CHAPTER 7

IS THE CERD COMMITTEE'S DECISION SUSTAINABLE?

7.1 The first term of reference for this inquiry asks:

> whether the finding of the Committee on the Elimination of Racial Discrimination (CERD) that the *Native Title Amendment Act 1998* is inconsistent with Australia's international legal obligations, in particular the Convention on the Elimination of All Forms of Racial Discrimination, is sustainable on the weight of informed opinion;

7.2 ATSIC has pointed out that the CERD Committee in fact expressed concern over the compatibility of the Native Title Act, as amended, (rather than the 1998 Amendment Act) with Australia's obligations under the CERD.[1] Similarly the Commonwealth Government has said that:

> As pointed out by ATSIC in its submission … the first term of reference does not accurately reflect the [CERD] Committee's actual decision. It is clear from the terms of the Committee's findings that the Committee's intention was to consider the amended Act not the *Native Title Amendment Act 1998*. The Government agrees that consideration of the amended Act is appropriate rather than the 1998 amendments.[2]

7.3 Thus the question posed in the first term of reference for this inquiry should properly focus on an assessment of whether the NTA as amended by the NTAA is inconsistent with Australia's international legal obligations.

7.4 Further, as regards the assessment of the CERD Committee's decision the Commonwealth Government has submitted that:

> In the Government's view the question of whether or not the Committee's findings can be sustained is not a matter to be determined by 'counting heads' but by a serious analysis of those findings in the context of international law and its application to the relevant circumstances.[3]

7.5 Thus, the first term of reference can properly be considered an inquiry into whether the finding of the CERD Committee that the amended NTA is inconsistent with Australia's obligations under international law, in particular those arising under the CERD, is correct.

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1 ATSIC, Submission 10, p 4.

2 Attorney-General's Department, Submission No 24, Part 1, p 6.

3 Attorney-General's Department, Submission No 24, Part 1, p 6.

The CERD Committee's Findings

Implementing the Principle of Equality

7.6 In its decision 2(54) the CERD Committee:

> having considered a series of new amendments to the Native Title Act, as adopted in 1998, expresses concern over the compatibility of the Native Title Act, as currently amended, with [Australia's] international obligations under the Convention.[4]

7.7 The CERD Committee went on to offer an explanation of why it considered that there may be an incompatibility between the amended NTA and Australia's obligations under the Convention:

> While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title holders.[5]

7.8 In particular the Committee noted four specific sets of provisions included in the amended NTA which discriminated against native title holders. These were provisions for the:

- validation of intermediate period acts;
- confirmation of extinguishment;
- primary production upgrades; and
- reduction in the scope of the right to negotiate.

7.9 The CERD Committee expressed the view that:

> These [discriminatory] provisions raise concerns that the amended Act appears to wind back the protections of indigenous title offered in the Mabo decision of the High Court of Australia and the 1993 Native Title Act.[6]

7.10 The Committee also observed that:

> As such, the amended Act cannot be considered to be a special measure within the meaning of Articles 1(4) and 2(2) of the Convention and raises concerns about [Australia's] compliance with Articles 2 and 5 of the Convention.[7]

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4 Decision 2 (54) on Australia : Australia. 18/03/99. A/54/18,para.21(2), para 6.

5 Decision (2)54 on Australia, para 6.

6 Decision (2)54 on Australia, para 8.

7 Decision (2)54 on Australia, para 8.

Effective Participation and the Requirement of Informed Consent

7.11 The CERD Committee in its decision 2(54) expressed the view that:

> The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to [Australia's] compliance with its obligations under Article 5(c) of the Convention.[8]

7.12 As set out in Chapter 3, Article 5(c) requires that State parties to the Convention guarantee the rights of their citizens to equality before the law in the enjoyment of:

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

7.13 The obligation of State parties under Article 5(c) in relation to their indigenous populations is elucidated by General Recommendation XXIII. This general recommendation is concerned specifically with discrimination against Indigenous peoples who:

> in many regions of the world … have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently the preservation of their culture and their historical identity has been and still is jeopardised.[9]

7.14 General Recommendation XXIII (as the CERD Committee noted in its decision) calls upon State parties to the Convention 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…[10]

7.15 General recommendations of the CERD Committee are not binding on State parties to the Convention. However, they do provide a guide to the international law relevant to the obligations imposed by the CERD.[11] General Recommendation XXIII indicates that, at international law, the consent of Indigenous people is required where government action will directly affect their rights and interests. Moreover, this requirement of consent derives its significance from the particular discrimination,

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8 Decision (2)54 on Australia, para 9.

9 General Recommendation XXIII(51) concerning Indigenous Peoples, paragraph 3.

10 General Recommendation XXIII(51) paragraph 4(c). See Also CERD Committee decision 2(54) on Australia, paragraph 9.

11 See Chapter 2.

disadvantage and dispossession suffered by Indigenous people as a result of the expansion of colonial societies, of which Australia is one. This was commented upon by Brennan J in his decision in Mabo (No 2):

> Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation.[12]

An Analysis of the CERD Committee's Findings in the Context of International Law

Did the CERD Committee Ask the Right Question?

7.16 The South Australian Government has argued that there are some indications that the CERD Committee has made the mistake of considering whether the NTAA complied with the CERD obligations, whereas the proper question is whether the amended NTA as a whole is consistent with the obligations under the CERD.[13]

7.17 The Commonwealth Government has made similar criticisms of the CERD Committee's approach, arguing that:

> whilst the Committee states that it is looking at the balance of the Act as amended … it does not appear to have in fact followed that approach. The Committee does not appear to have looked at the amended Act as a whole, and the wide range of measures it contains. Rather the Committee has focussed on only some elements of the Amended Act in isolation.
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> In particular the Government believes that the Committee has not given sufficient weight, or indeed any weight, to the aspects of the native title legislation that are clearly beneficial to indigenous Australians. The Committee's approach appears premised on an assumption that either:
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> - there were *no* measures in the amended Native Title Act or any other action by the Australian Government that were beneficial to native title holders that could 'counter balance' the 'discriminatory' provisions included; or
> - there were not *enough* measures that were perceived as positive to indigenous people to 'counter balance' the 'discriminatory' provisions of the *Native Title Amendment Act 1998.*[14]

7.18 The Commonwealth Government has submitted that the correct approach should be to assess whether the range of measures provided in the amended NTA as a whole, are discriminatory. In this case it argues that the four sets of provisions which

12 *Mabo (No 2)* (1992) 175 CLR 1 at 434.

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

14 Attorney-General's Department, Submission 24, Part I, p 20.

were of particular concern to the CERD Committee were 'reasonable in all the circumstances'.[15] Further, the amended Act includes a range of 'positive measures'.[16]

7.19 The South Australian Government also argued that:

> The State of South Australia accepts that the amendments reduce the extent of some of the protections that had been given in the 1993 Act, but the Act considered as a whole, remains beneficial.[17]

7.20 However, the arguments of the South Australian and Commonwealth Governments demonstrate a misunderstanding of the CERD Committee's decision, which is based firmly within the body of international law regarding the principle of equality.[18]

7.21 The CERD Committee opined that 'the amended Act cannot be considered to be a special measure within the meaning of Article 1(4) and 2(2)', suggesting that it regarded the original NTA to have been a special measure. In determining the meaning of the term 'special measure' in the CERD decision, resort must be had to international law.

7.22 The CERD obliges State parties to eliminate racial discrimination and to ensure substantive equality. The standard of substantive equality requires the basic guarantee of formal equality of treatment. In addition, State parties are obliged to treat racial groups differently, through special measures, where this is necessary to provide real, actual or substantive equality. Special measures are essential to the provision of equality not additional to it.[19] Further, the consent of the racial group concerned is essential to the characterisation of differential treatment as a non-discriminatory special measure.

7.23 Special measures are mentioned in both Articles 1(4) and 2(2) of the CERD. Under Article 2(2) State parties are required to implement special measures (differential treatment) to ensure the development and protection of racial groups whenever the circumstances warrant such measures.[20]

7.24 The CERD Committee considered the original NTA as a 'special measure' in the sense that in providing, in some respects, for the differential treatment of

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15 Attorney-General's Department, Submission 24, Part I, p 21.

16 Attorney-General's Department, Submission 24, Part I, p 22 and see generally pp 22-27.

17 State of South Australia, Submission 15, p 8. See also Mr Brad Selway QC, *Official Committee Hansard*, 22 February 2000, p 99.

18 See Chapter 3.

19 Whereas, under a formal equality approach, special measures are considered additional to the standard of equality and therefore discriminatory. See the discussion in Chapter 4 on substantive and formal equality.

20 See Chapter 3 for the discussion of the CERD requirements including the implementation of special measures.

Indigenous interests, it sought to address the specific disadvantage of Indigenous people, and also to ensure the protection of their unique rights.[21]

7.25 As has already been discussed, where legislation provides for the differential treatment of members of a racial group, the informed consent of those affected is essential in determining whether the obligation to implement the principle of equality is fulfilled. The existence of informed consent is essential even where the law purports to confer only a benefit on the racial group concerned, and the reasoning on this was set out in the judgment of Justice Brennan in *Gerhardy v Brown.* Also, General Recommendation XXIII indicates that at international law, given the specific and continuing disadvantage of Indigenous people due to the expansion of colonial societies, the informed consent of Indigenous people is required where an action will directly affect their rights and interests.

7.26 Further, the inclusion of discriminatory provisions in such legislation would not necessarily mean that the legislation failed to fulfil the requirement of equality under CERD. As observed earlier, the CERD Committee seems to accept that it is possible for groups to contract out of the protection offered by the Convention. Thus, the inclusion of discriminatory provisions in the law will not necessarily contravene the Convention where the group concerned has agreed to the provisions.

7.27 In observing the 'delicate balance' effected by the original Act between Indigenous and non-Indigenous interests the CERD Committee was not itself engaging in the exercise of weighing up the discriminatory provisions in the original Act against the beneficial provisions. Neither was the CERD Committee suggesting that, in its opinion, the inclusion of further discriminatory provisions through the NTAA had somehow tipped the balance of provisions in the NTA towards discrimination rather than benefit.

7.28 Rather, the CERD Committee was referring to the fact that the original NTA represented an agreement with Indigenous representatives. In other words, and this is the critical issue, the assessment of balance between the extinguishment of Indigenous title in exchange for future protection had been made by Indigenous people themselves through their representatives. The agreement had produced a law which achieved, among other things, the protection by validation of potentially invalid non-Indigenous interests, the facilitation of the grant of non-indigenous interests in land in the future, and the protection of non-Indigenous title in relation to that future activity.

7.29 The NTAA upset this agreed balance by inserting into the NTA provisions which extinguished or impaired native title and reduced the protective measures in the original Act, for the purpose of providing legal certainty for governments and non-Indigenous interest holders. Further, and most importantly, these amendments, which were largely detrimental to native title holders, were enacted without their consent.

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21 See the discussion of the original NTA as a substantive equality measure in Chapter 4: the original Act provided for a basic guarantee of formal equality through the freehold standard plus additional special measures to address Indigenous disadvantage and the unique nature of native title.

Mr John Basten QC advised this Committee in evidence given in the present inquiry that:

> The approach that was adopted by the CERD Committee was basically that, as at 1993, the Native Title Act did not contravene the convention despite the fact that it had significant validation provisions which operated against the interests of native title holders. As I read their comments, the reason for that is that they accepted at that time that there was agreement between the Government and the Parliament and the native title holders or the representatives of indigenous people, perhaps more accurately, that as a whole the act was acceptable and therefore constituted a special measure and therefore did not contravene the convention.
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> One of the problems that arises with the amendments is that if one accepts – as the CERD Committee does and I do not think that the Government disputes it – that the new act since 1998 no longer has the support of indigenous people, then the basis for considering it as a special measure disappears …[22]

7.30 If the amended NTA can no longer be considered a special measure then, as Mr Basten pointed out:

> the original validation provisions themselves must now be in contravention of the convention. That, it seems to me, is a very serious consequence of the procedure that was followed in 1998 to make significant amendments to the Act in a way which did not have the support of indigenous people.[23]

Is Any Legislation which Provides Protection above the Common Law Standard a Special Measure?

7.31 Alternatively, the South Australian Government has suggested that as the common law does not provide native title with any protection against extinguishment, any legislation which provides native title with a level of protection against extinguishment is clearly beneficial. Accordingly, both the original NTA and the amended NTA are clearly beneficial. Moreover, the South Australian Government suggests that such legislation is beneficial irrespective of whether or not Indigenous groups have consented to it:

> It was because that title was so susceptible to extinguishment … that the Commonwealth Government was moved to act and that Aboriginal leaders consented to the legislation. This was recognised by the High Court in its ready and unanimous acceptance (without any reference to whether or not there had been any consent, much less whether the consent had been given by those having the relevant rights) that the 1993 Act was beneficial.

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22 *Official Committee Hansard*, 23 February 2000, p 108.

23 *Official Committee Hansard*, 23 February 2000, p 108.

> Once it is accepted that the 1993 Act was clearly beneficial and was clearly a special measure primarily because of the weakness of common [law] native title in the absence of the protection afforded by the Act, then it becomes clear that the Act as amended in 1998 remains beneficial and a special measure.[24]

7.32 The South Australian Government has suggested that Indigenous people would have preferred the amended NTA to a situation where there was no Act at all:

> would the indigenous leaders who opposed the 1998 amendments for the obvious reason that the wound back some of their entitlements have preferred to have no act at all? The answer to that, in my view, would be no.[25]

7.33 The *Mabo (No 2)* decision established that the common law was capable of recognising native title but that native title was vulnerable to extinguishment by valid acts of the Crown. Thus, the decision can be considered to facilitate a process which had commenced upon the colonisation of the Australian continent by Britain: the unfettered dispossession of Indigenous people by government.[26]

7.34 However, native title was afforded some protection against extinguishment by the Racial Discrimination Act in particular.[27] The RDA operated to ensure that native title holders would have the same protection against the impairment or extinguishment of their title by State and Territory Governments as the holders of ordinary title. In other words, the RDA would ensure that the standard of formal equality prevailed in respect of State and Territory dealings with land over which native title existed (or was likely to exist given that it is a pre-existing title). The protection afforded native title by the RDA formed the basis of the general procedural rights - the freehold test standard - in the future act regime under the original Act.[28]

7.35 The first point to make in relation to the argument of the South Australian Government is that by reducing the freehold standard, the amended NTA reduced the general standard of formal equality that native title holders would anyway have been guaranteed, in relation to future acts by State and Territory Governments that affected native title. Therefore, it is arguable whether Indigenous people would have preferred the amended NTA to having no Act at all.

7.36 The second point to make about the South Australian Government's argument, is that the Commonwealth Government's obligation under the CERD is not merely to ameliorate the vulnerability of native title at common law, but to ensure that

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24 Submission 15, pp 7-8.

25 *Official Committee Hansard* 22 February 2000, p 100.

26 See Chapter 4.

27 Also by the Commonwealth Constitution. See the relevant discussion in Chapter 4.

28 See Chapter 4.

the standard of substantive or actual equality is achieved. The obligation includes accommodating the special nature of native title.

7.37 As previously discussed in this report, the consent of Indigenous people is required in relation to measures that affect their rights and interests particularly where differential treatment is proposed. The Government's assessment that a measure affecting Indigenous people is beneficial is not sufficient; those affected by the measure must consent to that differential treatment. As Brennan J observed:

> The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having a material benefit foisted on them.[29]

7.38 Similarly, with the question of whether Indigenous people would have preferred the amended NTA to having no Native Title Act at all is one that must be answered by Indigenous people themselves. As Mr Basten commented in evidence before this Committee:

> What is important is that the views of indigenous people are obtained and reflected in legislation. This is why I resist the idea that one says, 'Should one repeal the whole act or not?' That is a matter on which a consultation process would need to be undertaken. I can understand the proposition that, objectively, the act is, as a whole, beneficial to indigenous people. But that is a view which I think they should express not me.[30]

Conclusion: Is the CERD Decision Sustainable?

7.39 On an analysis in the context of the applicable international law the conclusion can be drawn that the findings of the CERD Committee which are relevant to the first term of reference are sustainable. Specifically, the amended NTA as a whole is incompatible with Australia's international legal obligations arising under the CERD, and international law generally. This incompatibility arises primarily as a result of the process that was followed in implementing the amendments to the NTA, without the informed consent of Indigenous people whose rights and interests are affected by the operation of the NTA.

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29 *Gerhardy v Brown* (1985) 159 CLR 70 at 135. See also Chapter 3.

30 *Official Committee Hansard*, 23 February 2000, pp 109-110.