

# Land, Rights, Laws: Issues of Native Title

*Native Title Research Unit*

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*The common law recognition of native title in the High Court's Mabo decision in 1992 and the Commonwealth Native Title Act have transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.*

*The 1998 Amendments to the Native Title Act were strongly opposed by Indigenous peoples. They appeared to be balanced in favour of other interests, at the expense of the interests of Indigenous peoples and to the detriment of native title. The concern reached the ear of the United Nations Committee on the Elimination of Racial Discrimination, who, in August last year, asked the Australian government to explain the apparent discriminatory nature of the legislation and the breakdown in consultation with Indigenous peoples. In this article, Darren Dick and Margaret Donaldson examine the Committee's actions in relation to Australia and the implications for Indigenous peoples' fight to retain their rights.*

*Darren Dick and Margaret Donaldson are members of the Native Title Unit of the Human Rights and Equal Opportunity Commission. This article is written in a personal capacity and does not purport to represent the views of the Aboriginal and Torres Strait Islander Social Justice Commissioner or the Human Rights and Equal Opportunity Commission.*

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## **The compatibility of the amended *Native Title Act 1993* (Cth) with the United Nations Convention on the Elimination of All Forms of Racial Discrimination**

**Darren Dick and Margaret Donaldson**

On 11 August 1998 the United Nations Committee on the Elimination of Racial Discrimination (the CERD Committee) requested that the Australian government provide it with information on the amendments to the *Native Title Act 1993* (Cth) (NTA). The purpose of the request was to address the Committee's concerns that the native title amendments may not be compatible with Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

This information was sought under the Committee's prevention procedure. This procedure, introduced in 1993, 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.

The decision to place a country under the procedure is a serious one. Australia is the first 'western' nation to be called to account under the procedure. Other countries considered under the procedure at the same time as Australia were the Czech Republic, the Congo, Rwanda, Sudan and Yugoslavia.

Representatives of the Australian government appeared before the CERD Committee in

Geneva on 12 and 15 March 1999 to present the Government's position. On 18 March 1999 the CERD Committee delivered its concluding observations on Australia, which included the following:

3. The Committee recognizes that within the broad range of discriminatory practices that have long been directed against Australia's Aboriginal and Torres Strait Islander peoples, the effects of Australia's racially discriminatory land practices have endured as an acute impairment of the rights of Australia's indigenous communities.
4. The Committee recognizes further that the land rights of indigenous peoples are unique and encompass a traditional and cultural identification of the indigenous peoples with their land that has been generally recognized.
5. In its last Concluding Observations on the previous report of Australia... the Committee welcomed, further, the Native Title Act of 1993, which provided a framework for the continued recognition of indigenous land rights following the precedent established in the Mabo case.
6. The Committee, having considered a series of new amendments to the Native Title Act, as adopted in 1998, expresses concern over the compatibility of the Native Title Act, as currently amended, with the State Party's international obligations under the Convention. While the original Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act. While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title.
7. The Committee notes, in particular, four specific provisions that discriminate against indigenous title-holders under the newly amended Act. These include: the Act's "validation" provisions; the "confirmation of extinguishment" provisions; the primary production upgrade provisions; and restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses.
8. These provisions raise concerns that the amended Act appears to wind back the protections of indigenous title offered in the Mabo decision of the High Court of Australia and the 1993 Native Title Act. As such, the amended Act cannot be considered to be a special measure within the meaning of Articles 1(4) and 2(2) of the Convention and raises concerns about the State Party's compliance with Articles 2 and 5 of the Convention.
9. The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention...
11. The Committee calls on the State Party to address these concerns as a matter of utmost urgency. Most importantly, in conformity with the Committee's General Recommendation XXIII concerning Indigenous Peoples, the Committee urges the State Party to suspend implementation of the 1998 amendments and re-open discussions with the representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention.
12. In light of the urgency and fundamental importance of these matters, and

taking into account the willingness expressed by the State Party to continue the dialogue with the Committee over these provisions, the Committee decides to keep this matter on its agenda under its early warning and urgent action procedures to be reviewed again at its fifty-fifth session.

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

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

The Committee noted that they had considered in detail the information submitted and arguments put forward by the government representatives in re-affirming this decision. The Committee also decided to 'continue consideration of this matter together with the Tenth, Eleventh and Twelfth period reports of the State party, during its fifty-sixth session in March 2000.'

The findings of the CERD Committee are highly significant. They support the position maintained over the past two and a half years by many Indigenous organisations, human rights advocates, lawyers and community leaders that the government's amendments to the NTA are racially discriminatory. Significantly, they also provide international recognition of the human rights of native titleholders.

This paper explains why the Committee found that Australia has breached its obligations under CERD. It then considers how the Committee's decision might be utilised to realise positive change in the government's treatment of native title issues.

## **Part 1 – Australia's obligations under CERD and the native title amendments**

### **Australia's obligations under CERD**

CERD outlines internationally agreed minimum standards of behaviour, which States undertake to observe by ratifying the Convention. Article 2 of the Convention places positive obligations on States not to discriminate, and 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.

While the principles of non-discrimination and equality are fundamental principles of international law there exists differing interpretations as to their scope. The obligations imposed by CERD have been interpreted as follows.

There is scope within the concept of equality to respect difference:

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.

That is, to treat people the same when their circumstances are different may actually be discriminatory.

This approach (the 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 that requires that everyone be treated identically regardless of such differences (the formal equality approach). Formal equality would require, for example, that the impact of the historical treatment of Indigenous Australians be ignored. Such an approach would entrench the disadvantage faced by many Indigenous Australians. The CERD Committee has recognised that racially discriminatory practices are often systemic and long term in effect. Consequently, States have obligations to ensure that the effects of past discrimination are not continued into the future, and to redress the continued inequality of marginalised groups.

Consistent with this approach, the CERD Committee has recognised that actions that constitute either a legitimate differentiation of treatment or a 'special measure' are not prohibited by CERD.

The Committee has observed that:

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... particular actions may have varied purposes. 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...

An example of an action that the Committee has recognised may constitute a legitimate, non-discriminatory, differentiation of treatment is the protection of Indigenous culture and identity. The Committee has 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.

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, 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;
- (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.

A second, yet distinct, type of action that does not constitute discrimination under CERD is an action that constitutes a 'special measure' under Articles 1(4) or 2(2) of the Convention. Special measures acknowledge the reality that often the impact of historical disadvantage and discrimination is entrenched. They are intended to operate as a 'catch-up' mechanism for groups who continue to suffer disadvantage because of past discrimination, so that they may,

in time, fully and equally enjoy their human rights. At the point where a position of full equality is reached, the special measure has served its purpose and can no longer be sustained.

### **The government's justification of the native title amendments**

During the debate on the native title amendments the government sought to justify the removal and reduction of native title rights on the basis of formal equality. They argued, for example, that the right to negotiate on pastoral leasehold land could be removed or diminished because it was not a right enjoyed by pastoral leaseholders. Such an approach does not meet the standard of equality required under CERD, nor does it address the historical disadvantage suffered by Indigenous people or protect their unique cultural identity. The government acknowledged that CERD requires a standard of substantive equality when they appeared before the Committee in March 1999. Rather than seeking to justify the amendments on the basis of equality the government argued its case on the basis of reasonableness and balance:

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.

This approach is a misreading of Australia's obligations under CERD. The ideas of legitimacy, justifiability and proportionality are drawn from the Committee's observations that a differentiation of treatment *will not* be considered discriminatory if it has a legitimate objective when judged against the purposes of the Convention, but *will* be considered discriminatory if it has an unjustifiable disparate impact on a particular racial group. Beneficial differential treatment, such as the right to negotiate provisions, will not be considered discriminatory under CERD, but invidious differential treatment will. In our view it is misguided to interpret the Convention as broadening the margin of appreciation permitted to States for acts of invidious discrimination.

In addition, the Committee made it very clear in paragraphs 6 and 7 of Decision 2(54) that discrimination occurs when non-Indigenous interests are preferred to Indigenous interests. The Committee was not concerned whether, in preferring non-Indigenous interests 'a balance is struck between the various rights and interests' which lobbied the government in the formulation of the native title legislation. The interests of leaseholders, the mining, tourism and fishing industries constitute the non-Indigenous interests whose titles were given certainty as a result of the amendments. Where native title is extinguished or impaired in order to give non-Indigenous interests certainty, discrimination occurs.

A balancing exercise which did concern the Committee however, was whether there are sufficient beneficial provisions in the amended NTA to remedy the effect of the discriminatory provisions so that, when read as a whole, the Act could be considered beneficial to Indigenous people. The Committee was not persuaded that this balance had been struck. The basis for their decision was twofold.

First, as a matter of process, the overwhelming indication to the Committee that the Act was discriminatory was the government's failure to obtain the 'informed consent' of Indigenous people to the amendments. Second, as a matter of substance, the Committee rejected the government's narrow characterisation of discrimination and in particular rejected their argument that:

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 past acts... in recognising and acknowledging things that happened in the past the government doesn't believe that it is acting discriminatorily.

The Committee's requirement of 'informed consent' in 'decisions directly relating to

[Indigenous] rights and interests', must be seen in the context of its finding in paragraph 7 and 8 of the decision that significant provisions of the NTA were discriminatory. In its consideration of the original NTA the consent of Indigenous people to the legislation was a 'critical factor in the legitimisation of the original 1993 Act'. It was also critical to their finding that, even though the original NTA contained discriminatory provisions, overall it was for the benefit of Indigenous people and thus constituted a special measure under Articles 1(4) or 2(2) of the Convention. The same could not be said of the amended NTA.

The government's argument that the validation and confirmation provisions were not, in themselves, discriminatory but merely validated or confirmed past discriminatory acts which 'cannot be undone' was never going to satisfy the Committee. The basis for the invalidity of 'past injustices' was their non-compliance with the *Racial Discrimination Act 1975* (Cth) (RDA), which is itself the domestic implementation of Australia's obligations under CERD. Several other reasons can be found for the Committee's rejection of the government's argument:

- The Committee recognised the need to acknowledge that past discriminatory practices have 'endured as an acute impairment of the rights of Australia's indigenous communities';
- The amendments to the NTA which validated certain discriminatory acts between 1993 and the *Wik* decision in 1996 (intermediate period acts) were particularly invidious in that such acts were committed knowing that there was a definite risk they would be found to be contrary to the NTA and the RDA. In this respect they are different to the past discriminatory acts validated by the original NTA. Before the *Mabo* decision, which for the first time recognised Indigenous rights to land, governments could be excused for not taking native titleholders' rights into account. After the *Mabo* decision, the question of whether native title co-existed on pastoral leasehold land was an open question yet to be decided by a court. Governments who, in their dealings on pastoral leasehold land, failed to recognise the rights of native titleholders did so knowing the risk attached to the legality of their actions;
- What the government now classifies as injustices of the past that 'cannot be undone' were, at the time of the passing of the original NTA, covered by the future act provisions. The freehold test in the original NTA sought to ensure that native titleholders would, in the future, be in the same position as ordinary titleholders in relation to their property. 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' is a reconstruction 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...<sup>25</sup> Mr Chairman 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.

## **Part 2 – Utilising the CERD Committee's findings**

International treaty committees draw their force and influence from the fact that signatory States have voluntarily undertaken to comply with the obligations under the treaty. The State

has consented to being scrutinised on the world stage. 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. This section seeks to provide information about mechanisms that may be utilised to improve the recognition and protection of the human rights of Indigenous Australians.

### **Potential international mechanisms**

#### *i) Continued scrutiny by the CERD Committee*

The CERD Committee will continue to monitor developments in native title when they next meet in March 2000. Should Australia continue 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 Security Council of the United Nations.

#### *ii) Individual communications*

Paragraphs 7 and 8 of Decision 2(54) raise concerns that the native title amendments breach Australia's obligations under Articles 2 and 5 of CERD. In our view it is likely that Australia has also breached the following obligations under the International Covenant on Civil and Political Rights (ICCPR):

- Article 1 (the right to self-determination);
- Article 2 (non-discrimination);
- Article 26 (equality before the law); and
- Article 27 (minority cultural and group rights).

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.

A complainant must have exhausted available domestic remedies before either Committee will accept a communication for consideration on the merits. The CERD Committee's decision provides an indication that, once admitted, a communication alleging that the native title amendments breach Australia's obligations under the relevant convention will have a good chance of succeeding.

The result of a successful communication is a finding which, although not binding, could assist in a campaign to have the NTA further amended, possibly leading to the repeal of some of the discriminatory provisions of the Act as it now stands. In addition the Committee may make suggestions or recommendations to the State on how it might respond in order to ensure that they comply with their obligations under the relevant convention.

Individual communications may also be particularly useful in exerting pressure on governments to exercise existing discretionary mechanisms within the NTA to redress the discrimination faced by the complainants. Such mechanisms include:

- **Removing acts from the list of scheduled interests.** Acts contained in Schedule 1 to the NTA 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 restore land to native titleholders.

iii) *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 with, 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.

iv) *International diplomacy*

Australia has a long-standing reputation as an advocate of human rights in the international arena. This reputation stands to be diminished by the current Government's position on native title specifically, and Indigenous issues more generally. The Government may find itself embarrassed internationally by the native title amendments, particularly where they advocate for other nations to recognise and protect human rights.

**Potential domestic mechanisms**

i) *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*. 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.

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. 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.

ii) *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.

*iii) 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* or as a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the [RDA] or the [CERD].' As the original NTA was considered to comply with Australia's international obligations, the Act could validly be made under either source of power.

Given the CERD Committee's finding that the amended NTA discriminates and can no longer be characterised as a special measure, 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 or pursuant to 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, and even then there may be limits. If a more beneficial characterisation of the race power prevails, the CERD Committee's findings will be a persuasive element in the High Court's determination of whether the amended NTA is discriminatory.

*iv) Focus on consensual resolution of native title issues*

When the above international and domestic implications are considered, what can be seen is that the quest for 'certainty' and 'workability' may not have been achieved by the methods invoked in the amended NTA. The basic message that emerges is that acceptable solutions need to be sought not imposed. The NTA contains extensive framework provisions for the making of agreements, and resolution of native title issues by consensus. The CERD Committee's findings highlight the importance of, and preference for, achieving negotiated outcomes.

### **Concluding remarks**

The reaction of the government and the Parliament to the CERD Committee's findings has not been positive. The Commonwealth 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.'

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.

This is the political climate in which the CERD Committee has made its findings. Whether the government can maintain this position in the face of these external pressures is not assured. We have outlined a series of mechanisms that could be utilised to ensure that the Committee's findings are at the forefront of the minds of decision-makers within Australia (be they judges, politicians or bureaucrats). However, the impact of many of these mechanisms is likely to be subtle and incremental.

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