# CHAPTER 1

# EXECUTIVE SUMMARY AND RECOMMENDATIONS

The *Native Title Act 1993*, as amended by the *Native Title Amendment Act 1998*, is racially discriminatory. It is in breach of Australia's international obligations, in particular under the Convention on the Elimination of All Forms of Racial Discrimination (the CERD).

Australia ratified the CERD in 1975. The CERD imposes an obligation on Member States to act to ensure racial equality in the enjoyment of fundamental human rights.

Compliance of State parties with their obligations under the CERD is monitored by the CERD Committee. The Committee is a panel of eighteen experts of 'high moral standing and acknowledged impartiality', elected by the State parties to the Convention from among their own nationals. Importantly, however, the CERD Committee members sit on the Committee in their personal capacity, and take an oath of impartiality upon assuming their positions.

## The Content of International Obligations: Equality

The obligation to ensure racial equality or, alternatively stated, the obligation to prevent racial discrimination, is imposed on Australia by the CERD. However, it is of such fundamental importance that it also has the status of a non-derogable principle of international law. In other words, even if Australia was not a party to the CERD, it would still be obliged to guarantee the right of all its citizens to protection against discrimination on the grounds of race.

Equality at international law means substantive equality. Under the standard of substantive equality nation states must ensure true or effective equality in the enjoyment of fundamental human rights, which means that the mere provision of formal equality (identical treatment) alone may not be sufficient where a racial group is particularly disadvantaged, or where it requires specific protection in order to be able to maintain its distinct cultural identity.

The CERD also requires that in relation to Indigenous people no decisions directly affecting their rights are taken without their informed consent. (This obligation derives from Article 5(c) of the Convention and the CERD Committee's General Recommendation XXIII.)

## The Original Native Title Act

The original Native Title Act sought to provide a form of protection that would take into account the unique nature of Indigenous peoples' traditional title and its central importance in maintaining the distinct identity of Indigenous groups. Of critical significance, the provisions in the NTA were implemented with the agreement of

Indigenous representatives, led by the Aboriginal and Torres Strait Islander Commission (ATSIC).

The original NTA established the framework for the recognition and protection of native title, and a regime for future dealings with native title which governed the circumstances under which native title could be extinguished in the future.

In 1994 the CERD Committee found that the original Native Title Act was consistent with Australia's obligations under the Convention, despite the fact that the original Act contained some discriminatory provisions. This was primarily because the passage of the original Act had the consent of Indigenous representatives.

*The Need to Amend the Original NTA*

It was generally accepted that amendments to the Act were required to deal with the need for a more effective threshold test for the registration of claims and to deal with the High Court decision in *Brandy*, which affected the functions and powers of the National Native Title Tribunal. There was, however, no need for the extensive impairment of Indigenous people's rights that was effected by the 1998 amendments, including a significant reduction in the capacity of Indigenous people to protect their native title pending recognition of that title through a determination.

One of the main reasons advanced by the Government for the substantial amendments to the NTA in 1998 was the need to ensure that the Act was 'workable'.

However, as this report argues, the 'workability' issues identified by the Government were in large part caused by a lack of good faith on the part of the Commonwealth, and most State and Territory Governments. These governments approached their obligations under the original Act with a view to deliberately creating a situation where the legislation was unworkable. The bad faith of governments in this regard is demonstrated by the fact that in some cases governments actually ignored their obligations under the original NTA by issuing titles to third parties, primarily over pastoral leases (and in some cases even over vacant Crown land), without abiding by the right to negotiate and other provisions in the future act regime. In these cases, the use of the future act regime would have ensured the protection of native title and would also have ensured the validity of the grants. The governments which made these grants did so in the full knowledge that native title may have continued to exist over this land.

Following the *Wik* decision it became clear that the disregard by governments of the future act provisions would result in the potential invalidity of these titles granted to third parties. To remedy this problem for itself, and the relevant State and Territory Governments, the Commonwealth included in the amended Act provisions which enabled the validation of these third party titles at the expense of the interests of native title holders. These validation provisions were specifically referred to by the CERD Committee as discriminatory.

In June 2000 the Western Australian Government again displayed its continuing bad faith in relation to implementing the NTA by announcing its intention to commence issuing titles, mainly for mining and exploration, to third parties without using the future act provisions of the NTA, ahead of the High Court's clarification of the extent of extinguishment of native title in that State. The High Court may consider the question of the extent of extinguishment in WA as a result of an application for special leave to appeal, lodged by the Miriuwung Gajerrong people to the decision of the Full Court of the Federal Court in the case of *Western Australia v Ward*.[1] If the High Court overturns the Full Court's decision it will result in the potential invalidity of these third party titles and again create a situation where discriminatory validation legislation at a Commonwealth level is called for.

**The CERD Committee's Findings and the Amended NTA**

The CERD Committee considered the amendments to Australia's native title legislation in August 1999 under its early warning and urgent action procedure.

In its consideration of the amended Native Title Act, the CERD Committee determined that the amendments to the Act discriminated against Indigenous native title holders by extinguishing their title and by reducing their capacity to protect their title from extinguishment in the future.

The CERD Committee's concerns were specifically in relation to the:

- validation provisions;
- 'confirmation' of extinguishment provisions;
- primary production upgrade provisions; and
- right to negotiate provisions.

The CERD Committee found that these provisions were discriminatory. Not only that, but these discriminatory measures were also included in legislation that was intended to recognise and protect the fundamental property rights of Indigenous people.

The CERD Committee was particularly concerned that these provisions were inserted into the Act without the consent of Indigenous people. The fact that the provisions inserted into the amended Act were mainly discriminatory meant that it was all the more important that Indigenous people agreed to their enactment.

This report also identifies a number of other provisions in the amended Act which discriminate against Indigenous people. These include the new stringent registration test which is denying bona fide applicants access to measures such as the right to negotiate, and the changes to the functions and funding of Native Title Representative

1 The application for special leave to appeal is due to be heard on 4 August 2000.

Bodies. The discriminatory nature of the amended NTA is discussed in detail in Chapter 6.

The CERD Committee expressed concern over the compatibility of the amended Native Title Act with Australia's international obligations under the Convention. In particular, the CERD Committee found that the NTA as amended could not be seen as a measure which addresses Indigenous disadvantage or addresses the unique nature of Indigenous peoples' interest in land.

It is clear that in amending the Native Title Act the Government has not understood its international obligations to provide equality. In particular, the Government has argued that in amending the Act it was entitled to balance competing interests.

In fact, Australia's obligation under the CERD is not to mediate between competing interests but to guarantee equality in the enjoyment of fundamental human rights. As the Aboriginal and Torres Strait Islander Social Justice Commissioner advised:

> The Convention requires that State parties balance the *rights* of different groups identifiable by race. An appropriate balance is not between miners, pastoralists, fishing interests, governments and Indigenous people, but between rights – civil, political, economic and social – of Indigenous and non-Indigenous title holders.
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> …
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> A relationship of equality is not one in which Indigenous people take their place, as just another interest group, among the vast range of non-Indigenous interest groups with a stake in native title. Rather, it is one where Indigenous interests are equal to the combined force of non-Indigenous interests, in all their forms and manifestations.[2]

Under the amended NTA, Indigenous rights and interests are extinguished, or impaired, for the benefit of non-Indigenous interests, in every case where there is an inconsistency. This does not meet Australia's CERD obligations. As Donald Rothwell and Shelley Wright, from the Faculty of Law at the University of Sydney, argue in their submission to this inquiry:

> Where private institutions (such as pastoral leaseholders, mining corporations or primary industry producers under the 1998 Act) "influence the exercise of rights or the availability of opportunities" Australia is bound to ensure that this neither creates nor perpetuates racial discrimination. Australia, through the *Native Title Amendment Act 1998,* has arguably failed in this obligation.
>
> No other group in Australian society is singled out in this way. No legislative or judicial act preventing a specific racial or ethnic group from exercising property rights already exercised under the common law and by

2 Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission 32, p 13.

> statute can be characterised as anything other than discriminatory on the basis of race or ethnic origin, specifically prohibited under the Convention.[3]

It is further argued throughout this report that the Government's obligation is not to minimise the recognition of native title for its own convenience, or the convenience of others. Nor does it satisfy Australia's international obligations merely to confirm the common law standard. The Government is obliged to ensure that the traditional title of Indigenous people is recognised and protected to the highest extent possible, irrespective of the common law.

In order to fulfil this obligation, the Government must first recognise that native title is not traditional title. Rather it is the means by which the traditional title of Indigenous people is recognised by the common law. Traditional title is based on the laws and customs of Indigenous people and is far less vulnerable to extinguishment or impairment than native title. The extinguishment of native title does not extinguish traditional title to land. Traditional title to land will continue to exist, irrespective of the position at common law on extinguishment of native title, for as long as Indigenous people continue to observe the laws and customs which give rise to their title. In order to ensure genuine and substantive equality, and in order to ensure that the law delivers justice, it is necessary that traditional title is recognised and protected to its fullest extent.

**Responding to the CERD Committee's Findings: Amending the Native Title Act**

The Government has rejected the findings of the CERD Committee, describing them as 'unbalanced'. It is evident from the analysis and consideration undertaken in this report that the amended Act is inconsistent with Australia's international obligations, as highlighted by the CERD Committee. This position is supported by the weight of informed opinion, as demonstrated by the evidence received in this inquiry.

If the Government chooses to ignore the findings of the CERD Committee, and its obligation under general international law to guarantee racial equality, it risks the condemnation of other nation states who are committed to implementing their international obligations. The rejection by Australia of the findings of the CERD Committee has already attracted the attention of States with poor human rights records.

Australia has long prided itself on its commitment to being a leading member of the international community, particularly in relation to human rights. In order to regain this reputation it must be prepared to implement its international obligations in good faith, and respect the expertise of the CERD Committee and other UN expert bodies.

In the light of the CERD Committee's findings, and the fact that the *Native Title Act 1993* is racially discriminatory, the Act needs to be amended to ensure that it is non-discriminatory and complies with Australia's international obligations.

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3 Dr Donald Rothwell and Ms Shelley Wright, Submission 29, p 7.

In particular, any amendments to the Act may need to address the validation, 'confirmation' of extinguishment, primary production upgrade and right to negotiate provisions identified by the CERD Committee as discriminatory. The immediate priority, as identified by ATSIC's submission to this inquiry, is to remove the discriminatory provisions in the Act and to reverse their effect. There are a number of mechanisms in the Act as it currently stands that may have the effect of minimising the discriminatory effect of the operation of the Act on the rights of Indigenous people, pending substantive amendments being passed.

Notably, it is open to the Government to take a policy decision not to approve any alternative State or Territory regimes that would remove the right to negotiate and lower the standard of protection offered to Indigenous title. In the long term, it is important that the NTA includes uniform, decent and enforceable national standards consistent with the Commonwealth's obligation to protect the fundamental rights of Indigenous people.

Critically, any amendments to the Act must be the result of a proper process of genuine consultation and negotiation with Indigenous people which results in their giving their informed consent to these amendments. Such a process of negotiation must be genuine, fair, inclusive, wide-ranging and culturally appropriate.

## 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.

**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.

**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.

**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.