Submission by Australians for Native Title and Reconciliation (ANTaR)

to the

Committee on the Elimination of Racial Discrimination

pursuant to their request for information concerning the compatibility of the 1998 native title amendments with Australia's obligations under the

***Convention on the Elimination of All Forms of Racial Discrimination*.**

Krysti Guest and Jennifer Clarke

March 1999

Executive Summary

The Original *Native Title Act 1993*

The original *Native Title Act 1993* was finely balanced between the interests of non-indigenous people and the interests of indigenous peoples.

- The original Act allowed 'validation' of land dealings post-1975 that might have been invalid because of the *Racial Discrimination Act* 1975, which implements certain aspects of the Convention. These validation provisions were racially discriminatory.
- To balance this discriminaiton, the original Act provided two key forms of protection for native title in post 1993 land dealings: the 'freehold standard', which required native title to be treated in the same way as freehold title, and a 'right to negotiate' about certain land use, especially mining.

Significantly, the original 1993 Act was the subject of extensive negotiations with indigenous groups, and attracted support from key members of some of those groups. Indigenous groups have made it clear that they would not have supported the discriminatory provisions of the Act relating to the 'past' had the Act not been balanced by the beneficial provisions of the freehold standard and the right to negotiate.

The Committee and the original *Native Title Act 1993*

The original 1993 Act was considered by the Committee in Australia's periodic report in 1993. The Committee accepted that the original Act was compatible with the Convention.

1998 Amendments to the *Native Title Act 1993*

The 1998 amendments ignore the fine balance between indigenous and non-indigenous rights in the original Act.

- With minor exceptions, the majority of the 1998 amendments support non-indigenous interests at the expense of indigenous concerns.
- The amendments unravel significantly both the 'freehold standard' and the 'right to negotiate', without repealing the discriminatory 'title validation' provisions. In fact, the discriminatory 'title validation' provisions are extended.

Representative indigenous groups were afforded no effective participation in negotiations, and strongly condemned the amendments when they were passed by Parliament.

Relevant Human Rights Standards

In accordance with the Committee's general recommendations, the Convention is to be interpreted according to the standard of substantive equality, and not merely formal equality.

The Articles of the Convention relevant to the native title amendments are:

- **Article 1:** general provision concerning non racial discrimination
- **Article 2**: general State obligation to act in a non racially discriminatory manner
- **Article 5:** general right to equality before the law in a non racially discriminatory manner and
- **Article 5(d)(v):** the right to own property and inherit in a non racially discriminatory manner.

Australian Government Approach to Equality

The Australian Government is overtly committed to a standard of strict formal equality in its approach to indigenous native title rights and has stated that different rights should not be enacted for indigenous and non-indigenous peoples. This is an extremely significant point, as it indicates an immediate discrepancy between Australia's obligation to implement the standard of substantive equality mandated by the CERD Committee and the native title amendments under question by the Committee.

The Convention and Specific Native Title Amendments

The following native title amendments are racially discriminatory and transgress the Conventions standards expressed in Articles 1, 2, 5 and 5(d)(v).

- discriminatory validation of other wise invalid titles
- legislative provisions detailing categories of land titles which extinguish native title (so-called 'confirmation of the common law')
- winding back of the right to negotiate
- non-consensual use of native title land by Government or private interests including in relation to:
    - expanded primary production uses of leasehold
    - management of air and water space
    - renewals, extensions and pastoral lease title upgrades
    - reserved land.

Effective Participation of Indigenous Representatives

The National Indigenous Working Group, comprised of key indigenous representative bodies, was formed to specifically engage in effective negotiations with the Government in relation to the native title amendments. However, throughout the debates such effective negotiations were either extremely limited in scope or absent.

Therefore, it is our submission that the process undertaken by the Government in relation to negotiations on the amendments breached the right to ***effective participation*** by indigenous peoples on matters of significant relevance to them, as required by Article 2 of the Convention and explained by the Committee in general Recommendation XXI and XXIII.

Conclusion

Given the significance of the racially discriminatory provisions described above in contravention of Articles 1, 2, 5 and 5(d)(v), and given the fact that indigenous peoples were denied effective participation in negotiations about a matter specifically relating to their culture in contravention of the Committee's interpretation of the Convention, the 1998 native title amendments tip the balance of the *Native Title Act 1993* into the realm of racial discrimination. **Australia has thus breached its obligations to respect the human rights of indigenous peoples pursuant to international human rights standards and the Convention.**

Table of Contents

1.1 General background of Australian Law
1.2 Common law standards
1.3 Legislative standards

2. The original *Native Title Act* 1993 and the Convention
2.1 Contents of the original Act
2.2 Effective participation of indigenous peoples and 1993 Act
2.3 Status of the 1993 Act in light of the Convention

3. International Human Rights and Native Title
3.1 Definition of equality and discrimination at international law
3.2 Specific Convention articles relevant to Native Title
3.3 International Inquiry into Indigenous Peoples' Relationship to Land

4. Australian Government's Approach to Concepts of Equality and Native Title

5. The Convention and Specific Native Title Amendments
5.1 Operation of the *Racial Discrimination Act 1975* (RDA) on the Native Title amendments
5.2 Discriminatory validation of otherwise invalid dealings
5.3 Legislative Provisions dealing with extinguishment (so-called 'confirmation' of common law)
5.4 Amendments to the right to negotiate
5.5 Non-consensual use of native title land by government or private interests
5.5.1 Expanded 'primary production' uses of leasehold
5.5.2 Management of water and airspace
5.5.3 Renewals and extensions and pastoral lease title upgrade
5.5.4 Reserved land or land leased to Crown authorities

6. Effective Participation of Indigenous Representatives during 1997-98 Debates
6.1 Was there a relevant indigenous consultation group formed?
6.2 No effective participation of indigenous representatives

7. Conclusions

Submission by Australians for Native Title and Reconciliation (ANTaR) pursuant to the Committee on the Elimination of Racial Discrimination's request for information concerning the compatibility of the 1998 native title amendments with Australia's obligations under the *Convention on the Elimination of All Forms of Racial Discrimination*.

March 1999

1. General Background of Australia Law

In order to understand the operation of native title law in Australia, it is necessary to briefly consider the structure of Australia's federal system of law.

1.1. Common law standards

As defined by the High Court in *Mabo v Queensland (no 2)* (1992) 175 CLR 1, native title is a vulnerable property right defined by the 'common' (judge made) law. Native title does operate *to recognise* something culturally significant to many Aboriginal and Torres Strait Islander people: the traditional relationship between people and land. However, under the common law, native title co-exists uncomfortably with a 'sovereign' title ('Crown radical title') – a power to extinguish native title without notice, consent or compensation. This can be achieved simply by the Crown granting an inconsistent title in the same land to somebody else, or using or setting aside native title land for its own purpose.[1] There is no need for *special* legislation (e.g. compulsory acquisition legislation) authorising governments to interfere with native title.

The common law is racially discriminatory. Under it, land titles *other* than native title are better protected against interference by the sovereign. The Crown cannot simply override or ignore them. The common law says that other titles (all of which were originally *granted* by the Crown), cannot be interfered with except where *legislation* allows that interference.

1.2 Legislative standards

In the Australian legal system, legislation or 'Acts' (laws made by Parliaments) override common law – provided the legislation is constitutional.

In the 20th century, compulsory acquisition legislation has typically allowed the Crown to interfere with property rights in land for public purposes. Landowners whose titles are interfered with for such purposes usually receive notice, a chance to object, and compensation. However, until recently, those standards have not been extended to native title.

---

[1] Since the mid 19th century, the Crown has done this under 'Crown lands' legislation, which allows things like the grant of freehold titles and pastoral leases and the establishment of reserves.

2. The original *Native Title Act* 1993 and the Convention

2.1 Contents of the original Act

The original *Native Title Act* 1993 (Cth) did four main things.

- First, it allowed 'validation' of land dealings post-1975 that might have been invalid because of the Commonwealth *Racial Discrimination Act* 1975, (which implements certain aspects of the Convention), which requires non-discriminatory treatment of property. These provisions (relating to so-called 'past acts') were racially discriminatory. They secured titles that had interfered with native title in a way that was not possible in relation to other titles. However, these provisions were considered necessary because of the recent 'discovery' of native title in *Mabo v Queensland (no 2)*. They were also justified by reference to the 'consent' of at least some indigenous 'leaders', who negotiated standards for the future treatment of native title land in return.
- Secondly, the *Native Title Act* 1993 established a statutory regime for the making of native title claims – at first instance to the National Native Title Tribunal.
- Thirdly, it established an Aboriginal and Torres Strait Islander Land Fund, envisaged as compensating people whose native title had been extinguished.
- Fourthly the original Act introduced new principles for future (post-1994) use of native title land ('future acts'). These differed from the common law of native title in two respects. They provided that native title could survive the grant of an inconsistent interest in the same land - rather than being *extinguished* by such a grant, native title would simply be *suppressed* by it. More importantly, they introduced a 'same treatment as freehold' standard for dealings with native title land. With several exceptions, that meant that governments and state parliaments could only do to native title what they could do to freehold.
- On top of this, when granting mining titles over native title land, state governments were required to negotiate with native title holders about whether they could do so (the 'right to negotiate'). The structure of the 'right to negotiate' was designed to reflect the Aboriginal desire for participation in management decisions concerning traditional land. For this reason, it was different from (but not always superior to) objection rights of other landowners in the mining context. The 'right to negotiate' regime also applied to an interesting new category of governmental dealings with land: compulsory acquisition of native title for *private* (ie, third party) purposes. This acquisition could only occur under a law that also allowed compulsory acquisition of *other* titles for private purposes. The idea that land titles could be compulsorily acquired in order to facilitate land grants to other people was a novel one in Australian law – one open to abuse by development-oriented governments.

2.2 Effective Participation of Indigenous Peoples and 1993 Act

Significantly, the original 1993 Act was the subject of extensive negotiations with indigenous groups, and attracted support from key members of some of those groups. This support was crucial to the Act being viewed as legitimate in human rights terms. The Act 'rolled back' (ie, repealed) the *Racial Discrimination Act*'s protection of native title, allowing discriminatory post-1975 Crown-granted titles to be 'validated'. **It is extremely unlikely that indigenous groups would have supported these discriminatory provisions relating to the 'past' had the Act not also promised them two future benefits of indefinite duration: the 'freehold standard' of protection for native title and some form of special 'right to negotiate' about land use, especially mining.**

(As discussed below, the 1998 amendments unravel significantly both the 'freehold standard' and the 'right to negotiate', without repealing the 'title validation' provisions. Indeed, the discriminatory 'title validation' provisions are extended.)

2.3. Status of the Original Act in light of the Convention

The Australian Government provided the Committee with information about the original *Native Title Act* in its periodic report in 1993. The Committee accepted that the original Act was compatible with the Convention. It was no doubt assisted in reaching that conclusion by the fact that the then Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Dodson was part of the Australian delegation which presented the periodic report and characterised the Act as a 'special measure'.

3. International Human Rights Law and Native Title

To assist the Committee, this section of our submission outlines the key legal principles and human rights standards against which this submission has assessed the native title amendments. This outlines is divided into:

- an overview of the Committee's interpretation of the foundational concepts of equality and non-discrimination and

- an overview of the Committee's interpretation of the articles of the Convention relevant to the native title amendments, namely:

    - prohibition of racial discrimination and equality rights
    - property rights
    - participation rights.

The submission does not address the Convention's provisions concerning the right to culture.

3.1 Definition of Equality and Discrimination at International Law

The principles of equality and non-discrimination provide the fundamental basis for the operation of the Convention.

Within international human rights law, the concepts of equality and discrimination have been defined according to a standard of substantive equality rather than the more limited standard of formal equality. The standard of substantive equality has two aspects:

- substantive equality focuses on the effect of a law, rather than merely whether its formal wording is non-discriminatory and
- substantive equality entails granting appropriately different treatment to differently situated social groups, so as to avoid entrenching discriminatory systems by treating differently situated people in exactly the same way. This requires isolating the relevant differences on which differentiation is permissible.

General Recommendation XIV on Article 1 by the CERD Committee endorses the standard of substantive equality for the purposes of interpreting the Convention. The Committee has stated that:

> a distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms. This is confirmed by the obligation placed upon States parties by article 2, paragraph 1(c), to nullify any law or practice which has the effect of creating or perpetuating racial discrimination.

This endorsement of the standard of substantive equality by the CERD Committee reflects the jurisprudence of the Human Rights Committee and the International Court of Justice.

3.2 Specific CERD Articles Relevant to the Native Title Amendments

3.2.1 General Prohibition of Racial Discrimination and Equality Rights: Article 1, 2 and 5

Articles 1 and 2 require that State parties undertake to prohibit racial discrimination in the enjoyment of all fundamental human rights and freedoms in the political, economic, social, cultural or any other field of public life. This is a wide reaching obligation.

Article 5 focuses this obligation so that State parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law in relation to all fundamental rights and freedoms.

Both these obligations must meet the standard of substantive equality.

Additionally, it is useful to note that there is a strong body of opinion that the principle of non-racial discrimination in the enjoyment of fundamental human rights and freedoms has attained the higher status of customary international law, and possibility the norm of *jus cogens* "the body of those general rules of law whose non-observance may affect the very essence of the legal system to which they belong" and consequently from which no derogation is permitted. These standards are additional to those of treaty obligations and provide a strong jurisprudential framework for the Committee to strictly interpret a State's obligations under the Convention.

In the CERD Committee's General recommendation XXIII concerning indigenous peoples, the Committee stated that this obligation to respect fundamental human rights and freedoms in a racially non-discriminatory manner must be understood in terms of the specificity of indigenous peoples culture and historical experience. Of particular significance for our submission, the Committee's analysis links the obligation of non-discriminatory respect for indigenous culture to the question of control over land:

> many regions of the world indigenous peoples 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.

The Committee consequently called upon State parties to:

> 4. (a) recognise and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
> 4. (b) ensure that member of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity.

3.2.2 Property Rights: Article 5(d)(v) and (vi)

Article 5 of the Convention provides that in compliance with the fundamental obligations laid down in Article 2, State parties must eliminate racial discrimination and guarantee the right of all in relation to equality before the law, including in relation to:

> (d)(v) the right to own property alone as well as in association with others
> (d)(vi) the right to inherit.

The CERD Committee's General Recommendation XXIII on indigenous peoples elaborates the possible scope of these rights to property free from racial discrimination. The Committee calls on State parties to:

> 4.c. provide indigenous peoples with conditions allowing for sustainable economic and social development compatible with their cultural characteristics; and
>
> 5. to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal land, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

Although the Committee does not specifically link this comment to the article on non discriminatory property rights, it is our submission that this aspect of General Recommendation XXIII be used as an interpretative mechanism when assessing enjoyment of such rights by indigenous peoples.

This proposition is supported by the practice of commentators invoking Article 17 of the UDHR as a basis for the international legal recognition of indigenous peoples claims to land. In relation to Australia, the submission is also supported by specific State practice. The High Court has stated in two different cases that recognition of property rights in the UDHR and Article 5 of the Convention CERD (as implemented in the *Racial Discrimination Act 1975*) secured protection against attempts to extinguish native title in Australia. In *Mabo v the State of Queensland (No. 1*) and the *State of Western Australia v The Commonwealth*, the High Court found that attempts by State Governments to extinguish native title were inconsistent with Article 5 of the Convention and hence the *Racial Discrimination Act 1975*.

3.2.3 Political Participation Rights

The final rights relevant to the question of recognition of native title in Australia are those rights associated with political participation and the developing standards of the internal aspect of self-determination.

In the 1996 General Recommendation XXI on self-determination, the Committee reiterated that the right to self-determination is a fundamental principle of international law and elaborated that there is both an external and an internal aspect to the right. The internal aspect is specifically relevant to indigenous peoples.

The internal aspect of self-determination is broadly the right of all peoples to freely pursue their economic, social and cultural development without outside interference. The Committee linked this right to Article 5(c) of the Convention, which provides that it is the right of every citizen to take part in the conduct of public affairs, as established in Article 5 (c) of the Convention.

The Committee's view on this internal aspect of self-determination was further expanded by the United Nations General Assembly in the *Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities*. Article 3(3) of the Declaration provides that such minorities have the right to:

> participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.

Recently, the Committee have further developed this concept of "effective participation" as an internal aspect of self-determination in relation to minority groups, including indigenous peoples. In General recommendation XXI, the Committee stated that in accordance with Article 2 of CERD (concerning a general prohibition on non-discrimination):

> governments should be sensitive towards the rights of persons of ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth, and to play their part in the government of the country .... Government should consider, within their respective constitutional frameworks, vesting persons of ethnic or linguistic groups ..., where appropriate, with the right to engage in such activities which are particularly relevant to the preservation of the identity of such persons of groups.

The CERD Committee further strengthened this notion of political participation in General Recommendation XXIII on indigenous peoples. Noting that indigenous peoples culture, historical identity and the right to their lands and resources has been, and remains, jeopardised through histories of colonisation and exploitation, the Committee has called on States parties to (among other things):

> 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.

Notably, the Human Rights Committee has similarly elaborated on this issue of effective political participation in both their General Comment on the rights of minorities and in their communication decisions.

It is our submission that this developing focus on internal self-determination and political participation rights is extremely significant. It represents a sophisticated negotiation between issues of State sovereignty and substantive equality for indigenous peoples. In doing so, it mirrors more general jurisprudential developments in international human rights law that have moved on from treating the State as the sole subject of international law and provided avenues for individuals and groups to assert their human rights.

3.3 International Inquiry into Indigenous Peoples Relationship to Land

Finally, in relation to interpreting the Convention, Australians for Native Title and Reconciliation (ANTaR) would like to recall for the Committee the findings of the inquiry by Mrs Erica-Irene Daes, Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities into indigenous peoples and their relationship to land.[2] It is our submission that this inquiry provides useful points of reference when applying the Convention to issues of native title.

In her preliminary report, the Special Rapporteur sets out in detail the legal and political impediments to the equal and non-discriminatory recognition of indigenous land rights worldwide. Daes traces what she terms the legal and political "doctrines of dispossession" which have acted as justifications for the historical failure to recognise land rights and notes that that these doctrines were not generated by abstract discriminatory beliefs, but rather that they were driven by the economic agendas of States.

The report states that although small steps are being made to begin ameliorating these doctrines, their underlying persistence is evident in two key phenomena:

- the failure of States to recognise, or accord appropriate legal status to, the evidence of indigenous use, occupancy and ownership of land and

- persistent discriminatory laws and legal doctrines that are applied to indigenous rights even when they are recognised.

This vulnerability of indigenous title is named as:

> a relic of the colonial period. It appears that, in modern times, the practice of involuntary extinguishment of land title ... is applied only to indigenous peoples. As such, it is discriminatory and unjust.[3]

The Report notes that "this single fact probably accounts for the overwhelming majority of human rights problems affecting indigenous peoples." The Report targets expropriation of indigenous lands for private development, particularly mining interests, and a general failure of States to enforce laws protecting indigenous lands as particularly acute examples of the dynamic of involuntary extinguishment.

It is our submission that Mrs Daes' analysis substantially reflects the development and operation of the 1998 native title amendments, a proposition which is detailed below.

---

[2] *Indigenous Peoples and their Relationship to Land*, Preliminary working paper prepared by Mrs Erica-Irene Daes, Special Rapporteur (20th June 1997) E/CN.4/Sub.2/1997/17.
[3] Ibid., p. 33.

4. Australian Government's Approach to Concepts of Equality and Native Title

The Australian Government is overtly committed to a standard of formal equality in its approach to indigenous native title rights. On numerous occasions, the Prime Minister has stated that what was at stake during the debates around native title was the principle of treating all people equally and that some groups (ie indigenous peoples) should not have what the Government conceptualises as 'special rights'.

This is an extremely significant point, as it indicates an immediate discrepancy between Australia's obligation to implement the standard of substantive equality mandated by the CERD Committee and the native title amendments under question by the Committee. As noted in the below analysis, it is our submission that in many instances the native title amendments do not even accord with the more limited standard of formal equality.

Equally relevant to our submission is the way in which the Prime Minister's conceptualisation of native title is framed by what Special Rapporteur Daes has noted are the persistent "doctrines of dispossession."

For example, in a key political speech on the proposed native title amendments, the Prime Minister indicated his staunch opposition to specific legal structures facilitating indigenous native title, including the *Native Title Act 1993*, which was 'opposed tooth and nail by all of my colleagues', the Wik decision which he characterises as 'highly impractical' and the 'right to negotiate' which he names as 'that stupid property right which was given to native title claimants alone'.[4]

Similarly notable are the Prime Minister's comments concerning the proposal to respond to the Wik decision by a blanket extinguishment of native title over all pastoral leases. Although the Prime Minister stated that blanket extinguishment was "attractive on the surface", it would result in a potentially exponential compensation bill due to the constitutional requirement to provide just terms compensation for Commonwealth acquisition of property, it would be vulnerable to constitutional challenge and it would probably not pass the Senate. **The fact that blanket extinguishment is racially discriminatory and robs indigenous peoples of the possibility of co-existing native title rights was not referred to by the Prime Minister.**

5. The Convention and Specific Native Title Amendments

This section of the submission provides an analysis of some of the most significant 1998 native title amendments and their compatibility with the Convention's human rights standards. **It is our submission that the following provisions consistently**

[4] The Hon. John Howard, Prime Minister, 'Longreach community meeting to discuss the Wik Ten Point Plan', *Press Release*, 17 May 1997.

transgress the standards of both formal and substantive equality in relation to the non racial discrimination provisions set out in Article 1, 2, 5 and 5(d)(v) of the Convention.

5.1 Operation of the *Racial Discrimination Act 1975* (RDA) on the Native Title Amendments

Overview

- It is necessary to clarify the operation of the *Racial Discrimination Act* 1975 on the native title amendments, in order to understand that the RDA does not protect against either formal or substantive racial discrimination.

- The Government response states that 'nothing in the NTA affects the operation of the RDA'. (p. 9) This statement is both untrue and misleading. It suggests the non-discriminatory principles of the RDA simply apply to the Native Title Act 1993 as amended.

- Given that later legislation generally overrides inconsistent earlier legislation, the range of discriminatory provisions in the native title amendments operate to impliedly repeal the operation of the RDA. In fact, an amendment was inserted during the 1998 amendments which limits the operation of the RDA to the exercise of functions and powers under the NTA, and where the meaning of a term is ambiguous.

- As much racial discrimination in the Act is explicitly and unambiguously authorised, the non discriminatory principles of the RDA will only be operative in relation to limited situations of bureaucratic or procedural discrimination.

Detailed Analysis

The original *Native Title Act* had some impact on the protection extended to native title by the *Racial Discrimination Act* 1975 (Cth). Although the original section 7 provided that the *Native Title Act* was *generally* not to affect the *Racial Discrimination Act*, it contained a *specific* exception concerning validation of discriminatory titles granted before 1994 ('past acts').

The High Court commented on the original section 7 in 1995.[5] It stated that the *Native Title Act*'s later, more specific standards were to be given effect if there were any inconsistency between the *Native Title Act* and the *Racial Discrimination Act*. In other words, to the extent of any inconsistency between the two Acts, the *Native Title Act* impliedly repealed the *Racial Discrimination Act*. (However, the Court commented that the two Acts were probably consistent, because the *Native Title Act* was

[5] *Western Australia v Commonwealth* (1995) 183 CLR 373.

probably either a racially non-discriminatory law or a special measure.) The Court's approach to the problem did not depend on the wording of section 7 – rather, it depended on the *Native Title Act* as a whole.

Applying this reasoning to the 1998 amendments produces a different result, however. The 1998 amendments have altered the nature of the *Native Title Act* for Convention purposes. **Later, more specific discriminatory standards in the amended *Native Title Act* are inconsistent with the general non-discriminatory standards in the *Racial Discrimination Act*, impliedly repealing those standards as they apply to native title** (but allowing them to continue to operate in other areas, e.g. discrimination in employment or housing). Again, **this conclusion flows from the amended *Native Title Act* as a whole. The amended section 7 does not alter that situation.** Although sub-section (1) states that the *Native Title Act* is now 'intended to be read and construed subject to the provisions of the *Racial Discrimination Act*', sub-section (2) substantially qualifies this interpretive principle. The *Racial Discrimination Act* is only to be used by courts interpreting *functions and powers* conferred by the Act, *and* only where the meaning of terms is *ambiguous*. In the context of an Act in which much racial discrimination is *explicitly* authorised, and under which officials and institutions are often *clearly directed* to practise it, this provision will provide relief against bureaucratic and procedural discrimination only.[6]

5.2 Discriminatory Validation of Otherwise Invalid Land Dealings

Overview

- The validation provisions are a very significant aspect of the native title amendments.

- The validation provisions allow validation of land dealings which occurred between the original Act's commencement (1 January 1994) and the *Wik* decision (23 December 1996) and which did not comply with the regime set down under the *Native Title Act 1993* (and would therefore have been invalid). These land dealings did not comply with the *Native Title Act 1993*, because Governments asserted that native title could not co-exist on a pastoral leasehold.

---

[6] For example, under the new 'right to negotiate' provisions, the Commonwealth Minister may approve the substitution of the right by 'alternative provisions' in state law (see section 43A). The amended *Native Title Act* clearly allows the Minister to approve 'alternative provisions' which provide inferior protections for some native title holders as compared to holders of other titles. The new section 7 will not cure this defect. However, it may prevent the Commonwealth Minister from determining that aspects of the 'alternative provisions' are 'appropriate', as section 43A requires, where they clearly provide discriminatory notice or procedures for native title holders. The Minister will be required to decide this 'appropriateness' by reference to the *Racial Discrimination Act*, although other aspects of his decision-making (eg the Minister's acceptance of 'mere consultation' requirements in state law where stronger objection rights are available to other landowners) and therefore the ultimate decision to allow state law to apply are permitted to be discriminatory.

- However, such an assertion misrepresented the state of the law, as all Governments were on notice that the courts were to consider the issue of native title and pastoral leases in relation to a range of legal applications.

- Consequently, the validation provisions are racially discriminatory as they extinguish native title in order to protect other types of land grants. By rewarding Governments who failed to take the appropriate procedures and care in relation to potential native title interests, the validation provisions are part of the racially discriminatory doctrines of dispossession identified by Daes.

- The provisions transgress the standard of both formal and substantive equality in relation to the general prohibition on discrimination, equality before the law provisions and the right to own property on a non discriminatory basis.

- Although the Government has argued that these provisions reflect similar provisions in the earlier Act, those earlier provisions were accepted as a compromise by the indigenous negotiators in order to secure a strong' future acts' regime with a right to negotiate and the freehold test. No indigenous negotiations were entered into in relation to the new provisions, and the amendments as a whole deliberately undermine the agreed 'right to negotiate' framework and the freehold test.

Detailed Analysis

The primary role of the 'future acts' regime of the original native title Act was to provide that all future acts which affected native title had to be subject to specific processes (for example the freehold test). Titles and land use authorisations granted in contravention of these requirements would be *invalid*.

Prior to the *Wik* decision, *many Governments asserted a belief that pastoral lease grants had extinguished native title (see, for example, p 2) and that the High Court would find this in the Wik case. Therefore, the Government asserted that grants could be made over pastoral lease land without reference to the Native Title Act 1993.* The Government submission to the Committee reiterates this view.

However, **this approach was highly ill-advised**. The 'understanding' that native title did not survive on pastoral lease land, although mentioned in the Preamble to the 1993 Act, was not shared by indigenous groups or other observers and suffered from several defects:

- First, **the entire question of native title's extinguishment was a side issue in *Mabo (no 2)***, because the Court held that the Meriam native title had *not* been extinguished. In Australian law, *obiter dicta* comments of this kind carry much less weight than principles (*ratio decidendi*) laid down in the course of reaching a decision on the facts;

- Secondly, although three judges in ***Mabo (no 2)*** expressed views which would support the 'understanding' which the Government asserts, **two judges expressed views which seemed to support the contrary view** – that native title and pastoral leases could co-exist;

- Thirdly, in pre-*Wik* decisions by the High Court, the Federal Court and the President of the National Native Title Tribunal in the ***Waanyi case***, all judges indicated that they believed that **the relationship between pastoral leases and native title was an 'open question'** – not one subject to an 'understanding';

- Fourthly, in the ***Waanyi case*** in the Federal and High Courts, some judges described the view that native title and pastoral leases could co-exist as **'fairly arguable'**, and **one judge decided that the two types of title could co-exist**;

- Finally, arguably governments and industry groups fostered the 'understanding' referred to in order to create a **political climate in which a contrary decision by the High Court would appear illegitimate**, and a legislative 'solution' to it favouring holders of Crown-granted titles urgently necessary.

The Government's response to the 'wrong answer' provided by the High Court has been to allow 'validation' of invalid land dealings which occurred in the period between the original Act's commencement (1 January 1994) and the *Wik* decision (23 December 1996).[7] It is true that these 'validation provisions are similar to those contained in the original Act', and in some respects they 'are not as wide-ranging' (p 10). But both sets of 'validation' provisions are racially discriminatory: they extinguish unextinguished native titles and give force to competing Crown-granted titles. The 1998 'validation' provisions affect a narrower category of land titles than the original 'validation' provisions, and effect less extinguishment. However, since the original 'validation' provisions remain in the Act, **more native title is extinguished by 'validation' under the amended Act than under the original Act**.

Some of the new 'validation' provisions have nothing to do with *Wik*. For example, illegal governmental dealings with (former) stock route land, or land on which government water bores are (or were) located, can be validated under the new regime. However, there is little similarity between stock routes and government bores (which involved the past reservation of small parts of the traditional 'country' of any Aboriginal group for occasional use by transient populations) and pastoral leases (which involve grants of title rights to large areas of land – possibly the entire traditional 'country' of a single Aboriginal group - to a single holder). Further, **there are important policy differences between the 'validation' effected by the original Act and that effected by the amendments**. The original 'validation' provisions were designed to overcome a novel situation in Australian land law: the impact of general human rights standards in Commonwealth law (the *Racial Discrimination Act*) on the interaction between a newly-discovered property right (native title) and (state) Crown-granted titles. By contrast, the 1998 'validation'

---

7 These land dealings are called 'intermediate period acts'.

provisions are designed to overcome the more predictable consequences of the unwillingness of (mainly state) governments to comply with clear, specific standards in Commonwealth law (the original *Native Title Act*), after having been made aware of native title's potential existence on the land with which they were dealing and of the likely invalidity of their actions as a result.

5.3 Legislative Provisions Dealing with Past Extinguishment (so-called 'confirmation' of common law)

Summary

The 'past extinguishment' provisions are another critical aspect of the native title amendments. These provisions profess to merely reflect the common law by providing a detailed list of past land grants that the common law would have determined extinguished native title. There are three issues here.

- First, the provisions do not merely reflect the common law, but they extend the discriminatory coverage of the common law in many circumstances, thereby creating arbitrary new categories for extinguishment of native title.

- Second, common law is racially discriminatory in relation to the protection it affords native title vis-à-vis other title holders. In terms of upholding Australia's obligations under international human rights standards, the Government should not be deeming the common law to be the 'standard' against which protection of native title is developed.

- Third, these amendments transgress standards of formal discrimination in relation to Article 2 and Article 5 as they overtly extinguish the possible rights of native title holders in order to secure the rights of non-native title holders. As this act of racial discrimination operates in a very wide range of circumstances, the effect of this racial discrimination is significant and form part of the 'doctrines of dispossession' identified by Special Rapporteur Daes.

Detailed Analysis

Part 2, Division 2B and Schedule 1 are dedicated to 'confirming' the *complete* past extinguishment of native title by the grant of a large number of different state land titles, and to 'confirming' the *partial* past extinguishment or suspension of native title by the grant of 'non-exclusive' agricultural and pastoral leases. The Government submission to the Committee states at p. 7 that 'these confirmation provisions seek to reflect the common law'.

However, many of these provisions will operate to extinguish or suppress previously unextinguished or unsuppressed native title rights. It is also possible that they can be used to extinguish rights conferred on Aboriginal people by the titles whose

extinguishing impact is 'confirmed'.[8] Therefore, such action does not REFLECT the common law at all, but develops new categories of extinguishment of native title in order to 'protect' non native title holders. In this way, these provisions are racially discriminatory over and above the racial discrimination inherent already in the common law.

This is a complex area because the provisions are a mixture of proper and improper analyses of the common law For example, under the common law, the grant of a *private* freehold title extinguishes native title.[9] Thus, where the Act confirms the extinguishment of native title by private freehold grants, it has no practical impact. Similarly, where the Act confirms the extinguishment of native title by *private* commercial and residential leases, it will have no impact, because these leases typically depend on the prior grant of a freehold title, which would have extinguished native title.

However, other provisions extend the common law extinguishment principles in ways which are not necessarily justified. This is partly because they employ categories of Crown-granted titles which are so general that they potentially catch many different titles granted at different times in history - not all of which would have extinguished native title under the common law.

For example, under the Act, *all* community purpose leases (including those granted historically) will have extinguished native title. However, 'community purposes leases' is a category which potentially catches **leases granted 100 years ago for bush racetracks which were used once a year** for only a short period of time. Similarly, the Act provides that all 'public works' (including those undertaken historically) extinguish native title. But **'public work' is defined to include** not only land uses like 'memorials' and bores, but also **the proclamation of stock routes, whether or not these were actually used, and regardless of how often they were used.** On common law principles, by contrast, little-used stock routes are unlikely to have extinguished native title. There are many stock routes in remote Australia which have not been the subject of other extinguishing Crown grants. Further, under the Act 'public works' incorporate adjacent land affected by their construction. This means that native title is not only extinguished on public roads and railways (which is sensible and consistent with the common law position),[10] but is also extinguished on **road and rail corridors**. However, in some parts of remote Australia, road corridors are 200 metres wide, and rail corridors even wider.

Some titles included in the Schedule appear not to extinguish native title on common law principles. For example, controversy surrounded the inclusion of Queensland 'grazing homestead perpetual leases'. These leases have been granted under 'land selection' provisions of Queensland legislation which commenced in 1962.

---

[8] Section 23J.
[9] *Fejo v Northern Territory* (1998) 156 ALR 721
[10] See *Fourmile v. Selpam* (1998) 152 ALR 294.

The original *Land Act* 1962 appears to have allowed the grant of such leases and their conversion to perpetual tenure if they were smaller than 10,000 acres in area.

The Schedule also refers to **some categories of Crown-granted leases** which appear quite specific, but in fact **could include leases with many different terms**, not all of which extinguish native title. This is likely to have occurred where the Schedule refers to core state land legislation which was amended several times after its enactment, and which allowed state officials discretion as to the insertion of lease terms.

5.4 Amendments to the Right to Negotiate

Summary

- The 'right to negotiate' is a procedural right that is triggered when certain things are done over native title land - primarily when a mining title is granted or when governments sought to compulsorily acquire native title for private purposes. The rights to negotiate was a key part of the original package of the *Native Title Act 1993*.

- The right to negotiate reflects the Aboriginal desire for participation in management decisions concerning traditional land. For this reason, it was different from (but not always superior to) objection rights of other landowners in the mining context. Therefore, in this sense the right was a substantive equality measure.

- The right to negotiate was also a critical aspect of the negotiations between indigenous and non-indigenous peoples during the development of the 1993 Act, particularly in light of the racially discriminatory validation provisions of the 1993 Act. By rolling back the scope of this right, the consent of indigenous peoples to the earlier Act is also diminished.

- A central objective of the 1998 amendments was to substantially repeal the operation of the right to negotiate, as the Government considered it to be unequal, discriminatory and as the Prime Minister stated "that stupid property right" granted to native title property holders alone.[11]

- The amendments enable State and Territory governments to override the right to negotiate by developing their own regimes with minimal standards. This allows the possibility that the right to negotiate can be removed from large areas of Australia and replaced with lesser procedural rights of varied quality.

---

[11] Op. cit., 'Longreach Address'.

- In some cases, removal of the right to negotiate leaves native title holders in an inferior legal position to other property holders confronted by mining proposals, thus offending the principle of formal equality. By dismantling one of the key mechanisms in the original Act which sought to protect the different relationship indigenous peoples have to their land, these changes also fundamentally undermine the standard of substantive equality.

Detailed Analysis

The right to negotiate reflects the Aboriginal desire for participation in management decisions concerning traditional land. For this reason, it was different from (but not always superior to) objection rights of other landowners in the mining context.

The 'right to negotiate' is a procedural right, not a substantive one. Under the original Act, it was provided to all registered native title holders (people who had proven their claims) and all registered native title claimants (effectively all people who had lodged claims). It allowed these people to be notified by governments of proposed mining grants[12] over, and 'private purposes' compulsory acquisitions of, native title land. There was scope for negotiation between the relevant government, the proposed miner (or other land user) and the native title party about whether the grant should be made (or the land acquired). If negotiation failed, there was scope for comprehensive arbitration of the issue by the Tribunal or substitute state body. An arbitrated outcome could be overridden by the relevant Minister on 'national interest' or 'state or territory interest' grounds.

'Streamlining' and 'reworking' of the 'right to negotiate' (p 11) under the amended Act means it will can be removed from large areas of Australia and replaced with lesser procedural regimes of varied quality. In some cases (e.g. where state governments authorise opal or gem mining, an activity generally not permitted on private land), the 'right to negotiate' is substituted by nothing more than a general requirement that governments notify native title parties of their intention to set land aside for that purpose. In other cases, the 'right' is substituted by general requirements that native title parties be notified of proposed grants or acquisitions, have the same opportunity as other landowners to put their views to an independent body, and be guaranteed that consultation 'procedures' are in place to deal with protection of traditional sites of 'particular significance', land access and rehabilitation.

On land in towns, or land which is *or was* reserved, held under leasehold, or held by a government body on freehold title for public or specific purposes, the

[12] These grants included the grant of exploration tenements and the renewal or extension of earlier grants. However, it was possible for the Commonwealth Minister to exclude the 'right to negotiate' from some types of exploration grants. It was also possible for state governments to assert that the right did not apply to others which would not interfere significantly with native title holders. A final decision on the latter issue was made by the National Native Title Tribunal or a substitute state body. However, the Tribunal often decided that the 'right to negotiate' did apply where state governments had asserted that it did not.

'right to negotiate' can be substituted by 'alternative provisions' in state law. (The Government's response describes these provisions as only applying to 'land where native title is only a co-existing right' (p 11). However, they can apply to reserve land in which virtually full native title rights might exist.)

The exact **content of the 'alternative provisions'** lies in the discretion of the Commonwealth Minister, who must approve them. In the case of mining grants, the amended Act directs him to ensure that they:

- contain 'appropriate procedures' for notifying native title parties;
- provide rights to object and to be heard by an independent body (whose decision can be overridden by a state or territory Minister 'in the interests of the State or Territory');
- require 'consultation' about 'ways of minimising' the impact of the proposed land use on native title rights and native title parties' access to the land;
- provide compensation and an independent mechanism for resolving disputes about it;
- provide protection for traditional Aboriginal sites of 'particular significance' where these are not protected under Commonwealth law.

In many respects, these proposed standards are appropriate. In many states, the procedural rights provided by these 'alternative provisions' will be equivalent to those of other landowners.[13] **However, they may be inferior to those of some landowners in other states**.[14] In New South Wales, for example, a mining lease *may not be granted* over freehold or pastoral leasehold land on which buildings are located, and a farmer or pastoral lessee may *veto* the grant of a mining lease over 'agricultural land'. Only the state Premier may override this 'veto'. Although the *Mining Act* 1992 (NSW) presently accords native title the same treatment, *it need not do so in order to be approved by the Commonwealth Minister*. While it is not suggested that native title holders be given a 'farmers' veto', **non-discrimination principles do not seem to dictate that the calibre of native title holders' rights be *weaker* than those accorded other landowners.**

5.5 Non-Consensual Use of Native Title Land by Government or Private Interests

A significant amount of the racially discriminatory aspects of the amendments arise out of the authorisation of non-consensual *use* of native title land by governments and other parties. While, generally speaking, such uses attract compensation and usually do not extinguish native title permanently, they suppress inconsistent native title

---

[13] It is unlikely that these rights can be superior to the rights of other landowners. In that circumstance, the *Racial Discrimination Act* may operate to either bolster or invalidate those provisions of state law which apply to non-Aborigines.

[14] The *Racial Discrimination Act* will not operate to overcome this defect, because the amended *Native Title Act* allows the Commonwealth Minister to approve a regime' which discriminates against native title holders, provided it meets the 'alternative provisions' requirements.

rights, sometimes indefinitely. **These non-consensual land uses would not be visited on other land users under general land or land use laws and as such are racially discriminatory according to the lower standard of formal equality.**

The original Act allowed governments to do these things where they did so in a non-discriminatory manner – by treating native title holders like other landowners or (in the case of waters) like other adjacent landowners. **These amendments were only sought because governments sought to authorise these land and water uses in a *discriminatory* manner.** Governments wanted to continue to treat native title as if it did not exist, as they had done historically. Notably, these racially discriminatory standards would be permitted by the racially discriminatory common law of native title. Arguments about the need for 'clarification' of the 'rights of governments' to authorise the use and management of land or waters subject to native title (see p. 8 of the Government's response) are usually appeals for a return to this background common law position - or, to put it another way, appeals for a watering down of the protections accorded native title by racial non-discrimination standards.

Finally, it is notable that a significant aspect of this discriminatory use of land is enabled by withdrawing the 'freehold standard' from the way in which native title can be used. As noted previously, the freehold standard was one of the central aspects of the original Act, which ensured native title would receive the same treatment as would freehold title. In this way, the racially discriminatory treatment of native title by the common law would be avoided.

5.5.1 Expanded 'primary production' uses of leasehold (and some other) land

Summary

The most significant non-consensual land use provisions relate to 'primary production activities' on 'non-exclusive agricultural and pastoral leases' granted before the *Wik* decision.

- The 'primary production' provisions allow state and territory governments to licence many new activities where these are not presently authorised by the leases.
- These provisions remove the obstacle of the non-discriminatory 'freehold standard' in the original *Native Title Act 1993*. Native title is suppressed by a 'primary production' licence for its duration, which could be an indefinite period and hence could fully extinguish native title.
- Such activities would not be authorised over other title holders' land without consent, and hence directly breach the standards of formal non-discrimination in relation to Article 2 and Article 5, including in relation to the right to own property.

Detailed Analysis

The most significant non-consensual land use provisions relate to 'primary production activities' on 'non-exclusive agricultural and pastoral leases' granted before the *Wik* decision in December 1996 (Part 2, Division 3, Subdivision G). These 'non-exclusive' leases typically authorise only particular types of land use, and include the leases considered by the High Court in *Wik* - leases for pastoral and associated purposes.

The 'primary production' provisions allow state and territory governments to licence many new *activities* where these are not presently authorised by the leases, for example in relation to:

- agriculture on pastoral land
- animal breeding and agistment on agricultural land
- fishing
- forest operations (including forest plantation)
- horticultural activities
- 'acquacultural activities' and 'farm tourism' unrelated to Aboriginal culture on both types of leases.

These provisions do not authorise changes to the land *title* (the lease), and do not allow complete diversification of large pastoral leases to non-pastoral purposes. They do not *confer power* on the states and territories to permit leaseholder 'diversification' - that power must exist in state or territory land legislation.[15] However, these provisions remove the obstacle to the *exercise* of any such powers presented by the 'freehold standard' in the original *Native Title Act* (or the non-discrimination standards in the *Racial Discrimination Act* 1975 (Cth)). Native title is suppressed by a 'primary production' licence which could be an indefinite period. Native title holders are entitled to compensation for the suppressing impact of 'primary production activity licence grants. However, compensation does not cure the unnecessary racial discrimination of these provisions.

Before *Wik*, some states had legislation allowing them to authorise leaseholder 'diversification'. However, the 'freehold standard' in the *Native Title Act* inhibited their ability to use these powers where co-existing native title could be adversely affected. The **amendments return these states to the position of being able to override native title** - although they lack similar powers to override other titles (not just freehold). Governments have sought to justify this change by emphasising that they did not anticipate the High Court's decision in *Wik* that native title could co-exist on pastoral leases.[16]

---

[15] Under principles which have operated since the mid-19th century, state governments cannot grant land titles without being authorised to do so by state legislation (see note 1 above?).

[16] The assumption that the High Court would make a different decision in *Wik* was, however, unwarranted. In an earlier decision (the *Waanyi* case), the Court itself described the question of

However, the amended Act ensures that **even *unauthorised* post-*Wik* diversification activities 'prevail' over native title**. This means that leaseholders who commence 'primary production activities' without a state government licence may not be prevented from doing so by native title holders. It is possible that **native title holders will not be compensated for such unauthorised interference with their rights**.[17] These rules are racially discriminatory. Normally, a landowner whose rights are trespassed on in this way can obtain an injunction to prevent the trespass, and compensation for any damage caused by it. Since even unauthorised 'primary production' diversification prevails over native title, there may be no incentive to seek licences for it, these provisions may provide state governments with a way of avoiding paying native title holders compensation.

The 'primary production' provisions of the Act do not only affect 'non-exclusive pastoral' or 'non-exclusive agricultural' leases. Some apply to post-*Wik* activities on native title land *adjacent to* these leases, or adjacent to other ('exclusive') pre-*Wik* pastoral or agricultural leases or land granted on freehold title. These provisions allow state or territory governments to authorise use of the adjacent land for grazing and irrigation activities by lessees or freehold farmers while native title claims are pending, provided native title holders are not denied 'reasonable access' to the land. If native title is found to exist in the land, grazing or irrigation activities can only be permitted if they are not inconsistent with native title rights.

These provisions discriminate against native title holders. Native title is a property right which either exists or does not exist. Its proof in a claim will establish that it has existed from the date on which the state or territory in which it lies was colonised:

- If, *before* its existence has been established in a claim, it is overridden by *any* grazing or irrigation permission, it will be treated unlike other titles (over which governments do not grant *general* grazing or irrigation rights without consent).

- If, *after* its existence has been established in a claim, it is overridden by a *consistent* grazing or irrigation permission, its treatment may also be discriminatory.

The extent of discrimination depends on the treatment of other landowners under state or territory grazing or irrigation law. However, it seems unlikely that state or territory laws authorise the grant of *consistent* grazing or irrigation rights over other types of title without consent. Indeed, if state laws permitted such treatment of freeholders, these amendments would not have been necessary. Similar treatment of native title holders would have been permitted on the 'freehold standard' in the original *Native Title Act*.

---

whether pastoral lease grants extinguished native title as an open one, as did the Federal Court in the same litigation.

[17] Compensation is not provided under this specific provision of the Act (section 24GC). It may not even be provided under the Act's catch-all 'just terms' compensation provision (section 53). Section 53 only applies where there has been an 'acquisition' of native title rights under the Commonwealth Constitution section 51(31). If native title is simply 'prevailed' over, it is possible that it is not 'acquired'.

The 'primary production' amendments also allow state governments to grant licences to cut timber or to extract gravel or rock over pre-*Wik* pastoral or agricultural leasehold land. These licences may be granted to the lessee, or to a third party. Where these provisions allow licence grants to lessees without native title holders' consent, they treat native title in a way that neither a freeholder nor a pastoral lessee would be treated. Where these provisions allow licence grants to third parties, they affect native title and pastoral leases similarly, but the procedural or objection rights provided to the two titleholders may be different, depending on the provisions of state natural resources or land legislation.

The Commonwealth has sought to ameliorate the impact of some of its 'primary production' provisions on native title holders by requiring that native title holders be given notice and an opportunity to comment on proposed forest operations, horticultural and acquacultural activities and proposed grazing and irrigation on 'adjacent' land.

However, the discrimination remains: such activities would not be authorised over other title holders' land without consent.

5.5.2 Management of water and airspace

Summary

- The original Act provided that governments were able to deal with waters and airspace in which native title might have existed in the same way as they dealt with waters in which adjacent freehold landowners had rights.[18] They **could** abolish native title rights and freeholders' rights to water under a non-discriminatory law.

- The amendments overturn this non-discriminatory 'freehold test', and allows Governments to grant licences to take water or fish or to use airspace in a way which is negatively different to the way in which freehold title is treated. Compensation is payable by the granting government, and native title parties must be notified of, and allowed to comment on, the proposed grant.

- However, such procedural rights do not cure the racial discrimination of these actions and therefore the amendments transgress the standard of formal discrimination in relation to Article 2 and Article 5, including in relation to the right to own property.

Detailed Analysis

[18] Under the original Act, governments could deal with airspace above native title land as they could deal with airspace above freehold land. Under Australian law, this meant that they could authorise activities above native title land which did not interfere unduly with the landowner's enjoyment of its rights. Similarly, under the original Act, governments could deal with native title waters as they could deal with waters adjacent to freehold land. Under Australian law, this meant that native title holders were to be treated as if they had either common law 'riparian' rights *to take water* from adjacent land, or no rights to water at all (in states where these 'riparian' rights have been abolished by legislation).

The Act contains broadly-drafted provisions relating to the public 'management or regulation' of 'surface and subterranean water... in all its forms' and of 'living aquatic resources' or 'airspace'. 'Management or regulation of water' is defined to include 'granting access to water, or taking water'. It includes government grants of statutory water or irrigation rights or licences (which are now common in Australian jurisdictions). These provisions are concerned with *inland* waters and fish, as another part of the Act (Part 2, Division 3, Subdivision N) covers the offshore.

Under this subdivision (Part 2, Division 3, Subdivision H), the grant of a licence to take water or fish or to use airspace is valid and suppresses native title. Compensation is payable by the granting government, and native title parties must be notified of, and allowed to comment on, the proposed grant.

Why were these provisions necessary? On their face, they suggest that native title presented a serious natural resources management problem for governments. However, under the original Act, governments were able to deal with waters and airspace in which native title might have existed in the same way as they dealt with waters in which adjacent freehold landowners had rights.[19] They could abolish native title rights and freeholders' rights to water under a non-discriminatory law (indeed, this happened in South Australia in 1997).[20] However, state governments were not happy with non-discriminatory water and airspace management, as they were accustomed to *discriminatory* resource management. These provisions allow state governments to continue to treat native title holders differently from other landowners.

The provisions relating to 'living aquatic resources' seem designed to ensure that state governments can continue to grant fishing licences over inland waters, whether or not native title holders consent to such grants. (These provisions do not seem to be aimed at overcoming a native title right in the fish themselves, as it is unlikely that such a right exists except as a usufruct dependent on native title to the bed of waters.) However, in some Australian jurisdictions, lake beds may be owned by the landowner whose land surrounds them. To the extent that the amendments allow the grant of fishing licences over native title but not over other privately owned lake beds, they treat native title holders in a discriminatory manner.

5.5.3 Renewals and extensions and Pastoral Lease Title Upgrades

Summary

---

19 Under the original Act, governments could deal with airspace above native title land as they could deal with airspace above freehold land. Under Australian law, this meant that they could authorise activities above native title land which did not interfere unduly with the landowner's enjoyment of its rights. Similarly, under the original Act, governments could deal with native title waters as they could deal with waters adjacent to freehold land. Under Australian law, this meant that native title holders were to be treated as if they had either common law 'riparian' rights *to take water* from adjacent land, or no rights to water at all (in states where these 'riparian' rights have been abolished by legislation).

20 See *Water Resources Act* 1997 (SA), section 7(9).

- The amendments allow renewal of pre-existing (pre-*Wik*) pastoral and agricultural leases; mining leases; rights to take water; timber or gravel from native title land and fishing licences.

- These provisions are discriminatory in the same way as those allowing *grants* of such tenures over native title land, as holders of Crown-granted titles are not subjected to the grant of other rights over their land by the Crown, nor are they subjected to those rights' renewal (except in relation to mining leases).

- The amended Act also allows the upgrading of pre-*Wik* lesser titles to freehold. Crown-granted titles would not be overridden in this way.

- In all cases of title upgrading and renewal, native title holders are entitled to compensation. This is payable by the government renewing or upgrading the title, not the title holder, thereby requiring the public to support an enhancement of private land interests.

- However, compensation does not relieve the discrimination involved. The fact remains that other titles are not extinguished or suppressed in this way. These provisions therefore again transgress the formal equality standards required by Article 2 and Article 5 including the right to own property.

Main Analysis

The amended Act, like the original Act, allows renewal of pre-existing (pre-*Wik*) pastoral and agricultural leases. It also allows renewal of mining leases, rights to take water, timber or gravel from native title land, and fishing licences. The lessee or rights-holder need not be *legally entitled to renew* before renewal can be effected. The amendments allow the term of such leases to be extended – possibly in perpetuity – so long as property rights are not enlarged. They permit changes in the 'primary production' purposes for which agricultural or pastoral leasehold land may legally be used. However, large pastoral leases (those exceeding 5000 ha) may not be converted to majority non-pastoral purposes by renewal.

These provisions are discriminatory in the same way as those allowing *grants* of such tenures over native title land. With one main exception, holders of Crown-granted titles are not subjected to the grant of other rights over their land by the Crown, nor are they subjected to those rights' renewal. (The exception relates to mining leases, which are often renewed without the landowner's consent, even if the landowner is entitled to object to or veto the original grant.) The 'renewal' of pastoral or agricultural leases by expansion of permitted land uses and perpetualisation of term effectively amounts to the grant of new rights over native title land which could not be granted over land subject to Crown-granted titles.

The amended Act allows the upgrading of pre-*Wik* lesser titles to freehold. Again, Crown-granted titles would not be overridden in this way. It is possible for the Queensland government to grant freehold title to a pre-*Wik* pastoral lessee if it can demonstrate that it does so 'in good faith in giving effect to, *or otherwise because of*,

an offer, commitment, arrangement or undertaking made or given in good faith on or before 23 December 1996, and of which there is written evidence created at or about the time'. Such 'offers' need not be legally enforceable. Arguably they include written political commitments made to pastoralists in anticipation of the *Wik* decision. While there were provisions in the original Act which allowed such upgrades, the amendments affect more land and potentially apply to a greater number of 'offers'.

'Freehold upgrades' of pastoral leasehold will extinguish native title permanently, as will 'upgrades' to other forms of title which confer exclusive possession. (This was not the case for 'upgrades' permitted by the original Act.) In such cases, native title holders are entitled to notice and an opportunity to comment on the proposed grant. Lesser title 'upgrades' and title renewals will suppress native title, possibly permanently. Where a pastoral or agricultural lease renewal involves extension or perpetualisation of its term, native title holders are entitled to more robust procedural rights of the kind provided when native title is compulsorily acquired (see below).

In all cases of title upgrading and renewal, native title holders are entitled to compensation. This is payable by the government renewing or upgrading the title, not the title holder. However, compensation does not relieve the discrimination involved. The fact remains that other titles are not extinguished or suppressed in this way.

5.5.4 Reserved land or land leased to Crown authorities (for schools, hospitals, national parks)

Summary

- The amendments provide that where Government or a statutory authority reserved land for a particular purpose prior to the *Wik* decision, it can use the land for that purpose without reference to native title.

- These provisions are formally discriminatory. Land held under Crown-granted titles may not simply be 'reserved' and used for other purposes without first being compulsorily acquired.

- Reservation of land or its grant to Crown authorities for other purposes deprives native title holders of the procedural rights associated with compulsory acquisition. Native title will only have a right to comment and will receive compensation.

- The right to comment and compensation does not cure the racially discriminatory nature of these provisions and subsequently transgress the formal rights to equality in Article 2 and 5 of the Convention.

Detailed Analysis

Where, before the *Wik* decision, the Crown or a Parliament reserved land for a particular purpose, the amended Act permits its subsequent use in good faith for that purpose or a similar purpose. The Act also allows statutory authorities holding land

on leasehold title to use that land (or allow others to use it) for its intended purposes where there is pre-*Wik* written evidence of that purpose. The purposes contemplated may be public or private.

These provisions are formally discriminatory. Land held under Crown-granted titles may not simply be 'reserved' and used for other purposes without first being compulsorily acquired. Nor may it be granted on other titles without prior compulsory acquisition. Reservation of land or its grant to Crown authorities for other purposes deprives native title holders of the procedural rights associated with compulsory acquisition. Native title holders will be notified of, and permitted to comment on, only proposed public works and national park management plans. Yet the consequences of land's use consistently with a reservation or lease to a Crown authority may be dire – native title could be extinguished permanently if a public work is constructed, or suppressed permanently in other cases. Compensation is payable, but does not overcome the discriminatory treatment of native title holders.

6. Participation of Indigenous Representatives During Recent Debate

Finally, it is our submission that the process undertaken by the Government in relation to negotiations on the proposed amendments breaches the right to ***effective participation*** by indigenous peoples on matters of significant relevance to them, as required by Article 2 of the Convention and explained by the Committee in general Recommendation XXI and XXIII.

6.1 Was There a Relevant Indigenous Consultation Group Formed?

The National Indigenous Working Group was convened in 1996 in order to ensure indigenous peoples had the opportunity to effectively participate in the proposed amendments to the *Native Title Act 1993*. The National Indigenous Working Group is comprised of key indigenous representative organisations, including:

- **Aboriginal and Torres Straits Islander Commission (ATSIC)** – the principal Commonwealth Government agency concerning indigenous affairs
- **Aboriginal and Torres Strait Islander Social Justice Commissioner** – a statutory appointment whose responsibilities include monitoring implementation of human rights for indigenous peoples in Australia.
- A broad range of indigenous representative land councils, which are legally required to be representative of their communities, both under the *Aboriginal Councils and Associations Act 1976* and the *Native Title Act 1993*.

Additionally to their representative role in Australia, many of these bodies (ATSIC, the Aboriginal and Torres Strait Islander Social Justice Commissioner, several land councils and the National Aboriginal and Islander Legal Services Secretariat) have international representative status with the Commission on Human Rights working group on the Draft Declaration on the Rights of Indigenous Peoples.

6.2 No effective participation of indigenous representatives

The Government submission to the Committee states at p. 6 that it 'undertook from early 1997 an extensive consultation phase with all interest groups, including indigenous groups'. **This statement is not true.**

Throughout the recent native title debates, effective negotiations with the indigenous peoples via the National Indigenous Working Group were either extremely limited in scope or absent. Indigenous representatives were, at best, not accorded equal negotiating weight as opposed to other stakeholders in the debate (farming and mining interests) and at worst were dismissed as having no mandate to enter into negotiations.

Key aspects of this disappointing pattern of exclusion from effective negotiations is as follows.

In the earliest stages of development of the amendments, members of the National Indigenous Working Group provided two important forums for negotiations with all relevant stakeholders.

> **The Wik Summit[21]:** held between indigenous elders, land councils, academics, and mining, farming and grazing representatives. Indigenous peoples agreed to a self-imposed moratorium on native title claims over pastoral leases provided the Government agreed to the non-extinguishment of native title on pastoral leases and undertook to honour the RDA (a Coalition election commitment from the 1996 election[22])
>
> **Co-Existence: Negotiation and Certainty Document[23]**: a national response by indigenous representatives to the *Wik* decision and the Government's proposed amendments. The Co-Existence Document is grounded on the principles of:
>
> - international human rights
> - respect for the property rights of all titleholders on a non-discriminatory basis
> - respect for the principles of non-discrimination as set out in the RDA and
> - no extinguishment of native title without the informed consent of native title holders.
>
> These principles represented a considered and principled attempt to solve the concerns of all parties, rather than extinguishing rights for the benefit of a minority.

Despite invitation, representatives of the Government did not attend the Wik Summit, nor did the Working Group receive a response from the Government on the *Coexistence* document. In terms of the proposals for a fundamental non-discriminatory framework, the Prime Minister stated early in 1997 that:

> There's no law in Australia which is so sacrosanct that it can never be changed. So we mustn't get hung up on this idea that you can never ever, ever amend the *Racial Discrimination Act*.[24]

---

[21] See *The Wik Summit Paper*s, Cape York Land Council, 1997.
[22] Liberal/Nationals Election Policy 1996, *Aboriginal and Torres Strait Islander Affairs Policy*, p. 9.
[23] National Indigenous Working Group on Native Title, *Co-existence – Negotiation and Certainty: Indigenous Position in response to the Wik Decision and the Government's Proposed Amendments to the Native Title Act 1993*, 22 April 1997

[24] Frank Brennan, *The Wik Debate: Its Impact on Aborigines, Pastoralists and Miners*, Sydney, UNSW Press, 1998, p. 51.

The NIWG was given no opportunity to have formal input into the development of the Government's 'Ten Point Plan' response to the Wik decision and were only able to access the publicly available headline principles of the plan.

In contrast, the Government held considerable negotiations with representatives from the mining and farming industries over the Government's proposed response to the Wik decision and hence were provided with an opportunity to shape the Government's response. When the NIWG were presented with a final copy of the Government's Ten Point Plan they were told that there was no opportunity for deviation from the principles in the plan. At that time a decision was made that unless the Government was prepared to engage in good faith, meaningful negotiations then there was no point in the NIWG continuing to meet with him. As no positive response from the Government was forthcoming, formal meetings with the government ceased.[25]

Commenting on these forms of exclusion, one of Australia's most respected and moderate indigenous leaders and former Chair of the Council for Aboriginal Reconciliation, Patrick Dodson said after this exclusion that:

> What we have is the development in our law in this country which has left the political thinking and ingenuity well behind. They are back in the 1830s in terms of the political thinking here ... the political mind sets have no knowledge of Aboriginal people, no knowledge of the customary law, no knowledge of our right to identity, no knowledge of our unique position within this country, of the unique way in which we've been treated in this country, don't understand it, don't even know the Aboriginal people ... what's happening is the desire to remove the Aboriginal people off the landscape and make them totally dependent and return them to a state of being refugees within this nation.[26]

The Government's rejection of the right of indigenous representatives to effective negotiations on native title was most explicit during the return of the native title amendments to the Parliament for a third time. This third and final round of the Parliamentary debate was triggered in response to the Prime Minister's threat that a double dissolution election would be called if the Parliament did no pass the native title amendments. The non-Government Senator who held the balance of power in Parliament negotiated a deal with the Government, against the wishes of indigenous peoples, on the ground that 'the amended bill will avert the divisive double dissolution race based election in which I firmly believe blind prejudice, intolerance and hatred will reign.'[27]

---

[25] However, ATSIC bureaucrats continued to meet "officer to officer" with members of the Government's Wik Task Force on technical issues in accordance with the parameters established by the Coexistence document.[25]
[26] ABC Radio, *AM*, 8th May 1997
[27] *Hansard*, Senate, 6 July 1998.

Although the Government negotiated with all other relevant stakeholders from the farming and mining industries, indigenous people were excluded despite constant requests for inclusion. The Government indicated that the inclusion of indigenous representatives was unnecessary as the non indigenous Senator who held the balance of power, and passed an agreement contrary to the wishers of indigenous peoples, "was putting propositions all of which involved representations on behalf of Aboriginal people."[28]

Indigenous peoples emphatically rejected the substance and procedure of this deal. Prominent indigenous spokespeople from the NIWG described the deal as a 'gross betrayal of the rights of indigenous Australians'.[29] The Government appointed Chair of the Aboriginal and Torres Strait Islander Commission, Mr Gatjil Djerrkura, stated that indigenous people were 'understandably angry by their exclusion from the process of negotiation. All other stakeholders except indigenous representatives were involved'. Mr Djerrkura said that this 'suggested a lack of respect and equality for indigenous people on behalf of the Government.'[30]

Non-indigenous community leaders supported this condemnation of indigenous exclusion from the negotiations. On 5 July, National Aboriginal Sunday on the Church's calender, the Bishop of Broome, Most Rev. Christopher Saunders stated in relationship to the 'deal':

> What is clear is that the deal was done behind closed doors. The indigenous people were not part of the negotiations. They were talked about. They were discussed …The way it has been carried out with indigenous people excluded from negotiations about their future is not a cause for delight but rather another indicator that this nation is not prepared to treat indigenous people with due dignity and respect. The process used is an inadequate response to the need the country has for reconciliation.[31]

Peter J Wertheim, President of the NSW Jewish Board of Deputies stated that:

> many people in our community have grave reservations about the process by which the latest compromise was arrived at. How can the process be fair if the indigenous community was not a part of it? How can the outcome be fair if the process was not?[32]

As a final attempt to have indigenous voices recorded in the Parliamentary debate, the NIWG prepared a statement to be read into Hansard by non-Government

---

[28] Senator the Hon. Nick Minchin, Senate, *Hansard*, July 7 1998, p. 5183.
[29] Peter Yu, David Ross and Patrick Dodson, *Media Statement*, 5th July 1998.
[30] ATSIC, *Media Statement*, 5th July 1998
[31] [31] National Indigenous Working Group, *Press release*, 'Indigenous Despair Over Secret Deal', 30th June 1998.
[31] Most Rev. Christopher Saunders (Bishop of Broome) *Media Release*, 5th July 1998.

[32] Peter J. Wertheim (President of the NSW Jewish Board of Deputies), *Media Release*, 5th July 1998

Senators.[33]The long speech attests to the lack of consultation, negotiation and respect given to indigenous peoples during the entire native title debates, and particularly during the final 'deal' which saw the amendments become passed by the Parliament. For the Committee information, a copy of this speech is provided as an attachment to this submission.

[33] Senator the Hon Nick Bolkus, Senator Dee Margetts, Senator Bob Brown, Senator John Woodley, Senator Meg Lees, *Hansard*, 7th July 1998, pp. 5182–5175.

Conclusions

It is our submission that the 1998 native title amendments clearly transgress the international human rights standards set out in the Convention.

The majority of the most significant native title amendments (detailed in this submission) privilege non-indigenous interests to the detriment of indigenous native title holders' interests. In doing so, the amendments are racially discriminatory as defined in Articles 1, 2, 5 and 5(d)(v) of the Convention.

Although there are some amendments which do contain beneficial aspects for indigenous peoples (for example the indigenous land use agreements discussed on p. 8 of the Government submission) such limited beneficial amendments do not balance the heavy weight of racial discrimination which threads throughout the key amendments.

By significantly weighting the amendments in favour of non indigenous interests, the Government has failed to respect the carefully created balance in the original 1993 Act. In fact the discriminatory amendments specifically roll back the beneficial aspects of the 1993 Act (in particular the 'freehold standard' and the 'right to negotiate) which secured indigenous leaders consent to the discriminatory aspects of the 1993 Act. Consequently, the Native Title Act as amended is substantially weighted in favour of non-indigenous interest in a way that is racially discriminatory to native title holders. **The Native Title Act as amended transgresses the standard of racial non-discrimination in all public life, including in equality before the law and in the right to property and the right to inherit property, as set out in the Convention.**

Additionally, the fact that indigenous peoples were denied effective participation in negotiations about a matter specifically relating to their culture transgresses the Committee's interpretation of the Convention.

Australia has thus breached its obligations to respect the human rights of indigenous peoples' pursuant to international human rights standards and the Convention. We urge the Committee to make a finding reflecting this conclusion.