

CHAPTER 4

THE CERD DECISIONS

4.1 Pursuant to article 9(1) of the Convention, Australia has submitted periodic reports to the CERD Committee. In August 1994, following the commencement of the *Native Title Act 1993* (and in considering Australia's ninth report), the Committee recommended that Australia should:

pursue an energetic policy of recognising Aboriginal rights and furnishing adequate compensation for the discrimination and injustice of the past.¹

The CERD Committee Decision 1(53) and Request for Further Information

4.2 On 11 August 1998, at its 1287th meeting (and its 53rd session), the CERD Committee, in decision 1(53), requested under Article 9(1) that Australia provide it with information on:

the changes recently projected or introduced to the 1993 Native Title Act, as well as on any changes of policy ... as to Aboriginal land rights and in the functions of the Aboriginal and Torres Strait Social Justice Commissioner.

4.3 Further, decision 1(53) noted that:

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.

4.4 Decision 1(53) also noted that:

The Committee wishes to consider the information, in the presence of a representative of the State party, at its fifty-fourth session (1-19 March 1999) and would therefore appreciate receipt of the information by 15 January 1999.²

4.5 In compliance with decision 1(53), the Australian Government provided a response to the CERD Committee on 13 January 1999³ in a document titled *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*, a copy of

1 Concluding Observations of the Committee on the Elimination of All Forms of Racial Discrimination: Australia. 19/04/94. A/49/18, para 547.

2 Decision 1(53) on Australia: Australia. 11/08/98. A/53/18, para 11B1.

3 Attorney General's Department, Submission 24, Part I, p 8.

which is attached to the submission to this inquiry from the Attorney General's Department.

4.6 In its submission to this inquiry, the Attorney-General's Department emphasised that the request from the CERD Committee was for information regarding the amendments and related matters, and did not require Australia to demonstrate how the amendments might, or might not, have been consistent with the Convention.⁴

The CERD Committee Decision 2(54)

4.7 The CERD Committee considered these matters at its 54th session in Geneva in March 1999. A delegation from Australia, including Mr Robert Orr, Deputy General Counsel with the Australian Government Solicitor, attended the sessions relevant to Australia, providing 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. Questions were also put to the Australian delegation by the country rapporteur (and CERD Committee member) Ms Gay McDougall, in particular regarding changes to the validation, confirmation, primary production upgrade and right to negotiate provisions in the Act.

4.8 The Australian delegation addressed the CERD Committee and responded to questioning by the Committee and the country rapporteur on 12 March and 15 March. 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.

4.9 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
- provide rights and benefits to Indigenous people which were not offered to other title holders.

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

4.11 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. The delegation argued

4 Attorney General's Department, Submission 24, Part I, p 9.

that the Australian Government's position was that General Recommendation XXIII of the CERD Committee, which required that no decisions affecting Indigenous peoples interests could be taken without their informed consent, was aspirational. It allowed that in relation to the amendments such consent had not been reached.⁵

4.12 On 18 March 1999 the CERD Committee published its decision 2(54) on Australia. A copy of the decision is reproduced in this report as Appendix 3. 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 of Indigenous title holders to negotiate non-Indigenous land uses (the right to negotiate provisions).⁶

4.13 The decision also raised concerns about Australia's compliance with Article 5(c) of the Convention, given what the CERD Committee saw as the lack of effective participation of Indigenous communities in the development of the amendments. The Committee also referred to its General Recommendation XXIII, which requires the informed consent of Indigenous people to decisions directly relating to their interests.⁷ The effect and application of General Recommendation XXIII and the meaning of the terms 'effective participation' and 'informed consent' are considered in Chapter 7 of this report.

4.14 The CERD 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 and which would comply with Australia's obligations under the Convention.⁸

4.15 The Committee resolved to keep this matter on its agenda under its early warning and urgent action procedure for review at its 55th session in August 1999.

The CERD Committee Decision 2(55)

4.16 The Committee considered this issue again at its 55th session in Geneva in August 1999. The Australian Government chose not to make any oral presentation to the Committee on that occasion but instead lodged a written response to decision 2(54), under Article 9 of the Convention. In accordance with normal practice, the response was included as an appendix to the CERD Committee's annual report to the UN General Assembly. A copy of the Australian Government's response to decision

5 Unofficial transcript of Australia's appearance before the CERD Committee, 18 March 1999, at: <http://www.faira.org.au/cerd/minutes-1323-cerd-meeting3.html>.

6 Decision 2 (54) on Australia: Australia. 18/03/99. A/54/18,para.21(2), paras 6-7, at: <http://www.faira.org.au/cerd/cerd-decision-on-australia.html>.

7 Decision 2(54) para 9.

8 Decision 2(54) para 11.

2(54) is included as attachment E to the submission to this inquiry from the Attorney-General's Department.⁹

4.17 In its formal response, 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. The Australian Government noted, but disagreed with, the views of the Committee on the amendments to the *Native Title Act 1993*, stating instead 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'.¹⁰

4.18 The CERD Committee, in decision 2(55) on Australia, reaffirmed the findings of its March decision. It advised that it intended to keep the matter on its agenda for consideration, along with Australia's tenth, eleventh and twelfth periodic reports, at its 56th session in Geneva in March 2000.¹¹

The CERD Committee's 56th Session – Concluding Observations on Australia

4.19 The Committee considered Australia's combined tenth, eleventh and twelfth periodic reports on 22 and 23 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.

4.20 The Committee issued its Concluding Observations on Australia on 24 March 2000. Of relevance to the Parliamentary Joint Committee's inquiry, the CERD Committee made the following observations. It:

- expressed concern about the lack of an entrenched guarantee against racial discrimination in Australian law that would override subsequent law of the Commonwealth, States and Territories;
- noted the disallowance by the Senate of the Northern Territory's proposed alternative right to negotiate regime and recommended continued close scrutiny of any future proposed regimes, to ensure that the protection of the rights of Indigenous peoples is not further reduced;
- expressed concern at the 'unsatisfactory' response by Australia to decisions 2(54) and 2(55) concerning the amendments to the Native Title Act;

9 Attorney General's Department, Submission 24, Attachment E.

10 Australia's Reply to the CERD Committee findings of 18 March, lodged under Article 9 of the Convention, p 2, Attachment E to Submission 24.

11 At the time of the CERD Committee's first decision on Australia under its early warning and urgent action procedure, Australia was overdue in presenting its tenth, eleventh and twelfth periodic reports. These reports were subsequently submitted to the CERD Committee for consideration during its 57th session in Geneva (6-24 March 2000).

- reaffirmed the decisions and reiterated its recommendation that Australia should ensure the 'effective participation' by Indigenous communities in decisions affecting their land rights;
- recommended that Australia provide full information on this issue in its next periodic report (due 30 October 2000); and
- noted that the Parliamentary Joint Committee's inquiry was in progress and requested, pursuant to Article 9(1) of the Convention, that Australia transmit a copy of the report to the CERD Committee when it is tabled.

4.21 In response, the Commonwealth Attorney-General issued a press release in which he rejected these observations of the CERD Committee as:

an unbalanced and wide-ranging attack that intrudes unreasonably into Australia's domestic affairs.¹²

4.22 The Government also stated that the CERD Committee had not paid adequate regard to the Government's submissions to it, choosing instead to rely 'almost exclusively' on information provided by non-government organisations. In conclusion, the Government predicted that the CERD Committee's:

international credibility will be in question unless it takes a more balanced perspective in the future.¹³

12 News Release, Attorney-General, the Hon Daryl Williams AM QC MP, 26 March 2000, p 1.

13 News Release, Attorney-General, The Hon Daryl Williams AM QC MP, 26 March 2000, p 2.

