, and failed to investigate the possibility of co-existing native titles, they did so at their own risk, almost in defiance of potential native claims.

- Weren't there warnings to this effect from the Social Justice Commissioner that must've been ignored by the governments granting property interests during that period?

- Doesn't this blanket retro-validation then just reward those who ignored such warnings?

- Aren't these provisions discriminatory in that they purport to validate acts and to provide for extinguishment only in relation to native title and not in relation to other forms of title and with no countervailing benefit to be obtained on the basis of which these amendments could be considered 'special measures' under the Convention?

These points must be of significant concern to this Committee in considering Australia's obligations under the CERD.

I would welcome the observations of the government delegation.

## Confirmation of extinguishment provisions

The amended Act also classifies certain land holdings as 'previous exclusive possession acts'. These tenures are listed in a detailed schedule to the Act and any such tenure listed in the schedule is deemed by the statute to extinguish all native claims to property.

The purpose of the confirmation provisions as stated in the government's report is 'to reflect the common law but to remove the need for a lengthy case by case determination by the courts'.

It appears to me that these confirmation provisions in the amended Act represent a significant encroachment on common law native title protections in two ways. First they 'deem' that certain tenures extinguish native title where at common law they would not and secondly, they provide that upon being confirmed, these tenures extinguish native title forever, regardless of whether the non-native tenure continues to subsist on the land. This provision, which denies the possibility of a reversion of native title interests following the end of an exclusive possession lease appears to extend beyond the scope of the High Court's intentions in *Wik*.

Native title holders may claim compensation for their extinguished rights but they would have no valid claim to the property itself.

I'm not sure that I heard the Government representative make a comment this afternoon to the contrary — that there was a possibility of reversion.

I'd be very interested in clarification of that point because I don't see that in the report submitted, or in the statute.

The Government report does acknowledge that the confirmation provisions may extend beyond mere codification of common law by noting that 'just terms compensation is assured should it be the case that there was in fact no prior common law extinguishment on any of these tenures'.

The schedule that we are talking about, the schedule of tenures, that the amendment deems to extinguish native titles runs to 50 pages and includes grants under regulations as early as 1829 and legislation dating back to 1860.

While I note that the Government's report attempts to present the picture that there is minimal impact — I think the report says that it only affects 7.7 per cent of the land of Australia — it seems to me nevertheless to be a sweeping divestment of native rights.

I would like to put the following questions to the government delegation:

- The government seeks to justify the confirmation and extinguishment provisions by characterising them as codifications of common law. But do you agree with my assessment that the common law recognition of native title is itself discriminatory and cannot on its own be considered to comply with the government's obligations under our Convention?

- Do you agree that if nothing else, the *Wik* decision requires a case by case analysis of what tenures are inconsistent with native title and in what degree and that a clear

and plain legislative intention is required to extinguish native title? Doesn't *Wik* require the opposite of the blanket extinguishment of native title that occurs under Schedule 4?

I understand that in a recent court decision in Western Australia, *Miriuwung Gujerrong*,[10] a Federal Court has found that many titles listed in the Schedule to the amended *Native Title Act* did not in fact extinguish native title at common law.

Now I understand that the government of Western Australia has appealed the decision but I would appreciate hearing the government's evaluation of this particular judgment by the court and its significance with respect to the amendments to the Act, certainly if the judgment is upheld on appeal. If this court decision is correct, doesn't it mean that these amendments create a situation of even greater discrimination and divestment than existed under common law?

- What was the nature of the consultation with indigenous peoples concerning what tenures were included in the Schedule?

- Is it correct that these provisions operate solely to divest native title holders while having no similar impact on non-native title holders?

- If so, how do you analyse that as complying with the Government's obligations under our Convention?

### Primary production upgrade provisions

The amended Act provides an opportunity for pastoral lease holders to upgrade the range of primary production activities that may be permitted on their leaseholds, regardless of the effect that these activities might have on co-existing native title interests in the land and the upgrade can occur without the consent of the native title holder.

In general, I understand that primary production activities are far more intensive uses of the land than pastoral activities such as grazing. In some cases, the primary production amendments would allow state governments to grant licenses to do things like cut timber or to extract gravel or rock.

They have the ability to transform the nature of the lease and, in accordance with the *Wik* decision to reduce the possible extent of co-existence with native title.

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10 Miriuwung-Gujerrong People, State of Western Australia, Ben Ward — native title party, Prospex Resources NL, Triaclo Resources Ltd (1997) NNTTA 3 (16 February 1997).

The provisions which allow holders of non-exclusive pastoral or agricultural leases to perform future acts at primary production levels appear to discriminate against native title holders by granting unwarranted preference to the interests of non-native title holders. Only native title rights will be effected under the amendments. Holders of non-native title property interests which co-exist with pastoral leases will not be affected in the same way. There will be no such impact on co-existing interests such as easements or mining development rights.

Primary production upgrades are, I believe, not authorised on the land of non-native title holders without their consent.

In relation to the primary production provisions, the Acting Social Justice Commissioner stated that :

> This seriously erodes the benchmark of equality that is central to the original Act. It paves the way for an enormous expansion of pastoralists' rights while removing legitimate procedural rights of Native Title holders.
>
> The dramatic expansion of pastoralists' rights will mean that native title is suppressed to a correspondingly greater extent.
>
> Native title will be suspended and rolled back on an unprecedented scale.
>
> Together with the so-called confirmation and validation provisions, this will constitute the greatest single and explicit impairment of native title in the history of Australia.'

I would just appreciate the Government's response to this characterisation. I would also appreciate the Government's response to the following question.

- In the original Act, one of the benefits that indigenous title holders gained was that future uses of their land would be subject to the freehold standard, they would effectively gain equal land rights to all others who have freehold with respect to future uses. Don't these primary production upgrade provisions, that is without the consent of the native title holders, eliminate or erode the freehold standard and return them to a position of inequality?

## Right to negotiate

Under the original Act, native title holders (once they registered their title) enjoyed a right to negotiate certain permissible future acts relating, in particular, and interestingly enough, to mining activities — both exploration and production — and to the compulsory acquisition of their land by the Government for the benefit of a third party.

This right to negotiate was seen as a major concession between the interests of native title holders and non-native title holders in the original Act.

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.

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 with respect to a broad range of activities, although the most important may be the ability of native title holders to protect property rights against the impact of land exploration and mining activities.

In addition to rescinding the right to negotiate in certain instances, the amendments allow States and Territories to introduce an alternative provision 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.

## Participation of indigenous groups in the legislative process

The consent of the indigenous community was a critical factor in the legitimacy of the original 1993 Act. The government report notes that as part of developing its response to the *Wik* decision, the government undertook from early 1997 an 'extensive consultation phase with all interest groups'.

This statement indicates that the legislative process by which the amended Act was adopted afforded significant opportunities for consultations between the government and Australia's indigenous communities.

The Committee would welcome additional information concerning this consultation process in light of the conflicting information suggesting that indigenous representatives were marginalised during the legislative process and have totally rejected the final legislation.

The lack of participation by indigenous peoples in the formulation of the amended Act could raise concerns with respect to Australia's compliance with its international obligations under our Convention.

This Committee has stressed the importance of political participation in its General Recommendation No XXIII on indigenous peoples in which we call on States to 'recognise and protect the rights of indigenous people to own, develop, control and use their common lands, territories and resources'.

The Committee also recognised 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'.

I would like to ask the representative of the Australian Government:

- What steps did the government put in place to ensure the effective participation of indigenous peoples?

- Could you say that by way of that process you obtained their 'informed consent' to the amendments?

- How did the government make the judgment that their interests were adequately incorporated given that the Social Justice Commissioner, the Aboriginal and Torres Strait Islander Commission and the National Indigenous Working Group opposed the amended legislation and I believe still do?

Now, one of the obvious omissions in the government's written report is that it fails to provide an explicit analysis of the compatibility of the amended Act with Australia's obligations under CERD.

The government report does, however, note that as with the 1993 Act, the new Act must still be 'read and construed' subject to the provisions of the *Racial Discrimination Act 1975 (Cth)* (RDA).

In this respect, I'd just like to stop and say that Australia must be commended for taking the important step of incorporating provisions of CERD into domestic legislation through the RDA. This federal anti-discrimination statute which was introduced in 1975 makes discrimination on the basis of race, colour, descent or national and ethnic origin unlawful.

The RDA binds both State and federal governments.

It is important to note, however, that the principle of parliamentary sovereignty places the RDA in an inferior relationship with subsequent legislation of the federal parliament that conflicts with provisions of the RDA. So, unfortunately, it appears that the RDA provisions are overridden by conflicting provisions of both the original Act and the amended Act and further that State legislation authorised by the amended Act is also immune from challenge based on the RDA.

I base that view on the following points:

In the case of *WA v Commonwealth* which concerned the validity of a West Australian statute, the High Court considered the interaction between the RDA and the *Native Title Act*. The High Court held that as subsequent legislation dealing specifically with native title 'the general provisions of the *Racial Discrimination Act* must yield to the specific provisions of the *Native Title Act* in order to allow those provisions the scope for operation'. And the Court came to this conclusion in spite of a provision in the Act, s 7, that had the purpose of ensuring that the RDA would be controlling in the interpretation of the *Native Title Act*.

Following this case, when the recent amendments were adopted to the Act, the Federal Parliament reportedly considered a provision that would have been effective in making the provisions of the RDA prevail over the provisions of the *Native Title Act*. In other words, it would've cured the problem that the Court saw in the Western Australian case. This amendment, however, was not adopted, so in the amended Act you've got the same s 7 that the Court says does not override the RDA.

This means that where the Act authorises the States or Territories to conduct activities which would conflict with the RDA, and therefore breach Australia's obligations under the CERD, those activities will be valid as a matter of Australian law. This, despite the fact that they would breach Australia's international obligations.

I would like to ask the representative of the Government of Australia these questions:

- Could you describe the legal effect of the High Court's decision in *Western Australia v Commonwealth*? Could you also comment in that regard on the statement in the Australian government's submission noting that 'nothing in the *Native Title Act* as amended effects the operation of the RDA'. My question is whether the RDA would be controlling in the case of a conflict between the amended Act and the RDA. It appears that s 7 may not provide any protection in that regard when a piece of State or Territory legislation authorised by the amended Act is unambiguous in its purpose and discriminates against native title holders. Please elaborate on that.

- Second, how does the government define substantive equality as opposed to formal equality and is it the position of the government that the Convention does not require substantive equality?

- What is the government's definition of 'special measures' as authorised under Articles 1(4) and 2(2) of the Convention and please explain how that would apply to the amended Act?

- The Government has stated that one impetus for amending the *Native Title Act* was that it wanted to create legal certainty after the *Wik* decision. Couldn't that legal certainty have been created by favouring native title over non-native title?

- Why is it that in every case the discrimination is against the Aboriginal claims and in favour of the other interests?

Finally, I just want to say a little bit about the change in the Social Justice Commissioner's role.

The Government has proposed a plan that would substitute two positions: the Aboriginal and Torres Strait Islander Social Justice Commissioner and the Race Discrimination Commissioner to remove those two specialist roles and put them both under the function of a Deputy President of the Commission who would be responsible for both of those areas.

I would like to ask the Australian Government to provide information as to whether the budget and powers allocated in this plan to appoint a new Deputy President to address both of these vast areas of concern would be equivalent to the budget and the powers currently allocated to these two separate posts.

And in the event that there would be some reduction of functional authority or resources, what justification does the government give for diminishing the authority and resources of the Commission in this important area.

Yes, I note that there has recently been an appointment of a new Social Justice Commissioner with a five year term but I understand (and would you clarify this point for me?) that the government's legislative package is going forward and that in fact it was passed by the lower house just the other day.

So, it was not taken off the table by any means, it's still very very relevant.

The Acting Social Justice Commissioner in her submission to this Committee noted that:

> Given the continued disproportionate rate of indigenous incarceration, the disproportionate numbers of Aboriginal and Torres Strait Islander people who die in police custody and prison custody, the chronic and distinct disadvantage of indigenous Australians as demonstrated by all social indicators, it may be

> considered that the continued existence of an appropriately qualified, specialist position to report on the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islander people falls within the categorisation of a special measure required to comply with Australia's obligations under CERD.

I would very much appreciate the Government's response to that view.

Mr Chairman, thank you very much.

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## Analysis of Decision (2)54 on Australia

The Committee handed down its decision on Australia on 18 March 1999.[11] It is useful at this point to examine this decision in some detail.

In expressing its concern over the compatibility of the amended *Native Title Act* with Australia's international obligations under the Convention, the Committee found that:

> While the original *Native Title Act* recognises 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.

The Committee noted, 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 production upgrade provisions; and restrictions on the right to negotiate. The Committee stated that:

> 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.

The lack of effective participation by indigenous communities in the formulation of the amendments was also raised by the Committee as a major area of concern with respect to the Australian government's compliance with its obligations under Article 5(c) of the Convention. Recalling its General Recommendation XXIII which calls on governments to 'recognise and protect the rights of indigenous peoples to own, develop, control and

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11 Decision (2)54 on Australia: CERD/C/54/Misc 40/Rev2 of 18 March 1999.

use their common lands, territories and resources', the Committee 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'.

The Committee called on Australia to address these concerns as a matter of utmost urgency. Specifically, it called on the Australian Government:

> ... in conformity with the Committee's General Recommendation XXIII concerning indigenous peoples, 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.

## Government's response

The Government's immediate response to this decision was outlined in a news release by the Attorney-General, The Hon Daryl Williams AM QC MP dated 19 March 1999.[12] In it, he stated that 'the Government ... does not agree with the conclusions reached ... [t]he Committee's comments are an insult to all Australians as they are unbalanced and do not refer to the submissions made by Australia on the native title issue ... and fail to understand Australia's system of democracy'. This latter comment refers to the Government's inability to suspend an Act of Parliament but fails to concede that the Government can review, repeal and amend legislation.

The Government did not accept that the Committee's finding about the lack of informed consent by Aboriginal peoples stating that '[t]here was an extensive process of consultation with all stakeholders in the development of the Amendment Act, including with indigenous representatives'.

## Visit to Australia by CERD experts

In addition to its findings in Decision (2)54, the Committee decided on 19 March 1999 to accept invitations it received from Senators John Woodley, Margaret Reynolds and Darryl Melham (Opposition Spokesman on Aboriginal and Torres Strait Islander Affairs) and the Aboriginal and Torres Strait Islander Commission to visit Australia. This decision was made dependent upon the Australian Government not objecting to the visit. This was seen as a major break through as it was previously the

12 While many news releases from the Attorney-General's office are available on his home page, this one is not.

policy of the Committee to visit countries only at the invitation of the government of that country. It was expected that the Committee's Rapporteur on Australia, Mrs Gay McDougall, accompanied by two Vice-Chairpersons of the Committee, would visit Australia in June and report back to the Committee at its August Session. The Government formally objected to the visit and it did not proceed.

## 55th session of the CERD Committee

The 55th session commenced on 2 August 1999, with Australia scheduled for consideration on 16 August 1999.

Committee members were heavily lobbied by Australian Government representatives leading up to and during their consideration of Australia. As many as five Government representatives were in attendance at the CERD meetings from 2 August until 16 August when Australia was considered. Strangely, even though Government representatives were present during the Committee's consideration of Australia, the Government did not choose to be available in an official capacity to engage in dialogue with the Committee. Instead the Government forwarded in writing its official comments[13] to be attached to the CERD Committee's report to the UN General Assembly.

### Analysis of CERD's decision on Australia of 16 August 1999[14]

First, the CERD Committee decided to reaffirm its decisions from its 54th Session in March 1999. The decisions referred to include Decision (2)54 on Australia and the decision to visit Australia provided the Australian Government does not object to the visit. It is important to reiterate the key aspects of Decision (2)54 to fully appreciate the importance of this reaffirmation.

In Decision (2)54, the CERD committee expressed its concern over the compatibility of the amended *Native Title Act* with Australia's international obligations under the Convention.

In particular, the CERD Committee considered that to 'wind back the protections of indigenous title offered in the *Mabo* decision and the 1993 *Native Title Act*' raises concerns about compliance with Articles 2 and 5 of the Convention.

The lack of effective participation by indigenous communities in the formulation of the amendments was also thought by the CERD Committee to breach Article 5(c) of the Convention

13 Australia's Comments on Decision 2 (54) of 18 March Pursuant to Article 9 (2) of the Convention.

14 Decision on Australia CERD/C/55/Misc 31/Rev.3 of 16 August 1999.

The CERD Committee decided that the *Native Title Amendment Act 1998* (Cth) discriminates against indigenous title holders by validating past acts, extinguishing native title, upgrading non-indigenous title and restricting their right to negotiate.

For these reasons, the CERD Committee called on Australia to:

> ... address these concerns as a matter of urgency to suspend implementation of the 1998 amendments and reopen discussions with the representatives of 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.

Also, in its Decision (2)54, CERD decided to keep the matter on its agenda under its early warning and urgent action procedures so that it could be reviewed at its 55th session.

Second, the Committee explained why it made the decisions it did in March as follows:

> In adopting these decisions, the Committee 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 of policy as to the exercise of these rights risked creating an acute impairment of the rights thus recognised to the Australian indigenous communities.

The Committee stated that in taking that decision:

> It considered in detail the information submitted and the arguments put forward by [Australia].

This is particularly important because it answers the criticism by the Australian Government that the Committee did not take account of the Government's submissions, written and oral, provided to the Committee.

The third part of the Committee's decision notes the comments received from the Australian Government[15] which will be included in the Committee's annual report to the General Assembly.

Finally, the Committee decided to continue consideration of the *Native Title Amendment Act 1998* 'together with the 10th, 11th and 12th periodic reports during its 56th session in March 2000'.

15 Decision (2)54 on Australia: CERD/C/54/Misc 40/Rev2 of 18 March 1999.

Immediately prior to the 55th session of CERD, Australia submitted its overdue 10th, 11th and 12th periodic reports in an amalgamated report.[16] The timing was an obvious ploy to have Australia removed from the CERD Committee's early warning agenda to its normal agenda item of consideration of States parties' periodic reports. Nevertheless, the CERD Committee decided to continue consideration of the matter of the 1998 amendments to the *Native Title Act 1993* together with the periodic reports at its 56th Session in March 2000.

The Government can take no comfort from the most recent CERD Committee decision as it cements its previous view that the 1998 amendments breach Australia's obligations under the Convention, keeps the matter on the agenda of its next meeting (together with consideration of Australia's periodic reports) and keeps alive the matter of the visit to Australia by CERD members.[17]

## Conclusion

Events in Australia since the latest CERD decision are strong indications that the strategy in pursuing this matter through the CERD Committee's prevention procedures was correct and is starting to bear fruit. Just two examples are the rejection by the Senate of the Northern Territory's native title legislation and the decision by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs that no amendments to the *Land Rights (Northern Territory) Act 1976* (Cth) should be contemplated without the informed consent of the Aboriginal people concerned.

While it is highly unlikely that the current government will revisit the *Native Title Amendment Act 1998* (Cth), continued critical scrutiny of the legislation by international bodies such as the CERD Committee will pressure future governments to amend the legislation to remove its racially discriminatory aspects. Furthermore, the development of international jurisprudence in interpreting international treaties to which Australia is a signatory (such as the Racial Discrimination Convention) will assist the Australian courts in interpreting domestic laws.

The National Indigenous Working Group on native title will continue to pursue all avenues available to us to ensure the repeal of this racially discriminatory legislation and the recognition of indigenous native title rights as no lesser than the rights of other land holders. ●

16 The reports were due in 1994, 1996 and 1998 respectively.

17 The CERD Decision on Australia of 16 August, the summary record of the 1353rd meeting and a transcript of that meeting can be found on the CERD web page on the FAIRA website at: <www.faira.org.au>.