GOVERNMENT RESPONSE TO THE 16TH REPORT OF THE PARLIAMENTARY JOINT COMMITTEE ON NATIVE TITLE AND THE ABORIGINAL AND TORRES STRAIT ISLANDER LAND FUND: `CERD AND THE NATIVE TITLE AMENDMENT ACT 1998'

Government Response

On 18 March 1999 the United Nations Committee on the Elimination of All Forms of Racial Discrimination (the CERD Committee) at its fifty-fourth session, published its decision 2(54) on Australia, in which it expressed concern about `the compatibility of the Native Title Act, as currently amended' with Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (the CERD).1The central obligation on a member State under the CERD is to prohibit and eliminate racial discrimination, and to ensure that its citizens enjoy their fundamental human rights.The CERD Committee queried Australia's discharge of this obligation in relation to the protection of the rights of indigenous Australians to own and inherit property.The CERD Committee also expressed concern at the `lack of effective participation by indigenous communities in the formulation of the amendments' to the original *Native Title Act 1993* (NTA), and the apparent absence of the informed consent of indigenous people to the amendments.2

On 9 December 1999 the Senate referred the findings of the CERD Committee to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (the Committee) for inquiry and report.The report of the majority Government members of the Committee (the Committee report), together with a report prepared by the minority non-Government members of the Committee (the minority report) was tabled in Parliament on 28 June 2000.

The Committee's Report

The Government welcomes and endorses the Committee's report.

The report concluded that the NTA as amended by the *Native Title Amendment Act 1998* `is consistent with Australia's international obligations and, in particular, its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination'.3In arriving at this conclusion the Committee gave careful consideration to the CERD Committee's findings, and both the original and the amended NTA.The Committee also considered international jurisprudence on the principle of equality at international law.

Importantly, the Committee report confirmed that, at international law, States have a `margin of appreciation' in their implementation of their international obligations.The margin of appreciation refers to the discretion that States have to determine how to implement their treaty obligations.This discretion exists in recognition of the fact that `States are in the best position to determine the appropriate measures required to implement treaty obligations and to balance competing interests within their jurisdictions'.4

In the case of the NTA the Committee report noted `... that [a]mong lawmakers, indigenous and non-indigenous interests there was general consensus that the

[original] Native Title Act needed to be amended', although opinions differed as to the extent of the amendments that were required.5Amendments to the NTA were necessary to address, amongst other things, the effect of certain court decisions since 1993 which had an adverse effect on the efficacy of the original Act.These decisions included most notably the High Court decisions in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 and *Wik Peoples v Queensland* (1996) 187 CLR 1, and the Federal Court decisions in *Northern Territory v Lane* 1995) 138 ALR 294. Amendments were also necessary to provide a better framework for binding agreements within the provisions of the NTA.

The CERD Committee described the original NTA as `delicately balanced between the rights of indigenous and non-indigenous title holders'.6The Committee report confirmed that the amended NTA also achieved an appropriate and equitable balance between the protection of the rights of indigenous and non-indigenous Australians.Further, the report noted that the amended NTA also provides indigenous interest holders with many beneficial measures `designed to take account of the special nature of native title', which are not generally available to non-indigenous interest holders.7

The Committee report concluded that the CERD Committee, in reaching its decision, did not take into account the significant additional benefits provided to indigenous people by the amended NTA.This omission, the Committee argued, was indicative of a fundamental flaw in the CERD Committee's approach to assessing the amended NTA.The Committee report noted that:

An assessment of whether our native title legislation is discriminatory cannot be made without regard to the position of other land holders in Australia.8

Accordingly, the Committee identified the correct approach as being to ask whether the amended NTA as a whole provides the interests of indigenous people with a level of protection that is equivalent to the protection provided to comparable non-indigenous interests under Australian law. The CERD Committee did not consider this question.The Committee report found that:

The amended Native Title Act strikes a balance between native title interests and other interests.It provides protection to native title that is at least the equivalent of the protection provided to comparable non-Indigenous interests, and provides significant benefits to native title holders which non-Indigenous title holders do not enjoy.9

In its decision 2(54), the CERD Committee appeared to suggest that the CERD requires the informed consent of indigenous people to any decision affecting their rights.The CERD Committee's decision also suggested that there had been a lack of `effective participation' by indigenous people in the formulation of the amendments to the NTA. 10 The Committee report found that international law does not require States to obtain the informed consent of groups that are affected by measures, before such measures are implemented, rather it is for Parliament to decide whether and what measures are necessary and appropriate.However, the Committee report noted the fact that indigenous people participated in both the extended period of public consultation,

and the parliamentary consideration given during the process of amending the NTA.The Committee report concluded that:

... to the extent that Article 5(c) of the CERD may require equality in relation to effective participation in public affairs, indigenous Australians did have that right.They not only participated in the extensive public policy development process that went on, and the lengthy parliamentary process, but had a significant input into that outcome. 11

The Committee report confirmed that the 1998 amendments to the NTA accord with Australia's international obligations and, in particular, the obligations arising under the CERD. The findings of the report confirm that, in amending the NTA, the Australian Government continues its commitment to the principles of justice and equity, which are expressed in the preamble to the Act.

The Minority Report

The non-Government members of the Committee found that the NTA as amended conflicts with Australia's international legal obligations, and recommended amendments to `the substantive and procedural provisions to render the legislation non-discriminatory and consistent with Australia's international obligations'.12 The Government does not accept the conclusion reached by the non-Government members of the Committee.The NTA was amended to deal with problems that arose in the operation of the original Act subsequent to its enactment in 1993.In amending the Act, the Government has acted within its margin of appreciation and has achieved an equitable balance between the rights of indigenous and non-indigenous interest holders.

The minority report made a total of 10 recommendations (**Appendix**).The Government does not accept any of the recommendations. In particular, the Government rejects recommendations 3-7 on the basis of the findings contained in the Committee report.

The Government specifically responds to recommendations 1, 2, 8, 9 and 10 of the minority report as follows:

Recommendation 1

In the light of evidence presented to this Committee, the non-Government members find, and recommend that the Government acknowledge, that the Committee on the Elimination of Racial Discrimination (the CERD Committee) is an expert and independent body, competent to receive and consider complaints regarding violations of rights protected under the Convention for the Elimination of All Forms of Racial Discrimination.

Recommendation 2

The non-Government members find, and recommend that the Government acknowledge, that individuals and groups in Australia had, and still have, the right to bring to the attention of the CERD Committee alleged violations of Australia's

undertakings as a signatory to the CERD, such as those inherent in both the substance of the amended Native Title Actand in the process through which it was drafted.

Recommendation 10

The non-Government members of the Committee recommend that the Government, consistent with its obligation to protect Australia's international reputation, desist from any attacks on UN expert bodies, and renew positive dialogue with them on a range of matters, including Australia's native title legislation.

The CERD provides for the establishment of a Committee `of eighteen experts of high moral standing and acknowledged impartiality'.13 The role of the CERD Committee is to monitor and assist member States with the implementation of the Convention, chiefly through its consideration of periodic reports submitted by States.

Under Article 14 of the Convention the CERD Committee can receive communications containing complaints against a State from individuals and groups within its jurisdiction, only where that State has made a declaration acknowledging the competence of the CERD Committee to receive and consider such communications.Where a State has made such a declaration, communications from individuals/groups may be made to the CERD Committee only when available local remedies have been exhausted. Australia made a declaration to this effect on 28 January 1993 and the declaration remains in force. The Government observes that, to date, there has been no individual communication registered with the CERD committee under Article 14 regarding the effect of the amended NTA.

The Government accepts that the CERD Committee is intended to be an expert and independent body competent to monitor compliance with the Convention.However, the Government has already indicated its concern at what appears to be a political and partisan approach adopted by the CERD Committee in its consideration, in recent times, of Australia's compliance with the CERD.An indication of this partisan approach adopted by the CERD Committee is its reliance on the information provided by non-Government organisations in its assessments of Australia, its lack of analysis of the arguments put by the Australian Government, and its disregard of the information provided by the Australian Government on the significant range of policies and measures undertaken to address indigenous issues.

The partisan approach of the CERD Committee to its assessment of Australia is further underscored by the report of the Parliamentary Joint Committee. The report has concluded, contrary to the conclusions reached by the CERD Committee, that the amendments to the NTA have not breached Australia's obligations under the Convention.Further, the report has revealed that the CERD Committee did not apply principles of international law relevant to the Convention, such as the margin of appreciation.

The Australian Government is concerned that the approach taken by the CERD Committee can have the effect of compromising its intended role as an expert human rights treaty body.Since 1996 the Australian Government has, through diplomatic channels, actively promoted reforms to the United Nations treaty body system in

order to increase the effectiveness of bodies such as the CERD Committee. In addition, early last year the Australian Government announced a whole of Government review, aimed at improving Australia's interaction with the UN human rights treaty committees.

As a result of that review, the Government announced in August 2000 a range of measures aimed at reforming the UN treaty body system and improving Australia's interaction with the system.These measures were supported in April 2001 by the announcement of Australia's high level diplomatic initiative; a long-term commitment aimed at practical, achievable benefits to the committee system and the cause of international human rights.

The Government does not accept the implication in recommendation 10 that it has been involved in attacking UN expert bodies.The Australian Government considers its role in encouraging reform of the UN committee system an important part of its continuing commitment to international human rights obligations.

Concerns expressed by the Australian Government about the effectiveness and impartiality of the UN human rights treaty bodies, such as the CERD Committee, have been supported in a recently released report on the UN human rights treaty system.The report entitled *The UN Human Rights Treaty System: Universality at the Crossroads* was prepared by Canadian academic Professor Anne Bayefsky, in collaboration with the Office of the High Commissioner for Human Rights.The report reviews the performance of human rights committees and depicts a system which is overburdened with national reporting, inefficiently structured with resultant duplication of effort, and often characterised by excessive focus on high-performing states and inconsistent treatment of different states.Importantly, the report also recognises the political bias in the concluding observations of committees (which provide an assessment of states).This political bias was most evident in the concluding observations of the CERD Committee which, according to the report, demonstrate “differential depth of treatment of some states (in the absence of corresponding justification in terms of human rights conditions)” and include recommendations that are “ad-hoc and apparently driven by whatever external source spoke the loudest.”

Recommendation 8

The non-Government members acknowledge that native title, as recognised by Australian common law and as dealt with in statute, is capable of, and is vulnerable to, extinguishment. They contrast this with the fact that extant traditional title emerging from, and contained within, the laws and customs of Indigenous Australians remains for so long as those people and their beliefs survive. They therefore recommend that the Government enact legislation that recognises and respects that fact, irrespective of findings that courts may make from time to time.

The Government does not accept recommendation 8 of the minority report.The non-Government members appear to be advocating further legislation which would provide a more extensive recognition of traditional title than that already provided by the common law and the NTA, particularly in relation to the question of

extinguishment of native title.The minority report provides no other indication of the extent of this proposed legislative recognition of traditional title or how it would inter-relate with non-indigenous interests.

The High Court decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and subsequent decisions have established both the recognition of native title at common law, and that the grant or reservation of interests in land by the Crown could extinguish native title.As the Committee report concluded, the Native Title Act achieved a balance between the protection of indigenous interests from extinguishment at common law, and the protection of non-indigenous interests in land. The Government does not accept that there is any value in further legislation to provide for the new and unexplored concept of `extant traditional title'.

Recommendation 9

The non-Government members recommend that the Government acknowledge that its native title legislation is only one early element of a range of instruments to be drafted over time as a part of the process for a lasting settlement or accord between Indigenous and non-Indigenous Australians.

The Government believes that ascertaining the continued existence of native title, and resolving the land ownership and land management issues which flow from the survival of native title, are ideally achieved through agreement between all relevant parties. The NTA provides a framework for the resolution of native title issues through agreement whether resulting in a consent determination by the Federal Court or an Indigenous Land Use Agreement: it includes provisions which ensure that agreements reached will be binding and enforceable on all parties; and a National Native Title Tribunal is established to facilitate the negotiation of agreements.

Therefore the Government envisages that, pursuant to the NTA, there will be an increasing reliance on agreements between native title holders, governments and third party land users.In this way the NTA allows for agreements, negotiated over time to deal with native title issues throughout Australia.However, the Government does not accept any implication in recommendation 9 that a treaty with indigenous people is necessary. The Government rejects the concept of a treaty as divisive and lacking the support of the majority of Australians. The Government remains firmly committed to an inclusive and practical reconciliation process that brings the nation closer together.

Recommendations

Recommendation 1

In the light of evidence presented to this Committee, the non-Government members find, and recommend that the Government acknowledge, that the Committee on the Elimination of Racial Discrimination (the CERD Committee) is an expert and independent body, competent to receive and consider complaints regarding violations of rights protected under the Convention for the Elimination of All Forms of Racial Discrimination.

Recommendation 2

The non-Government members find, and recommend that the Government acknowledge, that individuals and groups in Australia had, and still have, the right to bring to the attention of the CERD Committee alleged violations of Australia's undertakings as a signatory to the CERD, such as those inherent in both the substance of the amended Native Title Act and in the process through which it was drafted.

Recommendation 3

The non-Government members find, and recommend that the Government acknowledge, that the evidence presented to this Committee clearly shows that the weight of informed opinion supports the finding of the CERD Committee, that the Native Title Act, as amended in 1998, conflicts with Australia's international legal obligations. The non-Government members also find, and recommend that the Government acknowledge, that the inconsistency of the NTA with Australia's international legal obligations is a matter of fact.

Recommendation 4

The non-Government members recommend that the Government, in responding to court decisions and the practical experience of the operation of the NTA across Australia, amend its substantive and procedural provisions to render the legislation non-discriminatory and consistent with Australia's international obligations.

Recommendation 5

The non-Government members find that the requirement to obtain the informed consent of Indigenous Australians to legislation affecting their rights is, as a matter of fact, an obligation under our international undertakings, and recommend that the Government, in amending the NTA, do so through a process of negotiation with Australia's Indigenous peoples with the aim of gaining their informed consent to any such amendments, and to the amended Act as a whole.

Recommendation 6

The non-Government members recommend that the Government, in amending the NTA, implement uniform, decent and enforceable national standards for dealing with native title, consistent with the Commonwealth's responsibility for the protection of the rights of Australia's Indigenous peoples. They further recommend that these standards be applied to any State native title regime presented to the Commonwealth Government and the Commonwealth Parliament for approval under the present NTA.

Recommendation 7

The non-Government members recommend that the Government, in acknowledging the NTA as simply one of many legislative or administrative instruments that have the potential to impinge on the rights of Australia's indigenous peoples, apply the principles underpinning its international and constitutional obligations to the drafting of any statutory instruments or administrative procedures that have any such effect.

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Recommendation 10

The non-Government members of the Committee recommend that the Government, consistent with its obligation to protect Australia's international reputation, desist from any attacks on UN expert bodies, and renew positive dialogue with them on a range of matters, including Australia's native title legislation.

1 Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee), Decision 2(54), 1331st Session, 18 March 1999.

2 CERD Committee Decision 2(54).

3 Sixteenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (the Sixteenth Report), July 2000, p.ix.

4 The Sixteenth Report, p.9.

5 The Sixteenth Report, p.23.

6 CERD Committee Decision 2(54).

7 The Sixteenth Report, p.30.

8 The Sixteenth Report, p.32.

9 The Sixteenth Report, p.54.

10 CERD Committee Decision 2(54).

11 The Sixteenth Report, p.60.

12 The Report of the non-Government Members of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, p.95.

13 The Convention on the Elimination of All Forms of Racial Discrimination (the CERD), Article 8(1).