CHAPTER 8

AMENDING THE NATIVE TITLE ACT

8.1 The second term of reference for this inquiry requires this Committee to consider:

> 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.

8.2 The amended Native Title Act does not comply with Australia's international legal obligations. As a result, two options arise for consideration by the Australian Government. The first is that it may accept that further amendments to the Act are necessary to fulfil its international obligations. The second option is that the Australian Government may choose to repudiate the CERD.

8.3 A repudiation of the CERD would not free the Government from the obligation to ensure racial equality in the enjoyment of fundamental human rights and freedoms. As has been previously discussed, the requirement that states ensure racial equality has the status of *jus cogens* at international law. In other words, it is a fundamental principle inherent in the general body of international law, from which no derogation is allowed.

8.4 The Australian Government may choose to ignore international law. There are no sanctions for such a course of action except the opprobrium of other nation states which are committed to abiding by international legal principles. However, if Australia wants to continue to play a part in the international community it must comply with its international legal obligations, in particular an obligation of such fundamental importance as ensuring racial equality.

8.5 Australia's criticism of the CERD Committee has already attracted the attention of states with poor human rights records. For example, it was reported in a recent newspaper article that:

> Authoritarian China has moved quickly to exploit Australia's attack on the United Nations Human rights system, with a senior Chinese diplomat saying the countries shared common frustrations with the world body.
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> …
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> Senior DFAT officials had warned the Government that public attacks on the UN and its human rights committee system would encourage regimes

> like China, which refuses to accept international criticism of its widespread human rights abuses.[1]

8.6 The report in this article can be contrasted to an article written earlier reporting that the UN Secretary General:

> Congratulated Australia for what he called 55 years of model membership and a perfect partnership with the UN.[2]

8.7 As the Hon Elizabeth Evatt advised this Committee in evidence:

> I think it does affect our standing in the community concerned with human rights. A country such as Australia has many creditable things to be said about it in regard to its human rights – I do not disagree with that; we have many things that we can be proud of in regard to human rights – but countries tend to be judged not on the excellence of their rights in some areas but on the areas where they fall by the wayside. It is their reaction to those faults in performance that is important. If there is a failure to meet an international standard, then the way the country deals with that failure is the way the country will be judged …[3]

Amending the Amended Native Title Act

8.8 If the Government is to comply with its international legal obligations the NTA in its current form must be amended. The CERD Committee has already identified some discriminatory aspects of the legislation. In addition, the discussion of the amended Act in Chapter 6 of this report has indicated that the impact of provisions such as those dealing with the registration test and the Federal Court's way of operating may be discriminatory.

8.9 However, the problems with the 1998 amendments to the NTA primarily arose from the fact that they were made without the informed consent of Indigenous people whose rights and interests are affected by the operation of the Act.

8.10 The CERD Committee in its decision 2(54) called upon Australia to:

> address these concerns as a matter of utmost urgency. Most importantly, in conformity with the Committee's General Recommendation XXIII concerning Indigenous Peoples, the Committee urges [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

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1 'China Claims Canberra as anti-UN ally', *Sydney Morning Herald*, Saturday 8 April 2000. See also 'UN Slur is Hypocritical', *Age*, Friday 31 March 2000, and 'And the Loser is …', *Age* Tuesday, 4 April 2000.

2 'UN to vet jailing laws', *Age*, Tuesday, 22 February 2000.

3 The Hon Elizabeth Evattt AC, *Official Committee Hansard* 22 February 2000, p 63.

> view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention.[4]

8.11 The process of consultation undertaken in 1993 in the preparation of the original Act was appropriate given the novel state of the law at the time. However, it is not necessarily an appropriate model of consultation with Indigenous communities over any future amendments to the Act.

8.12 It is beyond the scope of this inquiry to consider the precise form of the process for consultation and negotiation with Indigenous people. However, it is useful to foreshadow some significant elements of that process. The importance of those who have the right to speak for country under Indigenous traditional law (for these purposes, Traditional Owners) must be acknowledged and, to facilitate their participation, consultation and negotiation should be regionally focussed. NTRBs and other representative regional community based Indigenous organisations should also be included, most importantly to ensure that TOs are properly resourced and advised in relation to the process. A national representative body would play an important monitoring role and ensure that regional bodies and TOs have access to expert advice.

8.13 A government genuinely committed to implementing its obligations under international law to ensure that the NTA is not discriminatory, must undertake a proper process of consultation and negotiation with Indigenous people and their communities, which is fair, inclusive, wide ranging and culturally appropriate, as regards, in particular:

- Indigenous methods of decision making; and
- Indigenous authority structures.

8.14 Furthermore, in consultations and negotiations with Indigenous people over the form of amendments to the Act, the Government must direct itself to fulfilling it obligations under the CERD, and under international law generally. As Elizabeth Evatt advised, what is required is:

> a genuine process of consultation with those affected by the decision in order to seek ways to bring the Act into line with our obligations under the Convention.[5]

8.15 As has been observed throughout this report, the obligation of the Government is not to minimise the extent of native title for its own convenience or for the convenience of other interests holders. Nor is the Government's obligation to confirm the common law standards, or merely to ameliorate the effect of the common law vulnerability of native title.

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4 Decision 2(54), paragraph 11.

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

8.16 The Government's obligation is to ensure that irrespective of the common law, Indigenous traditional title is recognised and protected to the highest extent possible, particularly given the central importance of traditional title to land in maintaining the distinct cultural identity of Indigenous groups.

8.17 The starting point for a Government seeking to fulfil its obligation to ensure that effective, substantive equality in the protection of Indigenous traditional title is achieved, is the recognition that native title is not traditional title, but rather the means by which traditional title is recognised by the common law. The extinguishment of native title does not extinguish traditional title or traditional affiliation with land. In other words, 'extinguishment' of native title means that the common law will cease to recognise traditional title but it does not, and cannot, mean that traditional title itself is extinguished.[6] For as long as Indigenous people continue to observe the laws and customs which give rise to their traditional title to land, that traditional title continues to exist (irrespective of common law recognition of it) and, furthermore, it continues to form the basis of their cultural identity and community life. The truth of this is evident in the many Indigenous communities throughout Australia which have maintained their law and knowledge of their lands, despite the denial of their traditional title at common law for the better part of 212 years.

8.18 Genuine, effective or substantive equality measures should endeavour to protect traditional title to its fullest extent, by ensuring that native title accurately reflects the content of traditional title (rather than provisions which confirm the limited recognition of traditional title in the 'bundle of rights' approach, as the Government has enacted). Further, provision for the 'revival' of native title should be considered, where it would otherwise have been extinguished at common law (rather than provisions which confirm the extinguishment of native title, as the Government has enacted).[7]

8.19 In addition, the NTA can only provide a framework for the recognition and protection of native title. The commitment of the Commonwealth and State and Territory Governments to implementing the measures in the Act, and ultimately in negotiating determinations of native title, is also required.[8]

Suspending the Implementation of the 1998 Amendments

8.20 The CERD Committee called on Australia to 'suspend implementation of the 1998 amendments' pending negotiations with Aboriginal and Torres Strait Islander people on an acceptable solution.

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6 See the discussion of the common law concept of native title in Chapter 4.

7 The NTA already provides for the 'revival' of native title notwithstanding the extinguishment at common law, in very limited circumstances.

8 See Richard Bartlett, 'Only an Interim Regime: the Need for a Long Term Settlement Process', in Richard Bartlett and Gary Meyers (eds), *Native Title Legislation in Australia*, Perth, 1994.

8.21 The Commonwealth Government offered the following criticism of the CERD Committee decision:

> It may be that the reference to the 'suspension' of the amendments was not intended literally. Under the Westminster form of government it is not possible for Executive Government to 'suspend' amendments which have been passed by the Parliament and assented to by the Governor-General.[9]

8.22 However, Mr John Basten QC commented in evidence:

> I know that the term 'suspend' has been the subject of comment, and indeed the Government commented that the [CERD] committee must have been confused and did not understand that it could not suspend the operation of laws. I must confess that I found that a slightly trivial criticism. The Government can put an amendment to the Parliament … which would have that effect. How one goes about it, of course, is not a matter which the Committee addressed. There are significant aspects of this Act which require administrative activity by a Government minister – for example, the Attorney-General – and he could decline to make decisions while these matters are considered.[10]

8.23 In fact, as ATSIC pointed out in its submission:

> The immediate priority is to remove those provisions that are clearly discriminatory and reverse their effect. It has recently been suggested that there are mechanisms in the amended Act as it stands that would allow this work to commence immediately. Particular mechanisms include:
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> - removal of tenures from the list of scheduled interests by regulation (section 23B(10))
> - agreements to change the effect of validation (section 24EBA(6)); and
> - restitution of land through the compensation provisions (section 79).[11]

8.24 In addition, it is open to the Commonwealth Government to take a policy decision not to approve any alternative State or Territory future act regimes. These alternative regimes, as described in Chapter 6, would, if approved by the

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

10 *Official Committee Hansard* 23 February 2000, p 112. The administrative activity to which Mr Basten is referring is to the power of the Attorney-General to make determinations approving State and Territory regimes that replace the right to negotiate under ss.26A, 26B, 26C & 43A.

11 ATSIC, Submission 10, p 11. In relation to the existing mechanisms in the amended Act that may be utilised to limit the effect on native title see Darren Dick and Margaret Donaldson, 'The Compatibility of the amended *Native Title Act 1993* (Cth) with the United Nations Convention on the Elimination of All Forms of Racial Discrimination', in Strelein (ed), *Land Rights, Laws: Issues of Native Title*, Issues Paper 29 August 1999, Native Title Research Unit, AIATSIS, Canberra.

Commonwealth Attorney-General,[12] allow State and Territory Governments to replace the RTN with lesser procedural rights.[13] Given the CERD Committee's concerns about the changes to the right to negotiate, it has been suggested that there should be no further determinations made under these provisions pending the outcome of negotiations with Indigenous people.[14]

8.25 The other immediate action the Government could take to ameliorate the detrimental effects of the amended NTA, pending its further amendment, is to ensure that NTRBs are adequately funded to carry out their expanded functions. Adequate funding of NTRBs would go some way towards ensuring that Indigenous people can effectively participate in decisions affecting their rights and interests in land, and can also ensure, to some extent, the protection of those interests in the interim pending amendments to the NTA following genuine and wide ranging consultations with Indigenous groups.[15]

12 The Commonwealth Attorney-General's approval (in writing) of a State or Territory alternative scheme can be 'disallowed' by the Commonwealth Parliament. In fact, on 31 August 1999 the upper house of Parliament – the Senate – disallowed the Attorney-General's approval in relation to an alternative scheme proposed by the Northern Territory. Further, on 8 June 2000, Senator John Woodley of the Australian Democrats gave notice of a motion to disallow the Attorney-General's determinations in relation to Queensland's proposed alternative regimes under ss.26A, 26B and 43A of the Act. A Senate vote on this motion is yet to take place.

13 Sections 26A, 26B, 26C and 43A.

14 Queensland Indigenous Working Group, Submission 9, p 20.

15 As discussed in Chapter 6, the funding of NTRBs is frozen at 1997 levels. In addition, the amendments to the NTA have expanded their functions without a commensurate increase in their funding. Further, the re-recognition process for NTRBs and the re-registration of native title applications have placed increased pressure on the resources of these organisations.