EXECUTIVE SUMMARY

The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund has carefully examined the findings of the United Nations Committee on the Elimination of Racial Discrimination in relation to the *Native Title Act 1993*, as amended by the *Native Title Amendment Act 1998*. The Parliamentary Joint Committee believes that the Act, as amended, is consistent with Australia's international obligations, in particular its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.

International Standards

Australia signed the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) on 13 October 1966 and ratified it on 30 September 1975. The *Racial Discrimination Act 1975* (RDA) was enacted to implement, in part, Australia's obligations under the Convention. The preamble to the RDA states a particular purpose of giving effect to the provisions of the CERD, and a copy of the Convention is scheduled to the Act.

At the time the CERD Convention was drafted, equality was conceptualised as sameness or identical treatment. Under this approach, known as formal equality, any distinctions in treatment are considered discriminatory. The only exception to identical treatment provided under this scheme was for temporary positive discrimination taken in recognition of underlying disadvantage and in order to hasten equal enjoyment of the same rights as other groups. Such affirmative action the Convention terms 'special measures'.

Equality, as the term is now understood under customary international law, incorporates the idea that differences in treatment are permissible, in order to achieve real or substantive equality. The State must be able to show that any such difference in the treatment of groups or individuals is not arbitrary, and can be reasonably and objectively justified by reference to the distinctive characteristics of the group or individual. The term 'discrimination' is now understood as meaning only unjustified or invidious distinctions.

The consent of affected groups to measures providing substantive equality is not a prerequisite to the adoption or amendment of such measures. Rather, it is for Parliament to decide whether substantive equality is to be provided and, if it is, what that will encompass. Similarly, special measures, either in a formal or substantive equality sense, do not require the consent of the beneficiaries of those measures in order to be characterised as such under the CERD.

International law allows states a 'margin of appreciation' in the implementation of international obligations, accorded in recognition that national institutions are best placed to assess the need for substantive equality measures and to find a balance between a range of competing interests. Novel areas of law attract a wider margin of

appreciation, such that a greater range of treatment will be regarded as meeting the treaty obligations.

The CERD Decisions

On 11 August 1998 the CERD Committee, in decision 1(53), requested that Australia provide information on changes to the Native Title Act, as well as on any changes of policy on Aboriginal land rights and in the functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner. The decision also noted that the Committee wished to examine the compatibility of any such changes with Australia's obligations under the CERD. The Australian Government provided a response to the CERD Committee on 13 January 1999.

The CERD Committee considered these matters in March 1999. Representatives from Australia provided an overview of the amendments to the *Native Title Act 1993* and the other issues of concern to the CERD Committee, as well as responding to questions from members of the Committee.

The Australian delegation maintained that Australia accepted its obligations under CERD and believed that the amended Native Title Act complied with those obligations. In particular, the delegation emphasised that the amendments to the Act were based on legitimate objectives and that the means were proportionate to achieve those objectives.

Importantly, the Australian delegation argued that the removal of certain rights, or changes to those rights, were not discriminatory, as the amended Native Title Act continued to provide for the recognition and protection of native title in a manner which was superior to the common law, and to provide rights and benefits to Indigenous people which were not offered to other title holders.

The delegation argued that the amended Native Title Act went beyond merely providing formal equality with other non-Indigenous interest holders, and that it provided some additional special measures, or, alternatively, that it could be considered as providing substantive equality.

The delegation also informed the Committee that that there had been an extensive process of consultation with Indigenous and other stakeholders over the amendments, although a consensus was not ultimately reached.

On 18 March 1999 the CERD Committee published its decision 2(54) on Australia. The Committee expressed concern about the 'compatibility of the Native Title Act, as currently amended', with Australia's obligations under the CERD. In particular, the Committee drew attention to the amended Act's validation, confirmation, and primary production upgrade provisions, as well as the right to negotiate provisions.

The decision also raised concerns about what the CERD Committee saw as the lack of effective participation of Indigenous communities in the development of the amendments.

The Committee called on Australia to suspend implementation of the 1998 amendments and re-open discussions with representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the Indigenous peoples which would comply with Australia's obligations under the Convention.

The Committee considered this issue again in August 1999. In a written response to decision 2(54) the Australian Government stated that it did not believe that the decision of the CERD Committee reflected the substance of the Government's submission and evidence on essential issues, stating that it believed that the amended Native Title Act maintained 'an appropriate balance between the rights of native title holders and the rights of others'. The CERD Committee, in decision 2(55), reaffirmed the findings of decision 2(54).

In March 2000 an Australian delegation, led by the Hon Philip Ruddock MP, Minister for Immigration and Multicultural Affairs and Minister assisting the Prime Minister on Reconciliation, appeared before the Committee to discuss Australia's report.

The Committee issued its Concluding Observations on Australia on 24 March 2000. Among other things, the Committee expressed concern at the 'unsatisfactory' response by Australia to decisions 2(54) and 2(55) concerning the amendments to the Native Title Act, reaffirmed those decisions and reiterated its recommendation that Australia should ensure the 'effective participation' by Indigenous communities in decisions affecting their land rights.

The Commonwealth Attorney-General rejected these observations of the CERD Committee as an unbalanced and wide-ranging attack that intruded unreasonably into Australia's domestic affairs.

Common Law Native Title and the *Native Title Act 1993*

In *Mabo v Queensland (No 2)* the High Court decided that the common law of Australia recognised the existence of native title to land, derived from the laws and customs observed by Aboriginal societies. The Court determined that native title would continue to exist where Indigenous people have maintained their traditional connection with the land and where native title has not been extinguished by a legislative or other act of government.

Prior to the decision the common law in Australia did not recognise native title. Thus, the decision constituted a significant development in the recognition of Indigenous rights in Australia. However, the decision also established that native title was vulnerable to extinguishment by legislation or by the exercise of the Crown's power to grant inconsistent interests in the land, or to appropriate the land and to use it inconsistently with the enjoyment of native title.

Because of the vulnerability of native title to extinguishment the Government of the day thought it necessary to enact legislation that would ensure the protection of native title, and also its integration into Australian law and land management, so that future

economic activity and development could proceed. In the original Native Title Act the protection of native title was achieved through the creation of a legislative regime regulating all acts done by governments on native title land from 1 January 1994.

To facilitate the recognition and protection of native title the original Act set up procedures to enable native title claims to be made, and to be determined by the National Native Title Tribunal and the Federal Court. The original Act did not specify the content of native title, or its relationship to non-native title interests, but left these matters to be determined by the courts in the future.

The Act also established a system of Aboriginal and Torres Strait Islander representative bodies, set up and funded by the Commonwealth Government to assist native title holders with the claims process.

The original Native Title Act also made provision for the validation of potentially invalid past acts of governments, and native title holders were given an entitlement to compensation for the extinguishment or impairment of their rights as a result of this validation.

At the time the original Native Title Act was passed the principle of equality, or non-discrimination, was understood as meaning formal equality and additional special measures. Formal equality was provided through the 'freehold test' which, in remedying the vulnerable status of native title to extinguishment, accorded it the same protection that the holders of freehold title would have in relation to government action affecting their title.

In addition, 'special measures' were included in the original Act: the right to negotiate, a special procedure for the ascertainment of native title through conciliation and a special fund to assist in the acquisition of land for dispossessed Aboriginal and Torres Strait Islander peoples.

The preamble to the Act stated that it was intended to be a special measure within the meaning of Article 1(4) of the CERD and s.8 of the Racial Discrimination Act. The case of *Western Australia v The Commonwealth* confirmed that the original Native Title Act was consistent with the Racial Discrimination Act and the CERD.

In decision (2)54 the CERD Committee took the view that the original Native Title Act fulfilled Australia's obligations under Articles 2 and 5 of the Convention, notwithstanding that the Act provided for extinguishment of native title, in particular through the validation of past acts. The Committee noted that the Act recognised and sought to protect native title and that it provided a framework for the continued recognition of Indigenous land rights following the precedent established in *Mabo*.

The *Native Title Amendment Act 1998*

The original Native Title Act was Australia's initial legislative response to a unique and complex area of law which the Parliament had not been required to address previously. Not surprisingly, soon after the original Act commenced operation a

number of operational and jurisdictional issues emerged that prompted the need for amendments to the Act. Several of these arose out of court decisions affecting the operation and administration of the Native Title Act and the National Native Title Tribunal.

Among lawmakers, Indigenous and non-Indigenous interests there was general consensus that the Native Title Act needed to be amended. Acknowledgment of the need to amend the Act was almost unanimous, although opinions differed as to the extent of the amendments that were required.

From 1995 there were several attempts to amend the Native Title Act. Following the High Court decision in *Wik* in December 1996, the Government believed that a comprehensive legislative response to the challenges of native title, in particular to the issues raised by the *Wik* decision, was required.

In *Wik* the Court held that the grant of a pastoral lease did not necessarily extinguish native title, and that the rights of native title holders and pastoral leaseholders could potentially coexist. Where there was any inconsistency between the two the native title rights would yield to the rights held under the pastoral lease. This gave rise to considerable uncertainty, particularly in relation to government grants and future acts on pastoral leasehold land.

A working draft of the new Native Title Amendment Bill was released for public comment on 25 June 1997. Following extensive public debate, wide-ranging consultations with interest groups and a lengthy legislative process, the Native Title Amendment Bill 1997 [No2] was passed on 8 July 1998. *The Native Title Amendment Act 1998* received royal assent on 27 July, with most of the Act's provisions commencing on 30 September 1998.

The Amended Act and Australia's Obligations under the CERD

In arriving at the conclusions expressed in decision 2(54), the CERD Committee appears to have considered only the amendments to the Native Title Act in isolation, without giving any weight to the significant beneficial measures contained in the amended Act as a whole, and has compared the position in relation to Indigenous peoples' rights under the amended Native Title Act with their rights under the original Act. No comparison is made with the position in relation to the interests of non-Indigenous Australians under Australian law.

Under international law, the Government is entitled to balance the rights of competing groups in society. An assessment of whether the native title legislation is discriminatory cannot be made without regard to the position of other land holders in Australia. If the position regarding Indigenous interests in land is compared with that of non-Indigenous interests, the amended Native Title Act strikes a balance between native title interests and other interests.

The Act provides protection to native title that is at least the equivalent of the protection provided to comparable non-Indigenous interests. In addition, significant

benefits are provided to native title holders which non-Indigenous title holders do not enjoy. The amended Act contains measures which protect native title from extinguishment in circumstances that would lead to extinguishment under the common law, takes account of special features of native title and addresses to some extent the effect of historical extinguishing acts of the Crown.

The general protection provided to native title, plus the additional measures, means that the amended Act meets the standards of either formal equality and special measures or substantive equality. The judgment about whether different treatment is required to achieve substantive equality, and the appropriateness of any such treatment, is a matter for individual states, which are in the best position to determine the appropriate measures required to implement treaty obligations and to balance competing interests within their jurisdictions.

The Four Contentious Sets of Provisions

Central to this inquiry is the focus in the CERD Committee's decision 2(54) on four sets of provisions in the amended Act that the Committee labelled discriminatory. Three of these, the validation, primary production and right to negotiate provisions were enacted specifically to respond to the implications and uncertainty caused by the *Wik* decision. The fourth, providing for confirmation of extinguishment, was considered necessary for the related reason of providing certainty under the Act about when native title could continue to exist and where it had been extinguished.

While superficially there might appear to be some discriminatory aspects of these provisions, the Government has acted to balance competing interests. The amendments do not breach the Government's obligations for a range of reasons, including the fact that they deal with areas where a margin of appreciation is allowed, that there is little or no impact on native title and that there are countervailing beneficial measures for any effect these provisions have on native title, including compensation.

One of the most significant problems caused by the *Wik* decision arose from the fact that the original Native Title Act and subsequent State legislation had been drafted on the assumption that native title could not exist over leasehold land, including pastoral leases. Judicial statements, as well as comments from politicians, academic commentators, and some Indigenous leaders had all suggested that pastoral leases extinguished native title. The original legislation was therefore not able to deal with the issues raised by the decision, and appropriate amendments were necessary to resolve the uncertainty that followed.

The amended Act validated certain acts over leasehold or freehold land that had been granted between the commencement of the Native Title Act in January 1994, and the *Wik* decision in December 1996. The potential invalidity of third party tenements resulting from the findings in *Wik* was not an appropriate consequence for acts done on the basis of a legitimate assumption subsequently proved wrong.

Most of those who ‘benefited’ from potentially invalid acts in the intermediate period were farmers and pastoralists who had acted in good faith and relied on the statements of governments. It was not appropriate that these people should bear the consequences of any invalidity caused by reliance on the accepted view of extinguishment. The amendments were appropriate and reasonable and more limited in scope than the related provisions in the original Act, and include significant countervailing benefits.

The confirmation provisions were intended to reflect the common law on extinguishment. The lack of clarity in the Native Title Act, and court decisions reducing the effectiveness of the threshold test, meant that claims could be made for native title which potentially involved thousands of respondents whose interests were, in fact, not affected by native title. Leaving it to the courts to resolve these issues would be a lengthy and expensive process and could not provide the desired certainty in a reasonable period.

Representative bodies were given an opportunity to comment on the schedule of interests confirmed to have extinguished native title before it was introduced into the Parliament, and as a result of consultations changes were made. These provisions do not effect any further extinguishment of native title rights or interests: the titles that are confirmed to have extinguished native title were included because it was assessed that they conferred exclusive possession and had therefore extinguished native title.

Provisions which allow the upgrading of pastoral lease interests were included in the amendments to the Act to deal with the uncertainty over what acts could be undertaken over pastoral leases where there was the possibility that native title rights could coexist with the rights of pastoralists. This uncertainty was compounded by the fact that the original Act had been drafted on the assumption that native title was extinguished by the grant of a leasehold interest, including a pastoral lease.

The need to clarify and provide explicitly for the continued activities of pastoral leaseholders was supported by a number of Indigenous leaders and groups. The difference in opinion between the Government and some Indigenous interests was about the scope of these provisions. In introducing the primary production provisions into the Native Title Act the Government faced the difficult task of balancing competing interests in land title in Australia. It was required to deal with the unique situation of coexisting rights in a manner that was reasonable and not arbitrary.

The amended Act streamlined the right to negotiate provisions that existed in the original Act. In some cases, the right to negotiate was removed altogether. In other cases it was replaced by lesser procedural rights such as the right to be consulted, the right to object, and the right to have that objection heard by an independent body. States and Territories are also able to implement their own right to negotiate schemes, or to replace the right to negotiate with an alternative scheme of their own, provided that such a scheme meets certain criteria set out in the Act.

The right to negotiate was enacted in its original form on the assumption that native title would primarily exist on vacant Crown land where the rights would be

equivalent, or similar to, rights of full ownership. However, the native title rights and interests that are likely to be able to exist on a tenure such as a pastoral lease, are, at the most, coexisting and cannot amount to something akin to full ownership. The provision of a full right to negotiate is therefore not appropriate in those circumstances. The object of the amendments was to ensure that the right available more closely reflected the nature of the native title rights that were likely to exist on pastoral leases and other tenures where future acts were proposed.

The right to negotiate is a unique statutory right. It is either a special measure or a measure providing substantive equality. It is a right which other Australian landowners do not enjoy. However, the fact that it is a special measure does not take away from Parliament the ability to adjust that special measure. Under international law and the Convention the Parliament can amend such provisions; there is no basis for the suggestion that the right to negotiate must remain forever in its 1993 form.

International Law Governing the Political Rights of Indigenous Peoples

Informed Consent

In decision 2(54) the CERD Committee appears to be suggesting that Article 5(c) of the CERD and General Recommendation XXIII require the consent of Indigenous Australians to any decision affecting their rights.

Australia has obligations at international law to respect the political rights of its citizens. Under Article 25 of the International Covenant on Civil and Political Rights (ICCPR) that general obligation includes the right for every citizen to take part in the conduct of public affairs, to vote, to be elected and to have access, on general terms of equality, to public service in his or her country.

Article 5(c) of the CERD elaborates on the ICCPR by obliging State parties to provide a guarantee of equality before the law in the enjoyment of rights including political rights. By virtue of these provisions Australia is under an obligation to provide for, and not impede, the individual citizen’s ability to become a public servant, to vote, to stand for parliament and to take part in public affairs.

The meaning of the term ‘public affairs’ is not defined in the CERD. However, the United Nations Human Rights Committee has accepted that the political rights in international instruments do not give rise to a right to participate in the political process in a specific fashion. Thus, groups cannot demand specific representation in an assembly, nor can groups require government to undertake a particular form of consultation in relation to legislation.

In view of the Human Rights Committee’s interpretation of what constitutes effective participation in public affairs, Article 5(c) does not appear to oblige State parties to obtain the ‘informed consent’ of groups to an exercise of legislative power.

Effective Participation

The Native Title Amendment Act was the result of an exhaustive series of consultations, inquiries by parliamentary committees and debates in both Houses of Parliament.

Following the election of the Coalition Government in March 1996 discussions were held between the Government and representatives of Indigenous and other interests in relation to difficulties in the original Native Title Act and an amending bill was introduced into the House of Representatives.

In December 1996 the High Court handed down its decision in *Wik,* recognising that native title could exist on land which was the subject of pastoral leases. Following the *Wik* decision the Prime Minister and other members of the Government held extensive discussions with Indigenous leaders as well as other stakeholders, although ultimately a consensus was not reached.

Indigenous and other interests also had opportunities to put their views to Parliament itself about the Bill. The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund conducted two inquiries into versions of the Amendment Bill. Indigenous interests made submissions to both of these inquiries, as did other individuals and groups.

The 1997 Bill was debated in Parliament over a period of ten months. Many amendments were proposed and a number passed. During this period there were extensive negotiations and discussions between Government and non-Government parties, particularly in relation to the amendments in the Senate. There were also extensive discussions and negotiations between representatives of Indigenous groups and the non-Government parties and independent Senators in relation to the preparation of their amendments.

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 the outcome.

Conclusions

The CERD Committee urged Australia to suspend implementation of the 1998 amendments and reopen discussions with the representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the Indigenous peoples which would comply with Australia’s obligations under the Convention. As stated above, there was an extensive process of consultation leading to the passage of the Amendment Act. The Parliamentary Joint Committee does not think that further discussion about the Act at this stage would be helpful.

In any case, the Parliamentary Joint Committee concludes that the amended Native Title Act is consistent with Australia's obligations under the CERD and that therefore no further amendments are necessary in order to ensure that Australia's international obligations are complied with.

Further, the Government cannot simply 'suspend' laws which have been passed by the Parliament and received royal assent. There would be limited options available to the Government if it were inclined to attempt to reverse the 1998 amendments to the Act, as recommended by the CERD Committee. The principal means of 'undoing' the amendments would be through the repeal of the *Native Title Amendment Act 1998*, or specific parts of it, through the passage of a Commonwealth Act of Parliament.

Any such repeal of the amendments to the Native Title Act would be further complicated by the fact that parts of the Act authorise the States and Territories to enact legislation to deal with various aspects of native title. The repeal of the Commonwealth amendments to the Native Title Act would have significant implications for the States and Territories. One of the most significant would be the effect of s.109 of the Australian Constitution (which relates to inconsistencies between Commonwealth and State laws) in relation to the validation and confirmation legislation of the various States.

It is also unclear whether the CERD Committee was referring to the entirety of the *Native Title Amendment Act 1998*, or only the four sets of provisions that it highlighted as being inconsistent with the CERD. The Parliamentary Joint Committee has serious concerns about any suggestion that all of the amendments to the Native Title Act be repealed or removed. This would necessarily include the essential amendments that were enacted to respond to the *Brandy* decision, to provide a workable registration test, and to provide a strong foundation for agreement making under the Act.

The removal of these provisions would, in the Committee's view, be a retrograde step in the workability of the Native Title Act. This is quite apart from the uncertainty that would be engendered by the removal of provisions which attempt to respond to the uncertainty caused by the *Wik* decision, particularly in relation to pastoral leases.