CHAPTER 7

INTERNATIONAL LAW GOVERNING THE POLITICAL RIGHTS OF INDIGENOUS PEOPLES

7.1 The CERD Committee, in paragraph 9 of its decision 2(54), stated that:

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

7.2 In paragraph 11 of its decision the CERD Committee, again referring to General Recommendation XXIII, urged Australia 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.

A Requirement of Informed Consent

7.3 In its decision the Committee appears to be suggesting that the Convention requires the consent of Indigenous Australians to any decision affecting their rights. This requirement is imposed, in the CERD Committee's view, by Article 5(c) of the CERD and General Recommendation XXIII. This interpretation of the CERD Committee's decision was supported by witnesses in the current inquiry, notably Mr John Basten QC.[1]

7.4 Australia has obligations at international law to respect the political rights of its citizens. Article 25 of the International Covenant on Civil and Political Rights (ICCPR) states the general obligation as follows:

> Every citizen shall have the right and opportunity, without any of the distinctions mentioned in Article 2 [which include race] and without reasonable restrictions:
>
> To take part in the conduct of public affairs, directly or through freely chosen representatives;

---

1 Mr John Basten QC, *Official Committee Hansard*, 23 February 2000.

> To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> To have access, on general terms of equality, to public service in his country.

7.5 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, in particular the right to participate in elections – to vote and stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.

7.6 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;
- vote;
- stand for parliament; and
- take part in public affairs.

7.7 The meaning of the term 'public affairs' is not defined in the CERD. However, the term has been considered by the Human Rights Committee. In its General Comment on Article 25 of the International Covenant on Civil and Political Rights (ICCPR) the Human Rights Committee interpreted public affairs as referring to the exercise of political power, whether that be in terms of legislative, executive or administrative power.[2]

7.8 The Human Rights Committee has further expanded on what is meant by participation in public affairs, saying that it involves the ability to exert influence through public debate in the general community and dialogue with political representatives. The obligation to protect freedom of speech and freedom of association is related to the obligation to protect the right to participate in public affairs.[3]

7.9 The Human Rights Committee has also 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

2 Attorney-General's Department, Submission 24, Part I, p 29.

3 Attorney-General's Department, Submission 24, Part I, p 29.

an assembly, nor can groups require government to undertake a particular form of consultation in relation to legislation.[4]

7.10 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.

General Recommendation XXIII

7.11 General Recommendation XXIII concerning Indigenous People, adopted by the CERD Committee on 18 August 1997, provides in paragraph 4(d) that:

> The Committee calls in particular upon States parties to:
>
> …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.

7.12 However, General Recommendations are not binding in nature, so that it cannot be said that they give rise to binding obligations on State parties.

7.13 Further, the South Australian Government submission has drawn attention to the problems which would arise for State parties if the requirements of General Recommendation XXIII were to be regarded as binding obligations, in particular paragraph 5 of the General Recommendation, which provides that:

> The Committee especially calls upon State parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources and, where they have been derived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

7.14 The South Australian Government points out that this paragraph suggests that Australia is under a positive obligation to restore to Aboriginal communities land from which they have been dispossessed since settlement.[5] The South Australian submission makes the following observation:

> If Recommendation XXIII represented the obligations of Australia under CERD then Australia's law (current and past) would not comply with CERD. No Australian Government has a policy which would result in Australian law being amended so as to comply. So far as it is known to the

---

4 Attorney-General's Department, Submission 24, Part I, p 29. Also *Marshall v Canada*, Comm No 205/1986, UN Doc CCPR/C/43/D/205/1986 (1991), paragraph 5, quoted in Submission 24, Part I, p 29.

5 State of South Australia, Submission 15, p 10.

> South Australian Government, no political party in any Australian jurisdiction has a policy which, if implemented, would result in Australia so complying.[6]

A Requirement of Effective Participation

7.15 Alternatively, the CERD Committee may have based its concern about compliance with Article 5(c) of the Convention on a 'lack of effective participation' by Indigenous communities in the formulation of the amendments.

7.16 The Commonwealth Government has outlined the process of consultation with Indigenous people over the amendments to the Native Title Act.[7]

7.17 The Coalition Government was elected in March 1996. In May 1996 a discussion paper which outlined difficulties in the original Native Title Act and invited submissions from the public and interested groups, including ATSIC and representative bodies, was circulated.

7.18 In June 1996 an amending bill was introduced into the House of Representatives containing the proposed *Brandy* amendments and changes to the threshold/registration test.

7.19 In October 1996 further amendments to the Act were publicly released proposing changes to the:

- right to negotiate;
- agreement provisions; and
- representative body provisions.

7.20 During this time, discussions were held between the responsible member of Government, Senator Nick Minchin (then Parliamentary Secretary to the Prime Minister), and representatives of industry groups and Indigenous interests.

7.21 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 the Parliamentary Secretary held extensive discussions with ATSIC leaders, representatives of native title bodies and other Indigenous groups, as well as other stakeholders, although ultimately a consensus was not reached.[8]

---

6 State of South Australia, Submission 15, p 11.

7 Attorney-General's Department, Submission 24, Part I, pp 30-34. The description of the process of consultation undertaken by the Government in relation to the amendments, and the participation of Indigenous representatives in the consideration of the amendments by Parliament, relies on Submission 24 to this inquiry, from the Attorney General's Department.

8 See also Mr Brad Selway QC, Solicitor-General for South Australia, *Official Committee Hansard*, 23 February 2000, p 101.

7.22 On 8 May 1997 the 'Ten Point Plan' was released, which contained the Government's proposals for dealing with the *Wik* decision.

7.23 Prior to the release of the Ten Point Plan 29 meetings were held between the Government and representatives of Indigenous interests, mostly the National Indigenous Working Group (NIWG) and its members, and ATSIC. The Prime Minister was involved in five of those meetings. In addition, the Prime Minister convened a Round Table meeting attended by representatives of Indigenous groups as well as other stakeholders.

7.24 Following the release of the Ten Point Plan, and prior to the introduction of the Native Title Amendment Bill into the House of Representatives in June 1997, a further four meetings were held with Indigenous interests and another four meetings were held with their legal representatives on technical issues.

7.25 On 7 May 1997 the then Chair of ATSIC, Mr Gatjil Djerrkura, wrote to the Government on behalf of the NIWG, indicating that the NIWG was not prepared to continue meeting with the Government to discuss the Ten Point Plan. There were, however, further meetings between the Government and the Chair of ATSIC until the time the Bill was passed in July 1998.

7.26 Throughout the process of parliamentary consideration of the Bill, the Government continued to express publicly its willingness to discuss the draft legislation. Other groups potentially affected by the legislation asked for, and had, meetings with the Government during that period. Indigenous representatives did not ask to meet the Government to talk about the draft legislation.

7.27 The Bill, as introduced in 1997, contained a number of proposals that were discussed extensively with representatives of Indigenous interests (particularly ATSIC). These included the provisions dealing with Indigenous Land Use Agreements and the provisions dealing with the accountability of representative bodies.

7.28 In addition, Indigenous interests had opportunities to put their views about the Bill to Parliament itself. This Committee conducted two inquiries: in September-October 1996 in relation to the 1996 amendment Bill, and in September-October 1997 in relation to the 1997 Bill. ATSIC and the NIWG made submissions to both of these inquiries, as did other individuals and groups.

7.29 The Native Title Amendment Bill 1997 was:

- considered by Parliament in November-December 1997 when it was passed by the Senate with a number of amendments which were unacceptable to the House of Representatives;
- debated in the House of Representatives and the Senate again in April 1998, with many of the amendments made by the Senate in December 1997, and again the Senate made a large number of further amendments which were unacceptable to the House of Representatives;

- passed by both houses of Parliament on 8 July 1998 with some amendments made by the Senate and some amendments made following the Government's negotiations with Senator Harradine.

7.30 In excess of 105 hours were spent considering the Bill. During this period there were extensive negotiations and discussions between Government and non-Government parties in the Senate, particularly in relation to the amendments in the Senate.

7.31 There were extensive discussions and negotiations between representatives of Indigenous groups (including ATSIC and the NIWG) and non-Government parties and independent Senators in relation to the preparation of their amendments, during the debate in the Senate and in relation to the Government amendments that were moved as a result of discussions between the Government and other parties. It is also the case that many of the proposals that were the subject of the negotiations with the Government (and which were accepted in some form) had their genesis in proposals from Indigenous representatives and were discussed extensively with both Government and non-Government parties and independent Senators.

7.32 Thus, 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.