

Native Title Report 1999

Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC. Report No. 1/2000

Report to the Attorney-General as required by section 209 of the Native Title Act 1993

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Contents

Chapter 1: Introduction	2
Chapter 2: International scrutiny of the amended <i>Native Title Act 1993</i> (Cth)	13
Chapter 3: State regimes	33
Chapter 4: The registration test	49
Chapter 5: Native title representative bodies	66
Appendix 1: <i>Response to request for information in relation to Decision (1)53 concerning Australia</i> Submitted to the United Nations Committee on the Elimination of Racial Discrimination by the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, 3 March 1999	80
Appendix 2: <i>Decision (2)54 on Australia: Australia. 18/03/99.</i> <i>CERD/C/54/Misc.40/Rev.2. (Concluding Observations/Comments)</i> United Nations Committee on the Elimination of Racial Discrimination, 54th Session, 1-19 March 1999	110

Chapter 1: Introduction

The period on which I report, 1 July 1998 to 30 June 1999, has coincided with the gathering momentum throughout Australia of the process of reconciliation between Indigenous and non-Indigenous people. The statutory requirement under the *Native Title Act 1993* (Cth) (NTA) that I monitor and report upon the impact of that Act on the human rights of Indigenous people provides me with an opportunity to understand the significance of the recognition of Indigenous rights in the reconciliation process.¹ The native title story has told us that reconciliation is not about Indigenous people proving that they can be reconciled to a non-Indigenous way of life. Rather it is about recognising Indigenous culture and giving it the same value and respect as that which is given to non-Indigenous culture.

The recognition of native title by the High Court in 1992 was a recognition that law did govern Aboriginal society when sovereignty was acquired by the British in 1788 and that this law was a subtle and elaborate system which provided a stable order of society over a very long period of time. In deciding whether to recognise Indigenous law it was no longer necessary to decide whether the Indigenous relationship to land was capable of being ‘reconciled’ to property concepts known to the common law. In fact to do so was discriminatory.

The theory that the indigenous inhabitants of a “settled” colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organisation and customs. As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case. This Court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher “in the scale of social organisation” than the Australian Aborigines whose claims were “utterly disregarded” by existing authorities or the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those which were not.²

The course which the court chose to take in that case is well known and represented a major advance in the struggle for the recognition of Indigenous rights and in the process of reconciliation. Native title, whilst recognised by the common law, has its origins in and is given its content by the traditional laws and customs acknowledged and observed by the Indigenous inhabitants of a territory.

There was, however, another side to the *Mabo (No.2)* decision. Although it recognised Indigenous law, it also recognised and confirmed the power of the State to appropriate Indigenous land. Native title has brought an end to terra nullius, and with this a kind of peace. But it has also signalled a new battle. The struggle now is not so much against the non-recognition of Indigenous culture but rather a struggle over the meaning and value that non-Indigenous law and society should give it. It is my role, as Social Justice Commissioner, to ensure that the principles of equality guide the outcome of this struggle.

It is fair to say that, in the reporting period, the full dimensions of native title have not been settled either by the legislature, by the common law or by Australian citizens engaged in the process of reconciliation.

¹ NTA, S209.

² *Mabo v Queensland (No.2)* (1992) 175 CLR 1 (*‘Mabo (No.2)’*), p 40.

The legislature

The recent amendments to the NTA³ represent a legislative ‘resolution’ to the meaning of native title in which non-Indigenous interests largely prevail over Indigenous ones. Gains made from the *Mabo (No.2)* decision, the original NTA and the *Wik* decision⁴ have been significantly eroded as a result of the amendments. The validation of otherwise invalid non-Indigenous interests, the extinguishment of native title with respect to classes and schedules of non-Indigenous interests, the upgrade of pastoral leases without negotiation in respect of conflicting native title interests, as well as the winding back of the right to negotiate in respect of mining and certain compulsory acquisitions mark a trail of dispossession through the NTA.

This legislative resolution of native title, however, is still taking shape in every state in Australia. As a result of the devolution of federal control over native title, in order to determine what particular native title regime applies to an identified parcel of land in respect of a specified act, decision, grant or enactment, one must venture into a myriad of state legislation. In Queensland alone there are around 53 separate regimes which may apply, depending on the contingencies of the situation. Each state, other than Tasmania, has devised or is considering devising separate regimes in respect of validation, confirmation, the right to negotiate, compulsory acquisition and/or dispute resolution. Within the right to negotiate regime there are separate processes in respect of exploration; tin and alluvial gold mining; opal and gem mining; and all mining and certain compulsory acquisitions on pastoral leasehold land, within towns or cities, or on reserves. States are authorised to establish their own bodies to oversee some or all of the functions previously undertaken by the National Native Title Tribunal. Terra nullius is being replaced by a plethora of state and Commonwealth legislation which gives native title holders different rights and native title different meanings. Chapter 3 of this report discusses the impact of the state regimes proposed or implemented on the rights of native title holders.

My concern in relation to this huge mix of legislative regimes governing native title processes is whether the meaning given to native title in these regimes is discriminatory of Indigenous people. A decision on 18 March 1999 by the Committee overseeing the Convention on the Elimination of All Forms of Racial Discrimination (the CERD Committee) in relation to the amendments to the NTA provides some useful signposts in determining this question.⁵ This decision is fully considered in chapter 2 of this report. The CERD Committee’s concern that the validation provisions, the confirmation provisions, the pastoral lease upgrade provisions and the changes to the right to negotiate provisions in the amended NTA are discriminatory, was based on a line of inquiry which asks: who gains and who loses as a result of these amendments? Where non-Indigenous interests are preferred over Indigenous interests the particular amendment is discriminatory. After this inquiry a further question remains to be answered. Does the legislation, taken as a whole, discriminate against Indigenous interests or is there a balance between the gains and the losses such that the legislation can be said to be non-discriminatory? The CERD Committee’s answer in relation to the amended NTA was that, taken as a whole, it did discriminate against Indigenous interests.

A difficulty that arises when trying to apply this latter test to the proliferation of state legislation which now governs native title throughout Australia is that there is no sense of a whole from which the meaning of native title can be seen to emerge. Instead, there is a procession of different land management regimes which treat native title in different ways depending on the land use patterns of the particular state. As native title becomes enmeshed in state land and

³ The *Native Title Amendment Act 1998* (Cth) was passed on 8 July 1998 and amends the *Native Title Act 1993* (Cth). Most of the amendments came into force from 30 September 1998.

⁴ *Wik v Queensland* (1996) 187 CLR 1 (‘*Wik*’).

⁵ Committee on the Elimination of Racial Discrimination, *Decision (2)54 on Australia*, 18 March 1999, UN Doc CERD/C/54/Misc.40/Rev.2.

resource management issues, questions of discrimination and human rights appear to fade into the background. An aim of chapter 3 of this report is to ensure that the human rights of Indigenous people are brought to the forefront in the development of the many native title regimes being devised presently at the state level. One way of doing this is to ensure that the provisions in the NTA which establish the authority of the state to legislate in respect of native title, incorporate the principles of equality and non-discrimination.

These principles are already enshrined in the *Racial Discrimination Act 1975* (Cth) (RDA). As a general rule, the RDA makes discriminatory state legislation invalid. This is because under section 109 of the Australian Constitution, federal legislation such as the RDA overrides state legislation to the extent of any inconsistency.

Where, however, the Commonwealth itself passes legislation that is inconsistent with the RDA, then, as a result of the principle of parliamentary sovereignty, the RDA is overridden to the extent of the inconsistency. Moreover, states, acting under the authority of federal legislation, can pass legislation which is inconsistent with the RDA.

The NTA is an example of federal legislation enacted subsequent to the RDA. Thus, it will override the RDA to the extent of any inconsistency. It was contended in the previous Native Title Report, a contention supported by the CERD Committee's findings in March this year, that there were significant aspects of the amendments to the NTA which were discriminatory and thus inconsistent with the RDA. In addition, under the NTA, states are authorised to pass discriminatory legislation in relation to the validation of invalid acts, the extinguishment of native title in relation to specific grants of non-Indigenous tenures and a series of modifications to or exclusions from the right to negotiate. The minimum standards set by the NTA in respect of state legislation fall below the standards of equality and non-discrimination upheld in the RDA and its progenitor, the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

The CERD decision made it clear that Australia has breached its international obligations under CERD by enacting discriminatory amendments to the native title legislation. The enactment by the states of discriminatory legislation authorised by the NTA is a separate and further breach of Australia's international obligations.⁶

The CERD Committee again considered the amendments to the NTA in August 1999. They found that, since it last considered the NTA amendments and found them discriminatory, the most significant activity in relation to native title legislation in Australia was the implementation by a majority of states of discriminatory legislation. The implications of the negative finding by the Committee in relation to Australia's native title laws are discussed in this report at chapter 2. The conclusion of this chapter is that, as a result of the ongoing maintenance of international scrutiny over the native title amendments, the attempt to 'resolve' the meaning of native title through legislation cannot succeed without incorporating the principles of equality and non-discrimination.

The common law

The meaning and value that the non-Indigenous legal system gives to native title is not only determined by legislation. The common law is still the central plank on which the statutory definition of native title rests.⁷ So long as the common law continues to recognise the traditions

⁶ This is because, at international law, when the Commonwealth ratifies or accedes to an international treaty, all tiers of government are bound by the terms of that treaty. This principle is encapsulated in Article 27 of the *Vienna Convention on the Law of Treaties* which provides that 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

⁷ NTA, S223.

and customs of Indigenous people and give them a meaningful place within Australian society today, native title exists as a declaration of justice. Where, however, the common law applies tests and rules which reduce native title to an historic right that cannot be exercised or enforced within contemporary Australia then native title exists as a declaration of injustice.

The common law approach to native title applications is to delineate two issues for its determination. First, the applicants must prove that they continue to acknowledge the laws and customs based on the traditions of the clan group. The connection test is based on the following passage from Justice Brennan's judgment in *Mabo No.2*:

Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an Indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition. Australian law can protect the interests of members of an Indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as it is practicable to do so). Once traditional native title expires, the Crown's radical title expands to a full beneficial title, for then there is no other proprietor than the Crown.⁸

The second issue for determination by the court, if the claimant's connection to the traditions and customs of their forebears is established, is whether the grant of tenures over the history of the claimed land since sovereignty has resulted in the extinguishment of native title.

The bifurcation of native title into two distinct tests of connection and extinguishment disregards the underlying continuity in the process which, on the one hand, disconnected Indigenous people from their land and culture and, on the other hand, appropriated Indigenous land in order to benefit and grant tenures to non-Indigenous settlers. Both processes have their origin in the overwhelming ambition of the colonial project to appropriate and utilise land in the new territory. It is this project which resulted in the dispossession of Indigenous people from their land and culture.

In one sense, dispossession was the outcome of an irreconcilable conflict between colonists, whose whole purpose was to convert the land to agricultural production, and Aborigines, whose sustenance - indeed whose entire sense of identity - was inextricably bound to specific tracts of land. For many involved in the process, even those who wanted some kind of peaceful accommodation, reconciliation must have seemed unattainable. The attachment of Aborigines to their country was profound. Reducing their territory to reserves was extremely difficult given the Aborigines' use of land and the colonists' insatiable demand for the most cherished resources (especially water). Displacing the Aborigines both severed the Aborigines' connection to the framework of their identity and generated grave conflicts with neighbouring groups. Although some settlers managed to coexist with Aborigines on the same land, that path too was fraught with difficulty....

The root conflict underlying dispossession, then, was one of colonists hungry for land versus an indigenous population that possessed a profound and incompatible attachment to the same land.⁹

⁸ *Mabo (No.2)*, pp 59-60.

⁹ Webber, J. 'The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*', (1995) 17(1) *Sydney Law Review* 5, pp 12-13.

The common law presents the colonial project euphemistically as a ‘tide of history’ which has ‘washed away any real acknowledgment of traditional law and any real observance of traditional customs’.¹⁰ It thus misrepresents the process of colonialism as one of abandonment and non-observance by Indigenous people. Yet it is obvious from the histories which unfold through the evidence before the courts dealing with native title that the colonial project was not a gentle ‘tide of history’ but an eroding and buffeting one characterised by violence and discrimination towards the original inhabitants of the land, and it was this process which undermined the foundations of Indigenous culture. The history of Indigenous dispossession which unfolds in the *Yorta Yorta* case and is summarised in the decision of Justice Olney illustrates this history of conflict:¹¹

By 1850s physical resistance to settlement had ceased. The Aboriginal population of the area had been drastically reduced in number by disease and conflict. The white population had grown dramatically, and was to grow even more rapidly following the discovery of gold. An 1857 census found only 1769 Aborigines left in Victoria. In 1858 a Select Committee was appointed to “inquire into the present condition of the Aborigines of the colony, and the best means of alleviating their absolute wants”. Missions and reserves were established in several places to pursue such a course but in the claim area, only ration depots were developed notably at Echuca, Gunbower, Durham Ox, Wyuna, Toolamba, Cobram, Ulupna, and Murchison. Local squatters were appointed as “guardians”.¹²

of dislocation:

A further component of official policy involved the relocation of children where possible to stations where they could be properly “educated” away from parents and other traditional distractions. In the late 1860s some people, mainly children and young single women, were sent to Coranderrk near Healsville, well outside of the claim area.¹³

of discrimination:

In 1884 proposals for dispersing “half castes” from the missions and stations were circulated in Victoria and an Act to the same effect came into force in 1886. The Act had profound implications for many Aboriginal people living in Victoria. Extended families were split up, or forced to move away from places which had been their home for many years.¹⁴

of religious intolerance:

Problems began to emerge at Maloga in early 1880. Many people resented moves by Matthews in the 1870s to limit traditional ceremonial activity and the sanctions imposed, such as loss of rations, if people failed to attend Christian services. Disputes arose over many aspects of life. Residents were expelled for “immorality”, for failing to attend services, and even for going to cricket matches or foot races.¹⁵

and of economic deprivation:

Much of the reserve land had been leased to white farmers after 1921. The irrigation system

¹⁰ *Mabo (No.2)*, per Brennan J, pp 59-60.

¹¹ The members of the *Yorta Yorta Aboriginal Community v The State of Victoria and Others* (unreported, Federal Court of Australia) [1998] FCA 1606, 18 December 1998 Olney J (‘*Yorta Yorta*’).

¹² *ibid*, para. 36.

¹³ *ibid*.

¹⁴ *ibid*, para 39.

¹⁵ *ibid*, para 40.

failed around 1927 and was not repaired, making it impossible to grow sufficient vegetables or even fodder for dairy cattle. Cash wages were abandoned for work on the mission in 1929 and most equipment was removed to other reserves. Employment generally became harder to find as the white work force was swelled with returned soldiers and increased settlement, and the need for labour shrunk with increasing mechanisation. In the 1930s, funding for the reserve was cut back and work became harder to find. The problem was compounded by official policies in New South Wales which provided able bodied men and their families with no options. Aboriginal people living on reserves were not eligible for State unemployment relief. Nor were able-bodied Aboriginal people eligible for rations.¹⁶

Ironically, while the *Yorta Yorta* decision exposes the dispossession which marked the relationship between Indigenous and non-Indigenous people in the history of settlement around the Murray-Goulburn Valley, it does so in order to establish a basis for the final dispossession of surviving Indigenous culture; the denial by the common law of its recognition as a native title right. The *Yorta Yorta* decision thus stands as a poignant reminder of the injustice contained within the common law's recognition of native title. That is, where the dispossession of Indigenous people has been most thorough and systematic and the injustices of colonialism most brutal and unforgiving, the less likely that the traditions and customs practiced today by the descendants of these Indigenous people will be recognised and protected by the law as native title rights.

Even though Justice Olney made it quite clear in the *Yorta Yorta* decision that he was not concerned with addressing the fundamental injustice within the common law, his treatment of the evidence before him and his limited construction of native title as a bundle of rights is not merely the application of common law principles as they exist. The *Yorta Yorta* decision has been taken on appeal to the Full Federal Court, as have other native title decisions of the Federal Court. The common law of native title is an emerging area of law and its final direction on these issues is by no means clear. There are two aspects of the *Yorta Yorta* decision which fall below the standard of equality acceptable within a human rights framework.

First, the Court's treatment of the oral evidence provided by the applicants and their witnesses fails to apportion sufficient weight to the cultural traditions on which such evidence is based.

The most credible source of information concerning the traditional laws and customs of the area... is to be found in Curr's writings. He at least observed an Aboriginal society that had not yet disintegrated and he obviously established a degree of rapport with the Aboriginals with whom he came into contact. His record of his own observations should be accorded considerable weight. The oral testimony of the witnesses from the claimant group is a further source of evidence but being based upon oral tradition passed down through many generations extending over a period in excess of two hundred years, less weight should be accorded to it than to the information recorded by Curr.¹⁷

The apportioning of greater weight to the written observations of an early squatter over the oral history of the applicants in relation to Indigenous traditions and customs is not just an evidentiary issue or a conclusion based on the credibility of particular witnesses. It involves a judgment against the oral tradition of Indigenous culture itself, instead preferring the Western written tradition of which the legal system is a part.

The issue of cultural bias within the court processes is addressed in the NTA and in the case law. Section 82 of the NTA makes it clear that the court should take into account the 'cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders but not so as to prejudice unduly any other party to the proceedings'.¹⁸ In the decision of *Ward v Western*

¹⁶ *ibid*, para 43.

¹⁷ *ibid*, para 106.

¹⁸ S82(2) of the original NTA gave greater weight to the cultural concerns of native title parties and provided that

*Australia*¹⁹ Justice Lee relied on Canadian precedent²⁰ to ensure that the oral histories of the Aboriginal applicants was not prejudicially treated.

Of particular importance in that regard is the disadvantage faced by Aboriginal people as participants in a trial system structured for, and by, a literate society when they have no written records and depend upon oral histories and accounts, often localised in nature. In such circumstances the application of a rule of evidence to exclude such material unless it is evidence of general reputation may work substantial injustice.²¹

Substantial injustice will also be caused if the oral history provided by Indigenous witnesses is considered inherently inferior to the written history originating from the non-Indigenous inhabitants of the claim area. Where the distinct cultural identity of Indigenous people is not recognised and taken into account, the principle of equality, as it is understood at international law, is contravened.

As discussed in chapter 2, a ‘substantive equality’ approach acknowledges that racially specific aspects of discrimination such as cultural difference, socio-economic disadvantage and historical subordination must be taken into account in order to redress inequality in fact. It can be contrasted with an approach (the formal equality approach) that requires that everyone be treated in an identical manner regardless of such differences.

A notion of equality which recognises and protects cultural difference is consistent with the protection which is given to minorities under Article 27 of the International Covenant on Civil and Political Rights, a Convention to which Australia is a signatory. Article 27 provides that:

Members of ethnic, religious or linguistic minorities shall not be denied the right, in community with the members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 27 recognises that unless States Parties such as Australia implement positive measures to protect the culture of Indigenous people then it simply will not survive. Merely treating Indigenous people the same as non-Indigenous people is not enough. The principle of equality requires that the oral history provided by Indigenous claimants is recognised as an eminent source in informing the court of the traditions and customs of Indigenous culture as it existed throughout that culture’s history, and as it survives today.

The second aspect of the *Yorta Yorta* case that diminishes the value of contemporary Indigenous culture is its treatment of native title as a bundle of rights protecting traditional practices as they occurred prior to sovereignty. The written records of Curr were relied on to determine the traditions governing exclusive rights to land and resources:

I recollect, on one occasion, a certain portion of country being pointed out to me as belonging exclusively to a boy who formed one of the party with which I was out hunting at the time. As the announcement was made to me with some little pride and ceremony by the boy’s elder brother, a man of five-and-twenty, I not only complimented the proprietor on his estate, *on which my sheep were daily feeding*, but, as I was always prone to fall in with the views of my sable neighbours when possible, I offered him on the spot, with the most serious face, a stick of tobacco for the fee-simple of his patrimonial property, which,

the Federal Court, in conducting proceedings, must take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders. S82(3) provided that the Court, in conducting proceedings, is not bound by technicalities, legal forms or rules of evidence.

¹⁹ *Ward and Others (on behalf of the Miriuwung and Gajerrong People) and Others v State of Western Australia and Others* 159 ALR 483 (‘Miriuwung Gajerrong’).

²⁰ *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193.

²¹ *Miriwung Gajerrong*, p 504.

after a short consultation with his elders, was accepted and paid.²²

Of the social organisation of the Bangerang, Curr wrote:

Amongst the Bangerang there was not, as far as could be observed, anything resembling government; nor was any authority, outside of the family circle, existent. Within the family the father was absolute. The female left the paternal family when she became a wife and the male when he took rank as a *young man*. The adult male of the Bangerang recognised no authority in anyone, under any circumstances, though he was thoroughly submissive to custom. Offences against custom had sometimes a foreign aspect, and brought about wars with other tribes. Within the tribes they usually amounted to wrongs of some individuals, and for every substantial wrong custom appointed a penalty....²³

Of the traditions and customs relating to the traditional use of food resources, Curr wrote:

It is a noteworthy fact connected with the Bangerang..... that as they neither sowed nor reaped, so they never abstained from eating the whole of any food they had got with a view to the wants of the morrow. If anything was left for Tuesday, it was merely that they had been unable to consume it on Monday. In this they were like the beasts of the forest. To-day they would feast – aye gorge – no matter about the morrow. So, also, they never spared a young animal with a view to its growing bigger...²⁴

I have often seen them, at an instance, land large quantities of fish with their nets and leave all small ones to die within a yard of the water....²⁵

Of traditional burial practices, Curr wrote:

The Bangerang mode of burial had nothing remarkable about it. The dead were rolled up on their opossum-rugs, the knees being drawn up to the neck with strings, when the corpse was interred in a sitting posture, or on its side, generally in a sand-hill, in which a grave about four feet deep had been excavated. A sheet of bark was then placed over the corpse, the sand filled in, and a pile of logs about seven feet long and two feet high was raised over all. Round about the tomb it was usual to make a path, and not unfrequently a spear, surmounted by plume of emu feathers, stuck at the head of the mound, marked the spot where rested the remains of the departed. Women were interred with less ceremony.²⁶

Having established from Curr's writings some of the laws and customs of the original inhabitants, the Court then asks whether these same laws and customs continue to be observed as contemporary beliefs and practices of the claimants.

The Court rejects the claim that the contemporary practice of protecting sites of significance, such as mounds, middens and scarred trees, should be recognised as a native title right. Its reasoning was that these sites were of no significance to the original inhabitants 'other than for their utilitarian value, nor [did] traditional law or custom require them to be preserved'.²⁷ On this analysis native title rights cannot extend to heritage protection.

In relation to the claim for recognition of a right to hunt, fish and gather bush tucker on the land and in the waters of the claim area, Justice Olney again found the contemporary practices did not sufficiently resemble those carried out by the original inhabitants:

²² *Yorta Yorta*, para 111.

²³ *ibid*, para 112.

²⁴ *ibid*, para 115.

²⁵ *ibid*.

²⁶ *ibid*, para 116.

²⁷ *ibid*, para 122.

Of these activities fishing appears to be by far the most popular but is currently engaged in as a recreational activity rather than as a means of sustaining life. It is said by a number of witnesses that consistent with traditional laws and customs it is their practice to take from the land and waters only such food as is necessary for immediate consumption. This practice, commendable as it is, is not one which, according to Curr's observations, was adopted by the Aboriginal people with whom he came into contact and cannot be regarded as the continuation of a traditional custom.²⁸

In relation to the claim for recognition of the right to carry out burial ceremonies on the claim area, a similar logic was applied:

There can be no question about the importance of the returning of the remains to the appropriate country but the modern practices associated with their reburial are not part of the traditional laws and customs handed down from the original inhabitants.²⁹

The Court's rejection of the *Yorta Yorta* people's claim is premised on a very limited construction of native title. Native title is seen as a set of traditional practices which will only be protected by the law if they continue to be practiced as they were by the original inhabitants. This construction of native title, discussed in chapter 4 of this report as it applies to the registration test, fails to give appropriate value and respect to contemporary Indigenous culture.

It fails to recognise that the practices which were observed and recorded were part of a broader system of rights, the existence of which was probably not observed or recorded by early squatters like Curr. A broader construction of native title based on the rights themselves rather than the practices which emanate from them permits a degree of flexibility in determining whether contemporary Indigenous practices should be recognised and protected as native title rights.

Terra nullius was also a legal construct which discarded Aboriginal claims to land on the basis that they failed to exhibit an underlying system in their relationship to the land, and certainly not a 'civilised' system. An alternative approach to this construction of native title is provided by the Canadian Supreme Court decision in *Delgamuukw*. In that case the court distinguished Aboriginal title from practices and activities which take place on the land. Aboriginal title is more than a set of site specific rights to engage in particular activities on particular land. It is a right to the land itself.³⁰

In view of the number of native title issues yet to be resolved by the common law, the question remains whether the common law's capacity to recognise native title as a legal right enforceable and protected by the law will be outweighed by its capacity to reduce it to an entitlement to which few Indigenous people will ever have access.

Australian citizens

The third area in which 'a question remains' is the meaning and value that Australian citizens will give to Indigenous culture. The reconciliation process provides a vehicle to consider how post-colonial Australian society should relate to Indigenous society. The way in which native title is being formulated by the common law and the legislature should not occur in isolation from this broader process.

²⁸ *ibid*, para 123.

²⁹ *ibid*, para 124.

³⁰ Justice Lee in *Ward (on behalf of the Miriuwung and Gajerrong People) v Western Australia* (1998) 159 ALR 483 approves of the approach taken in *Delgamuukw*. The decision is currently on appeal to the Full Federal Court.

The recognition in 1992 of native title as a legal right offered a solid foundation on which to develop a new relationship between Indigenous and non-Indigenous society. After two hundred years of denial, the traditions and customs of Indigenous society were finally given the status of legal rights within the non-Indigenous legal system. A relationship based on equal respect and equal rights promised to replace the colonial paradigm of welfare dependency and assimilation. The *Wik* decision further supported a fundamental shift away from a relationship of domination to one based on co-existence.

The promise of native title was that the basis of the legal right was to be found within Indigenous culture itself rather than imposed externally. The content of native title was only limited by the traditions and customs which continue to be observed by Indigenous people today. In this way native title promised to provide a basis for the protection of not only Indigenous property rights, but also Indigenous culture and society. Through native title, the recognition and protection of Indigenous heritage, Indigenous use of resources, Indigenous art and intellectual production could all be formulated around rights rather than a policy which depended on the benevolence of consecutive governments.

The promise that native title would provide a basis in rights for the continuing respect and recognition of customary law has not been realised. As indicated above, court decisions to date have not been consistent in their approach to native title and the value they place on Indigenous customs and traditions varies significantly from case to case. The resolution of these differences should be influenced by the principles and sentiments expressed in the draft Declaration for Reconciliation which provides:

Speaking with one voice, we the people of Australia, of many origins as we are, make a commitment to go on together recognising the gift of one another's presence.

We value the unique status of Aboriginal and Torres Strait Islander peoples as the original owners and custodians of traditional lands and waters.

We respect and recognise continuing customary laws, beliefs and traditions.

And through the land and its first peoples, we may taste this spirituality and rejoice in its grandeur.

We acknowledge this land was colonised without the consent of the original inhabitants.

Our nation must have the courage to own the truth, to heal the wounds of the past so that we can move on together at peace with ourselves.

And so we take this step: as one part of the nation expresses its sorrow and profoundly regrets the injustices of the past, so the other part accepts the apology and forgives.

Our new journey then begins. We must learn our shared history, walk together and grow together to enrich our understanding.

We desire a future where all Australians enjoy equal rights and share opportunities and responsibilities according to their aspirations.

And so, we pledge ourselves to stop injustice, address disadvantage and respect the right of Aboriginal and Torres Strait Islander peoples to determine their own destinies.

Therefore, we stand proud as a united Australia that respects this land of ours, values the Aboriginal and Torres Strait Islander heritage, and provides justice and equity for all.

The development of principles within the common law should not occur outside the process of reconciliation and the code of ethics which are being developed to underlie the relationship

between Indigenous and non-Indigenous people. On the basis of the principles set out in the draft Declaration for Reconciliation, and in particular paragraph 2, the Court should give equal respect and weight to the oral history of Aboriginal witnesses as that given to the written history of early settlers. The conflicting construction of native title by the common law, either as a bundle of practices or as a system of rights should be resolved consistently with paragraph 3 above, in favour of a broad recognition of 'continuing customary laws beliefs and traditions'.

Finally, the deeper conflict within the common law of native title, where the pattern of dispossession characterising the history of relations between Indigenous and non-Indigenous people is reproduced, paradoxically, in the recognition of a right, this conflict must also be resolved in a way which, in the spirit of paragraph 6 of the draft declaration, 'has the courage to own the truth, to heal the wounds of its past so that we can move on together at peace with ourselves'.

If the common law is unable to address the injustice which lies within the recognition of native title then other legislative measures need to be taken which can deal with the illegal and wrongful effects of past dispossession. The proposed social justice package and the land fund, established under the NTA, are examples of measures originally intended to overcome the destructive cultural, social and economic impact of dispossession on Aboriginal and Torres Strait Islander people. As a complement to native title the package provided the basis for achieving equality for Aboriginal people. Unfortunately, the social justice package never developed beyond a proposal. The land fund has been a useful measure in undoing past injustices.

The NTA cannot be classed as a legislative measure which addresses the injustice contained in the common law. As discussed above, and throughout this report, the NTA compounds the injustice within the common law. The amendments to the NTA discriminate against Indigenous people and are thus contrary to the principles of reconciliation.

I have argued that the legislative and judicial processes which determine the meaning of native title should be part of a broader process of reconciliation within society. In addition, these institutions which produce meaning are significantly influential in determining the outcome of the reconciliation process. They have a normative effect upon the way in which ordinary citizens view Indigenous culture. Where native title legislation prefers the interests of non-Indigenous people over those of Indigenous people, this choice influences a myriad of smaller choices that all people must make in the way they engage in their reconciliation with Indigenous people. Where the common law fails to recognise contemporary Indigenous practices as legal rights this too influences the significance which non-Indigenous people give to contemporary Indigenous culture.

The path towards reconciliation is still open. So, too, is the way in which the legislature and the judiciary resolve the meaning that they give to Indigenous culture. The principles of equality, non-discrimination and effective participation provide important signposts to navigate these paths towards a recognition of Indigenous culture which will change the relationship between Indigenous and non-Indigenous people forever.

Chapter 2: International scrutiny of the amended *Native Title Act 1993 (Cth)*

In March 1999, the United Nations Committee on the Elimination of Racial Discrimination found that in relation to the International Convention on the Elimination of All Forms of Racial Discrimination the Federal Government's native title amendments breach Australia's international human rights obligations. This chapter sets out the process by which the Committee came to consider the Australian situation, how the Australian Government sought to justify the native title amendments, and how the Committee found Australia to be in breach of the Convention. It then considers the implications of the Committee's findings, particularly in relation to Australia's other international human rights obligations and in terms of the implementation of the *Native Title Act 1993 (Cth)* by the states and territories.

The Committee on the Elimination of Racial Discrimination and the 'early warning' procedure

On 11 August 1998 the United Nations Committee on the Elimination of Racial Discrimination (the CERD Committee) requested that the Government of Australia provide it with information relating to the amendments to the *Native Title Act 1993 (Cth)* (NTA), any changes of policy in relation to Aboriginal land rights, and the functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner.³¹ The request was made under the Committee's early warning and urgent action procedure due to the concern of members of the Committee that the situation in Australia 'was clearly deteriorating'³² since Australia's previous appearance before the Committee in 1994. HREOC was also requested to make a submission in relation to the issues which concerned the CERD Committee. This submission is appended to this report at Appendix One.³³

The CERD Committee was the first human rights committee established within the United Nations structure. It consists of 'eighteen experts of high moral standing and acknowledged impartiality.'³⁴ Members are nominated by States Parties to the CERD Committee³⁵ and elected through a secret ballot. To ensure their independence, members serve in a personal capacity and cannot be dismissed during their term. In order to ensure that the Committee is representative, membership is intended to be equitably distributed according to 'geographical distribution and to the representation of the different forms of civilization as well as of the principle legal systems.'³⁶

³¹ Committee on the Elimination of Racial Discrimination, *Decision 1(53) concerning Australia*, 11 August 1998. UN Doc CERD/C/53/Misc.17/Rev.2.

³² Committee member Mr Wulfrum, in Committee on the Elimination of Racial Discrimination, *Summary record of the 1287th meeting (53rd session)*, 14 August 1998, UN Doc CERD/C/SR.1287, para 32. See also comments by Mr Van Boven, Ms McDougall and Mr Garvalov at paras 29, 38 and 42 respectively.

³³ 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*, (Herein referred to as HREOC CERD Submission), HREOC, Sydney, 3 March 1999.

³⁴ International Convention on the Elimination of All Forms of Racial Discrimination (Herein CERD), Article 8(1).

³⁵ The terminology of CERD refers to States Parties, or States. States in this sense refers to nation states, ie the nation state of Australia, and not to internal states and territories within a nation.

³⁶ CERD, Article 8(1).

The purpose of the CERD Committee is to monitor and review the actions of States who are signatories to the Convention on the Elimination of All Forms of Racial Discrimination (Herein CERD) to ensure that they comply with their obligations under the Convention.³⁷ The Committee introduced the early warning and urgent action procedure in 1993 to improve mechanisms by which it can scrutinise the compliance of States Parties with the Convention, and to ensure greater accountability of States Parties.

The need for such mechanisms was identified by the then Secretary-General of the United Nations, and the Security Council in 1992. The Security Council observed in 1992 that international peace and security is not assured solely by the absence of military conflicts among States. It is also influenced by non-military sources of instability in the economic, social, humanitarian and ecological fields.³⁸ The Secretary-General noted that the stability of States would be enhanced by the commitment to human rights standards, with a special sensitivity to the rights of minorities, and by increasing the effectiveness of the United Nations human rights system.³⁹

The centrality of human rights within the United Nations system was also re-affirmed by 176 nations, including Australia, in the Vienna Declaration and Programme of Action adopted at the 1993 World Conference on Human Rights. Article 6 of the Declaration states that:

The efforts of the United Nations system, towards the universal respect for, and observance of, human rights and fundamental freedoms for all, contribute to the stability and well-being necessary for peaceful and friendly relations among nations, and to improved conditions for peace and security as well as social and economic development, in conformity with the Charter of the United Nations.⁴⁰

In responding to the comments of the Security Council and Secretary-General, the chairpersons of all of the human rights treaty bodies of the United Nations agreed that:

the treaty bodies have an important role in seeking to prevent as well as to respond to human rights violations. It is thus appropriate for each treaty body to undertake an urgent examination of all possible measures that it might take, within its competence, both to prevent human rights violations from occurring and to monitor more closely emergency situations of all kinds arising within the jurisdiction of States parties.⁴¹

It is in this context that the CERD Committee adopted the early warning and urgent action procedure. The procedure has two aspects to it – early warning measures to prevent potential violations of CERD from arising or turning into conflicts; and urgent procedures to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention.⁴²

³⁷ The convention entered into force in Australia on 30 October 1975. For an overview of the Committee's functions and procedures see United Nations High Commissioner for Human Rights, *Fact Sheet No.12: The Committee on the Elimination of Racial Discrimination*, <<http://www.unhchr.ch/html/menu6/2/fs12.htm>>.

³⁸ Security Council Summit, 31 January 1992, cited in Committee on the Elimination of Racial Discrimination, *Annual Report of the Committee on the Elimination of Racial Discrimination*, UN Doc A/48/18 (1993), Annex 3, para 1.

³⁹ Secretary-General of the United Nations, An agenda for peace, cited in the CERD Committee's Annual Report of the Committee on the Elimination of Racial Discrimination, *op.cit.*, Annex 3, paras 2-4.

⁴⁰ See also Articles 3, 7 and 8 of the Vienna Declaration and Programme of Action. The Australian Government also acknowledges the relationship between the observance of human rights and Australia's broader economic and security interests: Department of Foreign Affairs and Trade, *In the national interest – Australia's Foreign and Trade Policy White Paper*, Commonwealth of Australia, Canberra, 1997, para 26.

⁴¹ Meeting of chairpersons of treaty bodies concerning the role of the Security Council and the development of effective responses to emergency situations, (UN Doc A/47/628, para 44) quoted in CERD, *Annual Report of the Committee on the Elimination of Racial Discrimination*, *op.cit.*, para 15.

⁴² The Committee is guided in its use of the procedure by the following working paper, which it adopted in 1993:

The Committee's decision to consider the situation in Australia under the procedure is highly significant. It indicates that the Committee was concerned that the situation in Australia might involve serious violations of Australia's obligations under CERD, which ought to be given immediate consideration. As one Committee member commented, 'the issues in question were so important that they deserved to be dealt with in their own right, and not merely in terms of Australia's regular reporting obligations under the Convention.'⁴³

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

The CERD Committee's decision of 18 March 1999 on Australia

The CERD Committee considered the Australian situation at its fifty-fourth session in March 1999. Representatives of the Federal Government appeared before the Committee on 12 and 15 March 1999.⁴⁴ On 18 March 1999 the Committee released its concluding observations on the compatibility of the amended *Native Title Act 1993* (Cth) (NTA) with Australia's obligations under CERD.⁴⁵

The Committee's decision⁴⁶ is reproduced in full as Appendix Two of this report. In summary, the Committee considered that the native title amendments breach Australia's obligations under CERD by discriminating against Indigenous people.

The Committee expressed concern that:

- Amendments that extinguish or impair the exercise of native title pervade the amended

Committee on the Elimination of Racial Discrimination, *Working Paper - Prevention of racial discrimination, including early warning and urgent procedures*, Annex 3 in CERD, *Annual Report of the Committee on the Elimination of Racial Discrimination, op.cit.*, see also paras 15-19 of the report; See also Michael O'Flaherty 'The Committee on the Elimination of Racial Discrimination: non-governmental input and the early warning and urgent procedure' in Pritchard, S. (ed.) *Indigenous Peoples, the United Nations and Human Rights*, Federation Press, Sydney, 1998. The Committee is able to justify requests for information through these procedures under Article 9(1) of the Convention. For the procedure to become a formal mechanism the General Assembly of the United Nations must approve it. To this end, the United Nations High Commissioner for Human Rights has appointed an internal task force to examine human rights mechanisms across the United Nations, and has undertaken to consider how to progress the framework of the CERD Committee's early warning and urgent action procedure: Committee on the Elimination of Racial Discrimination, *Summary record of the 1287th meeting (53rd session), op.cit.*, para 26.

⁴³ Mr Garvalov, Summary record of the 1287th meeting (53rd session), *op.cit.*, para 42.

⁴⁴ For the official summary of Australia's appearance before the Committee see: Committee on the Elimination of Racial Discrimination, *Summary record of the 1323rd meeting of the Committee on the Elimination of Racial Discrimination: Australia*, 19 March 1999. UN Doc CERD/C/SR.1323 (Herein CERD Summary Record). For the unofficial transcript of Australia's complete appearance before the Committee see: Foundation for Aboriginal and Islander Research Action (FAIRA), *Meeting of the Committee on the Elimination of Racial Discrimination - Report by Ms G McDougall, Country Rapporteur*, 12 March 1999, <www.faira.org.au/cerd/index.html> (Herein Australian Country Rapporteur, Report); and FAIRA, *Minutes of the 1323rd meeting of the Committee on the Elimination of Racial Discrimination*, <www.faira.org.au/cerd/index.html> (Herein FAIRA, CERD Transcript).

⁴⁵ Committee on the Elimination of Racial Discrimination, *Decision (2)54 on Australia - Concluding observations/comments*, 18 March 1999. UN Doc CERD/C/54/Misc.40/Rev.2. Herein CERD Decision.

⁴⁶ Note that decisions of international human rights committees are opinions, and do not bind domestic Australian law.

NTA. The Committee considered that the amendments favour non-Indigenous interests at the expense of Indigenous title, and consequently, do not strike an appropriate balance between Indigenous and non-Indigenous rights;⁴⁷

- In particular, the validation, confirmation, and primary production upgrade provisions, and restrictions and exceptions to the right to negotiate, discriminate against native title holders.⁴⁸ In doing so, these provisions raise concerns that Australia is not acting in compliance with its obligations under Articles 2 and 5 of the Convention (the non-discrimination principle and the requirement to provide equality before the law);⁴⁹
- The amended NTA cannot be characterised as a special measure under Articles 1(4) or 2(2) of the Convention;⁵⁰ and
- The lack of ‘effective participation’ of Indigenous people in the formulation of the amendments was a breach of Australia’s obligations under Article 5(c) of the Convention and contrary to the Committee’s General Recommendation XXIII on Indigenous People.⁵¹

The Committee’s finding that many of the amendments discriminate against Indigenous people is based on a concept of equality which is very different from that relied on by the Government to justify the amendments to the NTA. The concept of equality relied on by the Government, often referred to as formal equality, was that all people should be treated the same, regardless of their race, culture, history or traditions. It was this concept which, in the public debates surrounding the passage of the amendments through parliament, justified the withdrawal of rights, such as the right to negotiate, from the NTA.⁵²

In contrast, the Committee’s understanding of equality required that the history of dispossession of Indigenous Australians be acknowledged.⁵³ They further recognised the unique relationship between land and the traditions and cultural practices of Indigenous Australians.⁵⁴

The Committee called on Australia to address their concerns ‘as a matter of utmost urgency.’⁵⁵ They urged the Government to immediately suspend implementation of the amendments to the NTA and re-open discussions with Indigenous representatives ‘with a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia’s obligations under the Convention.’⁵⁶

On 19 March 1999 the Committee proposed, subject to the Australian Government’s consent, to send three members of the Committee to Australia for an informal visit. This was in response to invitations received by the Committee from individual members of the Australian Parliament

⁴⁷ CERD Decision, para 6.

⁴⁸ CERD Decision, para 7.

⁴⁹ CERD Decision, para 8. For an analysis of these obligations see Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, HREOC, Sydney, 1999, pp 30-51.

⁵⁰ *ibid.*

⁵¹ CERD Decision, para 9.

⁵² For an analysis of the concept of equality used to justify the amendments to the right to negotiate provisions see Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, HREOC, Sydney, 1999, pp 94-116.

⁵³ CERD Decision, para 3.

⁵⁴ CERD Decision, para 4.

⁵⁵ CERD Decision, para 11.

⁵⁶ *ibid.*

and others. On 6 April 1999 the Australian Government advised the Committee that the proposed visit should not proceed.⁵⁷

The Committee decided to keep Australia under the early warning procedure to be reviewed at the fifty-fifth session of the Committee in August 1999 ‘in light of the urgency and fundamental importance of these matters.’⁵⁸

How the native title amendments breach Australia’s obligations under CERD

The CERD Committee’s consideration of the native title amendments focused on the following obligations in the Convention:

- i) The requirements, under Articles 2 and 5 of CERD, to treat all people equally, and in a non-discriminatory manner; and
- ii) The requirement of ensuring the ‘effective participation’ of Indigenous people in decisions that affect them.

The Committee found that Australia had breached these obligations for the following reasons.

1. The principles of non-discrimination and equality

Article 2 of CERD places an obligation on States Parties to the Convention not to discriminate, as well as to prevent others within their jurisdiction from discriminating. Article 5 requires that, in accordance with this principle, States guarantee the right of everyone to equality before the law, including in relation to political rights, the right to own property (individually or communally), the right to inherit and the right to equal participation in cultural activities.⁵⁹

The CERD Committee, in interpreting these requirements, has recognised that racially discriminatory practices are often systemic and long term in effect. Consequently, to meet these obligations States must ensure that the effects of past discrimination are not continued into the future, and must redress the continued inequality of minority groups.⁶⁰ They must also recognise and give equal respect to the different cultural values of such groups.

This approach is often referred to as a ‘substantive equality’ approach. It acknowledges that ‘racially specific aspects of discrimination such as cultural difference, socio-economic disadvantage and historical subordination must be taken into account in order to redress inequality in fact.’⁶¹ It can be contrasted with an approach (the formal equality approach) that requires that everyone be treated in an identical manner regardless of such differences.

⁵⁷ A motion was defeated in the Senate on 22 April 1999 which had proposed ‘That the Senate... invites the Committee to visit Australia and to have discussions with the Government, indigenous people and members of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund’ Senate, *Hansard*, 22 April 1999, p 4091.

⁵⁸ CERD Decision, para 12.

⁵⁹ The meaning of these principles has been considered in detail in previous Native Title reports: Acting Aboriginal and Social Justice Commissioner, *Native Title Report 1998, op.cit.*, Chapter 2; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996-97*, HREOC, Sydney, 1997, Chapter 6; and in the HREOC CERD Submission, paras 92-126.

⁶⁰ Committee on the Elimination of Racial Discrimination, *General Recommendation XX on Article 5*, UN Doc CERD/48/Misc.6/Rev.2 15/03/96, para 2 and Committee on the Elimination of Racial Discrimination, *General Recommendation XIV – Definition of discrimination*, 19/03/93, para 2.

⁶¹ Acting Social Justice Commissioner, *Native Title Report 1998, op.cit.*, p 32.

Under the substantive equality approach adopted by CERD, differential treatment does not discriminate if it is consistent with the objectives and purposes of the convention.⁶² A special measure under Articles 1(4) or 2(2) of the Convention would be legitimate differential treatment, as would the recognition of the traditions and customs of distinct cultural groups.

In their dialogue with the Australian representatives and in their decision of March 1999, the CERD Committee highlighted the significance of a number of factors in determining that the amendments did not meet the required standard of equality and non-discrimination. In particular, they identified the following factors:

- The importance of the ongoing effects of the historical treatment of Indigenous Australians;
- The positive obligation on States Parties to CERD to recognise and protect Indigenous cultures and identity; and
- The appropriateness of the balance struck between the interests of native title holders and non-Indigenous titleholders in the amended NTA.

A recognition of the importance of the ongoing effects of the historical treatment of Indigenous Australians

The historical treatment of Indigenous Australians influenced the CERD Committee in their consideration of the compatibility of the native title amendments with CERD. Paragraph 3 of the decision states:

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

The Committee considered that the Australian Government did not sufficiently acknowledge the importance of the historical treatment of Indigenous Australians in formulating the native title amendments. Committee member Mr Van Boven stated to the Australian representatives appearing before the Committee:

I would have liked in fact if the government would have made an explicit recognition and acknowledgment that the Aboriginals have been marginalised and disadvantaged over the years and over the decades and over the centuries. And that their rights and their entitlements should be recognised in that light, in that perspective. So we can raise a smokescreen of definitions but we have to relate it to people... when we deal with human rights after all and issues of discrimination, it relates to people and that should have been more explicitly stated.⁶³

The Australian government representatives appearing before the Committee had argued that:

It is necessary to recognise that past acts, historical acts and the effects of these cannot be undone... Past acts, however discriminatory, which have resulted in dispossession of Australia's Indigenous people cannot be undone, though of course, present and future policies can remedy the effects, the current effects, of such acts.⁶⁴

⁶² Committee on the Elimination of Racial Discrimination, *General Recommendation XIV – Definition of discrimination*, 19/03/93, para 2. See Acting Aboriginal and Social Justice Commissioner, *Native Title Report 1998, op.cit.*, pp 32-34.

⁶³ Mr Van Boven in FAIRA, CERD Transcript, p 43.

⁶⁴ Australian Representative in FAIRA, CERD Transcript, p 23.

(The Native Title Act) protects native title much more than the common law does but what the Native Title Act doesn't and Australia believes that it is not obliged to do is to go back and undo the past.⁶⁵

The arguments that one cannot undo the injustices of the past and that a State Party is not required to do this under the Convention were relied upon by the Australian Government to suggest that the validation and confirmation provisions of the amended NTA were not discriminatory:

There is an issue for Australia as to whether it can go back and undo discriminatory actions which have taken place in the period since settlement and before the *Mabo* decision in 1992... I think it's an issue that needs to inform our discussion about the validation regimes and the confirmation regime...⁶⁶

(The validation regime)... is much more limited than the regime in the (original Native Title Act)... (This regime) only provides for validation of acts between 1993 and 1996... with regard to this validation regime we are talking about things that happened in the past, between 1993 and 1996. In acknowledging and recognising things that happened in the past the government doesn't believe that it is acting discriminatorily.⁶⁷

The government's position is that the confirmation regime provides no divestment of native title rights. It is simply a recognition of the historical position that native title has been extinguished by grants of freehold and leasehold... over the past 200 years... The Australian government believes it is not contrary to CERD to confirm this historical position... The provisions are simply an acknowledgment of past dispossession and extinguishment and the government does not believe that this is contrary, as I said, to CERD.⁶⁸

As the Australian Country Rapporteur⁶⁹ noted, there is some merit in the view that you cannot undo what has already been done.⁷⁰ However the acknowledgment and recognition that one gives to past acts of injustice are quite another matter. These past acts can be denounced and repudiated as contrary to the values of contemporary society, and that repudiation can have a retrospective effect. That is exactly what the High Court did in *Mabo (No. 2)* when it overturned terra nullius as a past injustice. The legal recognition of native title as a right that was in existence from the time of sovereignty has laid the foundation for a much fairer future:

The theory that the indigenous inhabitants of a "settled" colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organisation and customs. As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case. This Court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher "in the scale of social organisation" than the Australian Aborigines whose claims were "utterly disregarded" by existing authorities or the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those which were not.⁷¹

⁶⁵ *ibid*, p 31.

⁶⁶ *ibid*, p 21.

⁶⁷ *ibid*, pp 28-29.

⁶⁸ *ibid*, p 33. See also Australia's written report: Committee on the Elimination of Racial Discrimination, *Additional information pursuant to Committee Decision: Australia, op.cit.*, para 37.

⁶⁹ The Country Rapporteur is the committee member who leads the Committee in its consideration and questioning of the country.

⁷⁰ Ms McDougall in FAIRA, CERD Transcript, p 60.

⁷¹ *Mabo (No 2) op.cit.*, p 40.

One of the effects of rejecting terra nullius and recognising native title as a pre-existing right was that acts of dispossession which failed to recognise the procedural or substantive rights of native title holders were, after the implementation of the Racial Discrimination Act (Cth) (RDA) in 1975, unlawful. The purpose of the validation provisions in the original NTA was to validate these otherwise unlawful acts. Far from being a recognition that past injustices cannot be undone, the validation provisions were a response to the discontinuity which is created when injustices, for the first time, are legally recognised as such.

The validation of intermediate period acts in the amended NTA took place in very different circumstances. The failure of states and territories to observe the substantive and procedural rights of native title holders between 1994 and 1996 cannot be seen as an anomaly created by the belated denunciation of past injustice. In granting mining tenements on pastoral leaseholds without negotiating with native title holders, states knowingly took a risk that these acts would be unlawful if the High Court found (as it did) that native title co-existed on pastoral leasehold land.⁷² The Committee did not accept that acts that took place between 1994 and 1996 could conveniently be dismissed as ‘actions of the past’.

As the Australian Country Rapporteur noted:

The Australian government believes that it cannot go back and cure the injustices of the past. Of course there is some merit in that view. What concerns me however is that the validation and confirmation of extinguishment provisions in the amended Act... are provisions that do not only apply to the distant past. They appear to also apply to actions that in some cases took place as recently as 1994 and 1996...⁷³

I would welcome a discussion within the Committee about how we might continue our urgent deliberations on Australia’s Native Title Amendment Act... before other rights get extinguished in such a way that they would be referred to as the injustices of the past which cannot now be rendered right.⁷⁴

The Government’s argument that the confirmation provisions comply with the standards of the common law was also considered to be unacceptable to the Committee. The importance of acknowledging the historical treatment of Indigenous people as unjust was influential to the Committee in this regard. As the Australian Country Rapporteur noted:

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

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

As defined by the High Court in the *Mabo* decision, under common law, native title is a vulnerable property right, it is inferior to sovereign title which has the power to extinguish native title without notice, consent or compensation...⁷⁵

⁷² Prior to the High Court’s decision in *Wik v Queensland* (1996) 187 CLR 1, (*Wik*), state governments carried out many acts on pastoral leasehold land without negotiating with native title holders. As a result of the *Wik* decision, which found that native title co-existed on pastoral leasehold land, these acts were invalid. The amended NTA validated these invalid acts, called intermediate period acts. (Part 2 Division 2A) The effect of the validation of intermediate period acts depended on whether they were category A, B, or C intermediate period acts. (see ss 203A-232E) The grant of a freehold or exclusive leasehold had the effect of extinguishing native title. The grant of a non-exclusive lease has the effect of extinguishing native title to the extent of the inconsistency. The grant of a mining lease does not extinguish native title.

⁷³ Ms McDougall in FAIRA, CERD Transcript, p 60.

⁷⁴ *ibid*, p 61.

⁷⁵ Australian Country Rapporteur, Report, pp 4-5.

The Committee rejected the argument that the common law is the standard against which actions by Government should be judged as discriminatory or non-discriminatory. The common law itself is subject to international scrutiny and cannot constitute a benchmark of equality where it fails to meet Australia's obligations under the Convention.

The Committee also considered that the confirmation provisions went beyond merely confirming historical dispossession and might involve the actual extinguishment of native title.⁷⁶ Rather than redressing historical disadvantage these provisions were seen by the Committee as perpetuating the dispossession of Indigenous Australians.

Accordingly, the Committee considered that the validation and confirmation provisions of the amended NTA discriminate against native title holders.⁷⁷

The positive obligation on States Parties to recognise and protect Indigenous cultures and identity

The CERD Committee has recognised that the protection of Indigenous culture and identity constitutes a legitimate, non-discriminatory, differentiation of treatment under the Convention:

A differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate... In seeking to determine whether an action has an effect contrary to the Convention, it (the Committee) will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race...⁷⁸

The Committee has also recognised that Indigenous peoples worldwide:

Have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources... Consequently the preservation of their culture and their historical identity has been and still is jeopardized.⁷⁹

Due to this continued inequality the Committee has felt it necessary to emphasise that CERD places obligations on States to take all appropriate means to combat and eliminate discrimination against Indigenous peoples,⁸⁰ and has called on States to:

- (a) recognize and respect Indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- (b) ensure that members of Indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on Indigenous identity;

⁷⁶ The Country Rapporteur described the confirmation provisions as 'a sweeping divestment of native rights': Australian Country Rapporteur, Report, p 11. This view was put to the Committee by the Acting Social Justice Commissioner: See HREOC, CERD Submission, paras 57-68. The Committee did acknowledge that section 47B of the NTA allows claimants to disregard past dispossession where the land is now vacant crown land. Section 23B(10) NTA also provides that an act may be removed from the confirmation schedule by regulation.

⁷⁷ CERD Decision, para 7. For reasons why the Acting Social Justice Commissioner had argued to the Committee that the validation and confirmation provisions were discriminatory see: HREOC CERD submission, paras 43-68.

⁷⁸ Committee on the Elimination of Racial Discrimination, *General Recommendation XIV*, para 2.

⁷⁹ Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII – Indigenous Peoples*, 18 August 1997, UN Doc CERD/C/51/Misc.13/Rev.4, para 3.

⁸⁰ *ibid*, para 1.

- (c) provide Indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- (d) ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent;
- (e) ensure that Indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs, to preserve and to practice their languages;⁸¹

The Committee especially called on States Parties:

to recognize and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources...⁸²

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

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

Members of the Committee also made it clear that the Committee 'links the obligation of non-discriminatory respect for Indigenous culture to the question of control over land.'⁸³ One member of the Committee stated the issue as follows:

To what extent were the traditional rights of indigenous peoples affected by the provisions of the Act? That was the Committee's starting point: the special relationship between the Aboriginals, their culture and way of life, and the land. Native property rights should not simply be given the same protection as any other property rights but should be subject to special protection measures; anything else was tantamount to not protecting them.⁸⁴

This influenced the Committee's findings in paragraph 7 of the Decision that the native title amendments, particularly those provisions relating to confirmation, validation, primary production upgrades and changes to the right to negotiate, raised concerns about Australia's compliance with Articles 2 and 5 of the Convention.

The appropriateness of the balance struck between native title holders and non-Indigenous title holders in the amended NTA

The CERD Committee stated the following in their decision of March 1999:

- 6. The Committee, having considered a series of new amendments to the Native Title Act, as adopted in 1998, expresses concern over the compatibility of the Native Title Act, as currently amended, with the State Party's international obligations under the Convention. While the original Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act. While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title.

⁸¹ *ibid*, para 4.

⁸² *ibid*, para 5.

⁸³ Ms Ali, in FAIRA, CERD Transcript, p 19; Ms McDougall, *op.cit.*, p 60.

⁸⁴ Mr Diaconu in CERD Summary Record, para 45.

7. The Committee notes, in particular, four specific provisions that discriminate against indigenous title-holders under the newly amended Act. These include: the Act's "validation" provisions; the "confirmation of extinguishment" provisions; the primary production upgrade provisions; and restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses.
8. These provisions raise concerns that the amended Act appears to wind back the protections of indigenous title offered in the Mabo decision of the High Court of Australia and the 1993 Native Title Act. As such, the amended Act cannot be considered to be a special measure within the meaning of Articles 1(4) and 2(2) of the Convention and raises concerns about the State Party's compliance with Articles 2 and 5 of the Convention.

The following factors emerge from the Committee's reasoning:

- The balancing exercise undertaken by the Committee was between the rights of Indigenous and non-Indigenous titleholders, and not the interests of all the stakeholders in the legislation;
- Whereas the Committee had been satisfied by the balancing of the rights of Indigenous and non-Indigenous titleholders in the original NTA – despite the existence of discriminatory provisions, most notably the validation provisions - they found that there was not an appropriate balancing of rights in the amended NTA. This finding was influenced by the Committee's findings in paragraph 7 of the decision that there were four sets of provisions in the amended NTA which discriminate against Indigenous titleholders; and
- As a consequence, the amended NTA could not be seen as either non-discriminatory or as a special measure under the Convention.

The Australian Government's written and oral submissions present Indigenous parties as but one of a series of parties with a stake in the legislation.

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

[I]n the Australian government's view, it is necessary to look at the overall substantive effect of the Native Title Act and the Native Title Amendment Act, and other relevant legislation and the balance struck between the various rights and interests...

The process of developing the Amendment Act and the Act itself in the end didn't meet the concerns of these Indigenous representatives. But as I also said in my opening remarks, it did not meet the concerns of other stakeholders as well, including pastoralists, miners and some States and Territories.⁸⁵

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

⁸⁵ Australian Representative in FAIRA, CERD Transcript, pp 21 & 22.

The Committee responded to this by pointing out, in paragraph 6 of the decision, that the Convention requires that State Parties balance the *rights* of different groups identifiable by race.⁸⁶ An appropriate balance based on the notion of equality is not between miners, pastoralists, fishing interests, governments and Indigenous people, but between the rights – civil, political, economic, cultural and social – of Indigenous and non-Indigenous titleholders. Paragraph 6 states:

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

The Committee's understanding of equality is consistent with the protection which is given to minorities under Article 27 of the International Covenant on Civil and Political Rights. Article 27 provides that:

Members of ethnic, religious or linguistic minorities shall not be denied the right, in community with the members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 27 recognises that unless State Parties such as Australia implement positive measures to protect the culture of minorities such as Indigenous people then their interests will always be outweighed by the majority of non-Indigenous interests.

In view of the Committee's finding that four specific groups of amendments to the NTA were discriminatory, it was unlikely to find that the Act, when viewed as a whole, would be beneficial to Indigenous people and thus constitute a special measure under Articles 1(4) or 2(2) of the Convention.⁸⁷ In considering whether the amended NTA could qualify as a special measure the Committee undertook a further balancing exercise to determine whether beneficial provisions of the amended NTA outweighed the discriminatory provisions. The Committee found two elements particularly compelling in determining that the NTA could not be characterised as a special measure under the Convention – first, the extent of the discriminatory provisions of the Act, and second, the lack of consent to the amendments by Indigenous peoples.

II. The principle of effective participation of Indigenous peoples

In determining whether the amendments to the NTA were discriminatory the Committee was not only concerned with the standards of equality and non-discrimination contained in the Convention, but also with the procedure by which the amendments were settled. In this regard the Committee asked whether Indigenous people had participated in the formulation of the amendments and whether the amendments were acceptable to the Indigenous people whose rights are directly affected by them. The unequivocal answer to these questions was that Indigenous people did not give their consent to the amendments and that their participation in the process 'had not been given the legitimacy by the Australian Government that [they] expected.'⁸⁸ This was made quite clear by the National Indigenous Working Group the day before the legislation passed through Federal Parliament on 8 July 1998:⁸⁹

⁸⁶ See also Mr Aboul-Nasr, in FAIRA, CERD Transcript, p 44.

⁸⁷ As noted in the previous Native Title report and my predecessor's submission to the CERD Committee, native title does not contain the necessary elements to be characterised as a special measure – it can only constitute a non-discriminatory recognition of difference. To the extent that the NTA incorporates the common law recognition of native title, it too cannot be characterised as a special measure: *Native Title Report 1998*, Sydney, 1999, p 35; HREOC CERD Submission, paras 102-111.

⁸⁸ *Hansard*, Senate, 7 July 1998, p 4352.

⁸⁹ *ibid*, pp 4352-54.

...We confirm that we have not been consulted in relation to the contents of the Bill, particularly in regard to the agreement negotiated between the Prime Minister and Senator Harradine, and that we have not given consent to the Bill in any form which might be construed as sanction to its passage into Australian law.

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

Our participation has not been given the legitimacy by the Australian Government that we expected, and we remain disadvantaged and aggrieved by the failure of the Australian Government to properly integrate our expert counsel into the lawmaking procedures of government....⁹⁰

In its decision of 18 March 1999, the Committee expressed its concern that Australia had not complied with Article 5(c) of the Convention and General Recommendation XXIII concerning Indigenous Peoples:

The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention. Calling upon States Parties to "recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources," the Committee, in its General Recommendation XXIII, stressed the importance of ensuring "that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent".⁹¹

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

I note also that the CERD's general recommendation in Paragraph 4d goes on to say that no decisions directly relating to the rights of Indigenous People are to be taken without their informed consent. This is a higher level of responsibility, a higher level of obligation than simply providing equal rights. This is a requirement to provide for the informed consent of native title holders. Australia admits that the informed consent of native title holders and Indigenous Peoples was not obtained in the Native Title Amendment Act. Australia regrets this. As I said at the beginning on Friday, the government attempted to obtain a consensus with regard to the Act but despite a lengthy process, that consensus was not possible and in the end the parliament had to make the laws which it judged were appropriate. In this case, much of the Native Title Amendment Act is concerned with balancing rights, balancing rights of native title holders with pastoral lessees and others. As I also said on Friday there was no consent to these provisions neither from Indigenous People nor from pastoralists and miners. Australia regards this requirement essentially as aspirational and it tried to meet and aspire to this requirement but it admits honestly before this Committee that the requirement was not met.⁹²

The Committee disagreed with this interpretation of the Convention:

(I)n our general recommendation 23, we referred to the informed consent... it was said that this requirement of informed consent is only aspirational. Now it is not understood by this committee in that sense. I think there we tend to disagree.⁹³

⁹⁰ *ibid*, p 4352.

⁹¹ CERD Decision, para 9.

⁹² Australian Representative in FAIRA, CERD Transcript, p 38.

⁹³ Mr Von Boven in FAIRA, CERD Transcript, p 43.

The Government's interpretation of the Convention's requirement of effective participation follows from what it saw as its role of striking a balance between all those whose interests were affected by the native title legislation. The obligation of a government undertaking this role is that it consults with all the stakeholders so as to understand the position that each takes in relation to the amendments. There is no further obligation to ensure that the policies or legislation affecting Indigenous people are directly negotiated with and agreed to by Indigenous people.

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

Implicit in a relationship of equality is the recognition that the dispossession and marginalisation of Indigenous people has been as a result of their subjugation by **all** non-Indigenous interests. For Indigenous people there is little difference whether, at any particular time in the history of white settlement, mining interests or farming interests or the State itself are the proponents of their dispossession. These are all aspects of the same colonial structure which, since sovereignty, has failed to recognise the rights and interests of Indigenous people.

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

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

Mr Van Boven spoke about substantive right and I'm not going to elaborate on this. Then we were told that we were not able to achieve consensus. So? The parliament acted. That means what in lay man's words? That the point of view of the Indigenous population was not accepted? No consensus was achieved. So the parliament which is the white man again took the matter into their hands and they decided and they imposed on the indigenous people, so what consensus resulted? You put it in such a way, in a legal way as a good lawyer, but as someone who is working in the field of human rights the conclusion that I achieve is that the Indigenous population's point of view is not taken into consideration. The pressure was not felt. Consultation with them did not achieve anything, of course, why should it achieve anything? Equal rights were mentioned. Few rights and not all rights we were not told about that. Consensus was not achieved so parliament imposed whatever they want to impose. I must say that this is a little bit of an alarming picture.⁹⁴

A further basis for a commitment by Government to a negotiated outcome with Indigenous people over native title is the right of self-determination.

⁹⁴ The Chairman, in FAIRA, CERD Transcript, p 44.

The right of self-determination

The right of self-determination of all peoples appears as a fundamental principle in several treaties to which Australia is a signatory, including the International Covenant on Civil and Political Rights and the International Convention on Economic Social and Cultural Rights. Indigenous people are also entitled to exercise the right of self-determination. Article 1 of each of these Conventions states:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

In their General Recommendation on Self-determination the CERD Committee embraced the principle of self-determination:⁹⁵

The right to self-determination of peoples is a fundamental principle of international law. It is enshrined in article 1 of the Charter of the United Nations, in article 1 of the International Covenant on Economic, Social and Cultural Rights and article 1 of the International Covenant on Civil and Political Rights, as well as in other international human rights instruments.⁹⁶

The General Recommendation expressly states that it does not threaten the territorial integrity of sovereign states. It does however encourage states ‘to be sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens’.⁹⁷

Leaving aside the distinction between the internal and external aspects of the right of self-determination, it is clear that the focus of this right is the appropriate location of power rather than the impact of its exercise. Its primary concern is who exercises the decision-making power rather than the decisions that are made through its exercise.

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

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

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

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

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

⁹⁵ Committee on the Elimination of Racial Discrimination, *General Recommendation XXI – Self-Determination*, 8 March 1996, Un Doc CERD/A/51/18, 125-126, paras 9 & 10.

⁹⁶ *ibid*, para 7.

⁹⁷ *ibid*, para 10.

Let me say again that in raising these questions concerning the application of the amended Act, it is also important to evaluate the overall effect of these amendments in light of the initial compromises that were reached in the original 1993 Act between the rights of native title holders and the rights of non-native title holders.⁹⁸

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

Australia's response to the CERD decision

The federal Attorney-General issued a press release following the decision in March 1999 stating that the Government did not agree with the conclusions reached by the Committee, and that the Committee's comments were 'an insult to Australia and all Australians as they are unbalanced and do not refer to the submission made by Australia on the native title issue.'⁹⁹

The Senate considered two motions relating to the decision in April 1999. The first motion sought to express the 'grave concern' of the Senate at the CERD Committee's conclusions, to support their call for Australia to address the issues as a matter of urgency, to urge the Government to re-open discussions with Indigenous representatives, and to invite the Committee to come to Australia. It was rejected on 22 April 1999.

The second motion sought to establish a parliamentary committee inquiry into the compatibility of the amended NTA with Australia's obligations, particularly those under CERD, and the principles of the RDA. The government members of the Senate with the support of Senator Harradine defeated the motion on 29 April 1999.

The immediate response of the Government to the CERD decision can be contrasted to the Government's long-term aspirations in relation to eliminating racial discrimination as contained in Australia's White Paper on Foreign and Trade Policy:

Central to the values to which the Government gives expression is an unqualified commitment to racial equality and to eliminating racial discrimination. This is a non-negotiable tenet of our own national cohesion, reflected in our racial diversity, and it must remain a guiding principle of our international behaviour. The rejection of racial discrimination is not only a moral issue, it is fundamental to our acceptance by, and engagement with, the region where our vital security and economic interests lie. Racial discrimination is not only morally repugnant, it repudiates Australia's best interests.¹⁰⁰

On questions of race, as on other issues which go to the values of the Australian community, Australia's international reputation matters. Australia has a direct national interest in an international reputation as a responsible member of the international community, committed to the rule of law, ready to assist in cases of humanitarian need, and a constructive contributor to the economic development of its neighbourhood. An international reputation as a thoughtful and creative country, genuinely committed to the peace and prosperity of its region, and a source of practical ideas enhances Australia's capacity to influence the regional and global agenda in ways which promote the interests of

⁹⁸ Australian Country Rapporteur, Report, pp 5-8.

⁹⁹ Attorney-General, *Media Release*, 19 March 1999.

¹⁰⁰ Department of Foreign Affairs and Trade, *In the national interest – Australia's Foreign and Trade Policy White Paper*, Commonwealth of Australia, Canberra, 1997, para 24.

Australia.¹⁰¹

It is hard to see how Australia can maintain a dismissive attitude to the CERD decision while at the same time valuing its international reputation 'as a responsible member of the international community'. The force and influence of CERD derives from the fact that signatory States have voluntarily undertaken to comply with its obligations under the treaty to eliminate racial discrimination. The State has also consented to being scrutinised on the world stage. Australia's White Paper on Foreign and Trade Policy recognises that while decisions or opinions of international committees such as the CERD Committee's findings do not bind domestic Australian law, developments in the international arena still exert considerable influence on how domestic law and policy develops.

The implications of the CERD decision

Continued scrutiny by the CERD Committee

The CERD Committee will continue consideration of native title, together with Australia's tenth, eleventh and twelfth Periodic Reports when it next meets in March 2000. Should Australia be regarded as continuing to act in breach of its obligations under CERD the Committee may treat the situation in Australia with increasing concern and seriousness. Where the Committee has considered a State under the prevention procedures and found that they have violated their obligations under CERD, they have variously provided recommendations for action to the High Commissioner for Human Rights, the Secretary-General, the General Assembly or the Security Council of the United Nations.¹⁰²

Individual communications

In the *Native Title Report 1998* my predecessor argued that the amendments to the *Native Title Act 1993* (Cth) (NTA) breach Australia's international human rights obligations contained in the following treaties:¹⁰³

- International Covenant on Civil and Political Rights (ICCPR), including;
 - Article 1 (the right to self-determination);
 - Article 2 (non-discrimination);
 - Article 26 (equality before the law); and
 - Article 27 (minority group or cultural rights).¹⁰⁴
- International Covenant on Economic, Social and Cultural Rights (ICESCR); and
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

¹⁰¹ *ibid*, para 25.

¹⁰² Michael O'Flaherty, *op.cit.*, p 160; See also Committee on the Elimination of Racial Discrimination, *Working Paper – Prevention of racial discrimination, including early warning and urgent procedures, op.cit.*, paras 4 & 10.

¹⁰³ Acting Aboriginal and Social Justice Commissioner, *Native Title Report 1998*, HREOC, Sydney, Chapter 2. A similar view was put about the amendments as they were then proposed in the 1996-97 report: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996-97*, HREOC, Sydney, 1997, Chapter 6.

¹⁰⁴ See further *Native Title Report 1998*, Chapter 2. Note, however, that communications alleging a breach of the right to self-determination have been ruled inadmissible by the Human Rights Committee.

Paragraphs 7 and 8 of the CERD Committee's Decision 2(54) substantiate these concerns and confirm that the native title amendments breach Australia's obligations under Articles 2 and 5 of CERD.

Australia has taken the steps necessary under Article 14 of CERD and the First Optional Protocol to the ICCPR to recognise the competence of both the CERD Committee and the Human Rights Committee (which operates under the ICCPR). As a result, individuals within Australian jurisdiction may bring communications (or complaints) to either Committee alleging that they are victims of a violation of CERD or the ICCPR by Australia.

Where an individual communication results in a finding that Australia's obligations under CERD or the ICCPR have been breached it is open to the government to ameliorate the discrimination faced by the complainants through the exercise of the following discretionary mechanisms existing within the NTA.

- Removing acts from the list of scheduled interests. Acts contained in Schedule 1 to the Native Title Act are confirmed as having the effect of extinguishing native title permanently. Section 23B(10) allows any acts contained in the schedule to be removed by regulation. Individual communications may play a crucial role in persuading governments to remove grants from the schedule by regulation where it is revealed that the common law position differs from that confirmed by the schedule.
- Agreements to change the effect of validation. Section 24EBA(6) of the NTA provides that parties to an Indigenous Land Use Agreement may agree to change the effect of validation of an intermediate period act. The government party could agree, for example, that a particular grant does not have the effect of extinguishing native title.
- Restitution of land through the compensation provisions. Compensation applications are likely to arise in relation to the validation or confirmation provisions. Section 79 of the NTA provides that parties to a negotiation under the compensation provisions of the Act must consider requests by Indigenous parties for non-monetary forms of compensation and negotiate in good faith with regard to such requests. It is feasible that agreed compensation determinations could be reached which reconstitute land to native title holders.

Periodic reporting requirements

States that ratify international human rights treaties or conventions are obliged to provide periodic reports to the relevant Committee set up under the convention. These reports are generally required to provide details on how the State complies or breaches its obligations under the relevant convention. Australia can expect further scrutiny of the native title amendments by the CERD Committee, the Human Rights Committee (under the ICCPR) and the Cultural, Economic and Social Rights Committee (under the International Covenant on Economic, Social and Cultural Rights) when these committees consider Australia's next periodic reports under each of these conventions. In March 2000, the CERD Committee will be considering Australia's tenth, eleventh and twelfth periodic reports alongside developments in the NTA in August 1999.

Judicial review of administrative decisions

There is wide scope for judicial review of decisions made in accordance with the NTA or state or territory legislation authorised by the NTA. Examples of decisions that are reviewable include Ministerial determinations that state or territory legislation complies with the minimum standards of the NTA (eg, under s43A NTA), decisions by the Native Title Registrar, and determinations by relevant tribunals.

International law bears some influence in this review process due to the High Court's decision in *Minister for Immigration and Ethnic Affairs v Teoh*¹⁰⁵ The High Court held that the ratification of an international convention gives rise to a legitimate expectation that a decision maker will take into account Australia's international obligations in exercising their discretionary administrative powers.¹⁰⁶

The CERD Committee's findings reinforce that there is an obligation placed on Australia to ensure the effective participation of Indigenous people in decisions that affect them. The Human Rights Committee has also emphasised this requirement in interpreting the scope of the obligations imposed by Article 27 of the ICCPR.¹⁰⁷ These obligations are important, for example, in evaluating the adequacy of notification periods, consultation processes and independent review mechanisms contained in state or territory alternative provisions under section 43A of the NTA. Failure to consider these international obligations in making a decision could give rise to a right of judicial review.

Scrutiny and possible disallowance by the Senate

Section 214 of the NTA provides that various determinations made under the Act are disallowable instruments and subject to the scrutiny of Parliament. The CERD Committee's findings and Australia's international obligations generally are important factors to be taken into consideration by members of Parliament in determining the adequacy of any scheme authorised under the NTA and subject to disallowance. Chapter 3 will consider the Senate's deliberations in relation to the right to negotiate scheme which the Northern Territory seeks to introduce through its Parliament.

Constitutional validity

There are two possible heads of power in section 51 of the Constitution that would support the NTA – the external affairs power (s51(xxix)) and the race power (s51(xxvi)).

The High Court in *Western Australia v Commonwealth* held that the original NTA was 'either a special measure under s 8 of the *Racial Discrimination Act 1975* (RDA) or a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the (RDA) or the (CERD).'¹⁰⁸ As the original NTA was considered to comply with Australia's international obligations, the Act could validly be made under either head of power.

Given the CERD Committee's finding that the amended NTA discriminates and can no longer be characterised as a special measure under CERD, it is unlikely that the amended NTA falls within the scope of the external affairs power. That is because it can no longer be seen as implementing CERD.

Accordingly, for the amended NTA to be a valid act, it must fall within the scope of the race power. It remains uncertain whether the race power only supports laws that benefit peoples of a particular race or whether it supports laws that discriminate as well.¹⁰⁹ If the more limited characterisation of the race power prevails, the CERD Committee's findings will be a

¹⁰⁵ (1995) 183 CLR 273.

¹⁰⁶ The Attorney-General and Minister for Foreign Affairs have issued a joint statement which seeks to prevent such a legitimate expectation from arising, though the effect of this statement is questionable.

¹⁰⁷ See *Native Title Report 1998*, pp 53-54.

¹⁰⁸ (1995) 183 CLR 373, per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ at p 484.

¹⁰⁹ This issue was unresolved in the Hindmarsh Island Bridge case, *Kartinyeri v Commonwealth* (1998) 152 ALR 540.

persuasive element in the High Court's determination of whether the amended NTA is discriminatory.

What can be seen from the above consideration of the CERD decision is that acceptable solutions in relation to native title need to be negotiated not imposed. While native title remains a legislative scheme which prefers non-Indigenous interests at the expense of Indigenous interests, native title will be open to international scrutiny and pressure.

Chapter 3: State regimes

Many of the amendments to the *Native Title Act 1993* (Cth) (NTA) have the effect of transferring control over native title matters from the Commonwealth Government to state and territory governments. As the Aboriginal and Torres Strait Islander Social Justice Commissioner, my concern in relation to the many native title regimes developed at a state level, is that the human rights of Indigenous people are inadequately protected. This can best be addressed by the Commonwealth ensuring that binding standards, which incorporate the principles of equality and effective participation, are established within the Native Title Act. In this way, Australia's international obligations under the Convention on the Elimination of All Forms of Racial Discrimination (CERD), to ensure the rights of Indigenous people are recognised and protected, will be met.

Unfortunately, the minimum standards which the Commonwealth presently applies to state native title regimes do not incorporate the principles of equality and effective participation. Native title has become enmeshed in a procession of land management regimes which treat native title in different ways, depending on the land use patterns of the particular states. Accordingly, many of the native title regimes already established or being considered by state governments fail to meet Australia's international obligations under CERD.

The Committee on the Elimination of Racial Discrimination (CERD Committee), in its consideration of the amendments to the NTA, noted three groups of provisions that allow states to pass legislation which discriminates against Indigenous title-holders.¹¹⁰ These are the "validation" provisions, the "confirmation" provisions, and the provisions which allow the states to establish alternative regimes and exceptions to the right to negotiate provisions. In relation to these provisions the interests of non-Indigenous title holders are preferred over the interests of Indigenous title holders.

The validation provisions

The amended NTA contains provisions which enable states and territories to validate 'intermediate period acts' which took place after the proclamation of the NTA on 1 January 1994, and before the handing down of the *Wik*¹¹¹ decision on 23 December 1996.¹¹² An intermediate period act is an act which is invalid because the procedural or substantive rights of native title holders were not taken into account. An example is the grant of a license or mining tenement on native title land without extending procedural rights, such as proper notification, to native title parties. The amendments provide that such grants are valid and are deemed to have always been valid.¹¹³

The background to these amendments is that, during the 'intermediate period', governments acted on an assumption, proven false in the *Wik* decision, that the grant of a pastoral leasehold extinguished native title. Consequently, in relation to native title holders and claimants co-existing on pastoral leasehold land, state governments ignored the provisions of the original NTA which required that, for governments intending to deal with native title land, native title

¹¹⁰ Committee on the Elimination of Racial Discrimination *Decision 2(54) on Australia*, 18 March 1999. UN Doc CERD/C/54/Misc.40/Rev.2.

¹¹¹ *Wik v Queensland* (1996) 187 CLR 1 ('*Wik*').

¹¹² NTA, Division 2A, Part 2. S22F provides that states and territories may validate intermediate acts attributable to the state and territory.

¹¹³ NTA, s22A, 22F.

holders have the same procedural rights as ordinary title holders.¹¹⁴ The original NTA also provided that, in relation to the creation, extension and variation of a right to mine, native title holders and claimants had a right to negotiate with miners and governments over the project. In the intermediate period state governments, when issuing mining tenements over native title land which co-existed with pastoral leaseholds, disregarded the rights of native title holders as stipulated in the NTA.

As a result of the validation of intermediate period acts, native title is either extinguished, (where the act is the construction of a public work or the grant of certain freehold and leasehold estates)¹¹⁵; extinguished to the extent of any inconsistency, (where the act is the grant of 'other' leases)¹¹⁶; or not extinguished but rendered unenforceable until the intermediate period act ceases to be in operation, (where the act is the grant of a mining lease or any other act).¹¹⁷

Native title holders are entitled to compensation as a result of the impact of the validation provisions on their title. However, access to compensation for loss or impairment of title is dependent on identifying the parcels of land on which grants have been made, state governments notifying actual or potential native title holders that their interests may be affected by acts which have been validated, and the determination by a court that native title exists on the land.

The state government's duty to notify native title holders, claimants and representative bodies of intermediate period acts is limited to those acts which involve the creation, variation or extension (other than by the exercise of an option), of a right to mine.¹¹⁸ State governments must provide sufficient details to enable identification of the mining grant. Notification must take place within 6 months of the validation legislation being introduced. As a result of the limitation placed on the government's duty to notify Indigenous parties of intermediate period acts, access to compensation will, in practice, also be limited.

The amended NTA does not expressly provide for the payment of compensation in respect of the loss of the right to negotiate where an invalid mining tenement granted over native title in the intermediate period has been validated. It is arguable, however, that the loss of the right to negotiate as a result of the validation provisions is the loss of an interest in property and thus compensable on just terms under paragraph 51(xxxi) of the Constitution.¹¹⁹

Table 1 sets out the status of state and territory validation legislation, as at 30 June 1999. Where, at the time of writing, changes have been made to the information contained in the table, these are noted.

¹¹⁴ NTA, s23(6).

¹¹⁵ NTA, s229.

¹¹⁶ NTA, s230.

¹¹⁷ NTA, s231, 232.

¹¹⁸ The notification provisions are contained in NTA, s22H.

¹¹⁹ See NTA, s53.

Table 1: Validation legislation introduced by the states and territories

State or Territory	Legislative action	Status of legislation
New South Wales	<i>Native Title (New South Wales) Amendment Act 1998</i>	Proclaimed on 30 September 1998
Victoria	<i>Land Titles Validation (Amendment) Act 1998</i>	Parts 1 and 2 received assent on 24 November 1998
Australian Capital Territory (ACT)	<i>Native Title (Amendment) Bill 1999</i>	The bill is before the Legislative Assembly
South Australia	<i>Statutes Amendment (Native Title) Bill (No.2) 1998</i>	Introduced into Parliament on 10 December 1998. It will be presented in Spring 1999 session ¹²⁰
Western Australia	<i>Titles Validation (Amendment) Act 1999</i>	Assented to by Parliament on 5 May 1999
Northern Territory	<i>Validation of Titles and Actions Amendment Act 1998</i>	Assented to by Parliament on 28 August 1998 and commenced on 1 October 1998
Queensland	<i>Native Title (Queensland) State Provisions Act 1998</i>	Assented to on 3 September 1998.
Tasmania	No proposed legislation to date	N/A

Measuring the validation provisions against human rights standards

The past two Native Title Reports have evaluated the validation provisions against human rights standards.¹²¹ Since the publication of these reports, the CERD Committee has also examined these provisions in order to determine whether they comply with Australia's obligations under CERD. As discussed in chapter two of this report, the basis of the CERD Committee's criticisms of the amendments was the Government's failure to observe the principles of equality and effective participation.

Effective participation

In its decision of 18 March 1999 the CERD Committee expressed its concern that Australia had not complied with Article 5(c) of the Convention and General Recommendation XXIII concerning Indigenous Peoples:

The lack of effective participation by indigenous communities in the formulation of the

¹²⁰ On 18 November 1999 the *Native Title (South Australia) (Validation and Confirmation) Amendment Bill 1999* was introduced into Parliament.

¹²¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1997-98*, HREOC, Sydney, p 40 and *Native Title Report 1996-97*, HREOC, Sydney, Chapter 4, p 59.

amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention. Calling upon States Parties to "recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources," the Committee, in its General Recommendation XXIII, stressed the importance of ensuring "that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent".¹²²

The validation provisions were strongly opposed by the National Indigenous Working Group during the drafting of the amendments. Indigenous groups in states and territories also objected to state regimes which, under the authority of the NTA, validated intermediate period acts which failed to take account of native title interests. Yet in New South Wales, Victoria, Western Australia, Northern Territory and Queensland legislation has been enacted despite Indigenous protests. Inadequate consultation and an unwillingness to negotiate an alternative to blanket validation has characterised the drafting of state and territory legislation. The right of effective participation, which requires that decisions relating to the rights and interests of Indigenous people not be made without their informed consent, has been breached.

Equality

Of all the amendments to the NTA, the validation provisions were most criticised by the CERD Committee as discriminatory provisions. The questions in relation to the validation provisions put to the Australian representative by the CERD Committee's Country Rapporteur, Ms G McDougall, when the Committee considered Australia in March 1999, were of a rhetorical rather than inquisitorial nature:

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

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

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

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

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

Aren't these provisions discriminatory in that they purport to validate acts and to provide for extinguishment only in relation to native title and not in relation to other forms of title and with no countervailing benefit to be obtained on the basis of which these amendments could be considered 'special measures' under the Convention?¹²³

The test that the CERD Committee applied in deciding whether the validation provisions were discriminatory was whether they result in non-Indigenous interests being preferred over Indigenous interests. The preference given to non-Indigenous interests by these provisions can

¹²² Committee on the Elimination of Racial Discrimination, *Decision (2)54 on Australia*, 18 March 1999. UN Doc CERD/C/54/Misc.40/Rev.2., para 9.

¹²³ McDougall, G. Country Rapporteur, *Meeting of the Committee on the Elimination of All Forms of Racial Discrimination – Report by Ms G McDougall, Country Rapporteur*, 12 March 1999, p 9, (Herein Australian Country Rapporteur, Report.) <<http://www.faira.org.au/issues.html>>.

be illustrated in relation to the grant of a mining tenement over native title land in the intermediate period. The validation of this intermediate period act results in native title holders or claimants being deprived of a right to negotiate, and thus deprived of the protection which this right extends to native title interests. In addition, the real benefits to Indigenous communities which often result from the negotiation process, such as employment opportunities, sub-contracting opportunities, training and apprenticeship opportunities, and infrastructure benefits, are lost.¹²⁴ Although the non-extinguishment principle allows native title to revive when the mining interest expires, this is an unacceptable level of protection when the right to negotiate has been stripped, freeing mining companies from the obligation to observe native title holders' right of reversion. A benefit is delivered to mining interests to the detriment of the native title holders.¹²⁵

Australia, appearing before the CERD Committee in March 1999, sought to defend the validation provisions in several ways:

- The Government argued that the balance of legal opinion in relation to the intermediate period acts was that native title had not survived the grant of a pastoral leasehold and that states were entitled to assume that this opinion was correct. As indicated by the Special Rapporteur, contrary opinion was also available at the time, including the opinion of the Aboriginal and Torres Strait Islander Social Justice Commissioner, that a legislative intention to extinguish property interests, including native title, is not easily implied, and that in relation to the grant of a statutory lease, such as a pastoral lease, it is unlikely that native title is extinguished.
- The Government also argued that a distinction needed to be made between intermediate past acts, which might well have been discriminatory, and the legislative validation of these past acts, which was not discriminatory.¹²⁶ Indeed, it was argued, the validation of past discriminatory acts is an acceptance of the fact that past acts 'cannot be undone'.¹²⁷

This argument cannot be sustained within a human rights framework. After all, the invalidity of intermediate period acts was a result of the application of the 'freehold test' in the original NTA, which sought to ensure that native title holders would be in the same position as ordinary titleholders in relation to their procedural rights. In this way the NTA incorporated the standards of equality enshrined in the RDA and CERD to remedy the effect of past injustices in the future. To now classify these recent illegal dealings on native title land as 'things that happened in the past'¹²⁸ is a rewriting of history that the Committee was not prepared to accept. As the Country Rapporteur noted:

the government believes that it cannot go back and cure the injustices of the past. Of course there is some merit in that view. What concerns me however is that the validation and confirmation of extinguishment provisions in the Amended Act, that among them are provisions that do not only apply to the distant past. They appear to apply also to actions that in some cases took place as recently as 1994 and 1996...¹²⁹

Mr Chairman I would welcome a discussion within the committee about how we might

¹²⁴ See further: Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, HREOC, Sydney, 1999, Chapter 4.

¹²⁵ *Transcript of Australia's Hearing before the CERD Committee*, Summary Record of the 1323rd meeting, *Committee on the Elimination of Racial Discrimination*, pp 27-31. (Herein Australia's Hearing) <<http://www.faira.org.au/issues.html>>.

¹²⁶ Australia's Hearing, p 21.

¹²⁷ Australia's Hearing, p 22.

¹²⁸ Orr, R., CERD Transcript, p 30.

¹²⁹ *ibid*, p 60.

continue our urgent deliberations on Australia's Native Title Amendment Act... before other rights get extinguished in such a way that they would be referred to as the injustices of the past which cannot now be rendered right.¹³⁰

The CERD Committee recognised the need to acknowledge that past discriminatory practices have 'endured as an acute impairment of the rights of Australia's indigenous communities'.¹³¹

The confirmation provisions

Prior to the common law recognition of native title, state land rights legislation represented the only available remedy to Indigenous people for the dispossession of their land. The development of land rights legislation across the states is a history of inquiries, government resistance, small concessions, incremental improvements and continual lobbying over a period of at least twenty-five years.¹³² In contrast, twelve months after the passage of the amended NTA, most states have passed legislation, under the authority of the NTA, confirming extinguishment of native title.

Section 23E of the NTA provides that states and territories may introduce legislation that deems certain classes of tenures as well as specifically scheduled tenures granted before 23 December 1996 to have either extinguished or impaired native title. Native title holders are entitled to compensation for any extinguishment of native title as a result of these provisions. Table 2, following, provides details of legislation that the states and territories have introduced or have tabled as at 30 June 1999. Where, at the time of writing, changes have been made to the information contained in the table, these are noted.

Table 2: Confirmation legislation introduced by the states and territories

State or Territory	Legislative action	Status of legislation
New South Wales	<i>Native Title (New South Wales) Amendment Act 1998</i>	Royal assent and proclaimed on 30 September 1998
Victoria	<i>Land Titles Validation (Amendment) Act 1998</i>	Parts 1 and 2 received assent on 24 November 1998
Australian Capital Territory (ACT)	<i>Native Title (Amendment) Bill 1999</i>	The bill is before the Legislative Assembly
South Australia	<i>Statutes Amendment (Native Title) Bill (No.2) 1998</i>	The bill was introduced into Parliament on 10 December 1998 ¹³³
Western Australia	<i>Titles Validation (Amendment) Act 1999</i>	Passed by Parliament on 5 May 1999 ¹³⁴

¹³⁰ *ibid*, p 61.

¹³¹ CERD Decision, para 3.

¹³² Chesterman, J. and Galligan, B. *Citizens Without Rights: Aborigines and Australian Citizenship*, Cambridge University Press, 1997, Melbourne, pp 201-205.

¹³³ On 18 November 1999 the *Native Title (South Australia) (Validation and Confirmation) Amendment Bill 1999* was introduced into Parliament.

¹³⁴ *Titles (Validation) and Native Title (Effect of Past Acts) Amendment Act 1999* received royal assent on 13 December 1999. This Act adds all previous exclusive possession acts and all public works to the list of acts where extinguishment is confirmed.

Northern Territory	<i>Validation of Titles and Actions Amendment Act 1998</i> <i>Lands and Mining (Miscellaneous Amendments) Act 1998</i> <i>Statute Law Revision Act 1999</i>	Assented to on 28 August 1998 and commenced on 1 October 1998
Queensland	<i>Native Title (Queensland) State Provisions Act 1998</i>	Assented to on 3 September 1998
Tasmania	No proposed legislation to date	N/A

In 1997 the Commonwealth estimated the percentage of the nation covered by tenures over which states and territories can ‘confirm’ extinguishment. These figures are reproduced at Table 3 following.¹³⁵

Table 3: Extent to which the scheduled interests under the NTA extinguish native title

State	Areas in hectares of major listed tenures	Percentage of state	Percentage of Australia
New South Wales	4,650,933	5.80	0.61
South Australia	7,278,882	7.39	0.94
Queensland	38,565,164	22.33	5.02
Western Australia	930,700	0.37	0.12
Total	51,425,679	-	6.69

Note 1: The Commonwealth notes that ‘the other tenures for which detailed tenure information is not available comprises less than 1% of each jurisdiction... The area of Australia that would be subject to the (confirmation) schedule would therefore be less than 7.7% of the total area.’¹³⁶

Note 2: The figures for Western Australia are for the complete schedule listed in the NTA, and not the revised schedule passed by the Western Australian Parliament (which did not confirm extinguishment on some tenures – as discussed below).

Human rights standards

While the CERD Committee, in paragraph 11 of Decision 2(54), urged the Australian Government to suspend implementation of the 1998 amendments and resume negotiations with Indigenous parties, most states and territories have proceeded to introduce confirmation legislation.

¹³⁵ Commonwealth of Australia, *Commonwealth Government Submission on the Native Title Amendment Bill 1997 to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, 16 October 1997, Attachment C. These figures are rough estimates drawn from the limited available tenure information.

¹³⁶ *ibid.*

The CERD Committee Country Rapporteur made the following observations in relation to the confirmation provisions:

It appears to me that these confirmation provisions in the amended Act represent a significant encroachment on common law native title protection in two ways.

First they 'deem' that certain tenures extinguish native title where at common law they would not and secondly, they provide that upon being confirmed, these tenures extinguish native title forever, regardless of whether the non-native title tenure continues to subsist on the land.¹³⁷

The Government explained the rationale underlying the confirmation provisions to the CERD Committee:

In response to legal uncertainty in a range of areas, the NTA enables the past extinguishment of native title by the grant of previous exclusive possession tenures to be confirmed by States and Territories. These confirmation provisions seek to reflect the common law, but remove the need for lengthy case-by-case determination by the courts.¹³⁸

This approach to the determination of native title represents a significant departure from the approach of the original NTA.

The original NTA largely left the question of what extinguishes native title to the common law. Broad guidelines in *Mabo (No.2)* required a clear and plain intention on the part of the government for extinguishment to occur. This could be implicit in government actions totally inconsistent with the continuation of native title rights, such as the building of major public works...The Government in effect wanted to pre-empt the development of the common law by specifying in legislation the grants which extinguish native title¹³⁹.

The public policy objective of providing certainty in relation to property rights, although important, should not take precedence over the principles of equality and non-discrimination. The CERD Committee made it clear that discrimination occurs when non-Indigenous interests are preferred over Indigenous interests.

The discriminatory nature of the confirmation provisions is demonstrated by considering some examples of interests that are scheduled as extinguishing native title permanently.

Victoria

The Victorian legislation fully adopts the schedule of interests over which the states, under the authority of the NTA, can confirm extinguishment of native title. This includes current and historic tenures. By including historic tenures, the Victorian Parliament has extinguished native title on land where there has been no inconsistent tenure grant for many years. An example is the grant of freehold in the 1890s over land that is now part of Wilson's Promontory National Park.¹⁴⁰

¹³⁷ Australian Country Rapporteur, Report, p 10.

¹³⁸ Australian Government, Australian Government Response to the United Nations Committee on Racial Discrimination - *Request for Information Under Article 9 Paragraph 1 of the Convention on the Elimination of All Forms of Racial Discrimination*, January 1999, p 7.

¹³⁹ Burke, P. 'Evaluating the Native Title Amendment Act 1998' in *Australian Indigenous Law Reporter* (1998) 3 AILR p 337.

¹⁴⁰ The amended NTA provides a limited exception to extinguishment by historic tenure under s47B. Certain criteria must be met. The claimed area must not be the subject of a reservation and must be occupied by the claimants. Olney J considered the application of this section, and interpretation of use and occupation in: *Hayes v Northern Territory* [1999] FCA 1248 (9 September 1999).

Queensland

The *Native Title (Queensland) State Provisions Act 1998* confirms that Grazing Homestead Perpetual Leases (GHPLs) extinguish native title. Under the authority of the amended NTA, the Queensland Government was able to extinguish native title over these leases despite concerns from Indigenous people that the grant of a GHPL would not extinguish native title at common law.

A Grazing Homestead Perpetual Lease is created by statute and quite distinct from a lease created at common law. An eminent Brisbane barrister, who argued successfully before the High Court in the *Wik* case that the grant of pastoral leasehold did not extinguish native title, has provided the following advice to the Queensland Indigenous Working Group in relation to GHPLs.

A Grazing Homestead Perpetual Lease is a tenure of a kind that is entirely unknown to the common law. One of the fundamental features of a lease is that it constitutes a grant of an interest in land for a term of years. Yet, the Grazing Lease is said to be a lease “in perpetuity”. Such leases are part of the unique Australian system of rural land management which was considered by the High Court in *Wik Peoples v Queensland* (1996) 187 CLR 1. Consequently, even more so than in the case of a pastoral lease which was considered in the *Wik* case, it is important to bear in mind that this tenure creates an interest in land limited to the incidents prescribed by the Land Act and it would be a mistake to import into such a tenure any features of a common law lease by reference to the use of the word “lease” in the name of the tenure itself.

In addition, even more so than in the case of a pastoral lease, a “perpetual lease” cannot be taken to confer a right of exclusive possession simply because it is described as a lease: see *Wik* case at p 198 per Gummow J.....Other considerations which caused the majority in the *Wik* case to decide that the grant of a pastoral lease did not necessarily extinguish native title included the denial to a lessee of the power to destroy tress.: see at p.154. That restriction also applies to the holder of a Grazing Lease: s250. In addition, it was relevant that pastoral leases reserved the right of any person duly authorised by the Crown: at all times to go upon the said land, or any part thereof, for any purpose whatsoever, or to make any survey, inspection, or examination of the same: *Wik* case at p.154.

I have been briefed with a copy of a Grazing Lease and an identical reservation appears in that document.¹⁴¹

This advice raises serious concerns that legislation which extinguishes native title in respect of Grazing Homestead Perpetual Leases goes beyond the common law. Yet the Queensland Government has legislated to permanently extinguish native title on 12% of the land mass of Queensland. This legislative extinguishment was strongly opposed by Indigenous representatives on the basis that the interests of non-Indigenous interests are preferred over Indigenous interests.¹⁴²

Western Australia

Western Australia was the only state, within the reporting period, that had not extinguished native title to the full extent allowed in the amended NTA. The *Titles Validation (Amendment) Act 1999 (WA)* only partially adopted the schedule of the NTA. Native title parties argued that

¹⁴¹ Walter Sofronoff QC, Advice to the Queensland Indigenous Working Group, 25 August 1998, pp 3-4 in Queensland Indigenous Working Group *Collection of Papers of the Proceedings of the Queensland Native Title Working Group*, Brisbane, November 1998.

¹⁴² Queensland Indigenous Working Group, Letter to the Honourable Peter Beattie, Premier of Queensland, 25 August 1998, in Queensland Indigenous Working Group *Collection of Papers of the Proceedings of the Queensland Native Title Working Group*, November 1998.

the schedule included a vast range of leases which would not extinguish native title at common law. The Western Australian Parliament passed what is described as a ‘mini-schedule’ excluding, for example, historical leases.¹⁴³

In restricting confirmation to the ‘mini-schedule’ the Western Australian Parliament considered the Federal Court decision of Justice Lee in *Ward (on behalf of the Miriuwung and Gajerrong People) v Western Australia*¹⁴⁴

In that case, Justice Lee was required to look closely at special leases that had been granted under Sections 152 of the *Land Act 1898 (WA)*, and Sections 116 and 117 of the *Land Act 1933 (WA)*. The leases were for the purposes of grazing, cultivation and grazing, market gardening, canning and preserving works, concrete production, and for an Aboriginal hostel and an inter-cultural centre. These leases were scheduled in the amended NTA as extinguishing native title.

Justice Lee found that these leases did *not* extinguish native title at common law. He also found that the criterion used to ‘confirm’ extinguishment was directed at the wrong question. The question was not whether the grant of the title gives rise to a right of exclusive possession, but whether in granting the title there is a clear and plain intention to extinguish native title.

Justice Lee found that these leases amounted to a temporary use of the land; that in many cases the land had not been used for the purpose of the grant; that the grant was made for a limited time period; and that the land had in all cases reverted to Crown land. His conclusion was that in each instance, a clear and plain intention by the Crown to extinguish native title could not be found, and that as a consequence no extinguishment had occurred.¹⁴⁵

Initially, the upper house of the Western Australian Parliament amended the Government’s legislation, excluding from the schedule those interests that Justice Lee determined did not extinguish native title. More recently, however, the Western Australian Government has produced a table of Special Purpose Leases which will extinguish native title, even though at common law the grant is not inconsistent with the continuing existence of native title.¹⁴⁶

In order to know whether native title could co-exist on such leases one would need to know whether there had been any use of the land for the purpose for which it was granted; and determine whether such use is inconsistent with any continuing possession, occupation, use or enjoyment of the land for native title purposes. On the information supplied, (in the table) it may be that many of the leases in question have never been used for any purpose inconsistent with the continuing exercise of native title....

In the case of the camping lease which is held by the Strelly Housing Society for the benefit of Aboriginal people, the intention was almost certainly to preserve a lifestyle consistent with a co-existing native title.¹⁴⁷

The extinguishment of a citizen’s property rights is a serious incursion by the State upon the civil rights of an individual. Where that extinguishment is only in relation to Indigenous interests for the benefit of non-Indigenous interests, racial discrimination occurs.

¹⁴³ McIntyre, G. ‘Native Title and the Certainty Created by Racial Discrimination’ *Requirements of Justice: Legal Perspectives on Reconciliation*, University of New South Wales Law Journal Forum, p 24.

¹⁴⁴ (1998) 159 ALR 483. This decision is currently subject to appeal. *Requirements of Justice: Legal Perspectives on Reconciliation*, University of New South Wales Law Journal Forum, p 24.

¹⁴⁵ Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1997-98*, HREOC, Sydney, p 44.

¹⁴⁶ The *Titles (Validation) and Native Title (Effect of Past Acts) Amendment Act 1999* received royal assent on 13 December 1999. This Act adds all previous exclusive possession acts and public works titles to the list of acts which confirm extinguishment of native title.

¹⁴⁷ McIntyre, G. *op.cit.*, p 25.

The right to negotiate provisions

Under the original NTA, native title holders or claimants had an extensive right to negotiate with miners, developers and Government where the Government intended to create, vary or extend a right to mine over native title land or intended to compulsorily acquire the land for the benefit of a third party. The amended NTA substantially diminishes or, in some instances, removes the right to negotiate in a number of ways. One way is that, in a number of important areas, states and territories are authorised, though not compelled, to introduce legislation that diminishes or removes the operation of the right to negotiate. States require Commonwealth approval for legislative schemes that create exceptions to the right to negotiate in relation to the following grants or activities:

- a mining right at the exploration stage (s26A);
- approved gold or tin mining acts (s26B); and
- excluded opal or gem mining (s26C).

States are also authorised, under section 43A of the NTA, to replace the right to negotiate with a right to object and be consulted, where native title is over pastoral leasehold land, vacant crown land, reserve land or land within towns and cities. Again, the Commonwealth must approve alternative state regimes under s43A before enactment. Prior to the state legislation taking effect the Commonwealth Attorney-General must determine that it complies with minimum requirements set out in s43A of the NTA. This determination is a disallowable instrument, subject to rejection by the Senate.¹⁴⁸

Table 4 sets out the current status of alternative right to negotiate legislation that the states and territories have introduced, as at 30 June 1999. Where, at the time of writing, changes have been made to the legislation contained in the table, these are noted.

Table 4: State and territory legislation that adopts exceptions to the right to negotiate provisions

State or territory	Legislative action	Status of legislation
New South Wales	Ss32-39 <i>Native Title (NSW) Amendment Act 1998</i> (NSW) provide that the Administrative Decisions Tribunal will hear objections arising in relation to s24MD(6B). Amendments to <i>Mining Act</i> and <i>Petroleum Act (Onshore) Act 1991</i> ensure that particular grants qualify as either approved exploration grants (s26A) or approved opal or gem mining (s26C). These provisions do not come into force until the Commonwealth Minister has made a determination. NSW has applied for a determination in relation to s26C, but not for s26A.	Proclaimed on 30 September 1998
Victoria	The <i>Land Titles Validation (Amendment) Act 1998</i> amends the <i>Pipelines Act 1967</i> in order to comply with the requirements of s24MD(6B). The Government is considering introducing a bill that enables them to introduce exceptions under ss26A, 26B, 43 and 43A of the NTA.	Enacted by Parliament and in force No legislation as yet
ACT	No legislation is planned.	N/A

¹⁴⁸ NTA, s214.

South Australia	South Australia has had a state based right to negotiate in place since 1994. Amendments in the Statutes Amendment (Native Title) Bill (No 2) modify this scheme so that it complies with s43 NTA. This Bill also proposes to introduce provisions consistent with s26A of the NTA. Consultation in relation to the amendment to the right to negotiate provisions is continuing.	Introduced in Parliament on 10 December 1998
Western Australia	The <i>Native Title (States Provisions) Bill 1998 (WA)</i> proposes to: <ul style="list-style-type: none"> • Replace the RTN with a state based scheme (s43); • Replace the RTN on pastoral leasehold land (s43A); • Comply with the requirements of s24MD(6B). 	Bill expected to be before the Legislative Assembly on 21 December 1999
Northern Territory	The following acts and regulations have been passed <ul style="list-style-type: none"> • <i>Land Acquisition Amendment Act (No 2) 1998</i> • <i>Mining Amendment Act (No 2) 1998</i> • <i>Petroleum Amendment Act 1998</i> • <i>Petroleum (Submerged Lands) Amendment Act 1998</i> • <i>Land and Mining Tribunal Act 1998</i> • <i>Energy Pipelines Amendment Act 1998</i> • <i>Validation of Titles and Actions Amendment Act 1998</i> • <i>Land Acquisitions Amendment Regulations 1998</i> • <i>Mining Amendment Regulations 1999 No 14</i> • <i>Petroleum Amendment Regulations 1999 No 15</i> • <i>Energy Pipelines Amendment Regulations 1998.</i> 	Enacted by Parliament and in force
Queensland	<i>Native Title (Queensland) State Provisions Act (No.2) 1998</i> introduces the following provisions <ul style="list-style-type: none"> • Section 43 – State base right to negotiate • Section 43A – alternative right to negotiate • Section 26A – exploration acts, but only on pastoral leasehold land • Section 26B – gold or tin mining. The <i>Native Title (Queensland) Provisions Amendment Act 1999</i> significantly amends this Act.	Assented to on 27 November 1998. Assented to on 29 July 1999.
Tasmania	No proposed legislation to date.	

Human rights standards

The amendments to the right to negotiate, which allowed states to enact alternative legislation, were justified as an application of the principle of equality. The notion of equality relied on required that Indigenous people be treated in the same way as non-Indigenous people. This standard of equality is known as formal equality:

The proposed application of the right to negotiate will simply mean that, for future economic development on that land, native title holders will have exactly the same procedural rights as the pastoral lessee with whom they share the land, or the freeholder; that is, native title holders would have the same procedural rights as others and often the same rights as those who hold the highest form of interest in land known to the common law – freehold. In the government's view, this is a just and truly non-discriminatory position.¹⁴⁹

¹⁴⁹ Senator the Hon N. Minchin, *Hansard*, Senate, 3 April 1998, p 1958.

As discussed in chapter 2, the standard of equality required at international law is a substantive one which recognises and protects the cultural identity of Indigenous people and redresses past injustices. Taking rights away from Indigenous people because such rights are not shared by non-Indigenous people fails to understand the meaning of equality within a human rights framework:

We are not white people in the making, nor are we simply another ethnic minority group. We are, at a fundamental level part of the modern Australian nation. But, within this nation, we have a very particular position. We are Australia's Indigenous people, the first people of this land, and we continue to have – as we have always had – our own system of law, culture, land tenure, authority and leadership. It follows then, that treating us the same as everybody else will not deliver equality, but is in fact discriminatory.¹⁵⁰

In paragraph 7 of Decision 2(54), the CERD Committee expressed its concern that provisions within the NTA that place 'restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses' are discriminatory. The Committee urged the Australian Government to suspend implementation of the 1998 amendments.¹⁵¹ Nevertheless most states and territories have introduced legislation that contains provisions which restrict the ability of native title holders to negotiate over non-Indigenous land uses. This legislation fails to meet the principles of substantive equality and effective participation which form part of Australia's obligations under Articles 2 and 5 of the Convention.

Effective participation

There are two ways in which the amendments to the right to negotiate, outlined above, offend the principle of effective participation. First, in the formulation of the amendments themselves and the state regimes which followed, Indigenous parties did not give their informed consent. Second, a reduction in the extent to which Indigenous people can negotiate over the use of their land is a reduction in the extent to which Indigenous people effectively participate in decisions which affect them.

The amendments to the right to negotiate provisions were strongly opposed by the NIWG. Indigenous groups in states and territories have continued to object to state regimes which, under the authority of the NTA, reduce Indigenous participation in the use of their land. Yet, despite the opposition from native title parties, states such as Queensland¹⁵² and New South Wales have applied for determinations from the Attorney-General that their statutory schemes comply with the Act.

The Northern Territory was the first government to seek approval from the Commonwealth in relation to its alternative right to negotiate regime. In considering the scheme, the Attorney-General was required by the NTA to consider submissions made by Aboriginal and Torres Strait Islander representatives. Despite their objections to substantial areas of the scheme, it was approved. Ultimately, the regime was prevented from operation by a successful disallowance motion in the Senate. An important factor in the Senate's rejection was the failure of the Northern Territory Government to obtain the consent of the land councils.¹⁵³ Unless Indigenous

¹⁵⁰ Yu, P. *Forging a New Relationship Between Indigenous and non-Indigenous Australians*, Keynote Address, Australians for Native Title and Reconciliation Seminar, 2 June 1999.

¹⁵¹ Committee on the Elimination of Racial Discrimination, *Decision (2)54 on Australia*, 18 March 1999. UN Doc CERD/C/54/Misc.40/Rev.2. para 11.

¹⁵² On 22 July 1999 the Queensland Parliament passed legislation which included a s43A alternative provisions scheme. The Queensland Government has requested the Commonwealth Attorney-General to make a total of 13 determinations, four of which relate to s43A alternative provisions.

¹⁵³ The basis of the land councils' disagreement with the Northern Territory regime is discussed in De Soyza, A. 'The Northern Territory's Alternative Native Title Scheme and the Senate', *Indigenous Law Bulletin*, October 1999, volume 4, issue 24, p 7.

concerns are adequately addressed, the attempt by states to implement their own scheme will be stymied resulting in further delays to applications for mining grants.¹⁵⁴ An alternative procedure, which incorporates the principle of effective participation, is available through the use of Indigenous Land Use Agreements. Representative bodies, and indeed many other stakeholders, support the pursuit of Indigenous Land Use Agreements where appropriate, and where the future acts regime has been so affected by discriminatory amendments that it fails to protect native title.¹⁵⁵

A further basis for the Senate's rejection of the Northern Territory regime was that if the scheme was not disallowed, the Northern Territory could make subsequent amendments to their legislation without referral back to the Commonwealth Parliament. Only the Commonwealth Attorney-General would have an ongoing supervisory role over subsequent amendments. It was considered that this was insufficient to ensure that Indigenous concerns over the state regimes were adequately addressed. The principle of effective participation requires not only that Indigenous concerns are considered, but that they are addressed in the formulation of legislation that directly affects them.

The second way in which the amendments to the right to negotiate offend the principle of effective participation is that they reduce Indigenous participation in decisions which affect the use of their land. Under the original NTA native title parties were active participants in negotiating such issues as employment provision for Indigenous people; contracts for ancillary work; local investment; social development programs; equity participation; infrastructure development; as well as issues specific to the native title right being claimed. Under the amendments, the right to negotiate is either removed or, under s43A, reduced to a right to consult with miners or developers about ways of ameliorating the impact of the project on the registered native title rights. The Acting Social Justice Commissioner commented on this point in her *Native Title Report 1998* as follows:

Under the amendments the native title party must be consulted on ways of minimising the impact of mining on registered native title rights. This implies that native title is no more than a bundle of rights concerning activities which take place on the land. Mining might impair a right to fish or hunt on the land. Consultation might mitigate such effects. Minerals may be found on sites prohibited to the uninitiated. Consultation might result in such areas being avoided. On this construction of native title there is no entitlement to participate in the management of the land or obtain a benefit from the resources that exist on the land even where these rights were traditionally held. Native title is not seen as a right to control access to, or activities on the land.¹⁵⁶

The provision for alternative regimes which reduce the right to negotiate has the effect of reducing the capacity of Indigenous parties to participate in the development of their communities and to manage the integration of technology-driven projects into their communities is limited.

¹⁵⁴ Since the *Wik* decision, the Northern Territory and Queensland Governments have imposed a moratorium on processing mining applications as a result of their refusal to utilise the right to negotiate processes through the NTA.

¹⁵⁵ Wells, D. 'Native Title Legislation – a Realistic Way Forward' in *Native Title News*, Vol 4, No 1, p 14. The Executive Director of the Minerals Council of Australia stated:

A positive element and one that is likely to be pursued by many in the minerals industry, is the inclusion of provisions for agreements to be reached outside the process of the Native Title Act... Provided that the Native Title Act provides a reasonable fall-back position when negotiations fail to produce an agreement, it is predicted that the minerals industry will progressively seek indigenous land use agreement solutions for native title interests rather than resort to the right to negotiate provisions of the Native Title Act, p 14.

¹⁵⁶ Acting Aboriginal and Torres Strait Islander Commissioner, *Native Title Report 1998*, HREOC, Sydney, 1998, pp 75-76. Note that Chapter 3 of the 1998 Native Title Report is devoted to s43A of the NTA and the human rights implications of this amendment.

General Recommendation 23 issued by the CERD Committee makes it clear that the amendments which reduce the participation of Indigenous people in the control of their land is contrary to the intention of CERD. The Country Rapporteur, in her report to the CERD Committee, stated:

This Committee has stressed the importance of political participation in its General Recommendation No 23 on Indigenous Peoples in which we call on States to ‘recognise and protect the rights of indigenous people to own, develop, control and use their common lands, territories and resources.’

The Committee also recognised the importance of ensuring that ‘members of Indigenous Peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.’¹⁵⁷

By reducing the extent to which native title parties can participate in the management of their land, the amendments to the right to negotiate provisions fail to meet the standard of effective participation contained in CERD.

Equality

The reduction in the right to negotiate provisions also offends the principle of equality as promulgated in the CERD decision.¹⁵⁸

The right to negotiate recognises that Indigenous people have a unique relationship to their land and that mining or other projects may have a devastating impact on this relationship. An opportunity to negotiate prior to the commencement of these projects enables proper consideration of this relationship and meets a standard of equality which ensures that cultural differences are protected. A recent report by Mrs. Erica-Irene A. Daes,¹⁵⁹ appointed by the Commission on Human Rights to report on the relationship of Indigenous people to their land, confirms the importance of this relationship and the need by States to recognise and protect this relationship:

Throughout the life of the Working Group, indigenous peoples have emphasised the fundamental issue of their relationship to their homelands. They have done so in the context of the urgent need for understanding by non-indigenous societies of the spiritual, social, cultural, economic and political significance to indigenous societies of their lands, territories and resources for their continued survival and vitality. Indigenous peoples have explained that, because of the profound relationship that indigenous peoples have to their lands, territories and resources, there is a need for a different conceptual framework to understand this relationship and a need for recognition of the cultural differences that exist. Indigenous peoples have urged the world community to attach positive value to this distinct relationship...¹⁶⁰

The gradual deterioration of indigenous societies can be traced to the non-recognition of the profound relationship that indigenous peoples have to their lands, territories and resources, as well as the lack of recognition of other fundamental human rights. The natural order of life for indigenous peoples has been and continues to be threatened by a different order, one which is no longer dictated by the natural environment and the indigenous peoples’ relationship to it. Indigenous societies in a number of countries are in a state of rapid deterioration and change due in large part to the denial of the rights of the indigenous

¹⁵⁷ Australian Country Rapporteur, Report, p 15.

¹⁵⁸ CERD Decision (2) 54.

¹⁵⁹ Mrs Erica-Irene A.Daes, Special Rapporteur, Human Rights of Indigenous Peoples. *Indigenous People and their relationship to land*, E/CN.4/Sub.2/1999/18. 3 June 1999.

¹⁶⁰ *ibid*, para 10.

people to lands territories and resources.¹⁶¹

Clearly, native title rights are very different, both in substance and in source, to the rights and interests of a pastoral leaseholder, a miner, or a developer wishing to compulsorily acquire native title land. In balancing these non-Indigenous interests against the interests of native title parties, there needs to be an understanding that for native title holders land can constitute a source of cultural identity, a source of spirituality as well as an economic resource. Negotiation is the only way of ensuring that the cultural bridge between Indigenous and non-Indigenous parties is crossed to the satisfaction of all parties. The removal or reduction of the right to negotiate is contrary to the principle of equality, which seeks to ensure that a proper understanding is given to Indigenous culture.

¹⁶¹ *ibid*, para 19.

Chapter 4: The registration test

The amendments to the Native Title Act (NTA) introduced a registration test to be applied retrospectively to most native title claims lodged since the inception of the NTA in 1994. Since the amendments commenced in October 1998 the Registrar or his delegates have considered many applications for registration. The impact of these decisions is now being felt, and, in some cases, has had the effect of denying registration to bona fide claimants. Claimants who are refused registration cannot access the right to negotiate provisions and most other provisions of the future Acts regime. Consequently, where claimed native title rights fail to be registered, they are vulnerable to impairment or extinguishment in the period before a court determines the outcome of the native title application¹⁶² This chapter examines the impact of the registration test on the enjoyment of the human rights of Indigenous people.

The original NTA provided that in order to be registered, a claim had to meet an acceptance test. The relevant provisions of the NTA were interpreted by the High Court in such a way that there were few impediments to registration. Claims could be registered provided they could be made out on a prima facie basis and were not frivolous or vexatious.¹⁶³

The amended NTA introduced a registration test that establishes a significantly higher threshold to that contained in the original Act. Under the amended NTA a claimant application must not be accepted, and accordingly must not be registered, by the Native Title Registrar unless it meets the requirements of ss190B and 190C of the NTA. The test requires that the Registrar, or a delegated officer of the National Native Title Tribunal, be satisfied that the following conditions are met:

- *Identification of claimed native title.* The description provided must be sufficient to identify the native title rights and interests claimed;
- *Factual basis of the claim.* The information provided must be sufficient to support the assertions that the claimant group has, and the predecessors of the group had, an association with the area; that there exist traditional laws and customs acknowledged and observed by the group; and that the group has continued to hold native title in accordance with those traditional laws and customs;¹⁶⁴
- *Prima facie case.* The information provided must be sufficient to establish, on the face of it, at least some of the native title rights and interests claimed in the application.¹⁶⁵ Section 181(1)(g) of the Act provides that if the claim is accepted for registration, the Registrar must only enter those claimed native title rights and interests that have been so established. The right to negotiate and other provisions will be limited to those native title rights that have passed the prima facie test and have been registered;¹⁶⁶
- *Physical connection to the claimed land.* The application must establish that at least one of the claimants currently has, or previously had, a traditional *physical* connection with any part of the claimed land or waters.¹⁶⁷ There is an exception to this requirement, which allows

¹⁶² This is subject to the availability of injunctive relief: see the High Court's consideration of this issue in *Fejo v Northern Territory* (1998) 156 ALR 721.

¹⁶³ See *North Ganalanja Aboriginal Corporation v Queensland* (1995) 185 CLR 595 ('*Waanyi*').

¹⁶⁴ *Native Title Act 1993* (Cth), (Herein NTA), s190B(5).

¹⁶⁵ NTA, s190B(6).

¹⁶⁶ See for example NTA, s31(2), s39(1).

¹⁶⁷ NTA, s190B(7)(a).

a claimant to apply to the Federal Court for an order that the Registrar accept the claim for registration, where ‘at some time in his or her lifetime, at least one parent of one member of the native title claim group had a traditional physical connection with any part of the land or waters, and would reasonably have been expected to have maintained that connection but for things done by the Crown, a statutory authority of the Crown, or a leaseholder’¹⁶⁸;

- Identification of the native title claim group. The persons in the native title claim group are required to be individually named in the application, or described sufficiently clearly so that it can be ascertained whether any particular person falls within the group¹⁶⁹;
- No prior extinguishment. The application must not disclose that the native title rights and interests claimed have been extinguished, including extinguishment resulting from the validation or confirmation provisions¹⁷⁰; and
- Procedural requirements. The application must satisfy all the procedural requirements, as set down in s190C and ss61-62 of the NTA.¹⁷¹

Once registered, native title claimants have access to specified rights under the NTA, including:

- the right to negotiate about certain proposed future acts in the area of the claim. The right to negotiate entitles Indigenous people to negotiate with miners, developers and Government where it is proposed to grant a mining lease or to compulsorily acquire native title land for the benefit of third parties;¹⁷²
- the right to be consulted and object in relation to other future act provisions. For example, mining grants or compulsory acquisition on native title land co-existing on certain types of land, such as pastoral leasehold land, reserved land, or land in towns and cities are subject to a regime of consultation and objection under s43A NTA.
- the right to access pastoral leases for traditional purposes;¹⁷³
- the right to oppose non-claimant applications;¹⁷⁴

Failure to pass the registration test denies claimants access to the ‘protective’ provisions listed above and leaves native title vulnerable to impairment or extinguishment in the period before a court determines the native title claim.

The impact of the amended registration test on the enjoyment of human rights by Indigenous Australians

The human rights of Indigenous people are affected if the registration test prevents bona fide claimants from protecting their title from the impact of mining and other developments.

¹⁶⁸ NTA, s190D(4). This is the so-called ‘locked gate exception’.

¹⁶⁹ NTA, s190B(3).

¹⁷⁰ NTA, s190B(9)(c).

¹⁷¹ NTA, s190C(2).

¹⁷² NTA, s26.

¹⁷³ NTA, Part 2, Division 3, Subdivision Q.

¹⁷⁴ NTA, Part 2, Division 3, Subdivision F.

As discussed in chapter 2, the CERD Committee applied the standards of equality and effective participation in deciding whether the amendments to the NTA complied with the human rights standards contained in CERD. In relation to the standard of equality, the Committee asked whether, as a result of the amendments, non-Indigenous interests had been preferred to Indigenous interests. In relation to effective participation, the Committee looked at whether Indigenous people had participated in the decision-making process and whether they consented to the decisions which affected their rights.

The application of these principles to the rights which native title claimants gain through registration can be demonstrated in relation to the right to negotiate. In the previous *Native Title Report* the conflicting views concerning the right to negotiate, presented during the extensive public debate over the amendments to the NTA, were evaluated within a human rights framework.¹⁷⁵ Non-Indigenous stakeholders depicted the right to negotiate as a special statutory right, bearing no relationship to the common law recognition of native title. They argued that this right, which was not available to other titleholders, could be removed, modified or made more difficult to access without impinging on the rights of Indigenous people. It was claimed that such a removal, modification or impediment was not discriminatory of Indigenous people because it put them in the same position as non-Indigenous titleholders, such as pastoral leaseholders. In fact, the argument concluded, the provision itself was discriminatory and should be removed in order to achieve equality in the Act.

The notion of equality underlying this argument is that everyone should be treated the same, regardless of their cultural or social differences. Contesting this notion of equality is one which recognises that differential treatment is not, in itself, discriminatory. One must look to the impact of that treatment upon others and determine whether the objective of the treatment is contrary to the overall objectives of the human rights system. In the previous *Native Title Report* it was argued:¹⁷⁶

- the right to negotiate is not merely a statutory right but has a basis in the traditions and customs of Indigenous law;¹⁷⁷
- by providing protection to Indigenous land and culture from the potentially destructive impact of mining and development, the right to negotiate places Indigenous interests in a position of equality with non-Indigenous interests;¹⁷⁸
- the right to negotiate entitles Indigenous people to participate effectively in the decisions which affect their communities.¹⁷⁹ Negotiations between miners and Indigenous representatives on issues such as training, employment, ancillary enterprises and compensation enable Indigenous communities to participate in the management of their land and their communities.

Given the significance of the right to negotiate and other rights gained through registration to the human rights of Indigenous people, it is important that all *bona fide* native title claimants have access to these rights. Consistent with this view, the Government has stated the purpose of the registration test in the amended NTA as follows:

The registration test is not intended to provide a screening mechanism for access to the

¹⁷⁵ Acting Aboriginal and Torres Strait Islander Commissioner, *Native Title Report 1998*, HREOC, Sydney, 1998, pp 73-116.

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*, p 100.

¹⁷⁸ *ibid.*, p 104.

¹⁷⁹ *ibid.*, pp 61-63, 72-77.

Federal Court. Instead, the purpose of the registration test is to ensure that only claims which have merit are registered on the Register of Native Title Claims.¹⁸⁰

Where bona fide claimants are denied access to the rights available on registration, leaving their native title rights vulnerable to impairment and extinguishment, the human rights of those Indigenous people are violated. Accordingly, the conditions of registration should not exceed those that, on a *prima facie* basis, satisfy a claim to native title at common law. Nor should they be contrary to the principles of equality and effective participation established by the CERD Committee as the cornerstones of Australia's international obligations to Indigenous people.

The operation of the registration test

Within the reporting period the registration test has applied to more than one hundred claims across Australia.¹⁸¹ The operation of the registration test raises the following concerns:

- i) Native title is constructed in a manner which is not in accordance with the traditions and customs of Indigenous people and which is beyond the common law requirements for the recognition of native title;
- ii) The requirements for the identification of the native title claimant group are not in accordance with the traditions and customs of Indigenous people and are beyond the common law requirements for the recognition of native title holders;
- iii) The procedural requirements of the registration test are onerous and beyond the common law requirements for the recognition of native title.

I. The construction of native title

a. Native title as a bundle of rights

Sub-sections 190B(4), (5) and (6) of the NTA require claimants to identify each individual claimed native title right and interest and provide the factual basis of the claimed right. Where the Registrar or delegate is not satisfied that each right has been identified and proven on a *prima facie* basis it is not entered on the Register of Native Title Claims and consequently claimants cannot negotiate or object under the future act provisions of the Act in relation to that native title right.

These legislative provisions and their interpretation by the Registrar or his delegate, provide insight into the translation of Aboriginal culture into legal rights. They are the mechanisms through which native title rights are constructed out of the fabric of contemporary Indigenous life. What is striking about the native title rights which are constructed in the registration test is their lack of interrelatedness and their varying degrees of particularity. Native title rights are identified as a series of practices derived from a particular historical moment rather than a generalised system of rights, the exercise of which can take a variety of forms.

The following list of native title rights was presented for registration in the application of Gnaala Karla Booja¹⁸², for example

¹⁸⁰ Parliament of Australia, *Native Title Amendment Bill 1997 – Explanatory Memorandum*, paras 29.1, 29.2.

¹⁸¹ Registration test decisions can be viewed at the National Native Title Tribunal's Internet site <www.nntt.gov.au>. A reference below to decisions includes the name of the claim, the Application Number and the date of the decision.

¹⁸² Gnaala Karla Booja, WC98/58, 3 March 1999.

- (a) The right and interests to exclusively possess, occupy, and enjoy the area.
- (b) The right to make decisions about the use and enjoyment of the area.
- (c) The right of access to the area.
- (d) The right to control the access of others to the area.
- (e) The right to use and enjoy resources of the area.
- (f) The right to control the use and enjoyment of others of resources of the area.
- (g) The right to maintain and protect places of importance under traditional laws, customs, and practices in the area.
- (h) The right to maintain, protect and prevent the misuse of cultural knowledge of the common law native title holders associated with the area.
- (i) The right to rear and teach children in their country.
- (j) The right to manage, conserve and look after the land, waters, and resources, including locating and cleaning water sources and drinking water on the land.
- (k) The right to live on and erect residences and other infrastructure on the land.
- (l) The right to trade in resources in the land.
- (m) The right to receive a portion of any resources taken by others from the area.¹⁸³

The claimed rights numbered (k) to (m) were rejected by the delegate on the basis that there was insufficient evidence to establish them on a prima facie basis. It is apparent, however, that these rejected rights could be characterised as incidents of the more generalised rights, such as the right to exclusively possess, occupy, use and enjoy the area, that were accepted by the Registrar. The registration test does not require the delegate to see native title rights as an interrelated system. Each identified practice is examined separately to determine whether the evidence supports it on a prima facie basis.

Justice McLachlin in dissent in *R v Van der Peet* examines the construction of Aboriginal rights in Canadian jurisprudence and distinguishes between an Aboriginal right and the exercise of that right by reference to the degree of particularity.

It is necessary to distinguish at the outset between an aboriginal right and the exercise of an aboriginal right. Rights are generally cast in broad, general terms. They remain constant over the centuries. The exercise of rights, on the other hand, may take many forms and vary from place to place and from time to time.

If a specific modern practice is treated as the right at issue, the analysis may be foreclosed before it begins. This is because the modern practice by which the more fundamental right is exercised may not find a counterpart in the aboriginal culture of two or three centuries ago. So if we ask whether there is an aboriginal right to a particular kind of trade in fish, i.e. large-scale commercial trade, the answer in most cases will be negative. On the other hand, if we ask whether there is an aboriginal right to use the fishery resource for the purpose of providing food, clothing or other needs, the answer may be quite different. Having defined the basic underlying right in general terms, the question then becomes whether the modern practice at issue may be characterized as an exercise of the right.¹⁸⁴

¹⁸³ *ibid*, p 8.

¹⁸⁴ *R v Van der Peet* [1962] 2 SCR 507 per McLachlin J, p 560.

The construction in the registration test of native title rights as unrelated specific practices rather than a system of generalised rights limits the protection which can be extended as a result of the enforcement of that right. This can be demonstrated by reference to the exercise of the right to negotiate which follows from the successful registration of a native title right. Negotiation around a specific activity, such as hunting and fishing, is far more limited than negotiation around a more generalised right such as the right to use the resources on the claimed land. The Aboriginal Legal Service of Western Australia has criticised the reduction of Indigenous rights through the registration test:

From a non-legal perspective when you look at native title it is to allow claimants to acquire rights that they believe are traditional rights. When you apply the registration test you must clearly describe all of those rights. You only receive native title in line with those rights claimed. Many claimant groups, when they lodge an application, attempt to identify those rights in the broadest terms possible. What happens when a registration test is applied is the tribunal, on occasion, requested that those rights be narrowed down, so that, even if you are successful in having your claim registered, the rights that you have once registered are vastly reduced, or can be vastly reduced, from those which were originally applied for. To me, that is discriminatory by nature in that the application of the legislation by bureaucrats... is forcing a diminution of the original rights which were applied for by the claimants.¹⁸⁵

Where native title is cast as a system of rights, the exercise of those rights can take a contemporary form even though their origin is the traditions and customs of the original Indigenous inhabitants. Where, however, native title is constructed as a collection of traditional practices, the contemporary observance of Indigenous laws and customs is not recognised as a native title right. Justice McLachlin also examined the problem of frozen rights as a failure to distinguish underlying rights from their exercise:

Having defined the basic underlying right in general terms, the question then becomes whether the modern practice at issue may be characterised as an exercise of the right.

This is how we reconcile the principle that aboriginal rights must be ancestral rights with the uncompromising insistence of this Court that aboriginal rights not be frozen. The rights are ancestral; they are the old rights that have been passed down from previous generations. The exercise of those rights, however, takes modern forms. To fail to recognise the distinction between rights and the contemporary form in which the rights are exercised is to freeze aboriginal societies in their ancient modes and deny to them the right to adapt, as all people must, to the changes in the society in which they live.

I share the concern of L'Heureux-Dube J. that the Chief Justice defines the rights at issue with too much particularity, enabling him to find no aboriginal right where a different analysis might find one. By insisting that Mrs. Van der Peet's modern practice of selling fish be replicated in pre-contact Sto:lo practices, he effectively condemns the Sto:lo to exercise their right precisely as they exercised it hundreds of years ago and precludes a finding that the sale constitutes the exercise of an aboriginal right.¹⁸⁶

The construction in the registration test of native title as a bundle of particularised practices is contrary to certain developments in the common law in Australia. The decision of Justice Lee in the *Miriuwung Gagerrong* case demonstrates this development.

Native title at common law is a communal 'right to land' arising from the significant connection of an indigenous society with land under its customs and culture. It is not a

¹⁸⁵ Glenn Shaw, Aboriginal Legal Service of Western Australia, in Joint Parliamentary Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Section 206d inquiry into the operation of the Native Title Act 1993*, Hansard, 13 April 1999, p 136.

¹⁸⁶ *R v Van Der Peet* [1996] 2 S.C.R. 507 at 560.

mere 'bundle of rights': see *Delgamuukw* per Lamer CJ at 240-1. The right of occupation that is native title is an interest in land: see *Mabo (No 2)* per Brennan J at CLR 51. There is no concept at common law of 'partial extinguishment' of native title by several 'extinguishment' of one or more components of a bundle of rights. It follows that there cannot be a determination under the Act that native title exists but that some, or all, 'native title rights' have been 'extinguished'.¹⁸⁷

Justice Lee's decision is consistent with, and is influenced by, the development of the common law in Canada.¹⁸⁸ In contrast to the Canadian approach, the Federal Court in the *Yorta Yorta* decision adopts a very limited view of native title.¹⁸⁹ Native title is seen in that case as a set of traditional practices which will only be protected by the law if they continue to be practiced as they were by the original inhabitants. An analysis of this decision is provided in the Introduction to this report. As I indicate in this analysis, the common law of Australia is yet to finally determine whether its construction of native title will follow the Canadian direction or whether Australia will take a more limited approach to recognising and protecting contemporary Indigenous culture.

The assumption that governs the construction of native title as a bundle of particularised, unrelated practices rather than a generalised system of interrelated and generalised rights bears an alarming parallel to the ideological basis of terra nullius uncovered in the *Mabo* decision.

The view was taken that, when sovereignty of a territory could be acquired under the enlarged notion of terra nullius, for the purposes of the municipal law that territory (though inhabited) could be treated as a "desert uninhabited" country. The hypothesis being that there was no local law already in existence in the territory, the law of England became the law of the territory (and not merely the personal law of the colonists). Colonies of this kind were called "settled colonies". Ex hypothesi, the indigenous inhabitants of a settled colony had no recognised sovereign, else the territory could have been acquired only by conquest or cession. The indigenous people of a settled colony were thus taken to be without laws, without a sovereign and primitive in their social organisation.¹⁹⁰

The recognition of native title by the High Court in 1992 was a recognition that law did govern Aboriginal society when sovereignty was acquired by the British and that Indigenous law was a subtle and elaborate system which provided a reasonably stable order of society. Yet the reduction of native title to a bundle of specific and unrelated practices denies the generality and systematisation of rights which characterise any legal system including traditional Indigenous society. Constructing native title as atomised and particularised practices denies their origin in a system of traditional laws and customs and denies the capacity of these laws to develop and change into modern forms.

b. The requirement to demonstrate a current physical connection sets a higher threshold than the common law standard

The requirement to show a current physical connection with the land in order to be registered does not accord with the common law test for recognition of native title. In *Mabo (No.2)* the High Court held that claimants need to demonstrate a spiritual or physical connection to the land, such a connection being proven according to traditional laws and customs. The requirement that native title claimants must show a physical connection to the land may operate

¹⁸⁷ *Ward and Others (on behalf of the Miriuwung and Gajerrong People) and Others v State of Western Australia* (1998) 159 ALR 483 per Lee J, p 508.

¹⁸⁸ *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193.

¹⁸⁹ *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria and Others* (unreported, Federal Court of Australia) [1998] FCA 1606, 18 December 1998, Olney J ('*Yorta Yorta*').

¹⁹⁰ *Mabo v Queensland (No.2)* (1992) 175 CLR 1 per Brennan J, p 36.

to prevent native title claimants who can only demonstrate a continuing spiritual connection to the land, from having their native title rights protected by the procedures of the NTA.

II. The identification of the native title claimant group

There are two requirements concerning the identification of the native title claimant group within the registration test. First, s190B(3) requires native title claimants provide either of the following:

1. An exhaustive list of names of individuals within the claimant group, (s190B(3)(a)); or
2. Information which enables the Registrar or his/her delegate to ‘sufficiently’ identify all individuals who are members of the claimant group, (190B(3)(b)).

Second, s190C(3) requires that there be no claimants in common with other native title claims.

In relation to the first requirement, the most commonly accepted form of evidence satisfying this criterion is proof of biological descent through anthropological reports and genealogical evidence. Very few claims have sought to provide an exhaustive list of members of the group as can be done under s190B(3)(a).

The Registrar has refused to register claims on the basis that they describe the identity of the claimants in the following ways:

- *Self-identification by members of the group.* The Registrar rejected general statements that there exists a system of customary law under which Aboriginal people are identified as custodians of the land and waters within the claim area. The registration test instead requires claimants to provide details of their system of law by listing specific rules, customs and laws ‘which an individual or group might use to demonstrate the basis of their self-identification.’¹⁹¹
- *The practice of acceptance into the claimant group according to traditions and customs.* The Registrar rejected general statements that people can be accepted within the group in accordance with traditional laws and customs. Instead, he considered that the registration test requires details of the specific rule or law through which such acceptance takes place.¹⁹² This rule or law would need to be described in such a way that it could be applied or ‘objectively tested’ by the Registrar in relation to any member of the claimant group.
- *General statement about the descendants of the group.* In the Dja Dja Warung claim the Registrar rejected general statements that the claimant group includes Aboriginal people who are recognised as descendants of the Aboriginal people who have been custodians of the land since time immemorial, or who have acquired responsibilities of custodianship from the original inhabitants of the area.¹⁹³
- *Acceptance into the group through customary adoption practices.* Statements that individuals can form part of the group through customary adoption practices have been considered insufficient where there is no ‘objective’ way of testing this assertion. Extensive information about customary rules and laws that detail how people are accepted into the claimant group through customary adoption practices have been required.¹⁹⁴

¹⁹¹ *Dja Dja Warung*, VC 98/18, VC 98/19, VC 98/20, 4 December 1998, p 3.

¹⁹² *ibid.*

¹⁹³ *ibid.*

¹⁹⁴ See for example the following registration test decisions: *Darumbal #2*, QC 99/1, 23 February 1999; *Gnaala*

The requirements in the registration test in relation to the identity of the claimant group are not requirements that coincide with human rights principles. In addition they exceed the test established by the common law in identifying those entitled to exercise native title rights. Accordingly, *bona fide* claimants are being denied access to the rights available on registration, leaving their native title rights vulnerable to the impact of mining and development prior to the determination of their claim at common law.

a. Human rights principles

Effective participation

In chapter 2 of this report I discussed the principle of effective participation as one of the cornerstones of the CERD decision on the amendments to the NTA. Effective participation, like its counterpart, the principle of self determination, is concerned with the appropriate location of the decision-making power.

The statement by several claimants that acceptance into Indigenous groups should be determined through customary practices by the group itself represents a threshold challenge to the location of the decision-making power in the tribunal.¹⁹⁵ Such a challenge has, in principle, the support of the CERD Committee through General Recommendation VIII, which states that ‘group membership shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.’¹⁹⁶

The proviso to the principle of self-identification promulgated by the CERD Committee, ‘if no justification exists to the contrary’, cannot apply to the circumstances of the registration test. The Western Australian Native Title Support Group has argued that a narrow approach to the identification of the native title claim group is not necessary to meet the purposes of the registration test:

There is no good policy reason for adopting a narrow approach to the definition of the native title claim group which excludes individuals or families whom the applicants have sought to include. The registration of the claim maintains the capacity of the applicants to exercise the right to negotiate and other procedural rights of native title claimants under the NTA and any alternative state procedures. However, these procedural rights are vested in the registered native title claimants, as a group, for each claim. If there are members of the group included in the group by reference to asserted adoption or self-identification with the group, *that does not impose any additional procedural or other burden upon those who may be obliged to deal with the registered native title claimants.* If anything the extra burden is placed upon the applicants of ensuring that they act with the authority of the claimant group...¹⁹⁷

The level of certainty for those negotiating with native title claimants is further increased by the requirement of the registration test that applicants be authorised by all persons within the native title claim group to deal with matters arising in relation to the application.¹⁹⁸ Self identification

Karla Booja, WC 98/58, 3 March 1999; *Bullenbuk - Noongar*, WC 96/23, 17 March 1999.

¹⁹⁵ *ibid.*

¹⁹⁶ International Committee on the Elimination of Racial Discrimination, General Recommendation VIII – Identification with a particular racial or ethnic group (Article 1, paras 1 & 4), 24 August 1990, in UN Doc: A/45/18.

¹⁹⁷ Western Australian Native Title Support Team, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund – Section 206d inquiry into the operation of the Native Title Act 1993*, 14 April 1999, p 9. Italics added. (Herein Western Australian Native Title Support Team Submission to section 206d inquiry).

¹⁹⁸ S190C(4)(b).

is not inconsistent with the purpose of the registration test and is consistent with the principle as set out in the CERD decision.

Equality

The second cornerstone of the CERD decision on the amendments to the NTA discussed in chapter 2 is equality. Due to the continued inequality of Indigenous people, the CERD Committee has called on States to:

- (a) recognize and respect Indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- (b) ensure that members of Indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on Indigenous identity;
- (c) provide Indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- (d) ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent;
- (e) ensure that Indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs, to preserve and to practice their languages¹⁹⁹

The emphasis in the test of proving biological descent or of isolating the principles which account for the membership of all individuals in the claimant group fails to recognise the cultural practices of Indigenous people required by CERD.

The Kimberley Land Council has explained this concern in the following terms:

The conditions and implementation of this aspect of the registration test marginalise the customary law and cultural practices of Aboriginal people in the Kimberley, where traditional connections to country remain strong. In order to comply with the registration test, native title claimants are forced to find ways of expressing extended kin relationships that do not correlate with the traditional Western definitions based on marriage and blood ties. The requirement for those in the claimant group to express the relationships which connect them in terms of biological descent is at odds with traditional ways of defining who has rights to country...

Aboriginal ways of defining their relationships within a claimant group are belittled when they must do so according to Euro-centric notions of a biological descent group. This feature of the registration test and its administration is creating an artificially narrow definition of the claimant group... The laws and customs which underpin native title rights should be accorded legitimacy in the process of registering native title claims.²⁰⁰

Similarly, the rejection of native title claimants whose membership is justified by a general reference to customary adoption practices rather than objective rules of adoption is a rejection of Indigenous culture. For example, in assessing the claim in *Barada Barna Kabalbara & Yetimarla*, the delegate requested information detailing the customary law or rule by which

¹⁹⁹ Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII – Indigenous Peoples*, 18 August 1997, UN Doc CERD/C/51/Misc.13/Rev.4, para 4.

²⁰⁰ Kimberley Land Council, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund – Section 206d inquiry into the operation of the Native Title Act 1993*, 8 March 1999, (Herein Kimberley Land Council Submission to section 206d inquiry) pp 5-6.

adoption into the group takes place.²⁰¹ The anthropologist for the claimant group responded to the delegate's request in the following manner:

The... claimant group requested that a description of customary laws relating to adoption be left out of the anthropological report. The (claim) members that I interviewed and took genealogies from rarely discussed the issue of adoption when relating ancestral and family history. It was recognised that all descent groups listed in my report included individuals adopted into families. Furthermore, it should be made clear that adoption is the norm in Aboriginal societies throughout Australia and that, when tracing ancestry, individuals frequently include adopted parents in addition to their biological parents.

Seeking 'objective criteria by which it can be ascertained whether a particular person has been adopted into the claim group' is a requirement that demonstrates a lack of understanding of the realities of Aboriginal society in central Queensland today.²⁰²

The requirement in section 190C(3) of the NTA that there be no claimants in common with other native title claims is also a denial of the cultural identity of Indigenous people.

In *Cosmo Newberry*,²⁰³ the claimants passed each merit and procedural requirement of the registration test but were denied registration as members in the claimant group on the basis that they were also members of the *Wongatha* claim group.²⁰⁴

The existence of claimants in common between the *Cosmo Newberry* and *Wongatha* claims is a reflection of the complexity and vibrancy of both community groups, in that particular individuals are recognised as having custodial obligations within both groups. Claimants in common between groups may be a result of different groups having custodial obligations over the same land due to intermarriage. The refusal to register the claimants in *Cosmo Newberry* amounts to a failure to recognise the legitimate native title rights of the claim group based on their traditions and customs.

As the National Native Title Tribunal has noted:

(some) overlapping claims... reflect the fact that a number of people or groups may have rights to a particular area under indigenous custom...²⁰⁵

Justice Lee in *Miriuwung Gajerrong* also noted that:

Occupancy for the purpose of native title is not possession at common law but an acknowledged connection with the land arising out of traditional rights to be present on, and to use, the land. Such occupancy need not be exclusive to one community and may be shared between several communities in certain circumstances: see *Mabo (No.2)* per Toohey J at CLR 190; *Delgamuukw* per Lamer CJ at 259-60.²⁰⁶

The failure of the identification requirements in the registration test to recognise and accept Indigenous forms of social organisation *in their own terms* can be seen as a return to a *terra nullius* approach. As Peter Sutton has commented:

²⁰¹ *Barada Barna Kabalbara & Yetimarla*, QC97/59, 23 February 1999.

²⁰² *ibid*, p 3.

²⁰³ *Cosmo Newberry*, WC96/17, 3 May 1999.

²⁰⁴ *Wongatha*, WC94/8. The *Wongatha* application reflects the combination of a number of claims, including three that were entered on the Register of Native Title Claims prior to 21 February 1996. These were Ngurludhurra Waljen (WC 95/32), registered on 8 September 1995; Tjinintjarra Family Group (WC 95/57), registered on 6 October 1995; and Thithee Birni Binna Wiya (WC 96/04), registered on 15 January 1996.

²⁰⁵ National Native Title Tribunal, *Annual Report 1997-98*, Commonwealth of Australia, Perth, 1998, pp 26-27.

²⁰⁶ *Miriuwung Gajerrong* per Lee J, p 501.

In the jargon of earlier days, the more organised a society was, the more ‘advanced’ it was, and thus the more it had to be taken seriously by colonial powers. If a society failed to exhibit a certain ill-defined quantum of organisation – and especially if it failed to exhibit sedentism and horticulture – its lands might be regarded as *terra nullius*. Curiously this idea resonates again in the context of proof of native title, and at both historical ends of the process: the indigenous society at the time of sovereignty has to be shown to have a system of a certain order, and the claimants themselves do also.²⁰⁷

b. Common law principles

Where the identification requirements of the registration test place a greater onus on claimants than is required by the common law, bona fide claimants are denied the right to protect their title pending a determination of their claim. The identification requirements of the common law are still developing. Two decisions of the Federal Court, both currently on appeal to the Full Federal Court, represent conflicting approaches within the common law.

The *Yorta Yorta* case adopts a narrow and technical approach to determining the membership of the claimant group. Each member of the claimant group were required to establish an unbroken line of descent to the original inhabitants of the area. Of the 18 known ancestors established by the claimant group, only 2 were accepted as having a link to the original inhabitants. The other 16 failed because of insufficient evidence to link them to the inhabitants of the claim area. Even where known ancestors were born in the claim area, a stronger genealogical link to the ‘original inhabitants’ was required to be established.

George Middleton’s marriage certificate suggests that he was a full-blood Aboriginal but both his daughter and Treseder identify him as half-caste. There is an oral tradition that his mother was a daughter of an Aboriginal known as Barker Billy (or Barkabillie) but there is no other evidence to support this belief nor is there any evidence concerning Barker Billy which would support any relevant inference being drawn even if it be fact that he was George’s maternal grandfather. Another factor which militates against drawing any inference is that George was born in the mid-1850s, well after European settlement, in the Tocumwal district from whence he is said to have originated. The disturbance of the Aboriginal population which followed European settlement was well under way by the time of George’s birth and the mere fact of his birth at a place within the claim area cannot support a conclusion that he was a genealogical descendant of an original inhabitant of the claim area²⁰⁸

The application of a strict test to establish whether the members of the claimant group qualify to apply for native title is rejected by Justice Lee, whose approach in the *Miriuwung Gagerrong* case reflects that adopted in the Canadian Supreme Court decision of *Delgamuukw v British Columbia*²⁰⁹

Defining a community of indigenous people connected to land by traditional laws and customs by reference to “biological descent” involves a broad understanding of descent, not the application of a narrow, and exclusive test. If there were no evidence that the community claiming native title had some ancestral connection with the indigenous community in occupation of the land at the time of sovereignty the task of showing substantial maintenance of connection with the land would be difficult to satisfy. Some evidence of ancestry will be necessary not only to identify and define the group entitled to native title but also to show acknowledgment and observance of the traditional laws and

²⁰⁷ Sutton, P. ‘The system as it was straining to become: fluidity, stability and Aboriginal country groups’ in Finlayson, J., Rigsby, B., and Bek, H. (eds) *Connections in Native Title: Genealogies, Kinship and Groups*, Centre For Aboriginal Economic Policy Research, Australian National University, Canberra, 1999, p 42.

²⁰⁸ *Yorta Yorta*, para 39.

²⁰⁹ (1997) 153 DLR (4th) 193 (*Delgamuukw*).

customs of the community which possessed native title at sovereignty thereby showing that connection with the land has been substantially maintained.

As McEachern CJ BC stated in *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185 at 282.....

In a communal claim of this kind I do not consider it necessary for the plaintiffs to prove the connection of each member of the group to distant ancestors who used the lands in question before the assertion of sovereignty. It is enough for this phase of the case...for the plaintiffs to prove, as they have, that a reasonable number of their ancestors were probably in and near the villages of the territory for a long, long time.²¹⁰

Justice Lee stated the principles of determining the identification of the claimant group in the *Mirriuwung Gajerrong* peoples case as follows:²¹¹

- *The existence of an identifiable community.* The common law requires that there be an identifiable community at the time of colonisation. Native title will survive so long as there remains an 'identifiable community living under traditionally based laws and customs.'²¹² Difficulties in proving membership of that community will not prevent that community from being recognised as the holder of native title;
- *Biological descent.* Proof of biological descent does not constitute an exclusive test for defining the community that holds native title;
- *Maintenance of the connection to land.* Justice Lee's comments on biological descent demonstrate that the purpose of assessing information about descent is not to evaluate the adequacy of the description of the group, but to establish that the community, as identified, has substantially maintained its connection to the land since sovereignty²¹³;
- *Dynamic nature of Indigenous laws and customs.* Indigenous laws and customs, upon which native title is sourced, are dynamic, not static²¹⁴; and
- *Distribution and exercise of native title rights.* The social organisation, and traditional laws and customs of the community will determine how native title rights are exercised. For example, in *Mirriuwung Gajerrong* Justice Lee found evidence of vibrant sub-groups within the broader native title group. How the community is organised and chooses to exercise their native title rights is irrelevant to a determination that native title exists.²¹⁵

Justice Lee considered extensive historical, linguistic, genealogical, anthropological and oral evidence in determining that the Mirriuwung Gajerrong peoples had an identifiable community and were able to be recognised as the holders of native title at common law.

The higher threshold imposed by the registration test is demonstrated by the registration test decision in *Mirriuwung Gajerrong #2*.²¹⁶ The claimant group was the same that Justice Lee determined held native title as the Mirriuwung Gajerrong peoples in that case.

²¹⁰ *Ward v Western Australia* p 503.

²¹¹ See the discussion on this point in: Western Australian Native Title Support Team Submission to section 206d inquiry, 14 April 1999, pp 6-8.

²¹² *Mirriuwung Gajerrong* per Lee J, p503; citing Brennan J in *Mabo (No.2)* at p 61.

²¹³ *Mirriuwung Gajerrong* per Lee J, p 503.

²¹⁴ *ibid*, p 501.

²¹⁵ *ibid*, p 541.

²¹⁶ *Mirriuwung Gajerrong #2*, WC 94/6, 26 March 1999.

Despite Justice Lee's finding that the group was sufficiently identified to hold native title, the group failed the registration test on the basis of the identification requirement. The claimants had described the group by naming several applicants, and by the general descriptions of:

those people descended from the traditional owners of the land and waters... including those considered within the native title claim group by way of birth, adoption, marriage or other traditionally recognised method of inclusion who today identify themselves as Miriuwung and Gajerrong.²¹⁷

The claimants had argued that:

The 'determination of whether a particular person is a member' is a matter entirely for the group itself. It is not for the NNTT, a Court or any respondent. What is important is that there is this means by which individuals are accepted and recognised as members of the claimant group.²¹⁸

In applying this aspect of the registration test, the delegate considered that the description of the claimant group was not sufficiently clear.²¹⁹ The claimant's representatives had argued that:

the requirement that there be an 'external point of reference... rather than relying upon the internal mechanisms' of the group to define its own membership is inconsistent with Lee J's finding in *Ward* that the Mirriuwung Gajerrong people are the common law native title holders for the area covered by the MG#1 application and that they hold communal title.²²⁰

The delegate rejected this argument:

Sections 61(4) and 190B(3) impose certain preconditions which were not preconditions for Justice Lee's decision as to who held native title in the determination area. Justice Lee was not required to and did not consider the requirements of the registration provisions. The scheme of the current Act allows applicants to go forward for mediation and determination even if not registered. This allows greater scope for a broader and more general description of the native title claim group for the purposes of recognition of native title than for the purposes of registration.²²¹

The implications of the different standard required under the registration test was acknowledged by the delegate:

It is not difficult to see that many traditional means of defining membership of the group will not be accommodated by the subsection... The members of the group may say that traditional laws and customs are clear to them, and give certainty. However, in my view the section is intending that there must be a greater level of certainty for those outside the group, for example, non-indigenous people who must negotiate with registered persons and the group they represent.²²²

In this regard, the view of the Committee in Decision 2(54) that 'the amended (NTA) appears to create legal certainty for governments and third parties at the expense of indigenous title'²²³ is directly applicable to the registration test.

²¹⁷ *ibid*, p 17.

²¹⁸ *ibid*.

²¹⁹ *ibid*, pp 17-19.

²²⁰ *ibid*, p 20.

²²¹ *ibid*.

²²² *ibid*.

²²³ Committee on the Elimination of Racial Discrimination, *Decision 2(54) on Australia – Concluding observations/ comments*, 18 March 1999. UN Doc CERD/C/54/Misc.40/Rev.2. (Herein CERD Decision), para 6.

The result in *Mirriuwung Gajerrong #2* is further demonstration of a bona fide claimant being denied access to the future acts regime of the NTA. The potential consequences of this are worrying, as the State of Western Australia had issued a notice of an intention to grant a mining interest under section 29 of the NTA on 14 October 1998.²²⁴ By failing the registration test the claimants have lost the right to negotiate in relation to this development.²²⁵ Their native title is now vulnerable to impairment or extinguishment.

III. The procedural requirements of the registration test are onerous and beyond the requirements of the common law

The volume and detail of information that must be supplied under sections 190C, 61 and 62 of the NTA in order for a claimant to meet the merits requirements of s190B of the registration test are onerous. For example, claimants must provide all of the following information:

- Maps and tenure information that clearly identifies the external boundaries of the claim – in interpreting this requirement the Native Title Registrar or his delegates have considered maps and records that constitute part of the state’s land tenure system as sufficient to meet this requirement.²²⁶
- An exhaustive list of names of persons in the native title claim group or information that allows the decision-maker to clearly identify which individuals fall within the claimant group. The difficulties imposed by this aspect of the test are discussed further below. Information that has been considered sufficient to meet this requirement includes affidavits, genealogical reports, evidence of biological descent as well as other anthropological evidence providing information about customary laws of the claim group relating to adoption practices.²²⁷
- Information that identifies the factual basis of the claim, and which identifies each native title right claimed, and establishes, *prima facie*, each native title right or interest. Registration test decisions to date have placed particular emphasis on affidavits from claimants.²²⁸ Supporting evidence that has also been considered sufficient to meet these requirements includes anthropological evidence and reports about usage of the land and genealogical information.²²⁹ Section 181(1)(g) provides that individual native title rights and interests cannot be registered unless this information is provided.
- Information establishing that at least some of the claimants have a traditional physical connection with the claimed land. Decision makers have applied this stage of the registration test in a broad manner, ‘given the beneficial nature of the (NTA), its object and preamble.’²³⁰ Information considered sufficient to date includes affidavits and

²²⁴ *Mirriuwung Gajerrong #2, op.cit.*, p 1.

²²⁵ There remains, however, a right to appeal the decision to the Federal Court.

²²⁶ See for example the following registration test decisions: *Dja Dja Wurung (Combined Application)*, *op.cit.*, 4/12/98; *Barada Barna Kabalbara & Yetimarla*, *op.cit.*, 23/2/99. Note the decision in *Bullenbuk-Noongar*, WC 96/64, 17 March 1999, which failed the test on this ground.

²²⁷ See for example the following registration test decisions: *Dja Dja Wurung (Combined Application)*, *ibid*, 4/12/98; *Barada Barna Kabalbara & Yetimarla*, *ibid*, 23/2/99; *Darumbal #2*, QC99/1, 23 February 1999. Note, however, the decision in *Mirriuwung Gajerrong #2*, 26/3/99, which failed the test on this ground. This decision is discussed further below.

²²⁸ See for example the following registration test decisions: *Barada Barna Kabalbara & Yetimarla*, *ibid*, 23/2/99; and *Barunggam People*, QC99/5 26 February 1999, p 6.

²²⁹ See for example the following registration test decisions: *Dja Dja Wurung (Combined Application)*, 4/12/98; *Barunggam People*, 26/2/99; *Bullenbuk-Noongar*, 17/03/99.

²³⁰ *Darumbal #2*, 23/2/99, p 8. See also: *Powder Family*, QC 99/2, 23 February 1999; *Barunggam People*, 26/2/99.

anthropological reports.

- Affidavits stating that the applicants are authorised by all persons in the claim group to make the application and to deal with matters arising in relation to it. This requirement, under section 61(1)(a) NTA, has been interpreted as applying to all named applicants jointly. Some decisions provide that claimants can meet this requirement by providing a single affidavit sworn to be on behalf of all applicants,²³¹ whereas others require individual affidavits from each named applicant.²³²

Native title claims must be lodged in the Federal Court. Amendments of claims, such as where the registrar or delegate requests further information in order to satisfy the registration test, require an application to the court. Further resources are required to complete this process.

The decision in the *Powder Family* claim reveals that even though the claimants established the merits of their claim, they failed the registration test, first, for not providing a copy of all tenure history searches that they had conducted, and second, for failing to demonstrate that the named applicants were authorised by the group to lodge the claim.²³³

The Kimberley Land Council (KLC) has described the difficulties in complying with the procedural requirements of the registration test as follows:

The KLC, which takes very seriously its responsibility to effectively represent the native title interests of traditional owners in the Kimberley region, has no option but to attempt to meet the burdensome requirements of the new registration test. It is imperative that claims are re-registered, so that claimants may retain such rights to negotiate as remain under the new future act regime. But the problems the KLC has so far encountered with the new registration test are enormous...

In order to comply with the conditions of Sections 190B and 190C of the *Native Title Act*, regarding the merits of a native title claim and the procedures for registration, the KLC has developed a schedule of steps to be followed with each claim before applications may be submitted to the Registrar. Sixteen specific steps must be completed in order to gather and collate the information required about the native title claimants and produce the requisite forms and documents. Project Development Officers and Field Officers within the KLC coordinate field trips by consultants who then identify the claimant group and gather evidence of physical connection to the claim area...

KLC staff and consultants must also gather evidence to support the rights and interests being claimed. Several field trips may be needed before staff and consultants secure sufficient evidence to provide the level of detail being required by some delegates of the registrar. Then Project Development Officers and legal staff must complete a range of documentation to support the registration application, and this includes meetings with claimants as well as preparation for and signing of affidavits by claimants. For the eighty two claims the KLC is required to re-register in the next six months, the completion of the sixteen step process for each claim would require the following number of work days for various staff and consultants in the KLC: 288 consultant days; 597 Legal Officer days; 377 Project Development Officer days and 236 Field Officer days. The task is quite obviously impossible given the KLC's current level of resources.²³⁴

The difficulty for representative bodies to prepare claims is compounded by the strict time periods for notification within the NTA. Where the Government notifies an intention to do a

²³¹ *Powder Family*, 23/2/99, p 12.

²³² See for example: *Barada Barna Kabalbara & Yetimarla*, 23/2/99; *Darumbal #2*, 23/2/99.

²³³ *Powder Family*, 23/2/99, pp 12 and 15. Note the inconsistency of this test with the decisions in *Western Wakka Wakka People*, QC99/4, 26 February 1999; and *Barunggam People*, 26/2/99.

²³⁴ Kimberley Land Council Submission to section 206d inquiry, pp 2-4.

future act, claimants must meet the requirements of the registration test within a strictly limited time period. Where a claimant is unable to meet the requirements for registration, within this limited period, they may be denied the protection of the Act and the security of enjoyment of their title.

This is particularly so in circumstances where a claimant is required, within that limited time frame, to obtain a court order for registration of their interests (where they have been locked off the land or forcibly removed from their family (s190D(4))).

Chapter 5: Native title representative bodies

The participation of Indigenous people in the native title process depends on the effective functioning of representative bodies. Representative bodies link native title holders and claimants to a network of stakeholders including Government, statutory authorities, the mining industry, developers, adjoining property holders, anthropologists and lawyers. No other participant in the native title arena is required to balance as many interests at a local level, remaining accountable to native title holders and claimants, the local community and government funding authorities. The amendments to the *Native Title Act 1993* have significantly altered the identity and functions of representative bodies. The amendments institute a procedure which requires representative bodies across the country to reapply for recognition as a representative body; the jurisdictional boundaries of representative bodies are altered; the eligibility criteria of representative bodies are substantially amended; accountability requirements are significantly changed and the range of functions to be performed by representative bodies is greatly expanded. From a human rights perspective the relevant issue is whether the amendments improve the capacity of Indigenous people to participate in and determine the outcome of the decisions which affect them.

Representative bodies and the principle of effective participation

There are presently 24 native title representative bodies²³⁵ throughout Australia, each of which represents the interests of native title holders and claimants in a designated area. Most representative bodies exist within Indigenous organisations, which were well established at the time the *Mabo* decision was handed down in 1992.²³⁶ The primary function of these organisations, prior to the common law recognition of native title rights, was the acquisition, recognition and management of statutory grants of land secured to Indigenous people through land rights legislation. The role of representative bodies is a fusion of statutorily defined functions, and those that derive from their longstanding relationship with the Indigenous communities within their area. Representative bodies are integral to the participation of Indigenous people in various levels of decision-making in the native title process.

As discussed in chapter 2, the Committee on the Elimination of Racial Discrimination (CERD Committee), made it clear that the effective participation of Indigenous people in decisions which affect them is an essential requirement of the Convention on the Elimination of All Forms of Racial Discrimination (CERD). Drawing on their interpretation of Article 5(c) of CERD, in General Recommendation XXIII,²³⁷ the CERD Committee stated that State Parties were required to 'recognise and protect the rights of Indigenous peoples to own, develop, control and use their common lands, territories and resources.'²³⁸ The decision also states 'that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent'.²³⁹ The principle of effective participation is further elucidated in General Recommendation XXI as part of the broader right of self-determination.

²³⁵ Also referred to as NTRBs.

²³⁶ *Mabo v Queensland (No.2)* (1992) 175 CLR 1 ('*Mabo No.2*').

²³⁷ Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII(51) concerning Indigenous Peoples*, 18 August 1997. UN Doc CERD/C/51/Misc.13/Rev.4, para 5.

²³⁸ Committee on the Elimination of Racial Discrimination, *Decision (2)54 on Australia - concluding observations/comments*, 18 March 1999. UN Doc CERD/C/54/Misc.40/Rev.2, para 9.

²³⁹ *ibid.* Decision 2(54) draws on the Committee's *General Recommendation XXIII (51) Concerning Indigenous Peoples*, 18 August 1997. UN Doc CERD/C/51/Misc.13/Rev.4, para 4(d).

The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination.²⁴⁰

Representative bodies give effect to the principles of participation contained in article 5(c) of the Convention in the following ways.

- *Providing a service to native title holders.* Representative bodies provide a range of services to native title holders in their area, including the research and preparation of native title or compensation claims, the resolution of disagreements in relation to claims, and generally, the representation of native title interests.²⁴¹ As a result of representative bodies providing such services Indigenous communities are able to claim their title to land, and thus participate in the decision-making processes that affect their land.
- *Representing native title holders in the formulation of legislation and policy.* Representative bodies play a significant role in representing Indigenous interests in the formulation of government legislation and policy. As a result of their interaction with Indigenous communities at the grass roots level, representative bodies are well placed to inform politicians and the public at large about how legislative provisions and policy directives directly impact upon the exercise of native title rights in their community. This role is recognised in s43A of the amended NTA which requires the Minister to consult with representative bodies prior to approving proposed state alternative provision regimes.

Many representative bodies sought to represent the interests of the Indigenous communities within their area in the political process which culminated in the enactment of the *Native Title Amendment Act 1998*. The CERD Committee made it clear, however, that the lack of 'effective participation' of Indigenous people in the formulation of the amendments and the failure of the Government to obtain the informed consent of Indigenous people to the amendments were a breach of Australia's obligations under Article 5(c) of the Convention.²⁴²

- *Community development.* Representative bodies have played a significant role in developing community structures to facilitate decision-making by claimants in the native title process. In the recent Joint Parliamentary Committee Inquiry into Native Title the Kimberley Land Council (KLC) explained the importance of this role:

I think it is important to understand the context in which native title takes place. Native title is seen, of course, as a community title. What is difficult for Aboriginal people is that whenever you go into a place to assist with a communal native title you might think to look around for some sort of institutional manifestation of that community. But frequently that is not there. By institutional manifestations, I could use the comparison that the Broome community has the Broome Shire Council, the Western Australian community has the Western Australian parliament.....That is why the KLC has taken a community

²⁴⁰ Committee on the Elimination of Racial Discrimination, *General Recommendation XXI, Right to Self-Determination* (48th session), 15 March 1996. UN Doc CERD/A/51/18, para 9.

²⁴¹ NTA, s202(4).

²⁴² Members of representative bodies participated in the National Indigenous Working Group. Despite sustained attempts to consult and negotiate with the Government, the NIWG was excluded from the process of drafting and amending the Bill. The NIWG issued a statement outlining this exclusion from the process and opposing the Bill. This statement was published in the Aboriginal and Torres Strait Islander Social Justice Commissioner's *Native Title Report 1997-98*, Human Rights and Equal Opportunity Commission (HREOC), Sydney, 1998, Appendix One.

development approach to native title.... to assist communities to develop structures and processes for decision-making – that is the project development officers – and the field officers’ primary function is to assist communities in understanding the processes of the Native Title Act.²⁴³

In order to carry out their community development role effectively representative bodies need to have a deep understanding of the values and structure of the communities within their region. This has been achieved to date through the participation of the local people in the organisational structure of the representative body, which is required under the original NTA to be ‘representative of the Aboriginal peoples and Torres Strait Islanders in the area’.²⁴⁴

Representative bodies are at the forefront of Indigenous governance issues in Australia. The scope of their functions and their representative base have meant that they have been forced to develop and adopt organisational and administrative styles appropriate to an Indigenous organisation in a non-Indigenous framework. Representative bodies must be responsive and accountable both to their constituent communities and to Government. Not surprisingly, these demands place specific stresses upon them and require innovative methods of governance.

Amendments to the representative body provisions and human rights standards

The amendments to the representative body provisions of the NTA redraw the boundaries of the representative body areas, institute a procedure for re-recognition of representative bodies across the country, reform the structure of representative bodies and significantly alter their functions. The Government explains the rationale for the changes as follows:

The Government is committed to ensuring that representative Aboriginal and Torres Strait Islander bodies operate efficiently, effectively and accountably.

The Government considers that a robust representative body system will benefit not only native title holders but all those who have dealings with them.

The amendments to the Act in Schedule 3 of the Bill strengthen the representative body system by setting mandatory functions for the bodies and imposing nationally applicable standards of performance and accountability.

These standards are based on models for other organisations funded by ATSIC and on best practice for officers of Commonwealth instrumentalities.²⁴⁵

While the amendments were intended to improve the efficiency, effectiveness and accountability of representative bodies for the benefit of all stakeholders, it is significant that they were not initiated, nor consented to, by Indigenous people. The general absence of consultation with those affected during the amendment process applies also to the representative body provisions.

Consultation with representative bodies during the drafting process would have ensured a valuable contribution to the substance of the amendments by accessing an expanding reserve of information and experience on the relevant issues. Indigenous governance discourse engages academics, researchers, native title claimants and those working in Indigenous organisations,

²⁴³ Kimberley Land Council, *Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund – Section 206d inquiry into the operation of the Native Title Act 1993*, Hansard, 13 April 1999, p 159. (herein Kimberley Land Council Submission to section 206d inquiry)

²⁴⁴ Original NTA, s202(3)(a).

²⁴⁵ Attorney-General the Hon Mr D Williams, Second Reading Speech, *Native Title Amendment Bill 1997*, paras 51-53.

including representative bodies.²⁴⁶ The input of those affected by the changes is increasingly important in view of the shift from representation to a service provision model. These statutory requirements would have benefited from the input of those affected by them.

The principle of participation favours development and control by Indigenous people of their affairs with regard to land, resources and public life. There can be little doubt that on the basis of the CERD Committee's findings on effective participation, the determination of Indigenous governance structures should be located with Indigenous people.

Redrawing the boundaries of representative body areas and human rights standards

The amendments allow the Commonwealth Minister²⁴⁷ to reconsider all representative body areas and make changes taking into account, but not limited to, broad specified criteria.²⁴⁸ Only one representative body can be recognised in each area.²⁴⁹ On 19 February 1999, the Minister proposed a new set of boundaries.²⁵⁰ As a result of the amendments there are now fewer areas covering larger tracts of territory. Consequently, the area covered by some representative bodies has expanded and this encroaches on or subsumes the jurisdiction of others. The decision to redraw the boundaries in this way took into account comments made by ATSIC after consultations with representative bodies and other affected persons. Three weeks were then allowed for representative bodies and other interested persons to make comments on the proposals. The final decision was announced on 4 May 1999.²⁵¹ None of the representative bodies affected by the new boundaries expressed a desire to amalgamate or to be responsible for a larger area.

As a result of the amendments, which re-draw the boundaries and limit the number of bodies that can be recognised to one per area, representative bodies are effectively competing with each other for recognition in relation to the same area. Inevitably certain representative bodies will cease to exist as a result of the amendments.

For example, the South-East Queensland invitation area is currently served by FAIRA Aboriginal Corporation in the east, and Goolburri Land Council in the south west. While both organisations have a highly developed skill base of local and international experience and expertise, only one can continue to function as the recognised representative body. Both organisations also have strong links in their constituent local communities.²⁵² Other

²⁴⁶ In addition to the expertise gathered by those participating in representative bodies and other Indigenous organisations, studies of governance structures include the 1995 *Review of Native Title Representative Bodies* by ATSIC, and, more recently, the Australian Research Council Collaborative Research Project, *Governance Structures for Indigenous Australians On and Off Native Title Lands*, University of New South Wales and Murdoch University, 1999.

²⁴⁷ Minister for Aboriginal and Torres Strait Islander Affairs.

²⁴⁸ NTA, Subsection 203AA(2) requires the following criteria to be taken into account:

- (a) the areas for the representative bodies that are already in existence;
- (b) the need to minimise any disruption to the performance of the functions of those representative bodies;
- (c) the requirements of NTA subsection 203AD(4) in relation to the recognition of representative bodies.

²⁴⁹ NTA, s203AD(4).

²⁵⁰ The new areas are currently referred to as 'invitation areas'.

²⁵¹ Changes to boundaries under the *Aboriginal and Torres Strait Islander Commission Act 1989* require the Minister to convene a panel to review matters relating to boundaries of regions [Division 9, *Aboriginal and Torres Strait Islander Commission Act 1989*]. The decisions of the panel must be gazetted, and objections may be lodged. In comparison, the process of consultation for the boundary changes of representative body areas was minimal, and the international standard of informed consent was not met. This standard is stated in paragraph 4(d) of the General Recommendation XXIII Concerning Indigenous Peoples, 18 August 1997. UN Doc CERD/C/51/Misc.13/Rev.4.

²⁵² FAIRA Aboriginal Corporation currently has a full time representative in Geneva, participated in developing

representative bodies competing for recognition are Cape York against North Queensland Land Council; Aboriginal Legal Rights Movement (SA) against Anangu Pitjantjatjara and Maralinga Tjarutja Councils; and Ngaanyatjarra Council against the Western Desert Puntukurnuparna; and the Western Australian Legal Service against all representative bodies in Western Australia.

The longstanding relationship between representative bodies and their constituent groups will be significantly disrupted as a result of these amendments. Claims currently run by one representative body will now fall outside their jurisdiction. The successfully recognised representative body will be required to take over these claims, resulting, inevitably, in some duplication.

Because of the sensitive nature of the material, the process of initiating, documenting and mediating a native title claim operates best in a climate of trust and co-operation between the representative body and the claimants. This is especially important during negotiations by claimants to determine the identity and decision-making structure of claimant groups.²⁵³ This negotiation generally takes the form of a series of community meetings organised by the representative body. The role of the representative body in these meetings may include mediation, facilitation and providing transport and a venue. Fundamental groundwork for claims occurs at this stage. Complex tasks such as resolution of conflict, framing the claim, and the claimant group, require consistency of personnel and work practices in order to build the necessary trust and co-operation. Severing this relationship disrupts the process and has the potential to delay claims and negotiations.

As a result of the disruption in the relationship between representative bodies and their constituents caused by the new boundaries, the increasingly sophisticated participation by Indigenous people in public life is undermined and the development of local control of land and resources is impaired.

Reapplying for recognition as a representative body

Parts 1 and 2 of Schedule 3 of the *Native Title Amendment Act 1998* (Cth) effect a two stage reform of both the process of recognition of NTRBs, and their functions.²⁵⁴ The framework for the new scheme includes a transitional period of at least 12 months,²⁵⁵ during which original representative bodies perform existing functions and a number of additional functions. At the end of this period the original representative body regime will be repealed. During the transitional period the Minister has invited existing representative bodies to apply for recognition as representative bodies.²⁵⁶

In the first instance, existing representative bodies have been invited to apply for re-recognition in respect of the newly determined areas. Officers of ATSIC, after a process of consultation and assessment, will advise the Minister in relation to re-recognition of representative bodies. The

the Draft Declaration on Indigenous Peoples and made both oral and written submissions to the CERD Committee in its recent consideration of the amendments to the NTA.

²⁵³ The role of representative bodies is described in detail by Fred Tanner, Solicitor for the Aboriginal Legal Rights Movement, Native Title Unit South Australia, in 'Representing Native Title Groups', Strelein, L. (ed) *Working with the Native Title Act: Alternatives to the Adversarial Model*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1998.

²⁵⁴ The following summary of the provisions is based on the *Commentary* by the Native Title Unit, Office of General Counsel, Australian Government Solicitor in the *Native Title Act*, AGPS, at pp 56-60.

²⁵⁵ This period started at 30 October 1998, and can be extended by the Minister: see Note 2 NTA.

²⁵⁶ The process of recognition of representative bodies provides that bodies which are eligible to apply for recognition include existing representative bodies incorporated under Part IV of the *Aboriginal Councils and Associations Act 1976* and a body corporate established by prescribed laws (ss201B & 203A); applications can be made according to s 203A; and the criteria for recognition is set out in ss203AD & 203AI.

Minister's decisions on re-recognition were to be announced before 30 October 1999, but they will now be announced in July 2000. If existing representative body applications are rejected the Minister may invite other eligible bodies to apply for recognition.²⁵⁷

In exercising this discretion to recognise representative bodies, it is important that the statutory criteria for the decision incorporate effective participation. This applies also to the ongoing relationship as the amendments expand the statutory obligations of representative bodies and increase the Minister's control in relation to their performance, direction and financial management.²⁵⁸ The Minister also has increased powers to obtain documents and information from representative bodies.²⁵⁹

This expansion of Ministerial control could be balanced by the incorporation of statutory criteria increasing the effective participation of Indigenous people.

The absence of effective participation in this process contributes to concerns that the restructure and displacement of particular Indigenous organisations by a non-Indigenous process may be influenced by political considerations. The only recourse that representative bodies have against the unfair exercise of power by the Minister in relation to re-recognition is through appeal to the Federal Court under the *Administrative Decisions Judicial Review Act 1977* (Cth).

A similar concern was raised in the recent review of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).²⁶⁰ The report, known as the Reeves Review, recommended restructuring the land council system in the Territory, especially replacing the existing Northern and Central Land Councils with smaller regional units. The major recommendations of the review have been met with substantial criticism.

The Joint Parliamentary Committee which considered the Reeves Review concluded that the major recommendations be rejected.²⁶¹ Instead, Recommendation 1 of the Committee's report adopts the standard of informed consent for any future amendment to the *ALR(NT)Act*. It states:

The *Aboriginal Land Rights (Northern Territory) Act 1976* ('the Act') not be amended without:

- Traditional owners in the Northern Territory first understanding the nature and purpose of any amendments and as a group giving their consent; and
- Any Aboriginal communities or groups that may be affected having been consulted and given adequate opportunity to express their views.²⁶²

In a separate analysis of the Reeves Review, Ian Viner QC, concluded that the recommended restructure had no economic or organisational advantages, and amounts to a 'convenient way of

²⁵⁷ NTA, s203A(1), s203AA(4).

²⁵⁸ A further concern about the extension of accountability to the Minister in relation to representative body budgets was raised in a previous Native Title report. Commissioner Dodson wrote: 'The Commonwealth Government will not infrequently be an adversarial party to claims and appeals run by representative bodies on behalf of native title holders.' Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1995-96*, HREOC, Sydney, 1996, p 66.

²⁵⁹ NTA, s203D, s203DA, s203DB, s203DC.

²⁶⁰ Reeves QC, J. 'Building on Land Rights for the Next Generation: Report of the Review of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)', August 1998.

²⁶¹ The Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs tabled its report *Unlocking the Future: the report of the inquiry into the Reeves review of the Aboriginal Land Rights (Northern Territory) Act 1976*, together with minutes of the proceedings and evidence received by the Committee on 30 August 1999.

²⁶² *ibid*, pxxvii.

destroying the Northern and Central Land Councils, both of which have long been a target for destruction by the Northern Territory Government...'.²⁶³

Fair and equitable exercise of the Ministerial discretion requires the incorporation of effective participation into the statutory criteria for consideration in the decision making process. Increased consultation and consideration of the issues affecting native title claimants, holders and representative bodies as they are expressed by those affected would significantly contribute to this process.

Another implication of the displacement or dissolution of already existing representative bodies is the disruption caused to the relationship which exists between the Indigenous community and its representatives. A very real concern in relation to this disruption is the adequacy of the provisions in the NTA regulating the transfer of documents and other material from a former representative body to the body which receives recognition.²⁶⁴ Such documents may contain sensitive information relating to claims such as genealogical data, oral histories of a group of claimants and information about sites in an area.

As a result of amendments initiated by the National Indigenous Working Group some protective provisions were inserted into the Native Title Act in 1998 by the Senate to allow the Minister to direct that documents and records relating to the performance of functions or the exercise of power be given either to the person(s) who provided them or the replacement representative body.²⁶⁵ Such documents will not be provided to a replacement body unless the claimants have requested that the body assist them.²⁶⁶ Non-compliance with a direction from the Minister is subject to enforcement by a Federal Court order.²⁶⁷ Both the former representative body and the recognised one are required to make reasonable efforts to comply with the wishes of the traditional owners in relation to traditional material or other information.²⁶⁸ These provisions allow for substantial protection of culturally sensitive documents by claimants and representative bodies.

There are, however, two areas of concern that have been identified and remain to be addressed. First, the provisions may not adequately protect documents affected by ownership under copyright by the representative body. Second, the power to move the documents, once the claimants have made the necessary request, is located with the Minister.

There are no provisions in the NTA for the satisfactory transfer, storage, disposal or other method of dealing with such material. Nor are there provisions to address issues of confidentiality arising from dealings with the material. These shortcomings could have been avoided by closer consultation with representative bodies who have the most knowledge on these issues. The Act fails to provide the safeguards of confidentiality normally expected in such a relationship. If the standard of informed consent had been applied in drafting the amendments a more workable solution may have been available.

The implications of these provisions with regard to disclosure and use of sensitive material have been raised in a number of contexts by representative bodies. There should be an education campaign run for those claimants who may be affected by the dissolution of their representative body, so that they make informed decisions about the transfer of their material.

²⁶³ Viner QC, I. 'Whither Land Rights in the Northern Territory? Whither Aboriginal Self-Determination? A Review of the Reeves Report' in *Australian Indigenous Law Report* (1999) Vol 4, No 1, March, p 7.

²⁶⁴ NTA, ss203FC and 203FCA.

²⁶⁵ NTA, s203FC(2).

²⁶⁶ NTA, s203FC(1).

²⁶⁷ NTA, s203FC(3).

²⁶⁸ NTA, s203FCA.

The nature of the documents that may require to be transferred as a result of the re-recognition process and the need for their protection reflect the unique relationship of trust that representative bodies must develop in representing the interests of native title holders and claimants. This is a special relationship which should only be disrupted where the claimants themselves request it. It is not a relationship which should be controlled or dissolved using the standards of performance efficiency and effectiveness as the sole criteria and without regard to human rights considerations.

Amendments to the eligibility criteria of representative bodies

The original NTA provided that the Minister must not recognise a representative body unless:

- a) the body is broadly representative of the Aboriginal or Torres Strait Islander people in the area;
- b) the body satisfactorily performs its existing functions; and
- c) the body will satisfactorily perform its functions under subsection (4).²⁶⁹

Under the amendments the Minister has a discretion to recognise a representative body if he/she is satisfied that:

- a) the body will satisfactorily represent persons who hold, or may hold, native title in the area; and
- b) the body will be able to consult effectively with Aboriginal peoples and Torres Strait Islanders living in the area; and
- c) if the body is already a representative body – the body satisfactorily performs its functions; and
- d) the body would be able to perform satisfactorily the functions of a representative body.²⁷⁰

In relation to (a) and (b) above, the Minister must take into account whether ‘the body’s organisational structures and administrative processes will operate in a fair manner’.²⁷¹ In assessing fairness the Minister must have regard to issues of community participation and consultation, methods of review of decisions, conduct of executive officers, management issues and accountability.²⁷²

The amendments remove from the criteria for recognition the requirement that the applicant be representative.²⁷³ Instead, the Minister needs to be satisfied that the body will satisfactorily represent actual or potential native title holders.²⁷⁴ This amendment heralds a fundamental change to the relationship between representative bodies and the Indigenous communities they represent.

²⁶⁹ Original NTA, s202(3).

²⁷⁰ NTA, s203AD(1).

²⁷¹ NTA, s203AI(1).

²⁷² NTA, s203AI(2).

²⁷³ NTA, s202(3).

²⁷⁴ NTA, s203AD.

As indicated previously in this chapter, there are three ways in which representative bodies give effect to the principles of participation as required by CERD: first, through the provision of services to native title holders; second, through representing native title holders in the formulation of legislation and policy; and third, through their role in developing community structures to enable decision-making in the native title process. By shifting the emphasis away from 'representativeness' towards 'a capacity to represent', the amendments fail to appreciate the importance of representative bodies in the latter two roles of formulating legislation and policy and developing community structures. While the provision of services is a very important function of representative bodies, it is not sufficient to ensure full participation of native title holders and Indigenous people in the native title process.

Under a service provision model, organisations which are representative may be disadvantaged in their application for re-recognition. This is because where native title 'clients' or their representatives are in control of the organisations that represent them a conflict of interest arises. The model requires independence and impartiality in representing the interests of the client. If, as Senator Herron's interpretation below suggests, the amendments favour the service provision model of representation, then Indigenous organisations which are representative of the Indigenous communities in their area may be at a disadvantage in their application for re-recognition.

It should be clearly understood that the primary role of representative bodies is to provide a service to their clients. They are not there to make decisions for native title holders. Instead, under the Act, prescribed bodies corporate are the vehicles for decision-making with respect to the exercise of native title rights and interests. Accordingly, it is important that representative body areas are those areas which will best facilitate the delivery of a native title service.²⁷⁵

The amendments no longer require that the values of the local Indigenous people be present in the organisations which represent them. The question of how best to achieve the effective functioning of native title representative bodies is now being framed in terms of bureaucratic models of best administrative practice. Certainly, models and methods of administrative efficiency and productivity have an important contribution to make to this discourse. However, it would be misconceived to expect to overlay Indigenous dynamics with models of best practice without regard to the complexities of organisations striving to sustain service delivery in the context of cultural integrity.

Representation in Indigenous communities has always been a difficult issue for non-Indigenous people to understand. Indigenous peoples have been loathe to abandon Indigenous ways of representation for western ways and non-Indigenous people frequently respond by criticising Aboriginal people for not fostering 'democratic' principles. Representative practices in the Torres Strait are fundamentally different to practices of representation in the Kimberley. Representation in highly urban Indigenous communities has its own complexities again. For native title holders to be properly represented in a given area, Indigenous methods of representation must be able to operate. The ultimate test of the authenticity of representation must be the values of those represented. Unless it accords with their values it will not draw allegiance.²⁷⁶

The community development role of representative bodies in terms of participation in the local context should not be neglected. Their role as facilitators of claimant group meetings has provided a unique opportunity to foster traditional decision-making methods, encourage respect

²⁷⁵ Senator John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, *Media Release*, 10 May 1999.

²⁷⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1995-96*, HREOC, Sydney, 1996.

for, and acknowledge the authority of, the specialised knowledge of elders in the claim process.²⁷⁷

In addition to maintaining cultural integrity in service delivery, representative bodies have spanned local and national native title forums. Native title representative bodies have been criticised for focusing on national political strategies. After prefacing his comments with a desire not to denigrate the work of representative bodies, the former President of the National Native Title Tribunal, Justice French, remarked:

People have been going off to Canberra and participating in the National Indigenous Working group and so on. The most powerful political rhetoric that NTRBs can achieve is results on the ground. If they can foster agreements, small and large, those agreements create a much more positive atmosphere for native title than all the national debate and rhetoric can achieve.²⁷⁸

While it is important to be functioning effectively ‘on the ground’, and the contribution to workability and trust in the process should not be underestimated, it is also imperative not to lose sight of the political climate in which representative bodies operate in order to effectively represent their Communities. Representative bodies have been at the interface of native title issues, on both political and service provider levels, since their inception. In representing native title interests at a policy and legislative level they are actively providing for the ‘recognition and protection of native title’²⁷⁹ in the broadest sense.

Satisfactory service provision to claimants is undoubtedly an essential priority of representative bodies, but it is contrary to human rights standards to substitute service provision for representative participation in public life at a national and regional level.

Increased responsibilities and functions

The *Native Title Amendment Act 1998* (Cth), effects change on the overall structure and numbers of representative bodies. It also amends their responsibilities and functions. As a result of the amendments representative bodies will have increased responsibilities and play a more significant role in the native title process, including: an increased role in certifying applications for determinations of native title and applications for registering land use agreements;²⁸⁰ facilitating and assisting native title holders with native title matters;²⁸¹ an increased role in facilitating and participating in Indigenous land use agreements (ILUAs);²⁸² an increased dispute resolution function;²⁸³ and increased notification functions.²⁸⁴

The amendments focus on the service provision model, in the eligibility criteria applied to the recognition of representative bodies. As indicated, service provision is a necessary and important function of representative bodies. The objection is not to improving the performance of these functions by representative bodies, but rather to removing Indigenous people from the control of the provision of these services. In the amendments that affect the functions of

²⁷⁷ Because native title claims are grounded in the traditions and customs of a people, elders are given a renewed authority to speak for country and inform the claim. The role of representative bodies take in organising and facilitating community meetings includes reinforcing traditions and customs such as the authority of elders to speak for country and take a leading role in decision-making procedures.

²⁷⁸ Robert French J, *ATSIC News Interviews*, *ATSIC News*, June, 1999.

²⁷⁹ NTA, s3.

²⁸⁰ NTA, s203BE.

²⁸¹ NTA, s203BB.

²⁸² NTA, s203BH.

²⁸³ NTA, s203BF.

²⁸⁴ NTA, s203BH.

representative bodies the service provision model is once again emphasised. This time, however, there is another competing objective which determines some of the roles and functions of the representative body in the native title process. That is, representative bodies have a role in facilitating the efficiency and workability of the process, not for the benefit of native title holders, but for the benefit of all stakeholders. Under this objective the representative body must certify and give reasons for the certification of native title applications as satisfying various criteria: they must make reasonable effort to minimise overlapping claims in a particular area, without regard to the traditional basis of such an overlap; they must certify and give reasons for the certification of ILUAs as satisfying various criteria; they must seek to achieve agreement between its constituents about native title matters and mediate any disputes that arise over native title matters.

As a result of this further role in facilitating the workability and efficiency of the process, the duties which representative bodies have to Indigenous communities in their area may be compromised. In terms of the objectives of the service provision model which the Government has promulgated through the eligibility criteria, representative bodies face an extremely difficult task in representing the interests of their client while at the same time ensuring the process is operating smoothly and efficiently.

The new certification function of representative bodies in relation to ILUAs exemplifies the conflict between their role as representatives of native title clients and their role in ensuring the smooth operation of the native title process. The relevant provisions require that representative bodies certify applications for ILUAs,²⁸⁵ provided they are satisfied that all reasonable efforts have been made to ensure that all persons who hold, or may hold, native title in relation to the land or water have been identified and have authorised the making of the agreement.²⁸⁶ Even if representative bodies were adequately resourced and could readily perform this certification function, their duty towards their client, a particular native title party, is compromised by their duty to ensure that the ILUA is not subject to counter-claims by other claimant groups. In fact, this has the benefit of providing certainty to other stakeholders that the ILUA will not be contested by subsequent claims. However, it may compromise the interests of the native title claimant in having the ILUA registered.

The following comments by the former Commissioner suggest a means of resolution of these two functions:

To respond to these realities it is not appropriate to qualify the general mandatory responsibility of the representative bodies to undertake identification and consent. But it is appropriate to qualify its specific application to ILUAs. That is, the function should be performed as far as practicable. By way of support of this position, s43(2) of the *Aboriginal Land Rights Act* provides in part:

The Land Council shall not agree upon terms and conditions unless:

(a) it has, as far as practicable, consulted with the traditional Aboriginal owners... ”²⁸⁷

Similarly, the new role of the representative body to mediate disputes by claimants over particular areas of land or water is in conflict with their role as service providers to particular native title clients. There is always structural potential for conflict when one organisation participates in mediation processes, and then makes funding decisions on the basis of the outcome. Such decisions are reviewable by native title parties. However the potential for the

²⁸⁵ NTA, s203BE(1).

²⁸⁶ NTA, s203BE(5)(a) & (b).

²⁸⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1995-96*, HREOC, Sydney, 1996, p 148.

perception of bias in the process is clear. An unsatisfactory outcome of a particular mediation may be attributed to the representative body who, consequently, will find it difficult to regain the trust of the dissatisfied group within their area.

The amendment inserted by the Senate in December 1997 at the request of the National Indigenous Working Group assists representative bodies to prioritise their functions where there is a conflict between them.²⁸⁸ This amendment provides that:

A representative body:

- (a) must from time to time determine the priorities it will give to performing its functions under this Part; and
- (b) may allocate resources in the way it thinks fit so as to be able to perform its functions efficiently;

but must give priority to the protection of the interests of native title holders.

This provision acknowledges the complexity that characterises the work of representative bodies. It is important that this complexity is understood in determining the fate of representative bodies in the re-recognition process and in assessing their ongoing performance.

Allocation of resources

With these increased responsibilities and as a result of the high complexity of the native title process, representative bodies require additional resources and funding. Without appropriate funding rights will be lost. For example, many representative bodies have been inundated with notifications advising them that proposed mining acts and other acts could affect native title rights in a particular area. Where mining impacts on registered native title rights native title holders or claimants have a right to negotiate. Registration of claims, as indicated in chapter 4, is a very complex and onerous process. Representative bodies do not have sufficient resources to identify who should be advised of notices or where they might be located. Even if affected persons are located, an application must be filed within 3 months of notification.²⁸⁹ The Kimberley Land Council received \$300,000 additional funding to re-register native title claimants under the amended NTA even though they estimated that it would cost them \$1million.²⁹⁰ Native title rights are threatened where mining goes ahead without proper consultation with native title holders.

The Central Land Council expressed its concern as follows.

“One particular concern is...the expected rapid escalation of costs to Territory representative bodies associated with the proposed Northern Territory 43A schemes. Dealing with exploration licences, extractive permits, mining leases, and land acquisition, currently before the Commonwealth Attorney-General for determination. These schemes will operate in conjunction with the Northern Territory’s s26MD(6B) schemes which have similar cost implications.

It is disturbing that representative bodies throughout Australia have been advised that their funding for the year 1999/2000 is to be frozen at 1997/98 levels when the impacts of the amendment of the *Native Title Act 1993* are creating substantially greater demands upon them. Should this occur, the Central Land Council holds great concerns that native title holders will be deprived of their procedural rights, provided under the *Native Title Act*

²⁸⁸ NTA, s203B(4).

²⁸⁹ NTA, s29(4).

²⁹⁰ Kimberley Land Council Submission to section 206d inquiry, 12 and 13 March 1999, pp 52 and 96.

1993, in relation to land management due to the lack of funds.²⁹¹

The process of re-recognition has placed an added strain on the already stretched resources of representative bodies. Large amounts of money have been spent preparing applications for re-recognition. These are investments for which the re-recognised representative body will see little return.²⁹²

They are required to meet new standards relating to other areas of the amended Act, such as re-submitting registration test applications on behalf of claimants, while addressing the extensive criteria required for the application.

While none of us who are working at the NTRBs are enjoying the re-recognition process as it unfolds, hopefully the old adage of 'whatever does not kill you makes you stronger' will apply.²⁹³

Conclusion

Satisfactory organisational conduct has been an ongoing issue for land councils and representative bodies. It is well recognised that the principles of corporate governance and management may be at odds with Indigenous cultural practices and values. These have been expressed as conflicts regarding financial accountability, and relationships between board, management and staff, among others.

Sourcing the causal factors of governance problems has been variously tracked to technical issues, such as the need for more appropriate legislative models under Corporations Law regimes (see Marantzaris 1997). Others have argued for particular forms of regulatory mechanisms on funding and the possibility of developing comprehensive workload funding models (Kauffman and Wislon 1998); while others argue a comprehensive need for education and training in human and financial management and accountable forms of decision-making (see ICAC 1998). The urgency with which some solutions to these issues are needed has not been lessened by the expansion and increasing complexity of the native title claims processes and associated legislation.²⁹⁴

The overall effect of the amendments on the internal structure of the body is to emphasise organisational transparency and accountability. This may ultimately benefit Indigenous claimants and titleholders, as representative bodies have been criticised by both Indigenous and non-Indigenous parties on matters relating to decision-making, access to membership and, at worst, corruption.²⁹⁵ The amendments address corporate governance issues, and may encourage more effective administrative practices. There is no single successful formula for positive resolution of these dynamics,²⁹⁶ and, if an absence of dissent is the indication of success, perhaps it is an unrealistic expectation.

²⁹¹ Central Land Council, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund – Section 206d Inquiry into the operation of the Native Title Act 1993*, 12 March 1999.

²⁹² Russell Bellar, NIWG Meeting, 19 October 1999.

²⁹³ Ritter, DL. and Flanagan, FN., Yamatji Land and Sea Council, 'The Application Process for the Recognition of Native Title Representative Bodies under the Amended Native Title Act' (August 1999) Vol 4, No 4, *Native Title News*, p 75.

²⁹⁴ Finlayson, JD. 'New and Emerging Challenges for Native Title Representative Bodies' *Discussion Paper No 167/1998*, Centre for Aboriginal Economic Policy Research, Australian National University, p 8.

²⁹⁵ The Independent Commission Against Corruption completed the *Report on Investigation into Aboriginal Land Councils in New South Wales* in April 1998. Recommendations included proposals for increased accountability of office bearers to membership, increased transparency in decision-making, addressing corporate governance issues, and effective responses to disputes and allegations of misconduct: *Corruption Prevention and Research Summary*, pp 6-20.

²⁹⁶ Finlayson, JD. *op.cit.*, p 10.

What remains undetermined is whether continued pressure to conform to non-Indigenous standards of accountability will resolve these problems for such a diverse group.

A critical future challenge for NTRBs is reinventing themselves (Stead 1995), especially with mandatory re-registration now compulsory. There is an increasing need to transform themselves from the reactive, oppositional creatures of a previous political climate, to strategic, proactive organisations capable of seizing and recognising the political moment in a manner that ensures beneficial outcomes for their clients.²⁹⁷

Representative bodies are comparatively new entities, born into a shifting, complex area of law, culture and politics for which strategies will continue to need to be found. They require support to continue to develop appropriate organisational mechanisms, but not at the expense of meaningful Indigenous participation at local, national and international levels.

²⁹⁷ *ibid*, p 11.

Appendix 1: Response to request for information in relation to Decision (1)53 concerning Australia

In relation to Decision 1(53) concerning Australia: CERD/C/53/Misc.17/Rev.2, 11 August 1998

Submitted to the United Nations Committee on the Elimination of Racial Discrimination by the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, 3 March 1999

Introduction

1. On 11 August 1998 the United Nations Committee on the Elimination of Racial Discrimination (the Committee) adopted Decision 1 (53), which reads:

In view of the terms of article 9, para 1, in particular the provision that the Committee may request further information from the States parties, the Committee requests the Government of Australia to provide it with information on the changes recently projected or introduced to the 1993 Native Title Act, on any changes of policy in the State party as to Aboriginal land rights, and of the functions of the Aboriginal and Torres Strait (Islander) Social Justice Commissioner. The Committee wishes to examine the compatibility of any such changes with Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.²⁹⁸

2. The Australian Government response will be considered under the early warning and urgent procedures at the Committee's 54th session in Geneva, 1 to 19 March 1999.
3. On 3 December 1998 the Committee wrote to the Aboriginal and Torres Strait Islander Social Justice Commissioner at the Human Rights and Equal Opportunity Commission (HREOC) requesting information for consideration at the 54th session. This document responds to that request. It is understood that the purpose of the Committee's request for information is to assist in its examination of the matters specified in Decision 1(53) and their compatibility with Australia's obligations under CERD.
4. Since 22 January 1998, when Mr Michael Dodson completed his 5 year term, there has been no permanent appointment to the position of Aboriginal and Torres Strait Islander Social Justice Commissioner. Ms Zita Antonios, the Race Discrimination Commissioner within the Human Rights and Equal Opportunity Commission, has been acting in this position while simultaneously fulfilling her other full-time statutory role.
5. The information below is provided by the Acting Commissioner on behalf of HREOC. The information is based on material previously produced and published by HREOC, including Native Title Reports, public speeches given by the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, and discussion papers produced at seminars and conferences.

²⁹⁸ Decision 1(53); CERD/C/53/Misc.17/Rev.2, 11 August 1998.

1. Changes to the *Native Title Act 1993*

*i. Relationship between the Native Title Act and the Racial Discrimination Act*²⁹⁹

6. A central issue for consideration is the relationship between the *Native Title Act 1993* (NTA), as recently amended,³⁰⁰ and the *Racial Discrimination Act 1975* (RDA).
7. Before considering this relationship, it is necessary to understand how the protective provisions of the RDA generally operate within the Australian legal and constitutional system.
8. Australia is a federation comprised of a Federal (or Commonwealth) Government, six state and two territory governments. For convenience, in this document references to states include references to territories.
9. The RDA embodies Australia's domestic implementation of its obligations under CERD.³⁰¹ This Federal anti-discrimination statute was introduced in 1975. It makes discrimination on the basis of race, colour, descent or national or ethnic origin unlawful. It is designed to protect the rights of all Australians.
10. The RDA binds both state and federal governments. For example, it would be illegal to deny access to a federal or state government service on the basis of race.
11. Under section 109 of the Australian Constitution, federal legislation overrides state legislation to the extent that the state law is inconsistent with the federal law. Accordingly, the RDA generally operates to nullify state legislation that is racially discriminatory.
12. However, the principle of parliamentary sovereignty enables the Federal Parliament to pass legislation that overrides previous legislation. Parliament is not bound by its own prior legislation. Accordingly, the Federal Parliament can pass legislation subsequent to the RDA that specifically authorises action inconsistent with the provisions of the RDA. Such later legislation (in the absence of explicit provision to the contrary) overrides, or impliedly repeals, the RDA to the extent that the subsequent legislation is inconsistent with it.
13. If federal legislation subsequent to the RDA specifically authorises action that is inconsistent with the RDA, and authorises states to act pursuant to this subsequent federal legislation, then state parliaments will be relieved of the constraints normally imposed by the RDA.
14. The NTA is federal legislation subsequent to the RDA. This fact is crucial to the interaction between the two acts and to the compatibility of native title legislation with Australia's obligations under CERD.

²⁹⁹ This section is based on principles contained in *The RDA and Native Title: The implications of statutory extinguishment*, Race Discrimination Commissioner, Human Rights and Equal Opportunity Commission, Sydney 1998.

³⁰⁰ The NTA was amended by the *Native Title Amendment Act 1998* on 8 July 1998. This submission distinguishes between the original and the amended versions of the Act by referring to the original NTA and the amended NTA.

³⁰¹ The preamble to the *Racial Discrimination Act 1975* (Cth) states that the purpose of the Act is 'to make provision for giving effect to the Convention' (ie CERD).

15. The RDA has protected native title from extinguishment by state legislation in the past. The High Court of Australia has directly considered the operation of the RDA prior to the enactment of the NTA. The Court has also considered the RDA's curtailed operation subsequent to passage of the NTA.
16. Recognition of native title under the common law of Australia was made by the High Court in *Mabo v State of Queensland (No2)* (1992) 175 CLR 1. It was preceded by the Court's judgment in *Mabo v State of Queensland (No 1)* (1988) 166 CLR 186. The earlier case dealt with the *Queensland Coast Islands Declaratory Act 1985* (Qld) which sought to abolish retrospectively, without compensation, any native title rights of the plaintiffs, the Meriam people of the Murray Islands. Had the legislation been effective the *Mabo* action would have been terminated. The legislation was held to 'fail' because it contravened section 10 of the RDA.
17. In interpreting the scope of section 10 of the RDA, Justices Brennan, Toohey and Gaudron considered Australia's obligations under CERD.

Section 10 of the *Racial Discrimination Act 1975* (Cth) is enacted to implement art.5 of (ICERD) and the 'right' to which s 10 refers is, like the rights mentioned in art.5, a human right – not necessarily a legal right enforceable under the municipal law. The human rights to which s 10 refers include the right to own and inherit property... rights of that kind have long been recognised (such as in art.17 of the UDHR)...

When inequality in enjoyment of a human right exists between persons of different races, colours or national or ethnic origins under Australian law, s 10 operates by enhancing the enjoyment of the human right by the disadvantaged persons to the extent necessary to eliminate the inequality. As the inequality with which s10 is concerned exists 'by reason of' a municipal law, the operation of the municipal law is nullified by s10 to the extent necessary to eliminate the inequality.³⁰²

18. The High Court considered whether the Queensland Act prevented the Meriam people from enjoying the human right to own and inherit property, free from arbitrary deprivation, to the same extent as other members of the community. The Court held that

By extinguishing the traditional legal rights characteristically vested in the Meriam people, the 1985 Act abrogated the immunity of the Meriam people from arbitrary deprivation of their legal rights in and over the Murray Islands. The Act thus impaired their human rights while leaving unimpaired the corresponding human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Meriam people...

The 1985 Act has the effect of precluding the Meriam people from enjoying some, if not all, of their legal rights in and over Murray Island while leaving all other persons unaffected in the enjoyment of their legal rights... Accordingly, the Meriam people enjoy their human right of the ownership and inheritance of property to a 'more limited' extent than others who enjoy the same human right.³⁰³

19. As a result, the Queensland Act was inconsistent with the protection afforded by section 10(1) of the RDA, which operates to clothe

the holders of traditional native title.. with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other

³⁰² *Mabo v State of Queensland* (1988) 166 CLR 186 ('*Mabo (No.1)*') per Brennan, Toohey and Gaudron JJ at pp 216-17; see also Deane J at pp 229-230.

³⁰³ *Ibid*, pp 217-18.

persons in the community.³⁰⁴

20. By virtue of section 109 of the Australian Constitution, the RDA prevailed over and nullified the operation of the Queensland Coast Islands Declaratory Act.
21. The equal protection of property rights was revisited by the High Court in *Western Australia v Commonwealth*.³⁰⁵ That case concerned the validity of a Western Australian act - the *Lands (Titles and Traditional Usage) Act 1993* (WA) - which sought to abolish native title in Western Australia and replace it with a subordinate right of 'traditional usage' that could be overridden by other interests, such as mining titles. The High Court affirmed the reasoning of its earlier decision in *Mabo (No.1)*, holding that where,
- under the general law, the Indigenous 'persons of a particular race' uniquely have a right to own or to inherit property within Australia arising from Indigenous law and custom but the security of enjoyment of that property is more limited than the security enjoyed by others who have a right to own or to inherit other property, the persons of the particular race are given, by s10(1)(of the RDA), security in the enjoyment of their property 'to the same extent' as persons generally have security in the enjoyment of their property... Security in the right to own property carries immunity from arbitrary deprivation of the property...³⁰⁶
22. Accordingly, as the effect of the Western Australian act was to prevent native titleholders from enjoying their human rights in relation to land to the same extent as people of other races, the legislation was in conflict with the RDA.
23. In *Western Australia v Commonwealth* the High Court also considered the interaction between the RDA and NTA as two potentially inconsistent federal Acts. The High Court found that the NTA and the RDA were complementary pieces of legislation insofar as both provide legal protection and standards for dealing with native title. The NTA provides more elaborate provisions than the RDA as it is 'purpose built' to deal with native title and related issues. The majority of the High Court observed in *Western Australia v Commonwealth* that the regime established by the Native Title Act is 'more specific and more complex than the regime established by the Racial Discrimination Act.'³⁰⁷
24. The Court held that, as subsequent legislation dealing specifically with native title, the provisions of the NTA would impliedly repeal the protection of the RDA to the extent that there is inconsistency between the two Acts.

If the *Native Title Act* contains provisions inconsistent with the *Racial Discrimination Act*, both acts emanate from the same legislature and must be construed so as to avoid absurdity and to give each of the provisions a scope for operation. The general provisions of the *Racial Discrimination Act* must yield to the specific provisions of the *Native Title Act* in order to allow those provisions a scope for operation.³⁰⁸

25. The court also considered the effect of section 7 of the original NTA. This section deals explicitly with the interrelationship of the NTA and the RDA.

Section 7

(1) Nothing in this Act affects the operation of the *Racial Discrimination Act 1975*.

³⁰⁴ *Ibid.*

³⁰⁵ (1995) 183 CLR 373.

³⁰⁶ *Ibid.*, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, at p 437.

³⁰⁷ *Ibid.*, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ at p 462.

³⁰⁸ *Ibid.*, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, at p 484.

- (2) Subsection (1) does not affect the validation of past acts by or in accordance with this Act.
26. Section 7 was inserted in the original NTA to give some guarantee that its provisions would not override the RDA and would conform with the principle of non-discrimination. The specific exception to the general protection apparently offered by s7(1), expressed in s7(2) was intended to enable the validation of interests in land which had been granted by governments after the commencement of the RDA on 31 October 1975.
27. Following the *Mabo* decision, a question arose as to the validity of titles granted after the commencement of the RDA, given their consequential extinguishment or impairment of native title interests and the absence of any procedural protection or compensation. Such titles were clearly issued at a time when, while native title existed, it had not been recognised under the common law of Australia. In these circumstances, Indigenous representatives engaged in negotiations with the Federal government accepted the imperative to provide security of title.
28. In *Western Australia v Commonwealth* the High Court concluded that section 7 was in fact ineffective to provide general RDA protection in the face of the specific, subsequent provisions of the NTA.

Section 7(1) provides no basis for interpreting the Native Title Act as subject to the Racial Discrimination Act. The Native Title Act prescribes specific rules governing the adjustment of rights and obligations over land subject to native title and s7(1) cannot be intended to nullify those provisions. It may be that s7(2) is otiose but that provision is properly to be seen as inserted out of an abundance of caution.³⁰⁹

29. Accordingly, the NTA covers the field in matters pertaining to native title while the RDA continues to operate on matters outside the scope of the NTA.
30. The recent amendments to the NTA³¹⁰ provided an opportunity to redraft section 7 in order to effectively apply the RDA to the provisions of the NTA.
31. The section could have made it unequivocal that the provisions of the NTA are subject to the provisions of the RDA. There was precedent for this level of protection. The *Social Security Legislation Amendment (Newly Arrived Residents' Waiting Periods and Other Measures) Act 1997* contained an equivalent section defining the interaction of the RDA with Social Security legislation.

Section 4 - Effect of the Racial Discrimination Act 1975

- (1) Without limiting the general operation of the *Racial Discrimination Act 1975* in relation to the provisions of the *Social Security Act 1991*, the provisions of the *Racial Discrimination Act 1975* are intended to prevail over the provisions of this Act.
- (2) The provisions of this Act do not authorise conduct that is inconsistent with the provisions of the *Racial Discrimination Act 1975*.
32. A similar amendment was not adopted in the amended NTA. The section was amended in the following terms:

Section 7 - Racial Discrimination Act

³⁰⁹ *Ibid.*

³¹⁰ The amendments were passed on 8 July 1998 and most came into effect from 30 September 1998.

- (1) This Act is intended to be read and construed subject to the provisions of the *Racial Discrimination Act 1975*.
- (2) Subsection (1) means only that:
- (a) the provisions of the *Racial Discrimination Act 1975* apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and
 - (b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the *Racial Discrimination Act 1975* if that construction would remove the ambiguity.
- (3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.
33. As amended, section 7 does not ensure the protection of native title by the general standards of equality and non-discrimination enshrined in the RDA. The exercise of powers unambiguously authorised by the NTA are freed from the constraints of the RDA.
34. The amendment of section 7 offered an opportunity to guarantee that the operation of the NTA conforms with the RDA. However, section 7 does not determine whether the substantive provisions of the amended NTA are racially discriminatory or not.
35. To consider that question it is necessary to turn to the substantive provisions of the amended NTA.

ii. Specific provisions of the amended NTA and Australia's compliance with CERD³¹¹

36. There were difficulties with the original NTA. In particular:
- The High Court in *Brandy*³¹² held that provisions of the RDA for the registration and enforcement of decisions by HREOC were unconstitutional as they purported to confer judicial power on HREOC, a non-judicial body. Under the separation of powers doctrine of the Australian Constitution only courts of law may exercise judicial power.
- The powers of the National Native Title Tribunal (NNTT) to make enforceable determinations were in all respects similar to those of HREOC.³¹³ Amendments to the NTA were therefore necessary in order to vest the determination functions of the NNTT in a judicial body (ie the Federal Court).
- The registration test of the original NTA did not provide an effective screen to ensure that only bona fide native title claimants were entitled to access the future act provisions of the NTA, including the right to negotiate. A significant problem that resulted from this was the registration of multiple, conflicting claims, which rendered the right to negotiate and other provisions of the Act less workable.³¹⁴

³¹¹ This section is comprised of excerpts from chapters 4 and 5 of the Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report 1996-97*, HREOC Sydney 1997 (*Native Title Report 1996-97*). Note that references in the report to the *Native Title Amendment Bill 1997* have been replaced with references to the actual provisions of the *Native Title Amendment Act 1998* (Cth). This section also contains some updated material.

³¹² *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

³¹³ These provisions were found to be unconstitutional in *Fourmile v Selpam* (1998) 152 ALR 294.

³¹⁴ The National Native Title Tribunal has noted that some overlapping claims were the result of co-existing native title rights.

The High Court's decisions in *Lane*³¹⁵ and *Waanyi*³¹⁶ also had the effect of reducing the threshold requirements that had to be met for registration of a native title claim under the NTA. *Lane* held that the Registrar of the NNTT was limited in her ability to find that an application could not *prima facie* be made out. If information was supplied that constituted a *prima facie* case that the claim could not be made out then she would have a statutory obligation to refer the matter to a Presidential member of the NNTT. But if that information was not provided, the Registrar has no statutory obligation to look for that information independently.

Waanyi concerned an appeal against the decision of the President of the NNTT not to register a claim on the basis that the prior grant of pastoral leases had the effect of extinguishing the native title claimed. The High Court overturned this decision and held that a claimant should not be prevented from registering their native title claim where there was a legal doubt as to whether the rights claimed had been extinguished. In the end result this decision was consistent with the *Wik* decision, which held that pastoral leases under two Queensland statutes did *not* necessarily extinguish native title.

- The original NTA did not provide effective legal support to the process of agreement making. Section 21 of the original NTA provided that agreements could only be registered if they concerned native title rights which had been determined by the Federal Court. The agreements process was therefore left as an adjunct to the litigation process.

37. There was wide consensus on the need for amendments to the NTA on these grounds.
38. In December 1996, the High Court delivered its judgment in the *Wik* case.³¹⁷ This decision provided our country with a potential basis for co-existence between Indigenous and non-Indigenous Australians. It stands for the principle that pastoral rights prevail over, but do not necessarily extinguish, native title rights to the extent that such rights are inconsistent.
39. Indigenous representatives acknowledged that, in addition to amendments to deal with the issues raised above, the original NTA needed amendment to deal with issues raised by the *Wik* decision, including to confirm the extent of pastoralists rights. Indigenous representatives stated that the extent of the amendments required was minimal and could be done while still respecting the principle of co-existence as set down in the *Wik* decision.³¹⁸
40. The majority of provisions of the *Native Title Amendment Act 1998* (Cth) are not consistent with the principle of co-existence. Instead they focus on the extinguishment and impairment of native title. They also set the registration test to be met by claimants at a high threshold, which is likely to make it more difficult for claimants to access the right to negotiate provisions of the Act.
41. The amendments to the NTA have the potential, when considered from a human rights perspective, to remove and diminish the rights of Indigenous Australians, in particular through:

³¹⁵ *Northern Territory v Lane* (1995) 138 ALR 544.

³¹⁶ *North Galanjanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 ('*Waanyi*').

³¹⁷ *Wik Peoples v State of Queensland* (1996) 187 CLR 1 ('*Wik*').

³¹⁸ See National Indigenous Working Group on Native Title (NIWG) *Co-existence: Negotiation and Certainty*. The National Indigenous Working Group is a working group comprised of elected Commissioners from the Aboriginal and Torres Strait Islander Commission, the Aboriginal and Torres Strait Islander Social Justice Commissioner, representatives of land councils and representative bodies.

- the validation of intermediate period acts;
 - the ‘confirmation of extinguishment’ provisions;
 - the primary production upgrade provisions; and
 - the right to negotiate provisions.
42. On the other hand, the provisions relating to Indigenous Land Use Agreements remedy a deficiency in the original NTA and are a significant addition to the amended NTA. These provisions are discussed below at paragraphs 86 – 90.

*The validation of intermediate period acts*³¹⁹

43. The amendments to the NTA validate non-legislative acts which took place between the commencement of the NTA on 1 January 1994 and the handing down of the *Wik* decision on 23 December 1996. Those acts may have been invalid because of the failure of governments granting interests to take into account the possible existence of native title. Some acts performed after the *Wik* decision have also been validated – for example, options created before *Wik* which were exercised post-*Wik*.
44. The amendments also authorise States and Territories to validate acts if they do so on the same terms as provided in the amended NTA.³²⁰ All of these previously invalid acts are defined as *intermediate period acts*.
45. Intermediate period acts are divided into different categories. The categories indicate the impact which different validated acts may have on native title. The grant of exclusive agricultural and pastoral leases, and community purpose leases are included in *category A* intermediate period acts.³²¹ *Category A* intermediate period acts extinguish native title completely. Subject to exceptions, leases which are wholly or partly inconsistent with native title are *category B* intermediate period acts and extinguish native title to the extent of the inconsistency.³²²
46. Extinguishment is defined in the amended NTA as permanent.³²³ Native titleholders are entitled to compensation for the extinguishment of their title by validated acts.³²⁴
47. The rationale for such provisions is that when granting these interests, governments had acted on the assumption that native title was extinguished by the previous grant of a pastoral lease.³²⁵ If native title had been extinguished, then such grants could validly be done without complying with the future act procedures of the NTA. However, the *Wik* decision proved this assumption to be wrong. Accordingly, grants made without complying with the NTA may have been invalid.
48. The 1995 *Native Title Report* of the Aboriginal and Torres Strait Islander Social Justice Commissioner articulated the risk of governments issuing mining titles without taking into account the possible existence of native title on pastoral lands, and therefore without utilising the future act regime of the NTA.

³¹⁹ Extracted and based on material from *Native Title Report 1996-97*, pp 60-64.

³²⁰ NTA s22F.

³²¹ NTA s.232B(5)(b), s.229(3)(a).

³²² NTA s232C. Category C and D intermediate period acts are defined in ss232D and 232E NTA respectively.

³²³ NTA s237a.

³²⁴ NTA s22D, 22F.

³²⁵ This issue was not resolved at the time that the original NTA was passed. The preamble to the original NTA, which noted that leases extinguished native title, was ambiguous in the sense that it was understood by most to include pastoral leases (even though pastoral leases were not mentioned).

It is one thing to take a position about extinguishment, but it is an entirely different matter for governments to act on that position before it is confirmed in law. 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. Given the uncertainty around the issue, I find such an approach extraordinarily risky. The legal advice that state and territory governments are acting upon may ultimately be confirmed in the courts. However if it is wrong, governments have potentially issued tenements contrary to the NTA and the human rights of Indigenous peoples. Throughout the drafting of the NTA concerns were stated over the need to remove sovereign risk with regard to mining tenements. The right to negotiate provides a mechanism for interests to be granted without the risk of subsequent invalidity due to the existence of native title. The failure of state governments to use the right to negotiate process on assumptions relating to extinguishment which may be incorrect increases sovereign risk in circumstances where such risk could be easily avoided.³²⁶

49. In the *Native Title Report 1996-97* of the Aboriginal and Torres Strait Islander Social Justice Commissioner it was noted, in relation to the Native Title Amendment Bill,³²⁷ that

The Bill rewards those who ignored such warnings. Post-*Wik* validation is entirely different to the validation of land interests which occurred after *Mabo*. Ignorance of the existence of native title is one thing, denial of its existence is another. No doubt many governments had legal advice to which they referred in ignoring the future act procedures. But I doubt that such advice would have been unequivocal...³²⁸

50. Shortly after the government proposed the validation provisions, the Aboriginal and Torres Strait Islander Commission (ATSIC) identified the key concerns:

Validation will amount to retrospective sanctioning of conduct which was known to be potentially invalid at the time, on the part of State and Territory governments, and statutory authorities. Consequently, such a legislative provision, if enacted by the Parliament, would be unprecedented.

The legislation is discriminatory in that it purports to validate acts and to provide for extinguishment, only in relation to native title and not in relation to other forms of title. There is no countervailing benefit to be obtained from these proposals which could render this conduct a special measure.

The validation effected by the amendments, together with the ability under these amendments for State and Territory legislation to be passed with similar effect, will give rise to compensation where native title is extinguished. However, the provision for compensation, in relation to unidentified acts, may not constitute just terms compensation because native titleholders may not be in a position to know whether their rights have been affected by the validation. Thus a question of constitutional validity arises.³²⁹

51. The National Indigenous Working Group (NIWG) also stated that:

The basic unfairness is that blanket validation... damages native title rights [and]

³²⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1994–June 1995*, AGPS, Canberra, 1995, p 158 ('*Native Title Report 1995*'). See also, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report January–June 1994*, AGPS, Canberra, 1995, p 138 ('*Native Title Report 1994*').

³²⁷ The validation provisions of the *Native Title Amendment Act 1998* (Cth) are substantially similar to those contained in the Native Title Amendment Bill.

³²⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996-97*, AGPS, Canberra, 1997, p 62.

³²⁹ ATSIC, *The Native Title Amendment Bill 1997: Preliminary Commentary*, 25 July 1997, p 2.

potentially provides up-front solutions to non-native title parties, whilst leaving compensation for native titleholders to slow and expensive processes, possibly taking years.³³⁰

*The 'confirmation of extinguishment' provisions*³³¹

52. The amendments to the NTA classify certain land tenures, issued before 23 December 1996 (the date of the *Wik* decision), as *previous exclusive possession acts*. The acts include the following:
- interests scheduled to the amended NTA, in Schedule 1;
 - freehold estates;
 - commercial, residential or community purpose leases;
 - exclusive pastoral or agricultural leases;
 - other leases which are not mining leases and which provide exclusive possession.³³²
53. If a title is classified as a previous exclusive possession act it is 'confirmed' as extinguishing native title completely.³³³ Where state or territory governments have granted these titles the amendments authorise them to introduce complementary legislation that would have the same effect.³³⁴
54. Where native title is extinguished such extinguishment is permanent.³³⁵ Native titleholders are entitled to compensation but only to the extent (if any) that the common law has not already extinguished native title rights and interests.³³⁶
55. If extinguishment by a grant is 'confirmed', then the extinguishing effects of validation, described above, do not apply. That is, while the grant itself can still be validated, extinguishment has already taken place under the confirmation provisions.
56. The Aboriginal and Torres Strait Islander Social Justice Commissioner criticised the confirmation provisions in the *Native Title Report 1996-97*. The criticisms can be grouped under the following headings.

i. The confirmation provisions pre-empt the development of the common law

57. The *Wik* decision provided that a clear and plain legislative intention is required to extinguish native title. This intention may be express or 'necessarily implied' by the legislation.³³⁷
58. These provisions:
- 'confirm' extinguishment by grants that are yet to be found by the Australian common law

³³⁰ National Indigenous Working Group on Native Title, *Coexistence–Negotiation and Certainty: Indigenous Position in Response to the Wik Decision and the Government's Proposed Amendments to the Native Title Act, 1993*, April 1997, p 18.

³³¹ Extracted and based on material from *Native Title Report 1996-97*, pp 68-75.

³³² NTA s23B(2)(c).

³³³ The amendments also define certain acts as 'previous non-exclusive possession acts.' The consequences of such a definition are set out in NTA, Part 2 Division 2B. They are not discussed in this section.

³³⁴ NTA, s23E, s23I.

³³⁵ NTA s237A.

³³⁶ NTA s23J(1).

³³⁷ See, for example, *Wik*, *op.cit.* per Kirby J at pp 282-284.

to have extinguished native title. The legislation authorising the grants will not have expressly stated the intention that the grants will extinguish native title. Rather, the grants will be deemed to have extinguished native title on the basis that legislation authorising them ‘necessarily implied’ that this was intended.

Justice Kirby (in *Wik*) has indicated that the issue of whether a statute extinguishes by necessary implication ‘depends upon the language, character and purpose to which the statute was designed to achieve.’³³⁸ To date, the High Court has only considered a very limited number of interests with respect to the existence of such a ‘necessary implication’. It has done this in *Mabo (No.2)* and *Wik*...³³⁹

59. The amended NTA confirms the extinguishment of native title by various grants that:

would have been made under a plethora of enactments stretching back well over a century under Colonial, State, Federal and Territory governments. There has been no opportunity to consider whether there is any foundation for extinguishment by ‘necessary implication’ due to ‘*the language, character and purpose*’ of these multitude of statutes...

As Justice Gummow observed (in *Wik*):

the further elucidation of common law principles of native title, by extrapolation to an assumed generality of Australian conditions and history from the particular circumstances of the instant case, is pregnant with the possibility of injustice to the many, varied and complex interests involved across Australia as a whole. The better guide must be ‘the time-honoured methodology of the common law’ whereby principle is developed from the issues in one case to those which arise in the next.³⁴⁰

(The confirmation provisions of the amended NTA) generalise in precisely the manner criticised by Justice Gummow by creating national legislation about the extinguishing effect of a great variety of tenures. The legislation under which many of these tenures are granted may be devoid of any ‘clear and plain intention’ that extinguishment of native title should result from the grant. It is not the legal effect of a grant that is being ‘confirmed’. That legal effect, extinguishment’ is being created by the (amendments)...³⁴¹

ii. The confirmation provisions deem that certain interests amount to exclusive possession

60. Interests that are scheduled to the amended NTA are effectively ‘deemed’ to have conferred a right to exclusive possession, with the consequence that they permanently extinguish native title.³⁴² The schedule runs to 50 pages, and includes grants under regulations as early as 1829 and legislation dating back to 1860.
61. The confirmation provisions also deem that commercial, residential and community leases amount to exclusive possession. For example, s242(1)(b) of the amended NTA provides that a ‘lease’ includes ‘*a contract that contains a statement to the effect that it is a lease*’. Under the amended NTA a residential or community purpose contract that contains a statement that it is a lease would be deemed to be a lease, and to confer exclusive possession.
62. As the *Wik* decision demonstrates, however, deeming that an interest is a lease, or confers rights of exclusive possession, does not mean that a court would reach the same

³³⁸ *Wik, op. cit.*, per Kirby J at p 283.

³³⁹ *Native Title Report 1996-97, op.cit*, pp 68-69.

³⁴⁰ *Wik, op. cit.*, per Gummow J at p 232.

³⁴¹ *Native Title Report 1996-97, op.cit*, p 69.

³⁴² NTA s249C.

conclusion. Rather than simply deeming such interests to amount to exclusive possession these leases need to be analysed according to general law principles to determine whether this is in fact the case.

63. The High Court has also noted that there is, in Justice Kirby's words in *Wik*, 'a strong presumption that a statute is not intended to extinguish native title.'³⁴³

iii. The amendments apply the wrong test in determining whether native title has been extinguished

64. The focus of the amendments on the issue of 'exclusive possession':

does not accurately reflect the common law, particularly for statutory titles. The questions put to the High Court in *Wik* linked exclusive possession to necessary extinguishment. In Justice Gummow's view, 'the posing of a question in those terms may have distorted the general issues.'³⁴⁴ Earlier in his judgment he had explained:

Attention is to be focused upon the terms of the legislation and of the instruments themselves. In that examination, the term 'exclusive possession' is of limited utility...

*To reason that the use of terms such as 'demise' and 'lease' in legislative provisions with respect to pastoral leases indicates (i) the statutory creation of rights of exclusive possession and that, consequently, (ii) it follows clearly and plainly that subsisting native title is inconsistent with the enjoyment of those rights, is not to answer the question but to restate it.'*³⁴⁵

In my view, Professor Richard Bartlett has analysed the issue correctly:

*'Exclusive possession' was not necessarily an element in an inquiry as to extinguishment by the grant of a pastoral lease. In order to determine if an instrument confers exclusive possession and should be characterised in law as a lease it is necessary to consider the entire range of rights and duties, and the condition and qualifications to which they are subject, with respect to the rest of the world and all persons in it. No such inquiry was necessarily appropriate in order to determine if the grant of an instrument extinguishes native title. The relevant inquiry was as to the nature of the relationship between the holder of the pastoral lease and the native title claimants, and in particular did the former have the power to exclude the latter such that a clear and plain intention to extinguish was manifested'*³⁴⁶

(The confirmation provisions) answer the question of whether there is extinguishment by statutorily turning exclusive possession into extinguishment; permanent extinguishment. They create extinguishment where the Courts have not even been asked to look...

By purporting to 'confirm' the extinguishment by inconsistent grants, the Commonwealth is purposely pre-empting the development of the common law. For all the need for 'certainty' and 'workability' there is the balancing objective of allowing sufficient time to integrate the belated recognition of native title into Australia's land management system.³⁴⁷

iv. The Miriuwung Gajerrong case

³⁴³ *Wik, op. cit.*, per Kirby., J, p 282.

³⁴⁴ *Wik, op.cit.*, per Gummow J at p 248.

³⁴⁵ *Wik, op. cit.*, per Gummow J at p 241.

³⁴⁶ Bartlett, R., 'The *Wik* Decision And Implications For Resource Development' (1997) 16 *Australian Mining and Petroleum Law Journal* 27, p 30. Italics added.

³⁴⁷ *Native Title Report 1996-97, op.cit.*, pp 75-76.

65. In a recent case in the Federal Court of Australia many of the concerns raised above were substantiated. In *the Miriuwung and Gajerrong case*³⁴⁸, Justice Lee was required to look closely at special leases that had been granted under Sections 152 of the *Land Act 1898 (WA)*, and Sections 116 and 117 of the *Land Act 1933 (WA)*. The leases were for the purposes of grazing, cultivation and grazing, market gardening, canning and preserving works, concrete production, and for an Aboriginal hostel and inter-cultural centre. These leases were ‘confirmed’ in the amended NTA as extinguishing native title.³⁴⁹
66. Justice Lee found that these leases did *not* extinguish native title at common law. He found that the criterion used in order to ‘confirm’ extinguishment was directed at the wrong question. The question is not whether the title consists of the grant of exclusive possession but whether in granting that title there is a clear and plain intention to extinguish native title.
67. Justice Lee found that these leases amounted to temporary uses of the land, that in many cases the land had not been used for the purpose of the grant, that the grants were made for a limited time period, and that the land had in all cases reverted to being vacant Crown land. His conclusion was that in each instance a clear and plain intention by the Crown to extinguish native title could not be found, and that as a consequence no extinguishment had occurred.
68. Justice Lee’s decision has been appealed on 92 grounds by the Western Australian government. The grounds of appeal include the effect of the grant of the special leases mentioned above on native title.

*Primary production upgrade provisions*³⁵⁰

69. The amended NTA allows pastoral leaseholders to upgrade the types of activities that they may conduct on their leases to the level of ‘primary production.’³⁵¹ ‘Primary production’ is defined as including agricultural activities (such as cultivating the land, and maintaining, breeding and agisting animals), forestry, aquacultural or horticultural activities, the taking or catching of fish or shellfish, de-stocking of land or leaving fallow, and farmstay tourism.³⁵²
70. Section 24GB provides that leaseholders may do future acts at primary production levels regardless of the effect this may have on any continuing native title rights and interests, so long as the future act was authorised by legislation at some time before 31 March 1998.³⁵³ Section 24GB(5) provides that ‘if this section applies to a future act, the act is valid.’
71. These provisions are one example of how the amendments allow non-native titleholders to conduct certain future acts without having regard to native title interests. See also the provisions relating to:

³⁴⁸ *Ben Ward v State of Western Australia* (Unreported, Federal Court of Australia, Lee J, 24 November 1998. Ref: [1998] 1478 FCA (herein the *Miriwung and Gajerrong case*). <www.austlii.edu.au> (10 December 1998).

³⁴⁹ For extinguishment to actually take place, the Western Australian parliament must pass legislation confirming extinguishment. The *Titles Validation Amendment Bill 1998 (WA)* is presently before the Western Australian Parliament. Section 12H(1) will have the effect of extinguishing native title in relation to the titles scheduled.

³⁵⁰ Extracted and based on material from *Native Title Report 1996-97*, pp 87-92.

³⁵¹ NTA, Part 2, Subdivision G. For example, NTA, s24GB, s24GD, s24GE.

³⁵² NTA s24GA, s24GB(2).

³⁵³ Section 24GB(4) of the NTA provides two exceptions to this – (a) where the lease is for an area in excess of 5000 hectares and the future act would convert the use of the majority of the area from pastoral purposes; and (b) where the act would convert the lease into a right of exclusive possession.

- grants of rights to third parties on non-exclusive pastoral or agricultural leases (s24GE);
- management of water and airspace (S24HA);
- acts involving the renewal and extensions of acts (s24IA);
- acts involving reservations, leases etc (s24JA);
- acts involving facilities for services to the public (s24KA);
- low impact future acts (s24LA);
- acts that pass the freehold test (s24MD); and
- acts affecting offshore places (s24NA).

72. On these provisions generally the Social Justice Commissioner has commented that

The draft Bill³⁵⁴ does not facilitate the equitable co-existence of different property rights. Rather, it maximises the situations in which development can proceed on native title land. The Government's apparent intention is to minimise the procedural protection available to native titleholders and to increase the circumstances in which their rights can be overridden, leaving them with merely the ability to apply for compensation.³⁵⁵

73. The requirement under s24GB 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, authorising leaseholders to conduct activities at primary production levels where such activities could not previously be done, to come within the federal native title amendments. Consequently, that Western Australian legislation is not subject to the application of the RDA, whose standards it would breach.

74. In the *Native Title Report 1996-97* the Social Justice Commissioner noted the following on the potential for co-existence with native title:

Under *Wik*, once the extinguishment issue is resolved the focus shifts to the co-existence of native title and pastoralists' rights. Pastoralists' rights prevail over native title to the extent of any inconsistency between their co-existing rights...

There is significant potential for co-existence between pastoralists' rights and interests and those of native titleholders. In *Wik* Justice Kirby took the view, on the Mitchellton and the Holroyd pastoral leases, that:

*The exercise of the leasehold interests to their full extent would involve the use of the land for grazing purposes. This was of such a character and limited intensity as to make it far from impossible for the Aboriginals to continue to utilise the land in accordance with their native title, as they did (Wik, per Kirby J at p 284)*³⁵⁶

75. In relation to the primary production provisions,³⁵⁷ the Social Justice Commissioner stated that:

³⁵⁴ As it then was.

³⁵⁵ *Native Title Report 1966-97, op.cit*, p 106. The provisions commented on the 1996-97 report are substantially similar to those contained in the amended NTA.

³⁵⁶ *Native Title Report 1996-97, op.cit*, pp 87-88.

³⁵⁷ The primary production provisions proposed in the *Native Title Amendment Bill 1997* are substantially similar to those that were included in the *Native Title Amendment Act 1998*, except for one factor. 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), as discussed above.

Responding to the demands of pastoralists and governments from around the country, the Commonwealth has produced a package that seriously erodes the benchmark of equality that is central to the NTA. It paves the way for an enormous expansion of pastoralists' rights while removing the legitimate procedural rights of native titleholders. The enjoyment of native title is potentially rendered meaningless by the Commonwealth proposals for primary production activities on non-exclusive pastoral and agricultural leases.

Under the primary production provisions, leaseholders will have the ability to undertake extremely wide-ranging primary production activities. Native titleholders, meanwhile, will be rendered powerless to prevent their country being put to a massive range of inconsistent uses. Under the principles espoused in *Wik*, pastoralists' rights will prevail over native title to the extent of any inconsistency. Thus, the dramatic expansion of pastoralists' rights will mean that native title is suppressed to a correspondingly greater extent. Native title will be suspended and rolled back on an unprecedented scale. Together with the so-called 'confirmation' and 'validation' provisions, this will constitute the greatest single and explicit impairment of native title in the history of Australia...³⁵⁸

Discrimination

The facilitation of primary production activities on leaseholds diminishes the exercise and enjoyment of native title rights. Native titleholders are denied any procedural rights in these situations. Only native title rights will be affected by the amendments. Holders of non-native title property interests which 'co-exist' with pastoral leases will not be affected in the same way as native titleholders. There will be no such impact on co-existing interests such as easements, profits a prendre, agistment rights and mining development rights.³⁵⁹

76. Where an authorised primary production activity is conducted, the amended NTA provides that the 'non-extinguishment principle' applies. This principle means that native title is suspended while these activities are current. While better than clear extinguishment, when considered alongside the requirement for native title claimants to demonstrate that they have maintained a connection with traditional country in order to claim their title, the potential for permanent erosion of native title rights becomes clear.

*The right to negotiate*³⁶⁰

77. Under the original NTA, people registered as possessing or claiming native title were entitled to a 'right to negotiate' in relation to certain kinds of 'permissible future acts', namely:
- acts relating to mining (including both exploration and production); and
 - the compulsory acquisition of native title rights for the benefit of a third party.³⁶¹
78. There were some narrowly-defined exceptions to the application of the right to negotiate. It did not apply where there were no claimants registered within two months of notification.³⁶² Acts which had 'minimal impact on native title' could be excluded from the process by the Commonwealth Minister.³⁶³ In addition, Governments could apply for an 'expedited procedure' avoiding the right to negotiate where the proposed act 'does not directly interfere with the community life' of native titleholders or 'involve major

³⁵⁸ *Native Title Report 1996-97*, p 90.

³⁵⁹ *ibid.*, p 93.

³⁶⁰ Extracted and based on material from *Native Title Report 1996-97*, pp 113-117.

³⁶¹ NTA s.26(2).

³⁶² NTA ss.28(1)(a).

³⁶³ NTA ss.26(3),(4).

disturbance to any land or waters.³⁶⁴ Native titleholders or claimants could object to the application of this procedure.³⁶⁵

79. The amended NTA substantially alters the right to negotiate provisions. This occurs in two ways. First, the amendments remove the application of the right to negotiate in relation to the following acts:

- a mining right for the sole purpose of constructing an infrastructure facility (s26(1)(c)(i));
- a mining right at the exploration stage (s26A) ;
- the renewal, re-grant, re-making or extension of a right to mine (s26D);
- the compulsory acquisition of land for an infrastructure facility, for either a public or private purpose (s26(1)(c)(iii)(B));
- approved gold or tin mining acts (s26B);
- excluded opal or gem mining (s26C);
- grants of rights to third parties on non-exclusive pastoral or agricultural leases (s24GE);
- primary production activities (s24GB, 24GC);
- off-farm activities directly connected to primary production activities (s24GD);
- management of water and airspace (s24HA);
- acts involving the renewal and extensions of acts (s24IA);
- acts involving reservations, leases etc (s24JA); and
- acts involving facilities for services to the public (s24KA).³⁶⁶

80. Instead of a right to negotiate native title claimants or titleholders are now entitled to a right to be consulted and for any objection to be taken into account.³⁶⁷

81. Second, the amended NTA allows states and territories to replace the right to negotiate with 'alternative provisions' that provide a right of consultation and objection on land that is or was pastoral leasehold land, reserved or dedicated land, or is within a town or city (s43A). When a state or territory passes legislation introducing such alternative provisions they must apply to the relevant Commonwealth Minister for a determination that the provisions meet the minimum standards laid down in s43A of the amended NTA. The Senate can set the Minister's determination aside (as it is a disallowable instrument).

³⁶⁴ NTA ss.32 and 237.

³⁶⁵ NTA s.32(3).

³⁶⁶ Under the original NTA an act could be done if it was 'permissible.' To be permissible it had to be either an act that could be done to ordinary title (ie passed the 'freehold test'), that related to an offshore place or was a low impact future act. These exceptions to the right to negotiate remain in the amended NTA. Where a proposed act did not fall within these exemptions under the original NTA and was not an act relating to mining (to which a right to negotiate applied), the act could only be done by compulsorily acquiring the native title. This would also activate the right to negotiate provisions.

³⁶⁷ There is no such right in relation to excluded opal and gem mining (s26C); or primary production activities on non-exclusive agricultural or pastoral leases (s24GC).

82. The right to negotiate provisions establish the minimum acceptable standards for negotiating with native title claimants or holders about activities that may impact on their rights. Accordingly, the ability to replace the right to negotiate with a right of consultation and objection reduces the scope of these minimum acceptable standards, and may leave the titles of claimants more vulnerable to impairment.

83. In the *Native Title Report 1996-97* it was noted that

In its original form, the right to negotiate attempted to provide native title with a meaningful level of protection in situations where it was particularly vulnerable to being overridden by governments that wanted to grant extensive rights to third parties. By contrast, the proposed amendments are entirely weighted in favour of governments and private parties.³⁶⁸

84. CERD requires governments to provide substantive rather than formal equality in protecting the rights of all races. In the *Native Title Report 1996-97* the Social Justice Commissioner stated that:

I believe that the property rights of native titleholders require different protection to those of other title-holders, due to factors such as the communal nature of native title, its independence of government action, its spiritual and cultural significance and the traditional decision-making processes which apply to it.³⁶⁹ In its original form, the right to negotiate could be said to have accommodated these features to a limited degree...

In defending amendments which curtail the right to negotiate, the Government has argued that in order... to respect the RDA, it is merely required to ensure that native titleholders are left in a situation of formal equality with other titleholders...

...the character of the (amended NTA undermines this argument)... It is clearly wrong to suggest that the amendments ensure that native titleholders are left in a situation of formal equality with other titleholders. In fact, the theme of the amendments is to move away from such a guarantee...

*When it was originally enacted, categorisation of the NTA as a special measure saved it from being regarded as discriminatory, despite the fact that it contained discriminatory provisions validating Crown-granted titles. These provisions were portrayed as being outweighed by 'beneficial' provisions, such as the right to negotiate, which accommodated particular needs of native titleholders.*³⁷⁰

[the amendments] increase... the discriminatory aspects of the NTA, according to a test of formal equality. However, instead of providing additional assistance to native titleholders in order to 'balance' this increase in discrimination, the amendments allow native titleholders to be treated less favourably than other titleholders in a range of situations. They also wind back the right to negotiate to a significant degree. It is impossible to see how the NTA, as amended in this fashion, could be characterised as a 'special measure' for the benefit of Indigenous peoples.³⁷¹

85. The amendments to the right to negotiate provisions need to be considered in conjunction with the Indigenous Land Use Agreement (ILUA) provisions, discussed immediately

³⁶⁸ *Native Title Report 1996-97*, op.cit., p 114.

³⁶⁹ Clarke, J., 'Racial Non-Discrimination Standards and Proposed Amendments to the Native Title Act', *Lands, Rights, Laws: Issues of Native Title*, Issues Paper no. 16, April 1997, Native Title Research Unit, AIATSIS, Canberra, pp 4-5.

³⁷⁰ See The Hon. P. Keating, Prime Minister, 'Second Reading Speech: Native Title Bill 1993', *Hansard*, House of Representatives, 16 November 1993, p 2879.

³⁷¹ *Native Title Report 1996-97*, pp 115-116.

below. The ILUA provisions provide substantial legal support to the agreement making process. However, while it is too early to know what will happen in practice, it is possible that the removal of the right to negotiate in some circumstances and replacement of it with a right to consult or object in others will reduce the incentive for non-Indigenous parties to reach agreements with Indigenous people. This is because the amended NTA authorises non-Indigenous parties to conduct the activity that they propose to do, so long as they meet the procedural requirements set out in the Act, without entering into full negotiations with native title claimants and holders.

Indigenous Land Use Agreements (ILUAs)

86. The amendments to the NTA introduced extensive provisions for the making of Indigenous Land Use Agreements (ILUAs). The ILUA provisions remedied a defect in the original NTA, which did not provide effective support to agreements made about native title.
87. The amendments provide the mechanisms by which a variety of agreements can be reached and registered under the NTA.³⁷² Agreements can be reached with or without government involvement, although if the agreement involves the surrender or extinguishment of native title the government must be a party to it.³⁷³ Agreements can concern any matter on which the parties to the agreement have agreed. Body Corporate agreements and area agreements can change the effect of validation of an intermediate period act.³⁷⁴
88. The agreement provisions also ensure that there are notification provisions for representative bodies and any other prospective claimants in an area, to ensure that the rights of people not a party to the agreement are not unknowingly affected.³⁷⁵
89. The agreement making provisions offer significant potential for the achievement of positive outcomes for Indigenous and non-Indigenous parties. They offer an opportunity for Indigenous peoples to become more involved in the decision making process. These provisions offer the potential to assist the achievement of self-determination by Indigenous peoples.
90. However, the ILUA provisions must be placed into context. The potential gains from these provisions are limited by the focus of the amendments overall on the extinguishment and impairment of native title through provisions such as those on validation, confirmation and primary production upgrades discussed at paragraphs 43-76 above.

³⁷² See NTA Division 3, Subdivisions B-E.

³⁷³ Governments do not necessarily have to be parties to either a body corporate agreement (under Subdivisions B) or an area agreement (under Subdivision C) so long as the agreement does not involve the extinguishment of native title: NTA s24BD(2), 24CD(2).

³⁷⁴ NTA, s24BB(ab), 24CB(ab).

³⁷⁵ NTA, s24BH, 24CK-CL, 24DI-DL.

iii. Compliance of the amended NTA with Australia's obligations under CERD³⁷⁶

91. The NTA and any amendments to it need to be seen in the context of the world-wide struggle for recognition of Indigenous peoples' land rights and the persistence of 'doctrines of dispossession' in the legal treatment of Indigenous peoples. Many of these discriminatory practices are historical and systemic. In many States, discrimination is reflected in the legal structures that Indigenous peoples are forced to deal with when seeking recognition of their rights to land. In the Australian context, the doctrine of *terra nullius* was long used to deny Indigenous people a right to their land. Indigenous peoples' historical disadvantage and dispossession further enhances the significance of the recognition of native title and the form of that recognition.

The principles of non-discrimination and equality

92. The principle of non-discrimination is generally considered to be one of the fundamental doctrines of the international legal order. The principle of non-discrimination and equality is contained in all major human rights treaties and declarations. It is recognised and protected in the following instruments.

- Universal Declaration of Human Rights (UDHR), article 2;
- International Covenant on Civil and Political Rights (ICCPR), article 2;
- International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD), article 2;
- Convention on the Rights of the Child, article 2;
- International Covenant on Economic, Social and Cultural Rights (ICESCR), article 2; and
- International Labour Organisation Convention No.169 concerning Indigenous and Tribal People in Independent Countries, article 2.³⁷⁷

93. Furthermore, the International Court of Justice and eminent publicists have repeatedly observed that the principle of racial non-discrimination has the status of customary international law and is *jus cogens* and non-derogable.³⁷⁸

94. The principle cannot be set aside merely because it is inconvenient and does not accord with the policy of the day. The treatment of non-discrimination at international law involves the setting of standards and positive obligations in the treatment which States must accord minorities and Indigenous peoples. In this context, it is useful to examine the genesis of the principle of non-discrimination.

³⁷⁶ This section is based on chapter 6 of the *Native Title Report 1996-97, op.cit.*; and Paper presented to the Australian Property Institute, 'The valuation of native title and racial discrimination law' 27 March 1998, Sydney.

³⁷⁷ Australia has not ratified ILO 169.

³⁷⁸ Brownlie, I., *Principle of Public International Law*, Fourth Edition, Clarendon Press, 1990, p 513; McKean, W., *Equality and Discrimination under International Law*, First Edition, Clarendon Press, 1983, p 277; Judge Tanaka, *South West Africa case* (second phase) ICJ Reports (1966) 298; Judge Ammoun, *Barcelona Traction case* (second phase) ICJ Report (1970) 304; Judge Ammoun, *Namibia Opinion* ICJ Report (1971) 78-81.

95. At the conclusion of World War I, the newly established League of Nations adopted a treaty system which sought to protect racial, religious and linguistic minorities.³⁷⁹ From this system, a principle of non-discrimination, or equal treatment, emerged which recognised the need to protect the distinct identity of minorities.
96. The Permanent Court of Justice tackled this issue in 1934 in its famous advisory Opinion concerning the *Minority Schools in Albania* in which it stated that the underlying object of the League of Nations' treaties protecting minorities was to ensure members of racial, religious or linguistic minorities are 'in every respect on a footing of perfect equality with the other nationals of the State' and were able to preserve 'their racial peculiarities, their traditions and their national characteristics.'³⁸⁰ The desire to protect the integrity of minorities necessarily gives rise to questions about the relationship between difference and discrimination. This relationship can be reduced to three key principles which have been developed upon by treaty-based Committees and international courts.

i. Equality does not necessarily mean treating everybody in an identical manner.

97. The notion of equality does not necessitate the rejection of difference. The relationship between non-discrimination and minority rights was further refined in the *South West Africa case*.³⁸¹ Judge Tanaka's famous dissenting judgment has shaped understanding of the principle of non-discrimination at international law.

The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal,...To treat unequal matters differently according to their inequality is not only permitted but required.³⁸²

98. The model of equality adopted by Judge Tanaka is one of substantial equality rather than formal equality. The principle of non-discrimination requires equal treatment of equals and consideration of difference in assessing the need for different treatment. Different treatment is appropriate when it allows groups to maintain their own traditions and practices. Formal equality, treating everybody in an identical manner, identifies such differential treatment as discriminatory. CERD adopts a substantive equality approach. It recognises that a differentiation of treatment is not necessarily discriminatory, as was made clear in the following general recommendation of the Committee:

A differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4 (special measures)...In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable, disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.³⁸³

99. CERD defines racial discrimination in Article 1(1) as:

... any distinction, exclusion, restriction or preference based on race, colour, descent or

³⁷⁹ See generally: McKean, W., *Equality and Discrimination under International Law*, op cit, Chapters 1 and 2; Vierdag, *The Concept of Discrimination in International Law*, Martinus, The Hague, 1973, Chapter 6.

³⁸⁰ *Minority Schools in Albania* P.C.I.J. Series A/B No. 64 (1934), p 17.

³⁸¹ ICJ Reports 1966 248.

³⁸² *South West Africa Case* (Second Phase) {1996} ICJ Rep 6, pp 303-304, p 305.

³⁸³ Committee on the Elimination of Racial Discrimination, General Recommendation XIV on Article 1 (1993), para 2 Compilation of General Comments and General Recommendations Adopted by Human Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 at 67.

national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

100. This international definition has been incorporated into Australian law in subsection 9(1) of the RDA with some very minor rewording. Section 10 of the RDA also explicitly guarantees equality before the law for racial groups and has been held by the High Court to be particularly relevant in the context of native title. Generally, if a practice or measure offends section 10 of the RDA it would also offend section 9 and come within the international definition of racial discrimination.
101. The international definition of racial discrimination is generally considered to have two elements. First, 'a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin' is required. Second, the distinction based on race must nullify or impair 'the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.' This second element is generally taken to require that, to be considered discriminatory, any racially specific measure must be able to be characterised as detrimental to the racial group in question.
102. Native title is an example of a difference based on race which is not discriminatory. In fact the failure to recognise native title is discriminatory. *Terra nullius*, (no one's land) was characterised by the High Court in *Mabo* as a discriminatory doctrine because it failed to recognise the customs and traditions of the Indigenous people of Australia in relation to land.

Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.³⁸⁴

103. While the common law now recognises native title it does not define it. Native title has its 'origin in and is given its content by the traditional laws acknowledged and the traditional customs observed by the Indigenous (group)...The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.'³⁸⁵
104. The statutory definition of native title under the NTA does not displace the customary laws and traditions which constitute the content of native title. Native Title is defined in the NTA as follows:

223. The expression **native title** or **native title rights and interests** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.³⁸⁶

³⁸⁴ *Op cit.* p 42.

³⁸⁵ *Op cit* at p 58.

³⁸⁶ NTA s223. This definition was not altered by the *Native Title Amendment Act 1998* (Cth).

105. Thus the legislation contains a recognition of difference which is non-discriminatory. The NTA seeks to incorporate this difference within the Australian property system and position it in relation to non-Indigenous titles. Where the NTA extinguishes native title without the consent of Indigenous people in order to benefit non-Indigenous titleholders, native titleholders are discriminated against. This is not to say that the Commonwealth or the State cannot compulsorily appropriate native title in a non-discriminatory manner. Where land needs to be appropriated for a public purpose then native title, like any other title, can be extinguished.
106. However, extinguishing native title in order to validate titles which were granted in contravention of the original NTA (the validation provisions); extinguishing native title in order to ensure that other titleholders will be unaffected by co-existing titleholders (the confirmation provisions); and permitting the upgrade of pastoral leaseholds without negotiation with co-existing native titleholders (the primary production provisions), cannot be considered a non-discriminatory form of appropriation.

ii. 'Special Measures' are sometimes required in order to redress inequality and to secure, for members of disadvantaged groups, full and equal enjoyment of their human rights.

107. Special measures are a further type of differential treatment that is not discriminatory. They are aimed at achieving substantial equality. The rationale for allowing 'special measures' is that historical patterns of racism entrench disadvantage and more than the prohibition of racial discrimination is required to overcome the resulting racial inequality.
108. The definition of special measures is expressed in Article 1(4) of CERD:
- Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives of which they were taken have been achieved.
109. Not all non-discriminatory differential treatment qualifies as a special measure. Special measures have the following distinct characteristics: they must be taken for the sole purpose of securing the advancement of a particular group; such advancement must be necessary; they must not lead to the maintenance of separate rights for different racial groups; and they must not be continued once the objective of the measure has been achieved.
110. Native title cannot be described as a special measure. It is not a remedial measure taken by government for the purpose of overcoming the effect of historical patterns of racism. Native title does lead to the maintenance of separate rights for Indigenous people. Native title is not a temporary measure which can be removed once its objective has been achieved. The recognition of native title involves accepting a form of land title that derives from the traditional laws and customs of indigenous people. The protection of native title must reflect the substance of those traditional rights and customs. Different rights require different forms of protection to achieve substantive equality of treatment.
111. The High Court in *Western Australia v Commonwealth* observed that 'the [original] Native Title Act can be regarded as either a special measure under the Racial Discrimination Act or a law which, though it makes racial distinctions, is not racially

discriminatory'.³⁸⁷ Given the evolution of the legislation from the common law definition of native title which in turn recognises the traditional laws and customs of Indigenous people, the appropriate characterisation of the legislation is that of a non-discriminatory racial distinction. The amendments which extinguish native title in preference to non-Indigenous titles cannot be characterised as the removal of a special measure. In fact such amendments satisfy the definition of discrimination at international law under Article 1(1) of CERD outlined above. These amendments are a distinction or exclusion based on race which has the purpose of 'nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'

iii. Rights that recognise and protect the distinct cultural identity of minority groups are consistent with and sometimes required by the notion of equality.

112. Specific rights that recognise the distinct cultural identity of minority groups are consistent with a substantive approach to equality. Minority group rights, or cultural rights, are protected in article 27 of ICCPR which provides that:

Members in ethnic, religious or linguistic minorities shall not be denied the right, in community with the members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

113. As first peoples of a territory with a specific history and relationship to that territory, indigenous people are entitled to the protection afforded to all minority groups under Article 27 and also rights specific to their history. The CERD committee has recognised the relationship between the cultural rights of indigenous people and the principle of non-discrimination.

In many regions of the world Indigenous peoples have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardised.³⁸⁸

114. The Committee called on State Parties to take all appropriate means to combat and eliminate discrimination against Indigenous people, including by recognising and protecting their cultural identity.

The Committee calls in particular upon State parties to:

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

³⁸⁷ (1995) 183 CLR 373 at 483.

³⁸⁸ Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, adopted on 18 August 1997. CERD/C/51/Misc.13/Rev.4, para 3.

- e) ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs, to preserve and to practice their languages.³⁸⁹
115. The native title amendments fail to respect the cultural identity of Indigenous people and fail to promote the preservation of their culture as required by the CERD Committee. This is illustrated most clearly by the amendments to the validation and confirmation provisions.
116. The right to negotiate provisions under the original NTA enabled native titleholders to meet with other stakeholders to discuss how native title rights could be protected against the impact of mining developments and compulsory acquisitions and to involve Aboriginal owners in the management of the land.
117. The government sought to justify the amendments to the right to negotiate provisions on the basis that native titleholders should not be given different, preferential rights over their land than those of other titleholders. In doing so the government has taken the position that it is sufficient to provide formal equality.

The principle of formal equality

118. The Government has stated that it considers itself only bound to observe that the amendments to the NTA comply with a standard of formal equality.

In assessing the current government amendments, therefore, and advising in relation to them, the approach has been taken that the amendments need to leave the [Native Title] Act either as a special measure or provide formal equality. Provided that the amendments maintain provisions as special measures or provide formal equality, they comply with the Racial Discrimination Act.³⁹⁰

119. On this basis, it was suggested, the 'special right' provided by the right to negotiate scheme could be wound back or removed without giving rise to racial discrimination.
120. This approach provides no secure way to recognise Indigenous peoples' unique relationship to land and land rights as required by ICCPR and by CERD. The Government's equality jurisprudence relies heavily on the High Court decision in *Gerhardy v Brown*³⁹¹ that conceptualises the RDA as a generalised prohibition of differential treatment on the basis of race with an exception for matters capable of being characterised as 'special measures'.
121. There has been persistent criticism of the High Court's approach to racial discrimination in *Gerhardy v Brown* as being broadly out of step with accepted international approaches to non-discrimination and providing no clear way to recognise the unique position of Australia's Indigenous peoples other than through charitable 'special measures'.³⁹² In addition there is doubt whether the High Court's characterisation of discrimination as differential treatment can be applied to native title.

³⁸⁹ *Ibid*, para 4.

³⁹⁰ The Attorney-General and Minister for Justice, the Hon Daryl Williams AM QC MP, Second Reading Speech, *Native Title Amendment Bill 1996*, p 17.

³⁹¹ (1985) 159 CLR 70.

³⁹² See: Brownlie, I., 'The Rights of Peoples in International Law', *op. cit.*, p 9; Nettheim, G., 'Indigenous Rights, Human Rights and Australia', (1987) 61 *Australian Law Journal*, 291, p 299; Sadurski, W., 'Gerhardy v Brown: Reflections on a Landmark Case that Wasn't', (1986) 11 *Sydney Law Review*, p 30; Pritchard, S., 'International Law' in *Aborigines and Torres Strait Islanders, Laws of Australia*, Law Book Company, 1993, pp 34-35.

122. In *Gerhardy v Brown*, the Court was dealing with a legislative scheme to 'give' the Pitjantjatjara people rights to their traditional land. This was done in a context where Indigenous people had no recognised right to land independent of a crown grant. After *Mabo [No.2]* the situation fundamentally changed. Native title is a common law right and not a political gift of government. Native title exists because of Indigenous peoples' continuous and unbroken connection with their land.
123. *Gerhardy v Brown* provides no answers in the current debate over native title and pastoral leases. The Native Title Amendment Act is a subsequent specific enactment to the RDA. The RDA is impliedly repealed to the extent of any inconsistency by the amended NTA. The main racial discrimination issue is the compliance of the amended NTA with Australia's international obligations concerning non-discrimination and most significantly CERD. It is the NTA's compliance with international human rights law that the Government must address if it is concerned with acting in a non-discriminatory manner.
124. As a distinct interest in land that is racially based, native title must be accorded 'full respect' on a par with other interests in land. The fact that native title is a unique type of proprietary interest that non-Indigenous people cannot hold does not mean that it, or its protection, is a 'special measure' or detrimentally racially discriminatory. The principle of non-discrimination does not require that the treatment of all groups in society be the same. This is obviously relevant to Indigenous Australians who because of their unique history and cultural traditions, possess *sui generis* entitlements. The incidents of native title are determined by traditional laws and customs and warrant protection according to the particular terms of those laws and customs.
125. Moreover, the principle of non-discrimination is more than just about prohibiting discriminatory acts. It seeks to set the acceptable standard of treatment for preserving the distinct status of racial, ethnic, religious and linguistic minorities. It imposes obligations by State parties to eradicate racial discrimination as defined by Article 1. Article 2 comprises the central obligation in CERD in relation to the eradication of racial discrimination.
126. The amended Act contains few positive provisions for native titleholders to 'balance' its detrimental aspects. On the contrary, the amendments allow native titleholders to be treated less favourably than other titleholders in a range of provisions including the validation provisions, the confirmation provisions and the future act provisions.

2. Policy on Aboriginal land rights

127. The High Court of Australia's recognition of native title in 1992 was the first recognition of Indigenous land rights derived directly from the traditional laws and customs of Aboriginal and Torres Strait Islander peoples.
128. Previously there were a variety of ways in which particular parcels of land could be used by Indigenous Australians: as Crown land reserved for Indigenous use; land granted to be held on trust for the use of Indigenous people; or land owned by Indigenous people through government grant. These various forms of land tenure were essentially based on government policy. The nature of tenure, the terms of tenure and the basis on which such tenure would be granted, was purely a creature of government policy.
129. The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) is a federal Act applicable in the Northern Territory of Australia. It was landmark legislation. Its provisions have returned a significant amount of land to the traditional owners. Land is granted on the basis that the traditional owners are able to prove the maintenance of their

primary spiritual responsibility for the land claimed and to satisfy the Federal Minister for Aboriginal Affairs that the land should be returned, after the Minister has taken into account any objections to its return in whole or in part.

130. This legislation is the only statutory land claim mechanism, other than the Native Title Act 1993, for which the Federal Government has responsibility. It has recently been reviewed by John Reeves QC. The report, titled *Building on Land Rights for the Next Generation. Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, was presented to the Minister for Aboriginal and Torres Strait Islander Affairs in August 1998. A parliamentary committee, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, is currently considering the Report.
131. The Federal Government has yet to formulate its response to the Report's recommendations for substantial amendments to *the Aboriginal Land Rights (Northern Territory) Act 1976*.

3. Changes to the functions of Commissioner for Aboriginal and Torres Strait Islander Social Justice

132. Section 46C of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOCA) confers the following functions on the Human Rights and Equal Opportunity Commission to be performed by the Aboriginal and Torres Strait Islander Commissioner (the Commissioner):

46C. (1) The following functions are conferred on the Commission:

- (a) to submit a report to the Minister, as soon as practicable after 30 June in each year, regarding the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders, and including recommendations as to the action that should be taken to ensure the enjoyment and exercise of human rights by those persons;
- (b) to promote discussion and awareness of human rights in relation to Aboriginal persons and Torres Strait Islanders;
- (c) to undertake research and educational programs, and other programs, for the purpose of promoting respect for the human rights of Aboriginal persons and Torres Strait Islanders and promoting the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders;
- (d) to examine enactments, and proposed enactments, for the purpose of ascertaining whether they recognise and protect the human rights of Aboriginal persons and Torres Strait Islanders, and to report to the Minister the results of any such examination.

133. The proposed amendments to the *Human Rights and Equal Opportunity Commission Act 1986* will not change the functions of the Commission, presently performed by the Aboriginal and Torres Strait Islander Commissioner.
134. The proposed amendments seek to abolish the Commissioner's position and replace it with the position of a Deputy President responsible for the current functions of both the Race Discrimination Commissioner and the Aboriginal and Torres Strait Islander Commissioner.
135. This change is part of a wider restructuring which proposes to replace each of the current specialist Commissioners within the Human Rights and Equal Opportunity Commission. There are currently six specialist positions, in the areas of privacy, race discrimination,

sex discrimination, disability discrimination, human rights and Aboriginal and Torres Strait Islander social justice.

136. On 28 July 1998 the Human Rights and Equal Opportunity Commission made a submission to the Senate Legal and Constitutional Legislation Committee, the federal Parliamentary Committee considering the Government's proposed amendments to HREOCA.
137. Relevant parts of that submission are presented for the Committee's consideration. The primary concern is not with amendment to the functions currently performed by the Aboriginal and Torres Strait Islander Social Justice Commissioner, but the absence of a distinct position to perform those functions on behalf of the Commission. The absence of a dedicated position is aggravated by the proposed removal of the current mandatory qualifications for any person appointed to perform these functions.

Aboriginal and Torres Strait Islander Commissioner or Deputy President

- (d) The Commission has expressed its views in the past on the need to maintain a specialist Aboriginal and Torres Strait Islander Commissioner or Deputy President. If the position is to be abolished, however, the Commission is concerned that the new Deputy President who will deal with both racial discrimination and Indigenous human rights may not be appropriately qualified to deal with the second part of the duties. This is because the repeal of the definition of the Aboriginal and Torres Strait Islander Commissioner in section 46B of HREOCA, also involves the repeal requirement that:

“A person is not qualified to be appointed unless the Governor-General is satisfied that the person has significant experience in the community life of Aboriginal persons or Torres Strait Islanders.”

- (e) *The Commission is strongly of the view that at least one Deputy President should be able to satisfy the above criteria.*³⁹³

138. The issue of the need for the functions currently performed by the Aboriginal and Torres Strait Islander Social Justice Commissioner to be performed by an appropriately qualified person was also identified by the first Commissioner appointed, Michael Dodson, in his *First Social Justice Report 1993*.

Two very serious points need to be made about my appointment, as an Aboriginal person, to the position of Aboriginal and Torres Strait Islander Social Justice Commissioner.

First, it was not necessary for me to be an Aboriginal person or a Torres Strait Islander. Section 46B (2) requires only that the Commissioner be a person qualified by “significant experience in the community life of Aboriginal persons or Torres Strait Islanders.” The arbiter of whether or not a potential appointee holds such qualification is the Governor-General.

It is my strong belief that the criterion for selection should be amended to require any future Commissioner to be an indigenous person. While there remains a need for the position of an Aboriginal and Torres Strait Islander Social Justice Commissioner such a mandatory requirement would be amply justified as a special measure for the purposes of Article 1, paragraph 4 of the Convention on the Elimination of All Forms of Racial discrimination and section 8(1) of the *Racial Discrimination Act 1975*.

General issues raised by the present method of appointment are addressed in Chapter 2, which considers the concept of self determination. Here it is sufficient to point out that the

³⁹³ Submission by HREOC on the *Human Rights Legislation Amendment Bill No. 2* considered by the Senate Legal and Constitutional Legislation Committee on 28 July 1998.

quality of intimate knowledge, the under the skin experience, of life as an Aboriginal person or Torres Strait Islander cannot be replicated. Such knowledge and direct experience is, in my view, an essential qualification for the job.

This leads me to my second point. The appointment of an indigenous person as the Aboriginal and Torres Strait Islander Social Justice Commissioner does not relieve another source of tension inherent in the position, in fact, it gives rise to it. I am acutely aware that to be identified as an 'aboriginal leader' and appointed by the Commonwealth to a position of influence may be viewed by some Aboriginal and Torres Strait Islander people as being co-opted by government.

Clearly, I am not of this view. However, I take the concern very seriously. It is a measure of the experience of indigenous Australians, as the subjects not only of harsh government policies but also (more insidiously) well-intentioned paternalistic policies, that there continues a deep distrust of governmental policies and appointees. It is only superficially ironic that such distrust can be most intense when the overt intention of the policy is to advance indigenous interests. The reasons for this appear in Chapter 2, Self Determination, in the section entitled 'Jack's not as good as his master'.

It is of critical importance, if I am to genuinely fulfil my Commission, that I accurately reflect the experience and aspirations of Aboriginal and Torres Strait Islander peoples throughout Australia. To this end, I will not only consult, as I am obliged to, with the Aboriginal and Torres Strait Islander Commission but will also consult with community organisations and individual communities as much as possible.

In attempting to reflect the broad and diverse range of views in the Indigenous communities of Australia, I acknowledge to my country men and women that it is not appropriate that my views should be substituted for their own direct voices or that I can presume to speak for any person's particular traditional country. I ask for the support and assistance of the Aboriginal and Torres Strait Islander peoples in undertaking this work.³⁹⁴

139. The full import of the repeal of the requirement for a person performing the functions, currently undertaken by Aboriginal and Torres Strait Islander Social Justice Commissioner, to have 'significant experience in the community life of Aboriginal persons or Torres Strait Islanders' may be appreciated in the context of the former Commissioner's observations.
140. It is also relevant to consider the proposed repeal of the specialist Commissioner's position in the light of the reasons advanced for its original creation. They were described in 1992 by the then Attorney General of Australia as providing another example of the Federal Government's

...commitment to implementing its undertakings to Aboriginal and Torres Strait Islander people arising from the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

There were many aspects of the report of the Royal Commission. The fact that the Commission was required at all and the extent of the recommendations made, clearly indicate a need for there to be an ongoing overall report on the exercise of basic human rights by Aboriginal and Torres Strait Islander people. The extent of the disadvantage suffered by indigenous Australians was graphically highlighted by the work of the Royal Commission.

The response of all Governments to the recommendations of the Royal Commission has been very positive. But there continues to exist a need for us as a nation to regularly focus on the extent to which Aboriginal and Torres Strait Islander people are able to exercise the basic

³⁹⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report 1993*. Human Rights and Equal Opportunity Commission, Sydney, 1994, pp 3-4.

human rights that the rest of us take for granted.

The creation of this office and the production of a yearly report will provide this focus. I hope that all governments will actively co-operate in the work of the Commissioner to allow for that office to be part of the on-going push to improve the everyday lives of the first Australians.³⁹⁵

141. Given the continued disproportionate rate of Indigenous incarceration; the disproportionate numbers of Aboriginal and Torres Strait Islander people who die in police and prison custody; the chronic and distinct disadvantage of Indigenous Australians as demonstrated by all social indicators, it may be considered that the continued existence of an appropriately qualified, specialist position to report on the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islander people falls within the characterisation of a special measure required to comply with Australia's obligations under CERD.
142. The Aboriginal and Torres Strait Islander Social Justice Commissioner also holds a function under the *Native Title Act 1993*:

Section 209. Reports by Aboriginal and Torres Strait Islander Social Justice Commissioner

Yearly report

- (1) As soon as practicable after 30 June in each year, the Aboriginal and Torres Strait Islander Social Justice Commissioner (appointed under the *Human Rights and Equal Opportunity Commission Act 1986*) must prepare and submit to the Commonwealth Minister a report on:
- (a) the operation of this Act; and
 - (b) the effect of this Act on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders.

Reports on particular matters

- (2) The Commonwealth Minister may at any time, by written notice, direct the Commissioner to report to the Commonwealth Minister on any matter covered by paragraph (1)(a) or (b).
143. The abolition of the distinct position of Aboriginal and Torres Strait Islander Social Justice Commissioner will have the same impact on the performance of this particular function as with the Commissioner's core functions under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).
144. In paragraph 4 it was noted that this submission is provided by Ms Zita Antonios in her capacity as the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner. Ms Antonios has acted in this capacity since the completion of Mr Michael Dodson's five year term on 22 January 1998. On 3 March 1999 the federal government announced a permanent appointment to this position. This announcement is warmly welcomed by HREOC. At this stage it is unclear what effect this appointment may have on the

³⁹⁵ The Hon. M Duffy MP, Second reading speech on *the Human Rights and Equal Opportunity Legislation Amendment Bill (No.2) 1992*, 3 November 1992, as quoted in Aboriginal and Torres Strait Islander Social Justice Commissioner *First Report 1993*, HREOC, 1993, p 1.

proposed restructure of the Commission and the abolition of specialist Commissioner positions.

Appendix 2: Decision (2)54 on Australia

Decision (2)54 on Australia: Australia. 18/03/99. CERD/C/54/Misc.40/Rev.2. (Concluding Observations/Comments)

**Committee on the Elimination
of Racial Discrimination
54th Session
1-19 March 1999**

**CERD/C/54/Misc.40/Rev.2
18 March 1999
*Unedited version***

Decision (2)54 on Australia

1. Acting under its early warning procedures, the Committee adopted Decision 1(53) on Australia on 11 August 1998 (A/53/18, para. 22), requesting information from the State Party regarding three areas of concern: proposed changes to the 1993 Native Title Act; changes of policy as to Aboriginal land rights; and changes in the position or function of the Aboriginal and Torres Strait Islander Social Justice Commissioner. The Committee welcomes the full and thorough reply of the Commonwealth Government of Australia to this request for information (CERD/C/347). The Committee also appreciates the dialogue with the delegation from the State party at the Committee's 1323rd and 1324th meetings to respond to additional questions posed by the Committee in regard to the State Party's submission.
2. The Committee received similarly detailed and useful comments from the Acting Aboriginal and Torres and Strait Islander Social Justice Commissioner of the Australian Human Rights and Equal Opportunity Commission; the Aboriginal and Torres Strait Islander Commission; members of the Parliament and Senate of Australia.
3. The Committee recognizes that within the broad range of discriminatory practices that have long been directed against Australia's Aboriginal and Torres Strait Islander peoples, the effects of Australia's racially discriminatory land practices have endured as an acute impairment of the rights of Australia's indigenous communities.
4. The Committee recognizes further that the land rights of indigenous peoples are unique and encompass a traditional and cultural identification of the indigenous peoples with their land that has been generally recognized.
5. In its last Concluding Observations on the previous report of Australia, the Committee welcomed the attention paid by the Australian judiciary to the implementation of the Convention. (A/49/18, para. 540) The Committee also welcomed the decision of the High Court of Australia in the case of *Mabo v Queensland*, noting that in recognizing the survival of indigenous title to land where such title had not otherwise been validly extinguished, the High Court case constituted a significant development in the recognition of indigenous rights under the Convention. The Committee welcomed, further, the Native Title Act of 1993, which provided a framework for the continued recognition of indigenous land rights following the precedent established in the *Mabo* case.
6. The Committee, having considered a series of new amendments to the Native Title Act, as adopted in 1998, expresses concern over the compatibility of the Native Title Act, as

currently amended, with the State Party's international obligations under the Convention. While the original Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act. While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title-holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title.

7. The Committee notes, in particular, four specific provisions that discriminate against indigenous title-holders under the newly amended Act. These include: the Act's "validation" provisions; the "confirmation of extinguishment" provisions; the primary production upgrade provisions; and restrictions concerning the right of indigenous title-holders to negotiate non-indigenous land uses.
8. These provisions raise concerns that the amended Act appears to wind back the protections of indigenous title offered in the Mabo decision of the High Court of Australia and the 1993 Native Title Act. As such, the amended Act cannot be considered to be a special measure within the meaning of Articles 1(4) and 2(2) of the Convention and raises concerns about the State Party's compliance with Articles 2 and 5 of the Convention.
9. The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention. Calling upon States Parties to "recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources," the Committee, in its General Recommendation XXIII, stressed the importance of ensuring "that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent."
10. While welcoming the State Party's recognition of the important role that has been played by the Human Rights and Equal Opportunity Commission, the Committee also notes with concern the State Party's proposed changes to the overall structure of the Commission; abolishing the position of the Aboriginal and Torres Strait Islander Social Justice Commissioner and assigning those functions to a generalist Deputy President. The Committee strongly encourages the State Party to consider all possible effects of such a restructuring, including whether the new Deputy President would have sufficient opportunity to address in an adequate manner the full range of issues regarding indigenous peoples warranting attention. Consideration should be given to the additional benefits of an appropriately qualified specialist position to address these matters, given the continuing political, economic and social marginalization of the indigenous community of Australia.
11. The Committee calls on the State Party to address these concerns as a matter of utmost urgency. Most importantly, in conformity with the Committee's General Recommendation XXIII concerning indigenous Peoples, the Committee urges the State Party to suspend implementation of the 1998 amendments and re-open discussions with the representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention.
12. In light of the urgency and fundamental importance of these matters, and taking into account the willingness expressed by the State Party to continue the dialogue with the Committee over these provisions, the Committee decides to keep this matter on its agenda under its early warning and urgent action procedures to be reviewed again at its fifty-fifth session.

**1331st meeting
18 March 1999**

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