CHAPTER 2

CERD AND THE CERD COMMITTEE

The Convention on the Elimination of All Forms of Racial Discrimination

2.1 The Convention on the Elimination of All Forms of Racial Discrimination (the CERD) was opened for signature in 1966. Australia signed the Convention on 13 October 1966 and ratified it on 30 September 1975, with a reservation in respect of Article 4 which is not relevant to the present inquiry. The *Racial Discrimination Act 1975* was enacted in the same year to implement, in part, Australia's obligations under the CERD.

2.2 The substantive provisions of the CERD, and the obligations imposed on Australia to eliminate racial discrimination, are outlined in Chapter 3.

The Committee on the Elimination of Racial Discrimination

Establishment, Qualifications and Membership

2.3 The Committee on the Elimination of Racial Discrimination (the CERD Committee) was established in 1970 under Article 8 of the Convention:

> Art.8(1) There shall be established a Committee on the Elimination of Racial Discrimination … consisting of eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems.
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> Art.8(2) The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties. Each State Party may nominate one person from among its own nationals.

2.4 The CERD Committee was the first such monitoring body to be established under a United Nations treaty. The model used to establish the CERD Committee has been of assistance in the creation of monitoring bodies under other treaties, such as the Human Rights Committee established under the Universal Declaration of Human Rights.

2.5 The CERD Committee is an independent Committee of experts. In evidence to this inquiry, Mr Les Malezer of the Foundation for Aboriginal and Islander Research Action (FAIRA) observed that:

> The individual members themselves have qualifications which verify their standing.[1]

2.6 Although linked to the United Nations in a number of ways, such as the lodging of annual reports with the General Assembly, the CERD Committee is an autonomous body. This is evidenced by the fact that it is established under the CERD itself and that its members, while nominated by their states, serve on the Committee in a personal capacity – not as representatives of their respective governments. Committee members take an oath of impartiality upon their appointment. A ballot to determine membership of the CERD Committee is held every two years and, once elected, members cannot be dismissed or replaced without their consent.[2] The Committee also establishes its own rules of procedure.[3]

2.7 The fact that Committee members serve in a personal capacity highlights an important difference between UN treaty monitoring bodies such as the CERD Committee and the Human Rights Committee, and UN Charter bodies, such as the Commission on Human Rights, established pursuant to the human rights provisions of the UN Charter. While treaty monitoring bodies elect their members on the basis of particular expertise and 'acknowledged impartiality', the Charter bodies are essentially political bodies, consisting of government representatives.[4]

2.8 In public statements, and in hearings for the current inquiry, the Government, and Government members of the Parliamentary Joint Committee, have sought to call into question the composition of the CERD Committee, the credentials of its members and, by implication, the correctness of the Committee's decisions on Australia. For example, it was noted in evidence during public hearings for this inquiry that members of the CERD Committee came from countries such as Cuba and China with dubious human rights records, and it was suggested that this brought the decisions of the CERD Committee into question.[5] Also, in questioning of the Aboriginal and Torres Strait Islander Social Justice Commissioner, the following exchange took place:

> **CHAIR:** …the membership of the CERD Committee comprises representatives of countries where human rights abuses are fundamental. I would have thought you would have been concerned that there was no Australian representation on that committee when they made a judgment such as they did.
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1 *Official Committee Hansard*, 17 February 2000, p 28.

2 United Nations Centre for Human Rights, *The First Twenty Years: Progress Report of the Committee on the Elimination of Racial Discrimination*, New York, 1991, pp 16-17.

3 Convention on the Elimination of All Forms of Racial Discrimination, Article 10.

4 Dr Sarah Pritchard, *Official Committee Hansard*, 22 February 2000, p 69.

5 *Official Committee Hansard*, 22 February 2000, pp 46-47. See also, Minister for Foreign Affairs, Media Release, 'Government to Review Treaty Committees', 30 March 2000; Attorney-General News Release, 'CERD report unbalanced', 26 March 2000.

> **Dr Jonas:** …It seems to me that, if you are going to be questioning the membership of the United Nations committee system, you might as well start doing away with the committees in general and doing away with the United Nations in general.
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> **CHAIR:** I was not suggesting that for a moment. I was simply questioning the sorts of humans rights abuses in countries like Cuba, South Africa, India, Russia and Ecuador. I just find it interesting that those people would have a priority on this country which they clearly have not had on their own.[6]

2.9 However, as the Hon Elizabeth Evatt AC, a member of the UN Human Rights Committee and a former member of the UN Committee on the Elimination of Discrimination against Women (CEDAW), observed:

> It is very easy to pick out a country which may have nominated a member and suggest that that country has a poor record on human rights. Of course, I am yet to find a country that has a perfect record, but that is another story … When one of the treaty bodies reaches a unanimous view after consideration of the issues, in a way that transcends any comments that one might make about individual members or what countries they come from, because among the members of each of the committees are people of high reputation in international law and human rights. If they participate in decisions which are reached unanimously one can have great confidence that that was reached with careful consideration of the legal issues.[7]

2.10 Furthermore, Dr Sarah Pritchard from the Faculty of Law at the University of New South Wales told the Parliamentary Joint Committee that:

> It is a matter of some pride for states to ensure that their best independent and qualified experts are nominated for election to these treaty bodies.[8]

2.11 Ms Evatt also observed that in her experience as a member of the Human Rights Committee and the CEDAW Committee, the committees operate on the principle of collegiality, and that there is:

> a common commitment to the purposes of the convention, which is far more important than any sectional interests.[9]

2.12 Ms Evatt told the Committee that despite having the opportunity at every ballot conducted since it ratified the Convention, Australia has never nominated a national for membership of the CERD Committee. This is despite the fact that the

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6 *Official Committee Hansard*, 22 February 2000, p 38.

7 *Official Committee Hansard*, 22 February 2000, p 59.

8 *Official Committee Hansard*, 22 February 2000, p 69.

9 *Official Committee Hansard*, 22 February 2000, p 59.

CERD was the first UN Convention to establish a treaty monitoring body. Further, Elizabeth Evatt advised that of all the United Nations Conventions, the CERD is:

> the one that has been the most important in the development of our human rights law, and in particular in regard to the interests of Indigenous people.[10]

Functions and Powers

2.13 The CERD Committee has three main functions under the Convention on the Elimination of All Forms of Racial Discrimination. These are:

- the examination of periodic reports submitted by State parties, which describe the implementation of the Convention in their respective countries. The CERD requires the State parties to report on the 'legislative, judicial, administrative or other measures that it has adopted' and that give effect to the Convention obligations;
- consideration of communications from individuals and groups alleging violations of rights protected by the Convention, in states which have accepted the competence of the CERD Committee in relation to individual communications; and
- examination of inter-state disputes, although the CERD Committee has never exercised this function.[11]

2.14 The CERD Committee's powers to carry out its functions are contained in Articles 9 to 16 of the Convention. Under Article 9, State parties to the Convention undertake to submit periodic reports for consideration by the CERD Committee. The CERD Committee also has the power to request reports on a more regular basis and to request further information from a State party at any time. Article 9 also provides the basis for the CERD Committee's early warning and urgent action procedure, which is discussed below.

2.15 In 1993 Australia accepted the competence of the CERD Committee, under Article 14, to receive and consider communications from individuals and groups regarding alleged violations by Australia of rights protected under the CERD.

2.16 As Elizabeth Evatt observed, the CERD Committee exercises extremely important and significant functions and its main responsibility is to work in accordance with these functions to encourage and ensure compliance with the obligations of the Convention.[12] Ms Evatt also stated that these functions are:

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10 *Official Committee Hansard*, 22 February 2000, p 59.

11 Michael O'Flaherty, 'Substantive provisions of the International Convention on the Elimination of All Forms of Racial Discrimination', in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights*, Leichhardt, 1998, p 163.

12 Hon Elizabeth Evatt AC, Submission 7, p 3.

> in keeping with the importance of the obligations states have under the instruments to observe the principles of the universal declaration, now enshrined in legally binding instruments. What I want to stress is that Australia's obligation under CERD requires it to give serious consideration to the views of the committee on these or any other issues and to respond in a positive way to that … [13]

The CERD Committee's Practice

Examination of Periodic Reports

2.17 The examination of periodic reports submitted by State parties in compliance with their obligations under Article 9 of the CERD is one of the primary functions of the CERD Committee, as outlined above.

2.18 In practice, states are often substantially overdue in presenting these reports and in many instances they may lodge a series of reports for consideration at the one session of the CERD Committee (generally held in March and August of each year). For example, at the time the Committee considered Australia under its early warning and urgent action procedure in March 1999, Australia was overdue in presenting its tenth, eleventh and twelfth periodic reports to the Committee for consideration. These were subsequently lodged with the Committee in July 1999. These periodic reports were considered by the CERD Committee as part of its 56th session in Geneva in March 2000. Australia's next periodic report is due in October 2000 and the CERD Committee has recommended that it be of an updating nature, dealing with the large number of matters which arose from the consideration of Australia's periodic reports.

The Early Warning and Urgent Action Procedure

2.19 In 1993 the CERD Committee adopted its 'early warning and urgent action procedure', under which it considered the compatibility of Australia's native title legislation. The development of this procedure was prompted by an acceptance by the chairpersons of all of the human rights treaty bodies of the UN that:

> the treaty bodies have an important role in seeking to prevent as well as respond to human rights violations. It is thus appropriate for each treaty body to undertake an urgent examination of all possible measures that it might take, within its competence, both to prevent human rights violations from occurring and to monitor more closely emergency situations of all kinds arising within the jurisdictions of States parties.[14]

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13 *Official Committee Hansard*, 22 February 2000, p 59.

14 Meeting of chairpersons of treaty bodies concerning the role of the Security Council and the development of effective responses to emergency situations, (UN Doc A/47/628, para 44) quoted in CERD, *Annual Report of the Committee on the Elimination of Racial Discrimination* (UN Doc A/48/18 (1993)), para 15. See also the discussion in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1999*, pp 23-26.

2.20 The procedure that has been developed allows the CERD Committee to examine the situation in State parties where it is of the view that there is a cause for concern on the basis of actual or potential circumstances. A former Secretary of the CERD Committee, Mr Michael O'Flaherty, has stated that the procedure has two defining elements:

- it is not dependent on the state having submitted a report for consideration; and
- matters are dealt with on a case by case basis.[15]

The early warning and urgent action procedure utilises the CERD Committee's powers under Article 9(1) of the Convention to request information from a State party about the relevant matters or circumstances of concern or interest. It was under this procedure that the CERD Committee was able to consider the situation in relation to Australia's native title legislation, although at the time Australia had not submitted a periodic report to the CERD since 1994.

2.21 Once a state is placed under the procedure it remains indefinitely on the agenda of the CERD Committee and may receive consideration at subsequent sessions.[16]

2.22 This appears to contradict the Australian Government's understanding that its most recent appearance before the CERD Committee in March this year was solely to consider Australia's periodic reports lodged pursuant to Article 9. During Australia's appearance before the CERD Committee, the Minister for Immigration and Multicultural Affairs and Minister assisting the Prime Minister for Reconciliation, the Hon Philip Ruddock MP, commented that:

> it was our understanding that those [urgent] procedures were incorporated into the normal reporting procedures, in the statement that was issued I think on the 16th of August … as far as we are concerned we will continue to report in a timely way before the Committee in the normal rounds and our belief was that the further urgent action matters were not being pressed when the decision was taken in the form that it was.

2.23 In fact, the decision by the CERD Committee issued on 16 August 1999 reaffirmed its earlier decisions of March 1999 and decided:

> to continue consideration of this matter, *together with* the Tenth, Eleventh and Twelfth Periodic Reports of the State party, during its fifty-sixth session in March 2000.[17] [emphasis added]

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15 Michael O'Flaherty, 'The Committee on the Elimination of Racial Discrimination: non-governmental input and the early warning and urgent action procedure', in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights*, Leichhardt, 1998, p159.

16 Michael O'Flaherty, 'The Committee on the Elimination of Racial Discrimination: non-governmental input and the early warning and urgent action procedure', in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights*, Leichhardt, 1998, p 160.

This clearly indicates that the CERD Committee intended to keep the situation in Australia under consideration pursuant to its early warning and urgent action procedure, in conjunction with its consideration of Australia's periodic reports.

Decisions and General Recommendations

2.24 Since its establishment in 1970, and particularly since 1992, the CERD Committee has developed a form of jurisprudence with the intention of clarifying the content of the rights that are protected, and the obligations that this imposes on State parties, under the CERD.[18] This jurisprudence takes the form of records of the Committee's examination of States' reports and individual communications and of the decisions and general recommendations issued by the CERD Committee.

2.25 The decisions of the CERD Committee are issued at the conclusion of its consideration of States' periodic reports or as part of its early warning and urgent action procedure. The CERD Committee does not always issue decisions in relation to a particular situation or State party report. In some instances, it may consider it sufficient to issue its concluding observations following the examination of a State's report. The intention of decisions directed at the situation in individual countries is to assist State parties to understand and implement their legal obligations under the CERD.

2.26 In addition to Concluding Observations and decisions on individual and specific matters, the CERD Committee also issued general recommendations. The Committee's power to issue general recommendations is contained in Article 9(2) of the Convention. General recommendations cover procedural matters as well as substantive matters relevant to the interpretation of the Convention and the obligations arising under it.

2.27 Of particular interest to this inquiry are General Recommendation XXIII on the Rights of Indigenous People, General Recommendation XIV on Article 1(1) of the CERD and General Recommendation XX on Article 5 of the CERD. In evidence to the Parliamentary Joint Committee, Dr Sarah Pritchard advised that 'the very important General Recommendations of the CERD Committee on Indigenous peoples', formed the 'jurisprudential framework' against which the CERD Committee considered and measured the amendments to the Native Title Act.[19]

2.28 The decisions and general recommendations of the CERD Committee are not, *per se*, binding on State parties to the Convention. However, they reflect the state of international law at the time they are issued and they are clearly important in informing the interpretation and implementation of State parties' CERD obligations.

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17 Decision 2(55) on Australia: Australia. 16/08/99. A/54/18, para.23(2).

18 Michael O'Flaherty, 'Substantive provisions of the International Convention on the Elimination of All Forms of Racial Discrimination', in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights*, Leichhardt, 1998, p 163.

19 *Official Committee Hansard*, 22 February 2000, p 67.

As a former Secretary of the CERD Committee has observed, there is a presumption that in the absence of other bodies interpreting the international instruments, the analysis of these human rights treaty bodies carries a particular weight.[20]

2.29 The Hon Elizabeth Evatt advised the Parliamentary Joint Committee that over the years, human rights treaty bodies had increased their ability to analyse the law and practice in states and to issue detailed findings and recommendations. She argued that these were effectively 'setting the benchmark' for how instruments such as the CERD should be interpreted and applied in the countries that had signed and ratified the Convention.[21]

2.30 On one hand, the Government has accepted the importance of general recommendations as providing 'a useful summary of existing international law',[22] but on the other hand it has sought to argue that the requirement of 'informed consent' referred to in General Recommendation XXIII is not a requirement under the CERD or at international law generally. Ms Renee Leon from the Attorney-General's Department argued that:

> General Recommendation XXIII in one respect does not do what general recommendations are intended to do, which is to reflect the state of international law. In this respect, General Recommendation XXIII goes further than anything that exists elsewhere in international law in interpreting the meaning of political rights under the convention, even taking into account of the most recent developments in international law.[23]

2.31 However, as Dr Pritchard advised, General Recommendation XXIII is firmly based in the international legal jurisprudence on minority rights, dating back to the League of Nations in 1918. As such, it reflects the state of international law and international standards on equality for Indigenous people that have been developed within the jurisprudential framework of the League of Nations and the United Nations over a considerable period. [24]

Responding to CERD Committee Decisions

2.32 Evidence and submissions to the current inquiry have highlighted the need for the Australian Government to take the decisions of the CERD Committee seriously. Mr Ernst Willheim advised that the importance of the CERD decisions on Australia could 'scarcely be overestimated':

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20 Michael O'Flaherty, 'Substantive provisions of the International Convention on the Elimination of All Forms of Racial Discrimination', in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights*, Leichhardt, 1998, p 163.

21 *Official Committee Hansard*, 22 February 2000, p 61.

22 Ms Renee Leon, Attorney-General's Department, *Official Committee Hansard*, 9 March 2000, p 154.

23 *Official Committee Hansard*, 9 March 2000, p 154.

24 *Official Committee Hansard*, 22 February 2000, p 67.

> They have unique experience and expert knowledge of the application and implementation of the Convention by States Parties to the Convention … By its ratification of the Convention, Australia has recognised and accepted the competence of CERD.[25]

2.33 Dr Pritchard expressed concern at the fact that the Australian Government was developing 'a fairly unfortunate record of responding adversely – even belligerently – to adverse findings by UN human rights treaty bodies',[26] rather than seeing interaction with these bodies as an opportunity to engage with international experts in the field, in this case in relation to the CERD and racial discrimination. This approach can be compared with the fact that in the past Australia has been praised for the standard of its participation with international human rights monitoring bodies, including the CERD.[27]

2.34 As Elizabeth Evatt argued:

> it should damage the reputation of any state if it does not respect the views of these independent treaty bodies whose concern it is to monitor compliance with the instrument … states should respect those opinions and it should reflect on their standing if they ignore them.[28]

The CERD Committee Decisions on Australia

How Australia's Native Title Legislation Was Brought Before the CERD Committee

2.35 In August 1998 the CERD Committee, acting under its early warning and urgent action procedure, issued decision 1(53) on Australia. The Committee requested that Australia provide it with information on changes to the *Native Title Act 1993*, as well as any changes of policy in relation to Aboriginal land rights and the functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner.

2.36 The Committee advised that it wished to examine the compatibility of any such changes with Australia's obligations under the CERD. It requested the information by 15 January 1999 and advised that it wished to consider the information provided in the presence of an Australian representative at its 54th session in March 1999.[29]

2.37 It is significant that Australia is the first developed nation to be 'called to account' under the early warning and urgent action procedure. Other countries placed

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25 Aboriginal and Torres Strait Islander Commission, Submission 10(a), p 6.

26 *Official Committee Hansard*, 22 February 2000, p 65.

27 Dr Sarah Pritchard, *Official Committee Hansard*, 22 February 2000, p 66.

28 *Official Committee Hansard*, 22 February 2000, p 61.

29 Decision 1(53) on Australia: Australia. 11/08/98. A/53/18, para.IIB1. 1287th meeting, 11 August 1998.

under the procedure at the same time as Australia were the Czech Republic, the Congo, Rwanda, Sudan and Yugoslavia.[30]

2.38 The activation of the early warning and urgent action procedure in relation to Australia arose from a concern by the CERD Committee that the situation in Australia 'was clearly deteriorating'[31] since the last consideration of Australia's periodic report in 1994.[32]

2.39 The matters on which the CERD Committee requested further information were first brought to its attention by individuals and non-government organisations (NGOs) from Australia. NGOs do not have any official status or standing before the CERD Committee. However, they are able to make submissions, including through the CERD Committee Secretariat, to individual CERD Committee members.

2.40 Mr Les Malezer of the Foundation for Aboriginal and Islander Research Action (FAIRA) advised the Parliamentary Joint Committee that he had met a member of the CERD Committee in Geneva in 1998 and had inquired whether it was the role of the CERD Committee to examine such matters as the amendments to Australia's native title legislation. Following this discussion, it appears that the CERD member made personal inquiries into the matter and discussed the issue with other Committee members. The CERD Committee then initiated a consideration of the matter under its early warning and urgent action procedure.[33]

2.41 It is obvious from its subsequent decisions that the CERD Committee had carefully considered the information received from a range of individuals and NGOs in Australia.[34]

The Australian Government's Response to the Request for Information

2.42 The Australian Government responded to the request for information from the CERD Committee by 15 January 1999.[35] This response included a brief background to the *Native Title Act 1993*, relevant case law and an overview of the amendments to the *Native Title Act 1993*. The submission from the Attorney-General's Department to the current inquiry advised that the CERD Committee did not request, and therefore Australia did not provide, any assessment of the compatibility of these amendments with Australia's obligations under the CERD.[36] However, it is quite clear from the

30 Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission 32, p 3.

31 CERD Committee member, Mr Wulfrum, in CERD, *Summary Record of the 1287th meeting (53rd session)*, 14 August 1998, UN Doc CERD/C/SR.1287, para 32.

32 Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission 32, p 3.

33 *Official Committee Hansard*, 17 February 2000, p 27.

34 Aboriginal and Torres Strait Islander Commission, Submission 10(a), p 4.

35 *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*, January 1999.

36 Attorney General's Department, Submission 24, pp 8-9.

CERD decision that it intended to consider these changes in the light of their compatibility with the CERD.

2.43 An Australian delegation led by Mr Robert Orr, Deputy General Counsel with the Australian Government Solicitor, appeared before the relevant sessions of the CERD Committee's 54th session in Geneva in March 1999.

2.44 Following the general practice of the CERD Committee, Ms Gay McDougall was appointed as Country Rapporteur for the consideration of this matter. The role of the Country Rapporteur is to undertake a detailed analysis of the issues, the information provided by the State party in response to the request from the CERD Committee, and other relevant information (often provided by NGOs). Other members of the Committee are also given an opportunity to put questions to the State party and to seek clarification of matters contained in the State party's information to the Committee. The State party is then given the opportunity to respond to all of the matters that have been raised and to answer the questions that are asked. There was no limitation on the information that the Australian Government could provide to the CERD Committee in relation to the relevant matters and to demonstrate that it was not in breach of its CERD obligations.

Decision 2(54) on Australia

2.45 Following consideration of the information supplied by Australia in its written response and its appearance during the 54th session, as well as the other information available to it, the CERD Committee issued decision 2(54) on Australia on 18 March 1999.[37]

2.46 The findings of the CERD Committee were in the context of its recognition that the effects of Australia's racially discriminatory land practices had endured as an acute impairment of the rights of Australia's Indigenous communities.[38] It further recognised that the land rights of Indigenous peoples are unique and encompass a traditional and cultural identification of the Indigenous peoples with their land that has been generally recognised.[39]

2.47 In summary, decision 2(54) of the CERD Committee:

- expressed concern about the compatibility of the Native Title Act, as currently amended, with Australia's obligations under the CERD;
- stated that while the original Native Title Act recognised and sought to protect Indigenous title, 'provisions that extinguish or impair the exercise of Indigenous title rights and interests pervade the amended Act';

37 The full text of decision 2(54) is reproduced as Appendix 3 to the report of the Government members.

38 Decision (2)54 on Australia, para 3.

39 Decision (2)54 on Australia, para 4.

- stated that while the original Act was delicately balanced between the rights of Indigenous and non-Indigenous title holders, the amended Act appeared to 'create legal certainty for governments and third parties at the expense of Indigenous title';
- drew particular attention to the fact that the validation provisions, confirmation of extinguishment provisions, primary production upgrade provisions and the right to negotiate provisions in the amended Act discriminated against Indigenous title holders;
- raised concerns that these provisions appear to 'wind back' the protection provided by the *Mabo (No 2)* decision and the original Act;
- decided that the amended Act was not a special measure within the meaning of Article 1(4) and Article 2(2) of the CERD and raised concerns about Australia's compliance with Articles 2 and 5 of the CERD;
- raised concern that the lack of effective participation by Indigenous communities in the formulation of the amendments to the Native Title Act was potentially a breach of Article 5(c) of the CERD;
- urged Australia, in conformity with General Recommendation XXIII, to suspend implementation of the 1998 amendments and to re-open negotiations with representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the Indigenous peoples that would comply with Australia's obligations under the CERD; and
- advised that it intended to keep this matter on its agenda under its early warning and urgent action procedure for further consideration at its 55th session in August 1999.

The Australian Government's Response to Decision 2(54)

2.48 The Commonwealth Attorney-General issued a press release on 19 March 1999, rejecting the CERD Committee's decision and stating that the CERD Committee's comments were:

> An insult to Australia and all Australians as they were unbalanced and do not refer to the submissions made by Australia on the native title issue.[40]

2.49 The Australian Government also lodged an official response to the CERD Committee decision under Article 9(2) of the CERD. Article 9(2) requires the Committee to report its suggestions and general recommendations to the UN General Assembly each year, together with any comments from State parties.

2.50 The Government's response stated that:

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40 Attorney-General, News Release, 19 March 1999.

> the Australian Government was disappointed that the written views of the Committee did not record the substance of the Government's submission and evidence on key issues reported on by the Committee. The following comments seek to redress what the Australian Government considers to have been the unfortunate omission of relevant material from the Committee's report that, by its absence, supports a point of view on the issues before the Committee which the Australian Government contests.[41]

In particular, the Australian response rejected the fact that past discrimination against Australia's Indigenous peoples in relation to their land rights had endured.[42]

Decision 2(55) on Australia

2.51 In accordance with its earlier decision, 2(54), the CERD Committee considered the situation with respect to Australia's native title legislation at its 55th session in August 1999. The Australian Government decided not to send a delegation to appear before the Committee at this session, instead relying on the written response that it had lodged under Article 9 of the Convention.

2.52 On 16 August 1999 the CERD Committee reaffirmed the decision that it had made in March.[43] It stated that it had considered in detail the information submitted and the arguments advanced by Australia. The CERD Committee took note of the written comments received from the Australian Government and advised that, in accordance with Article 9(2), these comments would be included in the CERD Committee's 1999 annual report to the General Assembly.

2.53 The CERD Committee had therefore carefully considered and taken note of all of the information and arguments presented by the Australian Government. This contradicts the Government's claim that the Committee had reached its conclusions without considering the submissions.

2.54 It is obvious that the CERD Committee also had before it a range of submissions from individuals and non-government organisations, which disputed the Government's position that the amended Native Title Act is consistent with its CERD obligations. The fact that the CERD Committee decision does not refer to the Government's position does not indicate that it did not consider it, but rather that it did not agree with it. As the ATSIC supplementary submission observed:

> Notwithstanding the effort the Government put into presentation of its legal position, the Government's legal analysis has not been accepted. In

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41 *Australia's reply to the CERD Committee findings of 18 March, lodged under Article 9 of the Convention*, p 1.

42 *Australia's reply to the CERD Committee findings of 18 March, lodged under Article 9 of the Convention*, p 1.

43 Decision (2)54 on Australia, 18 March 1999.

> substance, the legal analysis in the submissions of the NGOs has been preferred.[44]

2.55 Finally, the Committee indicated that it intended to continue consideration of this matter, together with Australia's combined periodic reports at is 56th session in March 2000.[45]

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

2.56 Having considered Australia's Tenth, Eleventh and Twelfth Periodic Reports in the presence of an Australian delegation led by the Minister for Immigration and Multicultural Affairs and Minister assisting the Prime Minister for Reconciliation, Mr Ruddock, the CERD Committee made a number of concluding observations and Comments.

2.57 Of particular relevance to this inquiry, the CERD Committee:

- expressed concern about the lack of an entrenched guarantee in Australian law against racial discrimination that would override subsequent law of the Commonwealth, States or Territories;
- expressed concern and reiterated its recommendation that the Commonwealth Government undertake appropriate measures to ensure that its CERD obligations are implemented consistently at all levels of Government;
- expressed concern at the unsatisfactory response to its earlier decisions (2(54) and 2(55)) and at the continuing risk of further impairment of Indigenous rights in Australia.
- reaffirmed all aspects of those earlier decisions and reiterated its recommendation that Australia ensure the effective participation by Indigenous communities in decisions affecting their land rights as required by Article 5(c) of the Convention and General Recommendation XXIII, and recommended that Australia provide full information on this issue in its next periodic report;
- noted that the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund was conducting this inquiry and hoped that the results of the inquiry would assist Australia to re-evaluate its response to the CERD Committee decisions 2(54) and 2(55), and requested that a copy of the PJC's report be transmitted to the CERD Committee when it was tabled;
- recommended that Australia's next periodic report, due on 30 October 2000, be an updating report and that it address the points raised by the CERD Committee in its concluding observations.

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44 Aboriginal and Torres Strait Islander Commission, Submission 10(a), p 6.

45 Decision 2 (55) on Australia : Australia. 16/08/99. A/54/18,para.23(2).

The Australian Government's Response to the CERD Committee's Concluding Observations

2.58 The Attorney-General issued a press release on 26 March, describing the CERD Committee's report as an 'unbalanced and wide-ranging attack that intrudes unreasonably into Australia's domestic affairs'.[46] The Attorney-General further warned that the Australian Government:

> expect[s] more from the Committee. Its international credibility will be in question unless it takes a more balanced perspective in the future.[47]

2.59 It is clear to non-Government members of the Parliamentary Joint Committee that the Government does not intend to respect the decisions and recommendations of the CERD Committee. The 'belligerent' attitude of the Government in responding adversely to the decisions of the CERD Committee is also evident in a press release issued by the Minister for Foreign Affairs on 30 March 2000, in which he announced a review of the UN treaty committee system. He stated that:

> the Government was appalled at the blatantly political and partisan approach taken by the UN's Committee on the Elimination of Racial Discrimination (CERD) when it considered Australia's periodic reports in Geneva last week … The Committee's observations are little more than a polemical attack on the Government's indigenous policies. They are based on an uncritical acceptance of the claims of domestic political lobbies and take little account of the considered reports submitted by the Government.
>
> …
>
> The Cabinet has determined that it would now be appropriate to review how Australia participates in the UN treaty committee system.[48]

2.60 It appears to the non-Government members that the Government has already pre-determined its response to this review of the UN treaty committee system. It has been suggested by some witnesses to this inquiry that if the Government is not prepared to take its obligations under the CERD seriously, it should instead seriously consider its continued involvement as a signatory of the Convention. In particular, Jeremy Hobbs from Community Aid Abroad observed that:

> we are a parliamentary democracy and, as such, we chose to become a signatory to the CERD. To us, it seems you cannot be part-pregnant on this. Either you agree to the conditions of the CERD, or you do not. If Australia does not want to be a party to the CERD, then surely we should withdraw – and I think that is an unthinkable option for Australia. In that instance, I

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46 Attorney-General News Release, *CERD report unbalanced*, 26 March 2000.

47 Attorney-General News Release, *CERD report unbalanced*, 26 March 2000.

48 Minister for Foreign Affairs, Media Release, 'Government to Review Treaty Committees', 30 March 2000.

> think we have to abide by, if you like, the umpire's ruling in this particular case.
>
> [Australia] has at no stage said that we should not be a signatory to [CERD], and it has at no stage said that we should repeal the Racial Discrimination Act. Therefore, I think that we are obliged to accept international criticism when it is made by such a body.[49]

2.61 Non-Government members of the Parliamentary Joint Committee agree that withdrawal from CERD should not be an option for Australia simply because the Government does not like the fact that the CERD Committee has raised concerns about its compliance with its obligations under the CERD.

2.62 Further, even if the Government saw the repudiation of its commitment to CERD, under Article 21, as an attractive option, this does not relieve Australia of the fundamental obligations under international law in respect of equality and non-discrimination. As discussed in Chapter 3, non-discrimination is a norm of international law from which no derogation is permitted.[50]

2.63 The Australian Government could choose to ignore its obligations at international law to ensure racial equality. There are no sanctions for taking such a course of action, other than the reproach or condemnation of other nations. However, in order to continue to be a leading member of the international community, Australia must comply with its international legal obligations, particularly on such a fundamental issue as racial equality.[51]

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49 *Official Committee Hansard*, 22 February 2000, pp 89-90.

50 Dr Sarah Pritchard, *Official Committee Hansard*, 22 February 2000, p 70; Aboriginal and Torres Strait Islander Commission, Submission 10(a), p 7. See also Gillian Triggs, 'Australia's Indigenous Peoples and International Law: Validity of the *Native Title Amendment Act 1998* (Cth)', in *Melbourne University Law Review*, Vol 23, 1999, p 377.

51 See the discussion of this issue in Chapter 8.