Australian Institute of Aboriginal and Torres Strait Islander Studies

AIATSIS

Submission

to the

Parliamentary Joint Committee on Native Title and the Land Fund

Inquiry into the 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 (CERD)

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Foreword

I am pleased to present this submission by the Australian Institute of Aboriginal and Torres Strait Islander Studies to the Joint Parliamentary Committee on Native Title and the Land Fund, Inquiry into the 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.

Since the election of the Federal Coalition Government Australia's adherence to international human rights obligations has been questioned. This submission examines Australia's recent unprecedented appearance before the United Nations Committee for the Elimination of Racial Discrimination to answer criticisms that the amendments to the Native Title Act 1993 failed to comply with Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination. The submission addresses the Terms of Reference for this inquiry, with particular regard to the decision of the Committee, and the materials presented by the Government in response.

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Executive Summary

1 Introduction

This submission addresses the Terms of Reference of the Inquiry by the Parliamentary Joint Committee, including a review of Australia's international obligations; an assessment of the key findings of the Committee for the Elimination of Racial Discrimination in its decision on Australia; a discussion of how Australia should respond to the criticisms, including the need for amendments; and a comment on the continued engagement by Australia with the Committee.

2 Australia's international obligations with respect to Racial Discrimination and the rights of Indigenous Peoples

The United Nations Charter established non-discrimination in the enjoyment of human rights among the central tenets of the United Nations. *The International Convention on the Elimination of all Forms of Discrimination* (CERD) signed and ratified by Australia, reinforces the prohibition on discrimination and the obligation on States to eliminate racial discrimination. In 1997, a General Recommendation (XXIII) reaffirmed the application of the provisions of the Convention to Indigenous peoples. As a party to the Convention, Australia is obliged to amend its laws and policies to accord with the Convention.

In 1975 the Commonwealth Parliament introduced the *Racial Discrimination Act 1975* (Cth) (*RDA*), which partially implements the Convention. With respect to native title, however, the Commonwealth Parliament exercised its power to suspend the operation of the *RDA* in order to validate titles in 1993 and again in 1998. This treatment of the *RDA* is clearly in breach of Australia's CERD obligations under Article 2(b), to amend their laws to accord with the Convention, and by its nature presupposes further breaches.

3 The Decision on Australia (TOR A)

3.1 Key findings in relation to the Native Title Act

The Committee on the Elimination of Racial Discrimination handed down a Decision in March 1999 that indicated Australia would be in breach of its obligations if the proposed amendments were implemented. The Committee identified particular provisions and requested that the Government address the issues raised as 'a matter of utmost urgency'. They asked that the amendments be suspended and discussions with Indigenous peoples reopened with a view to reaching agreement on 'solutions acceptable to indigenous peoples and which would comply with Australia's obligations under the Convention.'

3.2 Validation of 'intermediate period' acts

The provisions that validated vast numbers of mining interests granted during the 'intermediate period' are discriminatory, regardless of the *bone fides* of the governments in granting the interests, because Indigenous peoples rights and interests were extinguished in favour of others.

The validation provisions in the original Act were also discriminatory. Nevertheless, the Committee was convinced that, on balance, the legislation would be an advance on the common law position. This view was in no small measure influenced by the support given to the Act by Indigenous peoples.

The Government should not rely on the *Native Title Act* as a whole, incorporating the validation provisions, to suggest there are sufficient 'countervailing measures' to offset the adverse provisions.

Compensation provisions are inadequate to meet international standards. Compensation is a remedy of last resort. Only where it is impossible to protect or return lands should compensation be considered, and then, where possible it should be in the form of lands.

3.3 Confirmation of extinguishment

The 'confirmation of extinguishment' provisions pre-empt development of native title at common law, providing certainty and predictability at the expense of Indigenous rights. Moreover, to argue that the provisions merely 'codify' the common law is inadequate to meet Australia's international obligations if the common law of native title is itself discriminatory.

The amendments also 'confirm' the power of governments to grant interests in relation to reserved lands, waters and airways without consent or negotiation with native title holders. The exercise of such power may impair or even extinguish native title. These provisions fail to meet the international standards requiring States to ensure greater ownership and control for Indigenous peoples over their lands.

3.4 Primary production activities

The 'primary production' provisions allow the holders of non-exclusive pastoral or agricultural leases to increase their level of activity on land without the consent of the native title holders, regardless of their effect. These provisions discriminate because they grant preference to the interests of non-native title holders and deny rights of Indigenous peoples. To argue that prioritising the interests of leaseholders in this way is consistent with the common law does not meet Australia's obligation to amend domestic law to accord with the international standards of non-discrimination.

3.5 Right to Negotiate

The right to negotiate provisions are measures necessary to protect the unique character of native title and facilitate greater control over native title lands. The *Native Title Amendment Act* discriminates against Indigenous peoples by reducing protection under

the Act in order to deliver greater security and access to non-indigenous interests. In addition, on balance, the *Native Title Act* no longer provides sufficient protection for native title rights. Lesser procedural rights of notification, consultation or compensation do not meet international standards for the protection and facilitation of ownership.

The *Amendment Act's* more rigorous registration test may deny native title holders access to the right to negotiate in circumstances where native title exists. Therefore, legitimate native title rights may be impaired in the interim period while native title claimants are denied the procedural rights under the Act.

Diminution of the right to negotiate lessens the ability of Indigenous peoples to secure beneficial agreements with industry. Provisions for Indigenous Land Use Agreements may also shift the burden of responsibility for negotiating economic and political autonomy to industry when many of these issues should be dealt with at a government level.

3.6 Understanding the Decision of the Committee

3.6.1 The Concept of Equality

Regardless of whether the amendments meet the requirements of Australia's Constitutional or common law, they must be assessed against the standards of equality and non-discrimination expected of Australia under international law.

The concept of equality and non-discrimination in law, including international law, relies on three measures of equality. The first is formal equality which requires that human rights be enjoyed without arbitrary or unjustified distinction. The second embodies the positive duty to eliminate systematic, institutionalised or historical disadvantage. The third is the concept of substantive equality which recognises that differential treatment is not necessarily discriminatory if it is legitimate, that is recognising legitimate difference or distinct rights.

The principle of equality rejects uniformity. To treat people in relatively different positions equally is therefore as arbitrary as treating those in relatively equal positions differently. To understand equality is to understand the importance of difference and maintaining a distinct identity. The recognition and protection of the distinct rights of Indigenous peoples is implicit in the international legal concept of equality and is often required to achieve equality and non-discrimination.

3.6.2 Native Title at common law

Mabo's case affirmed the inherent nature of Indigenous rights, based in prior sovereignty, and interests in land that are neither contingent upon nor sourced from the Crown. Yet, the High Court, in *Mabo,* specifically asserted that the State has power to divest those rights unilaterally, without consent or recompense. The result is a property interest unique to Indigenous people which places them in a position of vulnerability in relation to the State. Thus the native title doctrine establishes a hierarchical relationship between Indigenous interests and the interests of others.

The Parliament has the power to change the discriminatory aspects of the common law to more fully protect the rights of Indigenous peoples. Indeed, in the context of Australia's international obligations, it could be argued that they are obliged to do so.

4 Responding to the decision (TOR B)

Because of Australia's history of discrimination against Indigenous peoples, native title rights require specific protection against derogation. The Native Title Act should therefore be a positive measure to preserve and foster the distinct rights of Indigenous peoples in relation to their land.

The *Amendment Act* sought to balance interests between the total abolition of rights of Indigenous peoples on the one hand and the status quo of Indigenous rights recognition on the other. Beginning with these options was inevitably going to result in a breach of international obligations to act in a non-discriminatory way and to amend laws to overcome discrimination. In the result, greater certainty was provided for non-Indigenous interests at the expense of native title.

The amendment process, too, was flawed. The Committee on the Elimination of Racial Discrimination has stressed the importance of process in relation to the right of political participation. The Committee recognised that a measure of whether Indigenous peoples enjoy equal rights in respect of effective participation in public life is to ensure that 'no decisions directly relating to their rights and interests are taken without their informed consent'. The process of negotiating the amendments did not meet the obligation to secure effective participation by Indigenous peoples on a matter of significant importance to them.

While many of the amendments have been partially implemented it is imperative that the Government follow the recommendation of the Committee and begin meaningful negotiations with Indigenous peoples to determine a course of action that will address the problems of the *Amendment Act* and result on an agreed outcome if Australia is to meet its international obligations.

5 Australia's relationship with the CERD Committee (TOR C)

To fulfill it obligations as a party to CERD, Australia should respond positively to the ongoing Early Warning/Urgent Action procedures and examine their fundamental message, not solely in relation to the specific recommendations of the Committee but also to the broader implications of these criticisms.

Australian should commit to providing reports to the Committee regularly and on time. This periodic reflection is an important part of the Government's accountability in relation to the recognition, protection and fostering of the rights of Indigenous peoples.

In the long-term, Australia must address the erosion and constriction of native title both prior to and since its recognition in Australian law. Governments should consider entering into a process of consultation and agreement making that leaves all issues open

for discussion, from recognition as traditional owners of territory to resource management and self-government agreements.

6 Conclusion

The Committee's criticisms of Australia's approach to the *Native Title Amendment Act* lies in the failure to appreciate and apply the meaning of equality and non-discrimination and the refusal of to recognise the distinct rights of Indigenous peoples that cannot be arbitrarily interfered with. These two things, equality and the enjoyment of rights are the central tenets of the *Convention on the Elimination of Racial Discrimination*.

Moreover, it is not enough to argue that the domestic legal and constitutional arrangements have resulted in a doctrine that protects Indigenous peoples' rights to traditional lands that is discriminatory. Legislation cannot simply build on and intensify the discriminatory aspects of our law. Australia has a positive obligation not to derogate from the rights of Indigenous peoples and to rectify the flaws in the doctrine of native title.

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1. Introduction

It is now well established in international law that States have a particular responsibility for protecting the rights of Indigenous peoples to be free from discrimination and ensuring the equal enjoyment of human rights, including those rights that are specific to Indigenous peoples. Australia's relationship with its Indigenous peoples is a measure of our standing in the international community. Recent criticisms of the treatment of Indigenous peoples' rights by Australia, under the *Native Title Amendment Act 1998* (Cth) in particular, should be understood as a serious rebuke.

This submission addresses the Terms of Reference of the inquiry by the Parliamentary Joint Committee, including a review of Australia's international obligations; an assessment of the key findings of the Committee for the Elimination of Racial Discrimination in its Decision on Australia; a discussion of how Australia should respond to the criticisms, including the need for amendments; and a comment on the need for continued engagement by Australia with the Committee.

Emphasis has been placed on the first term of reference, assessing the veracity of the Committee's findings. Each of the provisions mentioned in the decision is considered in detail. This is followed by a discussion of some of the more fundamental concepts at issue, such as the concept of equality and the concept of native title at common law. It is the different understanding of these concepts that lies at the heart of Australia's failure to meet international standards for the recognition and protection of the rights of Indigenous peoples.

2. Australia's international obligations with respect to racial discrimination and the rights of Indigenous peoples

2.1 Non Discrimination in International Law

The United Nations Charter established non-discrimination in the enjoyment of human rights among the central tenets of the United Nations. Therefore one of the principal purposes of the United Nations is 'promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'.[1] The ideal of non-discrimination in the enjoyment of human rights was reiterated, and elaborated, in later human rights instruments including *The Universal Declaration on Human Rights, The International Covenant on Civil and Political Rights,* and *The International Covenant on Economic, Social and Cultural Rights.*[2] The human rights covenants, to which Australia is a party, impose obligations on States to ensure the human rights contained in them, 'without distinction of any kind'.[3]

2.2 The Convention on the Elimination of Racial Discrimination

The United Nations *Convention on the Elimination of all Forms of Discrimination* (CERD) signed and ratified by Australia, reinforces the prohibition on discrimination and the obligation on States to eliminate racial discrimination.[4] For the purposes of the Convention, racial discrimination is defined as:

> ...any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal

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[1] *United Nations Charter* Article 1(3), see also Article 55.

[2] Specifically, *The Universal Declaration of Human Rights* (Art. 2, 7), *The International Covenant on Civil and Political Rights* (Art. 2.2, 26), and *The International Covenant on Economic, Social and Cultural Rights* (Art. 2.2).

[3] '... such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status', ibid.

[4] CERD Preambular para.1, Art. 2 and expanded at Art. 5. Australia signed CERD on 13 October 1966 and ratified it on 30 September 1975. See generally, Sarah Pritchard, 'Native title in an international perspective', in *Sharing Country: Land Rights, Human Rights and Reconciliation after Wik, Proceedings of a Public Forum Held at University of Sydney, February 28, 1997,* Research Institute for Humanities and Social Sciences, University of Sydney, 1997, pp. 35-6.

footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[5]

Article 5 specifically refers to equality before the law and the enjoyment of rights, including the right to own and inherit property, whether alone or in association with others.

In 1997, a General Recommendation (XXIII) reaffirmed the application of the provisions of the Convention to Indigenous peoples and asked States to include reference to them in their periodic reports.[6] Of particular relevance here, the Recommendation called on State parties to protect the rights of Indigenous peoples to 'own, develop, control, and use their communal lands'. Further, State parties should take steps to return traditional lands, or where this is not possible to provide just, fair and prompt compensation, preferably in the form of lands.

2.3 Australia's obligations under other human rights instruments

CERD operates in the context of other human rights instruments which recognise the rights of Indigenous peoples, whether as groups, cultural minorities, or specifically in relation to their status as Indigenous peoples. The purpose of *CERD* is to ensure equality before the law and the enjoyment of the rights that are elaborated in the international human rights instruments. Australia has made a commitment to uphold and further the protection and recognition of these rights.

For example, *The International Covenant on Civil and Political Rights* recognises, in Article 27, the rights of minorities to enjoy their own culture, religion and language. The Human Rights Committee of the United Nations has made clear that Article 27 protects issues of cultural importance such as the relationship of Indigenous peoples to their lands. Moreover, protection of those rights may require 'positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them'.[7] In views expressed through First Optional Protocol Proceedings, the UN Human Rights Committee has used Article 27 to confirm special rights of Indigenous people in order to protect activities central to cultural survival.[8]

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[5] CERD Article 1.

[6] Committee on the Elimination of Racial Discrimination, General Recommendation XXIII (51) concerning Indigenous Peoples, adopted at the Committee's 1235th meeting, 18 August 1997 (UN Doc CERD/C/51/Misc.13/Rev.4), paras 1-2, 6.

[7] General Comment 23 (1994) paras 6.2, 7 UN Doc HR1/GEN/1/Rev1(1994), p. 40. See Pritchard, Native title in international perspective, op. cit., p. 45. See also Michael Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report Jun 1994-Jul 1995*, AGPS, Canberra, 1995, (ATSISJC 1995), p. 13.

[8] *Kitok v Sweden* UNDoc CCPR/C/33/D/197/1985 (1988); *Ominayak v Canada* UNDoc A/45/40 (1990) vol. 2 at 1; *Lansmann v Finland* UNDoc CCPR/C/52/D/511/1992 (1994); and *Lovelace v Canada* UNDoc

The United Nations Human Rights Committee is currently drafting International standards specifically for the recognition of the rights of Indigenous peoples. *The Draft Declaration on the Rights of Indigenous Peoples* though not yet ready for adoption by the General Assembly and State parties, is an indicator of the normative development of the international law towards greater recognition and understanding of the rights of Indigenous peoples. [9]

2.4 Australia's Racial Discrimination Act

As a party to the Convention, Australia has agreed to bring its laws and policies into accord with the Convention.[10] In 1975 the Commonwealth Parliament introduced the *Racial Discrimination Act 1975* (Cth) (*RDA*), which partially implements the Convention.[11] The *RDA* prohibits discrimination, by any arm of government, on the basis of race, nationality or ethnic origin. The only exception to this general rule is in the context of special measures which may be introduced to overcome disadvantage or institutional or structural discrimination. The legislation makes reference to the Convention, in which the types of discrimination are more specifically, although not exhaustively, set out.

In *Mabo v Queensland [No.2]* the High Court of Australia confirmed the existence of native title. At the same time the High Court recognised a power of governments to extinguish native title without consent. The doctrine of extinguishment replaced *terra nullius* with a further basis for dispossession. Moreover, the Court determined that native title did not enjoy the same protections as other interests and was, therefore, a much more vulnerable title than any non-Indigenous title.

All of the judges of the majority agreed, however, that extinguishment of native title without compensation or consent was a breach of the *RDA*.[12] Therefore, governments must exercise their power to reserve, dedicate or otherwise dispose of land in a manner consistent with the *RDA*. That is, at minimum, the same protection, such as Constitutional guarantees of just terms for compulsory acquisition of property, that apply to non-Indigenous interest must also apply to Indigenous titles. Therefore, the *Mabo decision*, while washing away the injustices of past dispossession, identified the *RDA* as a source of protection for native title in the future.

CCPR/C/OP/1 (1988). See Pritchard, Native title in international perspective, op. cit., pp. 45-7 and Douglas Sanders, 'Collective rights', *Human Rights Quarterly*, vol. 13, 1991, pp. 379-80.

[9] UN Doc: E/CN.4/Sub.2/1994/2/Add.1 of 20 April 1994.

[10] CERD Article 2(b).

[11] One aspect that has not been fully or properly implemented is criminal sanctions for incitement to racial hatred. See also Zita Antonios, *Racial Discrimination Act 1975: A Review*, AGPS, 1995, pp.25-26 and Chapter 8.

[12] *Mabo v Queensland [No.2]* (1992) 175 CLR 1, at p. 15, per Mason CJ and McHugh J. See also *Mabo v Queensland [No. 1]* (1998) 166 CLR 186.

In the absence of Constitutional entrenchment of the principle of non-discrimination, however, the paramountcy of the Australian legislature makes it possible for the Commonwealth Parliament to pass laws that are inconsistent with the *RDA*. A later Act will override the earlier Act to the extent of any inconsistency unless the earlier Act is specifically incorporated. The Commonwealth Parliament exercised this power in section 7 of the *Native Title Act 1993* (Cth) in relation to validations, and further limited the operation of the *RDA* with the 1998 amendments.

State parties to international human rights treaties cannot rely on domestic legal and constitutional arrangements to circumvent their obligations under those treaties. The treatment of the *RDA* in this way is clearly in breach of Australia's obligations under Article 2(b), to bring their domestic law into line with the Convention and by its nature presupposes further breaches.

2.5 The Committee on the Elimination of Racial Discrimination

Regardless of the Government's Constitutional power to discriminate, Australia remains accountable to international bodies who monitor States' compliance with human rights standards. The Committee on the Elimination of Racial Discrimination was established in 1969 to monitor the compliance of member States with their obligations under the Convention and to assist State parties to fulfil their obligations under the Convention. The Australian Government recognised the competence of the Committee in 1993.

The Committee considers periodic reports by State parties every two years on the legislative, judicial and administrative or other measures that have been adopted to give effect to the Convention. The Committee can adopt General Recommendations to assist in the interpretation of the Convention, such as General Recommendation XXIII, concerning Indigenous peoples, discussed above. The Committee may also consider communications by a State who is party to the Convention against another party for alleged breaches of those obligations

2.6 Australia's relationship with the Committee

Australia had not provided a periodic report to the Committee since the Ninth Report in 1994.[13] That report was able to point to significant developments in Indigenous affairs, including the High Court's *Mabo* decision, the *Native Title Act* 1993, the Land Fund and proposed Social Justice Package, and the creation of the position of Aboriginal and

[13] It should be noted that Australia's Sixth, Seventh and Eighth reports were also overdue and were combined to be submitted together in 1991. Australia has now provided a combined report for consideration at the March 2000 meeting of the Committee: Tenth, Eleventh and Twelfth Periodic Report of Australia under Article 9 of the International Convention of the Elimination of all Forms of Racial Discrimination (1 July 1992 – 30 June 1998).

Torres Strait Islander Social Justice Commissioner. The Committee acknowledged these positive developments and encouraged Australia to 'pursue an energetic policy of recognising Aboriginal rights and furnishing adequate compensation for the discrimination and injustice of the past.'[14]

In the absence of periodic reporting, and in light of the serious deterioration in Australia's policies toward, and relations with, Indigenous peoples, the CERD Committee instituted very serious action under their Early Warning/Urgent Action procedures. In August 1998 the Committee requested information on the (at that time) proposed amendments to the *Native Title Act,* changes of policy as to Aboriginal land rights and changes to the position of Social Justice Commissioner.[15]

Apart from information provided by the Government, the Committee received substantial submissions from the Aboriginal and Torres Strait Islander Commission (ATSIC), the Human Rights and Equal Opportunity Commission (HREOC), the National Indigenous Working Group (NIWG), and the community group Australians for Native Title and Reconciliation (ANTaR). Others, including individual members of the House of Representatives and the Senate, non-government organisations and private individuals also communicated their concerns to the committee.

The Committee handed down a Decision in March 1999 that was highly critical of the amendments and indicated that Australia would be in breach of its obligations if the proposed amendments were implemented.[16] The Committee requested that Australia address the issues raised as 'a matter of utmost urgency', asking that the *Amendment Act* be suspended and discussions with Indigenous peoples be reopened with a view to reaching agreement on 'solutions acceptable to indigenous peoples and which would comply with Australia's obligations under the Convention.' The Committee has retained the matter on its agenda for its next meeting, in March 2000.

No attempt had been made to delay the implementation of the amendments while the Committee considered them, and they were for the most part in force at the time the decision was handed down. The Australian Government was critical of the Committee's interference in its domestic affairs and dismissed the views of the Committee as uninformed.[17] Apart from this inquiry by the Joint Parliamentary Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, no substantive action has been taken to address the concerns of the Committee.

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[14] Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of All forms of Racial Discrimination*, UN Doc A/49/18 (1994) at para 547.

[15] Report of the Committee on the Elimination of Racial Discrimination, 10/09/98, 53rd session. UN Doc A/53/18, Decision 1 (53) on Australia, ch 2, part B, para 1.

[16] Report of the Committee on the Elimination of Racial Discrimination, 29/09/99, 54th session. UN Doc A/54/18, Decision 2 (54) on Australia, 1331st meeting, 18 March 1999.

[17] See for example the unfortunate inclusion in the *Rebutting the Myths* document, which is aimed at dispelling discriminatory misapprehensions about Indigenous people in Australian society, of the 'myth' that Australia is breaching human rights standards.

3. The Decision on Australia (*TOR A*)

The Terms of Reference of this inquiry request submissions on 'whether the finding of the Committee on the Elimination of Racial Discrimination (CERD) that the *Native Title Amendment Act 1998* is inconsistent with Australia's international obligations, in particular the Convention on the Elimination of all Forms of Racial Discrimination, is sustainable on the weight of informed opinion'. The following discussion outlines the key findings of the Committee and examines each of those findings in greater detail, having particular regard to the views of the Committee and the response by the Government.

3.1 Key findings in relation to the Native Title Act

In its decision, the CERD Committee said that it was not satisfied that Australia had met its obligations under the Convention. The Committee expressed concern over a number of issues specifically concerning the *Native Title Amendment Act 1998* (Cth). Foremost, the Committee questioned whether the *Native Title Act,* as currently amended, is compatible with Australia's obligations under the Convention to act without discrimination. In particular, the Committee noted:

(a) *The 'validation' provisions;*

(b) *The 'confirmation of extinguishment' provisions;*

(c) *The 'primary production upgrade' provisions;*

(d) *The restrictions concerning the right of Indigenous title holders to negotiate non-indigenous land uses.*

The Committee decided that the provisions wound back the protection of title recognised in the *Mabo decision* and protected by the *Native Title Act* to an extent that could not be justified against Australia's international obligations.

Still related to the amendments, the Committee expressed concern over the lack of participation of Indigenous peoples in the amendment process, citing, in particular, Australia's obligations under Article 5(c) to secure the enjoyment of rights of political participation. The Committee drew attention to its General Recommendation on Indigenous peoples which called upon State parties to the Convention to 'recognise and protect the rights of Indigenous peoples to own, develop, control and use their lands, territories and resources'. That Recommendation also required that 'no decisions directly relating to their rights and interests are taken without their informed consent.'

3.2 Validation of 'intermediate period' acts

3.2.1 The amendments to the 1993 Act

The *Native Title Act* 1993 Act contained provisions that validated land dealings since 1975, which may have been invalid because of the operation of the Commonwealth *Racial Discrimination Act* 1975.[18] These validation provisions were discriminatory because they extinguished native title property rights in favour of other property rights. Despite this, the provisions were considered by many Indigenous people to be part of a compromise package for the better protection of native title. To balance these provisions, the Act provided procedural standards for future native title rights. In particular, the 'right to negotiate' over mining and compulsory acquisition proposals and the 'freehold standard' for the protection of native title, which gave native title holders the protections afforded to freehold title holders, regardless of the extent of native title in each particular case. The balance between the discriminatory provisions for validation and the beneficial provisions for protection of native title was the basis for the Committee accepting that the Act was compatible with Australia's obligations under the Convention.[19]

Following the introduction of the *Native Title Act* some state and territory governments continued to deal with land without following the procedures set out in the Act. They proceeded on the basis that native title had not been determined to exist on pastoral lease land and, in their legal opinion, it would be determined that native title had indeed been extinguished.

The *Wik decision* held that native title and pastoral leases could co-exist and that native title would only be affected to the extent that the limited rights granted under a pastoral lease were inconsistent with rights asserted under native title.[20] As a result of the *Wik decision*, those titles issued over pastoral land in breach of the *Native Title Act* were potentially invalid.

The *Amendment Act* retrospectively validated those acts that occurred between the passing of the *Native Title Act* in 1993 and the date of the *Wik decision* which were potentially in breach of the original Act, and allowed state and territory governments to pass legislation to validate grants for which they were responsible.[21] These amendments increased the land area on which native title will not be recognised.

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[18] see note 11 above and accompanying text

[19] see also Australians for Native Title and Reconciliation (ANTaR), Submission by Australians for Native Title and Reconciliation (ANTaR) to the Committee on the Elimination of Racial Discrimination pursuant to their request for information concerning the compatibility of the 1998 native title amendments with Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination. March 1999, p. 7.

[20] *The Wik Peoples v The State of Queensland* (1996) 187 CLR 1.

[21] ss 22A and 22F.

3.2.2 The criticisms from the Committee

The Country Rapporteur Ms McDougall asked the Australian Government:

- whether the *Wik decision* required a case by case assessment of the extent of extinguishment by pastoral leases or other non-exclusive interests, rather than blanket validation as adopted by the NTAA;

- whether the non-native title holders who acquired their rights after the NTAA, and almost in defiance of potential native claims, are rewarded by such blanket validation; and

- whether these provisions are discriminatory because 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.[22]

Moreover, Ms McDougall noted that without countervailing benefits to native title holders there can be no basis for these amendments to be considered 'special measures' within the meaning of the Convention.

3.2.3 Government response

The Government dismissed the concerns of the Country Rapporteur in relation to a case by case analysis of native title under the *Wik decision*. Nonetheless, the comment does highlight the extent to which the 'blanket validation' provisions affected the rights of Indigenous peoples. Under *Mabo* and *Wik* and the procedures set up under the *Native Title Act,* the scope and content of native title and the extent of extinguishment would be determined on a case by case basis. On many pastoral leases the extent to which native title would be affected by coexisting rights may be very limited and native title may be constituted by significant rights. The validation of vast numbers of mining interests granted during the 'intermediate period' masks the detriment to native title that has been caused by breaches of the Act.

In response to the questions from Ms McDougall, the Australian Government representative admitted that the aim of the validation provisions, like other provisions, was to ensure that native title holders would have little or no rights in relation to development on pastoral lease land.[23] It was explained that governments had not expected native title to have survived over so much area therefore, one of the prime

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[22] Report by Ms G McDougall, Country Rapporteur, to the Committee on the Elimination of Racial Discrimination, 54th session, see also Aboriginal and Torres Strait Islander Commission (ATSIC), Aboriginal and Torres Strait Islander Peoples and Australia's obligations under the United Nations Convention on the Elimination of all Forms of Racial Discrimination, A report submitted by the Aboriginal and Torres Strait Islander Commission to the United Nations Committee on the Elimination of Racial Discrimination February 1999, (ATSIC 1999), p. 45-46. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1996 – June 1997,* Commonwealth of Australia September 1997, AGPS, (ATSISJC, 1997), at p. 154.

[23] Australia's Comments on Decision 2 (54) of 18 March pursuant to Article 9 (2) of the Convention.

objectives of the 1998 amendments process was to minimise the scope and impact of native title as far as possible.

3.2.4 Assessment

It is an extraordinary assertion that the granting of titles in the 'intermediate period' between the cut off for validations under the 1993 Act and the decision in the *Wik peoples' case* that disregarded the procedures set out in the *Native Title Act* were made in good faith on the *bone fide* assumption that native title would be proved not to exist on pastoral leases.[24]

It is difficult to see how this could be argued when all legal opinion, regardless of their conclusions, would have to have agreed that that the question had not been resolved. This is particularly the case given *obiter* comments in the *Waanyi decisions*. The characterisation of these acts by the Country Rapporteur as 'reckless' would appear to be an appropriate one.[25] The governments involved disregarded the risk. In 1995 the Aboriginal and Torres Strait Islander Social Justice Commissioner highlighted the risk in his annual report to the federal parliament:

> It is alarming that state and territory governments have limited their use of the future act regime and the protection that it provides to Indigenous peoples on the basis of assumptions about extinguishment.[26]

Any understanding that existed between state and federal governments or political parties could not have been based on sound legal opinion. If, on the other hand, the actions of state and territory governments were based on an understanding that whatever the outcome of the High Court's decisions, the position would be rectified through the amendment process, then the denial of Indigenous peoples' procedural rights under the *Native Title Act* to arbitrarily extinguish significant areas of native title would constitute a very serious human rights abuse.

In evidence before the Committee, the Australian Government suggested that, 'Validation was ... compatible with the Committee's General Recommendation XXIII (51) concerning indigenous peoples since it made provision for restitution and compensation'. To the contrary, compensation is a remedy of last resort in relation to Indigenous peoples' traditional lands. Only where it is impossible to protect or return lands should compensation be considered, and then, it should be considered in the form of land before monetary compensation.

The Government has relied on the continued consideration of the *Native Title Act* as a whole, incorporating the amendments, in order to suggest that there are still 'countervailing measures' to offset the adverse provisions.[27] While this argument may

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[24] ibid., para 7.

[25] Report by Ms G McDougall, op. cit. See also ANTaR, op. cit., pp. 16-17, which also noted the validation provisions that were unrelated to Wik including in relation to stock routes and bores.

[26] ATSISJC 1995, op. cit., p. 158.

[27] Australia's comments, op. cit., para 8.

be convincing before the High Court (though not necessarily),[28] it is not a justification in terms of Australia's international obligations. The Committee described the 1993 Act as 'finely balanced'. Clearly, the validation provisions in the original Act were also discriminatory and some would argue unjustifiable against international standards. The Committee was convinced that, on balance, the legislation would be an advance on the common law position. This view was in no small measure influenced by the support given to the Act by Indigenous peoples.

It is no justification to suggest that the 1998 amendments only mirrored the 1993 Act and were perhaps even 'much more limited in scope' because it related to a shorter time frame and only to leasehold land.[29] As the Social Justice Commissioner noted, 'ignorance of the existence of native title is one thing, denial of its existence is another'.[30] The validation of titles issued prior to the *Mabo decision* could be seen as an appropriate resolution to the difficulties raised by the belated recognition of native title in Australia. Once native title had been recognised in Australian law, however, attempts to deny its existence and constrain its impact are clearly prejudicial to Indigenous peoples' rights.

Regardless of the *bone fides* of the governments in granting the interests, the subsequent validation of those provisions remains a discriminatory act because, in the face of a conflict, Indigenous peoples rights and interests were extinguished in favour of the interests of others. [31]

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[28] The High Court of Australia, in the *Hindmarsh Island Bridge Case* (*Kartinyeri v The Commonwealth* (unreported decision of the High Court of Australia, A29/1997, 1 April 1998; [1998] HCA 22)), considered Government power to amend legislation implemented under the 'races power' (s51(26) of the Australian Constitution) that would adversely affect the legislative rights of Indigenous peoples. In that case legislation allowing the building of the Hindmarsh Island bridge was found to be a valid exercise of Commonwealth legislative power. However, members of the Court distinguished between legislative rights and common law rights. Two of the six Justices, Gaudron J, at paras 44-5 and Kirby J, paras 152 ff., found that the Commonwealth's power to make laws with respect to Aboriginal people was limited to beneficial laws, while two other judges, Gummow and Hayne JJ, at para. 82, found that the constitutional power was limited by the power of the courts to overturn legislation that showed a 'manifest abuse'. See also Gaudron J, paras 36-42 and Kirby J, para 117, point 3, and paras 159 ff. The remaining two judges, Brennan CJ and McHugh J, found it unnecessary to decide.

[29] Australia's comments, op. cit., para 6.

[30] ATSISJC 1997, op. cit., p. 62.

[31] This advice was given in evidence received by this Committee in 1997 regarding the Amendments. See for example, Appendix 4, Third Minority Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Parliament of the Commonwealth of Australia, October 1997. See ATSIC 1999, op. cit., pp. 45-6.

3.3 Confirmation of extinguishment

3.3.1 The Amendments to the 1993 Act

Under the *Native Title Act 1993*, the development of native title was left largely to the common law, particularly in relation to further areas where native title may be recognised and where native title may co-exist with other interests. The 'confirmation of extinguishment' provisions of the *Native Title Amendment Act 1998* sought to deem which titles and grants are for exclusive possession and which are non-exclusive, and thus whether native title has been completely or partially extinguished. The amendments provided for states and territories to enact legislation confirming extinguishment on these tenures (s 23E). These provisions pre-empt the development of the common law by the courts in determining which titles and grants extinguish native title. The *Amendment Act* made provision for compensation to be payable if it was shown in the courts that the acts deemed exclusive were in fact capable of coexisting with native title but native title would not be recognised (s 23J).[32] In addition, extinguishment under these provisions was defined as 'permanent extinguishment', that is, native title could not be re-recognised in the future (s 237A).

3.3.2 The criticisms from the Committee

The submissions to the Committee disputed the Australian Government's depiction of the confirmation of extinguishment provisions as merely a confirmation of the common law. They argued that the provisions extend extinguishment beyond the coverage of the common law, not least because the categories of titles listed are so general that a wide range of acts throughout history which previously did not extinguish native title are now able to do so.[33] Moreover, the provision for compensation in the event that the scheduled interests are found to be compatible with native title under the common law, but denial of any reconsideration the legislative extinguishment, is argued to illustrate that:

> ... the intention of the Commonwealth Government is not to 'confirm' the common law position, but to ensure extinguishment of native title by the scheduled interests, whether or not in accordance with the common law.[34]

Reporting to the Committee, the Country Rapporteur Ms G McDougall went further, expressing concern that the provisions deny the possibility of a reversion to native title interests following the end of an exclusive possession lease. Ms McDougall again indicated concern that the case by case assessment of the existence and extent of native

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[32] Supplementary Explanatory Memorandum to the Native Title Amendment Act 1998, p. 12.

[33] 'These grants include freehold and residential, commercial, community purposes and some agricultural leases, and a Schedule of specific types of such leases'. Additional Information pursuant to Committee Decision : Australia. 22/01/99. UN Doc CERD/C/347, para 38. One example is said to be the Queensland Grazing Homestead Perpetual Leases which cover 10% of Queensland and may have been capable of sustaining co-existing native title rights.

[34] ATSIC 1999, op. cit., p. 43.

title, including potential co-existence was no longer possible in relation to these tenures.[35] Also, Ms McDougall noted the acknowledgement that the provisions may extend beyond mere codification of the common law implicit in the compensation provisions.[36]

Ms McDougall's report also highlights the responsibility of Australia to its international obligations, noting that to simply argue that the provisions are a 'codification of common law' is not sufficient in circumstances where the common law of native title is itself discriminatory.

3.3.3 Government response

The Australian Government representative before the Committee pointed to section 47 of the *Native Title Act,* as amended, which would allow recognition of native title over lands that had once been exclusive possession tenures. The representative also noted the Land Fund which is aimed at returning traditional lands by purchase where native title can not be established.[37] While these provision are immensely important, they do not overcome the extinguishing effects of the confirmation and validation provisions.

In its submission to the Committee, the Australian Government stated that 'these confirmation provisions seek to reflect the common law'.[38] The Government's defence of the confirmation provisions maintained that they were merely confirmatory provisions and that they were not therefore in contravention of the Government's responsibility to 'facilitate restitution of rights to indigenous people where possible and prevent new extinguishment of their rights'.[39] At the same time, however, the Government representative acknowledged that the common law was discriminatory.[40] Moreover, the stated aim of the aim of the provisions was to provide certainty to non-Indigenous interests, in particular to freehold and leasehold interests rather than await the case by case development of the common law.[41]

3.3.4 Management of inland waters and airspace (s 24HA)

Although not specifically referred to in the Committee's decision or in the Country Rapporteur's report, the amendments also 'confirm' the Government's power to authorise the use and management of water, including aquatic resources, and airspace. A grant which authorises the taking of water or fish or to use the airspace above native

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[35] Report by Ms G McDougall, op. cit.. See also, National Indigenous Working Group on Native Title (NIWG), *Indigenous Peoples – Australia, Native Title, and Evolving International Law*, paper prepared by and presented with consent of Professor Gillian Triggs, 1999, p. 21.

[36] Report by Ms G McDougall, op. cit.

[37] Australia's Comments, op. cit., para 10-11.

[38] Additional Information op. cit., para 7.

[39] Australia's Comments, op. cit., para 13.

[40] ibid., para 10.

[41] Additional Information op. cit., para 37. See also Australia's Comments, op. cit., para 9.

title land is, therefore, a valid grant and suppresses native title to the extent of any inconsistency. The National Indigenous Working Group noted that:

> While the principle of non-extinguishment applies and native title holders are entitled to compensation, native title holders will not be able to take full part in the management and exploitation of resources, including fisheries.[42]

As a result, rights to the waters and resources on native title land can be granted to non-Indigenous interests without the consent of, or consultation with, the native title holders.[43] Indigenous peoples in Australia continue to call for greater involvement in the management and conservation, as well as the harvesting of water resources on their traditional land, particularly where they hold title over that land.[44]

The 1993 Act provided native title holders with some protection in this regard by applying the 'freehold test' through which native title holders would be given the same rights as a freehold title holder. While this formal equality provision did not give adequate protection to the special relationship of Indigenous peoples to their land, the amendments further reduce protection under the law.[45]

3.3.5 Reserved land or land leased to Crown authorities

Again, though not mentioned in the decision or by the Rapporteur, the changes to the provisions relating to reserved land and land leased to the Crown adversely affect native title rights. This issue was raised by ANTaR in its submission to the Committee:

> These provisions are formally discriminatory. Land held under Crown-granted titles may not simply be 'reserved' and used for other purposes without first being compulsorily acquired. Nor may it be granted on other titles without prior compulsory acquisition. Reservation of land or its grant to Crown authorities for other purposes deprives native title holders of the procedural rights associated with compulsory acquisition.[46]

The amendments provide for native title holders to be notified of, and permitted to comment on, proposed public works and national park management plans and provision is made for compensation where native title is affected. Such reservations, however, may impair or even extinguish native title in circumstances where native title holders have had no meaningful involvement in the decisions affecting their land.

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[42] NIWG 1999, p. 22.

[43] Native title holders will have right to be notified and to make comment in these circumstances.

[44] See declaration from the National Sea Rights Conference (ATSIC) Hobart Tasmania December 1999.

[45] On this formal equality test see ANTaR, op. cit., p. 26.

[46] ANTaR, op. cit., p. 28.

3.3.6 Assessment

It is an obligation upon States not only to prevent further extinguishment but also to facilitate restitution and remedy the discriminatory aspects of the law. The submissions and the report of the Country Rapporteur again point to the discriminatory treatment of native title in the amendments, which, while they may reflect the common law, also extend the discriminatory treatment of native title under it.[47] This is achieved by treating Indigenous peoples titles as subordinate to the interests of non-Indigenous landholders. The amendments particularly impair Indigenous interests further, while non-Indigenous interests are given greater security and government powers are extended.[48]

These provisions attempt to arrest the development of native title and to secure the powers that governments have assumed over Indigenous peoples' land. It does not matter that the government or grantees thought they had the power or the right to ignore the interests of Indigenous peoples in their land. That is not a justification for continuing to ignore the rights now recognised under the law. Maintaining historic and institutional discrimination in this way is a failure of Australia's obligations under international law to eliminate discrimination.

Australia's defence of these provisions before the Committee was unconvincing. The provisions take away valuable legal rights of native title holders to exercise a degree of control over and interest in developments in relation to their property. Far from preventing extinguishment these provisions promote it to the detriment of native title holders and native title holders only.

To point to other provisions which may allow recognition of native title on other forms of tenure does not excuse the discrimination in this instance. Nor can notification and compensation provisions remedy the discriminatory aspects of the amendments. The elimination of discrimination is a positive duty which often requires greater measures than those prescribed by domestic legal and political arrangements to meet that minimum standards required by international law.

3.4 Primary production

3.4.1 The Amendments to the 1993 Act

Prior to the amendments, the rights of many pastoral leaseholders were not specified in their leases and were generally simply stated to be 'for pastoral purposes', or the like. The activities allowable under such pastoral leases were limited to grazing and associated activities, such as building dams and fences. The *Native Title Act 1993*

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[47] The discriminatory aspects of the common law are discussed further at 3.6.2 below.

[48] Report by Ms G McDougall, op. cit.. See in particular arguments regarding the breach of formal equality in these provisions in ANTaR op. cit., p. 17.

allowed the renewal of pastoral leases without negotiation with native title holders provided there was no greater proprietary interest being granted. The 'primary production' provisions make it possible for the holders of non-exclusive pastoral or agricultural leases to increase their activities to the level of 'primary production'. These upgrade provisions allow for a diversity of activities such as: horticulture, aquaculture, forestry, and farm tourism (ss 24GA, 24GB). The amendments also make it possible to cut timber or to extract gravel or rock (s 24GE).[49].

The new range of activities can take place regardless of the effect on any co-existing native title and without negotiation or consultation.[50]

3.4.2 The criticisms from the Committee

In the report of the Country Rapporteur, Ms McDougall expressed concern about the effect that these activities might have on co-existing native title. While the 'non-extinguishment principle' applies, the rights of pastoralist 'prevail' over native title rights.[51] Native title is, therefore, suppressed and may be impaired to an extent that would effect an extinguishment. This is possible because the upgrade in the intensity of land use by these activities will affect the native title holders ability to exercise their native title and maintain the requisite connection with the land. [52]

In its submission, ATSIC argued that under Australia's international obligations:

> Compensation is neither adequate nor sufficient to militate against the discrimination involved in the systematic subordination of native title rights and interests in favour of third parties.[53]

There was concern that upgrades could occur without the consent of the native title holders thus returning native title holders to a position of inequality by granting unwarranted preference to the interests of non-native title holders.[54]

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[49] The provisions do not allow upgrade to freehold or exclusive possession leases, which would extinguish native title completely and permanently. State and territory legislation authorising these activities must have been in place prior to 31 March 1998.

[50] If the activity is forestry, aquaculture or horticulture then notification may be required (s 24GB(9)).

[51] Additional Information, op.cit., para 49.

[52] See Aboriginal and Torres Strait Islander Social Justice Commissioner (ATSISJC), Submission by the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner of the Australian Human Rights and Equal Opportunity Commission, Response to the request for information by the United Nations Committee on the Elimination of Racial Discrimination in relation to Decision 1(53) concerning Australia: CERD/C/53/Misc.17/Rev.2, 11 August 1998, HREOC, 1999, (ATSISJC 1999) p. 22.

[53] ATSIC 1999, op. cit., p. 47.

[54] Report by Ms G McDougall, op. cit. See also, ATSISJC 1997, op. cit., p. 93. It was again highlighted that only native title rights are adversely affected by the amendments. There will be no such impact on comparable co-existing interests such as easements, *profits a prendre,* agistment rights and mining development rights. Note also the concern raised over native title holders inability to prosecute 'unauthorised' diversification were it affects native title, ANTaR, op. cit., pp. 23-4.

The effect was highlighted by the changes to the position in Western Australia, for example. In this instance, though some diversification of pastoral lease activities was possible under that state's legislation, the 'freehold standard' in the *Native Title Act 1993* inhibited their ability to use these powers where co-existing native title could be adversely affected.[55] The freehold standard prohibited a grant or variation that may affect native title if that same act could not be done over freehold land.[56] The amendments allowed the state government to authorise a variation to a pastoral lease in Western Australia without negotiation with the native title holders. The amendments also allowed the state governments to pass legislation to increase the range of activities that would be allowable where such legislation would have otherwise breached the *Racial Discrimination Act*.[57]

3.4.3 Government response

The Australian Government representative explained to the Committee that the amendments 'aimed to achieve a balance between the rights of native title-holders and the rights of pastoral leaseholders'.[58] It was implied that the new provisions clarified rather than extended the rights of pastoralists, although compensation provisions were also part of the new regime.

3.4.4 Assessment

The primary production provisions are one of a number of future acts that will be valid under the amended *Native Title Act*, regardless of their affect on native title rights and interests. They will not require consent or negotiation with native title holders.

The suggestion that this balances the interests of competing groups is a misleading description when the 'balancing' involves derogation from the rights of native title holders and the augmentation of the rights of leaseholders. Moreover, international standards and jurisprudence on human rights do not allow a 'balancing' of interests by a State party to a treaty where that balancing results in derogation from fundamental human rights. The central tenet of the Convention is non-discrimination in the enjoyment of human rights, and it is the fundamental obligation for the treaty party to guarantee those human rights.[59]

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[55] See ibid., p. 23.

[56] ibid., pp. 23-4. Compensation is not provided for under this specific provision of the Act (s 24GC).

[57] ATSISJC 1999, op. cit., pp. 20-1, explained, s 24GB requires that there be state legislation in place before 31 March 1998 authorising activities at primary production levels allows amendments to the *Land Administration Act 1997* (WA) introduced in March 1998. The date at which primary production activities could be authorised by state legislation was moved from 23 December 1996 (the date of the *Wik* decision) to 31 March 1998 (to accommodate the passage of amendments to the *Land Administration Act (WA)*.

[58] Australia's Comments, op. cit., para 14.

[59] The fundamental problem with this idea of balancing competing interests is further discussed at 4.4, below.

3.5 Right to Negotiate

3.5.1 The Right to Negotiate under the 1993 Act

The 'right to negotiate' provisions of the 1993 Act provided procedural rights for both native title holders and applicants in relation to future acts that proposed to create a mining interest or compulsorily acquire land to confer an interest on a third party. The government was required to notify native title parties of any such proposal, who then had two months in which to respond. All the parties would then have four to six months to negotiate, in good faith, to reach an agreement about the proposed grant. [60]

The procedural rights were included in the Act as part of an overall strategy for the comprehensive identification and registration of native title. There was a need for procedural rights of this kind for a number of reasons. For native title to be meaningful there must be recognition that Indigenous peoples have the right to exert some control over development of their land and the use of resources from that land. In addition, it was recognised that there was a need for a clear process for all parties to follow in negotiating future development.

There was also a need to apply these provisions in relation to native title that had not yet been recognised because, most importantly, native title exists prior to identification and registration. Also, the process of identification and registration was always going to take considerable time. Processes were required in order to reduce the extent to which applications for native title are affected when reacting to proposed development. Without such provisions reliance on other legal remedies may result in delays for development (from the use of injunctive relief etc). Moreover, for development to go ahead prior to the identification of native title would result in further encroachment on Indigenous peoples rights to land. Such loss of native title could not be adequately compensated after the fact.

For these reasons Indigenous peoples have resisted any diminution of the right to negotiate provisions

3.5.2 Changes under the *Native Title Amendment Act 1998*

The curtailing of the right to negotiate was central to the platform of the 1998 amendment package. The *Native Title Amendment Act 1998* made significant changes to the right to negotiate provisions, reducing the scope of the provisions in some instances, removing them altogether in relation to some future acts and replacing them with lesser procedural rights in relation to others.

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[60] Even here they were by no means a veto on development. The failure of negotiations could not prevent the grant development. Where agreement could not be reached within the specified timeframes, arbitration was available and ultimately, there were ministerial override provisions. An expedited procedure also existed for proposals that were deemed not to interfere with community life or significant sites.

- Procedural rights have been removed from compulsory acquisition for private infrastructure projects not associated with mining (s 26(1)(c)(iii)) and from some opal and alluvial tin or gold mining (ss 26B and 26C) and rights to mine created by renewal or extension and they no longer apply in relation to the intertidal zone;

- A lesser right of consultation, for the purposes of minimising the impact of the act on native title, applies for private infrastructure projects associated with mining and compulsory acquisition for a third party in a town or city;

- An alternative consultation scheme may be introduced in relation to exploration where acts are 'unlikely to have a significant impact on the particular lands or waters concerned' (s 26A).[61]

Where the right to negotiate no longer applies, the *Amendment Act* prescribes that the 'freehold test' must still apply. That is, native title holders and registered claimants must enjoy the same procedural rights that would have been enjoyed had they held ordinary title, such as freehold.

In addition, the *Amendment Act* provided for state governments to introduce their own future acts regimes to replace the right to negotiate provisions, but with significantly impoverished minimum standards. These regimes may be introduced to apply to Crown land, including pastoral leases, reserved land, national parks and areas in a town or city (s 43A). The criteria are based on a process of notification, consultation and a right to object and to be heard by an independent body (ss 24MD(6A) and (6B)). There is no duty on parties to act in good faith, however, and the issues that can be considered by the independent body are limited.

The distrust by Indigenous peoples of state governments having the power to deal exclusively with native title is well documented, as are the positions in relation to native title of various state governments. This concern has been echoed in the Commonwealth Parliament where the Senate has been reticent to approve state regimes under the 'disallowable instruments' safeguard without continued Parliamentary oversight.

The amendments to the right to negotiate were strongly criticised in submissions to the CERD Committee and were picked up by the Committee and by the Country Rapporteur. Ms McDougall highlighted the importance of the right to negotiate and argued that the restriction of the application of the provision would seriously affect the ability of native title holders to protect their property rights against the impact of exploration and other mining activities.

The responsibility for the standards introduced at a state or territory level, however, remain the ultimate responsibility of the federal Government in relation to its international obligations. The minimum standards set down for state regimes may fail to meet those international standards if they fail to adequately protect native title rights or fail to give Indigenous peoples meaningful control over development on their lands.

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[61] The right to negotiate is also effectively removed altogether from acts related to primary production activities and titles were extinguishment is confirmed, as discussed above.

3.5.3 Government's response

The Australian Government argued before the Committee that the changes to the right to negotiate were required because the original provisions were based on the assumption that very little land would be subject to native title, in particular, that pastoral lease land would not be affected.[62] In its recent periodic report to the Committee, Australia has maintained the fiction that:

> At the time the Act was passed, it was assumed, based on the Mabo decision itself, that native title had been extinguished on leasehold land; and that the processes of determining native title would relatively soon result in a register of native title interests enabling ready identification for future dealings over native title land.[63]

The Government representative also argued that the fact that common law gives precedence to the rights of pastoral leaseholders provides justification for providing the same or lesser procedural rights in the face of development.[64]

The 'freehold test' was highlighted as an example of applying a non-discriminatory standard. The amended procedures are purportedly based on ensuring 'greater parity' between the rights of native title holders and the rights of other land holders.[65] This equation of rights is of serious concern with respect to Australia's obligations under international standards of equality and non-discrimination.

The Government suggested that one purpose of the amendments was to 'urge' parties to reach agreement and that this task was made easier by reducing the bargaining position of the native title holders.[66] To the contrary, however, the 'right to be consulted' may provide insufficient incentive to other parties to negotiate with native title holders. Indeed, it may have the opposite affect to that suggested by the Government.[67]

Finally, the Government argued that the right to negotiate was 'of a special nature' and Commonwealth parliament had the discretion to withdraw that right over exploration and mining or pastoral lease land. This implies that the right to negotiate provisions were not necessary for the protection of native title holders rights, and that Indigenous peoples unique ties to the land were adequately protected by the right to be consulted and to object.[68]

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[62] Australia's Comments, op. cit.

[63] Tenth, Eleventh and Twelfth Periodic Report, op. cit., para 303.

[64] Summary of record of the 1324th meeting: Australia, 07/10/99 CERD/C/SR.1324, para 15.

[65] ibid., and Additional Information, op. cit.

[66] ibid.

[67] ATSISJC 1999, op. cit., para 85.

[68] ibid., para 16.

3.5.4 Registration test

The Country Rapporteur, Ms McDougall, refers to the registration test with concern that the high threshold '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.'[69] The Australian Government explained that some amendment had been required to put in place a more rigorous registration test. [70] This was an opinion that was not necessarily disputed by Indigenous people.[71] The test laid out in the original *Native Title Act* had been interpreted by the Courts as providing little barrier to the registration of a claim and the almost automatic access to the procedural rights under the Act.[72] However, the amendments created a significant hurdle for Indigenous claimants including very onerous timelines and levels of proof and authorisations (ss. 190A-D).

Failure to pass the registration test does not, however, result in the failure of the application. Indeed, it has been argued that some of the requirements being imposed by the Registrar under the registration test are greater than those required to prove native title under the common law. Therefore, legitimate native title rights may be impaired in the interim period during which native title claimants are denied the procedural rights under the Act. [73]

3.5.5 Indigenous Land Use Agreements

Indigenous Land Use Agreements provisions were introduced to replace the general provision (s 21) allowing agreements to surrender native title. The new provisions were aimed at agreements between the resources industry and Indigenous communities over particular projects.[74] These provisions were seen as a positive development because they provided a regime for registration of agreements and created greater certainty for non-Indigenous interests in negotiations by providing more binding agreements.[75] The removal of the requirement to have government involved in agreements in some instances was also seen as a positive development.

Even where these provisions were supported, the Committee was cautioned that they do not balance the negative and discriminatory derogation from native title throughout the *Amendment Act*.[76] Specifically, HREOC suggested that the changes to the right to

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[69] Report by Ms G McDougall, op. cit.

[70] Additional Information, op. cit.

[71] See National Indigenous Working Group on Native Title, *Co-existence – Negotiation and Certainty: Indigenous Position in response to the Wik Decision and the Government's Proposed Amendments to the Native Title Act 1993*, 22 April 1997.

[72] *Northern Territory v Lane* (1995) 138 ALR 544, *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 (*'Waanyi'*). For a discussion see HREOC, submission pp. 10-11

[73] See also ATSIC 1999, op. cit., p. 49

[74] Additional Information op. cit.

[75] See NIWG, *Co-existence* op. cit., also ANTaR, op. cit., p. 33, and ATSISJC 1999, op. cit., p. 26

[76] see ANTaR, op. cit and ATSISJC 1999, op. cit.

negotiate would adversely affect the willingness of industry to negotiate with native titleholders who have been placed in a less powerful negotiating position. [77]

There is also potential under the new provisions for government to take a less central role in agreement making. While this is often seen as one of the advantages of the amendments, it may also shift the burden of responsibility for negotiating economic and political autonomy to industry when many of these issues should be dealt with at a government level, because, in part, there are some matters that only government can deliver. The original provisions made passing reference, in s 21(4), to regional and local agreements. It was hoped that this would provide a basis for negotiating comprehensive regional agreements. Such agreements are less likely under the new regime with the change in emphasis. At the heart of the change in emphasis is the view of native title as a competing land interest on the same level as non-Indigenous property interests in mining or farming, for example. This is in contrast to a view of native title as a reflection of Indigenous peoples autonomy and authority to make decisions about their traditional lands.

3.5.6 Assessment

The right to negotiate provisions were seen as a positive aspect of the negotiations over the 1993 Act. The provisions were, therefore, seen as a key part of the compromise that was developed between government, Indigenous and industry parties. In particular for Indigenous peoples, the positive procedural provisions were seen as a direct compromise in light of the potentially large losses of native title under the validation provisions.

Rapporteur McDougall stated that the right to negotiate was a major concession between the interests of Indigenous and non-Indigenous peoples in the 1993 Act, and a major reason why the Act was accepted as complying with Australia's obligations under the Convention.

It is wrong to suggest that positive measures for the protection of Indigenous peoples' rights are discriminatory and should be wound back to achieve 'greater parity' with other title holders. Indeed, it has been argued that 'positive measures to protect the unique and vulnerable nature of native title are a reasonable and proportionate means to achieve substantive equality, and are required as a matter of international obligation to safeguard Indigenous cultural rights'.[78]

The right to negotiate is not a special privilege but are measures necessary to protect the unique character of native title, including the need for native title holders to exercise a level of control over access to the use of their land.[79] The right to control access is a key right of holders of property. The right to negotiate, it could be argued, is merely a poor legislative reflection of the right to exclusive possession enjoyed by native titleholders as a fundamental incidence of their title.

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[77] ATSISJC 1999, ibid., p. 25.

[78] Pritchard, Native title in international perspective, op. cit., p. 42.

[79] ibid., p. 44.

Arguably, it was the intention of the federal Government to reduce the capacity of Indigenous peoples to protect their property rights against the impact of exploration and mining. Unfortunately this approach fails to meet the standards expected of Australia in their treatment of the rights of Indigenous peoples.

The ANTaR submission illustrates how the provisions offend the standards of equality and non-discrimination. First, where the changes leave native title holders in an inferior position to other property holders, they offend the principle of formal equality. In addition:

> By dismantling one of the key mechanisms in the original Act which sought to protect the different relationship indigenous peoples have to their land, these changes also fundamentally undermine the standard of substantive equality.[80]

Again, whether or not the amendments, or the provisions as amended meet the requirements of Australia's constitutional or common law standards does not mean that they meet the standards of equality and non-discrimination expected of Australia under international law. Australia cannot choose the degree to which rights will be recognised. Positive measures to protect the distinct rights of Indigenous peoples are required by international law.

3.6 Understanding the Decision of the Committee

3.6.1 The Concept of Equality

The provisions of the Convention are informed by jurisprudence of equality and non-discrimination that requires a more contextualised understanding of equality and what is necessary to secure the enjoyment of human rights for Indigenous peoples. In its General Recommendation XIV (1993) the Committee explained that a distinction for the purposes of Article 1 of CERD 'is contrary to the Convention if it has either the purpose or effect of impairing particular rights or freedoms' or has an 'unjustifiable disparate impact upon a group distinguished by race, colour, descent or national or ethnic origin'.

This relies on three kinds of measures of equality. The first is formal equality which requires that human rights be enjoyed without arbitrary or unjustified distinction. The second embodies the positive duty to eliminate systematic, institutionalised or historical disadvantage.[81] The third is the concept of substantive equality, which recognises that

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[80] See ANTaR op. cit. This flawed conception of equality in the governments approach is discussed at 3.6.1, immediately below.

[81] Overcoming systemic disadvantage is a positive duty. Article 1(4)) specifically refers to 'special measures' or affirmative action aimed at advancing disadvantaged groups or redressing past injustice or systematic or institutionalised discrimination for the purposes of ensuring the equal enjoyment of human rights.

differential treatment is not necessarily discriminatory if it is legitimate, that is recognising legitimate difference or distinct rights.

The *Native Title Amendment Act* 1998 focused on formal equality, treating all interests the same without differentiation.[82] Not only did this approach fail to understand what constitutes a relevant difference to be taken into account it even failed the standards of formal equality. Justice Gaudron explained the idea of equality before the law:

> It requires each of us to analyse what it is we are doing and for what reason. Only when that is done can we be sure whether we are or are not proceeding on the basis of a distinction. If we are, we must ask whether it is a relevant distinction and if so, what consequences properly attend it; if we are not, we must ask whether the failure to distinguish is not itself, the cause of injustice, either because it continues the effects of past discrimination or because it compounds underlying inequality.[83]

These themes were picked up in the 1994 Australian Law Reform Commission Report on Equality Before the Law.[84] The report discussed the harm caused by blanket application of a formal equality approach because it assumes that equal treatment will achieve equality without regard to the standard against which treatment is measured. Moreover, formal equality cannot accommodate the many experiences for which there is no comparison in that dominant standard. Nor can formal equality address institutionalised discrimination and disadvantage.[85]

To confuse the concept of equality with sameness is to use equality and freedom from discrimination as a 'guise for assimilation'.[86] Barry Fewquandie, giving evidence to this Committee explained:

> If equality is about making me have the same values and the same priorities, then I do not want it. I want access and equity. If the end result is being exactly like you whitefellas, then I do not want it. I do not believe that is what our people want.
>
> We have a separate identity . . .[87]

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[82] Although the compliance of the *Amendment Act* with this formal equality standard has also been questioned in many instances. See ANTaR, op. cit.

[83] Justice Mary Gaudron, 'Equality before the law with particular reference to Aborigines', *Judicial Review*, vol. 1(2), 1993, p. 88.

[84] Australian Law Reform Commission, *Equality Before the Law: Justice for Women,* ALRC Report No. 69, ALRC, Sydney, 1994. Chapter 3, titled 'Understanding equality' specifically concerns the different models of equality. The report outlines the 'contemporary approaches' to equality as (1) the formal equality approach; (2) the differences approach; and (3) the subordination/domination approach.

[85] ibid., paras 3.8-3.9.

[86] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report, Jan-Jun 1994*, AGPS, Canberra, 1995, p. 63.

[87] Barry Fewquandie, evidence to the Joint Parliamentary Committee on Native Title, Mount Isa, *Parliamentary Debates*, 4 August 1994, p. 374.

The principle of equality rejects uniformity. Instead, 'it proceeds on the basis that artificial and irrelevant distinctions must be put aside, but that genuine and relevant distinctions must be brought to account'.[88] To treat people in relatively different positions equally is therefore as arbitrary as treating those in relatively equal positions differently.[89]

The principle of equality proscribes 'illegitimate' differentiation and some will argue against the distinct rights of Indigenous peoples on the basis that differentiation founded on race is never a legitimate basis for the distribution of rights. 'Race' is not the basis upon which Indigenous peoples' rights are asserted. Indeed 'race' is a negative term that seeks to draw distinctions between peoples on the basis of cultural or biological characteristics. For Indigenous peoples, it was 'racism' that led to the denial of the rights of peoples to respect for their sovereignty and independence.[90] The claims of Indigenous peoples demand equality of respect as peoples not different treatment based on biology, culture or 'race'.[91]

As with any Western legal concept, there is a danger of individualising the concept of equality. It has been argued, 'inherent, unique characteristics which impact on a group's enjoyment of human rights *must* be adequately accommodated in order for that group not to be discriminated against'.[92]

This approach is supported by the decision in *Mabo v Queensland [No. 2].* There, the High Court founded the recognition of native title, a collective right, and the recognition of Indigenous land law on the concepts of 'justice and human rights (especially equality

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[88] Gaudron, op. cit., p. 88. Gaudron suggested that this is really nothing new, it merely reflects the duty to act judicially which has always required that proper weight be given to relevant factors. Indeed, Gaudron, p. 88, argued, 'it is the duty to act judicially which is the cornerstone of equality before and under the law'. This approach echoed comments by Deane and Toohey JJ in *Dietrich v The Queen* (1992) 177 CLR 292, at p. 486. See also Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law,* ALRC Report No. 31, AGPS, Canberra, p. 117.

[89] Geoffrey Walker, *The Rule of Law*, Melbourne University Press, Collingwood, 1988, p. 26.

[90] In particular, scientific racism. See also Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Clarendon, New York, 1995, pp. 59-60.

[91] See Warwick McKean, *Equality and Discrimination Under International Law*, Oxford University Press, New York, 1993, p. 288. Michael Dodson, Discrimination, special measures and the right to negotiate, paper presented to the HRC/AIATSIS Racism Conference, 21 February 1997, pp. 5-6, and Patrick Macklem, 'Distributing sovereignty: Indian nations and equality of peoples', *Stanford Law Review*, vol. 45, 1993, pp. 1356-7. See also *Western Australia v Commonwealth* (1995) 183 CLR 373, at pp. 483-4. Contrast *Gerhardy v Brown* (1985) 59 ALJR 311.

[92] Dodson, Discrimination, special measures ..., op. cit., p. 6 (original emphasis), see also p. 5. See also McKean, op. cit., p. 288; and Macklem, op. cit., p. 1362. See also ALRC, Report 31, op. cit., p. 117. In contrast, Kymlicka, op. cit., p. 109, argued that substantive justice measures are warranted to ensure individuals and minorities are free from disadvantage. See also Ronald Dworkin, 'What is equality? Part II: Equality of resources', *Philosophy and Public Affairs*, vol. 10(4), pp. 283-345; and John Rawls, *A Theory of Justice*, Oxford University Press, New York, 1971, p. 96. Webber, op. cit., pp. 151-2, argued that:

> Our [non-Indigenous] standard of equality has to be sufficiently supple that it can take into account the fact that the justice system already treats Aboriginal people differently. It treats them worse. In order to treat them equally we have to recognize their difference

before the law)'.[93] This was not an attempt to treat Indigenous peoples the same but to show equal respect for their rights as peoples and equal respect for their way of life.

This understanding of equality was reinforced in *Western Australia v Commonwealth (The Native Title Act case)*.[94] The High Court accepted that a law protecting Indigenous peoples' unique rights over land was not merely a 'special measure' to overcome disadvantage. It was not discriminatory because the distinct identity and status of Indigenous peoples were relevant distinguishing characteristics.[95]

The measures for protection and recognition of native title are not necessarily 'special measures' under the Convention. In accordance with the principles of equality, they are not discriminatory simply because they differentiate Indigenous peoples on the basis of their relationship with the land.[96] To the contrary, these measures are necessary to ensure the enjoyment of rights. The fact that native title recognises distinct rights to property does not make abrogation of those rights more acceptable. As distinct rights, they do not inhere as a result of discrimination, but, because of Australia's history of discrimination against Indigenous peoples, they do require specific protection against derogation. The *Native Title Amendment Act 1998* did not meet this standard.

To understand equality is to understand the importance of difference and of maintaining a distinct identity. The recognition and protection of the distinct rights of Indigenous peoples is implicit in the international legal concept of equality and is often required to achieve equality and non-discrimination.

3.6.2 Native Title at common law

In June 1992 in the case of *Mabo v Queensland [No. 2]* a majority of six judges of the High Court agreed that traditional Indigenous titles to land continued after the colonisation of the continent with the recognition and protection of the common law.[97] The source of that title lies outside the common law, in the traditional connection to the land, and its content is determined in each case by the nature of the traditional laws and customs of the native titleholders.

The Court dismissed the earlier doctrine, which denied the rights of Indigenous peoples based on a supposed scale of social organisation, as unjust and discriminatory. The theory was acknowledged as 'false in fact and unacceptable in our society'.[98] The High Court also rejected the defendant's argument that all interests in land were abolished upon the acquisition of sovereignty, except those specifically recognised by the

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[93] *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at p. 30, per Brennan J, also p. 58.

[94] (1995) 183 CLR 373.

[95] ibid., at pp. 483-4. Compare Brennan J in *Gerhardy v Brown* (1985) 59 ALJR 311, at p. 339, where it was argued that 'special measures may be necessary to achieve equality between groups'. See generally, Dodson, Discrimination, special measures..., op. cit., p. 10.

[96] Contrast the High Court's approach in *Gerhardy v Brown* (1985)) 159 CLR 70.

[97] (1992) 175 CLR 1.

[98] ibid., at p. 40, per Brennan J, and per Toohey J, at pp. 182, 187.

Crown.[99] *Mabo's case* affirmed the inherent nature of Indigenous rights, based in prior sovereignty.[100] Therefore, they are neither contingent upon nor sourced from the Crown. Instead, it is an acknowledgement that the title, while recognised by the common law, has its source in the community, and exists apart from the common law protection.[101]

The form of title recognised by the High Court in *Mabo's case* is not merely recognition of private, or individual, rights to land. Rather, the Court affirmed a communal title that carried with it the power to determine the law and custom applicable to land. Therefore, native title is a collective right that carries with it the power to make laws. In this way, the decision of the High Court in *Mabo* is an acknowledgment of the continuation of Aboriginal law and of Indigenous society as a source of authority. It is recognition of the people as lawmakers and law keepers.[102]

The *Mabo* decision moves Australian jurisprudence toward a theory of inherent Indigenous rights, that accepts that Indigenous peoples' rights 'inhere in the very meaning of aboriginality'.[103] That is, the rights of Indigenous peoples are recognised by virtue of their existence as distinct peoples and respecting Indigenous peoples as a constitutional entity, rather than a mere minority.[104]

The Court recognised that Indigenous peoples' rights to land exist outside common law or legislative recognition, but the judges in *Mabo* specifically asserted that the State has power to divest those rights unilaterally, without consent or recompense.[105] The majority of judges in *Mabo* held that past 'acts of state' adverse to the rights of Indigenous peoples to their land were not wrongful.[106] Native title, they argued, can be extinguished by a valid exercise of governmental power which demonstrates a clear and plain intention.[107] The basis for this is the claim that the underlying title of the State may be perfected by the exercise of complete dominion. The doctrine creates a property interest unique to Indigenous people, but places them in a position of vulnerability in

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[99] ibid., at p. 57, per Brennan J, at p. 81, per Deane and Gaudron JJ, and p. 184, per Toohey J.

[100] ibid., at p. 60, per Brennan J.

[101] Paul Patton, 'Mabo, freedom and the politics of difference', *Australian Journal of Political Science,* vol. 30, 1995, pp. 111-14.

[102] Brennan, 'The Indigenous people', in P. D. Finn (ed.), *Essays on Law and Government, Vol. 1: Principles and Values*, Law Book Co., North Ryde, 1995, p. 34.

[103] Michael Asch and Patrick Macklem, 'Aboriginal rights and Canadian sovereignty: An Essay on *R v Sparrow*', *Alberta Law Review*, vol. 29(2), 1991, p. 502.

[104] Macklem, Distributing sovereignty, op. cit., p. 1325. See also, Menno Boldt and J. Anthony Long, *Surviving as Indians,* University of Toronto Press, Toronto, 1988, p. xv.

[105] *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at pp. 68-74, per Brennan J; pp. 94, 100, per Deane and Gaudron JJ (although compare p. 92); and pp. 194-5, per Toohey J.

[106] ibid. Compare Deane and Gaudron JJ, p. 92, who initially commented on wrongful extinguishment, but reverted to the power of the State at pp. 94 and 100. Toohey J, at pp. 194-5, was the only judge to affirm the rights of Indigenous peoples against arbitrary exercise of power by the State. The brief judgement of Mason CJ and McHugh J confirmed the ratio of the case in this regard.

[107] ibid., at p. 64, per Brennan J.

relation to the State.[108] The Social Justice Commissioner criticised these limitations, arguing that:

> The Mabo decision does not recognise equality of rights or equality of entitlement: it recognises the legal validity of Aboriginal title until the white man wants that land . . .[109]

Thus the native title doctrine establishes a hierarchical relationship between Indigenous interests and the interests of others, reinforcing the dependency of Indigenous rights on the good will of the State.

If these rights are inherent then the failure to recognise these rights is merely temporal, existing only in the colonial law.[110] The Parliament has the power to change the discriminatory aspects of the common law to more fully protect the rights of Indigenous peoples. Indeed, in the context of Australia's international obligations, it could be argued that they are obliged to do so.

The provision of compensation or lesser procedural rights of notification are not adequate to meet these obligations. Compensation is a remedy of last resort. The first aim of Australia's laws should be to reflect, to the fullest extent, the rights of Indigenous peoples to own development control their land.

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[108] Patrick Macklem, 'First Nations self-government and the borders of the Canadian legal imagination', *McGill Law Journal*, vol. 36, 1991, p. 397.

[109] Michael Dodson, 'Statement on behalf of the Northern Land Council', in ATSIC, *The Australian Contribution: UN Working Group on Indigenous Populations, Tenth Session*, Geneva, July 1992, p. 35.

[110] Although such rights still require recognition by the courts in order to be enforceable against the State. This argument will be explored in greater detail in the following chapter.

4 Responding to the Decision (*TOR B*)

The second Term of Reference for this inquiry seeks submissions on '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'. This section identifies the recommendation of the Committee in the context of the Government's approach to Indigenous policy and the 1998 amendment process. The discussion focuses on the process of consultation required to determine appropriate ways to address the situation precipitated by the *Amendment Act*.

4.1 Amendments to the *Native Title Act.*

The Committee on the Elimination of Racial Discrimination called on Australia to suspend the *Native Title Amendment Act 1998* and reopen discussions with Indigenous people 'with a view to finding solutions acceptable to the Indigenous peoples and which comply with Australia's obligations under the Convention'.[111] For native title holders, the suspension of the Act is still an option to be considered. Every day the discriminatory treatment of native title is further entrenched and the specific rights of individual native title holders are eroded.

Significant rights have been given to many non-Indigenous interests at the expense of Indigenous peoples' native title. It is therefore difficult to see how the Government will ever be able to recover the loss suffered by Indigenous peoples through this amendment process.

While many of the amendments have been partially implemented, it is imperative that the Government begin meaningful negotiations with Indigenous peoples to determine a course of action that will address the problems of the *Amendment Act* and result in an agreed upon outcome.

First, it is important to reflect on the approach to native title and Indigenous policy throughout the amendment process, comparing it to the expectations at an international level. Australia has rejected self-determination, both domestically and internationally, as the cornerstone of Indigenous policy. In addition, funding and service functions and indeed policy advice has been mainstreamed. These choices reflect a movement toward Indigenous policy as a primarily addressing individual disadvantage and away from the recognition of group rights and distinct collective identity. In doing so an environment has been created where Indigenous peoples feel that their voice is marginalised if not silenced in policy-making.[112] To achieve an agreed outcome, as envisaged by the

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[111] Committee on the Elimination of Racial Discrimination, Decision 2 (54) of 18 March pursuant to Article 9 (2) of the Convention on Australia, 54th Session 1-19 March 1999, UN Doc CERD/C/54/Misc.40/Rev.2, para 11.

[112] See for example, fears that ATSIC is no longer able to fulfill its statutory functions, ATSIC 1999, op. cit., p. 7.

CERD Committee, would require a fundamental shift in the Government's engagement with Indigenous peoples and the Institutions that represent them.

4.2 The 1998 Amendment process

In her report, the Country Rapporteur spoke at length on the participation of Indigenous people in the legislative process. The consultation process prior to the 1993 legislation was directly contrasted with the 1998 amendment process. The Country Rapporteur and other Committee members were dissatisfied with the Government's failure to provide specific information on consultation in its report and in its response to the Country Rapporteur's report. Ms McDougall asked:

> 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?[113]

The Australian Government representative responded by suggesting that an extensive consultation process was entered into in 1998 in the lead up to and after the release of the Prime Minster's '10 point plan'.[114]

The Government argued that consultations had been undertaken with Aboriginal people, along with 'other minority groups', and that it had 'declared itself willing to discuss the draft amendments', although it was clear at the time that they were wedded to their approach. [115]

In evidence before the Committee, the Government pointed to the working groups created to represent the interests of native title holders. The National Indigenous Working Group, however, argued that they were progressively excluded from the negotiations, despite their continued conciliatory approach to the amendment process.[116] It was suggested by the government representative that because such groups had access to the minor parties, their interests were adequately represented. In fact, the passage of the Bill was secured by an agreement reached between the Government and a single non-Indigenous Member of Parliament without the involvement of Indigenous people. The Bill did not have the support of Indigenous representatives or organisations. ATSIC Chairperson, Mr Gatjil Djerrkura, defended Indigenous people's anger at the outcomes of a process from which they were excluded but where all other stakeholders

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[113] Report by Ms G McDougall, op. cit.

[114] Additional Information, op. cit., paras 31-2.

[115] Australia's Comments, op. cit., para 17

[116] NIWG, *Co-existence* op. cit. See also *The Wik Summit Papers*, Cape York Land Council, 1997.

were involved. Mr Djerrkura said that this 'suggested a lack of respect and equality for indigenous people on behalf of the Government.'[117]

Submissions to the Committee contested the view that Indigenous peoples had enjoyed the right to effective participation in the *Native Title Amendment Act* process, and most raised strong complaints about the Government's dismissiveness toward Indigenous representatives. [118] This included not only the National Indigenous Working Group, but also ATSIC, which has a statutory function for ensuring the participation of Indigenous peoples in the formulation and implementation of policies affecting them.[119] The NIWG prepared a statement to be read into Hansard by non-Government Senators during the final debate.[120]

4.3 'Balancing' rights and interests

There is no doubt that, as the Committee feared, these amendments, '...wind back the protections of Indigenous title offered in the Mabo decision of the High Court of Australia and the 1993 Native Title Act'.[121] The Government's recent periodic report lists, as the outcomes of the *Amendment Act*, to:

- validate acts that may have been done invalidly on the previously understood assumption that pastoral leases extinguished native title;
- put in place an effective registration test for native title claims for the first time;
- resolve the constitutional difficulties arising from the High Court's decision in the Brandy case;
- give greater recognition to the role of Native Title Representative Bodies and to specify their roles and responsibilities;
- ensure legal certainty for voluntary negotiated agreements about native title and encourage their use; and
- reflect the Wik decision.[122]

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[117] Gatjil Djerrkura, ATSIC, *Media Statement*, 5th July 1998. See NIWG Submission op. cit., , p.10. The disappointment of the National Indigenous Working Group in particular was expressed by Olga Havnen, then Executive Officer of the national Indigenous Working Group in a Seminar presented to the Australian Institute of Aboriginal and Torres Strait Islander Studies, Forthcoming 2000. See also Peter Yu, David Ross and Patrick Dodson, NIWG, *Media Statement*, 5th July 1998.

[118] See for example ANTaR, op. cit., p. 29.

[119] ATSIC 1999, op. cit., p.123-5. See s 3(a) *ATSIC Act 1989* (Cth)

[120] Senator the Hon Nick Bolkus, Senator Dee Margetts, Senator Bob Brown, Senator John Woodley, Senator Meg Lees, *Hansard*, 7th July 1998, pp. 5182–5175.

[121] CERD Decision 2(54), op. cit., para 8.

[122] Tenth, Eleventh and Twelfth Periodic Report, op. cit. para 311. *Brandy v Human Rights and Equal Opportunity Commission* (1994-95) 183 CLR 245 held that a Tribunal, such as HREOC or the National Native Title Tribunal, could not carry out judicial functions. Therefore, the *Native Title Act* required amendment to ensure that the final determination of native title was made by the Federal Court

None of these provisions increase the protection or recognition of native title rights.

The Government representative before the Committee made the extraordinary remark that because the Government had resisted pressure to 'abolish' native title and Indigenous land rights entirely, that somehow this was evidence of their compliance with the Convention.[123] This comment illustrates the Government's approach to native title through out the amendment process. The Prime Minster had commented that the 'pendulum had swung to far' in favour of Indigenous peoples rights and that the principle goal of the amendments was to bring the pendulum back to the side of the non-indigenous interests. In evidence to the Committee, the Government explained their rationale:

> Given that neither the common law nor the Convention required native title-holders to be given precedence on pastoral lease lands, Australia believed that the Act established a balance between two sets of concomitant interests: the legitimate rights of pastoral leaseholders to engage in their activities and the protection of the important land ties of native title-holders.[124]

The relative positions from which this 'balancing' was taken created a fundamentally discriminatory presumption. The balance was presumed to be between the total abolition of rights of Indigenous peoples on the one hand (this being the stated 'interests' or preference of non-Indigenous titleholders) and the status quo of Indigenous rights recognition on the other (which were seen as radically overstated). Remedying the defects in the law to provide greater security for native title was not considered, neither was the containment of non-indigenous titles.

The resulting provisions could not be considered 'special measures' within the meaning of the Convention (a term also used in the *Racial Discrimination Act*), which refers to measures which discriminate in favour of Indigenous peoples, to further the goals of non-discrimination. Instead, the Committee suggested that, while the original *Native Title Act* 'delicately balanced' rights and interests of Indigenous and non-Indigenous title holders, the *Amendment Act* 'appears to create legal certainty for governments and third parties at the expense of indigenous title'.

The options that the Government gave itself were inevitably going to result in a breach of international obligations to act in a non-discriminatory way and to amend laws to overcome discrimination. In the result, then, greater certainty was provided for non-Indigenous interests at the expense of native title.

In order to meet its international obligations, the Australian Government must make a greater commitment to protecting and promoting the rights of Indigenous peoples, not just as individuals but also respecting the group rights and distinct collective rights of Indigenous peoples. This also requires recognition of the legitimate demands that

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[123] Australia's Comments, op. cit, para 62.

[124] Summary record of the 1324th meeting : Australia. 07/10/99. CERD/C/SR.1324, para 15.

Indigenous peoples make against the State, arising from a history of discrimination and dispossession.

4.4 Effective political participation

The Committee on the Elimination of Racial Discrimination has stressed the importance of process in relation to the right of political participation. As we have seen in its General Recommendation XXIII on Indigenous Peoples, they highlighted the obligation upon 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 that a measure of whether Indigenous Peoples enjoy equal rights in respect of effective participation in public life is to ensure that 'no decisions directly relating to their rights and interests are taken without their informed consent'. Arguably then, the process of negotiating the amendments breached the obligation to secure effective participation by Indigenous peoples on a matter of significant importance to them.

Effective political participation is a central element of self-determination. Self-determination is a right recognised to inhere in all peoples. Ensuring the internal aspects of self-determination, such as political participation, are a key obligation of States who are a party to the human rights covenants.[125]

Self-determination can be understood as a statement of the appropriate way to respond to the aspirations of Indigenous peoples. Alternatively, it could be said to be a description of the nature of the process for attaining outcomes. The emphasis is on process as the essence of self-determination. In this context, self-determination respects a people's autonomy and authority in decision-making.

If the Government is to respond adequately to the Committee's criticisms it must ensure that Indigenous peoples are directly involved in decisions about legislative and policy changes and are not merely consulted as another minority interest group. Indigenous peoples have a special status within Australia's constitutional makeup which must be understood and respected as attracting distinct rights.

[125] See Pritchard, Native title in international perspective, op. cit., at pp. 48-50.

5 Australia's relationship with the Committee (*TOR C*)

The third Term of Reference seeks submissions on 'whether dialogue with the CERD on the Act would assist in establishing a better informed basis for amendment to the Act'. This section considers this question in light of Australia's recent engagement with the Committee in relation to Early Warning procedures and Periodic Reports.

Australia's history in relation to Indigenous peoples' rights is poor. The Committee pointed to 'the broad range of discriminatory practices that have long been directed against Australia's Aboriginal and Torres Strait Islander peoples', and singled out that 'the effects of Australia's racially discriminatory land practices have endured as an acute impairment of the rights of Australia's indigenous communities'.

Dialogue with international treaty bodies can be useful, particularly through formal reporting procedures and such bodies can provide an objective perspective on the standards expected of Australia. They can reinforce Australia's obligations to uphold and promote human rights and to amend its laws to do so, and insist that these should be the cornerstone of legal and policy development.

Australia's has not engaged effectively with the Committee on the Elimination of Racial Discrimination. For example, Periodic Reports to the Committee are not prepared and submitted on a regular basis as required under the Convention. This periodic reflection is an important part of the Government's accountability in relation to the recognition, protection and fostering of the rights of Indigenous peoples and should contain a frank account of Australia's performance in relation to Indigenous Affairs. In particular it should address Australia's performance against international standards for the enjoyment of human rights, equality before the law, ownership and control over lands, return of lands, increased self-government and consultation and political participation.

Moreover, in response to the most serious of processes, Australia has dismissed criticisms under the current Early Warning/Urgent Action process and has publicly questioned the role of the Committee and Australia's continued commitment to the Convention. The procedures are adopted by the Committee as a preventative measure, and to complement the procedures which respond to violations of CERD. These urgent procedures recognise 'the primary importance of preventing human rights violations before they occurred'.[126]

The Australian Government should pay due regard to the serious charges reiterated in ongoing Early Warning/Urgent Action procedures. Not solely in relation to the specific recommendations of the Committee but also to the broader implications of these criticisms and examine their fundamental message.

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[126] Committee on the Elimination of Racial Discrimination, Working Paper – Prevention of racial discrimination, including early warning and urgent procedures, Annex. 3 in Committee on the Elimination of Racial Discrimination, UN Doc A/48/18.

By signing and ratifying the CERD in 1975, Australia committed itself to the role of the international community as a mechanism for the monitoring of racial discrimination throughout the world. Continued dialogue with the Committee is part of this commitment, and this dialogue is encouraged.

However, dialogue with the Committee should not take the place of consultation and negotiations with Indigenous organisations and institutions in Australia. It should be remembered that the same information upon which the Committee made its assessment of the amendment process was available to the Government when it made its decisions. Of particular concern, the informed opinion of many Indigenous organisations were ignored, or dismissed by the Government

Further dialogue with the Committee should not be pursued in the hope that they will be convinced that the Government has successfully balanced competing interests. The CERD Recommendation clearly states that amendments to the *Native Title Act* should have the support of Indigenous peoples as a result of meaningful negotiations.

The Committee may not be persuaded by the flurry of activity by Parliamentary Committees in the lead up to the consideration of Australia by the Committee in March 2000. Significant commitments should be made to address the concerns of the Committee and to follow up the recommendation to engage in meaningful negotiations with Indigenous peoples.

6 Conclusion

While each of the amendment provisions can be assessed on their own, taken as a whole, the amendment package was clearly designed:

- to reduce the scope of native title;
- to make native title harder to prove;
- to minimise the impact of native title on lands over which non-Indigenous interests exist; and
- to make it easier to grant further interests over native title land.

None of these objectives were hidden by the Government as they presented their '10 point plan' to the non-Indigenous constituency.

Australia's commitment to human rights has come under question as has their understanding of the expectations of international human rights standards. It is of serious concern that the Australia has found itself unable to commit to the fundamental principles of non-discrimination and equality that are set out in the Convention, favouring instead a simplistic notion of equality and of balancing interests.

The Committee's criticisms of Australia's approach under the *Native Title Amendment Act* lies in the failure to appreciate the meaning of equality and non-discrimination and the refusal to recognise the distinct rights of Indigenous peoples that cannot be arbitrarily interfered with. These two things, equality and the enjoyment of rights are the central tenets of the *Convention on the Elimination of Racial Discrimination.*[127]

Moreover, it is not enough to argue that the domestic legal and constitutional arrangements have allowed a discriminatory doctrine to emerge to provide the only protection for Indigenous peoples rights to traditional lands. Legislation cannot simply build on and intensify the discriminatory aspects of the law. Australia has a positive obligation not to derogate from the rights of Indigenous peoples and to rectify the flaws in the doctrine of native title.

[127] CERD Article 5.