CHAPTER 8

CONCLUSIONS

The CERD Committee Recommendations

8.1 The CERD Committee 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.[1]

8.2 At the conclusion of its examination of Australia's tenth, eleventh and twelfth periodic reports, the CERD Committee expressed concern at the 'unsatisfactory' response by Australia to decisions 2(54) and 2(55) concerning the amendments to the Native Title Act. It reaffirmed its decisions and reiterated its recommendation that Australia should ensure the 'effective participation' of Indigenous communities in decisions affecting their land rights.[2]

8.3 This recommendation of the CERD Committee is relevant to the Parliamentary Joint Committee's consideration of its second term of reference, namely:

> what amendments are required to the Act, and what processes of consultation must be followed in effecting those amendments, to ensure that Australia's international obligations are complied with.

8.4 Previous chapters of this report conclude that the amended Native Title Act is consistent with Australia's obligations under the CERD. Therefore, the answer to this question is obvious: no amendments are necessary to the Native Title Act in order to ensure that Australia's international obligations are complied with.

8.5 A number of witnesses have elaborated on their understanding of the CERD Committee decision and their belief that the Government should respond to the recommendation that the 1998 amendments be 'suspended'.

8.6 The Queensland Indigenous Working Group made the following submission on required amendments to the Act:

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1 Decision 2(54) para 11, CERD/C/54/Misc.40/Rev.2, at: http://www.faira.org.au/cerd/cerd-decision-on-australia.html.

2 CERD Committee, Concluding Observations on Australia, 56th Session, Geneva, 24 March 2000, para 9.

> The first essential step in any action to remedy the injustices caused by the 1998 amendments to the NTA is to suspend the operation of the amendments to the extent possible. That includes not allowing any state or territory alternative provisions which rely upon the 1998 amendments to come into effect. Where states and territories have relied on the 1998 amendments to the NTA to enact legislation which operates to subordinate, impair or extinguish native title, there should be immediate investigation into ways to avoid retrospectively the effects of such legislation upon native title, or to provide proper and timely restitution where the effects of the legislation are found to be irreversible.
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> Secondly, the government should enter into detailed negotiation with indigenous Australians to identify the extent, if any of *real* problems arising out of the late recognition of native title, and to explore consensual solutions to any such problems. The Government should not take any action or adopt measures which affect native title without first obtaining the informed consent of native title holders.[3]

However, representatives of QIWG did concede that there 'may be practical problems in taking up the Committee's recommendations'.[4]

8.7 A later witness, Ms Jennifer Clarke from the Faculty of Law at the Australian National University, offered a number of potential amendments that she thought might reduce what she saw as the discriminatory aspects of the amended Native Title Act, although she was not sure that they would satisfy the CERD.[5] Ms Clarke agreed that given the important measures in the Act, in particular the ILUA provisions, the registration test, and the measures responding to *Brandy*, it was:

> probably better that we think about there remaining a Native Title Act on the books.[6]

8.8 Several of the witnesses expressed the view that the Government should first negotiate with Aboriginal people and then make changes to the Native Title Act, depending on what changes the Indigenous community consented to. Ms Clarke believed that the consultation should be broader than that which occurred in 1993, although she recommended that it be limited in scope, possibly to existing Aboriginal representative bodies.[7] ANTaR recommended that:

> the appropriate way to do it is to enter into real, genuine negotiations with Indigenous people. Whatever the outcome of those negotiations is, that is the approach that should be followed by the Government … I do not think

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3 Queensland Indigenous Working Group, Submission 9, Executive Summary, p 4.

4 Mr James Fitzgerald, Queensland Indigenous Working Group, *Official Committee Hansard*, 17 February 2000, p 16.

5 Ms Jennifer Clarke, *Official Committee Hansard*, 23 February 2000, p 127.

6 Ms Jennifer Clarke, *Official Committee Hansard*, 23 February 2000, p 127.

7 Ms Jennifer Clarke, *Official Committee Hansard*, 23 February 2000, p 126.

> that we would like to pre-empt anything that Indigenous people might put and might see as the object and an appropriate outcome of any such negotiations.[8]

8.9 This view appears to be founded on the aspects of the CERD Committee decision which refer to the rights of 'effective participation' under Article 5(c) of the Convention, and of 'informed consent' in General Recommendation XXIII. As discussed in Chapter 7, there is no requirement of 'informed consent' under the CERD, or at international law generally. The Government undertook an extensive process of consultation when amending the Act in 1997-98. The Committee does not think that further discussion about the Act at this stage would be helpful.

8.10 This also appears to place a different interpretation on the CERD Committee's recommendation, which stated Australia should *first* suspend implementation of the 1998 amendments and *then* re-open negotiations with Indigenous people. This raises a number of practical difficulties in relation to the interpretation and implementation of this aspect of the CERD Committee's decision.

The Impossibility of 'Suspending' the Implementation of the 1998 Amendments

8.11 The suggestion has been made that the CERD Committee did not intend this recommendation literally. If it did, it clearly demonstrated a lack of understanding of the system of law in Australia. As the Government has advised, it is subject to the laws of Australia and cannot simply 'suspend' laws which have been passed by the Parliament and which have received royal assent. The majority of the provisions of the *Native Title Amendment Act 1998* have already entered into force, most on 30 September 1998.[9]

8.12 There are limited options available to the Government if it were inclined to attempt to reverse the 1998 amendments to the Act, as has been recommended by the CERD Committee, and suggested by several witnesses to this inquiry.[10] The main way 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.

8.13 Any suspension 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.[11] As the South Australian Government advised, the repeal of the Commonwealth amendments to the Native

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8 Mr Angus Frith, Australians for Native Title and Reconciliation, *Official Committee Hansard*, 22 February 2000, p 49.

9 Attorney-General's Department, Submission 24, Part I, p 12.

10 Mr Geoff Clark, ATSIC, *Official Committee Hansard*, 17 February 2000, pp 9-10; Mr James Fitzgerald Queensland Indigenous Working Group, *Official Committee Hansard*, 17 February 2000, p 16.

11 See s.22F re validation, ss.23E and 23I re confirmation, ss.43 and 43A re State alternative regimes to the right to negotiate.

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.[12]

8.14 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. This Committee has serious concerns about any suggestion that the complete 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.

Senator Jeannie Ferris
Committee Chair

12 Mr Brad Selway QC, Solicitor-General for South Australia, *Official Committee Hansard*, 22 February 2000, p 99.