

Native Title Report

2000



*Human Rights and
Equal Opportunity Commission*



Native Title Report

2000

*Aboriginal & Torres Strait Islander
Social Justice Commissioner*



Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner

to the Attorney-General as required by section 46C(1)(a) Human Rights & Equal Opportunity Commission Act 1986.

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ISSN 1322-6017

Cover Design and Desktop Publishing by Jodey Wills

Printed by Superfine Printing

Artist Acknowledgement

The cover artwork by Alan Griffiths shows the Bali Bali Balga. When he was a young man he was given a ceremony by his Grandfather. In 1974 he had his own dream and added this to the song lines he already practised. The Bali Bali is a cultural ceremony that tells dreaming stories (old and new) about the country, the spirits and the Noongali people. It is structured in verse and each verse is represented by a Balmoora (woven dance board) made to a specific design that relates to the song line. Alan and his wife Peggy regularly perform the Bali Bali Balga and participate in many of the other ceremonial performances.

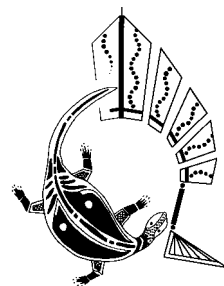
Alan Griffiths was born on Victoria River Downs Station in January 1933 where he lived and worked as a stockman until 1957. He then moved and worked at various outback stations as a stockman. In 1965 he met and married his promised wife Peggy at Argyle Station. Alan's artwork was first recognised in his Solo Exhibition at Greenhill Gallery in Perth, Western Australia in July 2000. His artistic career began in the early 1980s carving Boab Nuts and making didgeridoos and print making. Alan is a respected Aboriginal Elder of the Mirima Community and is deeply committed to cultural maintenance and traditional ways.

Our thanks to Alan for sharing his work with us.

Copyright in the artwork is retained by the artist.

About the Social Justice Commission logo

The right section of the design is a contemporary view of a traditional Dari or head-dress, a symbol of the Torres Strait Islander people and culture. The head-dress suggests the visionary aspect of the Aboriginal and Torres Strait Islander Social Justice Commission. The dots placed in the Dari represent a brighter outlook for the future provided by the Commission's visions, black representing people, green representing islands and blue representing the seas surrounding the islands. The Goanna is a general symbol of the Aboriginal people.



The combination of these two symbols represents the coming together of two distinct cultures through the Aboriginal and Torres Strait Islander Social Justice Commission and the support, strength and unity which it can provide through the pursuit of Social Justice and Human Rights. It also represents an outlook for the future of Aboriginal and Torres Strait Islander Social Justice expressing the hope and expectation that one day we will be treated with full respect and understanding.

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Human Rights and Equal Opportunity Commission



23 February 2001

The Hon Daryl Williams AM QC MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I am pleased to present to you the *Native Title Report 2000*.

The report is provided in accordance with section 209 of the *Native Title Act 1993*, which provides that the Aboriginal and Torres Strait Islander Social Justice Commissioner is to submit a report regarding the operation of the Native Title Act and its effect on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders.

Yours sincerely,

Dr William Jonas AM
Aboriginal and Torres Strait Islander
Social Justice Commissioner



Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner

Level 8, Piccadilly Tower, 133 Castlereagh Street, Sydney, NSW 2000
GPO Box 5218, Sydney, NSW 2001
Telephone: 02 9284 9600 Facsimile: 02 9284 9715
E-mail: atsisju@hreoc.gov.au



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Introduction

The breakthrough in the political and legal malaise which, in the late 20th Century continued to deny the inherent right of Aboriginal people to land, came from the common law. No-one believed terra nullius anymore. No-one believed that Aboriginal people were of a primitive and barbarous race without society or law. Yet the body politic had not responded to contemporary disbelief. It was the common law, the judiciary, which made this momentous first move. The *Mabo* decision¹ responded to a discontinuity between past and present perceptions of justice regarding Indigenous peoples rights to their land. Native title is a legal right to land based on the distinct cultural identity of Aboriginal people; their laws, traditions and customs.

The *Mabo* decision was not only significant in giving recognition to Indigenous rights to land. By breaking through the political inertia surrounding Indigenous rights the common law entered into a dynamic relationship with the legislature over the defining and refining of the principles that would govern the recognition of native title. Within 12 months of the *Mabo* decision the legislature responded. A new regime, the *Native Title Act 1993* (Cth) (NTA) dealt exhaustively with the protection and extinguishment of native title. Twelve months after the enactment of the NTA the High Court had reviewed the legislation declaring it to be constitutional and non-discriminatory.² In so doing the common law was not withdrawing from its tag match with the legislature. The NTA left a considerable role for the common law both in establishing the scope and nature of native title³ and in interpreting statutes which, prior to 1975,⁴ may be effective in

1 *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR1 (*Mabo (No.2)*).

2 *Western Australia v The Commonwealth* [1994-1995] 183 CLR 373. At 483-484 the Court said: 'The *Native Title Act* provides the mechanism for regulating the competing rights and obligations of those who are concerned to exercise, resist, extinguish or impair the rights and interests of the holders of native title. In regulating those competing rights and obligations, the *Native Title Act*, adopts the legal rights and interests of persons holding other forms of title as the benchmarks for the treatment of the holders of native title. But if there were any discrepancy in the operation of the two Acts, the *Native Title Act*, can be regarded either as a special measure under s8 of the *Racial Discrimination Act*, or as a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the *Racial Discrimination Act* or the International Convention on the Elimination of All Forms of Discrimination.



extinguishing native title. The importance of its role was reflected in the response, indeed outcry, from the government in December 1996 at the High Court's interpretation of early colonial laws granting pastoral leases in Queensland.⁵ The grant of a pastoral lease was held not to extinguish native title. Within 18 months of the *Wik* decision the amendments to the NTA, primarily directed at limiting the effect of this and other possible common law developments in native title law,⁶ were enacted. Now it is the common law's turn.

The claim of the *Miriuwung, Gajerrong and Balangarra* people in northern Australia has raised the issue of how the common law constructs rights whose origin lies in another system of law: the law of Indigenous people. The case, before the High Court for hearing on 6 March 2000, will decide whether native title is constructed as a bundle of discrete, severable and enumerable rights each of which can be extinguished by the grant of inconsistent non-Indigenous interests or whether native title is constructed as a right to the land itself. If the latter construction is confirmed native title will only be extinguished if the grant of a non-Indigenous interest in land is inconsistent with the continuation of the underlying relationship that Indigenous people have with their land. The choice for the Court is between native title as a weak title, able to be eroded piece by piece until its destruction is complete or native title as a strong title, able to survive and co-exist with non-Indigenous interests wherever possible.

A similar choice is before the Court in the claim of Mary Yarmir on behalf of her people for their sea rights off the coast of northern Australia. The High Court is again required to consider the extent to which it will recognize rights which originate in a system of law that differs significantly from that of which it is a part. Under a Western system the law of the sea differs considerably from the law of the land. This difference does not arise in Indigenous traditions. The consequence of imposing limitations onto the recognition of native title sea rights based on the Western distinctions is that the level of protection extended by the common law to native title is insufficient to ensure that Indigenous culture survives. These two cases, the *Miriuwung Gajerrong* case and the *Croker Island* case are discussed in Chapters 2 and 3 of this report.

The impact of these decisions on Indigenous culture is not ameliorated by the *Native Title Act* 1993(Cth) (NTA). The common law definition of native title is incorporated into the NTA through the definition section of the Act.⁷ If native title is extinguished at common law by the creation of non-Indigenous rights then, in most instances,⁸ they will not be revived by the NTA. Indeed the NTA renders valid those extinguishments after 1975 that would otherwise have been invalid

3 See: section 223 *Native Title Act* 1993 (Cth).

4 After the enactment of the *Racial Discrimination Act* in 1975 statutes which had the effect of granting title to non-Indigenous people whilst ignoring or extinguishing the rights of Aboriginal people to land were invalid.

5 The *Wik Peoples v State of Queensland and Others* (1996) 187 CLR 1 (the '*Wik* decision')

6 The confirmation provisions, sections 23A-23JA, had the effect of deeming that particular grants would extinguish native title. Consequently the common law position with respect to extinguishment would be otiose.

7 NTA s 223.

8 There is an exception under s47B NTA: where native title claims are made over vacant Crown land and the claimants are in occupation of the land, prior extinguishment will be disregarded.



as a result of the operation of the RDA.

The NTA has been the subject of severe and sustained criticism by two United Nations human rights treaty bodies in 2000. The Committee on the Elimination of Racial Discrimination, (the CERD Committee), after calling Australia to account for the amendments to the NTA in 1999, expressed its concern in March 2000 that no action had been taken in response to the Committee's conclusion that significant provisions of the amended NTA were discriminatory.⁹ The Human Rights Committee, meeting in July 2000 also expressed its concern 'that the Native Title Amendments of 1998 in some respects limit the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands'.¹⁰

This report documents and analyses, at Chapter 1, the dialogue that has generated at both a national and international level by the amendments to the NTA with particular focus on the meaning of equality and its application to the unique cultural and historical circumstances of Indigenous people within Australian society. While this dialogue has elevated the overall level of understanding within the community and within government of the meaning of equality in relation to Indigenous people, it has not resulted in amendments to remove the discrimination within the NTA. The final two chapters of the report discuss the operation of an Act which is declaimed as discriminatory and provides insufficient protection to Indigenous land and culture. Instead of taking an opportunity to re-frame the protection of Indigenous heritage within the broader concept of a human right to enjoy one's culture the NTA diverts heritage protection back to inadequate State heritage legislation. Those rights that remain for determination within the NTA are also exposed to inadequate protection due to the limited interpretation given to procedural rights under the Act.

The outcome of the two cases before the High Court are fundamental to setting the standard of protection that the common law will provide to native title. Yet the legislature remains the final arbiter of the level of protection that will be provided to Indigenous land and culture. It can decide where its tag match with the common law will end. From a human rights perspective it is the responsibility of the legislature to ensure that where the common law fails to set adequate benchmarks of protection in its recognition of native title additional protection will be provided to ensure that the international standard of equality is met.

9 Committee on the Elimination of Racial discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc: CERD/C/304/Add.101, 19/04/2000.

10 UN Doc CCPR/CO/69/AUS, para 9.



Nation in dialogue

The application of human rights principles to native title has been the subject of an ongoing dialogue taking place both nationally and internationally in the reporting period. This dialogue has occurred between the Australian government and two UN treaty committees, on the Elimination of Racial Discrimination (August 1999 and March 2000) and the Human Rights Committee (HRC) (July 2000); between Indigenous non-government organizations and UN committees on each of these occasions; between the government and Indigenous and non-Indigenous representatives before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Fund (PJC) in February and March 2000; and, at a broader level, among Australian citizens and a range of institutions, as part of a continuing debate about the meaning of reconciliation.

While this discourse has elevated the overall level of understanding within the community and within government of the meaning of equality in relation to Indigenous people, it has not resulted in amendments to remove the discrimination within the NTA. The NTA continues to authorise discriminatory state legislation; case law continues to confirm the inadequate protection extended by the NTA to native title holders; native title agreements continue to reflect the inadequate bargaining power offered Indigenous people under the NTA in relation to the management of their land; and Indigenous culture continues to be eroded throughout Australia. The inevitable consequences of the present legislative regime governing native title throughout Australia if left unamended are documented in Chapter 5 of this report.

Yet, despite this persisting discrimination, it is my conviction that over time the dialogue on equality and human rights will produce tangible results for Indigenous people. Through this process the notion of equality is informed by a range of views that are tested against each other. Gradually positions change as their proponents come to understand the impact of their 'logic' on others. Apart from these internal mechanisms for modifying and testing ideas and opinions, the context in which the dialogue takes place can have a significant effect on the positions adopted and the arguments put. This contextual effect was illustrated by the striking contrast between the arguments put to the electorate by the government in the domestic arena to justify the proposed



amendments to the NTA in 1998 and its arguments in the international arena as to why these amendments meet international standards of equality under the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) and the International Convention on Civil and Political Rights (ICCPR). In the domestic arena, the notion of equality was used to justify the winding back of procedural and substantive protections in the NTA on the basis that other landholders were not given these same rights. In the international arena it was accepted by the government that, because of its unique nature, native title required particular protection. The government conceded that the appropriate standard of equality to be applied to the amendments was one which permitted different treatment where the distinct characteristics of the group justified this. It then argued that the amended NTA met this international standard of equality. The inquiry by the PJC into the sustainability of the CERD Committee's decision¹ was, in effect, a re-hearing of what had already been argued before the CERD Committee in Geneva one year earlier. The context of this re-hearing however was a domestic one in which the politics of 'balancing' interests, fought out during the amendment debate, were to re-emerge.

The result was an attempt in the majority report on the inquiry² to conflate these two contexts, the domestic and the international, such that human rights standards could be seen to justify past political deeds. The CERD Committee's decision, on the other hand, emphasised the need to separate human rights from political imperatives, seeking instead to distil the non-derogable principles which must proscribe political will.

It is my view that the survival of Indigenous culture within the broader Australian society depends, not only on maintaining this separation, but in persuading others that such a separation is fundamental to a civil society. If the power of interests is to determine the basis of Australian society then Indigenous people, as a small minority group, will continue to lose their culture, their land, and their language to the will of the non-Indigenous majority. If however human rights are given a heightened position within civil society, acting as a brake on any one interest dominating and destroying the interests of others, then Indigenous people will enjoy their unique culture while still participating in the broader society.

This is where I hope the dialogue that others and I have been engaged in over the past year will take us. While the immediate impact has not been felt, particularly in relation to the NTA, the longer-term goal is to bring about this shift in thinking.

-
- 1 On 9 December 2000 the Senate referred to the PJC for inquiry and report; (a) whether the finding of the Committee on the Elimination of Racial Discrimination (CERD) that the *Native Title Amendment Act 1998* is consistent with Australia's international legal obligations, in particular, the Convention on the Elimination of All Forms of Racial Discrimination, is sustainable on the weight of informed opinion; (b) what the amendments are required to the Act, and what processes of consultation must be followed in effecting those amendments, to ensure that Australia's international obligations are complied with; and (c) whether dialogue with the CERD on the Act would assist in establishing a better informed basis for amendment to the Act.
 - 2 Parliament of the Commonwealth of Australia, *Sixteenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund: CERD and the Native Title Amendment Act 1998*, June 2000 (PJC Report).



The dialogue with the Parliamentary Joint Committee on Native Title

As indicated above, the inquiry by the PJC into the CERD Committee decision that the amended NTA did not meet Australia's obligations under the ICERD was an opportunity to reappraise within a domestic setting the arguments raised by both the government and Indigenous representatives before the CERD Committee. As in the international arena, the PJC inquiry dealt with the fundamental assumptions underlying the amendments to the NTA and evaluated these against the standard of equality. Such a dialogue is invaluable, particularly at a stage where the Act has been in operation for two years and is having an impact on Indigenous communities throughout Australia.

Placing the international law debate within a domestic setting also served a broader purpose. It provided an opportunity to many groups with an interest in the native title legislation, including the National Farmers' Federation and the Minerals Council of Australia, to participate in the process of reconciling their position with a human rights approach. Their participation broadened the dialogue, giving it a distinctive character, quite different to that which took place in Geneva one year before. As indicated, this process of maintaining a domestic dialogue around human rights assists the development of a civil society whose fundamental assumptions extend beyond self-interest.

Some of the important issues that arose out of the PJC inquiry are now discussed.

Treating differences differently

An acceptance in the majority PJC report that the standard of equality at international law incorporates substantive equality distinguished the dialogue with the PJC from public debate during the amendments to the NTA in 1998.

Equality, as the term is now understood under customary international law, incorporates the idea that differences in treatment are permissible, in order to achieve real or substantive equality.³

What this means is that the government, in line with international human rights definitions, accepts that racial equality is not always achieved merely by treating individuals or groups of particular ethnic origin the same as those who do not originate from that background. Different treatment is permitted, and in many circumstances required, in order to achieve equality.

Judge Tanaka of the International Court of Justice in the *South West Africa Case*, stated the principle succinctly:

The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal... To treat unequal matters differently according to their inequality is not only permitted but required.⁴

3 PJC Report, *op cit.*, Executive Summary, p ix.

4 *South West Africa Case (Second Phase)* {1966} ICJ Rep 6, pp303-304, p305.



Having accepted that substantive equality is an appropriate standard at international law, the PJC was left to grapple with the question of what differences should be treated differently in order to achieve real or substantive equality.

In evaluating the PJC's response to this question it is important to bear in mind that from a human rights perspective, the fundamental concern is that individuals or groups are not discriminated against on the basis of their race. That is, that they do not suffer disadvantage or invidious treatment because of their racial origin. Differential treatment that does this is a breach of international law. No rationale can justify or excuse such treatment.

Not all differential treatment based on race has a negative, discriminatory effect. Some differential treatment, such as measures to redress past discrimination, or to protect the culture and language of a particular ethnic group, is aimed at ensuring that the recipients of this treatment enjoy their human rights to the same extent as others. This differential treatment is not discriminatory and is the basis of a substantive equality approach.

It is also consistent with the Committee's General Recommendation XIV which excludes differential treatment consistent with the objectives and purposes of the Convention from the definition of discrimination.

A differentiation of treatment will not constitute discrimination if the criteria for such differentiation, **judged against the objectives and purposes of the Convention**, are legitimate... In seeking to determine whether an action has an effect contrary to the Convention, it (the Committee) will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race...⁵ (emphasis added)

Far from such treatment being outlawed by international law, there are occasions when such differential treatment is required by conventions such as ICERD, in order to achieve equality. The recognition and protection of native title illustrates this point.

The recognition of native title in the *Mabo* decision⁶ is a recognition of the distinct culture of Indigenous people. It is a title to land that only Indigenous people can enjoy.

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.⁷

The failure to recognise and protect the distinct relationship Indigenous people have with their land is a failure to give Indigenous culture the same respect that is given to non-Indigenous culture. The High Court made it clear in *Mabo* that the failure to recognise native title was discriminatory:

The theory that the indigenous inhabitants of a 'settled' colony had no proprietary interest in the land thus depended on a discriminatory

5 Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation XIV – Definition of discrimination*, 19/03/93, para 2.

6 *Mabo v Queensland (No.2)* (1992) 175 CLR 1 (the *Mabo* decision).

7 *ibid*, p58.



denigration of indigenous inhabitants, their social organisation and customs.⁸

The obligation to recognise and protect the Indigenous relationship to land must be understood in terms of a substantive equality obligation to treat differences differently. The level of protection required to ensure native title holders are given the same security in the enjoyment of their title as non-Indigenous title holders must also be gauged from this same understanding. Equal protection does not mean that native title holders are treated exactly the same as non-Indigenous title holders. The protection must be directed towards the enjoyment of the unique character of the title. My submission to the PJC (Appendix 1) sets out in more detail how the amendments to the NTA fail to provide the required level of protection measured against an equality standard.

The PJC majority report

The majority report of the PJC concedes the relevance of substantive equality to Australia's obligations under ICERD, and then seeks to explain what substantive equality requires of States at international law, and how the amended NTA meets this standard.

Its approach to this task is to distinguish substantive equality from formal equality, the essential distinction being the treatment of difference. Substantive equality permits different treatment on the basis of race in order to achieve equality whereas formal equality requires racial groups be treated the same.⁹

The next stage is to determine what different treatment is permitted under substantive equality. It is at this point that some confusion arises as to what principles justify the adoption of differential treatment. Early in the majority report the principle is pronounced to be:

Equality, as the term is now understood under customary international law, incorporates the idea that differences in treatment are permissible, in order to achieve real or substantive equality. The State must be able to show that any such difference in the treatment of groups or individuals is not arbitrary, and can be reasonably and objectively justified by reference to the distinctive characteristics of the group or individual. The term 'discrimination' is now understood as meaning only unjustified or invidious distinctions.¹⁰

This definition is consistent with the fundamental concern of a human rights approach that people or groups do not suffer disadvantage or invidious treatment because of their racial origin. It is also consistent with the obligation that underlies the recognition of native title – to give equal respect to the cultural identity of people or groups.

The principle, that differential treatment must not be invidious and must be justified by reference to the distinct characteristics of the group or individual, is significantly modified in a restatement of the principle later in the report:

8 *ibid*, p40.

9 PJC Report, *op cit*, p10.

10 *ibid*, Executive Summary, pix.



To be justified as a substantive equality measure, the different treatment must be based on relevant or justifiable distinctions, and must be appropriately adapted to the distinctive characteristics of the group or individual.¹¹

Significantly the requirement that the treatment must not be invidious is not mentioned. The justification by reference to the distinctive characteristics of the group is now only one arm of the test which also permits 'relevant or justifiable distinctions', without stipulating the criteria by which relevance or justifiability is to be measured.

This shift in the test is important because it raises the possibility that differential treatment that has a detrimental effect on an already disadvantaged racial group might be permitted through the substantive equality door even though such treatment would not be permitted under a formal equality approach.

What was only a possibility at this stage in the report becomes reality in the third manifestation of the principle which is applied to the four sets of provisions found by the CERD Committee in March 1999 to be discriminatory; the validation provisions, the confirmation provisions, the primary production upgrade provisions and the changes to the right to negotiate provisions.¹² In considering each of these provisions the differential treatment of native title holders, whose interests are subordinate to the interests of non-Indigenous title holders, is permitted under a substantive equality test, if the objectives of the provisions are 'legitimate'. It can be seen from an examination of the application of this test to the amendments to the NTA that the criteria against which legitimacy is measured are not human rights principles but political considerations.¹³

Applying the test of 'legitimacy' to the NTA amendments

Validation provisions: In relation to the validation provisions, the majority of the PJC argued that the legitimate objective of the differential treatment of native title holders whose interests are either extinguished or impaired, is to provide certainty. It is argued that the assumption that native title was extinguished by a pastoral leasehold prior to the *Wik*¹⁴ decision was reasonable in all the circumstances and that the validation of acts performed as a result of this assumption is reasonable.

Thus, the validation provisions in the 1998 amendments were enacted for the legitimate purpose of providing certainty and to respond to an unforeseen legal problem.¹⁵

The interest groups that gain as a result of the validation provisions are expressed to be both pastoralists:

... most of those who 'benefited' from the grant of potentially invalid acts in the intermediate period were not governments but farmers and

11 *ibid*, p10.

12 Committee on the Elimination of Racial Discrimination. *Decision (2)54 on Australia*, 18 March 1999, UN Doc CERD/C/54/Misc.40/Rev.2. (CERD Decision 2(54)).

13 The four sets of provisions are considered in the Majority Report of the PJC Report at pp37-58.

14 *Wik v Queensland* (1996) 187 CLR 1 (the *Wik* decision).

15 PJC Report, *op cit*, p42.

pastoralists, who acted in good faith and relied on the statements of governments.¹⁶

and mining interests:

The validation provisions only apply on pastoral leasehold land. Furthermore, the most common interests granted in the intermediate period without complying with the provisions of the Native Title Act were mining leases, which do not extinguish native title because the non-extinguishment principle applies. Therefore, if there has been any extinguishment of native title as a result of the validation provisions, it is likely to have been minimal.¹⁷

The identification of winners as a result of the validation of intermediate period acts implies that there must also be losers. Clearly, native title holders belong to this class. Certainty has been provided to one group at the expense of another group. The interests of pastoralists and miners have prevailed over the interests of native title holders. The 'legitimation' of the validation provisions by the majority of the PJC is a political justification for discriminatory acts rather than a human rights approach to differential treatment.

Having identified the winners, the majority report then argues that the impact on the native title holders, is minimal.¹⁸ It identifies countervailing provisions such as, the provision for governments and native title holders to agree to change the effect of the validation provisions; the provisions which reinstate native title where the holders are in possession and the land is vacant crown land; and the provision of compensation where native title is affected by the validation of intermediate period acts.¹⁹

I comment upon these countervailing provisions in my submission to the PJCT (Appendix 1).²⁰ In summary, these provisions are inadequate to compensate for the discrimination that has occurred as a result of the validation of intermediate period acts. Their effect is to lessen the impact of the validation provisions rather than offset their discriminatory impact. In relation to validated mining interests, granted over pastoral leaseholds during the intermediate period, native title holders are denied the right to negotiate. Ironically the right to negotiate was introduced into the original NTA in order to offset the discriminatory impact of the validation of past acts. No such countervailing measures were provided to offset the validation provisions of the amended NTA. Indeed the right to negotiate provisions were wound back in the amended NTA. In contrast to the countervailing measures provided under the original NTA to offset the discriminatory validation provisions, the amendments, both discriminatory and countervailing, were not enacted with the agreement of Indigenous people.

16 *ibid*, p43.

17 *ibid*, p43.

18 *ibid*, p45.

19 *ibid*, p44.

20 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Inquiry of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund into CERD and the Native Title Amendment Act 1998*, May 2000, pp14-17. *ATSISJ Commissioner's Submission to the PJC Inquiry into CERD*. See: Appendix 1. The submission is also available on the HREOC website: www.hreoc.gov.au.



Confirmation provisions: The justification in the majority report for the differential treatment of native title holders which occurs through the confirmation provisions of the amended NTA are also certainty and workability.²¹ Native title is extinguished where exclusive possession titles have been granted. If the extinguishment of native title were to be left to the common law to resolve, the Committee argues, this would result in time consuming and costly litigation.²² In the meantime land holders would be uncertain as to whether native title coexists on their land. For these purposes the extinguishment of native title for the benefit of non-Indigenous title holders is a differential treatment that is justified by reference to these purposes. Accordingly, it is argued, it is not discriminatory.²³ In addition it is argued that the impact of these extinguishments on native title holders is minimal because it merely confirms the common law in relation to extinguishment.²⁴ There are two responses to these arguments.

First, there is an inconsistency in the propositions underlying the Committee's argument that, on the one hand, the impact of the confirmation provisions are minimal in that they merely confirm the common law position, and on the other hand, that the confirmation provisions are necessary to provide certainty where the position is otherwise unclear.

Any confirmation that restricts itself to matters upon which the existing law is utterly clear and free from doubt will serve little useful purpose. Confirmation provisions that go beyond this (and enact what is, in effect, no more than a best estimate of what the law is) will result in an added measure of certainty.²⁵

And two paragraphs later, under the heading 'Limited Effect on Native Title and the Margin of Appreciation', the Committee contradicts its previous proposition,

The Government argues that these provisions do not effect any further extinguishment of native title rights or interests. The titles that are confirmed to have extinguished native title, including all of the Schedule 1 interests, were included because it was assessed that they conferred exclusive possession and had therefore extinguished native title.²⁶

It cannot be logically argued that the confirmation provisions merely confirm the common law if the justification for the confirmation provisions is to provide certainty where the common law position on extinguishment is unclear. Secondly, even if the confirmation provisions are a restatement of the common law position, the impact of these provisions on native title holders cannot be classified as minimal. As I argued in my submission to the PJC, the government is not permitted to breach its international obligations because it is 'merely' confirming

21 PJC Report, *op cit*, p45.

22 *ibid*, p48.

23 *ibid*, p37. This argument is put generally in relation to the four sets of provisions.

24 *ibid*, p46.

25 *ibid*. The majority of the PJC are here quoting from their *Tenth Report* where they found it appropriate that the Parliament intervene to resolve extinguishment where this is unclear at common law.

26 *ibid*.



the common law.²⁷ Far from exonerating the legislature, where the common law has a discriminatory operation then it is incumbent on the legislature to rectify such discrimination, not enshrine it in legislation. The government's international obligations in respect of the discriminatory impact of recent developments in the common law principles of extinguishment are discussed in Chapters 2 and 3 of this report.

Certainty is provided to non-Indigenous title holders at the expense of native title holders. Such differential treatment is invidious and disadvantages Indigenous people on the basis of their race. Under a human rights approach this differential treatment cannot be justified as meeting either a formal or a substantive equality standard.

Primary production upgrade provisions; The justification for the amendments that permit pastoral leaseholders to carry out a range of activities (in addition to those authorised by their lease) without negotiating with native title holders whose rights might be affected by these additional activities²⁸ is that the provisions strike a reasonable balance between the competing rights of native title holders and pastoral lessees.²⁹ This balance involves the subjugation of native title interests to those of pastoral leaseholders developing the land.

The CERD Committee responded to a similar argument put to it by the government representatives in March 1999 by pointing out, in paragraph 6 of its decision, that the Convention requires that State Parties balance the *rights* of different groups identifiable by race.³⁰ An appropriate balance based on the notion of equality is not between miners, pastoralists, fishing interests, governments and Indigenous people, but between the rights – civil, political, economic, cultural and social – of Indigenous and non-Indigenous titleholders. The CERD Committee's decision states:

While the original Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for government and third parties at the expense of indigenous title.³¹

The PJC's understanding of substantive equality allows invidious differentiation on the basis of race where the government is of the view that the interests of the various stakeholders are balanced. This is not differentiation which is justified by reference to the distinct characteristics of Indigenous people, it is differentiation based on the political exercise of balancing interests.

27 *ATSISJ Commissioner's Submission to the Inquiry into CERD, op cit*, p17.

28 NTA, Division 3, Subdivision G, Part 2, deals with the validation of primary production activities listed under s24GA, including cultivating land; maintaining, breeding or agisting animals; taking or catching fish or shellfish; forest operations; horticultural activities; aquacultural activities; and leaving fallow or de-stocking any land in connection with the doing of any thing that is a primary production activity. NTA s24GE also authorises the taking of natural resources from pastoral leases without negotiating with Indigenous people.

29 PJC Report, *op cit*, p49.

30 CERD decision 2(54), *op cit*, para 6. Committee member Mr. Aboul-Nasr discusses this issue when examining Australia. See: *Transcript of Australia's Hearing before the CERD Committee, Summary of Record of the 1323rd meeting, Committee on the Elimination of Racial Discrimination*, p44.

31 *ibid.*



The right to negotiate

There are two purposes which the majority report cites as justifying the amendments which wind back the right to negotiate, particularly where native title coexists on pastoral leasehold land. First, the right to negotiate is an impediment to resource and commercial development.³² Second, where native title coexists on pastoral leasehold land, native title is of a more limited character and the right to negotiate should be pegged back to reflect this more limited right.³³ In any case, it is argued, the amendments cannot be discriminatory because the right to negotiate is a special measure and limiting its operation does not offend the principle of substantive equality.³⁴

In relation to the first basis, the amendments have the effect of realigning interests so that commercial interests are preferred over the protection of native title. This approach cannot be justified within a human rights framework.

In relation to the second basis, the 'limited' nature of native title as a coexisting right does not legitimate moderating its protection. Indeed, where native title is vulnerable, as it is on pastoral leasehold land, a human rights approach would require the law to provide more protection in order to ensure equal respect for Indigenous customs and traditions.

The argument that the right to negotiate is a special measure and therefore its removal or amendment does not constitute discrimination, was commonly relied on during the parliamentary debate in 1998 to justify the amendments to the right to negotiate. The argument in the majority report is slightly different to that of 1998 in which the government characterised special measures as an optional extra to their formal equality obligation.³⁵ In the majority report special measures are still an optional extra but in this case they augment, not formal equality, but substantive equality. This is a novel argument.

As stated in the *Native title report 1998*, the right to negotiate is not a special measure.³⁶ This follows, as discussed above, from the nature of the rights that the right to negotiate is designed to protect, rights based on the traditions and culture of Indigenous people, not rights bequeathed by a benevolent government. Yet even if it were a special measure, its categorisation as an optional extra is erroneous. As stated in the *Native Title report 1998*,³⁷ there are two categories of differential treatment protected within a human rights framework. The first is the right to express one's cultural identity. The second is the provision of special measures aimed at facilitating the advancement of certain racial groups who historically have been disadvantaged by past discriminatory policies. Both these categories are justified by their objective of ensuring the genuine, substantive enjoyment of human rights.

32 PJC Report, *op cit*, p52.

33 *ibid*, pp52-54.

34 *ibid*, pp53-54.

35 See: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native title report 1998*, pp73-116 for the Commissioner's response to these arguments.

36 *ibid*, pp100-105.

37 *ibid*, p96.



Special measures are not in a category of their own belonging to neither a formal equality approach or a substantive equality approach; an optional extra which government can choose to provide or withdraw at will, without offending the concept, either substantive or formal, of equality. This position is inconsistent with Article 2(2) of ICERD which requires that where human rights are not enjoyed equally, then the provision of special measures are required to ensure equality is achieved between racial groups. In addition the basis for withdrawing a special measure is clearly set out in Article 1(4) of ICERD

...they shall not be continued after the objectives for which they were taken have been achieved.³⁸

The justification for the withdrawal of special measures is that they have done their job; they have broken the cycle of discrimination and the target group is no longer in need of special treatment; substantial equality has been achieved. The removal of the full right to negotiate on pastoral leasehold land cannot be justified by reference to these criteria.

The PJC's analysis of the four sets of provisions by reference to a substantive equality approach reveals that the majority of the PJC have sought to justify differential treatment which prefers non-Indigenous interests over Indigenous interests, so long as the purposes are 'legitimate'. Legitimate purposes can include providing certainty to particular interest groups, saving the expense of time consuming litigation, validating mistaken assumptions about future developments in the common law, striking a balance between interest groups and ensuring unimpeded commercial development.

The principle by which differential treatment is found to have met a substantive equality standard has, by the end of the majority report, degenerated from a test which protects Indigenous people against invidious treatment but recognises their distinct characteristics, to one which justifies invidious treatment whose purpose can, nevertheless, be legitimated as politically reasonable. The result is that, on the reasoning of the majority report, substantive equality provides a lower standard than formal equality which would not permit the discriminatory differentiation of Indigenous and non-Indigenous title holders.

This result, that substantive equality permits invidious differentiation on the basis of race, is inconsistent with a human rights approach. The hallmark of substantive equality is that it moves beyond the reductionist approach of applying a single rule against differential treatment to a contextual approach that recognises the historical and social determinants of discrimination. It aims to deal with the substance of discrimination, not just its form. It should not be used as a tool to increase the leeway that governments have in meeting their human rights obligation to ensure equality on the basis of race.

38 ICERD, Article 1(4).



The dialogue with the CERD Committee, March 2000

Arguments very similar to those put by the government to the PJC in relation to native title were also put to the CERD Committee when Australia's periodic report was considered in Geneva on 21 and 22 March 2000.³⁹ The reception of these arguments by the CERD Committee was quite different to that analysed above in the majority report of the PJC. Clearly the CERD Committee was dissatisfied with the government's response to the CERD Committee's concerns as expressed in *Decision 2(54)* and to its recommendation that the government renew negotiations with Indigenous people in order to rectify the situation. The CERD Committee's concerns are twofold. First the amended NTA fails to meet the standard of equality required under the Convention. Second, the requirement under Article 5(c) of the Convention, emphasised in *Decision 2(54)*, that Indigenous people give their informed consent to decisions that affect them, was disputed and ignored by the Australian government in relation to the enactment of the amended NTA.

The standard of equality under ICERD

In its Concluding Observations⁴⁰ the CERD Committee reiterated the finding that the amended NTA is discriminatory:

The Committee notes that, after the renewed examination in August 1999 of the provisions of the Native Title Act as amended in 1998, the devolution of power to legislate over the 'future acts' regime has resulted in the drafting of state and territory legislation to establish detained 'future acts' regimes which contain provisions reducing further the protection of the rights of native title claimants that is available under Commonwealth legislation. Noting that the Commonwealth Senate rejected on 31 August 1999 one such regime, the Committee recommends that similarly close scrutiny continue to be given to any other proposed state and territory legislation to ensure that protection of the rights of indigenous peoples will not be reduced further.

39 The oral appearance of the Australian government delegation before the CERD Committee is documented in two ways:

- (i) the unofficial, complete transcript of the dialogue by Foundation for Islander Research Action (FAIRA), *Transcript of Australia's hearing before the CERD Committee – 1393rd, 1394th and 1395th meetings*, 21-22 March 2000, FAIRA, Brisbane 2000, (FAIRA, *CERD Transcript, – 21-22 March 2000*), see also www.faira.org.au/cerd/; and
- (ii) the official United Nations summary records: Committee on the Elimination of Racial Discrimination, *Summary record – 1393rd meeting*, UN Doc CERD/C/SR.1393; Committee on the Elimination of Racial Discrimination, *Summary record – 1394th meeting*, UN Doc CERD/C/SR.1394 (Transcript only available in French); Committee on the Elimination of Racial Discrimination, *Summary record – 1395th meeting*, UN Doc CERD/C/SR.1395; Committee on the Elimination of Racial Discrimination, *Summary record – 1398th meeting*, UN Doc CERD/C/SR.1398. (Transcript only available in French).

Reference is also made to the written answers provided by the Australian delegation to the Committee. Copies of the written answers supplied by the government are available from the Secretariat of the CERD or by contacting the office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC.

40 Committee on the Elimination of Racial discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/304/Add.101, 19/04/2000, at para 8.



The dialogue between the government and the Committee about the international standard of equality under ICERD was led by Country Rapporteur, Ms Gay McDougall.⁴¹

First of all, is it the view of the state party that the Convention establishes a legal duty to ensure formal equality with respect to the rights of historically disadvantaged racial and ethnic groups that still suffer from those inequalities, or is it substantive equality that is the obligation, and what are your definitions and where do you place special measures within that framework?⁴²

The Australian delegation answered this question about their understanding of the standard of equality established at international law in the following terms:

Australia regards its obligations under the Convention as requiring equality between racial groups. This equality can be achieved by formal equality and special measures, where appropriate, or by substantive equality which recognizes that differential treatment is not necessarily discriminatory if it is legitimate, recognizing legitimate difference or distinct rights.⁴³

The Country-Rapporteur responded:

I'm also very pleased to hear your delegation confirm that it is the position of the state party that the Convention establishes an obligation to ensure substantive equality, not mere formal equality, in situations like those that prevail in Australia today.⁴⁴

The delegation responded further to this as follows:

Ms McDougall... made the point... that Australia had confirmed that substantive equality is required. I just wanted to make a little comment about that, and the issue... about whether Australia regarded formal equality as sufficient for the purposes of the Convention. I think the Australian Government does not argue that the Convention only requires formal equality, and this point was certainly made to the Committee members when the Australian delegation appeared in March last year.⁴⁵ I suppose that the way the Australian Government would see its obligations under the Convention is that the equality required by the Convention can be achieved in a number of ways – that equality is equality between racial groups – and those ways include by formal equality and special measures where appropriate, and by substantive equality which recognises

41 Ms McDougall is the Country Rapporteur for Australia. She is also the expert nominated for election to the CERD Committee by the United States of America. The country rapporteur leads the Committee in its consideration and questioning of the State Party.

42 I FAIRA, *CERD Transcript, 21-22 March 2000*, 1394th meeting, Part III, pp2-3.

43 Commonwealth of Australia, *Written answers to the Committee on the Elimination of Racial Discrimination. Issue: Does Australia regard the Convention as requiring formal or substantive equality*. See: n42.

44 FAIRA, *CERD Transcript, 21-22 March 2000*, 1394th meeting, Part III, p12.

45 Australia's appearance in March 1999 was in relation to the early warning procedure and the native title amendments. For an analysis of the government's explanation of how it believed the native title amendments to be consistent with the Convention see: *Native title report 1999, op cit*, Chapter 2; Dick, D. and Donaldson, M., *The compatibility of the amended Native Title Act 1993 (Cth) with the United Nations Convention on the Elimination of All Forms of Racial Discrimination*, Issues Paper 29: Land, rights, laws: Issues of native title, Native Titles Research Unit, AIATSIS Canberra 1999.



differential treatment, that differential treatment is not necessarily discriminatory.⁴⁶

The government has clearly sought to keep its options open on whether its treatment of Indigenous people has met its obligations under the Convention. It contends the Convention can be met by a combination of measures that provide either formal equality, substantive equality or, in a category of its own, the adoption of special measures. It argues the arbiter of what particular standards should be aimed for in any particular situation is the Parliament.

A similar position was expressed by the government to the Human Rights Committee (HRC), when Australia's periodic report under the ICCPR was considered in July 2000. Before the HRC, the government delegation stated:

Concerning Article 26 dealing with equality before the law and the prohibition of discrimination, I would note first that international law admits of both a formal and a substantive standard for assessing equality. Traditionally, racial equality was conceived of in terms of formal equality and, in that respect, the spirit of equality would lie in sameness and identical treatment, however, international law recognises that in some circumstances, positive discrimination towards certain racial groups may be necessary. This would be the case where in instances of underlying disadvantage, temporary affirmative action or special measures are allowed in order to hasten equal enjoyment of rights for all racial groups. Since that time, the interpretation of the concept of equality has broadened to include substantive equality in that Governments may treat like things alike and different things differently. However, this alternative way of defining equality does not preclude the one originally conceived of in international law. The two approaches to the issue of equality coexist in international law.⁴⁷

The flaw in this argument, that presents equality as a range of options from which a government may choose to dispense its treatment, is demonstrated by applying it to the obligation to recognise and protect native title. As indicated, the recognition of native title is a recognition of the distinct culture of Indigenous people. It is a title to land that only Indigenous people can enjoy. A formal equality approach, treating Indigenous people exactly the same as non-Indigenous people, would result either in the discriminatory non-recognition of native title or inadequate protection. The High Court made it clear in *Mabo* that the failure to recognise this unique relationship to land on the basis that it does not equate to non-Indigenous property concepts, is discriminatory.

The theory that the indigenous inhabitants of a 'settled' colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organisation and customs.⁴⁸

46 FAIRA, *CERD Transcript, 21-22 March 2000*, 1395th meeting p2.

47 Ms Leon, Foundation for Aboriginal Islander Action (FAIRA), *Transcript of Australia's appearance before the Human Rights Committee, 20-21 July 2000*, 21 July 2000, FAIRA Brisbane 2000, p19, (FAIRA, *Human Rights Committee Transcript*). See: www.faira.org.au/hrc/. See also Human Rights Committee, *Summary record of the 1856th meeting: Australia*, UN Doc CCPR/C/SR.1856, 28/07/2000; Human Rights Committee, *Summary record of the 1858th meeting: Australia*, UN Doc CCPR/C/SR.1858, 28/07/2000.

48 *Mabo, op cit*, p40.



The obligation to recognise an Indigenous relationship to land is an obligation to recognise and give equal respect to cultural difference. There is no formal equality option. Formal equality is a failure to recognise difference. Such a failure is discriminatory.

Once it is accepted that the recognition of native title relies on a substantive equality approach it follows that the level of protection required to ensure that native title holders are given the same security in the enjoyment of their title as non-Indigenous title holders cannot be met by formal equality. The measures aimed at providing this protection must be appropriate to the unique characteristics of the title. A formal equality approach to protection, that native title holders' rights are protected by adopting the exact same measures used to protect non-Indigenous title holders, would not be adequate to ensure equal enjoyment of the right and would be contrary to Australia's international obligations under ICERD.

The requirement of effective participation

While the CERD Committee was concerned to ensure that Australia met the international standard of equality, it was also concerned to ensure that Indigenous people are equal partners in negotiating the amendments. The requirement of effective participation is particularly important where certain amendments have the effect of winding back previously enjoyed rights. The CERD Committee confirmed the government's obligation to ensure that Indigenous people give their informed consent to the NTA prior to its enactment.

The government's position in relation to the principle of effective participation is that Parliament is the appropriate body to decide whether particular legislation is discriminatory or for the benefit of Indigenous people.⁴⁹ In reaching its decision in relation to native title legislation the government argues that its obligation is not to negotiate an outcome with Indigenous people but to balance the interests of all the stakeholders. This can be achieved through consultation.

The CERD Committee's decision in March 2000 reflects its dissatisfaction with the government's response to *Decision 2(54)* which urged the government to renew its negotiations with Indigenous people in order to rectify the erosion of rights under the amended NTA.

Concern is expressed at the unsatisfactory response to Committee Decisions 2(54) (March 1999) and 2(55) and at the continuing risk of further impairment of the rights of Australia's Indigenous communities. The Committee reaffirms all aspects of its Decision 2(54) and 2(55) and reiterates its recommendation that the State party ensure effective participation by indigenous communities in decisions affecting their land rights, as required under Article 5(c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of the ensuring the 'informed consent' of indigenous peoples. The Committee recommends the State party to provide full information on this issue in the next periodic report.⁵⁰

49 Robert Orr, Q.C. *Hansard*, Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 23 February 2000, p146.

50 *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia op cit*, para 9.



In 1993 the CERD Committee's decision to support the original NTA was largely as a result of the consent of Indigenous representatives. In 1999 it was obvious to the CERD Committee that this consent had been withdrawn. The Committee reiterated this view in March 2000:

When this Committee first looked at the Native Title Act – and I admit I was not on the Committee then – it was not my impression from reading the record that the Committee based its decision on an acceptance of 200 years of white settlement as a sort of *fait accompli* that was then the basis for moving forward. I don't think so. My sense was that the Committee based its decision to accept the discriminatory aspects of the Native Title Act because there was sufficient evidence that it was the product of genuine negotiations with the indigenous populations, and it was on that basis, on the basis that it was the product of genuine negotiations. Not that it wasn't discriminatory, and not from a sort of arbitrary decision by the Committee that 200 years must be accepted. I come back to this because I think that this question of negotiating with the indigenous populations is central and it perhaps is not seen so by the delegation.

I note that you have challenged our position that in situations regarding land rights of indigenous peoples, *if there is a deviation from the rights established under the Convention*, it must be with the informed consent of the indigenous people. That is what's said in our General Recommendation. I must admit to not being able to see that as such an extraordinary standard. You know, if someone wants to purchase or divest me of land that I own, they must have my informed consent.⁵¹ (emphasis added)

The CERD Committee's commitment to the principle of effective participation is encapsulated in General Recommendation XXIII, which calls on governments to:

ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.⁵²

In finding that Australia had not allowed effective participation by Indigenous people in the formulation of the amendments to the NTA, the CERD Committee was concerned that the power to approve or disapprove of the legislation was not appropriately located with Indigenous people whose rights were directly affected by it.

The dialogue with the Human Rights Committee, July 2000

On 20 and 21 July 2000 the UN Human Rights Committee (HRC) met for its 69th session to consider Australia's third and fourth periodic reports regarding Australia's compliance with the provisions of the International Covenant on Civil

51 Ms McDougall, Concluding Remarks, FAIRA, *CERD Transcript, 21-22 March 2000*, 1395th meeting, Part I, p6.

52 Committee on the Elimination of Racial Discrimination, *General Recommendation on Indigenous Peoples*, UN Doc CERD/C/51/Misc 13/Rev 4 (1997) para 4(c).



and Political Rights (ICCPR)⁵³ and “the measures [it] has adopted which give effect to the rights recognised herein and on the progress made in the enjoyment of those rights.”⁵⁴ The two reports submitted by Australia covered the period 1986 to 1996.⁵⁵ Contemporary issues were also reported upon and considered by the HRC.

The HRC is constituted in accordance with Article 28 of the Covenant. It is made up of eighteen members⁵⁶ who are “nationals of the State Parties to the present Covenant who shall be persons of high moral character and recognised competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience...The members of the Committee shall be elected and shall serve in their personal capacity.”⁵⁷

The purpose of the examination is to allow the HRC and the representatives of the State Party to enter into a constructive dialogue over the obligations which the State has voluntarily agreed to meet, and their performance of those obligations over the reporting period.

The *procedure* of studying the State reports is principally oriented along the *principle of constructive dialogue* with the State Party. The Committee has consistently stressed that it is not a court that is required to decide on violations of the Covenant in the reporting period and before which the State concerned must defend itself. On the contrary, it has stated that its function is to support the States Parties in promoting and protecting Covenant rights and thus contribute to mutual understanding and peaceful friendly relations among States.⁵⁸

The HRC's observations and recommendations in relation to native title

The HRC's concerns in relation to native title and the amendments to the NTA were based on Australia's obligations under Articles 1 and 27 of the Covenant. Article 1 protects the right of self-determination, and provides;

1. All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based on the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

53 The hearing of Australia before the Human Rights Committee is documented in Foundation for Islander Research Action (FAIRA), *Transcript of Australia's hearing before Human Rights Committee – 69th session, 20 and 21 July 2000*, FAIRA, Brisbane 2000, (FAIRA, *HRC Transcript, 20-21 July 2000*). See: www.faira.org.au/hrc.

54 ICCPR, Article 40.

55 UN Doc CCPR/C/AUS/99/3 and 4.

56 ICCPR, Article 28.1.

57 *ibid*, Article 28.2.

58 Manfred Nowak UN Covenant on Civil and Political Rights ICCPR Commentary 562.



3. The State Parties to the present Covenant, including those having responsibility for the administration of non-Self-Governing and Trust Territories, shall promote the realization of the right to self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The HRC made it clear that self-determination is a right to which Indigenous people are entitled. Its observation on Australia with respect to this right was;

With respect to Article 1 of the Covenant, the Committee takes note of the explanation given by the delegation that rather than the term 'self-determination' the Government of the State party prefers terms such as 'self-management' and 'self-empowerment' to express domestically the principle of indigenous peoples exercising meaningful control over their affairs. The Committee is concerned that sufficient action has not been taken in that regard.⁵⁹

In relation to Article 1 the Committee recommended that:

The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources.⁶⁰

The Committee's concerns in relation to Article 1 of the Covenant add weight to similar findings by the CERD Committee discussed above, that Indigenous people have been denied effective participation in decisions which affect them, and in particular in respect of their control over traditional lands and resources.⁶¹

Also of concern to the Human Rights Committee was Australia's failure to appreciate, with respect to the rights of Indigenous people, its obligations under Article 27 of the Covenant. Article 27 provides;

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The Committee observed that;

... despite positive developments towards recognising the land rights of the Aboriginals and Torres Strait Islanders through judicial decisions (Mabo 1992, Wik 1996) and enactment of the Native Title Act of 1993, as well as actual demarcation of considerable areas of land, that in many areas native title rights and interests remain unresolved and that the Native Title Amendments of 1998 in some respects limits the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands.⁶²

On the basis of this observation the Committee made the following recommendation.

59 UN Doc CCPR/CO/69/AUS, para 9.

60 *ibid.*

61 See: p19.

62 UN Doc CCPR/CO/69/AUS, *op cit*, para 10.



... that the State party take further steps in order to secure the rights of its indigenous population under Article 27 of the Covenant. The high level of the exclusion and poverty facing indigenous persons is indicative of the urgent nature of these concerns. In particular, the Committee recommends that the necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands, including by considering amending anew the Native Title Act, taking into account these concerns.⁶³

This recommendation is a clear indication of the Committee's concerns in relation to the amended NTA and Australia's failure to meet its human rights obligations under Articles 1 and 27 of ICCPR.

The dialogue between the Human Rights Committee and the Australian government

The focus of the dialogue on native title between the HRC members and the Australian government delegation was the government's obligations under Article 27. Rather than assume a responsibility to address the vulnerability, both historically and legally, of Indigenous title to land, the government perceives its obligations under the Covenant as conditional upon these limitations.

Extinguishment refers to the situation when the law can no longer recognise Native Title as existing over a particular piece of land. This recognises the historical facts that the land was settled and that portions of it have been handed over for residential purposes, for farms, for cities, for roads, commercial purposes, public works, and so forth...

Recognising the vulnerability of Native Title to extinguishment, the Government thought it necessary to enact legislation that would ensure the protection of native title and also its interaction into Australian law and land management.

The fundamental goals of the Native Title Act are: to protect and recognise Native Title, to make certain the extent to which Governments can act in relation to Native Title rights and interests, and to provide a balance between the rights and interests of all Australians. These goals have not been altered by the need to reflect recent developments in the law.⁶⁴

The 'developments in the law' referred to relate to the extinguishment of native title. The government is effectively arguing that it has no obligation to rectify the historical and legal construction of native title that has made it vulnerable to extinguishment but is entitled to 'reflect' these 'developments' in the amendments to the NTA. The extinguishment of native title through the confirmation provisions were sought to be justified in this way. The common law was posited as a benchmark against which the confirmation provisions can be evaluated.

The Government believes that these confirmation provisions have caused no divestment of Native Title rights. They simply represent a recognition of the historical position that Native Title had been extinguished by grants of freehold and some forms of leasehold in Australia over the past 200 years on approximately 20 percent of the Australian land mass.

63 *ibid.*

64 FAIRA, *HRC Transcript, 20-21 July 2000*, 20 July, *op cit*, p18 of 46.



Leaving the status of such tenures to the Courts to confirm would have required extensive litigation, wasted resources of both indigenous and non-indigenous parties, and produced unsuccessful outcomes for all. The Government did not consider such an objective to be legitimate.⁶⁵

The justification for the winding back of the right to negotiate provisions also relied on accepting the vulnerable construction given to native title by the courts.

The object of these amendments therefore was to ensure that the right available more closely reflected the nature of native title rights that were likely to exist on pastoral leases and similar tenures. Furthermore, practice had shown that the right to negotiate procedures impede resource and commercial development without giving indigenous peoples substantial benefits in return.⁶⁶

In response to this presentation, Mr Shinan of the Committee perceived a difficulty with this reliance on the legal construction of native title. From the point of view of Article 27 of the covenant, the obligation of State parties is to secure the sustainability of indigenous economic and traditional life.

I see a certain problem here which is that maybe the domestic discussion which concentrates around the legal notion of native title is somewhat misleading in order to approach the issues of rights under Article 27 because Article 27 speaks about the rights to enjoy one's culture in community with other members of the group.

Concentrating on native title may lead to decades of litigation in order to clarify the fundamental legal issues, which are at the background of course of use of land and resources, and which are at the background also of the possibility of Aboriginal peoples in Australia to enjoy their culture in the future. But I would like to have more information about the current situation and what steps are being taken to secure the sustainability, the continuance of the way of life of Aboriginal communities today – while the long term issue of native title is subject to legislation and re-legislation, which continue and may continue for decades.

For instance the committee has on other occasions identified that, in particular, in relation to indigenous peoples, hunting and fishing and other traditional forms of economic life do fall under the notion of culture and require special protection. I think that concentrating on the native title issues in the report has resulted in insufficient information as to steps taken to secure the sustainability of forms of indigenous economic life in relation to competing use of land and resources in relation to forms of modernisation.⁶⁷

The government representative did not accept the Committee member's view that Article 27 gives rise to a positive obligation on States to protect the right of minorities to enjoy their culture.

The first question which was asked by Mr Shinan and some other Committee members also, relates to the protection of indigenous cultures and way of life. In particular, it was asked what Australia is doing in

65 *ibid*, p20 of 46.

66 *ibid*, p21 of 46.

67 *ibid*, pp38-39 of 46.



response to Article 27 to ensure that these cultures and ways of life were preserved.

Just at the outset, I would like to say that Article 27 of the Covenant requires that States not deny ethnic, religious, or linguistic minorities the right to enjoy their own culture protect their own religion, or use their own language. The article does not, however, require States to enact legislation to guarantee these rights. As indicated by my colleague, Mr Campbell, States *may* implement these obligations under the Covenant by legislative or other measures.⁶⁸

The conflict between the government and the Committee deepened in relation to their respective understandings of a States obligations under Article 27 of the Covenant and its relationship to the right to equality as encapsulated in Article 26.

The government's position, that a State will meet its international obligations in relation to equality either by a substantive or formal equality approach is at odds with the Committee's approach. The government's position was stated as follows;

Concerning Article 26 dealing with equality before the law and the prohibition of discrimination, I would note first that international law admits of both a formal and substantive standard for assessing equality. Traditionally, racial equality was conceived of in terms of equality and, in that respect, the spirit of equality would lie in sameness and identical treatment, however, international law recognises that in some circumstances, positive discrimination towards certain racial groups may be necessary. This would be the case where in instances of underlying disadvantage, temporary affirmative action or special measures are allowed in order to hasten equal enjoyment of rights for all racial groups.

Since that time, the interpretation of the concept of equality has broadened to include substantive equality in that governments may treat like things alike and different things differently. However, this alternative way of defining equality does not preclude the one originally conceived of in international law. The two approaches to the issue of equality coexist in international law.⁶⁹

As discussed above the problem with this approach of seeing formal and substantive equality as complementary standards that coexist at international law, is that, at times, a substantive approach to equality does preclude a formal equality approach. This is discussed above in relation to native title. The potential inconsistency between these two approaches is made clear by an understanding of the effect of Article 27 on a State's obligations in relation to equality. This is explained by the Committee as follows.

Now, Article 27 is kind of a unique article among the whole provisions of the Covenant. I don't have to explain to you that the Universal Declaration adopted in 1948 was based on an assumption that if you do not discriminate among individuals, and if you set common standard of human rights, then everybody should be as happy as anyone else.

68 *ibid*, p9 of 51.

69 *ibid*, p19 of 51.



This assimilation or integration assumption has come to be proven not 100 percent justified. As a result, perhaps our Covenant has come to have Article 27 which is the right of minorities.⁷⁰

The right of minorities to enjoy their culture under Article 27 has the effect that a State cannot meet its obligation under ICCPR through a formal equality approach. To do so would deny a minority group enjoyment of its cultural identity. The dialogue between the Committee members and the government representatives in relation to Australia's obligations under the Convention has clarified the issues on which Australia and the Committee agree and those on which they differ. Similar issues were considered by the CERD Committee in March 2000. Subsequently, the Committee on Economic Social and Cultural Rights has considered Australia under its Convention.⁷¹ Before all of these Committees, the meaning of equality at international law and its application to Indigenous people have been central issues. The weight of international opinion recognises the impact that past discrimination has had upon Indigenous people throughout the world and the urgency with which their valuable cultures need to be protected. Australia's engagement with this body of opinion is necessary to develop domestic policies and legislation which are in keeping with an international perspective.

Maintaining the dialogue on human rights

Within a week of the CERD Committee releasing its Concluding Observations in March 2000, the government announced a review of Australia's participation in the treaty committee system. A press release issued by the Minister for Foreign Affairs at the time indicated the depth of resentment felt by the government in relation to the CERD remarks.

In this context, the Government was appalled at the blatantly political and partisan approach taken by the UN's Committee on the Elimination of Racial Discrimination (CERD) when it examined Australia's periodic reports in Geneva last week... The Committee's response was disappointing in the extreme. It largely ignored the significant progress made in Australia across the full spectrum of indigenous issues. The Committee's observations are little more than a polemical attack on the Government's Indigenous policies. They are based on an uncritical acceptance of the claims of domestic political lobbies and take little account of the considered reports submitted by the Government⁷²...

there are serious systemic problems in this reporting process and the resources needed for them to play their role effectively are not allocated to the treaty bodies. As a result, the outcomes of the system are not always fair and accurate assessments of state's performances. This was

70 *ibid*, pp43-44 of 46.

71 Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights; Australia*, E/C.12/1/Add.50, 1 September 2000.

72 The Hon A. Downer, Minister for Foreign Affairs, *Government to review UN treaty Committees*, Press Release, 30 March 2000.



the case for Australia recently in relation to our implementation of the Convention Against Racial Discrimination.⁷³

The decision to conduct a review was based on the following concerns;

- burdensome reporting requirements under the treaties;
- the perception of over-reliance on NGO submissions by the committees; and
- the suggestion that the committees were running political agendas and were straying beyond their mandate under the Convention.⁷⁴

Australia requested the following comments be included in the annual report of the Committee to the United Nations General Assembly:

The Australian Government has carefully considered the Committee's concluding observations on Australia's tenth, eleventh and twelfth periodic reports issued on 24 March 2000. While noting some positive commentary, the overall thrust is unduly negative. The Australian Government rejects these comments. It approached the CERD meeting in good faith and sent a high-level delegation, led by the Minister for Immigration and Multicultural Affairs and Minister Assisting the Prime Minister for Reconciliation, the Hon. Phillip Ruddock MP. Australia provided extensive written and oral information in order to engage constructively with the Committee.

The Australian Government is very disappointed that the Committee's concluding observations ignored the progress Australia has made in addressing indigenous issues, gave undue weight to NGO submissions, and strayed from its legitimate mandate. The Australian Government is also deeply concerned about the lack of consideration the Committee accorded to its views, and to its outstanding record of commitment to international human rights obligations.

Following the issue of the Committee's concluding observations, the Government in March 2000 initiated a review of its engagement with United Nations treaty bodies, which will involve, *inter alia*, consideration of the working procedures of CERD. The Government will announce the conclusions of the review in due course.⁷⁵

My concerns about the government's response to the Committee's concluding observations are set out in detail in the Social Justice Report at pages 79-83. The Human Rights and Equal Opportunity Commission has also expressed its concern to the Attorney-General about the government's response to the CERD decision.

73 The Hon A. Downer, Minister for Foreign Affairs, *Australia's hope for the United Nations in the twenty-first century*, Speech – 2000 National Youth Conference of the United Nations Youth Association, Melbourne, 3 July 2000.

74 Minister for Foreign Affairs, *Government to review UN treaty Committees*, Press Release, 30 March 2000.

75 Commonwealth of Australia, *Comments of the government of Australia on the concluding observations adopted by the Committee on the Elimination of Racial Discrimination on the tenth, eleventh and twelfth periodic reports of Australia*, Annex X in Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, UN Doc: A/55/18. (Sessional/Annual Report of Committee), 17/10/2000.



My perspective was that of a witness and participant in the dialogue that occurred on three separate occasions throughout 2000 before three UN human rights Committees: the CERD Committee, the Human Rights Committee, and the Committee on Economic Social and Cultural Rights.

What I witnessed on those occasions was not a process that sought to judge, let alone embarrass Australia on the international stage. Rather I observed and participated in a constructive dialogue in which government representatives, non-government organisations and national institutions debated the human rights significance of a range of important issues and policies including mandatory sentencing, native title, Aboriginal heritage, the stolen generations, Aboriginal poverty and disadvantage.

While this debate does occur on a domestic level, a range of other interests, especially economic interests, often dilutes the human rights significance of these issues. It is only by reference to our obligations under human rights treaties that the impact of particular policies on the human rights of Indigenous and non-Indigenous people can be separated and brought into sharp focus. Under this light it can be seen that human rights principles are often compromised for more expedient ends.

The right of an accused person to be sentenced proportionally to the crime committed is a principle that a human rights committee does not easily overturn in order to assuage a popular demand for tough criminal sanctions. Such a committee cannot be easily persuaded that the right of Indigenous titleholders to equal protection of their title by the law should be compromised in order to achieve certainty for other stakeholders. For example, the interests of water skiers would never outweigh the interests of traditional owners to protect their sacred sites on a lake or lagoon – as has been the case at Boobera Lagoon in the far north of New South Wales. In fact the balance of interests is not the concern of a human rights dialogue. Rather it is whether there is sufficient value placed upon fundamental and universal human rights despite the economic or political expediencies.

The CERD Committee made this point to the government in relation to native title issues in 1999. In that context, the government had argued that it had struck an appropriate balance between the interests of miners, pastoralists, and Indigenous people in the native title amendments. The Committee responded that the balance is not between domestic political interests but between the enjoyment of rights by different racial groups in society. The native title amendments did not provide an appropriate balance in this regard.⁷⁶

Australia has voluntarily applied the standards set by human rights treaties to the policies and legislation that govern our domestic arena. Our obligations under these treaties represent an undertaking on behalf of the government to its citizens that the tools of government will be exercised fairly and in accordance with universal human rights principles.

All parties to human rights treaties are brought to account by the UN committee system. What is important in this system is that a dialogue is established between

76 This point is discussed at length in Chapter 2 of the *Native title report 1999* and the *ATSI/SJ Commissioner's Submission to the PJC Inquiry into CERD*, *op cit*.



those who draft and apply policies and legislation and those whose human rights are affected by such policies and legislation. The involvement of NGOs in the Committee's consideration of the periodic reports of member States is instrumental in ensuring that those whose human rights are affected by domestic policies and legislation are involved in the dialogue. Mr Henkin, a member of the Human Rights Committee, explained the Committee's role to Australia when it was before it in July, as follows:

Most of us have seen the reports in the newspapers that the Australian Cabinet has had some unhappiness with the work of treaty bodies. They didn't make any exception for this particular treaty body, although I don't suppose they should have too much trouble with this treaty body since they haven't appeared before us as now in some 14 years...

I would like to suggest that perhaps the Government of Australia, like the Governments of other countries, ought to see this Committee as it sees itself. We see our work as an important contribution to your compliance with the obligations which you voluntarily assumed; in fact, eagerly assumed. And that is true not only about the protocol, but also about the Covenant itself.

So we don't see ourselves really, despite the tone of some of our questions, as sitting in judgment but as helping State Parties carry out the obligations which you voluntarily assumed, and wish to assume. Of course, that requires cooperation by the States Parties. It does not help to read, therefore, questions about the work of the treaty bodies, and even on communications it does not help to see Governments – and I don't refer only to Australia – somehow resist the judgments or the final views of this Committee.

Therefore, I can only close by saying that we cannot help Governments comply with the obligations which you voluntarily assumed unless there is cooperation between your Government and the Committees, both in regard to the reports which you filed and we hope you will file more frequently, and the response to our views.⁷⁷

The dialogue around reconciliation

The international and domestic dialogue discussed thus far has put Indigenous people as its object. In the process of reconciliation however Indigenous people should be equal partners in an extensive dialogue that has taken place and will continue to occur over many years. The overriding purpose of this process is to resolve the many conflicts between Indigenous and non-Indigenous people in colonial and post colonial Australia so that a more equitable relationship based on mutual respect can develop in the future. The Council for Aboriginal Reconciliation (CAR) describes the process in this way.

Reconciliation between Australia's Indigenous peoples and all other Australians is about building bridges. It is about respecting our differences. It is about giving everybody a fair go. It is about building on the strengths of common ground.⁷⁸

77 Mr Henkin, FAIRA, *HRC Transcript*, 20-21 July 2000, *op cit*, 20 July, pp42-43 of 46.

78 Council for Aboriginal Reconciliation, *Corroboree 2000: Towards Reconciliation*, Canberra 2000. See: www.reconciliation.org.au/towards/index.



CAR also recognises that an important step towards reconciliation is an acknowledgement and understanding of the past and its impact on the present relationship between Indigenous and non-Indigenous people today.

Our nation must have the courage to own the truth, to heal the wounds of its past so that we can move on together at peace with ourselves.⁷⁹

In this section I will discuss the effect of the *Mabo* decision of the High Court in 1992 on the way in which important conflicts between Indigenous and non-Indigenous people in the colonial and post-colonial period have been perceived and thus the way in which they might be resolved. I will also discuss how the court's inability to resolve the fundamental contradictions in our nation's history has affected judicial and legislative developments in native title.

'Our nation must have the courage to own the truth'⁸⁰

The recognition of native title came from acknowledgement of important truths about our past and seeking to reconcile these truths with contemporary notions of justice. *Mabo* brought to the fore a fundamental conflict arising at the time of the establishment of Australia as a colony and remaining unresolved today. That is the conflict between the assertion on the one hand that the settlement of Australia gave rise to exclusive territorial jurisdiction by the colonial power and, on the other hand, the denial that this claim to exclusive jurisdiction has ever been conceded to or surrendered by Indigenous people who coexist on the same territory. CAR also recognizes in the *Declaration Towards Reconciliation* the significance of this absence of consent to the establishment of the colony.

We recognize this land and its waters were settled as colonies without treaty or consent.⁸¹

Indigenous people in Australia continue to assert that their deep spiritual economic and social connection to the land is inconsistent with that same land being under the sole political control of non-Indigenous people. James Tully describes the contradiction at the heart of the establishment of colonial power as follows:

The problematic, unresolved contradiction and constant provocation at the foundation of internal colonization, therefore, is that the dominant society coexists on and exercises exclusive jurisdiction over the territories and jurisdiction that the indigenous peoples refuse to surrender.⁸²

Because of the link between the recognition of Indigenous land rights and the foundations of Australia as a nation both within and beyond the colonial era, the *Mabo* decision brings to the fore this fundamental contradiction.

79 Council for Aboriginal Reconciliation, *Australian Declaration Towards Reconciliation*, Canberra 2000.

80 *ibid.*

81 *ibid.*

82 Tully, J., "The Struggles For and Of Freedom", in *Political Theory and the Rights of Indigenous Peoples*, Duncan I., Patton P. and Sanders W., eds, Cambridge University Press, 2000, pp39-40.



Enlarged notion of terra nullius

Mabo is not only a case about whether the common law recognises Indigenous people's relationship to their land. It is also a case about the legal foundations of Australia as a nation. Indeed its significance lies in the link between the domestic law on Indigenous land rights and the way in which sovereignty was acquired by the colonial power. In order to recognise native title, the High Court had to review the juridical tools used to justify the acquisition of sovereignty over the colony of New South Wales by Britain over two hundred years ago. This link between the recognition of native title and the overturning of terra nullius is fundamental to the way in which native title has developed through the common law. It is also fundamental to the resolution of the conflict referred to above between Indigenous and non-Indigenous people at the establishment of the colony.

According to Blackstone, the juridical tools that were available under international law to colonial powers seeking to acquire sovereignty over foreign lands in the 18th Century were threefold: conquest or treaty (cession) where the land was occupied; or occupation where the land was uninhabited.

Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother-country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties.⁸³

The juridical tools used to justify the acquisition of sovereignty were important because the way in which sovereignty was acquired determined the laws that applied within the colony:

Although the question of whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law. Accordingly, the municipal courts must determine the body of law which is in force in the new territory. By the common law, the law in force in a newly acquired territory depends on the manner of its acquisition by the Crown. Although the manner in which a sovereign state might acquire new territory is a matter for international law, the common law has had to march in step with international law in order to provide the body of law to apply in a territory newly acquired by the Crown.⁸⁴

In summary, if a territory is acquired through occupation of uninhabited land then, so long as it is applicable to the colony, English law is in force, while in the case of acquisition through treaty or conquest, the 'ancient' laws remain until they are changed.

The armory of juridical tools used to justify the colonial ambition was supplemented by a theory that enabled already inhabited land to be annexed through occupation alone. No treaty was required. The 'enlarged notion of terra

83 Commentaries, Bk1, ch.4, pp106-108, referred to in *Mabo. op cit*, p34.

84 *Mabo, op cit*, p32.



nullius' was applied to 'backward peoples' where 'the indigenous inhabitants were not organized in a society that was united permanently for political action'.⁸⁵

The view was taken that, when sovereignty of a territory could be acquired under the enlarged notion of terra nullius, for the purposes of the municipal law that territory (though inhabited) could be treated as a 'desert uninhabited' country. The hypothesis being that there was no local law already in existence in the territory, the law of England became the law of the territory (and not merely the personal law of the colonists). Colonies of this kind were called 'settled colonies'. Ex hypothesi, the indigenous people of a settled colony had no recognized sovereign, else the territory could have been acquired only by conquest or cession. The indigenous people of a settled colony were thus taken to be without laws, without a sovereign and primitive in their social organization.⁸⁶

To these territories, 'without settled inhabitants or settled law',⁸⁷ the laws of England applied without the consent of the Indigenous inhabitants.

Overturing terra nullius

There are many reasons why the notion of terra nullius no longer holds legitimacy as a basis for the establishment of a colony already inhabited by Indigenous people. The High Court canvassed some of these. The International Court of Justice has also discarded terra nullius as a legitimate means of acquiring sovereignty.⁸⁸ Recent reports from the UN have provided further analysis which leads to a rejection of terra nullius as a legitimate basis for the acquisition of territory.⁸⁹

In *Mabo* the High Court rejected terra nullius as a basis for colonisation in Australia on three grounds;

- Terra nullius no longer accords with 'present knowledge and appreciation of the facts'⁹⁰ with regard to Aboriginal society. The proposition that Aboriginal people were 'without laws, without sovereign and primitive in their social organisation'⁹¹ can not be sustained in the light of present knowledge about the complex and elaborate system by which Indigenous society was governed at the time of colonisation.
- Terra nullius no longer accords with the values of contemporary society. In particular terra nullius is a discriminatory denigration of Indigenous society which was considered 'so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the

85 *ibid*, relying on Lindley, *The Acquisition and Government of Backward Territory in International Law*, (1926) Chapters III and IV.

86 *ibid*, p36.

87 *Cooper v Stuart* (1889) 14 App Cases 286, p291.

88 *Advisory Opinion on Western Sahara* [Western Sahara Case] [1975] ICJR. 12.

89 Martinez, M., *Study on treaties, agreements and other constructive arrangements between States and Indigenous populations*, Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, UN Doc E/CN.4/Sub.2/1999/20, 22 June 1999; and Cobo, M., *Study of the Problem of Discrimination against Indigenous Populations*, E/CN.4/Sub.2/1986/7/Add.4.

90 *Mabo, op cit*, p38.

91 *ibid*, p36.



institutions or the legal ideas of civilized society.⁹² The notion of equality relied on by the Court to reject terra nullius was one that recognised and gave equal respect to the distinctive characteristics of Indigenous society. This aspect of the High Court's decision is discussed in Chapter 2 of this report at pp65-67.

- Terra nullius is out of step with modern international law, particularly in relation to the human rights of equality and self-determination. This aspect of the decision is also discussed further at Chapter 2 pages 70-73.

Finally the Court was influenced by the decision of the International Court of Justice in its *Advisory Opinion of Western Sahara* (1975) ICJR that rejected terra nullius as the basis for Spanish sovereignty in Western Sahara.

Two United Nations' reports that support and expand upon the reasoning of the High Court in rejecting terra nullius have recently been tabled at the United Nations. The first report, *Study on treaties, agreements and other constructive arrangements between States and indigenous populations*,⁹³ prepared by the Special Rapporteur, Miguel Alfonso Martinez, came out of a recommendation of the monumental *Study of the Problem of Discrimination against Indigenous Populations*,⁹⁴ produced by Martinez Cobo in 1986. The second report that critically appraises terra nullius as a discriminatory instrument of colonization is the final working paper prepared by the Special Rapporteur, Erica-Irene A. Daes entitled, *Indigenous peoples and their relationship to land*.⁹⁵ Both these reports have been produced as a result of resolutions of the Sub-Commission on the Promotion and Protection of Human Rights.⁹⁶

While reinforcing the reasoning of the High Court, the UN reports add a further basis on which to discard terra nullius, namely, that terra nullius removed Indigenous people from the sphere of international law and into the sphere of the domestic law of the colonial power.

Martinez' rejection of terra nullius stems from an overriding objection to the ambitions of colonialism generally. He sums up his objections as follows:

Despite the surfeit of pious excuses that has been found to justify ethically the launching of this overseas colonial enterprise, and the pseudo-juridical (sometimes even openly anti-juridical) reasoning which has attempted to defend it 'legally' there is irrefutable evidence that its clearly defined goals had nothing either 'humanitarian' or 'civilising' about them.

Its first raison d'être was to guarantee a permanent presence of the overseas power, either settler population or mere trading posts, in territories inhabited by other people. Secondly, the overseas power sought to acquire the rights to exploit the natural resources existing there and to secure these new markets for the import and export needs. Thirdly, it coveted those new strongholds to strengthen its position in the struggle

92 *In re Southern Rhodesia* (60) (1919) AC 211, pp233-234, per Lord Sumner, quoted in *Mabo* p39.

93 Martinez, *op cit*.

94 Cobo, M., *Study of the Problem of Discrimination against Indigenous Populations*, E/CN.4/Sub. 2/1986/7/Add.4.

95 Daes, Erica-Irene, *Final Report Indigenous Peoples and Their Relationship to Land*, UN Doc E/CN.4/Sub.2/2000/25.

96 The Sub-Commission on the Promotion and Protection of Human Rights is under the Commission on Human Rights. It is out of this Sub-Commission that the Working Group on Indigenous Populations is convened.



with other European powers. Finally, it sought to safeguard what had been acquired by imposing its political, social and economic institutions and modalities on the peoples inhabiting the lands.

Those goals were to be accomplished at any cost, even – should it be necessary and possible – that of the destruction of often highly advanced cultures, socio-political institutions and traditional economic models developed over centuries by the indigenous peoples.⁹⁷

International law legitimised the colonial ambition of annexing land in the new world. Erica-Irene Daes notes

The doctrines of dispossession which emerged in the subsequent development of modern international law, particularly ‘terra nullius’ and ‘discovery’, have had well known adverse effects on indigenous peoples. The doctrine of terra nullius as it is applied to indigenous peoples holds that indigenous lands are legally unoccupied until the arrival of a colonial presence, and can therefore become the property of the colonizing power through effective occupation. Strictly speaking, in the seventeenth, eighteenth, and nineteenth centuries, the doctrine of ‘discovery’ gave to a discovering State of lands previously unknown to it, an inchoate title that could be perfected through effective occupation within a reasonable time. The doctrine, as it has come to be applied by States with little or no support in international law, gives to the ‘discovering’ colonial power free title to indigenous land subject only to indigenous use and occupancy, sometimes referred to as aboriginal title. Only recently has the international community begun to understand that such doctrines are illegitimate and racist.⁹⁸

One of the intended effects of colonial domination was to deny Indigenous people their status as subjects of international law. Referring to a second phase of the colonisation process Martinez reports;

Thus began the process that the Special Rapporteur has preferred to call (without any claim to originality) the ‘domestication’ of the ‘indigenous question’, that is to say, the process by which the entire problematique was removed from the sphere of international law and placed squarely under the exclusive competence of the internal jurisdiction of the non-indigenous States. In particular, although not exclusively, this applied to everything related to juridical documents already agreed to (or negotiated later) by the original colonizer States and/or their successors and indigenous peoples.⁹⁹

The ‘domestication of the Indigenous question’ is certainly inherent in the notion of terra nullius. Whereas the premise of a treaty was that the Indigenous people already had sovereignty in the territory sought to be acquired, terra nullius contained no such assumption. As indicated by the High Court, terra nullius was a denial of the sovereignty of Indigenous people.¹⁰⁰ Following from this, Indigenous people colonised through terra nullius were, from the outset, denied any status as subjects of international law.

97 Martinez, *op cit*, paras 172-174.

98 Daes, *op cit*, para 30.

99 Martinez, *op cit*, para 192.

100 Mabo, *op cit* p36.



Filling the Gap

The High Court's decision to overturn *terra nullius* brought Australia in line with an international rejection of the discriminatory methods by which colonialism performed its task of annexing other people's territory. Yet many questions remain to be answered. What will fill the gap, at the foundations of our nation, created by the overturning of *terra nullius*? What has replaced *terra nullius* as a legitimate explanation for the establishment of what is now the Australian nation? What impact does the rejection of *terra nullius* have on the relationship between Indigenous and non-Indigenous people? Does this rejection offer new solutions to the fundamental conflict between Indigenous and non-Indigenous people stated above as the assertion of exclusive jurisdiction by non-Indigenous people over traditional lands that have never been surrendered?

• *A common law basis*

Having rejected the distinction between inhabited territories that were considered *terra nullius* and those that were not considered *terra nullius* based on the customs of their Indigenous inhabitants, the common law was liberated to recognise and give protection to the relationship that Indigenous people continue to have with their land through the concept of native title.

It was only by fastening on the notion that a settled colony was *terra nullius* that it was possible to predicate of the Crown the acquisition of ownership of land in a colony already occupied by indigenous inhabitants. It was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other. If that hypothesis be rejected, the notion that sovereignty carried ownership in its wake must be rejected too. Though the rejection of the notion of *terra nullius* clears away the fictional impediment to the recognition of indigenous rights and interests in colonial land, it would be impossible for the common law to recognize such rights and interests if the basic doctrines of the common law are inconsistent with their recognition.¹⁰¹

The rejection of *terra nullius* was a rejection of the assertion that Indigenous people were not socially or politically constituted. The promise of native title was that *terra nullius* would be replaced, not by another value judgment by the non-Indigenous legal system about what Aboriginal society was thought to be, but rather by the laws acknowledged and the customs observed by the Indigenous people reclaiming their land.

Native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty... It is a problem that did not arise in the case of a settled colony so long as the fictions were maintained that customary rights could not be reconciled 'with the institutions or the legal ideas of civilized society' that there was no law before the arrival of the British colonists in a settled colony and

101 *ibid*, p45.



that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown.¹⁰²

This shift in thinking was important because it heralded a new approach to redressing historical dispossession based, not on the belated generosity of the State that had benefited from it, but rather as a matter of right, based on the distinct identity of Indigenous people, their laws and customs. Yet the promise that, with the overturning of terra nullius the common law might form the basis of a new relationship between Indigenous and non-Indigenous people has not been fulfilled. The fundamental conflict about the assertion of exclusive jurisdiction by non-Indigenous people over traditional Aboriginal lands is not solved by the recognition of native title.

The State as supreme sovereign power

The direction in which the concept of native title has developed within the common law is shaped by the distinction that the court makes between terra nullius as a means of acquiring sovereignty and the fact of sovereignty itself. The review of terra nullius was not directed towards the fact of sovereignty, but only to the means by which sovereignty was acquired. The supreme power of the sovereign state is an uncontested and uncontestable premise of the court's decision to recognise native title. Relying on the principle that '[T]he acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged controlled or interfered with by the Courts of that state'¹⁰³ Justice Brennan went on to state in *Mabo*:

Although the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law. Accordingly, the municipal courts, must determine the body of law which is in force in the new territory. By the common law, the law in force in a newly-acquired territory depends on the manner of its acquisition by the Crown. Although the manner in which a sovereign state might acquire new territory is a matter for international law, the common law has had to march in step with international law in order to provide the body of law to apply in a territory newly acquired by the Crown.¹⁰⁴

While sovereignty is uncontestable at law, as a result of the overturning of terra nullius, it is also without justification or legitimacy. Its assertion is simply an act of power.

The assertion in *Mabo* of sovereign power has determined the development of native title in three significant ways. First the recognition of native title at common law fails to identify Indigenous people as subjects of international law. The determination of Indigenous rights to land takes place squarely within the frame of domestic law. Second it results in an acceptance of and a basis for the state's power to extinguish native title. Third, it has resulted in the development of a construction of native title in which the characteristics of Indigenous

102 *ibid*, p58.

103 *New South Wales v Commonwealth (The Sea and Submerged Lands Case)* (1975) 135 CLR, p338.

104 *Mabo, op cit*, p32.



sovereignty have been erased. Reference to native title as a bundle of rights rather than a system of laws can be seen as exemplifying this construction.

Indigenous people as subjects of domestic, not international law

In overturning terra nullius the High Court has not overturned the effect terra nullius had of denying Indigenous people their status as subjects of international law. Indeed it has reinforced and entrenched this denial. Even though terra nullius is an international law concept which had to be overturned in order to recognize Indigenous people's relationship to land, native title is a common law concept belonging squarely within municipal or domestic law. What the court has recognised through native title is the proprietary title of Indigenous people to their land not the jurisdiction of Indigenous people over their territory.

There is a distinction between the Crown's title to a colony and the Crown's ownership of land in the colony... The acquisition of territory is chiefly the province of international law; the acquisition of property is chiefly the province of the common law. The distinction between the Crown's title to territory and the Crown's ownership of land within a territory is made as well by the common law as by international law.... The general rule of the common law was that ownership could not be acquired by occupying land that was already occupied by another.¹⁰⁵

The absence, at the establishment of colonial power in Australia, of any recognition of the pre-existing sovereignty of Indigenous people over the same territory is not overcome by a concept which belongs solely to the common law of the colonial power.

Extinguishment

The power of the state to extinguish native title and the continuing exercise of this sovereign power underlies the development of native title at common law. First, in the recognition stage of a native title determination, the court will only recognise claims where there has been an ongoing connection between the claimants and the land.

Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition. Australian law can protect the interests of members of an Indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those customs (so far

105 *ibid*, pp44-45.



as it is practicable to do so). Once traditional native title expires, the Crown's radical title expands to a full beneficial title, for then there is no other proprietor than the Crown.¹⁰⁶

Thus, legislative or executive acts, or other unauthorised (including illegal) acts that dispossessed Aboriginal people of their land and conferred a concomitant benefit to non-Indigenous people using and exploiting the same lands, will be confirmed in the native title process.

Second, even if the claimants' relationship to their land withstands this historical dispossession, the court will, as a matter of law, determine whether the title has in any case been extinguished by the creation of non-Indigenous interests (whether current or expired) over the same land. Thus the creation of a mining lease or a national park on the same land may, as a matter of law, extinguish native title.

Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory. It follows that, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power.¹⁰⁷

The common law test for extinguishment is discussed at Chapter 2 of this report. The court's approach to the extinguishment of native title has not been finally determined by the court. In general there is agreement by the High Court judges that native title will be extinguished where the legislation evinces a clear and plain intention to do so. While the statutes which create non-Indigenous interests, such as mining leases or pastoral leases, do not expressly extinguish Indigenous interests in land, there being no recognition that Indigenous interests existed at that time, the courts are willing to infer such extinguishment where an inconsistency exists between the statute creating the new non-Indigenous interest and the exercise of the pre-existing Indigenous interest. What the High Court has **not** decided is whether, in some cases an inconsistency between the Indigenous interest and the non-Indigenous interest amounts to a suspension rather than an extinguishment of the Indigenous interest. In either case non-Indigenous interests will always prevail over the pre-existing Indigenous interests. At Chapter 2 the discriminatory effect of recognising non-Indigenous interests over Indigenous interests so as to extinguish forever the Indigenous interest is discussed. Earlier in this chapter the criticism by international human rights committees of the extinguishment of Indigenous interests in land for the benefit of non-Indigenous people was discussed. Special Rapporteur Erica-Irene Daes also recognizes that the Courts have failed to accord appropriate protection to native title (or 'aboriginal title') compared with that accorded to non-Indigenous interests in land.

Where aboriginal title is recognized, indigenous peoples have at least some legal right that can be asserted in the domestic legal system. However, aboriginal title is often subject to the illegitimate assumption of State power to extinguish such title, in contrast to the legal protection

106 *ibid*, pp59-60.

107 *ibid*, p63.



and rights that, in most countries, protect the land and property of non-Indigenous citizens, other individuals and corporations... This single fact probably accounts for the overwhelming majority of human rights problems affecting indigenous peoples.

In many of the countries that do recognize aboriginal title, it is more limited in its legal character and the rights that appertain to it, and more limited in the legal protection accorded to it, than other land titles.¹⁰⁸

The common law's capacity to review acts of state which extinguish native title is limited, particularly where such an intention is expressly stated in the legislation. So long as the exercise of the state's power to extinguish Indigenous interests in land is constitutionally authorised then the court is powerless to contain it. Where the intention of the legislature is not expressly stated the court plays a greater role in interpreting the legislation so as to give effect to its purpose. Ambiguity in the legislation may be resolved consistently with international law standards. In general however, the court's influence over the question of extinguishment is limited.

Thus the development of the common law of native title is framed by the incontestability of the power of the sovereign state. Recognising native title has not established a relationship of equality between Indigenous and non-Indigenous people. The non-Indigenous state still maintains exclusive jurisdiction over traditional Aboriginal land. The decision of the state to extinguish native title is incontestable by a court despite its discriminatory character.

Bundle of Rights

In rejecting *terra nullius* the High Court rejected the discriminatory denigration of Indigenous people as having no social organization, laws or recognised sovereign. The promise of native title was that the traditional systems underlying Indigenous society could be recognized by the common law. Yet recent developments in the common law notion of native title indicate the reluctance of the court to recognise Indigenous laws and governance structures. The extent to which the common law recognises the system of laws on which Indigenous peoples' relationship to their land is built, will be determined by the High Court this year in the *Miriuwung Gagerrong* and *Croker Island* appeals.¹⁰⁹

In Chapters 2 and 3 of this report I outline how the main issue before the court in these cases is whether native title is conceived as a bundle of individuated rights which entitle native title holders to carry out specified activities on their land or whether it is based on a more fundamental relationship between Indigenous people and their ancestral land originating from the traditional system of law and custom. It can be seen, in view of the above discussion, that the characterisation of native title as a bundle of rights, dissociated from the laws which give rise to these rights does not fill the gap created by the court's rejection of *terra nullius*. Indeed native title as a bundle of rights reinforces *terra nullius*'s depiction of Indigenous people as being 'without laws, without a sovereign and

¹⁰⁸ Daes, *op cit*, paras 37-38.

¹⁰⁹ *Western Australian v Ward* (2000) 170 ALR 159; and *Commonwealth of Australia v Yarmirr* (1999) 168 ALR 426.



primitive in their social organisation'.¹¹⁰ It denies the generality and systematisation of rights which characterise all legal systems including traditional Indigenous laws. Constructing native title as atomised and particularised practices denies their origin in a system of laws and customs which underlie Indigenous culture and society.

• *A Legislative basis*

The response of the international community over the last few years to the legislation which currently controls the recognition and protection of native title in Australia¹¹¹ makes it clear that this legislation provides an unacceptable basis for the relationship between Indigenous and non-Indigenous people. As noted before both the CERD Committee and the Human Rights Committee made it clear that the current native title legislation is a breach of Australia's human rights obligations to deal with Indigenous people equally,¹¹² to protect Indigenous culture¹¹³ and to the right of Indigenous people to self-determination.¹¹⁴ The extinguishment of Indigenous land in the amended NTA constitutes a breach of all three of these human rights obligations.

An important message to Australia from the UN committees was that where legislation is proposed which affects Indigenous people, it should only be enacted with the informed consent of the Indigenous people affected. This requirement arises out of Article 5 of ICERD and from the principle of self-determination under Article 1 of ICCPR. In fact the CERD Committee, meeting in March 1998 to consider the amended NTA under its urgent action procedure, contrasted the process by which the amendments were implemented without the consent of Indigenous people with the process by which the original NTA was implemented with Indigenous consent. It is this process of negotiation and consent that enables Aboriginal people to gain effective control over their ancestral lands.

The comparison made by the CERD Committee between the two approaches taken to legislating on native title also shows the inherent weakness of defining/building the relationship between Indigenous and non-Indigenous people on legislation alone. That is, as a result of the sovereignty of parliament, legislation can always be amended or repealed by subsequent governments without the consent of Indigenous people.

• *A human rights basis*

The overturning of terra nullius and the consequent absence of any legitimate basis for the establishment of non-Indigenous sovereignty over previously occupied territory can be addressed by ensuring that the establishment of a new relationship between Indigenous and non-Indigenous people is based on human rights principles.

110 *Mabo, op cit*, p36.

111 The *Native Title Act 1993* as amended by the *Native Title Amendment Act 1998*.

112 ICERD, Articles 2 and 5.

113 ICCPR, Article 27.

114 ICCPR, Article 1.



The international law principle most relevant to providing the basis for negotiation between Indigenous and non-Indigenous people in relation to the control of traditional Indigenous land is that of self-determination. Article 1 of ICCPR and ICESCR provide:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources... In no case may a people be deprived of its own means of subsistence.
3. The State parties to the present Covenant... shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the Charter of the United Nations.

There is little doubt based on the Concluding Observations of the Human Rights Committee and the Committee on Economic Social and Cultural Rights on Australia in July and August 2000 respectively (see: Appendices 3 and 4) that Indigenous people are entitled to enjoy the right of self-determination. Special Rapporteur Miguel Alfonso Martinez also has no doubt in this regard:

The Special Rapporteur also harbors no doubts concerning the much debated issue of the right to self-determination. Indigenous peoples, like all peoples on Earth, are entitled to that inalienable right.¹¹⁵

Both the Human Rights Committee and the Economic Social and Cultural Rights Committee directed their observations in relation to the amendments to the NTA to the rights of Indigenous people under the principle of self-determination to control their land and their resources. Both these Committees and the CERD Committee urged Australia to ensure greater participation by Indigenous people in decisions that affect them.

The evolution of the principle of self-determination at international law challenges the notion that the non-Indigenous state has exclusive jurisdiction over traditional land, not by replacing it with exclusive Indigenous jurisdiction, but by challenging the foundations on which the assertion of paramount control by one group to the exclusion of all others rests. James Anaya criticizes the theories articulated by Vattel and Hobbes that acknowledge and assign rights to only two entities, the state and the individual.¹¹⁶ The foundation of international law in the nation state whose social organisations are characterised by exclusive territory and centralised and hierarchical authority, meant that Indigenous people, organised through tribal or kinship ties, decentralised political structures and overlapping territorial spheres, would never benefit from the international law of nations. The characterisation of states as 'free, independent and equal' provides the basis of modern international law:

Vattel thus articulated the foundation for the doctrine of state sovereignty, which, with its corollaries of exclusive jurisdiction, territorial integrity, and

115 Martinez, *op cit*, para 256.

116 Anaya, S.J. *Indigenous Peoples in International Law*, Oxford University Press, New York, 1996, p13.



non-intervention in domestic affairs, developed into a central precept of international law.¹¹⁷

Theorists of international law adopted an approach that legitimised the subjugation of Indigenous people. As Erica-Irene Daes notes

...it is of critical importance to underscore the cultural biases that contributed to the conceptual framework constructed to legitimize colonization and the various methods used to dispossess indigenous people and expropriate their lands, territories and resources. It is safe to say that the attitudes, doctrines and policies developed to justify the taking of lands from indigenous peoples were and continue to be largely driven by the economic agendas of States.¹¹⁸

And later:

International law remains primarily concerned with the rights and duties of European and similarly 'civilised' States and has its source principally in the positive, consensual acts of those States.¹¹⁹

The principle of self-determination challenges the assumptions of an international law based on exclusive territorial jurisdiction. The assertion by Indigenous people of this right as a collective right also challenges the notion that the only recognisable entities at international law are the state and the individual.

Any conception of self-determination that does not take into account the multiple patterns of human association and interdependency is at best incomplete and more likely distorted. The values of freedom and equality implicit in the concept of self-determination have meaning for the multiple and overlapping spheres of human association and political ordering that characterize humanity. Properly understood, the principle of self-determination, commensurate in the values it incorporates, benefits groups – that is, 'peoples' in the ordinary sense of the term – throughout the spectrum of humanity's complex web of interrelationships and loyalties, and not just peoples defined by existing or perceived sovereign boundaries.¹²⁰

Not only does the principle of self-determination challenge the assumptions on which the sovereign state relies, it is particularly confronting to those states whose assumptions depend on the annexation of Indigenous people's territory without their consent. Thus in the *Western Sahara case*,¹²¹ the International Court of Justice refused to give weight to the legal theory on which the land was acquired and preferred instead to 'give precedence to the present-day aspirations of aggrieved peoples over historical institutions'.¹²²

Acknowledging the challenge that self-determination poses to the sovereign state as the foundation of international law assists in understanding the response of governments to international criticism over their failure to accord this right to Indigenous people. The present government's recent review of international

117 *ibid*, p15.

118 Daes, *op cit*, para 21.

119 Daes, *op cit*, para 26.

120 Anaya, *op cit*, p79.

121 *Advisory Opinion on Western Sahara [Western Sahara Case] [1975] ICJR p12.*

122 Anaya, *op cit*, p84.



treaties discussed at pages 26-27 above can be understood as a response to the challenge that human rights obligations, and in particular the right to self-determination poses to State power. It also casts light on the change in government policy on Indigenous matters which resulted in the withdrawal of the term 'self-determination' in relation to Indigenous policy. In its place the government prefers to use a more individualistic notion such as self-empowerment or self-management. These terms do not challenge the state/individual dichotomy on which state power is based.

The right to self-determination forms the basis on which Indigenous people may share power within the existing state. It gives Aboriginal people the right to choose how they will be governed. Yet the obligation placed on Australia at international law to accord this right to Indigenous people has not been effective in ensuring Indigenous people have control over their land, their resources and the form of governance which determines the nature of this control.

The problem with relying solely on the international human rights system as a basis for the establishment of a new relationship between Indigenous and non-Indigenous people is not due to the inadequacy of the principles it espouses but rather, the reluctance of states to implement or enforce them. This is despite the requirement at international law that international human rights obligations be performed in good faith.

In Australia the implementation of human rights obligations relies on the enactment of domestic legislation. There is no automatic mechanism by which human rights obligations are incorporated into the domestic law. Even where legislation is enacted, there may still be no provision for enforcement within domestic courts. Certainly, in relation to the right of Indigenous people to self-determination there is no domestic implementation or enforcement in Australia.

While an international law process for hearing complaints about treaty breaches exists,¹²³ there are serious limitations on the effectiveness of this process. Firstly, the findings of the international committee hearing the complaint are not enforceable in the domestic sphere. It is only through indirect international pressure or through a willingness on the state to adhere to the committee's findings that action will be taken to rectify the breach. In addition, communications under the Optional Protocol to the ICCPR provides that only individuals can lodge a complaint against a state. Individuals lodging complaints in relation to a collective right to self-determination have no standing to take a representative action on behalf of their people. Consequently, there is no effective remedy for Indigenous people whose right to self-determination has been denied. Antonio Cassese comments on the limitations which deny Indigenous people a means of enforcing their right to self-determination at international law as follows:

123 The Optional Protocol to the ICCPR, to which Australia is a signatory, provides a complaint mechanism by which the Human Rights Committee hears complaints in respect of breaches of ICCPR. Only individuals or other Contracting States can submit communications about the actions of the State. A Committee will not hear a complaint unless all domestic remedies have been exhausted.



The Human Rights Committee has chosen a strict interpretation whereby the 'collective right' set out in Article 1 cannot be indicated by individuals. Under this interpretation only 'individual rights' can be invoked before the Committee.

It follows from this that ultimately, under the Covenants, peoples do not actually possess a veritable right to self-determination. To assert that peoples possess a legal right would be tantamount to asserting the existence of a right that exists in theory only. It is the Contracting States which hold the rights conferred by the Covenants. Peoples are simply the 'beneficiaries' of these State rights and of the corresponding duties incumbent upon each Contracting State.¹²⁴

Thus, while international human rights norms provide a set of principles for establishing a new relationship between Indigenous and non-Indigenous people in Australia these principles must be adopted and incorporated domestically as a result of negotiations in which both Indigenous and non-Indigenous representatives enter freely, willingly and in good faith.

• *A Reconciliation Basis*

The reconciliation process has made clear the pressing need for Aboriginal peoples to negotiate freely the terms of their continuing relationship with Australia. The above analysis shows that there is also a pressing need for non-Indigenous people to re-establish the foundations of a nation which can no longer justify the means by which its sovereignty was first acquired. This analysis also shows that the recognition of Indigenous people's right to their land and the origins of a nation are inextricably related and that changes to one part of the relationship infer and require changes to the other. Developments in native title law reflect upon the ethical foundations of the nation.

Various avenues by which a new relationship between Indigenous and non-Indigenous people can be established have been discussed. Human rights principles provide a set of norms on which to rebuild this relationship which is so fundamental to the nation. The application of these principles must be negotiated and agreed upon by both parties before a new relationship can emerge. A process must be put in place for continuing negotiations along these lines.

The Council for Reconciliation (CAR) included in its report to Parliament¹²⁵ a draft Bill which forms a framework for the ongoing negotiation of unresolved issues between Indigenous and non-Indigenous people. The objects of the draft legislation include;

- To acknowledge the progress towards reconciliation and establish a process for reporting on the nation's future progress;
- To establish processes to identify and resolve the outstanding issues between Indigenous peoples and the Australian community;

124 Cassese, A., *Self Determination of Peoples, A legal Appraisal*, Cambridge University Press 1995, p143.

125 Council for Aboriginal Reconciliation, *Reconciliation, Australia's challenge: final report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament*. December 2000. See: www.reconciliation.org.au/finalreport.



- To initiate a negotiation process to resolve reconciliation issues between Indigenous peoples, and the wider community through the Commonwealth government that will result in a Treaty or Agreement.

The underlying assumption of the draft Bill is that reconciliation is an ongoing process in which unresolved issues are squarely raised and processes put in place for their resolution based on the informed consent of both sides. It has been argued in this chapter that an unresolved issue that needs to be negotiated and agreed upon before reconciliation can be achieved is the recognition of Indigenous people's right to land. The resolution of this issue with the informed consent of Indigenous people would exclude the extinguishment of native title. As was stated by the Canadian Royal Commission on Aboriginal Peoples,

[N]othing is more important to treaty nations than their connection with their traditional lands and territories, nothing is more fundamental to their cultures, their identities and their economies. We were told by many witnesses at our hearings that extinguishment is literally inconceivable in treaty nations cultures...

The treaty nations maintain with virtual unanimity that they did not agree to extinguish their rights to their traditional lands and territories but agreed instead to share them in some equitable fashion with the newcomers.¹²⁶

Special Rapporteur Miguel Alfonso Martinez also considers the issue of 'recognition of indigenous peoples' right to their lands and their resources, and to continue engaging, unmolested, in their traditional economic activities on those lands'¹²⁷ to be of central importance in establishing a renewed relationship between Indigenous and non-Indigenous people.

This is the paramount problem to be addressed in any effort to establish a more solid, equitable and durable relationship between the indigenous and non-indigenous sectors in multi-national societies. Owing to their special relationship, spiritual and material, with their lands, the Special Rapporteur believes that very little or no progress can be made in this regard without tackling, solving and redressing – in a way acceptable to the indigenous peoples concerned – the question of their uninterrupted dispossession of this unique resource, vital to their lives and survival.¹²⁸

Martinez, in the conclusions and recommendations of his report supports the process adopted in the draft Bill:

Finally, the Special Rapporteur is strongly convinced that the process of negotiation and seeking consent inherent in treaty-making (in the broadest sense) is the most suitable way not only of securing an effective indigenous contribution to any effort towards the eventual recognition or restitution of their rights and freedoms, but also of establishing much needed practical mechanisms to facilitate the realization and implementation of their ancestral rights and those enshrined in national and international texts. It is thus the most appropriate way to approach conflict resolution of indigenous issues at all levels with indigenous free and educated consent.¹²⁹

126 Report of the Royal Commission on Aboriginal Peoples 1996, Vol 2, Part 1, p44.

127 Martinez, *op cit*, para 252.

128 *ibid*, para 252.

129 *ibid*, para 263.



Martinez also recommends that agreements negotiated in a treaty-making process such as that envisaged by the draft Bill should maintain their character as 'instruments with international status'.¹³⁰ In this way the agreement process is consistent with the human rights principle of self-determination that recognises Indigenous people as a separate and distinct people, capable of negotiating with nations on an equal footing. Yet it is a notion of self-determination that does not seek to replace exclusive jurisdiction by a non-Indigenous state with exclusive Indigenous jurisdiction or sovereignty. Rather the process emphasises the real nature of treaty relationships, sharing and mutual benefit. The mutual benefit to be gained from negotiation based on consent and equality is that what was a contradiction at the foundation of our nation between the conflicting claims of Indigenous and non-Indigenous people to the jurisdiction of traditional lands, becomes an agreement as to the basis of our coexistence.

130 *ibid*, paras 270 and 271.



Definition and extinguishment of native title by the common law

This year the High Court will decide fundamental issues about the nature of native title and the extent to which it is protected by the common law. In hearing the appeal of the Miriuwung, Gajerrong and Balangarra peoples from the decision of the Full Federal Court in *Western Australia v Ward*¹ the court will be called upon to arbitrate an old dispute that has never been settled; that between Indigenous and non-Indigenous people as competing claimants for land. In this arbitration process the survival of non-Indigenous interests is assured. It is the Indigenous interests that are under threat.

The construction of native title at common law is important because it determines whether Indigenous interests in land are capable of withstanding the grant of non-Indigenous interests created throughout the history of colonisation in Australia. The survival of Indigenous interests in land is central to the survival of Indigenous culture throughout Australia. If native title is constructed as a weak title at common law it will be extinguished by the creation of non-Indigenous interests and the culture that is sustained by that land will end. If native title is constructed as a strong title then it will survive the creation of these interests and Aboriginal culture will endure.

The construction of native title at common law will in turn affect the level of protection provided to native title in the NTA. This is because the common law construction of native title is imported into the statutory definition of native title at s223, which provides;

- (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal people or Torres Strait Islanders in relation to land or waters, where:
 - (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

¹ *Western Australia and Ors v Ward and Ors* (2000) 170 ALR 159 (the 'Miriwung Gagerrong case').



- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognized by the common law of Australia.

The NTA offers little further protection than that provided by the common law to Aboriginal people whose interests have been affected, either impaired or extinguished by the statutory or executive creation of non-Indigenous interests prior to 1975. Indeed, the NTA validates post-1975 extinguishment that would otherwise have been invalid as a result of the operation of the RDA. However, the NTA does extend the common law protection of native title in relation to one exempted category; where native title claims are made over vacant Crown land and the claimants are in occupation of the land, prior extinguishment will be disregarded.²

Issues in the *Miriwung Gajerrong* case

The main issue in the case is whether native title should be characterised by the common law as a bundle of rights in relation to land and waters **or** as an interest in that land and those waters. The majority of the Full Federal Court, their Honours Justices Beaumont and von Doussa, characterized native title as a bundle of rights to carry out activities and traditional social and cultural practices. Justice North, dissenting, agreed with the trial judge, Justice Lee, that native title was a right to the land and the social and cultural practices were pendant rights arising from the underlying right to the land.

The outcome of this issue will determine the level of protection extended to native title by the law and whether it is strong enough to survive the grant of various non-Indigenous interests in land. Where native title is constructed as a bundle of rights in relation to land it is extinguished, right by right, whenever their exercise is inconsistent with the enjoyment of non-Indigenous rights. Where native title is constructed as an interest in land it is extinguished as a result of a deeper inconsistency between this underlying right to the land and the enjoyment of non-Indigenous rights.

Native title as a bundle of rights

- *Definition.* Native title is a bundle of distinct severable and enumerable rights and interests that can be exercised on the land.³ There is no overriding principle which unifies these rights and interests into a broader legal construct.⁴ The common law applies to protect only the physical enjoyment of rights and interests that are of a kind that can be exercised on the land, and does not protect purely religious or spiritual relationships with land.⁵ The right to maintain protect and prevent the misuse of cultural knowledge of the common law holders associated with the determination area is a personal right and not a right which can be the subject of a native title determination.⁶

2 s47B NTA.

3 *ibid*, per Beaumont and von Doussa J.J., at 185, 189.

4 *ibid*, at 186 and 189.

5 *ibid*, at 188.

6 *ibid*, at 321.



- *Extinguishment.* Extinguishment may be caused by (i) laws or acts that indicate a 'clear and plain intention' to extinguish native title, (ii) laws or acts which create rights in third parties in respect of a parcel of land which are inconsistent with the continued right to enjoy native title; and (iii) laws or acts by which the Crown acquires full beneficial ownership of land previously subject to native title.⁷ Where extinguishment is caused by laws or acts creating rights in third parties, native title is extinguished "to the extent of the inconsistency, irrespective of the actual intention of the executive and whether or not the legislature or the executive officer adverted to the existence of native title".⁸
- *Partial extinguishment.* Where the creation of rights in third parties is inconsistent with the exercise of only some native title rights then only those native title rights will be extinguished permanently.⁹ A bundle of rights that was so extensive as to be in the nature of a proprietary interest may by partial extinguishments be so reduced that the rights which remain no longer have the character of a proprietary interest.¹⁰ A succession of different grants may have a cumulative effect such that native title rights and interests which survive one grant that brought about partial extinguishment may later be extinguished by another grant.¹¹

Native title as a right to land

- *Definition.* Justices North and Lee both describe native title as a right to land based on the traditional connection of Aboriginal people to the land. The right to undertake activities on the land, such as hunting and fishing, derives from this underlying right to the land.¹²
- *Extinguishment.* Native title is extinguished by legislative or executive acts where the Crown has displayed a clear and plain intention to do so.¹³ A clear and plain intention to extinguish native title is an intention to permanently and totally abrogate the right of Aboriginal people to the land itself.¹⁴ Native title will be extinguished where there is a 'fundamental, total or absolute' inconsistency between the rights or interests created by a legislative or executive act and the underlying right of Aboriginal people to the land, reflecting the intention of the Crown to remove all connection of the Aboriginal people from the land in question.¹⁵
- *Suspension.* Where there is an inconsistency between the rights and interests created by a legislative or executive act and the exercise of

7 *ibid*, at 180.

8 *ibid*, at 180.

9 *ibid*, at 184, 189-190.

10 *ibid*, at 189-190.

11 *ibid*, at 189-190.

12 *ibid*, per North J., at 328 and 353-354; *Ward and Others (on behalf of the Miriuwung and Gajerrong People) and Others v State of Western Australia and Others*; Federal Court of Australia, 159 ALR 483 (the *Miriwung Gajerrong case* at first instance), per Lee J. at 507-508.

13 The *Miriwung Gajerrong case op cit*, per North J., at 332-336, 336 and 371; the *Miriwung Gajerrong case* at first instance *op cit*, per Lee J., at 508.

14 The *Miriwung Gajerrong case op cit*, per North J., at 328; the *Miriwung Gajerrong case* at first instance *op cit*, per Lee J., at 508.

15 The *Miriwung Gajerrong case op cit*, per North J., at 328.



rights derived from the holding of native title, such inconsistency not constituting an intention to extinguish native title, the rights created by the legislative or executive act will take priority over the exercise of native title rights. Inconsistent native title rights will be held in abeyance in order to allow the full enjoyment of rights and interests created by the law but will not be extinguished.¹⁶ Native title holders can resume exercising native title rights when the inconsistent rights created by the law have expired.

Impact of developments in the common law upon the human rights of Aboriginal people

From a human rights perspective the preferred construction of native title is one which ensures that Indigenous law and culture are protected from extinguishment. The following human rights standards support this construction of native title

- The right to equality
- The right to protection of property
- The right to enjoyment of culture
- The right to self determination
- The principle of freedom of religion

The right to equality

The right to racial equality is recognised in every major international human rights treaty, convention and declaration.¹⁷ These principles govern the assessment of the level of protection required with regard to all substantive human rights, including the rights to protection of property and the rights of minority populations and Indigenous peoples to maintain and develop their cultures.

1. Equality requires the protection of a distinct cultural identity

The meaning of equality has been informed by the recognition of how the operation of the formal standard of equality affected minority groups and Indigenous peoples. The standard of 'formal equality' required merely that all people be subject to the same laws and protections, regardless of any underlying inequality or difference in their economic and cultural circumstances. Yet it was early accepted that minority groups and Indigenous peoples have a right to maintain their distinctive characteristics. As was stated in the first session of the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in 1947:

16 The *Miriuwung Gajerrong case* *op cit*, per North J., at 328-329, 348, 776, see generally North J.'s discussion of the precedent, at 342-349; the *Miriuwung Gajerrong case* at first instance *op cit.*, per Lee J., at 500, 508, 509.

17 See: Article 2, Universal Declaration of Human Rights; Article 2, International Covenant on Civil and Political Rights; Article 2 International Covenant on the Elimination of All Forms of Racial Discrimination; Article 2, Convention on the Rights of the Child; Article 2, International Covenant on Economic, Social and Cultural Rights and; Article 2, International Labour Organisation Convention No169 concerning Indigenous and Tribal Peoples in Independent Countries.



Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics they possess and which distinguish them from the majority of the population.¹⁸

This was a recognition that the strict application of formal rules of equality would not protect the human right of minority groups to maintain their distinctiveness, but in fact force them to 'integrate' or 'assimilate' into the majority culture. Consequently, it was recognised that where there are fundamental differences between a majority population and minority groups or Indigenous peoples, mere equal treatment before the law (through the application of general laws to their particular circumstances) will result in a failure to protect their fundamental human rights. In order that the human rights of Indigenous peoples be equally protected, the mechanisms to achieve that protection must encompass differential treatment which takes account of our cultural and historical specificity. This is the principle of substantive equality.

What is required by 'differential treatment' was discussed by the Permanent Court of International Justice in *Minority Schools in Albania*, when the Court stated that protection of a minority group required:

to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.¹⁹

This formulation recognises that to protect a right to enjoy culture *necessitates* a substantive equality approach. It is explicitly stated by the Court that equality requires protection of the special circumstances that enable the continuation of the culture:

...there would be no true equality between majority and minority if the latter were deprived of its institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.²⁰

The principle of substantive equality and its corresponding protection of difference, is a requirement of the basic equality standard, not just an additional 'special measure' tacked onto formal equality – as Dr Sarah Pritchard has stated:

... an understanding of equality that is elaborated in international practice regards measures to protect the distinct identities of Indigenous

18 UN Doc E/CN 4/52 (1947), section V; this comment is discussed in Sarah Pritchard, 'Special Measures', in Race Discrimination Commissioner, *The Racial Discrimination Act 1975: A Review*, Canberra, 1995, p186; Warwick McKean, *Equality and Discrimination under International Law*, Oxford, 1983, p182; Australia, Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, February 2000, *Sixteenth Report – Consistency of the Native title Amendment Act 1998 with Australia's International Obligations under the Convention on the Elimination of all forms of Discrimination (CERD) – Report of the Non-Government Members of the Parliamentary Joint Committee*, Chapter 3, p114.

19 *Minority Schools in Albania* (1935) PCIJ Ser A/B No 64, at 17.

20 *ibid.*



Australians as *required* by the concept of equality rather than as an exception to it.²¹

The Committee on the Elimination of Racial Discrimination (the CERD Committee) has confirmed that in their application to Indigenous peoples, the Convention requires States to comply with a substantive equality standard. General Recommendation XXIII on Indigenous Peoples requires States *inter alia* to:

- (a) recognise and respect indigenous distinct culture, history and language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- (b) ensure that members 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;
- (c) provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- (d) ensure that no decisions directly relating to the rights and interests of indigenous peoples are taken without their informed consent;
- (e) ensure that indigenous communities can exercise their rights to practise and revitalise their cultural traditions and customs, to preserve and practise their languages; and
- (f) recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands and territories and resources and, where they have been deprived of their lands and territories traditionally used or otherwise inhabited or used without their free and informed consent, to take steps to return these land and territories. Only where 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.²²

It is now also accepted by the Australian Government that substantive equality is the standard now required at international law. The Government's arguments before the CERD Committee conceded that the standard of equality has

21 Sarah Prichard, *Official Committee Hansard*, 22 February 2000, p NT 66. These comments were made in the course of Dr. Prichard's submission to the Joint Parliamentary Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund: Parliament of Australia, *Inquiry into the Consistency of the Native title Amendment Act 1998 with Australia's International Obligations under the Convention on the Elimination of all forms of Discrimination (CERD)*, Commonwealth of Australia, Canberra 2000 (Herein the *Joint Parliamentary Committee CERD Inquiry*) Dr. Prichard's comments were discussed in the Non-government Members Report at p117.

22 Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, CERD/C/51/Misc.13/Rev.4 (1997), paras 4–5. (Herein CERD *General Recommendation 23*).



broadened under international law to include 'substantive equality'.²³ This is reflected also in the Attorney General's submission to the Parliamentary Joint Committee on Native Title Inquiry into the CERD decision in February 2000, which stated:

At the time the CERD Convention was drafted, equality was conceptualised as sameness or identical treatment. Under this approach any distinctions in treatment are considered discriminatory...

However, in international law, as recognition of the existence of legitimate differences between racial groups has developed, there has been a broadening of the interpretation of the equal treatment obligation to approve the taking into account of 'genuine difference'. This understanding of what differences in treatment are permissible has been termed 'substantive equality'. It allows like treatment of things that are alike and appropriately different treatment of things that are different.²⁴

International human rights standards require that cultural differences are not only taken into account in providing equality between racial groups but that those differences are positively protected.

The most recent guidance in relation to the international law standards of equality that apply to the recognition of Indigenous peoples' lands comes from the CERD Committee in its consideration of the amendments to the NTA and their consistency with the requirements of their Convention.

The Committee's finding, that many of the amendments to the NTA discriminate against Indigenous people, is based on an understanding of equality that the unique relationship between land and the culture of Indigenous people be protected.

The Committee recognises further that the land rights of indigenous peoples are unique and encompass a traditional and cultural identification of the indigenous people with their land that has generally been recognised.²⁵

A number of informative and educative United Nations reports on the relationship of Indigenous people to their land have been submitted through the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. While these reports are not a source of international law they inform and influence the standards which are emerging through the UN system. The one point on which they are all consistent is their recognition of the unique and fundamental relationship that Indigenous people have with their land. Mrs Erica-Irene Daes tabled her second progress report of the study entitled *Indigenous people and*

23 Commonwealth of Australia, *Written answers to the Committee on the Elimination of Racial Discrimination. Issue: Does Australia regard the Convention as requiring formal or substantive equality.* See also Ms Leon, in Foundation for Aboriginal Islander Action (FAIRA), *Transcript of Australia's appearance before the Human Rights Committee, 20-21 July 2000*, 21 July 2000, FAIRA Brisbane 2000, www.faira.org.au/hrc/, p19. The Commonwealth government expanded on this interpretation to the Human Rights Committee, when Australia's periodic report under the ICCPR was considered in July 2000. See: *Summary record of the 1858th meeting: Australia*, UN Doc: CCPR/C/SR.1858, 28/7/2000. This is discussed in greater detail in Chapter 1.

24 Attorney-General's Department, Submission No 24, Part I, p17: quoted in the *Joint Parliamentary Committee CERD Inquiry*, *op cit*, p8.

25 *ibid*, para 4.



their relationship to land in June 1999. The final report has been tabled at a recent meeting of the Working Group on Indigenous Populations. Mrs Daes notes;

Throughout the life of the Working Group, indigenous peoples have emphasised the fundamental issue of their relationship to their homelands. They have done so in the context of the urgent need for understanding by non-Indigenous societies of the spiritual, social, cultural, economic and political significance to indigenous societies of their land, territories and resources for their continued survival and vitality. Indigenous people have explained that, because of the profound relationship that indigenous peoples have to their lands, territories and resources, there is a need for a different conceptual framework to understand this relationship and a need for recognition of the cultural differences that exist. Indigenous peoples have urged the world community to attach positive value to this distinct relationship.²⁶

The report of Mrs Daes follows from and is consistent with the conclusions proposals and recommendations of Special Rapporteur Jose R. Martinez Cobo, in *Study of the Problem of Discrimination Against Indigenous Populations* 1986. Mr Martinez Cobo states:

It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture.²⁷

The unique and fundamental relationship that Indigenous people have with their land is confirmed again in the Final Report by Miguel Alfonso Martinez in his *Study on treaties, agreements and other constructive arrangements between States and indigenous populations*.²⁸ The Final Report recommends;

The first general conclusion concerns the issue of recognition of indigenous peoples' right to their land and their resources, and to continue engaging, unmolested, in their traditional economic activities on those lands. This is the paramount problem to be addressed in any effort to establish a more solid, equitable and durable relationship between the indigenous and non-indigenous sectors in multi-national societies. Owing to their special relationship, spiritual and material, with their lands, the Special Rapporteur believes that very little or no progress can be made in this regard without tackling, solving and redressing – in a way acceptable to the indigenous peoples concerned – the question of their uninterrupted dispossession of this unique resource, vital to their lives and survival.²⁹

The underlying message of these reports is that unless the dispossession of Indigenous people from their land is addressed then Indigenous people will continue to be disadvantaged.

26 Daes, Erica-Irene, *Final Report Indigenous Peoples and Their Relationship to Land*, UN Doc E/CN.4/Sub.2/2000/25.

27 Cobo M., *Study of the Problem of Discrimination against Indigenous Populations*, E/CN.4/Sub.2/1986/7/Add.4.

28 Martinez, M., *Study on treaties, agreements and other constructive arrangements between States and Indigenous populations*, Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, UN Doc E/CN.4/Sub.2/1999/20.

29 *ibid*, para. 252.



2. *Substantive equality requires the effect of past discrimination be addressed*

The Committee's finding, that many of the amendments discriminate against Indigenous people, is based on an understanding of equality that requires that the history of dispossession of Indigenous people be acknowledged and addressed.

The Committee recognises that within the broad range of discriminatory practices that have long been directed against Australia's Aboriginal and Torres Strait Islander people, the effects of Australia's racially discriminatory land practices have endured as an acute impairment of the rights of Australia's indigenous communities.³⁰

When the right to enjoyment of culture is governed by a principle of substantive equality, the protection of that right may also require assessing the right in the light of past discriminatory treatment and redressing the effects of that past discriminatory treatment. The CERD Committee recommended that States:

... ensure that Indigenous communities can exercise their rights to practice and *revitalize* their cultural traditions and customs, to preserve and to practice their languages.³¹ [emphasis added]

Further, in a case regarding the impact of non-Indigenous activities on the Indigenous economic activities which sustain the way of life and culture of the minority group the Human Rights Committee stated:

In considering whether the economic activities of the minority group are being interfered with in such a way as to threaten the way of life and culture of the community, the Committee will take into account historical inequities in treatment.³²

These commentaries reveal that partial destruction of Indigenous culture because of past discriminatory treatment should not justify further destruction of that culture. In fact the impact of past dispossession on the capacity of current Indigenous communities to sustain their culture must be taken into account when considering what is required to ensure equal protection for the future economic sustainability of that culture.

3. *The extinguishment of Indigenous interests in land for the benefit of non-Indigenous interests is discriminatory*

The CERD Committee's observations in relation to the amendments to the NTA also offer some guidance on the international law standard of discrimination and its application to Indigenous relationships to land. The amendments to the NTA that the CERD Committee found discriminatory were those amendments which preferred non-Indigenous interests over Indigenous interests.

30 Committee on the Elimination of Racial Discrimination, *Decision 2(54) on Australia – Concluding observations/comments*, 18 March 1999. UN Doc CERD/C/54/Misc.40/Rev.2. para. 3. (Herein CERD *Decision 2(54)*).

31 CERD *General Recommendation 23*, *op cit*, para 4.

32 *Chief Ominayak and the Lubicon Lake Cree Band v Canada*. Communication No 167/1984, Report of the Human Rights Committee, UN Doc A/45/40 (1990).



While the original Native Title Act was delicately balanced between the rights of indigenous and non-indigenous titleholders, the amended Act appears to create legal certainty for government and third parties at the expense of indigenous title.³³

The Committee notes in particular, four specific provisions that discriminate against indigenous title-holders under the newly amended Act. These include: the Act's "validation" provisions; the "confirmation of extinguishment provisions; the primary production upgrade provisions; and restrictions concerning the right of indigenous title-holders to negotiate non-indigenous land uses.³⁴

The first three sets of provisions referred to by the committee as discriminatory are provisions which protect non-Indigenous land uses or titles at the expense of native title. The Committee found these provisions to be discriminatory even though compensation is available to native title holders for the impairment or extinguishment of native title as a result of these provisions. The Committee's discussion of the confirmation provisions is particularly relevant to the question of how the common law may have a discriminatory impact on Indigenous people. The following comments of Ms McDougall, special rapporteur on Australia, are in response to the government's argument that the amendments to the NTA, in particular the confirmation provisions, are not discriminatory because they cause no further extinguishment of native title than the common law;

Since... European settlement... the native land rights of Aboriginal peoples have been systematically undermined... (terra nullius) completely discounted the cultural value of Aborigines traditional and complex land distribution system...

Because much of the government's argument is that its actions have been justified because they meet the standard of the common law, it is important to note that the common law itself is racially discriminatory.

As defined by the High Court in the *Mabo* decision, under common law, native title is a vulnerable property right, it is inferior to sovereign title which has the power to extinguish native title without notice, consent or compensation...³⁵

The Committee rejected the argument that the common law is the standard against which legislative actions should be judged as non-discriminatory. Where native title is constructed by the common law as a vulnerable property right, extinguished by 'sovereign title' then the common law itself is discriminatory. The High Court has an opportunity in the *Mirriuwung Gajerrong* case to construct native title as a strong title reflecting the underlying values of Indigenous culture and its relationship to the land. Rather than permitting this culture to be extinguished, the Court can provide a level of protection that will ensure its continuation, while at the same time allowing the non-Indigenous title to be enjoyed to the full.

33 CERD *Decision 2(54)* para. 6.

34 *ibid*, para. 7.

35 Ms G. McDougall, Australian Country Rapporteur, *Meeting of the Committee on the Elimination of all forms of Racial Discrimination – Report*, <http://staff.faira.org.au/issues/racial-discrimination-con.html> (19/3/99), pp4-5.



The right to protection of property

The right to protection of property is one of the fundamental human rights at international law. The Universal Declaration of Human Rights, which is considered to be customary law, the highest form of international law from which no derogation is permissible,³⁶ protects the right under Article 17:

1. Everyone has the right to own property alone, as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

The right to protection of property is further protected under the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD). Article 5 requires State parties to ensure 'equality before the law without distinction as to race, colour or national or ethnic origin' in the enjoyment of (among other things) 'the right to own property alone and in association with others, and the right to inherit'. The meaning of this protection in relation to Indigenous Peoples is further explained by the CERD Committee's General Recommendation on Indigenous Peoples. The recommendation calls upon state parties 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.³⁷ [emphasis added]

This is an expansive protection of rights to property. It protects communal ownership of territories, and anticipates that where traditional lands have been confiscated without the free and informed consent of the Indigenous owners that such lands will be returned or where return is not possible, give rise to a right to compensation.

The obligation to 'return' lands and territories, means that the domestic *legality* of past acts of confiscation of traditional Indigenous lands and territories will not be sufficient to prevent a breach of international law. Consequently, the application of the substantive equality principle to protection of Indigenous rights to property in the present will require that the history of past discrimination be taken into account.

The right to enjoyment of culture

At international law minority groups and Indigenous peoples have a collective right to the enjoyment of their own distinctive culture. This is expressed in Article 27 of the International Covenant on Civil and Political rights (ICCPR):

36 Prichard, S. *op cit*, p.NT 69.

37 CERD *General Recommendation 23, op cit*, para 5.



Members in ethnic, religious or linguistic minorities shall not be denied the right, in community with the members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Protection of culture is also provided by Article 5 (e)(vi) of CERD, which requires states to guarantee equality before the law in relation to:

economic, social and cultural rights, in particular... the right to equal participation in cultural activities.

Ensuring the survival of minority or Indigenous cultures thus requires two things:

- the provision of 'conditions for sustainable economic and social development', and
- that these conditions be 'compatible' with the 'cultural characteristics' of the Indigenous people.³⁸

The first requirement above incorporates the recognition that the right to enjoyment of culture includes a right to social and economic development. The right to enjoy a culture is not 'frozen' at some point in time when the culture was supposedly 'pure' or 'traditional'. The enjoyment of culture should not be falsely restricted as a result of anachronistic notions of the 'authenticity' of the culture.

The second requirement above suggests that this right includes the right to equal protection of the *circumstances* required to maintain and develop that culture. Where land is of central significance to the sustenance of a culture, as it is with Indigenous culture, then the right to enjoyment of culture requires the protection of the land.

The right to self-determination

The right to self-determination is guaranteed by Article 1 of the International Covenant on Civil and Political Rights and Article 1 of the International Covenant on Economic Social and Cultural Rights. The applicability of this right to Indigenous peoples was made clear by the Human Rights Committee in its concluding observations concerning Canada.³⁹

The Committee notes that, as the State party acknowledged, the situation of the aboriginal peoples remains "the most pressing human rights issue facing Canadians". In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasises that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent

38 *ibid*, para 4.

39 (1999) UN doc. CCPR/C/79/Add.105.



aboriginal rights be abandoned as incompatible with Article 1 of the Covenant.

The Human Rights Committee considered Australian Indigenous policy and legislation under Article 1 of ICCPR in July 2000. In relation to Indigenous control over traditional lands the Committee said:

With respect to Article 1 of the Covenant, the Committee takes note of the explanation given by the delegation that rather than the term 'self-determination' the Government of the State party prefers terms such as 'self-management' and 'self-empowerment' to express domestically the principle of indigenous peoples exercising meaningful control over their affairs. The Committee is concerned that sufficient action has not been taken in that regard.

The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources.⁴⁰

The bundle of rights approach to native title restricts the control that Indigenous title holders can exercise over their land. Native title is a right to perform specific enumerated practices, not a right to make decisions regarding what practices can be carried out on the land. In contrast, the title to land approach applies a more general definition of native title that leaves a space within which traditional laws and customs can determine the meaning and content of the pendant rights.

In its decision of 18 March 1999 in relation to the amendments to the Native Title Act the CERD Committee confirmed the right of Indigenous people to effective participation under Article 5(c) of CERD as interpreted by *General Recommendation XXIII (51) Concerning Indigenous Peoples*:⁴¹

The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention. Calling upon States Parties to "recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources," the Committee, in its General Recommendation XXIII, stressed the importance of ensuring "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".⁴²

The bundle of rights approach is contrary to the principles of self-determination and effective participation that put Indigenous people in control of the decisions concerning their land, their territories and their resources.

40 Human Rights Committee, *Consideration of Reports submitted under Article 40 – Concluding Observations of the Human Rights Committee – Australia, (69th session)*, 28th July 2000, UN Doc CCPR/CO/69/AUS, para 9 (Herein *HRC Concluding Observations*).

41 CERD *General Recommendation 23, op cit*, para 9.

42 CERD *Decision 2(54)*, para 9.



Freedom of Religion

Article 18 of the ICCPR contains a guarantee of thought, conscience and religion. In its General Comment on Article 18, the UN Human Rights Committee has adopted a broad interpretation of freedom of thought, conscience or religion, encompassing freedom of theistic, non-theistic and atheistic beliefs and freedom not to subscribe to any of these beliefs. The Committee has made clear that the protection of Article 18 is not confined to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.⁴³ A UN Special Rapporteur on Religious Intolerance has described religion as “an explanation of the meaning of life and how to live accordingly”.⁴⁴ Pursuant to State reporting procedures, both the Committee on the Elimination of Racial Discrimination and the Human Rights Committee seek information concerning the protection of the religions of Indigenous peoples.⁴⁵

Application of these principles to native title

There is no doubt that the outcome of the issues before the court in the *Miriuwung Gajerrong* case will affect the human rights of Indigenous people throughout Australia.

The extinguishment test is the test that ultimately determines the level of protection granted to Indigenous interests in land. The principle of equality requires that the law accord native title holders the same level of protection and security in the enjoyment of title as that enjoyed by non-Indigenous title holders. The extinguishment of Indigenous interests in land for the benefit of non-Indigenous interests in land is racially discriminatory.

The *Mabo* decision makes it clear that from 1975 the *Racial Discrimination Act, 1975* (Cth) (the RDA) rendered invalid Crown grants which had the effect of extinguishing Indigenous interests in land for the benefit of non-Indigenous interests. However, prior to the enactment of the RDA in 1975 racial discrimination was not illegal in Australia.

Many of the Crown grants that are before the court in the *Miriuwung Gajerrong* case were authorised by statutes that were enacted before 1975. These enactments have not been rendered invalid by the operation of the RDA. The difficulty in determining whether Crown grants authorised by these statutes

43 Human Rights Committee, *General Comment No 22* (1993), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev 4, 2000, paras 1 & 2. See also T van Boven, *Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, UN Doc E/CN 4/Sub 2/1989/32 (1989), para 5; E Odio Benito, *Elimination of All Forms of Intolerance and of Discrimination Based on Grounds of Religion or Belief*, UN Doc E/CN 4/ Sub 2/1987/26, para 13, reprinted *United Nations Human Rights Study Series No 2*, UN Sales No E.89.XIV.3 (1989); A Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, UN Doc E/CN 4/Sub 2/200/Rev 1 at 1, UN Sales No 60.XIV.2 (1960) reprinted (1978) 11 *New York University Journal of International Law and Policy* at 227.

44 Odio Benito, *ibid*, para 19.

45 *ibid*, at 68. As to the characterisation of Aboriginal belief-systems as religions, see: M. Charlesworth, “Introduction” in M Charlesworth (Ed) *Religious Business: Essays on Australian Aboriginal Spirituality*, Cambridge University Press 1998 xiii at xv; W.E.H. Stanner, “Some Aspects of Aboriginal Religion” written 1976, reproduced in Charlesworth, *ibid*, at 1.



had the effect of extinguishing native title is that the purpose of these statutes was not to extinguish native title but to create interests in land over which it was assumed there was no prior owner. To add to this conundrum, when native title was recognised in 1992 it was constructed as a pre-existing title; a burden on the Crown since the acquisition of sovereignty.⁴⁶ It is in these circumstances that the construction of native title by the court, as either a bundle of rights or as a title to land, is instrumental in determining whether native title survives the grant of various non-Indigenous interests in the same land. It is also the reason why the courts cannot characterise their role in the extinguishment of native title as simply giving effect to past discriminatory legislation. The form in which the courts recognise native title today is determinative of whether native title is extinguished by our summary past dealings on Indigenous land.

- *Extinguishment and co-existence;*

Where constructed as a bundle of rights native title is liable to extinguishment, right by right, whenever the exercise of a particular right is inconsistent with the enjoyment of non-Indigenous rights. Where native title is constructed as an interest in land it is extinguished only as a result of a deeper inconsistency between this underlying right to the land and the enjoyment of non-Indigenous rights. The 'bundle of rights' approach to the characterisation of native title facilitates the finding of 'inconsistency' (and therefore facilitates the finding of extinguishment) through:

- restricting the rights that may be 'recognised' as native title as rights to 'physical use',
- atomising the rights recognised into discrete minor rights, and
- abandoning the attempt to maintain the Indigenous character of the right recognised at common law.

The construction of native title as bundle of rights makes possible its partial and progressive extinguishment. It is only when native title rights are understood as entirely independent of each other, that the possibility of extinguishing them progressively one by one arises:

... if particular rights and interests of indigenous people in or in relation to land are inconsistent with rights conferred under a statutory grant, the inconsistent rights and interests are extinguished, and the bundle of rights which is conveniently described as "native title" is reduced accordingly.⁴⁷

The result is that native title can be progressively weakened, but cannot ever regain its initial strength.

In a particular case a bundle of rights that was so extensive as to be in the nature of a proprietary interest, by partial extinguishment may be so reduced that the rights which remain no longer have that character.⁴⁸

46 *Mabo and Ors v Queensland (No 2)* (1992) 175 CLR 1, per Brennan C.J. at 49-50 (quoting from the Privy Council decision, *Amodu Tijani* (98) (1921) 2 AC, at p403 per Viscount Haldane), 51-52, 57; per Deane and Gaudron J.J. at 87, 91, 109, 116; and per Dawson J. at 133, (Herein *Mabo (No 2)*).

47 *ibid*, at 185.

48 *ibid*, at 189.



This construction of native title makes native title inherently weaker than non-Indigenous forms of property. Treating a mere impairment of native title as partial extinguishment favours property rights of kinds held by non-Indigenous people over those held only by Indigenous people and is inconsistent with Australia's obligations in relation to equality. These obligations require that the common law presumption against extinguishment of a proprietary interest be extended to the recognition and protection of native title which has been proven to exist in accordance with Indigenous law and customs.

The effect of the progressive extinguishment of native title through the bundle of rights approach is illustrated by the application of the majority's approach to extinguishment of pastoral leases and mining leases in Western Australia. On the majority's approach the enclosure or improvement of pastoral leases had the effect of permanently extinguishing 'the rights of Aboriginal people to enter to seek their sustenance in their accustomed manner'.⁴⁹ Having regard to the magnitude of the areas which can be treated as enclosed or which have been enclosed in the past and the comparatively inconsequential character of the works which can constitute enclosure, this has a "potentially dramatic impact".⁵⁰ It falls for the High Court to consider whether the particular outcomes of the principles applied by the majority in the Full Court 'weigh in favour of a somewhat less draconian limitation on the ability of the common law to recognise and protect native title rights and interests'.⁵¹ Where the choice is open, the High Court must prefer interpretations of the relevant Western Australian statutes and regulations that are consistent with the guarantee of equality and the rights of minorities, and hence a less draconian approach to the recognition and protection of native title in land subject to pastoral leases.

The effect of the increased extinguishment introduced by the bundle of rights approach is further illustrated by the majority's conclusion that statutory provisions vesting ownership of minerals and petroleum in the Crown and certain mining leases extinguish native title. This too has considerable impact on the level of protection accorded to native title.⁵² However, as the decisions of Justice Lee at first instance and Justice North in the Full Court show, there is room for argument that the mining leases granted pursuant to the scheme of the *Mining Act 1978* (WA) and *Mining Regulations 1981* (WA) did not extinguish native title. Similarly, there is room for argument that the non-exclusive vesting of minerals and petroleum in the Crown pursuant to s 3 of the *Constitution Act* (WA), s 117 of the *Mining Act 1904* (WA), s 9 of the *Petroleum Act 1936* (WA) and s 3 of the *Minerals Acquisition Ordinance 1953* (NT) did not extinguish native title. That such grants should not be held to extinguish native title is supported by the High Court's decision in *Yanner v Eaton* in relation to non-exclusive governmental

49 The *Miriwung Gagerrong* case, *op cit*, at 242.

50 R.S. French, "The Evolving Common Law of Native Title", paper delivered at University of Western Australia, 19 September 2000, at 12. On the potentially 'dramatic impact' of the majority's approach on the extent to which native title may have survived over current or former pastoral leases in Western Australia, see also D. Bennett S.G. Q.C., "Native Title and the Constitution", Native Title in the New Millennium Representative Bodies Legal Conference, Melbourne, 16-20 April 2000, at 20.

51 R.S. French, *ibid*.

52 *ibid*, p12, fn 97.



rights of control over fauna,⁵³ the acceptance by the majority in the Full Court of non-exclusive governmental rights over water, and in the approach of Justices Lee and North.

Where there is any doubt, the Court should strive to reach a finding that the rights of native title holders and the rights of holders of mining leases can be exercised concurrently. Where such a finding is unavailable, the Court should construe the grant of a right to mine as equivalent to a regime of strict regulation which, to the extent of any inconsistency, impairs or suspends native title for the duration of the mining operation.⁵⁴

The 'bundle of rights' characterisation of native title is a construction of the right that directly entrenches every small incursion into the right so as to ensure that the accumulation of small incursions finally results in the complete erosion of the substantial right. There is no notion of sovereign power being exercised so as to regulate or curtail Indigenous interests in land. Only extinguishment will result from the creation by the Crown of inconsistent rights. In this way Indigenous culture is inexorably removed, parcel by parcel, to give way to new interests in land as they are created.

Under the right to land approach, adopted by Justices Lee and North, non-Indigenous rights are given priority but not so as to extinguish native title whenever there is an inconsistency. Because this latter approach enables native title to survive the grant and enjoyment of non-Indigenous rights, there is an incentive to both parties to reach an agreement as to how their interests can co-exist. In this way the law assists in the conciliation of interests rather than their arbitration.

This holistic approach to the construction of native title allows room for regulation or suspension of native title, rather than its extinguishment. This is consistent with human rights norms, which require the conceptualisation of native title in a manner which promotes its resilience, rather than its fragility and susceptibility to extinction forever in the eyes of the law.⁵⁵

- *Recognition of Aboriginal law and culture*: The bundle of rights approach constructs native title as a defined and finite series of discrete rights. Each right, whether it be a right to control access to the land or a right to hunt on the land, is extinguished severally or jointly by the Crown's creation of inconsistent rights. There is no recognition of an underlying relationship with the land which unifies these individual rights into a system of rights. In particular there is no recognition of an abstract or conceptual level within Indigenous culture which orders physical activities or presence on the land into a system of laws. For Indigenous culture the abstract level which has this ordering effect is the spiritual relationship between the land and the people. The failure in the bundle of rights approach to recognise and protect this aspect of Indigenous culture is a denial of its unique and essential identity.

53 *Yanner v Eaton* (1999) 166 ALR 258.

54 Under the NTA mining leases are excluded from the categories of interests which extinguish native title: in relation to past acts ss 13A, 228, 231, 15(1)(d); in relation to future acts s 24MA.

55 K. Barnett, "Western Australia v Ward: One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis" (2000) 24 *Melbourne University Law Review* 462 at 474-477.



While the relationship of indigenous people with their traditional home land is “primarily a spiritual affair” or as Blackburn J. described it in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR at 167, a “religious relationship”, the common law applies to protect only the physical enjoyment of rights and interests that are of a kind that can be exercised on the land, and does not protect purely religious or spiritual relationships with land.⁵⁶

The result of the approach of the majority in the *Miriuwung Gajerrong* case is that even though Aboriginal people may continue to maintain a spiritual connection with the land, the common law will consider their native title rights to be extinguished where an inconsistency occurs. This disjuncture between Aboriginal law and culture and common law recognition and protection was acknowledged by their Honours to be a result of their limited construction of native title.

That the common law does not provide for the protection or enforcement of purely religious or spiritual affiliation with land, divorced from actual physical use and enjoyment of the land, has the consequence that the continued recognition of traditional laws and observance of traditional customs may substantially maintain a connection between the indigenous people and the land even after native title rights and interest have under Australian law been totally extinguished, for example by a grant of freehold.⁵⁷

What their Honours did not acknowledge was that the failure of the common law to recognise and protect Indigenous culture, especially that aspect which identifies its essential characteristic, is a breach of the human rights of Indigenous people.

In contrast to the bundle of rights approach, the right to land approach does recognise the systemic and spiritual basis of Indigenous traditional law and custom. This approach gives effect to the recognition of the interconnectedness of Indigenous connection to land and Indigenous culture. It does not restrict the right afforded by native title to limited physical usage rights which are disconnected from any of the cultural meanings that give them purpose. Instead, the ‘title to land’ characterisation of native title recognises that the activities on the land flow from and take their meaning from this more fundamental connection. As Justice North stated in his dissenting judgment in Full Federal Court Decision in *Miriuwung Gajerrong*:

Native title is a right to the land itself. That conclusion reflects the traditional law of the aboriginal people.⁵⁸

... aboriginal traditional law does not treat the “rights” as stand-alone rights. The incidents of native title depend upon the connection of the aboriginal people with the land. The underlying connection is the foundation for the exercise of various rights. The land is not just the place to hunt. Rather the right to hunt follows as a result of the significance of the land as the centrepiece in aboriginal law and culture.⁵⁹

56 The *Miriuwung Gajerrong* case, *op cit*, per Beaumont and von Doussa J.J. at 188.

57 *ibid*, at 189.

58 *ibid*, per North J. at 784.

59 *ibid*, at 784.



In order to extinguish native title under a 'title to land' approach, the rights created by a legislative or executive act must be inconsistent with the fundamental relationship of Indigenous people to the land. Inconsistency at the level of contingent or incidental rights will not extinguish native title, but hold it in abeyance for the duration of the inconsistency. This construction of native title precludes the possibility of 'partial' and progressive extinguishment – and so accords protection to the entirety of the right (just as other common law rights are protected).

The 'title to land' characterisation of native title thus satisfies the substantive equality standard for the protection of the right to enjoy and develop culture in that it legally protects the circumstances required to maintain Indigenous cultures that are reliant upon their connection to their lands.

The common law recognition of native title within a human rights framework

The above discussion shows how the common law construction of native title affects the human rights of Aboriginal people. What is now argued is that native title is an issue that the common law itself recognises should be determined under the guidance of international human rights standards. The basis of this argument is fivefold;

1. The principles of equality and respect for cultural difference underlie the recognition of native title in the Australian common law.
2. The recognition of native title by the common law was influenced by changes in international law and developments in the common law of native title should be guided by developments in international law.
3. In the development of the common law, international law is a legitimate and important influence.
4. Human rights principles provide the common law with a set of guidelines for the recognition of a system of law and culture whose origins lie outside of the common law.
5. The interpretation of statutes that create non-Indigenous property rights over native title land should be guided by human rights principles.

1. The principles of equality and respect for cultural difference underlie the recognition of native title in the Australian common law

The *Mabo* decision represented a fundamental break with the previous common law doctrine regarding the status of Indigenous rights to land. Prior to the *Mabo* decision, the doctrinal explanation of the acquisition of sovereignty in Australia was that the British had settled territories that although already inhabited could be considered uninhabited or 'terra nullius'. The acquisition of territory that was terra nullius allowed the Crown to take absolute beneficial ownership of all the land. As Brennan C.J. stated in *Mabo*:

It was only by fastening on the notion that a settled colony was terra nullius that it was possible to predicate of the Crown the acquisition of ownership of land in a colony already occupied by indigenous inhabitants.



It was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other. If that hypothesis be rejected, the notion that sovereignty carried ownership in its wake must be rejected too.⁶⁰

The consequence of the High Court discarding the distinction between inhabited colonies that were terra nullius and those that were not was that the rights and interests of Indigenous inhabitants in land survived the acquisition of sovereignty by the British Crown.

The High Court has stated that the overturning of the terra nullius doctrine in the *Mabo* decision was based upon and made necessary by a new understanding of historical 'fact'.

... the gist of *Mabo [No 2]* lay in the holding that the long understood refusal in Australia to accommodate within the common law concepts of native title rested upon past assumptions of historical fact, now shown then to have been false.⁶¹

This false assumption of 'historical fact' was really a set of values or assumptions that interpreted Indigenous societies as lower on the 'social scale' than British society and consequently not worthy of legal protection. It was the assumption that the difficulty of explaining Indigenous connection to land within the conceptual categories already known to the common law legitimated ignoring it altogether.

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are *not to be reconciled* with the institutions or the legal ideas of civilized society. *Such a gulf cannot be bridged*. It would be idle to impute to such people some shadow of the rights known to *our* law and then to transmute it into the substance of transferable *rights of property as we know them*".⁶² [emphasis added]

The new 'fact' accepted in the *Mabo* decision was the re-evaluation of these values or assumptions. It was a re-evaluation, based on contemporary values of equality and social justice, of the status of Aboriginal 'social organization and customs', specifically in relation to the status of their connection to land.

The theory that the indigenous inhabitants of a "settled" colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs.⁶³

The re-evaluation of the relationship between Indigenous law and custom and the common law in *Mabo* was not understood as equating Indigenous connections to land into common law property right categories. Rather, the relationship was understood as a question of *how* a connection to land established by customary Indigenous social organization and external to the

60 *Mabo (No 2) op cit*, per Brennan C.J. at 46.

61 The *Wik* decision, *op cit*, per Gummow J. at 180.

62 *In re Southern Rhodesia* (60) (1919) AC 211, per Lord Sumner, at pp233-234 – quoted in *Mabo (No 2) op cit*, by Brennan C.J. at 39.

63 *Mabo (No 2) op cit*, per Brennan C.J., at 40.



common law could nevertheless be recognised by the common law. Consequently, the decision recognised a right to land that had its source in Indigenous law.

The basis of this re-evaluation was an understanding of equality, not as applying the same standards regardless of culture, but as recognising cultural difference. This understanding of equality requires that fundamentally different forms of social organization be recognised as having equal validity and respect. It implies a standard of equality based on equality of cultures. The assumption of cultural equality is determinative of the Court's decision in *Mabo* to develop principles that apply to all Indigenous societies in Australia and not just the society of the Meriam people.

The theory that the indigenous inhabitants of a 'settled' colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs. As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case. This Court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher 'in the social organization' than the Australian Aborigines whose claims were 'utterly disregarded' by the existing authorities or the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those which were not.⁶⁴

The court's decision to overrule the existing authorities was a decision not to distinguish between cultures based on their values and way of life, but to accept that cultures are entitled to equal respect regardless of their social organisation.

Discontinuity within native title

Mabo created a discontinuity between what was regarded before and after *Mabo* as an acceptable basis for the common law treatment of Indigenous rights to land. However the common law has not shrugged off its discriminatory past. The discontinuity between equality and discrimination still sits within the logic of native title as a distinction between the process of recognition and extinguishment. Recognition is understood as overturning terra nullius by giving legal status to, and so protecting Indigenous rights to land. Extinguishment, on the other hand, preserves non-Indigenous interests in land at the expense of Indigenous interests. It occurs because interests created by the Crown are granted greater protection than Indigenous interests in land.

The tension that exists between the recognition of native title with its origin in cultural equality, and extinguishment with its origin in discrimination, needs to be resolved. To date the High Court has not been required to resolve these contradictory processes within the common law partly because they have not been presented to the Court as interrelated issues. In *Wik* the issue of whether native title is extinguished by the grant of a pastoral lease was dealt with hypothetically in the absence of a determination of the native title claim. In *Fejo v Northern Territory*,⁶⁵ the High Court's decision that the grant of fee simple

⁶⁴ *ibid*, at 40.

⁶⁵ (1998) 156 ALR 721 (*Fejo*).



extinguished native title was also made in the absence of a native title determination and was based on the nature of the fee simple grant. In *Yanner v Eaton*⁶⁶ the proceedings were commenced as a criminal action in which the protection of s 211 of the NTA was invoked as a defence. The *Miriuwung Gajerrong* appeal is the first native title case to be heard by the High Court in which the question of extinguishment arises in the context of a claim where traditional laws and customs have been clearly established and the traditional connection to the land is ongoing. The way in which the issues are presented to the court is not the only reason why the fundamental inconsistency in the common law has not been addressed.

The issues of recognition and extinguishment of native title have been kept separate in the development of the common law doctrine of native title. There are two structural bases for their separation.

- *The temporal separation of recognition and extinguishment.* Native title is a retrospective doctrine. It does not say that Indigenous rights to land *should have been* a legal right. It says that native title was always a legal right, but simply wasn't 'recognised' as such.⁶⁷ The doctrine of native title not only reformulates legal relationships to land. Native title reformulates legal history.

In this new construction of legal history, the existence of native title is inserted into the past. Native title is said to have existed since the time of the change in sovereignty and the reception of the common law in Australia.

Yet, while the legal category of native title is inserted into this history, the process of 'recognition' is not. The legal requirement for recognition of native title is the maintenance of a 'continued connection'.⁶⁸ While there is an 'historical' component to this requirement, the critical date for proof is the present; the contemporary connection. The date of 'recognition', if it occurs at all, is in the present, at the determination of the native title claim.

The result of this reformulation of history is that, despite the fact that native title was not recognised in any individual instance between the British settlement of Australia and *Mabo*, it nevertheless did have *legality*.

This re-formulation of history also has the effect of inserting extinguishment into the past, at the time that the Crown acts granting interests in land were enacted. The reformulation of legal history to insert a fictional *legal* right to native title at the time of such Crown grants thus creates a *legal* relationship between the Indigenous right to land and the Crown grant *at the time* of the grant. What was simply non-recognition at the time of the grant, becomes legal extinguishment at the time of the grant. Because

66 (1999) 166 CLR 258 (*Yanner*).

67 *Wik* decision, *op cit*, per Kirby J. at 230.

68 A 'connection' based on continued acknowledgement and observance of traditional law and custom: see section 223 NTA; *Mabo (No 2)* *op cit*, per Brennan C.J., at 70; per Deane and Gaudron J.J. at 110; *Yanner op cit*, per Gleeson C.J., Gaudron, Kirby and Hayne J.J. at 270; the *Miriuwung Gajerrong* case at first instance *op cit*, per Lee J., at 500.



the conflict was between *legal rights* at the time of the Crown grant (not just the creation of interests in land in which there is no recognised prior owner), it could be resolved within the *legal* framework of that time. Thus, whether the test for extinguishment is 'intention' or 'inconsistency', the relevant date of that 'intention' or 'inconsistency' is the date of the act causing extinguishment, not the effect of that act on the *contemporary* connection of Indigenous people to their lands.

The consequence of this temporal separation of recognition and extinguishment is that native title could be *legally* extinguished at the time of the grant, even though at that time its existence was not recognised. It could be extinguished, because native title was a *legal* right, and extinguishment was an act with *legal* effect. The *legal* effect of this retrospective 'extinguishment' is to entrench the effects of the 204-year operation of the doctrine of terra nullius into the doctrine of native title.

- *The separation of responsibility for the processes of recognition and extinguishment between the judiciary and the executive/legislative government.* Just as the processes of recognition and extinguishment are separated in time, the responsibility for each is also divided between the judiciary and the executive government. 'Recognition' is posited as a process of the common law, while 'extinguishment' is posited as a process of the executive or legislature.

According to current native title doctrine, extinguishment is the termination of a legal native title right, caused as a direct result of, and at the time of, a Crown act creating a non-Indigenous interest in land which is inconsistent with the native title right. By finding the source and resolution of the *legal* conflict entirely within the Crown grant, native title doctrine limits the powers of the court to intervene in the conflict between Indigenous and non-Indigenous interests in land. The court's capacity to deal with the conflict is delimited by the doctrine of the separation of powers and the rules of statutory interpretation that flow from that doctrine.

The separation of powers doctrine places limitations on the capacity of the judiciary to review executive and legislative acts. The doctrine is based on the principle that each arm of government has absolute authority within its constitutionally defined powers. The court may review executive or legislative acts only if they are illegal; that is, if the act does not fall within one of the constitutionally defined powers. The court may not review executive or legislative acts according to a measure of merit (such as whether or not the act is discriminatory).

The courts cannot review the merits as distinct from the legality, of the exercise of sovereign power.⁶⁹

Nevertheless, general rules of statutory construction dictate that the courts must ensure that statutes are implemented in accordance with the 'intent' of the legislature at the time they were enacted. In the context of native

69 *Mabo (No 2) op cit*, per Brennan C.J., at 63.



title doctrine, this general rule has been interpreted as a requirement that the legislature manifest a 'clear and plain intention to extinguish' before native title is held to have been so extinguished.⁷⁰ The only question that thus arises for the court in the context of native title is whether *at the time* of the grant 'extinguishment' of native title was the 'intent' of the executive or legislature in creating statutes allowing the grant of non-Indigenous rights to land. This construction of the problem leaves the court with only a limited capacity to decide the question of extinguishment and gives responsibility for 'extinguishment' principally to the executive and legislature.

While this construction of the problem appears to absolve the court of responsibility for extinguishment, the conclusion that 'extinguishment' is a direct result of past Crown grants of non-Indigenous rights to land is not a necessary conclusion. While it is undeniable that past Crown grants created interests potentially incompatible with the pre-existing Indigenous interests, what has created the *legal* conflict between the Indigenous and non-Indigenous rights to land is the *legality* accorded to the Indigenous title since the decision in *Mabo*. Were this recognised, the court would retain the power and the responsibility for the resolution of the conflict of interests that arise when native title is granted *legal* status for the first time. The court would then be responsible for the construction of a *contemporary legal* explanation for the relationship between those interests.

The *Miriuwung Gajerrong* case presents the High Court with a factual context in which the recognition and the extinguishment of native title are interrelated issues. The court is poised to determine at a level of principle the nature of native title and its capacity to withstand past discrimination. Once it is recognised that the court's capacity to protect native title is a result of the court's construction of the doctrine, then it is possible to understand the processes of 'recognition' and 'extinguishment' as contemporary processes of *judicial* interpretation. A bundle of rights approach to recognition creates an inherently weak title that is able to be eroded, piece by piece so as to accommodate non-Indigenous interests. Its construction ensures its disintegration. Faced with two alternative constructions of native title, one resulting in the inevitable extinguishment of native title in a piecemeal fashion, the other resulting in the suspension of native title rights for the duration of the conflicting interest in land, the court should be guided in its choice by contemporary international human rights principles of equality and non-discrimination.

70 *Mabo (No 1)* (1988) 166 CLR 186, per Brennan Toohey and Gaudron J.J. at 213; *Mabo (No 2) op cit*, per Brennan C.J., at 64; per Deane and Gaudron J.J. at 111; *Western Australia v Commonwealth (The Native Title Act Case)* (1995) 183 CLR 373, per Brennan, Mason, Deane, Gaudron, Toohey McHugh, at 433; *Wik* decision *op.cit.*; Toohey at 123-124, 130; per Gaudron J. at 155, 166, per Gummow J. at 193, 185; and per Kirby J. at 247.



2. The recognition of native title was influenced by changes in international law and its development should continue to be guided by international law

As indicated above the Mabo decision represents a fundamental break from the past denial of Indigenous interests in land.⁷¹

The status accorded Indigenous rights to land by the common law was inextricably linked to the doctrine which justified the British acquisition of sovereignty over the various Australian territories; terra nullius.

The international legal doctrine of terra nullius originally applied only to territories which were in fact uninhabited by any people. However, the doctrine was extended to apply to some territories occupied by Indigenous people, on the basis that a territory could be considered uninhabited if the inhabitants were without laws, without a sovereign and primitive in their social organisation.⁷²

The international doctrine of 'terra nullius' was applied to the British acquisition of sovereignty over Australian territories on this basis.

The legal consequences of acquiring sovereignty in a territory that was 'terra nullius' had similar legal consequences to acquiring sovereignty in other ways such as conquest or cession, in that all three carried with them the consequences that:

- the common law became the law of the colony;
- Indigenous peoples became subjects of the Crown; and
- Indigenous people became subject to and entitled to the protection of the common law.

However, the legal consequences of settlement of a territory that was 'terra nullius' differed from the legal consequences of other ways of acquiring sovereignty in that it allowed the Crown to take absolute *beneficial* ownership of all the land. As Brennan C.J. stated in *Mabo*:

It was only by fastening on the notion that a settled colony was terra nullius that it was possible to predicate of the Crown the acquisition of ownership of land in a colony already occupied by indigenous inhabitants. It was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other. If that hypothesis be rejected, the notion that sovereignty carried ownership in its wake must be rejected too.⁷³

The doctrine of terra nullius was overturned in the *Mabo* decision, or as Brennan CJ put it, the Court 'discarded':

...the distinction between inhabited colonies that were terra nullius and those which were not.⁷⁴

71 p65.

72 *Mabo (No 2) op cit*, per Brennan C.J., at 36.

73 *ibid*, per Brennan C.J., at 45.

74 *ibid*, per Brennan C.J., at 40.



This left the consequences that:

- sovereignty was still vested in the Crown from the date of settlement;
- the common law still became the law of the colony from date of acquisition of sovereignty; and
- Indigenous people still became subjects of the crown, entitled to the protection of the common law.

The overturning of the doctrine of terra nullius also had the consequence that, because the territory could no longer be thought of as having been uninhabited, the acquisition of sovereignty did not have the effect of vesting absolute beneficial ownership of land in the Crown.⁷⁵ Consequently, the rights and interests of indigenous inhabitants in land survived the acquisition of sovereignty by the British Crown and the importation of the common law as the law of the territory.

The re-evaluation of the doctrine of terra nullius is discussed above as a consequence of changes in contemporary values and particularly in the principle of equality.⁷⁶ What is argued in this section is that, even though terra nullius has been discarded as an international law doctrine, the recognition of native title does not require that the nexus between international law and the common law treatment of Indigenous people within the legal system of a sovereign state be discarded. In fact, the *Mabo* decision confirms that the domestic recognition of Indigenous people's relationship to land continues to be strongly influenced by international law standards. It also confirms that where international law standards change, the common law approach to Indigenous people should, where possible, change to reflect this. Thus, in *Mabo*, the influence of terra nullius on the common law's denial of Indigenous rights to land is replaced by the influence of international human rights standards on the recognition of Indigenous rights to land.

This exchange takes place in Justice Brennan's judgment (with which the majority agreed);

If the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of the common law which depends on the notion... can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.

The fiction [terra nullius] by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country. The policy appears explicitly in the judgment of the Privy Council in *In Southern Rhodesia* in rejecting an argument that the native people "were the owners of the unalienated lands long before either the Company or the Crown became concerned with them and from time immemorial ... and that the unalienated lands belonged to them still"...

75 *ibid*, per Brennan C.J., at 38-43 this was confirmed in *The Native Title Act Case op cit*, per Mason C.J., Brennan, Deane, Toohey, Gaudron and McHugh J.J. at 433.

76 p67.



Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands...

However recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.⁷⁷

The court's receptivity to changes in international law standards contributed to its recognition of native title. In developing principles that will determine the nature of native title and its protection within the common law, the court should continue to take into account the evolution and elaboration of international law as it affects Indigenous people.

3. In the development of the common law international law is an important influence

In *Mabo* Brennan J. held that an unjust and discriminatory doctrine which refused to recognise the rights and interests in land of the Indigenous inhabitants could have no place in the contemporary law of this country. Justice Brennan confirmed that while 'the common law does not necessarily conform with international law, international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.⁷⁸ Thus Brennan J. confirmed that the expectations of the international community in this regard accord with the contemporary values of the Australian people. His Honour held that it would be contrary both to international standards and to fundamental values of the common law to entrench a discriminatory rule, which because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denied them a right to occupy their traditional lands.⁷⁹

The singularity of the common law lies in the ability of the courts to mould the law to correspond with the contemporary values of society. This is not to say that responsibility for keeping the common law consonant with contemporary

⁷⁷ *Mabo (No 2) op cit*, per Brennan C.J., at 41-43.

⁷⁸ *ibid*, at 42.

⁷⁹ *ibid*, at 42.



values means that changes in the common law are made whenever a judge thinks change desirable. Clearly, the law must be kept in logical order and form, for an aspect of justice is consistency in decisions affecting like cases and discrimination between unlike cases on bases that can be logically explained.⁸⁰ The development of the common law of native title in conformity with Australia's international human rights obligations would both achieve the objective of keeping the law in logical order and form, and accord with the contemporary values of the Australian people.

There is no doubt that the common law of native title is in a developing stage. As discussed previously, in the *Miriuwung Gagerrong* case the issue of extinguishment is, for the first time presented to the court with the claimants' connection fully argued and accepted. The interrelationship of the Court's construction of native title and the consequent extinguishment or survival of native title is, for the first time, laid bare.

The basis of the majority's finding that the common law does not recognise a traditional spiritual relationship with the land reflects the lack of authoritative precedent available to it.

In *Fejo* six members of the High Court in their joint judgment at CLR 126 say that a grant of fee simple 'simply does not permit of the enjoyment by anyone else of any right or interest in respect of the land' and at CLR 128; 'the rights of native title are rights and interests that relate to the use of the land by the holders of the native title'.

In our opinion references to enjoyment of rights and interests in respect of the land in these passages, confirm that the native title rights and interests that are recognised and protected by the common law are those which involve physical presence on the land, and activities on the land associated with traditional social and cultural practices.⁸¹

The link between finding that the common law does not protect spiritual connections to authority is very tenuous. Similarly the determination that native title is a bundle of rights is not based on clear authority to this effect. The authority for this construction comes from decisions where the court has referred to native title rights as a pluralistic concept. These authorities are not conclusive of a bundle of rights approach because they could also be read as consistent with the title to land approach. The title to land construction of native title also contains a plurality of rights. However these rights are dependant on and tied together by an underlying relationship to the land. None of these authorities relied on by the majority say that native title is nothing more than a multiplicity of rights and interests.

In view of the lack of direct authority on the nature of native title the court should be guided by international law governing the relationship of Indigenous people to their land. On this basis the courts would seek to maintain the integrity of both the grant of non-Indigenous interests and native title as much as possible. Inconsistency can be dealt with through suspension or regulation and extinguishment would be the last option.

⁸⁰ *Dietrich v The Queen* (1992) 177 CLR 292 at 320 per Brennan J.

⁸¹ The *Miriuwung Gagerrong* case, *op cit*, per Beaumont and von Douss J.J., at 188.



4. Human rights principles provide the common law with a set of guidelines for the recognition of a system of law and culture whose origins lie outside of the common law

Native title is characterised as an interest in land based on something entirely outside the common law (Indigenous law and custom), but nevertheless 'recognisable' by the common law.

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.⁸²

The existence of the Indigenous law and custom is defined in the above paragraph as a matter of *fact*.⁸³ Yet of itself, the *fact* of Indigenous connection to land has no *legal* consequences within the common law system. Between the proof of the *fact* of Indigenous connection and the grant of common law protection is a further process of 'recognition'.

This is a critical ambiguity in native title doctrine. Indigenous law and custom is understood as the origin of the right, but is legally unenforceable until it is recognised by the common law. Legal protection is thus dependant on a process of translation, and only that which is 'translated' will be protected by the common law.⁸⁴

Like any translation process, the recognition of Indigenous interests in land within the non-Indigenous legal system seeks to find equivalence between that which is the subject of the translation and that which is the product of translation. The construction of native title as a product of translation should find equivalence with the traditional law and customs of Indigenous people as the subject of the translation process. At the same time there is implicit in the translation process a recognition that exact equivalence between the Indigenous relationship to land and a common law interest in land can never be found. If an exact equivalence could be found then there would be no need to differentiate between the common law recognition of native title and its origins and content.

The impossibility of constructing an exact equivalence between these two systems of meaning, of constructing an equivalent notion of Indigenous relationships to land within the common law, should not be a basis for abandoning the recognition process. To do so would mean a return to the terra nullius approach of Lord Sumner in *In re Southern Rhodesia*:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the

82 *Mabo (No 2) op cit*, per Brennan C.J., at 58.

83 *ibid*.

84 See: discussion in Mantziaris, Christos, and Martin, David, *Native Title Corporations: a legal and anthropological analysis*, The Federation Press, Sydney, 2000, Chapter 1 "Native Title: The Product of a Recognition Space".



rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.⁸⁵

The High Court rejected this approach of not recognising Indigenous interests in land because their 'usage and conceptions of rights and duties' were irreconcilable with 'rights of property as we know them'. Justice and equality require that the common law recognise Indigenous 'social organisation' and 'transmute it into the substance of [transferable] rights of property as we know them'.

Requiring the court to recognise Indigenous law and culture still leaves it with a discretion as to what meaning to give it. How the 'translation' process is constructed will influence the extent to which the meaning and content of Indigenous connection to land is expressed through or diminished by the native title recognised. Translating Indigenous law so as to render it comprehensible within the common law will always involve to some degree an imposition of concepts and assumptions of the common law onto the understanding of the Indigenous law system. Yet if the recognition of native title is to be ascertained by reference to Indigenous laws and culture then direct analogy to common law titles may efface the Indigenous character of the interest almost entirely.

What is argued in this section is that the impossibility of finding a perfect equivalence between an Indigenous relationship to land and common law recognition of native title should not signal to the courts that the search for equivalence in its translation of Indigenous law and culture can be set aside. Human rights principles provide the court with guidelines for the translation of Indigenous law and culture within the common law. In fact the principle of equality and its construction at international law provides a paradigm on which to base the incorporation of difference within the framework of equality/equivalence.

As discussed above the international law concept of equality is a substantive one. The essential distinction between a formal and a substantive standard of equality is their treatment of difference. Formal equality is achieved by erasing difference. Substantive equality on the other hand not only permits the recognition of difference but may require it where this is necessary to achieve equality between racial groups. Judge Tanaka of the International Court of Justice explained this concept as follows:

The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equals and unequally what are unequal... To treat unequal matters differently according to their inequality is not only permitted but required.⁸⁶

Rather than the courts focusing on the differential treatment on the basis of race, a substantive equality approach focuses on the impact of that treatment on the racial group concerned. Differential treatment is discriminatory where it

85 [1919] A.C. 211 at pp233-234: quoted in *Mabo (No 2) op cit*, per Brennan J. at 39, 41, 55, 58; per Deane and Gaudron J.J. at 83; per Toohey J. at 185; in *The Native Title Act Case, op cit*, per Mason C.J., Brennan, Deane, Toohey, Gaudron and McHugh J.J. at 432; in *Fejo, op cit*, per Kirby J. at 132.

86 South West Africa Case (Second Phase) [1966] ICJ Rep 6, pp303-304, p305.



has an invidious impact on the racial group concerned. On the other hand, not to recognise differences is also discriminatory where it denies and oppresses the cultural identity of the racial group. This approach can provide a guide to the court's recognition of cultural difference through the concept of native title. Equivalence is to be found in the level of respect or protection that the common law extends to native title being equal to the level of respect and protection that the common law extends to non-Indigenous interests in land. A substantive equality approach would seek to provide Indigenous interests in land with the protection necessary to ensure they can be enjoyed, according to their tenor and to the same extent as non-Indigenous interests in land. Constructed in this way, native title is a vehicle for the continued enjoyment of Indigenous culture within the protection of the common law.

Within this human rights framework based on equality it is possible to compare the two constructions of native title that are before the High Court in the *Miriuwung Gagerrong* case. The translation of Indigenous relationships to land into a bundle of rights fails to provide protection to the enjoyment of Indigenous law and culture within the common law.

Translating Indigenous relationships to land into a bundle of rights

In constructing native title as a bundle of rights their Honours, Justices Beaumont and von Doussa, appreciate that native title is necessarily a translation of traditional laws and customs and as such, a construction of the common law.

Once rights and interests that involve the physical use and enjoyment of land are identified, their recognition by the common law gives rise to jural rights under the common law system. Native title rights and interests thus give rise to jural rights which are "artificially defined" under the common law because they arise from the acknowledgment and observance of traditional laws and customs under a different legal system. The common law accords a status to, and permits enforcement of, those rights according to common law principles. The artificiality is a consequence of the intersection of the common law system of law with traditional laws and customs of the indigenous people.⁸⁷

They argue that native title as a construction of the common law, is subject to the limitations in the capacity of the common law to recognise particular attributes of Indigenous culture. One of these limitations is its recognition of the spiritual connections which constitute the underlying relationship between Indigenous people and the land. After quoting from *The Idea of Property in Land* their Honours Justices Beaumont and von Doussa comment

The authors, while recognising that an aspect of the behavioural notion of property is a perception of belonging to the land, which in the context of native title would include spiritual, cultural and social connection with the land, it is the empirical facts, and the behavioural data that evidences that connection, which is recognised and protected by the common law.⁸⁸

87 *The Miriuwung Gagerrong case, op cit*, at 188.

88 *ibid*, at 188.



As a result of this 'inherent' limitation in the common law, that in the context of native title it only recognises 'empirical facts and behavioural data', there is no recognition of a spiritual level within Indigenous culture which transforms physical activities or presence on the land into a system of laws. The failure in the bundle of rights approach to recognise and protect this aspect of Indigenous culture is, as their Honours make clear, a denial of its unique and essential identity.

While the relationship of indigenous people with their traditional home land is "primarily a spiritual affair" or as Blackburn J. described it in *Millirrpum v Nabalco Pty Ltd* (1971) 17 FLR at 167, a "religious relationship", the common law applies to protect only the physical enjoyment of rights and interests that are of a kind that can be exercised on the land, and does not protect purely religious or spiritual relationships with land.⁸⁹

It is unclear why their Honours maintain that the common law will only recognise and protect 'native title rights and interests... which involve physical presence on the land, and activities on the land associated with traditional social and cultural practices.' It is posited as a premise rather than a conclusion. As a premise it is simply a terra nullius style denial of Indigenous culture. As a conclusion it appears to be linked to the way in which their Honours approach the task of translating Indigenous culture into the common law recognition of native title.

One reason why their Honours posit this limitation in common law recognition of native title is that to give native title a systematised basis, is to give it the character of common law property rights. Because native title is not an institution of the common law then, it is argued, it 'cannot be elevated to something akin to common law tenure by describing them [native title rights] as "incidents"⁹⁰ of an abstract form of title from which pendant rights are derived.

Implicit in their Honours reasoning is that because there is no equivalent of Indigenous relationships to land within the common law system of tenure, the recognition of these unique relationships within the common law cannot resemble or bear any equivalence to the common law. Where a resemblance does appear between native title and common law tenures it is a misrepresentation of the sui generis nature of native title. This reasoning can be criticised from a human rights perspective in three ways.

First, the task of cultural translation before the court does not require that native title be constructed as a title bearing no resemblance to a common law system of tenure. The uniqueness lies in the relationship that Indigenous people have with the land. The task for the court is to render this unique relationship comprehensible (recognisable) within the common law. As indicated above this process will always involve to some degree an imposition of concepts and assumptions of the common law onto the understanding of the Indigenous law system.⁹¹ The danger does not lie in the process of analogising native title to common law concepts but in whether the enjoyment of Indigenous culture is denied through any particular analogy.

89 *ibid*, at 188.

90 *ibid*, at 186.

91 p75.



Second, the impossibility of there being a common law construct of native title which is equivalent to the Indigenous relationship to land does not require that the search for equivalence be abandoned. Instead the search for equivalence in the common law's translation of Indigenous culture should be aimed at the level of protection that the common law gives to Indigenous relationships to land compared with the protection it gives to non-Indigenous interests in land. If likening native title to a proprietary interest within a tenurial system provides a vehicle for the enjoyment of the unique Indigenous laws and customs within the protection of the common law then such a translation is justifiable as providing substantive equality to Indigenous people. Richard Bartlett makes this point in his argument that, on the basis of equality, the common law presumption against the extinguishment of a proprietary interest should be extended to native title.⁹²

Third, native title does not have to be 'elevated' to a common law tenure to recognise that, within Indigenous culture, a systemic relationship exists between the activities that are traditionally carried out on the land. Anthropologist Peter Sutton characterises these relationships according to core and contingent rights.⁹³ Core rights include 'the right to assert a requirement to be asked for permission to access, use or alter the area by those who are not holders of core customary rights and interests'.⁹⁴ Within the traditional system the right to hunt or fish cannot be seen in isolation from the right to grant access to carry out this activity. Where the right to control access is disconnected from or given the same value as the right to fish, each equally extinguishable by the creation of any inconsistent rights, then the protection which the right to control access gives to the right to fish (or hunt) is denied. This, in turn, denies native title the inherent strength which comes when rights are interrelated and systematised. The refusal of the common law to construct native title in a way that accepts Indigenous forms of social organisation in their own terms can be seen as a return to the terra nullius approach overturned in the *Mabo* decision.

The view was taken that, when sovereignty of a territory could be acquired under the enlarged notion of terra nullius, for the purposes of the municipal law that territory (though inhabited) could be treated as a "desert uninhabited" country. The hypothesis being that there was no local law already in existence in the territory, the law of England became the law of the territory (and not merely the personal law of the colonists). Colonies of this kind were called "settled colonies". Ex hypothesi, the indigenous inhabitants of a settled colony had no recognised sovereign, else the territory could have been acquired only by conquest or cession. The indigenous people of a settled colony were thus taken to be without laws, without a sovereign and primitive in their social organisation.⁹⁵

92 Bartlett, R., *Native Title in Australia*, Butterworths, Australia, 2000, p184.

93 Sutton, P., *Kinds of Rights in Country: The 'Incidents' of Aboriginal Native Title*, forthcoming manuscript dated 24/6/1999, National Native Title Tribunal, Perth, 2000, cited in Martin and Mantziaris, *op cit*, p61.

94 *ibid*, p66.

95 *Mabo (No 2) op cit*, per Brennan C.J., at 36.



Terra nullius deemed that the failure to exhibit an organisational structure analogous to 'civilised' society was tantamount to a failure to exhibit an organisational structure at all. The recognition of native title by the High Court in 1992 was a recognition that law did govern Aboriginal society when sovereignty was acquired by the British and that Indigenous law was a subtle and elaborate system which provided a reasonably stable order of society. The bundle of rights approach, like terra nullius, denies recognition and protection to an Indigenous system of rights on the basis they are unique and therefore not analogous to 'part of the tenure system of the common law'. (p186) Like terra nullius the bundle of rights approach denies Indigenous laws and culture the recognition of an organisational structure at all.

Translating Indigenous relationships to land into a right to land

In contrast to the bundle of rights approach, native title as a right to land does recognise the systemic nature of Indigenous traditional law and custom. By conceptualising native title as a holistic entity from which all pendant rights derive their meaning and authority, the 'right to land' approach;

- offers greater protection and ensures the durability of native title, despite incursions into, 'regulation' or 'suspension' of the exercise of the rights which derive from the title,
- allows greater openness in the definition of native title.

The 'title to land' approach employs common law property notions to establish the degree of protection of native title that is to be granted by the common law.

It reflects the fact of aboriginal law translated into the language of the Australian legal system. What is involved is a characterisation of the relationship between aboriginal people and the land translated into terms which have meaning for Australian law.⁹⁶

North's approach is consistent with the following statement of Brennan CJ in *Mabo*, which illustrates how the analogy to common law proprietary interests ensures the capacity of the common law to protect native title.

If it be necessary to categorize an interest in land as proprietary in order that it survive a change in sovereignty, the interest possessed by a community that is in exclusive possession of land falls into that category.⁹⁷

In this statement Brennan C.J. does not assert that native title is equivalent to a 'proprietary' interest under the common law. Rather, the statement signifies that while the indigenous relationship with land is entirely different to common law 'proprietary' interests in land, it requires an equivalent degree of protection. It indicates that native title is to be regarded as a common law property right and entitle to the protection that this characterisation warrants.

Consequently, the 'right to land' approach satisfies a substantive equality standard in relation to property rights, in that it protects the circumstances required to protect the right, without prescriptively defining the exact content of native title. Rather than merely substituting common law categories for the

⁹⁶ North J. in the *Miriuwung Gagerrong case*, *op cit*, at 784.

⁹⁷ *Mabo (No 2) op cit*, per Brennan C.J., at 51.



Indigenous nature of the right, it provides a greater degree of openness for the expression of the Indigenous character of the right to be protected.

5. *The interpretation of statutes that create non-Indigenous property rights over native title land should be guided by human rights principles*

It was argued above⁹⁸ that, within the common law doctrine of native title, the processes of recognition and extinguishment are posited as distinct and separate. Recognition is a process of the common law, while 'extinguishment' is a process of the executive or legislature. Extinguishment occurs at the time that the Crown act creates an interest in the land which is inconsistent with native title while recognition occurs at the time of the court's determination. Accordingly the Court's role in the extinguishment of native title is limited to interpreting the legislative or executive act that created a non-Indigenous interest in the land to determine whether there was an intention to extinguish native title. As pointed out above, this approach fails to appreciate the interrelationship between the court's contemporary construction of native title and the capacity of native title to survive the past creation of non-Indigenous interests in land. It also fails to appreciate the anomaly created by the fact that native title was only recognised by the court after the 'extinguishing' acts took place.

In this section it is argued that even if it is accepted that the extinguishment of native title is effected through legislation, the court should be guided by human rights principles in its interpretation of these statutes. This argument is not without judicial precedent. It is a long-established presumption that a statute is to be interpreted and applied, as far as its language admits, so as to be consistent with the established rules of international law.⁹⁹ If the legislature intends to effect inconsistency "it must express its intention with irresistible clearness to induce a Court to believe that it entertained it".¹⁰⁰ Where there is ambiguity in the meaning of a statute, the Court has held that it should favour a construction which accords with the obligations of Australia under an international treaty.¹⁰¹ This is because, the Court has said, a common sense approach suggests that Parliament intended to legislate in accordance with its international obligations.¹⁰² In more recent cases, the Court has indicated that a narrow conception of ambiguity is to be rejected.¹⁰³

98 p68.

99 *Leroux v Brown* (1852) 12 C.B. 801; *The Zollverein* (1856) Swab. 96; *The Annapolis* (1861) Lush. 295; *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309; *Zachariassen v Commonwealth* (1917) 24 CLR 166. See also *Maxwell on the Interpretation of Statutes* 7th Ed, 1929, at 127.

100 *Murray v Charming Betsy* (1804) 2 Cranch 64, 118; also *United States v Fisher* (1805) 2 Cranch 390.

101 *Chu Kheng Lim v Minster for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson J.J.

102 *Dietrich v The Queen* (1992) 177 CLR 292 at 306-07 per Mason C.J. and McHugh J.; also *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529 at 534 per Gummow J.

103 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason C.J. and Deane J.; also *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 per Gummow and Hayne J.J. Generally A. Simpson and G. Williams, "International Law and Constitutional Interpretation" (2000) 11 *Public Law Review* 205 at 208; J. Spigelman, "Access to Justice and Human Rights Treaties" (2000) 22 *Sydney Law Review* 141 at 149.



The rules of statutory interpretation determining whether the Crown has extinguished or appropriated a citizen's property is that this will not occur unless there is a clear and plain intention to do so. The corollary of the requirement for a clear and plain intention is the common law presumption that the Crown will not so intend.¹⁰⁴ An intention to extinguish is not evinced from the state of mind of the legislators at the time of legislating but from the words and construction of the statute.¹⁰⁵

Because the statutes which created non-Indigenous interests in land were based on an assumption that there was no prior Indigenous interests in the land there could never be an express intention to extinguish native title. In both the *Mabo* and *Wik* decisions this difficulty appears to be overcome by a finding that a clear and plain intention to extinguish native title can be implied when interests created by past Crown acts and native title are unable to co-exist.¹⁰⁶ Toohey J. quoted from Lambert J. in the Canadian decision in *Delgamuukw v British Columbia* (1993) 104 DLR 470 at 668 to explain the test;

Implicit extinguishment is extinguishment brought about by sovereign power acting legislatively in an enactment which does not provide in its terms for extinguishment but which brings into operation a legislative scheme which is not only inconsistent with Aboriginal title or Aboriginal rights but which makes it *clear and plain by necessary implication* that, to the extent governed by the existence of the inconsistency, the legislative scheme was to prevail and the Aboriginal title and Aboriginal rights were to be extinguished.¹⁰⁷

This then is the inconsistency test. It takes the focus away from whether, at the time of the enactment, there was an express intention to extinguish proprietary rights, to a comparison between two sets of proprietary interests; those created by the Crown and native title. It is the effect, or implication of the creation of interests by the Crown on native title rather than the actual intention of the Crown in the creation of these interests that extinguishes native title.

In determining whether native title is extinguished as a result of the creation of non-Indigenous interests over native title land, constitutional jurisprudence should be applied to the extinguishment of native title in the same way as it is applied to the appropriation of general property. For the purposes of s51(xxi) of the Constitution, before an acquisition of property is held to have occurred, a very thoroughgoing elimination of practical enjoyment of the ownership of land should be applied. In relation to s 51 (xxi), there are numerous situations in which a diminution of rights or restriction of use will not amount to an acquisition of property.¹⁰⁸ To establish an acquisition, it must be shown that the relevant person has been denied the substance and reality of its proprietary interest or

104 *Mabo (No 2) op cit*, per Brennan C.J. at 64; per Deane and Gaudron J.J. at 82-83, 111; the *Wik* decision *op cit*, per Gaudron J. at 146-147, 154-155; per Kirby J. at 247-251; Toohey J. at 123-124; *The Native Title Act Case op cit*, per Mason C.J., Brennan, Deane, Toohey, Gaudron and McHugh J.J. at 422-3.

105 *Mabo (No 2) op cit*, per Deane and Gaudron J.J. at 111; *Wik* decision *op cit*, per Toohey J. at 108, Gaudron J. at 146-7, 154-155, per Gummow J. at 166.

106 *Mabo (No 2) op cit*, per Brennan 68; *Wik* decision *op cit*, per Toohey J. at 126 [citing *Delgamuukw* (1993) 104 DLR (4th) 470 at 668]; per Gummow J. at 185-186; per Kirby J. at 249.

107 *Wik* decision *op cit*, per Toohey J. at 126 [citing *Delgamuukw* (1993) 104 DLR (4th) 470 at 668].

108 *Lane's Commentary on the Australian Constitution* (2nd Ed) at 316-318.



everything that made it worth having.¹⁰⁹ There are many measures which in one way or another impair an owner's exercise of his or her proprietary rights which involve no acquisition such as pl (xxxi) speaks of.¹¹⁰

In general property law, an example of the temporary displacement of rights dependent on underlying freehold title which does not destroy the underlying title can be seen in planning legislation. Such legislation does not have the effect of extinguishing the underlying freehold title. Instead, for the period of restrictions upon the rights of the freehold title holder to use and enjoy the land in specific ways, the rights affected are suspended, but the freehold title remains in existence.

Another example in general law is the effect of statutes giving the Crown or a statutory authority control over waterways. Again, the rights of the holder of the freehold are overridden, but not extinguished.¹¹¹ From a human rights perspective, there can be no justification for a discriminatory distinction between the continuation of freehold title in such circumstances and the continuation of native title in circumstances involving no "fundamental, total or absolute" inconsistency reflecting the intention of the Crown to remove all connection of the Aboriginal people from the land in question.¹¹²

Similarly in general property law, the notion of suspension of rights and interests is well accepted, reflecting an idea which lies at the foundation of the doctrine of estates.¹¹³ It would again be contrary to the prohibition of discrimination to decline to extend the concept of suspension of rights to the law of native title.

On an ordinary approach to statutory interpretation, courts require very plain words to reveal a legislative intention to abrogate rights of private property.¹¹⁴ Courts impose a strict construction where the interference with property rights is expropriation. If there is any doubt as to the way in which language should be construed, it should be construed in favour of the party who is to be disappropriated.¹¹⁵

The effect of these aspects of law in Australia applying to land generally (that is, land not held under native title by indigenous people) is that such title or ownership is not treated as extinguished (or expropriated, or acquired, or destroyed) unless that is, effectively, the only possibility.¹¹⁶ The effect of the

109 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513, at 530, 633-634; *Minister of State for the Army v Dalziel* (1994) 68 CLR 261 at 286; also *Commonwealth of Australia v State of Western Australia* (1999) 196 CLR 392 at 433 per Gummow J., at 480, 485 per Hayne J.

110 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, per Stephen J. at 415.

111 *Thorpes Ltd v Grant Pastoral Co Pty Ltd* (1955) 92 CLR 317 at 331; also the *Miriuwung Gajerrong case, op cit*, at 348.

112 The *Miriuwung Gajerrong case, op cit*, per North J., paras [684], [784].

113 The *Miriuwung Gajerrong case, op cit*, per North J., at 358, 360.

114 Bennion, *Statutory Interpretation*, 3rd Ed, section 278; *Clissold v Perry* (1904) 1 CLR 363 at 373; *Greville v Williams* (1906) 4 CLR 64; *Wade v New South Wales Rutile Mining Co Pty Ltd* (1970) 121 CLR 177 at 181, 182.

115 *Methuen-Campbell v Walters* [1979] QB 525 at 542; *Stile Hall Properties Ltd v Gooch* [1980] 1 WLR 62 at 65; *Chilton v Telford Development Corpn* [1987] 1 WLR 872; also *Mabo (No 2) op cit*, at 111; the *Wik* decision at 155.

116 Compare New Zealand jurisprudence which maintains in relation to extinguishment the equal status of native title with other interests: *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 at 24.



decision of the majority in the Full Court is to depart from the principle of “full respect” and to discriminate markedly between native title and other title in the adoption of a bundle of rights approach and the rejection of the possibility of suspension or qualification of native title rights and interests. The effect of the majority’s decision is to disregard the different character of native title rights, which ought not be seen for these purposes as merely a bundle of severable rights, but rather as communal rights which derive from the distinct underlying religious or spiritual relationship of indigenous peoples with their country.

The consequence of applying a presumption against extinguishment is to seek to find a way in which native title could be reconciled with the interests created by statute. The negotiation of the contemporary legal relationship between Indigenous and non-Indigenous rights may involve co-existence, regulation or suspension rather than extinguishment. This approach is reflected in the decision of Justice North.

The law will recognise consequences on native title short of extinguishment, such as suspension of the enjoyment of some of the incidents dependent upon the holding of native title, in order to allow full scope for the enjoyment of the inconsistent rights or interests but permits native title to survive and permits the rights or interests dependent on holding native title to be enjoyed without interfering with countervailing rights or interests. (p331 ALR)

This can be contrasted to the approach of the majority who posit the inconsistency test in this way;

...a law or executive act which creates rights in third parties inconsistent with a continued right to enjoy native title extinguished native title to the extent of the inconsistency, irrespective of the actual intention of the legislature or the executive and whether or not the legislature or the executive officer adverted to the existence of native title. (p180 para 69)

The bundle of rights characterisation of native title coupled with an inconsistency test which results in the extinguishment of one or more native title rights whenever there is any inconsistency with the grant ensures that the accumulation of every incursion, large or small, will result in the complete erosion of native title.

The dynamic relationship between the common law and the legislature is set to be a long term one. It is my role to ensure that this relationship is one based on equality. In 1992 the High Court broke the inertia over Indigenous rights. Since then the issue has been high on the political agenda of successive governments. In this chapter I have made it clear that the role of the courts is instrumental in maintaining the momentum on native title. The common law is still the central plank on which the statutory definition of native title rests. Where the common law gives Indigenous culture a meaningful place within contemporary society then the standard of equality will form the benchmark against which a legislative response will be measured. Where however the common law reduces native title to an historic right that cannot be exercised or enforced within contemporary society then it is incumbent on the legislature to reset the standard in keeping with its international obligations.



Native title and sea rights

One of the major events of the period covered by this report was the handing down of the decision by the full Federal Court in the *Croker Island* case¹ on appeal from the decision of Justice Olney.² It is the major test case on the recognition of native title sea rights and represents the most authoritative statement of the law in Australia at the present time. It was a split decision and this chapter analyses the human rights implications of the different legal positions adopted by the majority and the minority decisions of the court. At the time of writing, the High Court had already granted special leave to appeal the Federal Court's decision and a date for hearing had been set for hearing on 6 February 2001. Thus, the question of the full recognition of native title rights offshore by the common law of Australia has yet to be finally determined. This chapter is a timely survey of the issues that will be before the High Court.

The recognition that both the common law and the *Native Title Act 1993* (Cth) (NTA) give to Indigenous rights to sea is different from the recognition that they give to Indigenous rights to land. This difference does not arise from Indigenous traditions but is a product of Western imagining. The consequence of imposing limitations onto the recognition of native title sea rights is that the level of protection extended to them by the common law and the legislature is insufficient to ensure that either the traditions or the rights themselves can be fully enjoyed by Aboriginal people. In fact, the present legal position is that all other interest groups competing for a commercial or economic stake in the sea take priority over Indigenous rights. It is this prioritising of non-Indigenous interests over Indigenous interests that has attracted the criticism of international human rights committees in the past 12 months. In this chapter I will analyse the trends in both the common law and the legislation within a human rights framework in an attempt to understand the basis of the recent international concern.

1 *Commonwealth of Australia v Yarmirr* (1999) 168 ALR 426.

2 *Yarmirr and Ors v Northern Territory* (1998) 82 FCR 533.



1. Overview of the variety of indigenous traditions relating to sea country

Mary Yarmirr was one of the main Indigenous witnesses in the hearing of the *Croker Island* case. 'As far as my eyes can carry me' was her answer under cross-examination to the question of the extent of her traditional sea country.³ It is just one of her answers that exemplifies the gulf between Indigenous and non-Indigenous understandings of the coastal seas. When Indigenous people like Mary Yarmirr assert their rights to 'sea country' it is a challenge to the European imagination to conceive of traditional 'country' in which there is no essential difference between the land and the sea parts. The prime example of this unity of land and sea country is the dreaming story. Typically, it is the sacred account of the creation of the physical and social world by dreaming ancestors in their heroic and ancient travels that are recounted in song cycles, ceremonies, designs and ultimately the basis for claims to country according to traditional laws and customs. The ancestral journeys often commence out at sea then move closer to land, creating seascapes – islands, reefs, sandbars and so on – and travel on to create landscapes. Thus the kinds of connections that are widely documented in relation to land are also present in relation to sea country. They include:⁴

- Multitudinous named places in the sea including archipelagos, rocks, reefs, sand banks, cays, patches of seagrass;
- named zones of the sea defined by water depth;⁵
- bodies of water associated with ancestral dreaming tracks;
- sacred sites that are the physical transformation of the dreaming ancestors themselves or a result of their activities;
- cloud formations associated with particular ancestors;
- sacred sites that can be dangerous because the power of the dreaming ancestors is still there, for example important places on reefs that can be used either to create storms or make them abate;⁶
- ceremonial body painting and other painted designs using symbols of the sea such as the tail of a whale, black rain clouds over white foaming waves, reefs, sandbanks, islands, foam on the sea, a reef shelf;⁷
- particular kin groupings having a special relationship with tracks of the sea by virtue of their inheritance of the sacred stories, songs, ceremonies and sacred objects associated with it and by exercising control over that area.

3 *Yarmirr and Ors v Northern Territory* (1998) Federal Court, Transcript (DATE), p72.

4 See generally Cordell, J., (ed), *A Sea of Small Boats*, Cultural Survival Report No 26, Cultural Survival Inc, Cambridge (Massachusetts), 1989; Myers, G., O'Dell, M., Wright, G., and Muller, S., *A Sea Change in Land Rights Law: the Extension of Native Title to Australia's Offshore Areas*, NTRU Legal Research Monograph, AIATSIS, Canberra, 1996; Peterson, N., and Rigsby, B., (eds) *Customary Marine Tenure in Australia*, Oceania Monograph No 48, University of Sydney, 1998.

5 Chase, A., and Sutton, P., 'Hunter-Gatherers in a Rich Environment: Aboriginal Coastal Exploitation in Cape York Peninsula' in Keats, A., (ed) *Ecological Biogeography in Australia*, W. Junk, London 1981, cited in Myers, *et al*, *op cit*, p11.

6 Peterson and Rigsby, 'Introduction' in Peterson and Rigsby (eds), *op cit*, p13.

7 Davis, S., 'Aboriginal Tenure of the Sea in Arnhem Land' in Cordell (ed), *op cit*, p45 and 52.



The depth of these cultural links to the sea is not surprising considering the antiquity of the Indigenous engagement with the sea, particularly for the provision of food over thousands of years.⁸ Indeed, the archaeological record indicates that on some islands off the north Queensland coast the sea was more important to Indigenous survival than the land.⁹

Indigenous people from many parts of northern Australia have asserted the holistic nature of their claims to the sea. They have also insisted that their sea country does not belong to everyone, it belongs to particular Indigenous people. They have explained the intricacies of their systems to anthropologists who have documented them for numerous Indigenous peoples including the Umpila-speaking people and other 'Sandbeach People' of Eastern Cape York, Torres Strait Islanders, the Lardil, Yangkaal, Ganggalida and Kaiadilt people in the Wellesley Island region of the Gulf of Carpentaria, the Yanyuwa around the Sir Edward Pellew group of islands in the Gulf of Carpentaria, the Anindilyakwa of Groote Eylandt; Burarra and Yan-nhangu and Yolngu of Arnhem land, and the Bardi and Yawuru people near Broome.¹⁰

Diversity

Much of the detailed testimony about the intricacies of traditional sea rights comes from remote areas where Indigenous peoples have been able to maintain fairly continuous contact with their traditional sea country throughout the period of colonisation. Such relatively uninterrupted association is not the case in most of Australia. There are a variety of historical circumstances and contemporary cultural traditions. The archaeologist Bryce Barker, for example, describes the situation of the descendants of the traditional owners of the Whitsunday Islands off the north coast of Queensland.¹¹ The first substantial non-Indigenous intrusion into the area was in 1860 when Port Denison (Bowen) was established. Initial good relations gave way to a brutal period of suppression involving the Queensland Native Mounted Police following the attack and burning of the ship *Louisa Maria*. In 1881 the remaining Island people gathered at Dent Island Lighthouse for protection and were eventually moved to the mainland where all of their descendants were born. Now traditional knowledge consists of stories relating to marine species and knowledge of specific locations including reef and mangrove systems as well as relating to the outer barrier reef itself. The traditional owners are in dispute with the Great Barrier Reef Marine Park Authority over the hunting of the now endangered turtle and dugong.

Another circumstance, as described by Scott Cane,¹² is the situation of the Aboriginal people of the south coast of New South Wales out of which arose

8 Myers, *et al*, *op cit*, p3-5.

9 Barker, B., 'Use and Continuity in the Customary Marine Tenure of the Whitsunday Islands' in Peterson and Rigsby (eds), *op cit*, p91.

10 See generally, Peterson and Rigsby (eds), *op cit*, and Myers *et al*, *op cit*, p10-16.

11 Barker in Peterson and Rigsby (eds), *op cit*, p89-95.

12 Cane, S., 'Aboriginal Fishing Rights on the New South Wales South Coast: a Court Case' in Peterson and Rigsby (eds), *op cit*, p66-88. Cf Cane, S., *Aboriginal Fishing on the South Coast of New South Wales – Report and Supplementary Report to Blake Dawson and Waldron and the New South Wales Aboriginal Land Council*, (unpublished reports) 1992.



the New South Wales Court of Appeal decision in *Mason v Triton*.¹³ The Aboriginal families involved in this case defended a prosecution for illegal fishing on the basis of traditional rights. They have an historical connection with the general area of the south coast of New South Wales going back to the time of first settlement. As to be expected, after such a long period of intense colonisation, ancient laws and customs were represented by what Cane calls 'an attenuated core of language and mythology'. A continuous involvement in fishing both for subsistence and small-scale trading is backed up by substantial archaeological evidence of the same pre-contact activity. Cane's account of contemporary culture also includes some intriguing evidence of the ancestors of the defendants trading fish with the early white settlers in the region. Fishing is still very important to the identity of Aboriginal people on the south coast and a seafood feast is an important part of contemporary cultural celebrations such as NAIDOC week.

Similarly, in relation to the Tasmanian fisheries prosecution case of *Dillon v Davies*,¹⁴ no general system of traditional laws and customs was asserted by the Indigenous defendant. The customary practice of taking abalone, being a practice that could be archaeologically traced back to the defendant's ancestors at the time of the first white settlement of the area and the activity subject of prosecution, was relied on to support an honest claim of right.

2. Relevant international human rights standards

The picture that emerges from these accounts of Indigenous law and culture is that while the Indigenous relationship to sea country is diverse it also constitutes a unique interest which has no equivalent in the non-Indigenous legal system. Within a human rights framework, the recognition of native title must ensure that this unique relationship is protected and capable of full enjoyment by Indigenous people. Where the common law does not provide an adequate level of protection, it is incumbent on the legislature to ensure that Indigenous culture is fully protected by non-Indigenous law. In particular, the principles of equality and self-determination underlie the obligation of states to meet their international obligations in this regard.

Equality

The international legal principles of equality and non-discrimination require that Indigenous culture be protected. In particular, they require states 'to recognise and protect the rights of Indigenous people to own, develop, control and use their communal lands, territories and resources'.¹⁵ The relationship that Indigenous people have to sea country is part of their distinctive culture and must be protected in accordance with these principles.

This approach is often referred to as a 'substantive equality' approach. It acknowledges that racially specific aspects of discrimination such as cultural difference, socio-economic disadvantage and entrenched racism must be taken into account in order to redress inequality in fact. Measures must be taken to

13 (1994) 34 NSWLR 572.

14 (1998) 156 ALR 142.

15 Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) Concerning Indigenous Peoples*, UN Doc CERD/C/51/Misc.13/Rev.4 (1997), para 5.



protect cultural differences and to redress disadvantage. This approach can be contrasted with a formal equality approach that merely requires that everyone be treated in an identical manner regardless of such differences.

Increasingly, domestic jurisprudence is accepting the international law standard that requires more than formal equality and recognises the distinctive cultural rights arising from the unique and enduring relationship Indigenous people have with both land and sea.¹⁶

Protection of culture

Article 27 of the International Covenant on Civil and Political Rights (ICCPR) protects Indigenous rights. It provides:

Members of ethnic, religious or linguistic minorities shall not be denied the right, in community with members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

A series of decisions by the Human Rights Committee (HRC) has emphasised the importance of protecting Indigenous peoples' lands and resources in order to ensure their cultural survival,¹⁷ and governments' duties to take positive steps towards that end. The relevance of the HRC decisions lies in their recognition of the central role that economic and resource activities play in the maintenance of the cultural rights protected by Article 27.

At its 69th session, the HRC expressed concern about whether Australia was meeting its obligations with respect to the protection of Indigenous culture and economy under Article 27 of ICCPR:

The Committee expresses its concern that securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing, and gathering), and protection of sites of religious or cultural significance for such minorities, that must be protected under Article 27, are not always a major factor in determining land use.¹⁸

The consideration of the Indigenous claims to sea should be viewed in the context of international obligation of the State to protect Indigenous culture.

Self-determination

The right of Indigenous peoples to self-determination, as set out in the ICCPR and the International Covenant on Economic, Social and Cultural Rights

16 Attorney-General's Department, 'Submissions' in Commonwealth of Australia, *Sixteenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund: CERD and the Native Title Amendment Act 1998*, Canberra, 2000, p65.

17 *Lovlace v Canada*, Communication No 24/1977, *Selected Decisions of the Human Rights Committee Under the Optional Protocol*, UN Doc CCPR/C/OP/1(1998), p86-90; *Kitok v Sweden*, Communication No 197/1985, UN Doc CCPR/C/33/D/197/1985 (1988); *Chief Ominayak v Canada*, Communication No 167/1984, *Report of the Human Rights Committee* UN Doc A/45/40 (1990), *Länsman v Finland*, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992 (1994), all cited in Pritchard, S, 'Native Title from the Perspective of International Standards', 18 *Australian Year Book of International Law* (1997), p127 at n90.

18 Human Rights Committee, *Consideration of Reports Submitted Under Article 40 – Concluding Observation of the Human Rights Committee*, 28 July 2000, CCPR/CO/69/AUS, para 11.



(ICESCR), is a right of Indigenous peoples to control their lands, territories and resources. Without such control, self-determination is empty of content. Indeed, Article 1(2) of both the ICCPR and ICESCR provide, *inter alia*, that:

1. All peoples have a right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All people may, for their own ends, freely dispose of their natural wealth and resources... In no case may a people be deprived of its own means of subsistence.

The Human Rights Committee has explicitly linked ICCPR Article 1(2) with Indigenous control over traditional land and resources, and explicitly applied it to Australia. In its Concluding Observations in respect of Australia at its 69th session in July 2000, the HRC proposed that:

The State party [Australia] should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources 9 Article 1, para 2.¹⁹

The jurisprudence of the Human Rights Committee, including recent examination of Australia's performance, shows that the international human rights community expects that Australia will implement its obligations to its Indigenous peoples under the instruments in good faith.

Other international norms

*International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries 1989*²⁰

While the International Labour Organisation Convention 169 (the ILO Convention) has not been ratified by Australia, its significance lies in the fact that it is the only international human rights treaty dealing specifically with Indigenous rights. The ILO Convention provides evidence of developing international customary law in respect of Indigenous rights, a law which clearly recognises Indigenous rights to use and exercise control over the natural resources available in their traditional territories. It is clear from the wording of the Convention that the term 'territories' includes land and sea.

Article 13 (1) provides that governments shall respect the special importance of Indigenous peoples' relationship with their lands or territories, which they occupy or use, and in particular the collective aspects of this relationship. Importantly, the concept of Indigenous territories is deemed, in Article 13 (2), to include 'the total environment of the areas which the peoples concerned occupy or otherwise use'.

¹⁹ *ibid*, para 9.

²⁰ International Labour Organisation Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries. Adopted by the General Conference of the International Labour Organisation, Geneva, 1989. Entered into force 1991.



In respect of the use of the term 'territories' in the ILO Convention, noted international law commentator Howard Berman has made the following observation:

Increasingly, indigenous rights have been conceptualised legally in terms of territorial rather than simply proprietary possession. Territoriality best describes the complex interrelationship between indigenous peoples and the land, waters, sea areas and sea ice, plants, animals and other natural resources that in totality form the social, cultural, material and deeply spiritual nexus of indigenous life.²¹

It is clear that sea rights fall within the ILO Convention's concept of 'territories'. Articles 14 and 15 provide a high level of protection of Indigenous rights in respect of possession, use and management of such territories and the resources they contain. Article 14(1) affirms that the rights of ownership and possession over the lands and territories which they traditionally occupy shall be recognised. Article 15 requires states to safeguard Indigenous peoples' rights to the natural resources throughout their territories, including their right 'to participate in the use, management and conservation' of those resources. When these articles are read in conjunction with Article 6(2) of the ILO Convention,²² they provide a strong level of protection in international law of Indigenous peoples' rights to possess, use and manage natural resources in their traditional territories, including the requirement of Indigenous agreement or consent to decisions about the development of resources in Indigenous land and sea territories.

Principle 22 of the Rio Declaration of the UN Conference on Environment and Development 1992

This principle recognises the vital role of Indigenous communities in ensuring sustainable environmental management and the need to protect Indigenous lands and resources.

The Convention on Biological Diversity 1993

This convention was ratified by Australia in 1993. Articles 8(j) and 10 provide a high level of protection to Indigenous traditional practices in respect of the conservation and sustainable use of biological diversity. Indigenous people in Australia have consistently complained about the degradation of their marine resources through, among other things, the unsustainable fishing practices of non-Indigenous people. Indigenous peoples have a right, recognised in international legal principles, to not only use their marine resources on a sustainable basis but also to protect them for future generations by participating

21 Berman, H.R., 'The International Labour Organisation and Indigenous Peoples: Revision of ILO Convention No 107 at the 75th Session of the International Labour Conference 1988' in International Commission of Jurists, (1998) 41 *The Review* 48.

22 International Labour Organisation Convention No. 169, Article 6(2) states: The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.



in management regimes, exercising a right to negotiate over proposed developments and developing agreements with other stakeholders.

International Whaling Convention 1946

This convention, to which Australia is a party, recognises the right of Indigenous people to use their marine resources. An exemption from prohibitions on taking whales is provided under the Convention for Indigenous peoples, who can take whales for traditional subsistence purposes. Indigenous subsistence whaling rights are consistent with Article 1(2) of the ICCPR and ICESCR, which provide that 'in no case may a people be deprived of its own means of subsistence'. The right in respect of whaling has mainly been asserted by Inuit peoples. The Australian government has also supported the right.²³ Through the work of a Technical Committee of the International Whaling Convention, the exemption has been developed to recognise the importance of Indigenous co-operation and participation in decision-making affecting Indigenous subsistence economies, the resources on which they depend and the importance of traditional social, cultural and spiritual values.²⁴

Torres Strait Treaty with Papua New Guinea 1978

The Torres Strait Treaty, between Australia and Papua New Guinea, which was finalised in 1978 and came into force in 1985, recognises Indigenous sea rights. In developing the treaty, Australia was concerned to recognise and preserve the livelihood of the Indigenous peoples of the Torres Strait Islands. The Treaty establishes a Torres Strait Protected Zone to 'protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement'.

The treaty uses the term 'traditional' in place of the term 'Indigenous' but the meaning of 'traditional' is interpreted in a liberal fashion, so that, for example, the treaty permits the use of modern fishing methods provided these methods are consistent with contemporary custom. However, it seems likely that some of the international law understandings of the right of Indigenous peoples informed the making of the Treaty text.²⁵ Certainly, the treaty provides a degree of recognition and protection of customary or traditional rights for Torres Strait Islander People. The policy implication would appear to be that similar legal protection should, as a matter of equity, be afforded to other coastal Indigenous peoples with traditional affiliations with marine areas in Australia.

The rights of Indigenous peoples to use, manage and control the resources of the marine environment within their traditional territories are supported by international laws and principles. These rights can extend to exclusive possession of sea domains, based on prior occupation and use, consistent

23 White, D., 'Department of Foreign Affairs and Trade's Involvement with Indigenous People's Rights over the Sea' in Northern Territory University, *Turning the Tide*, Faculty of Law, Darwin, 1993, p65.

24 See Doubleday, N., 'Aboriginal subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law', (1989) 2(17) *Denver Journal of International Law and Policy* 373, p389.

25 See generally Mfdowo, K., and Tsamenyi, M., 'The Regulation of Traditional Fishing under the Torres Strait Treaty' in Northern Territory University, *op cit*, p229.



with the traditions and laws of the Indigenous peoples concerned. Indigenous people are entitled to protect their resources, including customary marine tenures, from one generation to the next.

3. Common law recognition of native title rights to the sea

International human rights standards provide the relevant framework for the evaluation of the common law approach to Indigenous rights in the *Croker Island* case. There are few cases from overseas jurisdictions that have dealt with the issues of native title sea rights so exhaustively as the *Croker Island* case. The High Court's decision is therefore set to become an influential precedent throughout the common law world.

To understand the territorial scope of the appeal to the High Court, the various maritime jurisdictional limits imposed under Australian law on sea country need to be briefly mentioned. They are set out in the sectional diagram in Figure 1 [see next page].²⁶

The Croker Island claim does not include the foreshores/seabed in the intertidal zone, even though this appears to have been the intention of the claimants. The entire claim is within Australia's territorial sea and most of the claim falls within the territorial sea in the jurisdiction of the Northern Territory. The territorial sea is the maritime zone in which full jurisdiction is asserted by Australia subject only to a customary international law requirement of innocent passage.²⁷ The fact that the claim is totally within the territorial seas means that the case does not necessarily decide issues of native title in relation to the contiguous zone, the exclusive economic zone and the continental shelf. In relation to these more distant zones, however, there is United States authority to suggest that, even in these areas, Indigenous subsistence rights can be recognised.²⁸

Evidence in the *Croker Island* case: a unique and complex system of laws

The claimants' evidence in the hearings of the *Croker Island* case presented the sea as part of an elaborate system of laws and customs that had been substantially maintained to the present day. The details of that system were set out in the claimants' evidence, the anthropologist's report²⁹ and are summarised in Justice Olney's judgment.³⁰

26 See generally Opeskin, B.R., 'The Law of the Sea' in Blay, S., Piotrowicz, R., and Tsamenyi, M., *Public International Law: an Australian Perspective*, Oxford University Press, Melbourne, 1997; Sparkes, S., 'Below Low Water: Marine Boundaries and Native Title – a Brief Overview' in Myers, G.D., (ed) *In the Wake of the Wik*, National Native Title Tribunal, Perth, 1999.

27 *Seas and Submerged Lands Act 1973* (Cth), s 6. This Act implements the United Nations *Convention on the Law of the Sea* (16 November 1994, UNTS 1833 p138; 1835 p 261) in Australian domestic law (ATS 1994 No 31). It is noteworthy that, while the provisions relating to innocent passage are annexed to the Act, they are not specifically enacted by the legislation. This means that the legal right of innocent passage in Australian territorial waters does not arise under Australian law but customary international law.

28 See *Gambell v Hodel* 869 F2d 1273 (1989) and discussion in Dorsett, S., and Godden, L., *A Guide to Overseas Precedents of Relevance to Native Title*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1998, pp144-152.

29 See generally Peterson, N., and Devitt, J.A., *A Report in Support of an Application for Recognition of Native Title to Areas of Sea by the Mangalara, Mandilarri-Ildugij, Murrar, Gudura, Mayarram, Minaga and Nganyjaharr of the Croker Island Region*, Northern Land Council, Darwin, 1997.

30 *Yarmirr v Northern Territory* (1998) 82 FCR 533, pp563-570.

Figure 1.

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The claim was presented in terms of the traditional rights of six 'estate groups' to five fairly well-defined areas of land and sea. The estate group, like a 'clan', is a single group of people who can trace their descent through the male line and is known as a *yuwurumu*. The *yuwurumu* have names and those involved in this claim were the Mangalara, Mandilarri-Ildugij, Murrar, Gudura, Minaga and Nganyjaharr. The traditional rights of the members of the *yuwurumu* included such things as:

- to be recognised as the traditional owners of the estate, to transmit all inherited rights, interests and duties to subsequent generations and to exclude or restrict others from the entering the area;
- to speak for and make decisions about all aspects of the estate;
- free access to the estate and its every day resources in normal circumstances;
- the right of senior members to receive a portion of major catches (for example turtle, dugong, crocodile or big hauls of fish) if they are co-resident with the person making the catch;
- the right of senior members to close off areas of the estate on the death of *yuwurumu* members and decide when they shall be re-opened to use;
- to allocate names associated with their estate to their relatives;
- to speak for and make decisions about the significant places in the estate and to ensure unintended harm is not caused by them or to them;
- to receive, possess and to safeguard the cultural and religious knowledge associated with the estate and the right and duty to pass it on to the younger generation; and
- the right to speak for and make decisions about the estate resources and the use of those resources and the right and duty to safeguard them.³¹

The evidence presented by the claimants, particularly the main witnesses, Mary Yarmirr and Charlie Wardaga, included:

- accounts of the land and sea creating travels of the dreaming ancestors – the Seahawk Burarrgbiny Garrngy, Warramurrungunji, and to the named sacred sites associated with the stories;
- women's and men's ceremonies associated with different dreaming sites;
- the severe consequences of revealing secret/sacred parts of stories and ceremonies;
- accounts of inheritance of rights through the claimants' fathers and being taught about the country by fathers and grandfathers;
- repeated assertions of ownership and the right to be asked about developments such as petroleum exploration, commercial fishing and tourism;
- an example of permission being given to establish a pearl farm;
- examples of the closure of certain areas following a death;
- examples of seeking permission to use another *yuwurumu* area;
- extensive accounts of fishing and hunting for turtle and dugong at particular locations on the estates;
- trade between the members of different *yuwurumu*, trade with the mission and trade with the Macassans.

31 Peterson and Devitt, *op cit*, p18-19.



The *Croker Island* decision

Justice Olney accepted that all of the claim area comprised the sea country of one or another of the several claimant *yuwurrumu*, in other words, that native title existed and that the claimants are the native title holders of the whole area. The main difference between the claims and Justice Olney's findings was the nature and extent of the rights recognised.

The NTA requires the Federal Court, when making a native title determination, to state, among other things, 'whether the native title rights and interests confer possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others'.³² The claimants sought a determination that they did have such rights. Justice Olney's proposed determination stated that they did not have such rights. This was a crucial and much disputed finding and is discussed in more detail below.

The NTA also requires that the nature of native title rights determined to exist is set out in the determination.³³ The claimants sought an extensive list of rights based on the claimants' traditional rights (set out above). Justice Olney accepted some of these but rejected or curtailed others. The claim to a right of ownership was rejected, principally on the basis that the terminology of 'ownership' was considered inappropriate in the native title context because it did not necessarily equate with any particular Indigenous concept. The claimed rights to control resources was rejected, because of a lack of evidence of the use of the resources of the soil under the seabed. The claim to a right to control access to sea country was also rejected. The claimed right to trade was rejected on the basis of insufficient evidence and insufficient connection with native title sea rights. The generality of the claimed right to safeguard cultural knowledge was reduced to cover only situations that required presence on sea country.

The native title determination of the court was as follows:

4. The native title rights and interests which the Court considers to be of importance are the rights of the common law holders, in accordance with and subject to their traditional laws and customs to have free access to the sea and seabed within the claim area for all or any of the following purposes:

32 *Native Title Act* 1993 (Cth), s 225. A preliminary question is why the question of exclusivity is relevant at all. The terminology of exclusive native title rights as opposed to other native title rights seems to coincide with a 'proprietary' versus a 'non proprietary' distinction. If this is correct, it has huge implications for the enforcement and protection of native title rights against others. On one view, all native title rights are proprietary in nature at the level of communal native title as opposed to the individual exercise of rights under communal native title, which could be classed as usufructuary rights. See Bartlett, R., 'The Proprietary Nature of Native Title' (1998) 6 *Australian Property Law Journal* 77-99; Gray, K., and Gray, S., 'The Idea of Property in Land' in Bright, S., and Dewar, J., *Land Law: Themes and Perspectives*, Oxford University Press, 1998, p26-27. In this view, a finding of native title necessarily involves a finding of exclusive proprietary rights, making the NTA s 225 requirement for a native title determination to state whether the rights are exclusive or not, unnecessary. The requirement may be an anachronistic reference to the question in lands rights cases: 'is the clans' relationship to the land a recognisable proprietary interest?' (*Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, p 262-274). This question has been resolved in the affirmative by *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 and subsequent cases.

33 NTA s 225(b).



- (a) to travel through all or within the claimed area;
- (b) to fish and hunt for the purpose of satisfying their personal, domestic or non-commercial communal needs including the purpose of observing traditional, cultural, ritual and spiritual laws and customs;
- (c) to visit and protect places which are of cultural and spiritual importance;
- (d) to safeguard their cultural and spiritual knowledge.

This determination effectively reduces the rights that the claimants are able to exercise in respect of their traditional sea country from being rights against the whole world to rights that must either coexist with or be subjugated by all other common law rights.

Justices Beaumont and von Doussa in the majority of the full Federal Court decision in the *Croker Island* case endorsed Justice Olney's finding that only non-exclusive cultural and subsistence rights could be recognised by the court. There are three bases to this decision:

- the court would not recognise exclusive native title rights if they had not been exercised against non-Indigenous trespassers;
- the court's conceptualisation of native title was limited;
- the court found, as a matter of law, exclusive native rights offshore would be inconsistent with other common law rights of the public to navigate tidal waters and to fish, and with the international law obligations to allow innocent passage of shipping in territorial seas.

1. Non-recognition of exclusive native title rights

The finding against exclusive native title rights outlined above appears to be based on the fact that the claimants did not enforce these rights against non-Indigenous people. The connection between these two propositions is never fully explained in the judgment. The relevant section commences with an extract from the evidence of Charlie Wardaga:

- Q. If we wanted to travel on your water, by your law what should we do?
- A. I can't do nothing, because you been talking about another balanda [whitefella] he coming into you law boat, like that.
- Q. I am talking your law?
- A. Yes.
- Q. Aboriginal way?
- A. Yes, my Aboriginal law. That balanda he break that the Law, like that. Not like you mob, you been come and see me – I'm clan, or Mary clan, like that. And other people, oh, no, he got no brains that one.

Doing the best I can, I understand the witness to be saying that a non-Aboriginal person, who did not know of the traditional Aboriginal law and thus would be unaware of the need to seek permission from the clan owner, should be allowed to pass through.³⁴

34 *Yarmirr v Northern Territory* (1998) 82 FCR 533, p585.



The claim that by their traditional laws and customs the applicants enjoy exclusive possession, occupation, use and enjoyment of the waters of the claimed area is not one that is supported by the evidence. At its highest the evidence suggests that as between themselves, the members of each yuwurrumu recognise and defer to, the claims of the other yuwurrumus, to the extent on occasions permission is sought before fishing, hunting or gathering on another sea clan's country. By inference, although the evidence is not strong, other Aboriginal people from outside the claimed area probably do likewise.³⁵

His Honour's reasoning suggests that in order to establish a native title right to control access, Aboriginal people would be required to demonstrate before a court not only the existence of a traditional right to control access to their land and the exercise of this right by the applicants, but also that the native title applicants and their forebears, in the face of inordinate risks, asserted this right consistently against non-Indigenous people through the post-sovereignty period. While Indigenous people may continue to observe their laws, under this test, previous non-Indigenous disrespect for their rights provides a basis for the ongoing non-recognition and denial of Indigenous rights.

The use of the applicants' evidence of forbearance in the face of ignorance and disregard for their laws as the basis of the denial of their right to control, is a new, more onerous test for recognition of native title rights than was contemplated in *Mabo*.³⁶ As Justice Merkel remarked in the minority judgement of the full Federal Court:

It is important to emphasise that it is the traditional connection with the land arising from the acknowledgement and observance of the laws and customs *by* the community, and not recognition or acceptance by others of the connection, or of the laws or the customs, that is the source of native title.³⁷

This approach is also in stark contrast to the approach taken to proving exclusive possession in the landmark Canadian case of *Delgamuukw*.³⁸ Aboriginal title encompasses a right to exclusive possession, which in turn is established if the following criteria are satisfied:

- the land must have been occupied prior to sovereignty;
- if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation; and
- at sovereignty, that occupation must have been exclusive.³⁹

Another context in which to view Justice Olney's interpretation of the evidence is the fact that there have been two Aboriginal Land Commissioner's reports on sea closure applications under the Northern Territory *Aboriginal Land Act 1978*,

35 *ibid*, p422.

36 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

37 *Commonwealth of Australia v Yarmirr* (1999) 168 ALR 426, p319 (emphasis in original).

38 *Delgamuukw v British Colombia* (1997) 153 (4th) DLR 193.

39 *ibid*, per Lamer, C.J., paras 43-59.



which were also in Arnhem Land.⁴⁰ The significance of these reports is that rather than reporting on traditional ownership *per se*, the Land Commissioner, among other things, must report on whether, in accordance with Aboriginal tradition, strangers were restricted in their right to enter the seas. In both cases, Justice Toohey and Justice Kearney, respectively, found that strangers were so restricted and they based their conclusions on evidence that is remarkably similar to the evidence considered by Justice Olney. The Aboriginal Land Commissioners' findings tend to support the impression that Justice Olney was taking a very strict approach to the interpretation of the evidence in the *Croker Island* case.

There are two approaches to the task of ascertaining and recognising exclusive native title rights. One is to focus on the exercise of excluding others, as Justice Olney has done. The other is to make a global assessment of the completeness of the traditional system of law and custom, taking into account all the evidence of the traditional laws and customs and of continuing traditional connection.

The former approach anticipates a confrontation between the exercise of Indigenous and non-Indigenous rights. An example of such a confrontation occurred recently when three Torres Strait Islanders from Mer (Murray Island) found commercial fishermen fishing in their traditional sea country.⁴¹ They confiscated the fish in the commercial fishermen's dinghies and with the aid of a crayfish spear told the commercial fishermen in strong terms to get out of the area. On their return to Mer Island, the Islanders sold the confiscated fish and divided the proceeds amongst themselves. Two of the men were charged with theft of fish with violence, an indictable offence. So far, the charges have been successfully defended on the basis of an honest claim of right based on the recognition of traditional fishing rights under the Torres Strait Treaty. Although the defence is not based on the exercise of native title fishing rights, these Torres Strait Islanders are certainly laying the groundwork for a good claim under the test proposed by Justice Olney.

The history of struggle between Indigenous people for their land and sea country is littered with confrontations of the type described above. Unlike the example given above, many of these confrontations ended in the separation of Indigenous people from their culture and their country. Consequently, many Indigenous people are unable to sustain a claim for native title. Justice Olney's approach to establishing exclusive native title rights ensures that even where Indigenous peoples maintain connection to country, such as with the Croker Island people, the common law will nevertheless limit the recognition of the native title.

The latter approach to ascertaining native title recognises that where Indigenous culture has survived confrontation with non-Indigenous culture, then it should be recognised in a way that ensures its enjoyment. Native title should reflect

40 Aboriginal Land Commissioner, *Closure of Seas: Millingimbi, Crocodile Islands and Glyde River Area*, Northern Territory Government Printer, Darwin, 1981; Aboriginal Land Commissioner, *Closure of Seas: Castlereach Bay/Howard Island Region of Arnhem Land*, Northern Territory Government Printer, Darwin, 1988.

41 Haigh, D.J., 'Fishing War' in the Torres Strait: Case Note on the *Queen v Benjamin Ali Nona and George Agnes* (sic: Agnew Gesa', (1999) 4(22) *Indigenous Law Bulletin* 20:21; Haigh, D. J., 'Fishing War' in the Torres Strait – Round Two: Update on the *Queen v Benjamin Ali Nona and George Agnew Gesa'* (1999) 4 (44) *Indigenous Law Bulletin* 18.



the law and tradition of the claimant group as exercised and observed by them. In this way, the common law will not only provide protection for Indigenous culture so that it can be enjoyed within the broader community but also allow the protective mechanisms existing within Indigenous culture, such as control of access to traditional country, to operate effectively.

2. The conceptualisation of native title as a bundle of rights

Under the bundle of rights approach native title is constructed as a highly specific and finite series of practices derived from a particular historical moment. There is little opportunity for Indigenous culture to continue to inform the content of that bundle or for decisions to be taken about matters outside of the defined bundle.

Where native title is cast as a system of generalised rights, the exercise of those rights can take a contemporary form even though their origin is the traditions and customs of the original Indigenous inhabitants. Where, however, native title is constructed as a collection of specific traditional practices, there is a failure to separate the idea of rights from activities carried out pursuant to those rights.

Justice Olney, and the majority in the full Federal Court, construct native title as a bundle of rights in which each separate native title right must be directly supported by separate evidence of traditional laws and customs relating to the particular right. This requirement and treatment of the evidence is consistent with a bundle of rights approach to native title. In Chapter 2 of this report, the bundle of rights approach to the legal characterisation of native title is criticised for predisposing native title to extinguishment.⁴² In the *Croker Island* case, it can be seen that the bundle of rights approach also limits the extent to which Indigenous laws and culture will be recognised at all by the common law, particularly where there is a claim for exclusive rights. The bundle of rights approach limits common law recognition and protection of Indigenous law and culture in three ways.

- **A bundle of rights approach reduces the control that Indigenous people can exercise over country**

The construction of native title as a series of rights to perform specific enumerated practices runs counter to its construction as an exclusive right to possession, occupation, use and enjoyment of the territory. Only if the specific rights proven add up to a difficult-to-specify comprehensive set of rights will the exclusive right to possession, occupation, use and enjoyment of the territory as against the whole world be determined to exist.

If this kind of determination is made, the specification of what this entitles the native title holders to do on the land is not that important. For example, in the *Croker Island* case, if such a determination had been made, the specification of other rights such as the right to use and control resources, the right to trade and the right to protect places of importance would not have been crucial

42 See above, pp61-65.



because, in effect, they are all subsumed under the global right of exclusive possession.⁴³

Once it is decided that an exclusive possession determination will not be made, the description of the non-exclusive native title rights becomes extremely important, for this description will define the totality of the rights. That is why Justice Olney's failure to find a specific right to trade in the resources of the estate was significant to the claimants. In the absence of a determination of exclusive rights of possession, occupation, use and enjoyment, the inclusion in the determination of a right to trade in resources was essential to extend their acknowledged fishing rights beyond their own subsistence needs.

Yet this discrete right, like many others, was difficult to prove because of the nature and extent of the evidence required. Even where evidence of contemporary control over the claimed areas was provided, Justice Olney was reluctant to interpret this as confirming exclusive rights. For instance, the applicants' evidence that they insisted on being asked about important developments in their country relating to oil exploration, tourism and commercial fishing, was treated as supporting a right to be consulted and not as a right to control access,⁴⁴ even though in traditional Indigenous society asserting a right to be asked is a mode of asserting exclusive rights to country.⁴⁵ In relation to a right to trade, His Honour required detailed evidence of historical and contemporary trading. Even this may not have been enough, as he indicates that the exchange of goods may not be sufficiently related to land or sea for it to be considered a native title right, notwithstanding that the exchanged goods come from the land and sea.⁴⁶

In the full Federal Court, the majority agreed with Justice Olney's interpretation of the evidence. Justice Merkel, although he was troubled by some of Justice Olney's assessments of the evidence, did not have to decide the issue, as he ultimately would have referred the matter back to Justice Olney for reconsideration.

- *The bundle of rights approach fails to give Indigenous relationships to country the protection afforded other non-Indigenous proprietary interests.*

In *Mabo*, Justice Brennan, with whom Chief Justice Mason and Justice McHugh agreed, famously stated:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.⁴⁷

43 See Mantziaris, C., and Martin, D., *Native Title Corporations: a Legal and Anthropological Analysis*, Federation Press, Sydney, 2000.

44 *Yarmirr v Northern Territory* (1998) 82 FCR 533, p578.

45 See Myers, F., 'Always Ask: Resource Use and Land Ownership among Pintupi Aborigines' in Williams, M., and Hunn, E., (eds) *Resource Managers: North American and Australian Hunter-Gatherers*, Westview Press, Boulder, 1982, pp173-96.

46 *Yarmirr v Northern Territory* (1998) 82 FCR 533, p586-588.

47 *Mabo*, *op cit*, p58.



In Chapter 2 of this report, this separation of factual and legal elements of native title is described as a critical ambiguity in native title doctrine.⁴⁸ Indigenous law and custom are understood as the 'origin' of the right that is not legally enforceable until it is 'recognised' by the common law. Legal protection is thus dependant on a process of translation, and only that which is 'translated' or recognised from Indigenous law will be protected by the common law.

The courts' task of cultural translation does not require that native title be constructed as a title bearing no resemblance to a common law system of tenure. Nor does it require that the court find exact equivalence between the common law and Indigenous law and culture. The task for the court is to render the unique relationship of Indigenous people to their country comprehensible (recognisable) within the common law. What is significant from a human rights perspective is that the form in which native title is recognised by the common law gives Indigenous law and culture adequate protection so that it can be fully enjoyed to the same extent as non-Indigenous interests.

If by likening native title to a proprietary interest the common law provides the same level of protection and security to the unique relationship that Indigenous people have with their land and sea country as that which is provided to all non-Indigenous proprietary interests, then such a translation is consistent with the principle of substantive equality. Richard Bartlett makes this point in his argument that, on the basis of equality, the common law presumption against the extinguishment of a proprietary interest should be extended to native title.⁴⁹

The following statement by Chief Justice Brennan in *Mabo* illustrates how the analogy to common law proprietary interests is used to ensure that the protection of native title is equal to the protection of non-Indigenous common law proprietary interests:

If it be necessary to categorise an interest in land as proprietary in order that it survive a change in sovereignty, the interest possessed by a community that is in exclusive possession of land falls into that category.⁵⁰

In this statement Chief Justice Brennan did not assert that native title is equivalent to a 'proprietary' interest under the common law. Rather, that while the Indigenous relationship with their country is entirely different from common law 'proprietary' interests in the land, it requires an equivalent degree of protection. It indicates that native title is to be regarded as at least as strong a form of connection to land as common law proprietary tenures and is equally protected by the common law.

Contrary to a human rights approach, Justice Olney has interpreted Brennan's approach as authorising a search for particular traditional laws and customs that demonstrate the proprietary or non-proprietary nature of the rights claimed. The bundle of rights approach justifies the fragmentation of native title into proprietary or non-proprietary interests, each of which may be compared to

48 See above, pp67-70.

49 Bartlett, *op cit*, Ch 12. He also points out that proprietary interests are afforded the greatest degree of protection of any legal property rights.

50 *Mabo*, *op cit*, p51.



common law forms of property. This approach is not consistent with either the authority in *Mabo* or a human rights approach.

- *A bundle of rights approach fails to recognise the dynamic nature of Indigenous law and culture.*

The bundle of rights formulation denies the evolution of traditions to include contemporary practices. For example, activities pursuant to native title rights are restricted to pre-contract methods of exercising those rights (subsistence fishing, not commercial fishing). On this basis Justice Olney summarily dismisses the claimed right to the use of the resources (including minerals) of the subsoil under the seabed. He states:

...as there is no evidence to suggest that any traditional law or traditional custom of the Croker Island community relates to the acquisition or use of, or to trading in, any minerals that may exist or be found on or in the seabed or subsoil of the waters of the claimed area there can be no basis for a determination that would recognise native title in such minerals.⁵¹

While Justice Olney is prepared to describe the determination area in the proposed draft determination as including the seabed, the exclusion of the subsoil is based on a finding that there is no close correspondence between ancient traditional activities and contemporary potential mining uses.⁵² This is notwithstanding the evidence of the relationship of dreaming ancestors to the seabed.⁵³

Many of these problems can be avoided if native title is conceived of as the ownership of territory arising out of the exclusive occupation of the territory by Indigenous people prior to the assertion of British sovereignty. There is authority for this approach, most notably in the judgment of Justice Toohey in *Mabo*⁵⁴ and in *Delgamuukw*.⁵⁵ Proof of native title would still have its difficulties, as there would be scope for wide variation in the level of evidence required to establish exclusive possession at the time of sovereignty. However, it would avoid the minute characterisation of particular traditional rights in order to define the scope of current rights. Current native title rights would equate with full ownership and questions about whether current activities on the land were authorised by tradition would be irrelevant. This approach maintains a definition of native title at a high level of generality, distinguishing between the general right and its exercise at any particular historical moment. Thus it provides a space for the survival of Indigenous control over traditional land within the common law framework.

Under a substantive equality approach native title should be a vehicle for the enjoyment and protection of Indigenous culture, not a means to its confinement. Specifying the practices which constitute native title while at the same time denying the relationship that exists between these practices, confines the enjoyment and protection of Indigenous culture within the common law.

51 *Yarmirr v Northern Territory* (1998) 82 FCR 533, p600.

52 *ibid.*

53 Peterson, N., and Devitt, J., *op cit*, p5-7.

54 See Justice Toohey's discussion of 'common law aboriginal title' in *Mabo op cit*, p206-214.

55 *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 (1997), paras 140-159.



3. Common law recognition of exclusive native title rights offshore

The court's findings

- *Threshold issue of offshore jurisdiction*

There is a threshold legal issue of whether the common law extends beyond the low water mark. If there is no common law offshore, the argument goes, native title cannot be recognised. Justice Olney and the majority in the full Federal Court seem to have accepted this proposition from the old English authority of *R v Keyn*,⁵⁶ but their reasoning made this question irrelevant.⁵⁷ They held that native title could be recognised offshore since the beginning of 1994 when the NTA commenced because the NTA itself, by virtue of including a statutory definition of native title and by virtue of the NTA's application offshore, revealed an intention to provide for recognition of native title offshore. This is a neat solution because it also obviates the need to distinguish between the various jurisdictional offshore zones and the various times at which sovereignty in them was acquired. On the other hand, it does put strain on the interpretation of the definition of native title in the NTA by interpreting it as creating a kind of statutory land rights.⁵⁸ It also causes some conceptual difficulties, for under this theory native title could be extinguished prior to 1994. This means that native title could be extinguished even before it could have been recognised, post-1994.

The minority judge in the Federal Court, Justice Merkel, opted for a different solution – maintaining the significance of the date of assertion of sovereignty and the relevance of recognition by common law by closely analysing the seemingly problematic case of *R v Keyn*. He found that the High Court's apparent endorsement of that case in the *Sea and Submerged Lands Act* case⁵⁹ was really only an acknowledgement of the state of the law at the time of Federation in 1901. Since then, there has been, in domestic Australian law, a progressive extension of sovereignty further offshore. With that extension of sovereignty comes jurisdiction and the operation of the common law.⁶⁰ On this view, the question of the relevant date for the proof of prior traditional laws and customs is resolved, even if it is in a complicated way giving rise to four relevant dates – 1824, 1863, 1930 and 1990 – corresponding with each extension of sovereignty beyond land.⁶¹ This would mean that the relevant date for proving the prior occupation of the native title holders would vary according to what part of the sea was being claimed.

56 (1876) 2 Ex D 63.

57 It may be more accurate to say that Justice Olney and the majority of the full Federal Court do not pursue the arguments involving *R v Keyn* for there are Commonwealth and state statutes that purport to extend the application of the law offshore.

58 The problem is that there are good arguments for the proposition that the definition of native title in the NTA was never intended to be a complete codification of the common law, but rather refer back to common law principles: see the arguments outlined in the judgment of Justice Merkel *Commonwealth of Australia v Yarmirr* (1999) 168 ALR 426, p507-515.

59 *New South Wales v The Commonwealth* (1975) 135 CLR 337.

60 *Commonwealth of Australia v Yarmirr* (1999) 168 ALR 426, pp518-529.

61 *ibid*, p527.



- *Right to control access*

Justice Olney and all the members of the Federal Court found that the common law could not recognise an exclusive native title right to control access because this would conflict with the public right of navigation and Australia's international obligation to permit innocent passage of ships through Australia's territorial seas. Thus Justice Olney states:

The common law also recognises a public right of navigation which has been described as a right to pass and repass over the water and includes a right of anchorage, mooring and grounding where necessary in the ordinary course of navigation; *Hawsbury Laws of England* (4th ed, 1977), vol 18, par 604. This right evolved before Magna Carta and is therefore a right distinct in its origin from the right of innocent passage in international law. A native title right, such as the claimed right to exclusive possession of, and to control the access of others to the claim area, would contradict the public right of navigation and thereby fracture a skeletal principal of a legal system. Such a right as claimed could not be recognised by the common law.⁶²

Justice Merkel also agreed with this general proposition. He stated:

...the right claimed to exclusive possession of, and to control access to, the claimed area fractures the skeletal principle of the freedom of the seas and the tidal waters, which has given shape and consistency from ancient times to the rights of innocent passage and to navigation.⁶³

- *The exclusive right to a fishery*

The majority supported Justice Olney's contention that the public right to fish and other rights of navigation meant that the exclusive nature of native title fishing rights could not be recognised. Justice Merkel, on the other hand, found that an exclusive right to a fishery could exist and that they would not necessarily be inconsistent with rights of navigation or a public right to fish. He also hints that native title rights to regulate access to sacred sites in a particular area may amount to exclusivity if they are unlikely to significantly impede navigation.⁶⁴

The significance of Justice Merkel's findings go beyond the need for protection of Indigenous marine resources. Since one of the main reasons for the intrusion of strangers into sea country is to fish, an exclusive native title right to a fishery may well give native title holders more influence over access generally.

Alternatives to non-recognition

Where a conflict arises between Indigenous laws and customs and non-Indigenous laws a human rights approach requires that they be given equal protection. In practice this requires the court to seek to accommodate both sets of rights. There are various ways in which such an accommodation could occur. Exclusive native title rights in the territorial sea could be recognised and at the same time be qualified by the international right of innocent passage.

62 *Yarmirr v Northern Territory* (1998) 82 FCR 533, p593.

63 *Commonwealth of Australia v Yarmirr* (1999) 168 ALR 426, p546.

64 *ibid*, 547.



This would give native title holders some important rights of control, such as the right to exclude domestic tourists and fishermen. There are many examples where the common law recognises exclusive property rights that are nevertheless qualified by the right of others to enter the land. The exclusive rights pertaining to freehold title are not destroyed by the grant of a mining tenement, but the title is nevertheless subject to the limitations imposed by the grant of the tenement. The freeholder's rights remain good against the whole world except one category of persons, namely those entitled to enter under the mining tenement.⁶⁵ Similarly, the native title holder's rights would be good against the whole world except those who fall within the scope of 'innocent passage'.

Another means of avoiding non-recognition of Indigenous law and culture is to consider conflicting non-Indigenous rights as regulating Indigenous law. Just as a right of international law to innocent passage does not undermine the sovereignty of the coastal state over the territorial sea⁶⁶ (nor its right to regulate the exercise of innocent passage in respect of a number of matters),⁶⁷ nor should the right of innocent passage prejudice Indigenous claims in the respect of the use, management and control of their sea territories and resources.

International human rights standards should be taken into account in the formulation of the common law of native title offshore. It is one of the ironies of the development of the law in this area that the often quoted passage from Justice Brennan's judgment in *Mabo* about the influence of international human rights law on the development of the common law (quoted above), was also quoted by Justice Olney in support of the proposition that the international obligation to provide innocent passage justified the limitation of the recognition of offshore native title to non-exclusive rights.⁶⁸ The two international rules – the protection of Indigenous culture and the right of innocent passage – can be accommodated together, in the same way that the sovereignty of the coastal state and innocent passage co-exist. Accordingly, it is not a necessary conclusion that the right of innocent passage negates claims of exclusive native title rights to customary marine tenures in Australian law.

If the common law public right of navigation and fishing is inconsistent with exclusive native title rights, as maintained by the majority, then the rule which applies in relation to inconsistency between non-Indigenous interests should also apply here; pre-existing proprietary rights should take precedence over public rights that by their nature are not proprietary. This argument is not new⁶⁹ and the legal authorities supporting it are outlined in Justice Merkel's judgment in relation to the exclusive fishery argument.⁷⁰

65 Basten, J., and Howie, R., *Applicants' Submissions in the Appeal from Justice Olney's Decision in Applicants Submissions in the Appeal from Justice Olney's Decision in Yarmirr v Northern Territory* 16 April 1999 (unpublished).

66 United Nations Convention on the Law of the Sea, *op cit*, Article 2.

67 *ibid*, Article 21. The right of innocent passage itself is by no means unqualified. Coastal states may make laws and regulations relating to innocent passage in respect of navigation safety, conservation of living resources, preservation of the environment and so on. Innocent passage merely provides passage rights. It does not interfere with property rights. It may be regarded as a regulated exception to the ability to exclude normally associated with property.

68 *Yarmirr v Northern Territory* (1998) 82 FCR 533, pp591-2.

69 See: eg, Storey, M., 'The Black Sea' (1996) 3 (79) *Aboriginal Law Bulletin* 4.

70 *Commonwealth of Australia v Yarmirr* (1999) 168 ALR 426, pp547-50.



Conclusion about the common law

On the view of the majority, the common law alone would not recognise any Indigenous rights offshore. In their reasoning, it is only the NTA itself that extends the possibility of the recognition of native title offshore. The limited rights that can be recognised offshore only really address the issue of not depriving a people of its own means of subsistence. Because the non-exclusive native title sea rights must be shared with all others with public rights of navigation and fishing, the common law position, as stated by the majority, does not address the requirement of Indigenous control over Indigenous resources, the requirement of informed consent before major decisions are made, nor the acknowledgement of the role of Indigenous people in ensuring sustainable environmental management.

4. Recognition of native title rights to the sea under the Native Title Act 1993

Given the vulnerability of the native title sea rights at common law, it is fitting and consistent with the internationally recognised rights to enjoy one's culture that native title should be provided particular protection by the legislature. The legislative response falls short of its international obligations. It adopts the same assumption that underlies the development of the common law; it assumes there is a fundamental difference between Indigenous rights on land and sea. As indicated, this assumption is not consistent with an Indigenous perspective as incorporated in the ILO Convention that covers 'the total environment' of Indigenous people and the inclusion of sea rights in the notion of Indigenous 'territories'. Nor is it consistent with a human rights perspective, which seeks to protect Indigenous cultures, their means of sustenance and their development. There are four aspects of the NTA that impact upon the human rights of Indigenous people and their relationship to sea country.

Prioritising non-Indigenous interests

Failure to extend the right to negotiate to Indigenous interests in sea country

In both the original and the amended NTA, the right to negotiate is limited to an 'onshore place'.⁷¹ The right to negotiate was seen by Indigenous negotiators as extremely important to the overall acceptance of the original NTA despite the validation of past acts. It is important because, while not a veto, it sets a reasonable standard of protection for Indigenous interests where exploration and mining is proposed on native title land. The right supported genuine negotiation with Indigenous interests. The practical significance of this relates mainly to offshore petroleum exploration and extraction as there is little mineral exploration or mining offshore. The decision not to extend the right to negotiate offshore has denied Indigenous people the possibility of any meaningful

71 There was also some doubt about whether the right to negotiate in the original NTA applied to the intertidal zone. This doubt was resolved against Indigenous interests in the 1998 amendments, which clearly excluded the right to negotiate from the intertidal zone (amended NTA s 26(3)).



negotiation about future offshore petroleum developments. It has also denied them a right to participate in the development and management of their country.

Validating offshore legislative regimes

In the original NTA, this objective was principally achieved by allowing the states to confirm their existing ownership of natural resources, to confirm that existing fishing rights would prevail over any other public or private fishing rights and to confirm any existing public access to coastal waters.⁷² All jurisdictions passed such legislation.⁷³

The NTA provided that such confirmation legislation does not have the effect of extinguishing any native title rights.⁷⁴ Whether this means that the native title rights are completely suppressed for the duration of the confirmation or can coexist with the confirmed rights is difficult to decide. Whatever view is correct, the existence of this legislation presents a major hurdle to the recognition of full native title rights offshore.

The 1998 amendments took a different approach to the validity of offshore acts such as commercial fishing and oil exploration. Rather than ensuring their validity by leaving them out, the amendments explicitly validated them in the future act regime, specifically in subdivision H (management of water and airspace) and subdivision N (acts affecting offshore places) of the NTA.

Procedural rights

In the original NTA, the procedural rights protecting offshore native title rights were expressed in general terms. Native title holders received the same procedural rights as anyone else with 'any corresponding rights and interests in relation to the offshore place that are not native title rights and interests'.⁷⁵ This contrasted with the statutory protection extended to onshore native title rights, which were the same as those attached to freehold. In the 1998 amendments to the NTA, similar procedural rights were split between subdivisions H, which covers waste management regimes and the granting of such things as commercial fishing licences and subdivision N, which covers everything else, typically, petroleum exploration of the seabed and subsoil. Subdivision H specifies a right to be notified and an opportunity to comment. The procedural rights in Subdivision N are in similar general terms to the original NTA – the same rights as holders of ordinary (freehold) title.

These procedural rights are inadequate to protect the unique nature of Indigenous relationships to sea and fall below international law standards of substantive equality. In particular, they apply a formal equality standard to protect what are unique Indigenous interests. Under this approach native title is given

72 The original NTA s 212.

73 *Validation (Native Title) Act 1994* (NT), ss 12-13; *Native Title (New South Wales) Act 1994* (NSW), ss 16-18; *Land Titles of Validation Act 1994* (Vic) ss 14-16; *Native Title (Queensland) Act 1993* (Qld) ss 16-18A; *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA), ss 13-14; *Native Title (South Australia) Act 1994* (SA), s 39; *Native Title (Tasmania) Act 1994* (Tas), ss 13-14; *Native Title Act 1994* (ACT), ss 10-13.

74 The original NTA s 212(3).

75 *ibid*, s 213(6).



the same procedural rights as non-Indigenous rights. However the measures that are sufficient to protect a range of non-Indigenous interests will not necessarily be adequate to protect native title interests.

The substantive equality approach would recognise that Indigenous people in Australia have a special relationship to sea country that requires special protection. The procedural rights that are associated with native title rights to sea should not be less than the procedural rights necessary to protect native title rights to land.

There are other problems with the protection offered to native title sea rights by statutory procedural rights.⁷⁶ Two recent court cases demonstrate some of the more technical shortcomings of these provisions.⁷⁷ The *Lardil* case⁷⁸ demonstrates that the wording of the procedural rights, which would indicate that they are mandatory, is misleading. For example, the notification provisions in subdivision H commence by stating 'Before an act covered by subsection (2) is done, the person proposing to do the act must (a) notify... (etc)'. But, if a state government does not offer the specified procedural rights, a native title holder cannot readily insist upon them. Even if the native title holders were already registered they would still have to present evidence of their native title rights in order to obtain an injunction to stop the act going ahead. In the meantime, if the act has been done, it is valid notwithstanding the failure of the State government to provide procedural rights. This loophole is a direct result of the fact that in the amended and the original NTA the performance of procedural rights is not a precondition for validity.

The second case, *Harris*,⁷⁹ demonstrates that the procedural rights specified in subdivision H are indeed as meagre as they appear to be at face value and cannot be read as including any extra common law procedural rights.⁸⁰ It also shows that notice of acts, in this case issuing of licences to tourism operators, can be given in such general terms that it is difficult to identify the particular areas that will be affected by the activity. This seems to be a direct and intended result of allowing the notification to relate to acts 'or acts of that class'.⁸¹

The non-extinguishment principle: s 44C

The non-extinguishment principle is one of the major efforts in the NTA to protect native title as it allows for the suppression of the exercise of native title rights rather than their complete extinguishment by an inconsistent grant. The non-extinguishment principle applies to acts that are valid under subdivision H and subdivision N.

76 For a more detailed analysis of statutory procedural rights see Chapter 5 of this report, p150.

77 See generally McIntyre, G., and Carter, G., 'Future Acts Affecting Native Title Offshore and Injunctive Relief', unpublished paper presented at the *Native Title in the New Millennium Representative Bodies Legal Conference*, Melbourne, 16-20 April 2000.

78 *Lardil, Kaiadilt, Yangkaal & Gangalidda Peoples v Queensland* (1999) 95 FCA 14, (1999) FCA 1633.

79 *Harris v Great Barrier Reef Marine Park Authority* (2000) 165 ALR 234.

80 *ibid*, p239.

81 *ibid*, p241; NTA s 24HA (7).



Generally speaking, fisheries legislation has been seen as mere regulation of native title rather than affecting any total or partial extinguishment. But the non-extinguishment principle could be extremely important in preserving native title if the theory of partial extinguishment, which was accepted by a majority in the Federal Court in the *Miriwing Gajerrong* case,⁸² becomes more widely applied. This theory is discussed in detail in Chapter 2.

The non-extinguishment principle provides minimal protection to Indigenous rights. It is 'minimal' because it accepts the complete inferiority of native title rights in relation to the inconsistent non-Indigenous rights. Native title, while not extinguished, is subjugated by the interests of non-Indigenous users.

Subsistence fishing rights and traditional access rights: s 211

Section 211 provides that Commonwealth, state or territory laws that are aimed at restricting hunting and fishing etc without a licence, do not apply to certain activities of native title holders undertaken in the exercise of their native title rights. The activities include hunting, fishing, gathering and a cultural or spiritual activity. There is a major limit on this exemption – the purpose of the activity must be for satisfying personal, domestic or non-commercial communal needs.⁸³

The scope of the laws to which the exemption applies was somewhat reduced in the 1998 amendments to the NTA. The exemption does not now apply to a law that provides that a licence is only to be granted for research, environmental protecting, public health or public safety purposes.⁸⁴ What laws answer this description is not absolutely clear.

Given the prevalence of statutory regulation of all sorts of fisheries, s 211 remains an extremely important provision. It ensures that Australia complies with the international human rights standard under both the ICCPR and the ICESCR, that in no case may a people be deprived of its traditional means of subsistence. Section 211 was, for example, the basis on which Murrandoo Yanner successfully defended prosecution for the talking of crocodiles in the leading case of *Yanner v Eaton*.⁸⁵ In that case, the fact that Yanner was exercising his native title rights was not contested. But in other cases, such as *Dillon v Davies*,⁸⁶ the court has not accepted that the fishing question was an exercise of particular rights according to traditional laws and customs.

5. The consequences of the non-recognition of exclusive native title rights

In trying to assess the practical consequences of the inadequate protection extended to Indigenous sea rights by both the common law and the legislature, it is helpful to identify the concerns that prompted the applicants in the *Croker Island* case to lodge their claim. Some of them are mentioned in Justice Olney's judgment: the increasing presence of non-Indigenous people, particularly

82 *Western Australia v Ward* (2000) 170 ALR 159.

83 NTA s 211.

84 NTA s 211(1)(ba).

85 (1999) 166 ALR 258. Cf *Wilkes v Johns* (1999) 151 FLR 89.

86 (1998) 156 ALR 142.



tourists and commercial fishermen, in the waters around the islands increasing the risk of interference with offshore sacred sites, their ability to harvest the resources of the sea, and their privacy,⁸⁷ concern that these intrusions would limit Indigenous people's own capacity for commercial development of the area; concern about the decline in the most highly prized food resources of sea country – dugong and turtle. A similar list of concerns motivated one of the sea closure applications under the Northern Territory legislation.⁸⁸ In the case of turtle, driftnet fishing by commercial fishermen is suspected of being a major contributor. The decline of dugong is more dramatic and difficult to understand. Overdevelopment of the foreshore is one of the suspects. Indigenous aspirations in relation to their sea country were extensively canvassed in the Resource Assessment Commission's Coastal Zone Inquiry in the early 1990's⁸⁹ and in other more recent reports.⁹⁰ As will be seen, the various formulations of offshore native title rights will have a direct bearing on the role which native title can play in achieving these aspirations.

Non-exclusive rights

Even if native title holders could convince a court of their exclusive native title rights, the majority approach in the *Croker Island* case means that only non-exclusive rights could be recognised offshore. The effect of this is that native title rights are restricted to a right to travel throughout the area and to hunt and fish. But native title holders would have to share the area with the public by virtue of the public right of navigation and fishing. They would not be able to exclude tourists or recreational fishermen. The native title holders would not obtain any particular rights in relation to the introduction of any new law for the management of the fisheries in the area but they would have a right to be notified and to comment on the grant of a commercial fishing licence. They would have to weigh up whether exercising those procedural rights was worthwhile considering the narrow scope for influencing the result. The rights of commercial fishermen under their licence would prevail over all native title rights. Subsistence native title fishing rights, however, would be exempted from regulation by virtue of s 211 of the NTA.

87 This list is derived from a submission by the Croker Island community opposing the establishment of a nearby Marine Park, quoted in *Yarmirr v Northern Territory* (1998) 82 FCR 533, p579.

88 The list included: failure of commercial fishermen to ask permission to use the sea and shore; desecration of sacred sites; wastage of fish and other resources, and the effect of the spoiling of marine creatures on those for whom they have religious significance. See Keen, I., 'Aboriginal Tenure and Use of the Foreshore and Seas: an Anthropological Evaluation of the A Northern Territory Legislation Providing for the Closure of Seas Adjacent to Aboriginal Land' (1984) 85(3) *Anthropological Forum* 421-439, p427.

89 See Smyth, D., *A Voice in All Places: Aboriginal and Torres Strait Islander Interests in Australia's Coastal Zone*, Resource Assessment Commission Coastal Zone Inquiry, Commonwealth of Australia, 1993.

90 Sutherland, *Fisheries, Aquaculture and Aboriginal and Torres Strait Islander Peoples: Studies, Policies and Legislation*, Report Commissioned by Environment Australia, Commonwealth of Australia, 1996. For a recent overview see Smyth, D., 'Fishing for Recognition: the Search for an Indigenous Fisheries Policy in Australia' (2000) 4 (29) *Indigenous Law Bulletin* pp8-10.



There are difficult questions of how the coexistence of statutory rights of commercial fishermen and common law native title rights, protected under s 211, would operate in practice. For example, if it were established that driftnet commercial fishing was killing turtles as bycatch, could the native title holders use their native title rights to force a change of fishing practices? Consideration of how coexistence might work in relation to pastoral leases may be found in the majority judgement of the full Federal Court decision in *Miriuwung Gajerrong*. There, it was suggested that the law requires that each set of coexisting rights must be exercised reasonably, having regard to the interests of the other.⁹¹ But the extent to which such principles would apply offshore to restrain commercial fishing is uncertain.

Without exclusive native title rights, there is very little leverage for native title holders to become involved in commercial fishing or other economic developments. Their s 211 rights are specifically limited to non-commercial purposes. Their common law rights mirror these limitations and begin to look much the same as the common law rights of recreational fishermen.

Sacred site protection would depend largely upon the effectiveness of state and territory Indigenous heritage protection legislation and the extent of its application offshore.⁹²

Overall, this position responds to only one aspect of the relevant international human rights standards – not depriving a people of their means of subsistence. Even there the response may be inadequate, for a right to fish and to hunt dugong and turtle will not be worth much if fish stocks are dwindling and there are fewer and fewer dugong and turtle to be found. Obviously, the future of subsistence fishing and the management of the environment and the fisheries are interrelated. But the limitation of the recognition of native title sea rights to non-exclusive rights relegates the native title holders to being simply another interest group when major decisions are being made about fisheries management, the granting of commercial fishing licences, oil exploration, the management of marine parks and so on. Yet it is these very decision-making activities and resource management rights that are an integral part of relevant international human rights standards.

Similarly, the right to traditional access to the sea is a very minimal approach to the right of minorities to enjoy their own culture and practice their own religion.⁹³ It is the right to visit sacred sites but not to ensure their protection by excluding others. It is the right to close seas to Indigenous people after a death, but have that closure ignored by non-Indigenous tourists and recreational fishermen.

Non-exclusive access rights, possible exclusive native title fishery

The second situation is the position of Justice Merkel, the minority judge in the *Croker Island* case: non-exclusive rights of access combined with the possibility of exclusive rights to a fishery and exclusive rights to sacred sites where it does not unreasonably interfere with other navigation rights. As above, the native title

91 *Western Australia v Ward* (2000) 170 ALR 159 p238-239.

92 See: Chapter 4 of this Report.

93 ICCPR, Article 27.



holders would not be able to control the access of non-Indigenous tourists except perhaps in relation to certain sacred sites. In relation to site protection, there would be difficult questions to consider of whether identifying the location of sites would increase or decrease the likelihood of desecration.

Because of the findings of fact in the *Croker Island* case there would be no possibility of recognising an exclusive native title right to a fishery in that case. If, in another case, the evidence supported a finding of exclusive native title rights, exclusive rights to a fishery could be made in a determination. The difference would be that in theory the proprietary native title rights to the fishery would take precedence over the common law public right to fish open up the possibility of legal remedies for trespass and nuisance.

Ultimately, common law proprietary rights may be subject to overriding fisheries legislation under which commercial fishing licences are granted. But some difficult legal questions would arise about the validity and compensation notwithstanding the provisions of the NTA that are designed to give validity to such legislation. In particular there are questions about whether the acquisition of property on just terms include some procedural fairness requirement.⁹⁴ Also, questions of how to calculate compensation for loss of native title rights are largely unresolved. But it is probably fair to say that the loss of exclusive rights should entitle the native title holders to far more compensation than the loss of non-exclusive rights. If nothing else, the question of compensation would hopefully lead to a more serious engagement by governments with Indigenous interests in the management of fisheries and sea country generally. It could provide the crucial platform for negotiating more Indigenous involvement in commercial fishing.

Again, under this second position, s 211 of the NTA would preserve subsistence fishing and traditional access rights.

In terms of human rights standards, this position does not guarantee a role in decision-making and resource management. But it would provide a basis for pursuing such involvement because exclusive native title rights to a fishery could not be easily sidelined.

Exclusive native title rights subject only to innocent passage

The third situation, mooted above, is the possibility of the recognition of exclusive native title rights subject only to international customary law rights of innocent passage. In addition to the benefits outlined above, it would allow some control over access. The native title holders may not be able to stop a tourist operator from travelling through their sea country but they would be able to stop the tourist operator from fishing, and, in an extreme example, from setting up a floating hotel.⁹⁵ For there are considerable limits as to what constitutes 'innocent passage'. It means continuous and expeditious navigation for the purpose of traversing the sea. The only stopping and anchoring allowed is if it is incidental to ordinary navigation or an emergency.⁹⁶ It must not be prejudicial to the peace,

94 *Commonwealth v Tasmania* (1983) 158 CLR 1.

95 Basten and Howie, *op cit*, para 4.13.

96 See: eg, United Nations Convention on the Law of the Sea 1982, *op cit*, Article 18.



good order and security of the coastal state.⁹⁷ It may be heavily circumscribed by legislation. The coastal state may make laws and regulations relating to innocent passage in respect of navigation safety, conservation of living resources, preservation of the environment and so on.⁹⁸ Innocent passage merely provides passage rights. It does not necessarily interfere with property rights. It is a regulated exception to the ability to exclude normally associated with property.

In terms of international human rights standards, this position comes closest to achieving the kind of control that is necessary for the participation of Indigenous people in the management of their traditional country. However, it is worth noting that, again, a high degree of involvement in the decision-making over the use of resources of sea country is not guaranteed. There is also the issue that, in all three positions, an important and ready-made set of procedural rights – the right to negotiate – does not apply offshore.

Before European colonisation the Indigenous people of Australia had full territorial rights over the seas. Those rights were taken away without their consent and the Indigenous people are now a disadvantaged small minority within the settler state. The full recognition of Indigenous sea rights would provide some significant restitution. At the time of the assertion of sovereignty over the territorial seas those same seas were the subject of the traditional laws and customs of the Indigenous people of Australia. The common law should recognise those laws and customs where the traditional connection with the seas continues and those rights have not been extinguished.

The shortcomings of legal recognition of Indigenous sea rights are apparent. In some parts of Australia, traditional sea country is constituted by an elaborate system of laws and customs that on land could be recognised as full beneficial ownership. But, as the law currently stands, this is not possible offshore. Traditional laws and customs, which define sea country as belonging to particular groups of Indigenous people, have to contend with deeply ingrained notions that the sea is a commons and cannot be owned. The native title holders have to share their sea country with everyone. What this means is that in relation to the exploitation of the resources of their sea country, particularly commercial fishing and petroleum exploration, native title holders are relegated to bystanders in the major natural resource developments in their sea country.

The present state of Australian law, whether the common law or statute, falls well short of this internationally mandated standard in respect of the sea rights of Indigenous Australians. Australia will quite likely continue to be brought to task by UN treaty committees where there is a failure to adequately recognise and protect the human rights of Australia's Indigenous peoples, including the right to own and inherit property and the right not to be deprived of their own means of subsistence.

This means that no matter what the outcome of the High Court's consideration of the *Croker Island* case, the issue of Indigenous sea rights will have to be revisited by Australian governments. This should be a bipartisan commitment.

97 *ibid*, Article 19.

98 *ibid*, Article 18.



It is not simply a case of the original NTA being curtailed by the 1998 amendments. The original NTA itself was inadequate. This is most clearly demonstrated in the adoption of a formal equality approach to procedural rights, notwithstanding the unique relationship of Indigenous people to their sea country. The Commonwealth's Oceans Policy that arose out of the Resource Assessment Commission's Coastal Zone Inquiry acknowledges the importance of the seas and marine resources to many coastal Indigenous Australians. The policy states:

The social, cultural and economic relationships of many Aboriginal and Torres Strait Islander peoples with the ocean environment mean that they have strong interests in the use, conservation and management of Australia's oceans.⁹⁹

The policy goes on to affirm that:

Access to, and use of, marine resources are essential to the social, cultural and economic well being of coastal Aboriginal and Torres Strait Islander communities.¹⁰⁰

It is hard to imagine a more forthright acknowledgement of the continuing importance of the seas to Australian Indigenous peoples. In light of the current state of international law in respect of the rights of Indigenous peoples, and Australia's international legal obligations arising from both customary international law and ratified multilateral treaties, it is incumbent upon Australia to provide positive legal recognition and protection of sea rights for Indigenous Australians. To allow Indigenous sea rights to be relegated to the same legal status as recreational fishermen would be to hold to an outdated and defective doctrine of *mare nullius*, wholly inconsistent with contemporary international rules and principles.

99 Commonwealth of Australia, *Australia's Oceans Policy, Specific Sectoral Measures*, Australian Government Printing Service, Canberra, 1998, p24.

100 *ibid.*



Chapter 4

Indigenous heritage

In the early years of settlement Mrs Elizabeth Macarthur wrote that she found her new country pleasing to the eye:

The greater part of the country is like an English park, and the trees give it the appearance of a wilderness or shrubbery, commonly attached to the habitations of people of fortune. . . .
Aboriginal people had created these nourishing terrains through their knowledge of the country, their firestick farming, their organisation of sanctuaries, and their own rituals of well-being. Their lands were their 'fortunes', and their fortunes were their own – in Law and in practice. Elizabeth Macarthur was not wrong. She was, indeed, seeing a place which was the home of people of fortune.¹

The recognition of native title by the High Court in 1992 was a significant development in the legal apparatus for protecting Indigenous culture. Under the concept of native title it is possible that sacred and significant sites and objects might be protected, not within the historical category of Aboriginal heritage, but as matters valued in contemporary Indigenous culture with current significance to a people whose culture is ongoing. In addition, under native title such protection could be provided, not as an act of beneficence by government, but as a matter of legal right.

This type of legal development was remarked upon by Special Rapporteur Madame Erica-Irene Daes in her recent study entitled *Indigenous People and Their Relationship to Land*.²

It must be acknowledged that an important evolution is taking place. The fact that dozens of countries have adopted constitutional and legislative measures recognizing in various degrees the legal rights of indigenous peoples to their lands and resources is powerful evidence that such legal measures are consistent with domestic legal systems and that they are needed. The ongoing development of indigenous peoples' rights to lands,

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- 1 Rose, D.B., *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness*, Australian Heritage Commission, 1996, quoting Seddon, G., 'The evolution of perceptual attitudes' in Seddon, G. and Davis, M. (eds), *Man and Landscape in Australia: Towards an ecological vision*, Australian National Commission for Unesco, AGPS, Canberra, p10.
 - 2 Daes, Mdme Erica-Irene, *Final Report Indigenous Peoples and Their Relationship to Land*, UN Doc E/CN.4/Sub.2/2000/25, para 114.



territories and resources must be seen as an opportunity for both indigenous peoples and States to contribute to the progressive development of human rights standards. It must be acknowledged that legal concepts and rights and, indeed, indigenous peoples themselves cannot be frozen in time. Indigenous communities and societies change and evolve like all other societies.³

Such an approach to Indigenous culture, as an holistic evolving concept, is in stark contrast to the social Darwinist approach underlying past heritage legislation (often contained in state parks and wildlife legislation) in which Aboriginal society was depicted as a relic of a dying or extinct civilisation.

The recognition of native title is an opportunity to re-frame the protection of Indigenous heritage within the broader framework of a human right to enjoy one's culture. However, developments within the common law of native title, and amendments to the *Native Title Act 1993* (NTA) have placed heritage protection outside of this broader frame. The bundle of rights approach to native title has meant that contemporary practices of protecting and respecting significant or sacred sites are considered insufficiently connected to the actual practices of the original inhabitants to be included in a native title determination. In addition, the amendments to the NTA have significantly reduced the protection available to Indigenous heritage and the right of native title holders to participate in decisions about protecting their cultural heritage. This chapter will examine these developments.

As a result of the inadequate protection provided through native title, State and Commonwealth heritage legislation remains the most significant form of heritage protection available to Indigenous people. One source of protection is through the registration of places that hold current significance to Indigenous people on the *Register of the National Estate* established under the *Australian Heritage Commission Act 1975* (Cth). Indigenous heritage is just one component of this Act whose main criteria for inclusion on the Register is the 'national significance' of a place. The Act controls actions by the federal government that may adversely affect a registered place. However, private owners or state or local governments are not controlled by this Act. The Act is also limited in the extent to which it provides a framework for the participation of Indigenous people in the decisions under the Act.

A further source of Indigenous heritage protection through Commonwealth legislation is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBCA) which protects properties of world heritage value. This Act improves upon and replaces the protection provided by the *World Heritage Properties Conservation Act 1983* (Cth). These acts are the Commonwealth's domestic implementation of the Convention for the Protection of the World's Cultural and Natural Heritage. The EPBCA provides automatic protection to world heritage properties by ensuring that an environmental impact assessment is undertaken for actions that are likely to have a significant impact on the world heritage values of the property. While this protection is invaluable, the process for establishing the world heritage value of a property is lengthy and onerous.

3 *ibid*, para 114.



Further, Indigenous people have very little control over the decisions taken under the Act.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (Commonwealth Heritage Act) differs from the above Commonwealth acts in that it is dedicated solely to the protection of Indigenous heritage. It was introduced as an interim measure during the protracted and unresolved struggle for uniform national land rights legislation. It is now a matter of history that national land rights legislation did not eventuate and the Commonwealth Heritage Act has remained the primary source of Indigenous heritage protection at the federal level. This Act was the first recognition of the need to protect Indigenous cultural heritage for reasons other than scientific or archaeological research. It was the first recognition of the right of Indigenous people to preserve, protect, access and manage cultural material. This recognition formed part of a general move away from policies of assimilation towards self-determination. As a product of the early stages of this thinking, the Act is a small step forward from the paternalistic idea of heritage protection as a matter of preserving the relics of a by-gone era.

Yet a review of this legislation by Dr Elizabeth Evatt in 1996 indicated that the legislation was inadequate in the protection that it provided as well as the extent to which it involved Indigenous People in the decisions that were made under the Act. In 1998 the *Aboriginal and Torres Strait Islander Heritage Bill* was introduced into Parliament. The Bill was debated and amended in the Senate in November 1999 along the lines of the recommendations of the Evatt Report. The Senate's amendments have been rejected in the House of Representatives. This chapter will discuss the relevant Commonwealth, State and Territory heritage legislation and the proposed amendments to the Commonwealth heritage legislation in the light of international human rights standards. In order to understand the level of importance placed on Indigenous culture at an international level it is helpful to review developments in the international discourse concerning heritage protection.

International discourse on Indigenous heritage protection

The international human rights standards relevant to the protection of Indigenous heritage can be broadly identified as follows:

- the right to self-determination,
- the right to protect Indigenous heritage, including the right to manifest, practice, develop and teach Indigenous heritage,
- the right of Indigenous people to participate in matters effecting their heritage,
- the right to equality of treatment,
- the right to freedom of thought, conscience and religion.

An annotated inventory of Conventions and General Recommendations relevant to the protection of Indigenous heritage is set out at Appendix 5.



Human Rights Committee

The urgent need for resolution, in accordance with human rights principles, of the status of proposed amendments to the Commonwealth heritage legislation was noted by the Human Rights Committee⁴ (HRC) in its Concluding Observations in 2000. In relation to Australia's compliance with the right to self-determination under Article 1 of the International Covenant on Civil and Political Rights (ICCPR) the HRC stated at paragraph 9 of its Concluding Observations:

With respect to Article 1 of the Covenant, the Committee takes note of the explanation given by the delegation that rather than the term "self-determination" the Government of the State party prefers terms such as "self-management" and "self-empowerment" to express domestically the principle of indigenous peoples exercising meaningful control over their affairs. The Committee is concerned that sufficient action has not been taken in that regard.

The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources (Article 1, para 2).⁵

In relation to Australia's compliance with its obligation to protect minority cultures under Article 27 of ICCPR, the HRC stated at paragraph 11 of its Concluding Observations that:

The Committee expresses its concern that securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities, that must be protected under Article 27, are not always a major factor in determining land use.

The Committee recommends that in the finalization of the pending Bill intended to replace the Aboriginal and Torres Strait Islander Heritage Protection Act (1984), the State party should give sufficient weight to the above values.

The Committee's observations and recommendations were a response to the priority given by successive Australian governments to non-Indigenous land use over the human rights of Indigenous people. Article 27 of the ICCPR requires that Indigenous people not be denied the enjoyment of their culture and that the 'continuation and sustainability of traditional forms of economy of indigenous minorities' is assured. The decision in July 2000, by the Minister for the Environment and Heritage, Senator Hill, to defer a protection order over Boobera Lagoon for a further two years in order to allow water skiers to find an alternative recreational site⁶ struck the Committee as a particularly worrying illustration of land management practices which prioritise non-Indigenous culture over Indigenous culture.

4 The Human Rights Committee monitors State Parties' compliance with the International Covenant on Civil and Political Rights.

5 Human Rights Committee, *Consideration of Reports Submitted Under Article 40 – Concluding Observations of the Human Rights Committee*, 28 July 2000, CCPR/CO/69/AUS., para 9.

6 Hill, Senator Robert, *Press Release: Decision on the Future of Boobera Lagoon*, 28 June 2000, www.environment.gov.au/minister/env/2000/mr28jun00.html, (27 November 2000).



During oral submissions to the Human Rights Committee, Mr Lahlah, the committee member from Mauritius, commented on the lack of judicial remedies for breaches of the Covenant. He stated the following on the government's decision in relation to Boobera Lagoon:

As I understand, the water skiing is going to continue until alternative sites are found. I would have thought that since this is a Covenant right and water skiing is not as such a Covenant right, then maybe the reverse should have happened. I'm not taking this as a light matter. It may very well be that water skiing is related to property rights guaranteed under the constitution. It may very well be. I do not know. But in this case, the court would have had the opportunity of deciding on these priorities, cultural rights of certain minorities guaranteed under the Covenant and property rights not guaranteed under the Covenant but guaranteed elsewhere.⁷

Protection of Indigenous heritage is a fundamental component of the instruments and obligations relating to the international human rights of Indigenous people. The importance of heritage protection, as one aspect of the obligations to Indigenous people to land is recognised by human rights bodies.

Report of the seminar on the draft principles and guidelines for the protection of the heritage of indigenous people by Chairperson-Rapporteur Erica-Irene Daes⁸

The report on the protection of the heritage of Indigenous people by Erica-Irene Daes is the most comprehensive statement from an international organisation of the appropriate standards for the protection of Indigenous peoples' heritage. The principles and guidelines are widely endorsed by Indigenous peoples and reflect the position of the Working Group on Indigenous Populations, the most expert group on Indigenous issues in the United Nations system. The principles were elaborated in accordance with the Working Group's mandate to develop standards regarding the rights of Indigenous peoples.

I would draw particular attention to the following principles:

- The effective protection of the heritage of the indigenous people of the world benefits all humanity. Its diversity is essential to the adaptability, sustainability and creativity of the human species as a whole.⁹
- To be effective, the protection of indigenous peoples' heritage should be based broadly on the principle of self-determination, which includes the right of indigenous peoples to maintain and develop their own cultures and knowledge systems, and forms of social organisation.¹⁰

7 Mr Lahlah, *Transcript of Human Rights Committee's examination of Australia*, 21 July 2000, www.faira.org.au (27 November 2000).

The attempts of the local Aboriginal Community to protect Boobera Lagoon and the failure of the Commonwealth Minister to issue a protection order over the lagoon are discussed below at p138.

8 Daes, Erica-Irene, *Report of the seminar on the draft principles and guidelines for the protection of the heritage of Indigenous people*. Geneva, 28 February – 1March 2000, 19 June 2000. E/CN.4/Sub.2/2000/26. These principles are also annexed to the study *Protection of the Heritage of Indigenous People* produced in conformity with Sub-Commission resolution 1993/44 and decision 1994/105 of the Commission on Human Rights UN Doc E/CN.4/Sub.2/1995/26,

9 *ibid*, Appendix 1, para 1.

10 *ibid*, Appendix 1, para 2.



- Indigenous peoples should be the source, the guardians and the interpreters of their heritage, whether created in the past, or developed by them in the future.¹¹
- Indigenous peoples ownership and custody of their heritage should be collective, permanent and inalienable, or as prescribed by the customs, rules and practices of each people.¹²
- The discovery, use and teaching of indigenous peoples' heritage are inextricably connected with the traditional lands and territories of each people. Control over traditional territories and resources is essential to the continued transmission of indigenous peoples' heritage to future generations, and its full protection.¹³

Underlying these five principles in relation to Indigenous heritage are the human rights of self-determination under Article 1 of ICCPR and the protection of minority cultures under Article 27 of ICCPR. The Report also makes important recommendations concerning the protection of Indigenous heritage through national legislation:¹⁴

23. National laws for the protection of indigenous peoples' heritage should:
 - (a) be adopted following consultations with the peoples concerned, in particular the traditional owners and teachers of religious, sacred and spiritual knowledge, and wherever possible should have the informed consent of the peoples concerned;
 - (b) guarantee that indigenous peoples can obtain prompt, effective and affordable judicial or administrative action in their own languages to prevent, punish and obtain full restitution and just compensation for the acquisition, documentation or use of their heritage without proper authorisation of the traditional owners;
 - (c) Deny to any person or corporation the right to obtain patent, copyright or other legal protection for any element of an indigenous peoples' heritage without adequate documentation of the free and informed consent of the traditional owners to an arrangement for the sharing of ownership, control, use and benefits;
 - (d) Ensure labelling, correct attribution and legal protection of indigenous peoples' artistic, literary and cultural works whenever they are offered for public display or sale.
24. In the event of a dispute over the custody or use of any element of an indigenous peoples' heritage, judicial and administrative bodies should be guided by the advice of indigenous elders who are recognised by the indigenous communities or peoples concerned as having specific knowledge of traditional laws.

11 *ibid*, Appendix 1, para 3.

12 *ibid*, Appendix 1, para 4.

13 *ibid*, Appendix 1, para 5.

14 *ibid*, Appendix 1, paras 23 & 24.



25. Government should take immediate steps, in cooperation with the indigenous peoples concerned, to identify sacred and ceremonial sites, including burial sites, healing places, and traditional places of teaching, and to protect such places from unauthorised entry or use and from deterioration.

The Daes Report on the protection of Indigenous heritage contains the following fundamental principles to guide governments in their formulation of heritage legislation:

- informed consent by Indigenous people to the legislation
- maintenance of Indigenous control over their culture in accordance with the right of self-determination and
- restitution and compensation for the appropriation of their culture.

The Report offers a timely guide to the government in its proposed overhaul of existing heritage legislation in Australia.

Protecting Indigenous heritage in Australia

It was recognised as early as 1984 that the Commonwealth Heritage Act was inadequate to protect Indigenous culture, in particular, because it failed to locate heritage protection within the context of Indigenous peoples' fundamental relationship with their lands. Nevertheless, the limitations of the Act were justified on the basis that it was proposed as a temporary measure, pending the forthcoming introduction of national land rights legislation. It was expected that more appropriate and comprehensive heritage protection would be achieved through the enactment of such legislation.

In 2001, the NTA is the only national legislation that has since been enacted to protect Indigenous people's relationship to land. It is ironic then, that when Indigenous peoples have complained about the inadequacies of the NTA to protect Indigenous heritage, the response has been that heritage protection should be achieved through specifically targeted legislation, rather than through a comprehensive land rights protection scheme.

Protection of Indigenous heritage through native title

The promise of native title was that the protection of Indigenous culture would be rescued from the swings and roundabouts of successive governments in giving or withdrawing their support to heritage legislation and subsequent amendments. Native title is a legal right comparable to any other interest in land. Native title has its origins in the culture and traditions of Indigenous people. That is what gives the title its content. It follows that Indigenous heritage, as a subset of Indigenous culture, is included in the concept of native title, and capable of being protected in the same way that other common law titles to land are protected.

Moreover, positioning heritage protection with the laws that protect Indigenous title to land better reflects the centrality of land to the vitality and survival of Indigenous heritage and culture. The principles in relation to Indigenous heritage identified in the Daes report support this positioning. A recent United Nations



report prepared by the Special Rapporteur Miguel Alfonso Martinez, entitled *Study on treaties, agreements and other constructive arrangements between States and indigenous populations*,¹⁵ places similar weight on the relationship of Indigenous people with their land.

Owing to their special relationship, spiritual and material, with their lands, the Special Rapporteur believes that very little or no progress can be made in this regard without tackling, solving and redressing – in a way acceptable to the indigenous peoples concerned – the question of their uninterrupted dispossession of this unique resource, vital to their lives and survival.¹⁶

Common law and legislative developments in relation to native title have not held true to the promise held out by the recognition of native title. At common law, native title has been determined to be inherently weak and inferior, making it vulnerable to extinguishment. Extinguishment has also been effected through amendments to the future act provisions of the NTA. The armoury of procedural rights under the original NTA (such as the right to negotiate) that protected native title from destruction or impairment as a result of commercial or government developments was similarly eroded by the amendments to the NTA. Furthermore, there has not yet been any definitive recognition that native title may include a right to “maintain, protect and prevent the misuse of cultural knowledge”¹⁷ or a right to control cultural property.

The common law protection of Indigenous heritage

The common law approach to native title applications is to delineate two issues for determination. First, the applicants must prove that they continue to acknowledge the laws and customs based on the traditions of the clan group. If the claimants’ connection to the traditions and customs of their forebears is established, then the court may determine whether the grant of tenures over the history of the claimed land since sovereignty has resulted in the extinguishment of native title.

The emergence of an approach to native title that characterises native title as a bundle of rights has the capacity to affect the outcome of these two lines of inquiry. In Chapters 2 and 3, I discuss the effect of the ‘bundle of rights’ conceptualisation of native title in relation to the question of extinguishment. Of particular note is the majority decision of Beaumont and von Doussa JJ in the *Muriuwung Gajerrong* case¹⁸ which, if upheld by the High Court,¹⁹ will confirm the total and permanent extinguishment of native title where land is, or has been, subject to:

- enclosed or improved pastoral leases²⁰ in Western Australia (and in jurisdictions that have similar legislative provisions in relation to pastoral

15 Martinez, M.A., *Study on treaties and other constructive arrangements between States and indigenous populations*, Final Report, E/CN.4/Sub.2/1999/20, 22 June 1999.

16 Martinez, *ibid*, para 252.

17 *Western Australia and Ors v Ward and Ors* (2000) 170 ALR 159 (Muriuwung Gajerrong case).

18 *ibid*.

19 The appeal will be heard by the High Court on 6-16 March 2001.

20 *Ward, op cit*, p242.



leases); and

- mining leases granted in Western Australia under the *Mining Act 1978* (WA) and Regulations²¹ (and in jurisdictions that have similar legislative provisions in relation to mining leases).

The bundle of rights approach also limits what the courts will recognise as native title rights. In particular, it diminishes the value that the courts place on contemporary Indigenous culture. It fails to recognise that the practices which establish the applicants' connection to their culture are part of a broader system of rights of which particular practices are an emanation. Where only traditional practices are recognised as forming the content of native title and not the system of laws and traditions underlying those practices, then little flexibility is permitted in determining whether contemporary practices that seek to protect Indigenous heritage should be recognised and protected as part of native title.

The extent to which a bundle of rights approach limits the recognition of contemporary Aboriginal practices concerned with heritage protection is illustrated by the decision in the *Yorta Yorta* case.²² Recognition of native title is dependant upon proof that Indigenous people have maintained their traditional connection to land. In *Yorta Yorta* the trial judge interpreted the evidence of traditional connection very restrictively. The written records of an early squatter, Edward Curr, were heavily relied on to determine the traditional practices which constitute the content of native title. Of traditional burial practices, Curr wrote:

The Bangarang mode of burial had nothing remarkable about it. The dead were rolled up on their opossum-rugs, the knees being drawn up to the neck with strings, when the corpse was interred in a sitting posture, or on its side, generally in a sand-hill, in which a grave about four feet deep had been excavated. A sheet of bark was then placed over the corpse, the sand filled in, and a pile of logs about seven feet long and two feet high was raised over all. Round about the tomb it was usual to make a path, and not unfrequently a spear, surmounted by a plume of emu feathers, stuck at the head of the mound, marked the spot where rested the remains of the departed. Women were interred with less ceremony.²³

Having established from Curr's writings some of the individual practices of the original inhabitants, the court noted that these same practices are not observed today in the same form.

In relation to the claim for recognition of the right to carry out burial ceremonies on the claim area, a similar logic was applied:

There can be no question about the importance of the returning of the remains to the appropriate country but the modern practices associated with their reburial are not part of the traditional laws and customs handed down from the original inhabitants.²⁴

The court further rejected the claim that the contemporary practice of protecting sites of significance, such as mounds, middens and scarred trees, should be

21 *Ward, op cit*, pp296, 301 & 302.

22 *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria* (Unreported, Federal Court of Australia) [1998] 1606 FCA, 18 December 1998, Olney J.

23 *ibid*, para 116.

24 *ibid*, para 124.



recognised as a native title right. His honour reasoned that these sites were of no significance to the original inhabitants 'other than for their utilitarian value, nor [did] traditional law or custom require them to be preserved'.²⁵

The trial judge thus refused to recognise traditional laws and customs unless they replicated the observed practices of the original inhabitants. This restriction of what is regarded as 'traditional connection' prevents native title from protecting practices that, although differing from the practices of the original inhabitants, develop from those practices and seek to preserve and protect the past. This restriction on what may be recognised as native title means that native title protection cannot extend to heritage protection.

Protection of Indigenous heritage in the NTA

The capacity of the NTA to protect Indigenous culture is limited in three ways.

- The extinguishment of native title through the confirmation provisions in Division 2B of Part 2 of the amended NTA;
- The denial and erosion of procedural rights by the amendments to the NTA. The amendments to the NTA have substantially reduced the procedural rights available to native title holders in relation to a broad range of future acts now covered by Division 3 of Part 2; and
- The reliance in the NTA upon inadequate protection provided in Commonwealth, State and Territory heritage legislation. Where the protection of Indigenous heritage and native title coincide under the NTA the protection of Indigenous heritage is diverted to inadequate Commonwealth, State and Territory Indigenous heritage legislation.

Limitations resulting from extinguishment of native title

The total and permanent extinguishment of native title through the confirmation provisions of the amended NTA (Division 2B of Part 2) means that a significant area of the traditional lands of Indigenous people cannot be protected under the concept of native title.

Section 47B provides that in certain circumstances native title claimants may apply for a determination on land where native title would otherwise have been extinguished because of previous Crown grants. The section will only apply where the area is presently vacant Crown land and is not subject, for example, to a reservation for a public or particular purpose or subject to a resumption order.²⁶ In addition, native title claimants must occupy the land at the time of application.²⁷ Section 47B thus provides some relief from the otherwise inevitable destruction of Indigenous land ownership and culture as a result of the extinguishment of native title.

The Committee on the Elimination of the all Forms of Racial Discrimination (the CERD Committee) considered the amendments to the NTA in March 1999 and again in March 2000 and heard the government's argument that the confirmation provisions merely reflect the position of native title at common law. This

25 *ibid*, para 122.

26 NTA s 47B(1)(a) & (b).

27 NTA s 47B(1)(9c).



justification for the provisions was unacceptable to the Committee. As the Australian Country Rapporteur noted:

Since...European settlement...the native land rights of Aboriginal peoples have been systematically undermined...[terra nullius] completely discounted the cultural value of the Aborigines' traditional and complex land distribution system...

As defined by the High Court in the *Mabo* decision, native title is a vulnerable property right, it is inferior to sovereign title, which has the power to extinguish native title without notice, consent or compensation...

... Because much of the Government's argument is that its actions have been justified because they meet the standard of the common law, it is important to note that the common law itself is racially discriminatory.²⁸

The CERD Committee recognises that as a result of both the unique nature of Indigenous property rights, linked as they are to cultural and spiritual practices, and the historical disadvantage and dispossession experienced by Indigenous people native title must be recognised and protected as part of Australia's commitment to equality.

In its recent consideration of Canada's periodic report to it, the Human Rights Committee recommended that 'the practice of extinguishment of inherent aboriginal rights be abandoned as incompatible with Article 1 of the Covenant, [the right of self-determination]'.²⁹

The extinguishment of native title worked by the amendments to the NTA was strongly opposed by Indigenous people. Their capacity to protect immovable cultural property, traditional knowledge such as medical knowledge and genetic material, and cultural materials on land is profoundly impaired by any extinguishment of native title.

The denial and reduction of procedural rights by the amendments to the NTA³⁰

Under the original NTA future development on native title land was governed by the freehold test. Native title holders had the same protection as 'ordinary titleholders' holding freehold title in relation to developments on their land.³¹ In addition, native title holders had a right to negotiate in relation to mining proposals and compulsory acquisitions for the benefit of third parties.

Under the amended NTA the procedural protection provided by the freehold test has been greatly reduced. The freehold test now applies to onshore³² legislative acts³³ and to onshore non-legislative acts³⁴ except those provisions specifically enumerated. The freehold test has been greatly reduced as a result of the amendments to the NTA, and in particular by on-shore non-legislative acts discussed below.

28 McDougall, G., *Transcript of Australia's Hearing Before the CERD Committee*, FAIRA, CERD Transcript, 21-22, *op cit*, p4-5.

29 (1999) UN doc. CCPR/C/79/Add.105 para 8.

30 A further discussion of procedural rights under the amended NTA is at pp150-157 of this report.

31 The original NTA, s 23(6).

32 NTA, s 24MC.

33 NTA, ss 24MA & 24MB.

34 NTA, ss 24MB & 24MD.



The amendments to the NTA deny and reduce the procedural rights available to native title holders in relation to a broad range of future commercial or government developments on native title land. The relevant provisions are found in Division 3 of Part 2 of the NTA.

Denial of procedural rights

The amended NTA provides no procedural rights to native title holders in relation to a range of future primary production activities and acts giving effect to the renewal, re-grant, re-making or extension of certain leases, licences, permits or authorities. The effect of this denial of procedural rights is extensive, covering the agricultural land of Australia where native title continues to exist. In these instances, the protection of Indigenous heritage is left exclusively to Commonwealth, State and Territory legislative regimes of Indigenous heritage protection. The relevant sections of the NTA are:

- s 24GB: primary production activity³⁵ or associated activity (other than forest operations, horticultural activity or aquacultural activity or, where a non-exclusive pastoral lease is to be used agricultural purposes³⁶), on non-exclusive agricultural and non-exclusive pastoral leases granted on or before 23 December 1996;
- s 24IC: the renewal, re-grant, re-making or extension of leases, licences, permits or authorities granted on or before 23 December 1996, or a renewal re-grant etc under s 24IC or a lease etc created under s 24GB, 24GD, 24GE or 24HA.

Reduction of procedural rights

In relation to certain other government or commercial activities that may impair native title, the amendments to the NTA have reduced the procedural rights of native title holders from those available to holders of freehold title (the freehold test) to a mere right to be notified and a right to comment.

The procedural rights of native title holders are reduced to a right to comment in relation to the following acts:

- s 24GB: the exceptions (forest operations, horticultural activity or aquacultural activity or native title holders, where a non-exclusive pastoral lease is to be used agricultural purposes) to the total denial of procedural rights of native title holders where primary production activity or associated activity occur on non-exclusive agricultural and non-exclusive pastoral leases granted on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment;³⁷
- s 24GD: grazing on, or taking water from, areas adjoining or near to freehold estates, non-exclusive agricultural and non-exclusive pastoral leases granted on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment;³⁸

35 Defined in NTA, s 24GA.

36 NTA, s 24GB(9).

37 NTA, s 24GB(9).

38 NTA, s 24GD(6).



- s 24GE: cutting and removing timber and extracting and removing sand, gravel rocks, soil or other resources from non-exclusive agricultural and non-exclusive pastoral leases granted on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment;³⁹
- s 24HA: the management and regulation (including through the grant of leases, licences and permits) of surface and subterranean water, living aquatic resources and airspace attract, for native title holders, a right to be notified and a right to comment;⁴⁰
- s 24IB and s 24ID: the grant of freehold estate or the right of exclusive possession over land or waters pursuant to a right created by an act on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment;⁴¹
- s 24JA and s 24JB: the construction or establishment of public works on land reserved, proclaimed, dedicated etc for a particular purpose on or before 23 December 1996 or on leases granted to a statutory authority of the Commonwealth, State or Territory on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment;⁴² and
- s 24JA and s 24JB: the creation of a plan of management for land reserved, proclaimed, dedicated etc. for a particular purpose on or before 23 December 1996 or for leases granted to a statutory authority of the Commonwealth, State or Territory on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment.⁴³

In addition, through the introduction of s 24KA, the amended NTA modifies the procedural rights of native title holders available under the freehold test in relation to acts providing facilities for services to the public. Where the construction of public facilities⁴⁴ occurs on land covered by a non-exclusive agricultural or non-exclusive pastoral lease, the procedural rights of native title holders are the same as those of the lessee.⁴⁵ The procedural rights afforded to a lessee are unlikely to secure the protection of Indigenous heritage and again, the responsibility for the protection of Indigenous heritage will fall upon Commonwealth, State and Territory legislative regimes. This is recognised in s 24KA(1)(d), which requires that laws of the Commonwealth, a State or a Territory make provision in relation to the preservation or protection of significant Indigenous areas, or sites.

The effect of this reduction of procedural rights is extensive, effectively covering all the following kinds of lands and waters over which native title continues to exist: parts of Australian agricultural land, surface and subterranean water, airspace, reserved land, dedicated land and leases granted to statutory

39 NTA, s 24GE(1)(f).

40 NTA, s 24HA(7).

41 NTA, s 24ID(3).

42 NTA, s 24JB(6).

43 NTA, s 24JB(7).

44 Defined in the NTA, s 24KA(2).

45 NTA, s 24KA(7)(a).



authorities. The right to comment is unlikely to secure the protection of Indigenous heritage, particularly where the decision maker is free to ascribe minimal weight to such comments. In these instances, the responsibility for the protection of Indigenous heritage will fall upon Commonwealth, State and Territory heritage legislation.

Judicial interpretation of procedural rights under the NTA

The right to comment has been considered recently in *Harris v Great Barrier Reef Marine Park Authority (Harris)*.⁴⁶ The full Federal Court held that native title claimants need only be given general notice of the areas to be affected and the activities to be conducted pursuant to the proposed future act. Nevertheless, the native title parties need not be notified of each specific permit, as it would be sufficient to notify the registered native title claimants that the Authority '...proposes to grant an unspecified number of permits of a particular class for access to the area defined'.⁴⁷ The court stated that the opportunity to comment is *not* 'a right to participate in the decision whether to issue the permit or a right that entitles the recipients to seek information from the decision-maker necessary to satisfy those interests about matters of concern to them'.⁴⁸ Furthermore, the 'opportunity to comment' provisions place no obligation on the decision maker to 'make any particular use of the information provided by way of comment or to act in a way that will ensure that no harm is done to native title interests or that such harm is minimised'.⁴⁹

In *Lardil Kaiadilt, Yangkaal & Ganagalidda v State of Queensland*⁵⁰ a severely restricted interpretation of 'future act' by Cooper J. has meant that where procedural rights of native title holders or claimants are disregarded by decision-makers, the decision will nevertheless be valid. The court held that an act is only defined as a future act if it 'affects' native title. On this reasoning, an act cannot 'affect' native title until there is a native title determination. Native title claimants whose rights have not been determined by a court cannot enforce the prescribed procedural rights to prevent a government body or authority from proceeding to carry out the activity. A subsequent native title determination will not affect the validity of the future act, even though the procedural rights of Indigenous people were ignored.

The amendments to the NTA have resulted in reduced procedural rights in relation to future development of the land. Judicial interpretation of the procedural rights that are available has confirmed their inadequacy. The human rights implications of these amendments and their interpretation by the courts are discussed in Chapter 5 at page 151.

46 Unreported, Federal Court of Australia, [2000] FCA 603 (11 May 2000), per Heerey, Drummond and Emmet J.J.

47 paragraph 45.

48 paragraph 38.

49 paragraph 51.

50 Unreported, Federal Court of Australia [1999] FCA 1633, 24 November 1999, Cooper J.



The reliance in the NTA upon inadequate protection provided in Commonwealth, State and Territory heritage legislation

As indicated above, the recognition and protection of native title could have had the effect of locating the protection of Indigenous heritage with that which provides its life blood, the relationship of Indigenous people to their land. Instead the Act has expressly excluded heritage protection preferring instead to hive it off to targeted, albeit inadequate, heritage legislation.

Freehold Test

In the previous section it was shown how amendments to the NTA diminished the protection available to Indigenous culture and thus Indigenous heritage by removing or reducing the application of the freehold test. Even where the freehold test does provide procedural protection to native title, this may not be adequate to protect the unique nature of native title, particularly its cultural, spiritual and social qualities. Rather than incorporate processes dealing specifically with this issue into the NTA, Parliament deferred the responsibility for the protection of Indigenous heritage to other Commonwealth, State or Territory legislation. Paragraph 24MB(1)(c) requires:

- (c) a law of the Commonwealth, a State or a Territory makes provision in relation to the preservation or protection of areas, or sites, that may be:
 - (i) in the area to which the act relates; and
 - (ii) of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions.

The very general terms of s 24MB(1)(c), 'a law of the Commonwealth, a State or a Territory makes provision in relation to the preservation or protection of areas, or sites', may ultimately require interpretation by the judiciary, but the Commonwealth appears to have adopted the view that so long as heritage protection is provided for in a law of the Commonwealth, State or Territory, there is no further inquiry as to its adequacy in protecting Indigenous heritage.

In the case of an act consisting of the creation or variation of a right to mine for opals or gems, s 24MB(2) extends the freehold test to circumstances where the act could not be done if the native title holders instead held ordinary title to the area concerned. In order to satisfy the s 24MB(2) variant of the freehold test, s 24MB(2)(d), which is identical to 24MB(1)(c), must be satisfied. This places even more reliance upon Commonwealth, State or Territory legislation for the protection of Indigenous heritage.

The NTA has left the protection of the unique nature of native title to ineffective Commonwealth, State or Territory heritage legislation. Yet it is the responsibility of the Commonwealth to ensure the standards established for the protection of Indigenous heritage conform to human rights standards.



The right to negotiate

The right to negotiate⁵¹ is designed to provide native title claimants or native title holders with the most comprehensive procedural rights where mining rights and certain compulsory acquisitions of native title rights are proposed.

Section 39 of the NTA is a pivotal provision in the right to negotiate process. When negotiations under s 31(1)(b) have not resulted in an agreement, s 39 provides criteria upon which the arbitral body can determine whether an act may or may not be done and, if it may be done, whether conditions should be imposed.

Subparagraph 39(1)(a)(v) provides the criterion dealing with the protection of Indigenous heritage:

- (1) In making its determination, the arbitral body must take into account the following:
 - (a) the effect of the act on: ...
 - (v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions.

To date, the determinations of the National Native Title Tribunal (NNTT) in its capacity as an arbitral body (where the parties have not consented to the determination) are not encouraging where the protection of Indigenous heritage is concerned. In Western Australia, the grant of a mining lease or exploration licence contains an endorsement drawing the grantee party's attention to the provisions of the *Aboriginal Heritage Act 1972* (WA). The NNTT has tended to defer the protection of Indigenous heritage to the grant condition imposed by the Government leaving it to be dealt with under the *Aboriginal Heritage Act 1972* (WA) and the Commonwealth Heritage Act. The reasoning behind this approach is stated in the *Waljen* decision:⁵²

The Aboriginal Heritage Act has been considered and explained in Tribunal determinations relating to the expedited procedure... An endorsement drawing the lessee's attention to its provisions is included on all mining leases...

In earlier decisions, the Tribunal has found that generally, but not always, the protections offered by the Aboriginal Heritage Act are adequate to ensure that there is not likely to be the interference with sites referred to in s.237(b) on the basis of grantee parties acting lawfully...

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) also provides for the use of emergency and permanent declarations to protect significant Aboriginal areas which are under a threat of injury or desecration...

Each case will have to be considered on its merits depending on the evidence, but on the face of it, looking at this criterion alone, there is no reason for the Tribunal to conclude that this legislative regime would necessarily be ineffective in protecting sites.⁵³

51 NTA, Subdivision P of Division 3 of Part 2.

52 *State of Western Australia and Thomas & Ors (Waljen) and Austwhim Resources NL, Aurora Gold (WA) Ltd* (1996) 133 FLR 124; also located online at www.nntt.gov.au/determin.nsf/areal/homepage.

53 *ibid*, p209-211.



The NNTT has adopted this view despite its reservations about the *Aboriginal Heritage Act 1972* (WA) when considering objections to the expedited procedure under s 32 of the NTA. In making determinations as to whether the expedited procedures should apply to a grant under the *Mining Act 1978* (WA) the NNTT has consistently found that once the existence of a significant area or site on the area subject to the proposed grant is established, irrespective of the existence of the *Aboriginal Heritage Act 1972* (WA), the expedited procedure should not apply. The reasons for those decisions is the possible operation of section 18 of the *Aboriginal Heritage Act 1972* (Cth) which gives the minister and registrar of aboriginal sites the discretion to permit interference with areas or sites of significance.⁵⁴ This reasoning does not appear to have been as persuasive in NNTT decisions regarding s 39 of the NTA, such as in the matter of *Waljen*.

Alternative provision schemes

The amendments to the NTA permit States and Territories to remove the right to negotiate in relation to specific acts or areas and implement 'alternative provision schemes' which offer diminished rights to native title holders compared with those provided in the Commonwealth NTA. The alternative provision schemes are:

- an exploration, prospecting or fossicking scheme under s 26A;
- a gold or tin mining scheme under s 26B;
- the creation of an approved opal or gem mining exclusion area under s 26C;
- an exception to the right to negotiate scheme under s 43A.

Alternative provision schemes must comply with the freehold test.⁵⁵ In addition the Commonwealth minister is required to take into account the existence of a law of the Commonwealth, a State or a Territory that makes provision in relation to the preservation or protection of areas, or sites before approving the scheme.⁵⁶

The standards applying to the s26 schemes require only that Indigenous people be notified, heard and consulted (ss26A,26B) or that the minister will consider submissions made (s26C). Section 43A schemes reduce the rights of Indigenous people from a right to negotiate to a right to be notified, heard and consulted. These standards are well below those required for effective participation.

Included in the alternative provision schemes are provisions dealing with the protection of significant Indigenous areas or sites.

Before approving an exploration, prospecting or fossicking scheme under s 26A, the Commonwealth minister must take account of a number of matters, including the requirement in s 26A(7)(a):

54 See, for example, *Dann (No.2)(Unggumi Ngarinyin)/Western Australia/GPA Distributors*, (Unreported, NNTT) WO95/19, 10 June 1997, Sumner C.J. and *Brownley (Bibila Lungkutjarra People)/Western Australia/ Aberfoyle Resources Ltd.*, (Unreported, NNTT) WO98/907, 4 November 1999, Lane, Mrs P; both online at www.nntt.gov.au/determin.nsf/area/homepage

55 NTA, ss 26(2), 43(1) & 43A(1).

56 NTA, SS26A(1), 26B(1), 26C(2), and 43A(1)(b). The determination to approve is subject to disallowance by the Commonwealth Parliament – see NTA, s 214.



- (7) The matters are:
- (a) the protection and avoidance of any area or site, on the land or waters to which the native title rights and interests relate, of particular significance to the persons holding the native title in accordance with their traditional laws and customs.

An approved gold or tin mining scheme has an identical requirement in s 26B(8)(a).

The creation of an approved opal or gem mining exclusion area under s 26C requires that the State or Territory minister invites and considers submissions about processes for the identification and protection of significant indigenous areas or sites. Subsection 26C(5) states:

Third condition

- (5) The third condition is that, before making the request, the State Minister or Territory Minister:
 - (a) notified the public, and notified any registered native title bodies corporate, registered native title claimants and representative Aboriginal/Torres Strait Islander bodies in relation to any of the area, that he or she was intending to make the request in relation to the area; and
 - (b) invited submissions about the request, and in particular about the area covered by the request and about processes for the identification and protection of any area or site within that area of particular significance to native title holders in accordance with their traditional laws and customs; and
 - (c) considered any such submissions that were made.

Before the Commonwealth minister can make a determination under s 43A(1)(b) approving an alternative provision area scheme the minister must be satisfied that the scheme complies with s 43A(7). Subsection 43A(7) states:

- (7) For the purposes of paragraph (1)(b), the requirements of this subsection are complied with if, in the opinion of the Commonwealth Minister, a law of the Commonwealth, the State or the Territory provides, for the whole of the land or waters to which the alternative provisions relate, in relation to the preservation or protection of areas, or sites, that may be of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions.

On 27 April 1999 the Commonwealth Attorney-General determined under s 43A(1)(b) that three Northern Territory alternative provision schemes had complied with all the requirements of s 24MB(1)(c) and s 43A, including s 43A(7). This occurred despite the Indigenous concerns about the level of protection provided by Commonwealth and territory legislation for the protection of Indigenous heritage in the Northern Territory, under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) and the Heritage Act.⁵⁷

On 31 May 2000, the Commonwealth Attorney-General made 9 determinations⁵⁸ in relation to Queensland that schemes enacted pursuant to s 26A(1), 26B(1)

57 *Submission of the Central and Northern Land Councils pursuant to s 43A(3)(b) of the Native Title Act* dated 12 April 1999 pages 74-76.

58 A further four determinations under s 43(1)(b) of the *Native Title Act* were also made on that date.



and s 43A(1)(b) of the NTA complied with the legislative requirements of those sections, including requirements for the protection of significant Indigenous areas and sites in sections 24MB(1)(c), 24MB(2)(d), 26A(7)(a), 26B(8)(a) and 43A(7). The Queensland scheme included:

- three s 26A exploration schemes;
- two s 26B gold and tin mining schemes; and
- four s 43A schemes.

This occurred despite the Queensland Indigenous Working Group raising numerous and serious concerns with the minister about the level of protection of Indigenous heritage provided by Commonwealth and territory legislation, including the *Northern Territory Aboriginal Sacred Sites Act 1989* and the Heritage Act.⁵⁹ Indeed, the Queensland government acknowledged in 1999 that its primary legislation, the *Cultural Record Landscapes Queensland and Queensland Estate Act 1987* (Qld), was not adequate to protect Indigenous heritage. The Queensland government stated in a 1999 discussion paper:

The Queensland Government wishes to ensure that State legislation provides effectively for the protection of Aboriginal and Torres Strait Islander cultural heritage whilst providing a workable process for land use and development proposals. It is intended that the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* be repealed and replaced with new legislation.⁶⁰

Developments within the common law and amendments to the NTA have meant that the opportunity to re-frame the protection of Indigenous heritage within the broader protection of Indigenous peoples' culture and its special relationship with land has failed to eventuate. Accordingly the protection of Indigenous heritage continues to rely on specially targeted State and Commonwealth Heritage legislation.

The protection of Indigenous culture through heritage legislation

Protection of Indigenous heritage is a national responsibility that the Commonwealth has wide legislative powers to achieve. The Australian Constitution gives the Commonwealth the power to make special laws with respect to people of any race⁶¹ and to make laws with respect to copyright, patents of inventions and designs, and trade marks.⁶² The federal government is a signatory to numerous international instruments that require it to provide to Indigenous culture the same level of protection that is provided to non-Indigenous culture.

Widespread criticism of the effectiveness and appropriateness of the existing national framework of Indigenous heritage protection, and in particular the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the

59 *Comments to the Commonwealth Attorney-General Concerning the Lack of Proper Provision for the Protection of Indigenous Cultural Heritage in Queensland Native Title Legislation* dated January 2000.

60 Queensland's Indigenous Cultural Heritage Legislation Review: Draft Model for New Legislation p5.

61 The Constitution, s 51(xxvi).

62 The Constitution, s 51(xviii).



Commonwealth Heritage Act) led to a review of heritage protection by the Hon. Dr Elizabeth Evatt AC (the Evatt Report).⁶³

The Evatt Report was balanced and comprehensive – it was conducted over an eight month period, received nearly 70 submissions and was based on extensive consultations across Australia. As a result, Indigenous people throughout Australia largely support its recommendations.⁶⁴ The Evatt Report was also endorsed at the National Heritage Convention in August 1998, and a resolution stating that the government should adopt the recommendations of the Evatt Report in order to ensure the protection of Indigenous heritage was adopted.

In commissioning the Evatt Report, the federal government recognised the need to reform existing heritage legislation. However, the proposed reforms, enshrined in the *Aboriginal and Torres Strait Islander Heritage Protection Bill (No 2) 1998* (Heritage Bill) do not improve the level of protection currently available to Indigenous culture in Australia. Rather, the Bill proposes to devolve power and responsibility for Indigenous heritage to States and Territories without ensuring that State and Territory-based protective regimes will meet human rights standards.

The Heritage Bill was debated and substantially amended in the Senate on 26 November 1999⁶⁵ to ensure that it implemented the recommendations of the Evatt Report. It was returned to the House of Representatives on 9 December 1999. The government has rejected the substantive amendments, although it indicated during the Senate debate that it would consider the many concerns raised.

The inadequacies of the Commonwealth Heritage Act have resulted in three parliamentary reviews and a number of draft amendments but no action has yet been taken to give it the broad focus necessary to provide adequate protection to Indigenous culture and heritage. The Act's unworkability is demonstrated through the example of Hindmarsh Island, which cast Indigenous heritage into the political sphere and the courts.⁶⁶

The Special Rapporteur on the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, Mr Amor, made the following comments on heritage protection after visiting Australia in 1997.⁶⁷

63 Evatt, Dr Elizabeth, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Canberra, 22 August 1996.

64 See, for example, ATSIC, *Submission to Senate Legal and Constitutional (Legislation) Committee*, 12 February 1999, p15 and ATSIC Heritage Issues Paper www.atsic.org.au/default_ie2.asp (27 November 2000).

65 The Opposition and the Democrats jointly moved 179 amendments.

66 *Bropho v Tickner* (1993) 40 FCR 165; *Tickner v Bropho* (1993) 114 ALR 409; *Chapman & Others v Tickner & Others* (1995) 55 FCR 31; *Tickner & Others v Chapman & Others* (1995) 57 FCR 451; *State of Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 37 ALD 633; *Minister for Aboriginal and Torres Strait Islander Affairs v State of Western Australia* (1997) 149 ALR 78.

The qualifications of the person appointed by the Minister to report under s 10(1)(c): *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

67 Amor, A., *Report submitted by Mr Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1996/23 Addendum, visit to Australia*, 4 September 1997. UN Doc E/CN. 4/1998/6/Add.1.



Many different kinds of protection, both specific and general, direct and indirect, are given to the land and to sacred sites, including sacred objects, and therefore to their religious dimension. They take the form either of regional agreements and legislation ensuring the protection and management of Aboriginal lands or Commonwealth and State and Territory laws on property and the cultural heritage. These forms of protection are the expression of an official policy in favour of Aboriginals, based on well-developed legislation. There are still a number of difficulties, however, related to loopholes and shortcomings in the laws and to interference with their objective, mainly owing to conflicts of interest.

Regarding the loopholes and shortcomings in the law, in the first place and in general, there is the problem of its complexity, particularly with respect to relations between Federal and State systems, that is, between federal Laws, which are few and protective, and State and Territory laws, which are many, uneven in the degree of protection they afford and sometimes inadequate in relation to Commonwealth standards.

One criticism which is often put forward is the inability of these laws derived from a Western legal system to take account of Aboriginal values. A basic difficulty arises from the fact that, under some laws, Aboriginals have to prove the religious significance of sites and their importance; partly this is difficult owing to different approaches by different Aboriginal groups to sacred sites and to the fact that knowledge of the sites is restricted to a few gender-specific individuals and partly it conflicts with some Aboriginal values and customs, including the importance given to secrecy...⁶⁸

The theoretical difficulties with the heritage legislation noted by Mr Armor can be summarised as inadequate protection, unworkability and ineffective participation by Indigenous people in the legislation that affects them.

From its enactment in 1984 until June 1999, approximately 200 applications have been lodged under the Commonwealth Heritage Act. Until December 1998 the Minister for Aboriginal and Torres Strait Islander Affairs was responsible for administering the Heritage Act assisted by the Aboriginal and Torres Strait Islander Commission. This responsibility was then transferred to the Minister for the Environment who administers the Act through Environment Australia.

The outcomes in terms of ministerial declarations of protection over the fifteen years of the Act's operation are as follows:

- eight declarations under s 10 protecting objects of significance to Indigenous people;
- five emergency (temporary) declarations under s 9 protecting significant places; and
- two declarations providing long term protection to significant Indigenous sites under s 10 of the Heritage Act, Junction Waterhole (*Niltye/Tnyere-Akerte*), Alice Springs and Boobera Lagoon, Moree, NSW.⁶⁹ The order protecting Boobera Lagoon was scheduled to come into effect on 1 July 2000. The Minister for the Environment deferred the declaration of the protection order until July 2002 to allow water skiers a further two years to find an alternative site for their activities.

68 Paras 91, 92, 93.

69 See discussion of Boobera Lagoon at pp120-121.



The local Aboriginal community has been actively pursuing protection of Boobera Lagoon through available heritage protection measures for over 25 years. They have consistently sought to restrict recreational and other use of the area. Boobera Lagoon was officially catalogued by the National Parks and Wildlife Service in 1977 but its significance to Aborigines has been acknowledged by non-Aborigines at least since 1899 when it was recorded by a government surveyor. The site is significant chiefly because of the belief that the local Rainbow Serpent lives in the Lagoon. The area of significance is the entire lagoon and the land bordering it.

The importance of Boobera Lagoon was considered by the Human Rights and Equal Opportunity Commission in *The Toomelah Report: Report on the Problems and Needs of Aborigines Living on the NSW-Queensland Border*.⁷⁰

In 1996 Hal Wootten AC QC articulated the significance of Boobera Lagoon to the Kamilaroi people in his Report to the Minister for Aboriginal Affairs.⁷¹ After considering the matters raised by the Report, the minister was satisfied that Boobera Lagoon is a significant Aboriginal area and is under threat of injury or desecration.⁷²

As a result of the minister's delay in issuing a protection order and the Lagoon being treated as a recreation site, local Aboriginal people are prevented from fulfilling their role as custodians of the area. This represents a loss for the Aboriginal community and the wider Australian community.

In order to provide water skiers and other recreational users with an opportunity to find an alternative site the protection order has been delayed for a further two years. The interests of recreational users have been preferred to the human right of Indigenous people to have their culture protected.

Decisions such as those in relation to Boobera Lagoon reflect the inadequacy of the Commonwealth Heritage Act as a means of protecting Indigenous heritage. Yet, as pointed out above, amendments to the NTA have meant that Indigenous people are reliant on targeted heritage legislation, including the Commonwealth Heritage Act, as the major source of heritage protection. It is important therefore that deficiencies in the Commonwealth Heritage Act are identified and remedied consistently with international human rights standards.

The Evatt Report on the Commonwealth Heritage Act

The Evatt Report⁷³ identified many deficiencies in the Commonwealth Heritage Act which can be characterised in terms of its failure to meet international standards and obligations with respect to the protection of Indigenous heritage and their right to self-determination.

70 Einfield, Hon. Justice Marcus, Killen, Hon. Sir James & Mundine, Kaye, *The Toomelah Report*, Human Rights and Equal Opportunity Commission, Sydney, June 1988.

71 Hal Wootten, A.C. Q.C., *Report to Minister for Aboriginal Affairs re Boobera Lagoon*, April 1996.

72 The Commonwealth Heritage Act, s 10(1)(b).

73 *op cit*, para 2.30, p14.



Protection of Indigenous heritage

- *Inadequate State/Territory legislation.* The Act does not operate as it was intended – as a last resort – because its effectiveness is compromised by inadequate protection at the State and Territory level. Consequently, the Act is often required to provide primary site protection rather than ‘last resort’ back-up to legislation in the States and Territories.⁷⁴ This has been compounded by State and Territory opposition to intervention by the Commonwealth which has contributed to the low level of protection being accorded under the Act.⁷⁵
- *Delay.* The process under the Act for the Commonwealth minister to consult with State or Territory ministers – a process which excludes the applicant and other interested persons – is unnecessarily long, placing Indigenous heritage at risk where no interim protection is in place.⁷⁶
- *Delay and onerous requirements:* A lack of adequate procedures in the Act has contributed to delays, litigation and higher costs for the applicants and other affected parties. As a result of successful legal challenges of the reporting process,⁷⁷ strict requirements on the reporting process were imposed. These requirements have been burdensome and costly for everyone involved, and the outcomes have made the Act unworkable when considered against its original intentions.⁷⁸
- *Delay and Failure to Provide Effective Protection:* The operation of the Act was subject to unreasonable delay in responding to and deciding applications for protection, causing concern from Indigenous people (that some sites for which protection was sought were damaged as a result) and from developers generally.⁷⁹
- *Lack of Confidentiality:* Indigenous people are concerned that the Act does not protect confidential information which may be communicated during the reporting process from disclosure.⁸⁰ This has been borne out in *Chapman v Luminis Pty Ltd [No 2]*⁸¹ and is a disincentive for Indigenous people to use the Act.
- *Incomplete Protection:* The Act fails to cover all aspects of Indigenous heritage important to Aboriginal people such as intellectual property⁸² and the regulation of the use and sale of significant Indigenous objects.

74 *op cit*, para 2.31, p14 & 15.

75 *op cit*, para 2.31, p14 & 15.

76 See, generally, *Bropho v Tickner* (1993) 40 FCR 165; *Tickner v Bropho* (1993) 114 ALR 409; *Chapman & Others v Tickner & Others* (1995) 55 FCR 31; *Tickner & Others v Chapman & Others* (1995) 57 FCR 451; *State of Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 37ALD 633; *Minister for Aboriginal and Torres Strait Islander Affairs v State of Western Australia* (1997) 149 ALR 78.

77 *op cit*, para 2.26, p13.

78 *op cit*, para 2.27 & 2.28, p13 & 14.

79 *op cit*, para 2.34, p15 & 16.

80 Unreported, Federal Court of Australia [2000] FCA 1010, 28 July 2000, von Doussa J.

81 Except in Part IIA, which applies only in Victoria.

82 *Wamba Wamba Local Aboriginal Land Council v Minister Administering the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (1989) 86 ALR 161, 170.



Self-determination

- *Unsatisfactory Model for Decision-Making.* So long as the Commonwealth minister considers the matters to which s 10(1)(b) of the Act directs attention, she or he is not obliged to act, even if an area is of significance to Aboriginal people.⁸³
- The Act fails to sufficiently include Indigenous people in decisions relating to protection or in the administration of the Act.⁸⁴
- The Evatt Report also identified the failure to provide for Indigenous involvement in decision making and policy formulation on heritage protection issues as contrary to the requirements imposed by Article 27 of the ICCPR, and recommended the situation be remedied by establishing an Aboriginal Cultural Heritage Advisory Council to provide advice on the operation of the Act and relevant processes.⁸⁵

Recommendations in the Evatt Report: Commonwealth processes

The Evatt Report makes numerous recommendations in relation to the scope, functions and processes under the Commonwealth Heritage Act in order to address the above deficiencies. The comprehensive recommendations seek significant changes to the legislation in the following areas:

Protection of Indigenous Heritage

- The Commonwealth Act and minimum standards: recommendations deal with protection of information from disclosure, information protocols, exemption from the *Freedom of Information Act 1982* (Cth), exemptions from various Court procedures, public interest immunity, access for protection of heritage, provision of penalties;
- Making the Act more effective: recommendations deal with improving the process for determining whether to protect indigenous heritage, ensuring protection is effective, emergency and interim protection, the obligation to determine applications for the protection, the process for making and recording applications for protection, procedural fairness, consultation with State or Territory Ministers, the processes to be employed by a heritage protection agency and improving accountability;⁸⁶
- Protecting Aboriginal objects: recommendations deal with the enactment of national, uniform laws to regulate the sale of significant indigenous objects, agreements in relation to objects, the extension of the definition of objects to include records and the repatriation of objects.⁸⁷

83 *op cit*, para 2.37, p16 & 17.

84 *op cit*, recommendation 11.16, p223.

85 *op cit*, recommendations 10.1-10.48, pp145-205.

86 *op cit*, recommendations 12.1-12.4, pp224-233.

87 *op cit*, recommendations 8.1-8.9, pp109-126.



Self-Determination

- Deciding significance is an Aboriginal issue; the report makes recommendations on the basis for assessment of significance, the scope of reliance on State or Territory assessment, referral of applications to accredited State or Territory processes, establishing an Aboriginal cultural heritage committee; separating the decision in relation to the significance of an area or object from the decision to protect, the use of Aboriginal information in the assessment of significance, binding the minister to an assessment of significance, resolving dissent between Aboriginal groups, and the assessment of the threat upon Indigenous heritage;⁸⁸
- Encouraging agreement: the report recommends mediation to deal with conflicts over Indigenous heritage issues;⁸⁹
- An Aboriginal heritage protection agency and Aboriginal cultural heritage advisory council: the report recommends the creation, composition and functions of a new Commonwealth Heritage Protection Agency and the creation and composition and functions of an Aboriginal cultural heritage advisory council.⁹⁰

Reforming State and Territory heritage protection legislation to ensure effective interaction with a reformed Commonwealth Act

The Evatt Report acknowledges that primary responsibility for heritage protection must operate at the State and Territory level. The role of the Commonwealth is to ensure acceptable State and Territory levels of protection by providing protection of last resort when the State and Territory protection regimes fail to deliver the required standard of protection. This could only be achieved through effective interaction between a reformed Commonwealth Act and State and Territory heritage protection legislation.⁹¹

The success of the interaction would be totally reliant upon reforming State and Territory heritage protection legislation⁹² to achieve minimum standards of State and Territory heritage protection in key areas⁹³ and ensure that the mechanism for determining the significance of an area or object is both independent and based upon views, laws and customs of Indigenous people.⁹⁴ Failure to achieve an effective interaction due to poor standards or improper implementation of State and Territory heritage protection legislation would continue to place the

88 *op cit*, recommendations 9.1-9.8, pp127-144.

89 *op cit*, recommendations 11.1-11.17, pp206-223.

90 *op cit*, Chapter 5, pp60-74.

91 *op cit*, recommendations 5.1, p70.

92 *op cit*, recommendations 5.2 p70 & 5.3, p73.

93 *op cit*, recommendation 5.4, p73.

94 *op cit*, paragraphs 5.11 & 5.12 (p64 & 65).



Commonwealth Act in the unintended and unsuited role of providing a primary level of protection as occurs, for example, in Queensland and Western Australia.⁹⁵

The Aboriginal and Torres Strait Islander Heritage Protection Bill 1998

While the recommendations of the Evatt Report have not been implemented, measures taken by the Commonwealth over the past four years have reinforced its central view – that the national framework of Indigenous heritage protection legislation requires immediate attention if Indigenous heritage is to be effectively protected in Australia.

Partly as a response to the Evatt Report, the federal government initiated an overhaul of the Commonwealth Heritage Act on 17 December 1996. The government presented the *Aboriginal and Torres Strait Islander Heritage Protection Bill (No 1) 1998* in the House of Representative on 2 April 1998. That Bill lapsed on 3 October 1998 and on 12 November 1998 an amended Bill, the *Aboriginal and Torres Strait Islander Heritage Protection Bill (No 2) 1998* ('Heritage Bill'), was introduced and passed by the House of Representatives. The Heritage Bill was substantially amended by the opposition parties in the Senate on 26 November 1999.

Two Commonwealth parliamentary committees, the Parliamentary Joint Committee on Native Title and the Indigenous Land Fund and the Senate Legal and Constitutional (Legislation) Committee have, on 2 April 1998, 1 June 1998, and 31 March 1999 respectively, considered the Evatt Report. On each occasion, the Committee divided with the government majority making the recommendations of the Committee and the Opposition and the Democrats producing a minority report demanding adherence to the Evatt Report.

The end result of this long process is that no amendments have been made to the Commonwealth Heritage Act. State and Territory Indigenous heritage protection legislation also continues to operate without change. Finally, the legislation that is supposed to address these issues, the Heritage Bill, has stalled because it is unsatisfactory in many respects.

The Heritage Bill weakens the inadequate protection currently available from the Commonwealth for areas and objects of significance to Indigenous people. It provides for the accreditation of State or Territory Indigenous heritage protection legislation, which under the proposed regime, will be responsible for all Indigenous heritage matters other than those 'in the national interest'. An applicant must exhaust all the remedies of a State or Territory regime, irrespective of whether that regime is accredited or not, before applying for 'national interest' status under the Commonwealth legislation.

95 Where an accredited State or Territory heritage regime (AR) is in operation, the Bill imposes a 'national interest' test upon:

- the acceptance of an application for a long term protection order (LPO) (s 39(2));
- the making of an emergency protection order (EPO) (s 62(3)(c));
- the making of an interim protection order (IPO) (s 63(2)(b)(iii)); and
- the making of an LPO (s 45).

An accredited State and Territory heritage regime is one that complies with the minimum standards set out in s 26 of the Bill and is the subject of a declaration under s 25(1).



Improving the effectiveness and efficiency of the Commonwealth Heritage Act is essential if Australia is to meet its human rights obligations. This is particularly so with the failure of native title to provide adequate protection to Indigenous culture. My concerns in relation to the proposed reform of the Commonwealth Heritage Act, as encapsulated in the Bill, can be seen in terms of the human rights principles that firstly require adequate protection of Indigenous culture and secondly effective participation of Indigenous people in the decisions made in relation to their culture.

Protection of Indigenous Heritage

- The national interest test is not an adequate safety net for ineffective State legislation;

'National interest' is the threshold test for protection of Indigenous heritage under the Commonwealth Act where protection is not provided for under an accredited State or Territory Act.⁹⁶ However, 'national interest' is not defined in the Bill and the Explanatory Memorandum to the Bill states that "... the circumstances in which protection would be in the national interest are likely to be quite rare".⁹⁷

The failure of the Bill to provide for a definition of 'national interest' that includes protection of areas and objects of significance to Indigenous people considerably weakens the protection available.

The Commonwealth's role in heritage protection is essential. It is the Commonwealth's responsibility to ensure that heritage protection in Australia is sufficient to meet its obligations under ICCPR to ensure protection of Indigenous peoples rights to self-determination, protection, equality, effective participation and the right to freedom of religious expression. Where a breach of human rights standards arises because of inadequate State and Territory standards, as is the case in relation to heritage protection, the Commonwealth is responsible to ensure that the international requirements are met. The Human Rights Committee stated in its Concluding Observations in July 2000:

The Committee considers that political arrangements between the Commonwealth Government and the governments of states or territories may not condone restrictions on Covenant rights that are not permitted under the Covenant.⁹⁸

- The minimum standards for State and Territory legislation are inadequate; Land management has traditionally been the legislative and administrative sphere of State and Territory, rather than Commonwealth, governments. Indigenous heritage protection is, however, not simply a land management issue. The New South Wales Aboriginal Land Council put it this way:

96 Commonwealth of Australia, Explanatory Memorandum: *Aboriginal and Torres Strait Islander Heritage Protection Bill (No.2)* 1998, cl 45, p15.

97 *op cit*, para 14.

98 Mr Warwick Robert Baird, *Hansard*, Senate, 19 February 1999, p56.



...Aboriginal heritage is not just a land management issue; it is the protection of a people's cultural heritage. That is more than just land management. That needs to be borne in mind in dealing with this Bill. The next point is that NSWALC has no problem and in fact supports state involvement in Aboriginal heritage protection. However, it needs to be ensured by the Commonwealth that the standards are sufficiently high, sufficiently prescriptive and sufficiently rigorous so that it actually takes place. That is part of the Commonwealth fulfilling its obligations to Aboriginal people across the country.⁹⁹

An accreditation standards framework was developed in the Evatt Report with a view to providing uniformity across the country on key aspects of State and Territory Indigenous heritage protection legislation. The minimum standards contained in s 26(1) of the Bill however are drafted in a manner that is too general to clearly establish uniform standards. The Heritage Bill currently lacks the following minimum standards in relation to the laws of a State or Territory seeking accreditation:

- (a) Provision for access for Indigenous persons to exercise responsibilities in relation to significant Indigenous areas and objects.
- (b) Provision for the establishment of an independent body in accordance with the recommendation of the Evatt Report,¹⁰⁰ to assess the significance of areas and objects. The separation of the function of assessment of cultural significance, that is, assessment of the factual issues from the exercise of ministerial discretion is essential to ensure unbiased decisions.¹⁰¹ This assessment should be conducted by an independent body with substantial Indigenous control.
- (c) Provision for the notification of Indigenous heritage on certificates of title covered by a heritage agreement. In accordance with the principle of blanket protection for Indigenous heritage, all title holders should be notified of heritage sites on parcels of land. This is a necessary requirement in order to establish a satisfactory system of prosecution and defence for violation of heritage protection.
- (d) Provision for emergency and/or interim protection to prevent harm to significant areas or objects whilst a matter is processed.

⁹⁹ Evatt Report, *op cit*, para 6.19 & recommendation 6.3, pp83 & 84.

¹⁰⁰ Hansard, Mr Warwick Robert Baird, Independent Legal Adviser, New South Wales Aboriginal Land Council, Oral submission to Senate and Legal Constitutional Legislation Committee, Reference: Aboriginal and Torres Strait Islander Heritage Protection Bill 1998, Friday 19 February 1999, page 58.

¹⁰¹ Evatt Report, *op cit*, recommendation 11.13, p223.



- (e) Provision for:
- requiring reasons be provided to the Indigenous applicants in relation to a decision to remove or otherwise affect heritage protection and that those reasons will be taken to form part of the record; and
 - judicial review by Indigenous applicants is not precluded from decisions that remove or otherwise affect heritage protection; and
 - that decision makers give substantial weight to the particular nature of Indigenous heritage and the importance of protecting significant areas and objects when deciding to remove or otherwise affect heritage protection.
- (f) Provision for the monitoring of the implementation and performance of accredited regimes on a triennial basis as an additional basis for the revocation or variation of accreditation of State and Territory regimes under s 27. The standard by which the implementation and effectiveness of an accredited state or territory regime is to be determined must be its record of effective protection of significant Indigenous areas and objects over the previous 3 years. Advice to the minister should culminate in a positive decision regarding the ongoing accreditation of a state or territory regime. The monitoring and review process should also provide for the notification of all interested parties and the receipt of their submissions.
- The provision of interim and emergency protection orders are insufficient to provide adequate protection.

The following concerns arise in relation to the making of an Interim Protection Order (IPO) under the Bill:

- (a) There are no guidelines for the decision to grant an IPO under the Bill. It appears to be entirely a matter for the minister upon the lodgement of an application for an IPO;
- (b) The drafting of s 63(2)(b) raises the question as to whether information supplied separately from the originating application can be taken into account. The requirement that such information should not be taken into account should be placed beyond doubt;
- (c) Where interim protection is sought, it is usual that the standard applied to obtaining long-term protection is reduced to one a *prima facie* level. This is envisaged, but not necessarily achieved, by s 63(2)(b) of the Bill. Paragraph 63(2)(b) requires that 'the Minister is satisfied that the application, on its face, established' the matters in subparagraphs (i)-(iii). That is, the significance of the area or object, that the area or object is under serious threat of injury or desecration and, that the protection of the area is in the national interest. This test does not appear to adopt the usual principles of law where interim relief is sought, namely a reduction of the standard of proof to the *prima facie* level. Instead, the drafting requires that the matters in subparagraphs (i)-(iii) be 'established'



by the application – a seemingly impossible task at that stage. By way of contrast, it is sufficient for an IPO that the Director is ‘satisfied’ that the protection of an area or object is in the national interest.

In relation to the making of an Emergency Protection Order (EPO) under the Bill, section 62 currently requires information to be supplied separately from the originating application, leaving the process open to the involvement of non-applicant parties and consequential conflict and litigation. The amended definition of the originating application provides a simple mechanism for the utilisation of the rejected application in section 62. This will avoid possible challenges from other interested parties seeking to provide information and allows parity between sections 62 and 63 to be secured.

- the requirement to exhaust remedies creates serious or fatal delays for Indigenous applicants.

Under the Bill it is necessary to exhaust state or territory remedies before an application for a heritage protection order can be made, even where a state or territory regime is not accredited. Consequently Indigenous applicants waste valuable time and resources exhausting the ‘remedies’ of an unsatisfactory state or territory regime, risking the desecration of a significant area or object while this is occurring.

Self-determination

- the confidentiality of cultural information is not guaranteed. Subsection 30(4) of the Bill (No.2) provides the director with the discretion to determine the confidentiality of cultural information rather than Indigenous people. A process that provides a primary role for Indigenous people in this important matter should replace this.
- Indigenous people are not recognised as the primary source of information.

Section 57 of the Bill requires only that the director or independent reviewer ‘**must have regard to** the principle that indigenous persons are the primary source of information about the significance...’ The application of this principle is discretionary not mandatory. Furthermore, s 57 fails to recognise that Indigenous persons are the primary source of information in determining the threat to a significant area or object posed by a proposal.

- The Commonwealth body administering Indigenous heritage protection is not sufficiently independent.

It is essential that the Commonwealth body established under the Bill (No.2) to carry out heritage functions is independent. This body would operate in a highly specialised area and the legislation should prescribe the way the body operates and the qualifications of its staff and consultants. At the very least:



- (a) the body must operate in a fair, just, economical, informal and prompt way and in so doing, it must take account of the cultural and customary concerns of Indigenous people; and
 - (b) staff and consultants retained by the body have an understanding of Indigenous culture and heritage and an ability to deal with Indigenous persons in a culturally sensitive manner.
 - (c) consistent with the recommendations of the Evatt Report,¹⁰² the director or delegate who conducted the mediation should not take part in the reporting process unless the interested parties agree.
- Provision has not been made for an Indigenous advisory council as recommended in the Evatt Report.
- Under the recommendations, the functions of the Council would be:
- (a) to advise the director and the Commonwealth minister on:
 - (i) issues arising under the Act, especially the most appropriate means by which protection is provided to areas and objects of significance and the recovery and repatriation of objects. This should also include the accreditation and effectiveness of accredited State and Territory regimes;
 - (i) appropriate procedures for dealing with indigenous people in the performance of functions under the Act;
 - (ii) the making of regulations under the Act;
 - (b) to liaise with, and the promote the views of, Indigenous people in relation to heritage protection issues;
 - (d) to undertake research for the purpose of carrying out its functions.
 - (e) to advise the director and/or minister with respect to matters that involve intra-Indigenous disputes about the threat to or significance of an area or object and the protection of the area or object.

The Heritage Bill represents a retreat from the Commonwealth's national and international responsibility for Indigenous heritage protection. The government should, as a matter of urgency, reform the national framework of legislation so that it complies with Australia's international obligations to provide protection to Indigenous culture and ensure the effective participation of Indigenous people in the decision around their heritage.

In Australia, the recognition of Indigenous interests in land have primarily been forged by non-Indigenous land use requirements. Existing heritage legislation was born out of a need to incorporate Indigenous culture into non-Indigenous systems of property development and land use. Although the recognition of native title acknowledged the traditions and customs of Indigenous people, it did not provide a comprehensive system for the protection of Indigenous culture which would include Indigenous heritage.



Separate heritage regimes at State, Territory and Commonwealth levels have fragmented the protection of Indigenous heritage. One of the consequences of shaping Indigenous rights through inadequate legislative regimes is a failure to provide protective mechanisms which fully represent and safeguard Indigenous culture. Native title offered an opportunity to unify these diverse sources so that the protection of Indigenous heritage was provided through the legal right of Indigenous people to their land and their culture. Amendments to the NTA in 1998 and developments in the common law of native title since its recognition in 1992 have meant that this opportunity has not eventuated.



Implementing the amendments to the Native Title Act

In 1999 and 2000 the Committee on the Elimination of Racial Discrimination (the CERD Committee) and the Human Rights Committee (HRC) of the United Nations both criticised the 1998 amendments to the *Native Title Act 1993* (the NTA) as limiting the rights of Indigenous people.¹ The committees found that the amendments were discriminatory and recommended that Australia either suspend implementation of the 1998 amendments² or amend the NTA anew.³ No action has since been taken to lessen the discriminatory impact of the 1998 amendments and the true extent of the diminution of native title parties' rights is now becoming clear.

In this chapter I assess some of the ways in which the implementation of the 1998 amendments has borne out the findings of the CERD Committee and the Human Rights Committee decisions. In particular, I assess developments in the judicial interpretation of procedural provisions in the NTA. These provisions were originally intended to provide protection to registered native title claimants while their claim was being determined. Instead, judicial interpretations confirm the inadequacy of the amended Commonwealth future acts regime to provide protection to native title parties. I also assess the implementation (and attempted implementation) of alternative state regimes. This process has illustrated the vulnerability of Indigenous rights to incursion by state regimes which further reduce the protection available to native title parties. Finally I assess the difficulties experienced by native title representative bodies (NTRBs) in satisfying the requirements of re-recognition when already under-resourced for carrying out their specified functions.

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- 1 Committee on the Elimination of Racial Discrimination. *Decision (2)54 on Australia*, 18 March 1999, UN Doc CERD/C/54/Misc.40/Rev.2 (*CERD Decision (2)5a*); Committee on the Elimination of Racial Discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/304/Add.101, 19/04/2000 (*CERD Concluding Observations*); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*. 28/07/2000. CCPR/CO/69/AUS. (*HRC Concluding Observations*).
 - 2 *ibid*, CERD *Decision (2)54*, para 11.
 - 3 HRC *Concluding Observations*, *op cit*, para 10.



Introduction

Procedural rights protect native title, but do not freeze all future development until a final native title determination is made. The original 'future acts' regime set up under the NTA attempted to achieve this balance; it allowed for the further development of lands while at the same time protecting native title by providing for significant consultation with Aboriginal people. It ensured that Aboriginal people were able to participate in decisions regarding development so that it could occur in a manner that did the least damage to their native title.

The 1998 amendments to the NTA introduced far-reaching changes to Indigenous peoples' 'procedural rights' regarding 'future acts'. The application and development of the procedural rights regimes in the reporting period have further reduced these rights and fall far short of human rights standards that require native title to be protected to the same extent as non-Indigenous rights to land.

Particular issues that have emerged during the reporting period include:

- the content of the procedural rights granted, including:
 - the extent and nature of the right granted by the 'opportunity to comment' provisions;
 - the time limits governing the right to negotiate;
- access to procedural rights; the statutory right to judicial review of a refusal to register a claim;
- enforceability of procedural rights; and
- the reduction of procedural rights under 'alternative state regimes'

Significance of procedural rights to native title

Native title is a culturally distinct form of title that is nevertheless entitled to equal protection before the law. Procedural rights form part of the protection assured to native title in order that it be equally protected with all other forms of property. The procedural rights are necessary for the protection of native title because:

- native title is vulnerable to impairment or extinguishment in the time before it has been formally recognised and protected by the common law. Procedural rights' are the mechanism by which native title is protected from erosion by government or third party activities prior to a determination of the nature and extent of the native title rights.
- the unique nature of native title (based as it is, on traditional law and custom) means that it is difficult to compare with other forms of title. The nature of the Indigenous interests at stake are significantly different to common law rights or property interests. Without the protection of the procedural rights native title may be more vulnerable to impairment or extinguishment than other forms of non-Indigenous title. A decision-making authority may have limited capacity to understand the cross-cultural meanings and values at stake. A process of consultation will not adequately protect this unique interest if there is not sufficient information provided to Indigenous people to enable them, as experts on the meaning of their own cultural norms, to make an assessment of the



impact of proposed future acts on their native title interests. The operation of the procedural rights may thus affect whether or not a future act which could significantly impair native title will take place and the manner in which it may occur.

Procedural rights in a human rights framework

Under a human rights framework the protection of native title must provide for:

- equal protection of property interests before the law; as required by the International Convention against the Elimination of Racial Discrimination (ICERD), Article 5 and the Universal Declaration of Human Rights (UDHR), Article 17.
- protection of the right to maintain and enjoy a distinct culture; as required by International Convention on Civil and Political Rights (ICCPR), Article 27.
- the right of Indigenous people to effective participation in decisions affecting them, their lands and territories: as required by ICCPR, Article 1 and the International Covenant on Economic Social and Cultural Rights (ICESCR), Article 1.

In its most recent country report on Australia, the Human Rights Committee stated its concern that the 1998 amendments to the NTA had limited the rights of indigenous persons and communities '... in the field of *effective participation* in all matters affecting land ownership and use'⁴ and had failed to take sufficient action to ensure that indigenous peoples exercised '*meaningful control over their affairs*'.⁵ The HRC stated that 'The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources (Article 1, paragraph 2)'.⁶

These criticisms reflect the stated principles of the HRC's General Comment on Article 27 of the ICCPR. In the General Comment the HRC discussed the importance of political participation in the context of the need to protect the particular cultural relationship of minority groups to the use of land resources, particularly in the case of Indigenous peoples. The HRC stated that the enjoyment of culture may require "measures to ensure the effective participation of members of minority communities in decisions which affect them".⁷

These principles reflect those enunciated also by the CERD Committee in its General Comment on Indigenous peoples when it called on States parties to:

ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.⁸

4 *ibid*, para 10 (emphasis added).

5 *ibid*, para 9 (emphasis added).

6 *ibid*.

7 *The Rights of Minorities (Article 27): 08/04/94. CCPR General Comment 23 (para 7) in Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev 1 (1994) at 40.

8 *General Recommendation XXIII (51) concerning Indigenous Peoples* (para.4) adopted on 18 August 1997, CERD/C/51/Misc.13/Rev.4.



The extent and nature of the right granted by the 'opportunity to comment' provisions

The amended NTA provides for registered native title claimants and certain specified bodies to be given notice of specified future acts, in order that they have an opportunity to comment on the proposed future acts. The specified future acts entitling notice for this reason include:

- post-1996 grants of pastoral or agricultural leases in fulfilment of pre-*Wik* undertakings [per ss 23F & 23HA],
- certain primary production upgrades [per s 24GB],
- off-farm activities connected to primary production [per s 24GD],
- gravel and timber etc rights over pastoral/agricultural leases [per s 24GE],
- leases, licences etc over waters or airspace [per s 24HA],
- extinguishing grant of freehold or exclusive possession based on pre-*Wik* right or undertaking [per s 24ID],
- construction of a public work pursuant to a pre-*Wik* reservation or lease to a statutory authority [per s 24JB],
- creation of a national park plan of management pursuant to a pre-*Wik* reservation or lease to a statutory authority [per s 24JB].

The manner of notifying eligible native title parties where notice is required for the purpose of giving an opportunity to comment is prescribed by section 8 of the *Native Title (Notices) Determination 1998*.⁹ Section 8(3) states that:

- (3) A notice ... must include:
- (a) a clear description of the area that may be affected by the act or class of acts; and
 - (b) a description of the general nature of the act or class of acts; and
 - (c) a statement that the person to be notified must be given an opportunity to comment on the act or class of acts within a period specified in the notice; and
 - (d) the name and postal address of the person to whom comment must be given.

The requirements of notification imposed by the NTA and the content of the right recognised by the 'opportunity to comment' were discussed in *Harris v Great Barrier Reef Marine Park Authority*.¹⁰ The full Federal Court decision restricted the information required to be notified for the 'opportunity to comment' in three important ways:

- There was no requirement to notify the native title parties regarding each specific permit proposed to be granted;¹¹ it would be sufficient to notify the registered native title claimants that the Authority "...proposes to grant an unspecified number of permits of a particular class for access to the area defined".¹²

9 Commonwealth of Australia Gazette, No. S 440, 2 September 1998.

10 [1999] Federal Court of Australia (5 August 1999); per Kiefel J.; [2000] FCA 603 (11 May 2000), per Heerey, Drummond and Emmet J.J. (*Harris*).

11 *ibid*, para 44.

12 *ibid*, para 45.



- There was no requirement to notify the native title parties regarding the activities to be carried out pursuant to the permits; only general information was required.¹³
- The notice need not identify 'lands and waters affected by the act' in relation to the lands and waters the subject of a native title claim, but need only identify the 'area the subject of the proposed permit or authority'.¹⁴

The court held that the content of the notice was so limited because the content of the right conferred by the 'opportunity to comment' was itself limited in the following ways:

- The right is merely "... an opportunity to proffer to the decision-maker argument and information known to them about their native title interests"¹⁵ and to "explain why, in their opinion, the act should not be done at all or only on conditions..."¹⁶
- The opportunity to comment is *not* "... a right to participate in the decision whether to issue the permit or a right that entitles the recipients to seek information from the decision-maker necessary to satisfy those interests about matters of concern to them".¹⁷

Consequently, the 'opportunity to comment' provisions place very few obligations on the future act-granting authority:

- The Authority is not required in any way to take account of the comments provided.
- The decision-maker need only "... make such use of [the information proffered by native title parties] as it considers appropriate".¹⁸
- No obligation is placed on the decision maker to "... make any particular use of the information provided by way of comment or to act in a way that will ensure that no harm is done to native title interests or that such harm is minimised..."¹⁹
- The Authority need not even give the notice before it has determined to grant the permit requested, but need only give notice before the permit is actually granted.²⁰

In fact the 'opportunity to comment' process places effectively *no* restrictions at all upon the manner or outcome of the decision-making process.

This interpretation of the right conferred by the 'opportunity to comment' breaches international human rights standards for the following reasons:

13 *ibid*, para 49.

14 *ibid*, para 56. This is in contrast to the judgment at first instance, in which Kiefel J. held that the notice must contain a specific description of the area that would be subject to the proposed future acts. Kiefel J. did hold however that only very limited information was required regarding the proposed activities to be carried out pursuant to those licences.

15 *ibid*, para 42. This conclusion was drawn in part from the determination that the existence of the different procedural rights conferred by the different sub-divisions of Division 3 indicated a legislative intention that the procedural rights created under the amended NTA are 'carefully graded' with regard to the required degree of 'attention' to be given to the views of native title parties about the doing of an act (para 27).

16 *ibid*, para 38.

17 *ibid*.

18 *ibid*.

19 *ibid*, para 51.

20 *ibid*, para 50.



- Registration is substantial proof of a significant interest in land (albeit not a final determination of common law recognition of native title) that is required to be protected because of the right to equal protection of property rights
- Native title claimants have a right to participate in decisions affecting their claimed lands and waters. Indigenous peoples participation rights cannot be displaced merely because the future acts which give rise to the opportunity to comment are not acts which extinguish native title, but rather may give rise to a compensable 'impairment' of native title.²¹
- The fact that so little information must be provided regarding the nature of the proposed future acts, means that native title parties may not be sufficiently aware of what is proposed even to make a meaningful assessment of how it will affect their native title. This further prevents native title parties from effective participation in decisions affecting their lands and waters.

The time limits governing the right to negotiate

In the reporting period the case of *Coppin v State of Western Australia*²² (*Coppin*) made findings regarding the time limitations governing the right to negotiate under the NTA.

The *Coppin* case expanded upon the decision *Walley v Western Australia*²³ (*Walley*) which determined that until the Government party had negotiated in good faith, the National Native Title Tribunal (NNTT) did not have jurisdiction to hear the government party's application for determination regarding future acts. The *Walley* case did not make any findings regarding the time period within which the government was required to perform its obligation to negotiate. In *Coppin* the court held that:

- the government's obligation to negotiate in good faith had a commencement date that 'probably' arose '...at the latest, at the expiration of the period of two months from the giving of the notice under s 29';²⁴
- even though the government had failed to perform its obligation to negotiate within a reasonable time-frame, and even though it was the *native title parties* who made the application, the NNTT did not have jurisdiction to make the determination until the government had negotiated in good faith.

Failure by government parties to negotiate in good faith within a reasonable time frame breaches the right of Indigenous people to participate in decisions that affect them. Native title claimants should not be forced to wait upon the inaction of the government party.

If a timeframe for completion of important consultation processes, such as that stated in *Coppin*, is to have any meaning, there must be options available to enforce government compliance where they do not adhere to it voluntarily. This may mean that where the government does not comply, native title parties should be able to apply to the arbitration body to enforce government compliance and, if the government still fails to comply, to obtain a determination regarding

21 *ibid*, para 42. Note that the 'opportunity to comment' is applicable to future acts which do not cause extinguishment, but which may impair native title.

22 *Coppin v State of Western Australia* [1999] 67 FCR 931 (8 July 1999).

23 *Walley v Western Australia* (1996) 137 ALR 561.

24 *Coppin*, *op cit*.



the proposed future acts. That in the *Coppin* case the NNTT had no jurisdiction to hear an application for determination of native title before the government complied with its obligation to negotiate in good faith, undermined any protection that the provisions were originally intended to apply.²⁵ However, were the time limitation stated by Carr J. in *Coppin* treated as binding it could become an important safeguard of the protections afforded to native title by the right to negotiate.

Access to procedural rights and the statutory right to judicial review of a refusal to register a claim

Registration of a native title claim is the threshold requirement for access to the procedural rights under the NTA (including right to negotiate, right to be notified and right to object and be consulted). The increased requirements of the registration test have proven a significant restriction on access to the procedural rights.

Consequently, the right of review of decisions not to register native title claims is an important safeguard of native title claimants' access to procedural rights. Section 190D(2) of the NTA gives native title applicants who fail the registration test²⁶ the right to apply to the Federal Court for judicial review of the Native Title Registrar's decision not to register their application on the National Native Title Register.²⁷ In the reporting period, the extent to which the Native Title Registrar's registration decisions are reviewable has been tested in several cases.

In *Powder v Native Title Registrar*,²⁸ the court decided that the application of the registration test is an administrative rather than a judicial function. For this reason, the review process available under s 190D(4) is not an appeal but a process of review of an administrative decision by the court.²⁹ Consequently, the review function allowed by section 190D is equivalent to review under the Administrative Decisions Judicial Review Act (the ADJR Act).

In contrast to this, the full Federal Court in *Strickland*³⁰ (2000) decided that the 'nature and extent' of the court's review power under s 190D(2) is 'conferred in

25 It seems that the requirement that the government and grantee parties negotiate in good faith was intended for the protection of native title parties. This view is supported by the decision in *Walley*, where the prohibition on the NNTT from determining a government application before it had negotiated in good faith protected the native title parties rights to negotiate over the proposed future acts. Further, the 1998 amendments to the NTA maintain a requirement that the government negotiate in good faith with native title parties and miners in those remaining circumstances where the right to negotiate continues to operate. In relation to the jurisdiction of arbitral bodies to hear applications for determinations regarding proposed future acts, the amended act specifically states that an arbitral body must not make a determination regarding future acts if any negotiation party, *except a native title party*, has failed to negotiate in good faith prior to the application for the determination.

26 NTA Part 7 sections 190A-C. See: Aboriginal & Torres Strait Islander Social Justice Commissioner, *op cit*, Chapter 4: The Registration Test, p69.

27 Non-claimant parties can object to registration under the ADJR Act: *Western Australia v Native Title Registrar* (1999) 95 FCR 93; 57 ALD 307. (Carr J., 16 November 1999). They also have a right to be heard in relation to any matters with may affect their interests: NTA s190D(5).

28 *Powder Family on Behalf of the Jetimarala People v Registrar, National Native Title Tribunal (Powder)* (1999) FCA 913 (Unreported, Kiefel J., 5 July 1999).

29 *ibid*, paras 26-29, 34.

30 *State of Western Australia v Strickland* [2000] FCA 652 (18 May 2000).



the broadest of terms' and is not restricted to, nor need be analogous to, the grounds for review in the AAT Act and the ADJR Act. Rather, as section 190D does not specify the nature or extent of the review or impose any limitation upon the material that may be taken into account',³¹ the court may consider issues of law and fact. If a ground of review is established, the court must make appropriate orders to do justice between the parties.³² Further, if a review is raised on factual grounds, the reviewing court may consider evidence not available to the registrar,³³ and must consider relevant events that occur subsequent to the decision under review.³⁴

Consequently, the broad nature of the review of registration test decisions under the NTA may in some cases enable the registration of claims that would not have been registrable by the primary decision-maker. Given the devastating effect on native title claimants' rights to participate in decisions regarding 'future acts' if they are unable to have their claim registered, it is appropriate that the review of registration decisions be comprehensive.

Enforceability of procedural rights

The right to have the native title claim protected pending a determination is rendered meaningless if that right is unenforceable. That is the consequence of Justice Cooper's decision in the *Lardil* case,³⁵ which held that:

- an act is only a 'future act' if it 'affects' native title;
- before there is a final determination as to the existence of native title, and regardless of whether or not a native title claim is registered, it cannot be known whether there is any native title to be 'affected', and consequently, it cannot be known whether a proposed act is a 'future act' or not;³⁶
- as a result, native title claimants do not have a *right* to have the prescribed procedural steps taken;³⁷
- because registered native title claimants have no *right* to the prescribed 'procedural rights', acts later discovered to be 'future acts' (in a subsequent native title determination), but which were authorised without according the registered native title claimants their procedural rights, will nevertheless be valid;³⁸ and that
- the court did not have jurisdiction to hear the application for enforcement of procedural rights because the NTA does not deal with the *enforcement* of native title rights by curial process.

31 *ibid*, para 64.

32 *ibid*, para 66.

33 *ibid*, paras 67, 62-68.

34 *ibid*, para 62.

35 *Lardil, Kaiadilt, Yangkaal & Gangalidda Peoples v State of Queensland* [1999] FCA 1633 (24 November 1999).

36 *ibid*, para 27.

37 *ibid*.

38 As the question of validity was not immediately before the court, this aspect of the judgment is not binding.



This decision deprives native title claimants of all protection. By holding that an act can only attract the 'future act' processes if it occurs over lands or waters where a determination of native title has already been made, this decision ensures that the future acts regime would never operate in regard to registered native title claimants. Furthermore, the distinction between the existence of a right to have future act processes followed and the right to enforcement of that right, renders the right meaningless.

This decision in *Lardil* is not supported in other cases:

- In *Bullen*,³⁹ French J. held that the application of the 'right to negotiate' provisions are a "condition of the validity of the future acts to which it applies".
- The decisions in *Walley*⁴⁰ and *Coppin*⁴¹ that, in regard to the 'right to negotiate', the NNTT does not even have jurisdiction to hear an application for determination of native title until the government has complied with its statutory duty to negotiate in good faith, clearly suggest that the procedures under the 'procedural rights' provisions are obligatory and that no valid legal consequence can flow until they are complied with.

The restriction on the enforceability of procedural rights in the *Lardil* case is unacceptable for two reasons:

- The registration test, especially in its new more demanding form, proves the existence of a connection to the land which should be sufficient to give rise to a right to participate in decisions regarding that land, regardless of whether the claim has been finally determined or not.
- The purpose of the procedural rights is to prevent derogation from existing native title rights before the extent of the right has been determined. To give rights and then not enforce them is the equivalent to no rights at all.

Procedural rights under the alternative state regimes

Under the original NTA the 'right to negotiate' (the RTN) was recognised as a way of ameliorating the effects of 'future acts' on existing, but as yet unrecognised native title interests. Nevertheless, in relation to those lands to which the RTN still applies, the amended NTA now authorises the States and Territories to introduce less demanding procedural rights under 'alternative state regimes'. In implementing such regimes, States and Territories are able to grant different procedural rights on the basis of what non-Indigenous tenures exist or previously existed over the claimed lands.

The approach of providing for differing procedural rights according to what non-Indigenous tenures exist(ed) over claimed lands appears to be based on the assumption that a past grant had a particular effect of extinguishing native title. However, it is as yet undecided by the High Court whether the creation of non-Indigenous interests over native title lands is capable of 'suspending', rather than 'extinguishing' native title interests.⁴² If the 'suspension' argument is accepted, then many more lands may continue to be held as native title, even

39 *Bullen (Nyungar people) v Western Australia* [1999] FCA 1490 (28 October 1999).

40 *Walley, op cit.*

41 *Coppin, op cit.*

42 See *Western Australia and Ors v Ward and Ors* (2000) 170 ALR 159 (the *Miriwung Gagerrong* case).



where the capacity of native titleholders to exercise all forms of their native title may be restricted. In such cases, Indigenous owners of land should still be entitled to full participation rights in matters of concern to their lands, regardless of what non-Indigenous titles co-exist or have previously co-existed over their lands.

Alternative s 43A schemes

Section 43A of the NTA enables States and Territories to replace the RTN over 'alternative provision areas' with regimes that provide lesser procedural rights. 'Alternative provision areas' are areas that are or have been covered by freehold or pastoral or agricultural leases, or was reserved land or land within a town or city and over which native title is not extinguished.⁴³

In the reporting period three governments⁴⁴ requested determinations for approval of proposed 'alternative state regimes'⁴⁵ that replaced the RTN regime under the NTA (Cth) with reduced procedural rights. Most of these schemes would further diminish the human rights of Indigenous Australians by attempting to reduce protection of native title and reduce the capacity for Indigenous people to have 'meaningful participation' in decisions over their lands.

- *Western Australia*

In Western Australia 'alternative provision areas' account for approximately 57% of the State.⁴⁶ The state of Western Australia attempted to introduce its section 43A provisions within a comprehensive State based future act regime under a State Native Title Commission. The scheme, introduced under the *Native Title (State Provisions) Act 1999* ('NTSPA'), the *Native Title (State Provisions) Regulations 2000* ('NTSPR') and amendments to the Land Administration Act 1997 ('LAA'), would have reduced the procedural rights available to native title claimants over significant areas of land to a right to be notified, rights to make an objection and the right to consultations in good faith following an objection.⁴⁷

The major parts of the WA regime required a determination under the NTA by the Attorney General.⁴⁸ The Commonwealth Attorney General made a determination in response to the WA Premier's request under s 43A of the NTA on 27 October 2000 but the determination was disallowed in the Senate on 9 November 2000. Consequently, the provisions have not come into effect.

43 NTA, s 43A(2).

44 Western Australia, Queensland and the Northern Territory.

45 NTA ss 43 and /or 43A.

46 John Clarke, "Western Australian native Title (State Provisions) Act 1999" in *Native Title News Vol 4 No 7 2000, Butterworths* p2.

47 These are the procedural rights provided in the place of the right to negotiate pursuant to s 43A of the NTA.

48 Excluding NTSPA Part 4 (future acts over lands to which which s 24 MD(6B) of the NTA would otherwise apply).



- *Northern Territory*

The Northern Territory's alternative regime was also rejected by the Senate; on 31 August 1999. The Northern Territory has since asked the Commonwealth Attorney General to reconsider its alternative native title regimes (relating to petroleum, mining and land acquisition) for a determination.⁴⁹

- *Queensland*

Queensland also attempted to introduce a comprehensive alternative state regime that would substantially curtail the capacity of registered native title claimants to participate in decisions affecting their claimed lands. In alternative provision areas, which in Queensland cover about 54% of the state,⁵⁰ the RTN would have been replaced with a right to consult. However, the legislation was strongly opposed in the Senate and large parts of the original Queensland scheme passed by the state government, including the parts under section 43A NTA, were disallowed.

Under the compromise reached in the Senate disallowance debate, the reduced right to negotiate introduced in relation to the creation or variation of high impact exploration permits, high impact mineral development licences, mining claims and mining leases over unallocated state land (under s 43 NTA), was also introduced in relation to the alternative provision areas. The reduced right to negotiate encompasses notification of native title parties, a right to object, and to consultation and negotiation before the grant of the tenement. Where no agreement is negotiated the matter is heard by the Land and Resources Tribunal. The Minister may overrule the Tribunal in some circumstances.

The Queensland government enacted the Native Title Resolution Act 2000 (Qld) on 8 September 2000 to amend the original scheme.

The Queensland scheme also included the creation of the Land and Resources Tribunal⁵¹ (the Tribunal) which integrates native title future act processes, including hearing all future act determinations, resolving disputes regarding future acts, with other processes under the Mineral Resources Act and with assuming responsibility for cultural heritage matters in Queensland.

The Queensland regime also requires that where there is a recognised native title claim, compensation must be settled before the grant of a mining lease or mining claim. Compensation is to be settled with claimants, and if agreement is not possible, the Tribunal must determine the amount of compensation payable on the date on which the Tribunal determines whether to grant the mining claim or mining lease and the money is paid into trust. For prospecting permits, exploration permits and mineral development licences compensation need not be settled before the grant is made.

The new scheme commenced on 18th September 2000.⁵²

49 August 2000.

50 McKenna, M., 'Native Title Deal Support', *Courier Mail*, Tuesday 5 September 2000.

51 Land and Resources Tribunal Act 1999 (LTRA).

52 Attorney-General's Department "Queensland Alternative Native Title Regime". <http://nttf.gov.au/nttf/queensland.html> pp1-2.



Section 26A, 26B and 26C schemes

Section 26A enables the Commonwealth Minister to determine that any 'acts' or 'class of acts' that create or vary a right to 'low-impact' mining exploration, prospecting or fossicking is exempt from the right to negotiate. Where the relevant State or Territory Minister requests it, section 26B enables the Commonwealth Minister to determine that certain 'acts' or 'classes of acts' done by a State or Territory that create or vary a right to mine gold or tin in surface alluvium is exempt from the right to negotiate. Sections 26A and 26B are disallowable instruments and so must receive also the approval of the federal Parliament. Section 26C enables the Commonwealth Minister to determine that certain 'acts' that create or vary a right to explore or prospect within a approved opal or gem mining area is exempt from the right to negotiate. Section 26C determinations do not require the approval of the federal Parliament.

In the reporting period the Queensland government requested determinations under sections 26A and 26B of the NTA and the New South Wales government requested determinations regarding future acts procedures for 'low impact' mining exploration under sections 26A, and 26C of the NTA.

- *New South Wales*

In New South Wales two determinations⁵³ were made in the reporting period declaring that land and waters known as Areas 1 and 2 in the Lightning Ridge region were 'approved opal or gem mining areas' for the purpose of section 26C NTA. The right to negotiate provisions now no longer apply to grants of opal mining titles in these areas.

In addition, the NSW government requested the Attorney-General make two determinations in relation to approved 'low-impact' exploration grants under section 26A of the NTA. These were the subject of a determination by the Commonwealth Attorney-General and passed the scrutiny of the federal Parliament on 12 December 2000 when the time to lodge a disallowance motion expired.

Currently, these provisions allow for consultation with native title parties on the protection of native title rights and interests and the signing of an access agreement with registered native title parties before entry onto the land can occur. Where an access agreement is not finalised within two months, the Mining Registrar may mediate the matter. If no agreement is reached through mediation within one month the Land and Resources Tribunal may make a determination.

Subsection 32C(1) of the Mining Act allows the NSW Minister to publish the types of prospecting operations that may be authorised under a low impact exploration licence. On the 15 October 1999, the NSW Minister for Mineral Resources published an order listing the prospecting operations in the *NSW Gazette*.⁵⁴ The prospecting operations are explained in *New South Wales*:

53 17 February 2000. The determinations were gazetted on 18 February 2000: Attorney-General, the Hon Daryl Williams, *Gazette Special No S77*, 18 February 2000.

54 *NSW Government Gazette* No 120 of 15 October 1999.



*Compliance with the provisions of s.26A Low Impact Exploration Licences (Minerals) New South Wales: Compliance with the Provisions of s.26A Low Impact Prospecting Titles (Petroleum).*⁵⁵ For example, 'drilling and activities associated with drilling are allowed (paragraph (e)) but only where they do not involve clearing ... or site excavation.' Clearing and site excavation is, however allowed where there is the minimum necessary to establish a drill site'.⁵⁶ The NTRB negotiated with the NSW government to modify provisions relating to notice⁵⁷ and security of the legislation.

Consequently, NSW now has its own native title scheme in relation to low impact exploration for minerals and petroleum,⁵⁸ which replaces the right to negotiate with a requirement that miners reach access arrangements with all land holders (including registered native title claimants and holders) about the way in which exploration will proceed.

• *Queensland*

Parts of the comprehensive Queensland alternative state regime that were rejected by the Commonwealth Senate were the provisions in relation to the creation or variation of alluvial gold and tin mining claims and leases.⁵⁹ These sections were held to be worse than the other sections under the proposed alternative Queensland regime because the alluvial gold and tin mining provisions applied not just to the creation of mineral exploration rights but also extraction permits. Nevertheless, the section 26A determination survived the Senate disallowance debate. As a consequence, where the creation or variation of specified 'low-impact' prospecting permits, 'low-impact' mineral development licences and 'low-impact' exploration permits is contemplated, the Queensland regime replaces the Commonwealth RTN with a 'right to consult'.

While they survived the Senate disallowance motion, these provisions were the subject of intense criticism during the Senate debate. In particular, the definition of the term 'low-impact' mining activities was criticized on the basis that it hid the fact that it would 'apply to nearly all mineral exploration in Queensland, apart from the dozing of grid lines and bulk sampling'⁶⁰ These provisions were finally allowed by the Senate with the proviso that the definitions applying to the 'low-impact' schemes under s 26A were to be 'no less favourable to indigenous interests' than those under the New South Wales s 26 scheme.

55 <http://www.nttf.gov.au/nttf/nsw.html> Attorney-General of New South Wales.

56 *ibid*, p6.

57 *Mining (General) Regulation 1997*, s11A states that 4 months notice must be given to native title parties before the grant of the licence. This is the equivalent of the notice provisions in the amended *NTA*.

58 including:

- grant of an exploration licence (under the *Mining Act*, s 22) that is a low impact exploration licence under and in accordance with Division 5 of Part 3 of the Act.
- the renewal under s 114 of the *Mining Act*.
- the conversion by amendment of an exploration licence to a low impact exploration licence.

59 covered by *NTA*, s 26B.

60 Senator Woodley (Democrats) – Senate Hansard Wednesday 30 August 2000 p15601.



The Queensland Indigenous Working Group⁶¹ (QIWG) states that the definition of 'low-impact' continues to fall below the standard of that in the NSW legislation. The definition became a major sticking point in negotiations between the QIWG, Queensland Native Title Representative Bodies and the Queensland government over the creation of a framework agreement for the processing of the backlog of exploration permits and mining development licenses.⁶² The Premier, the Hon. Peter Beattie MP, had previously stated that no exploration permits of the type covered by s 26A would be issued prior to establishment of a satisfactory regime, based on the NSW definition of low impact exploration.

The re-recognition of native title representative bodies

The 1998 amendments to the *Native Title Act* (the NTA) subject Native Title Representative Bodies (NTRBs) to a process of re-recognition. In informal consultations NTRBs have generally confirmed that the re-recognition process has been onerous, time consuming and debilitating.

The re-recognition process initially required the Minister to make decisions about the boundaries of areas in which invitations would be issued to NTRBs. Invitations were issued in May 1999.⁶³ After consultations with ATSIC, Cape York Land Council and North Queensland Land Council, the Minister has since created a further invitation area in Queensland by dividing the Far North Queensland invitation area into two invitation areas. This restores the boundaries that existed prior to the amendments to the NTA.

At the time of writing the minister has made decisions recognising NTRBs for the following invitation areas:

Torres Strait (1 invitation area)

- Torres Strait Regional Authority recognised for Torres Strait

Queensland (6 invitation areas)

- Central Queensland Land Council recognised for Queensland North
- Carpentaria Land Council recognised for Queensland West
- Queensland South Native Title Representative Body Aboriginal Corporation (formerly Goolburry Land Council) for Queensland South
- Cape York Land Council for ATSIC Cooktown Regional Council area (previously part of Queensland Far North invitation area)
- Gurang Land Council for Queensland Central

61 The details of QIWG's dealings with the Queensland government are from a conversation with Tony Juhnson, Acting Manager of the Native Title Branch, Foundation for Islander Research Action (FAIRA), 30 November 2000.

62 Conversation with Trevor Robinson, Co-ordinator, Queensland Indigenous Working Group, 10 October 2000.

63 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1999*, Chapter Five, Native Title Representative Bodies.



Western Australia (6 invitation areas)

- Kimberley Land Council recognised for Kimberley
- Ngaanyatjarra Land Council recognised for Central Desert
- Yamatji Land and Sea Council recognised for Pilbara and Geraldton
- Goldfields
- Land Council recognised for Goldfields

Northern Territory (2 invitation areas)

- Northern Land Council recognised for northern Northern Territory
- Central Land Council recognised for the southern Northern Territory

South Australia (1 invitation area)

- Aboriginal Legal Rights Movement recognised for all South Australia

New South Wales (1 invitation area)

- NSW Land Council recognised for New South Wales

Victoria (1 invitation area)

- Mirimbiak Nations Aboriginal Corporation for Victoria

Through this process some existing NTRBs have been re-recognised and some have not. At the time of writing no representative body has been recognised for South West Western Australia⁶⁴ or ATSIC Cairns Regional Council Area (previously part of Queensland Far North invitation area). However, North Queensland Land Council's application for recognition is still under consideration and a determination is expected by May 2001. No applications have been received in response to the invitation areas of Tasmania, ACT, Jervis Bay or the external territories such as Christmas Island and Norfolk Island.

The re-recognition process has placed enormous strain on NTRBs. They are critically under-resourced for carrying out even their general statutory functions and meeting the requirements of application for re-recognition has further drained scarce resources and placed increased stress on the organisations. The competition between representative bodies for recognition has created unnecessary rivalry, which in turn has made it difficult for organisations to remain focused on their main objective of providing effective participation for Indigenous people in issues relating to land. Further, the uncertainty created by having to operate under transitional provisions has impacted on staffing and service provision,⁶⁵ making it more difficult to meet the requirements for re-recognition.

NTRBs are the key to ensuring that Indigenous people are given effective participation in decision-making over traditional lands and natural resources. In 1999 the Committee on the Elimination of Racial Discrimination encouraged Australia to provide effective participation for Indigenous people in matters

64 The Aboriginal Legal Service of WA and Noongar Land Council's applications for recognition were rejected.

65 NTRBs cited the difficulty of attracting and keeping well-qualified staff, when funding was only issued in the short term and no guarantee of security could be offered to employees.



affecting them.⁶⁶ In July 2000 the Human Rights Committee called on Australia to "...take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources".⁶⁷ Re-recognition has been an ongoing issue for NTRBs since the 1998 NTA amendments were enacted and the process has not yet been finalised. There is a need for closure in relation to this issue so that resources can be put where they are urgently needed, that is, in giving Indigenous people effective representation in furthering their native title claim and effective participation in the decision-making processes that affect their land.

The amendments to the NTA have been in operation for over two years. In relation to the provision of procedural rights the courts have confirmed the failure of the Act to provide appropriate protection to native title. Governmental control over native title continues to devolve to state governments who are authorised under the amendments to implement regimes which provide less protection than that provided under the Commonwealth Act. Several UN treaty committees have found these amendments to be discriminatory and in breach of Australia's treaty obligations. Unless the discriminatory provisions of the NTA are repealed Australia will continue to be condemned by human rights treaty bodies in respect of its treatment of Indigenous people.

66 CERD Committee *Decision (2)54, op cit.*

67 *HRC Concluding Observations, op cit, para 9.*



Submission of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

Inquiry into:

- (a) whether the finding of the Committee on the Elimination of Racial Discrimination (CERD Committee) that the *Native Title Amendment Act 1998* is inconsistent with Australia's international legal obligations, in particular the Convention on the Elimination of all Forms of Racial Discrimination, is sustainable on the weight of informed opinion;
- (b) what amendments are required to the Act, and what processes of consultation must be followed in effecting those amendments, to ensure that Australia's international obligations are complied with; and
- (c) whether dialogue with the CERD Committee on the Act would assist in establishing a better informed basis for amendment to the Act.

(a) The findings of the CERD Committee

Introduction

The Committee on the Elimination of Racial Discrimination (the CERD Committee), acting on its early warning and urgent action procedure, considered the amended *Native Title Act 1993* (Cth) (NTA) in March 1999. Australia provided both written and oral submissions to the Committee arguing that the Act did not breach Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Representatives of the Australian government appeared before the CERD Committee in Geneva on 12 and 15 March 1999 to present the Government's position. On 18 March 1999, the Committee found that significant amendments to the NTA were contrary to Australia's obligations under CERD. Having considered these amendments the Committee expressed concern that the amended NTA, taken as a whole, was incompatible with Australia's international obligations. The Committee also found that, on the basis that the amendments were enacted without obtaining



the informed consent of Indigenous people, Article 5 of CERD was also contravened. The March findings were reaffirmed at the Committee's fifty-fifth session on 16 August 1999.

The Human Rights and Equal Opportunity Commission made submissions to the CERD Committee in March 1999 and August 1999 copies of which are annexed hereto and marked A and B respectively. These submissions are consistent with the CERD Committee's findings, expressed above. The Aboriginal and Torres Strait Islander Social Justice Commissioner advised the government in his 1997 *Native Title Report* that the amended NTA breached Australia's obligations under CERD.¹ He also criticised the amendments to the right to negotiate as a violation of CERD in the 1996 *Native Title Report*.² Thus, in relation to the first term of this Inquiry as to whether the CERD decision is sustainable on the weight of informed opinion, my position clearly is that the CERD decision is sustainable. Before dealing with the decision itself and the basis of that decision it is helpful to set out the background to the decision and the committee that made it.

Background; the CERD Committee and its decision to adopt the 'early warning' procedure in relation to the amendments to the NTA

The CERD Committee was the first human rights committee established within the United Nations structure. It consists of 'eighteen experts of high moral standing and acknowledged impartiality'.³ Members are nominated by States Parties to the CERD Committee⁴ and elected through a secret ballot. To ensure their independence, members serve in a personal capacity and cannot be dismissed during their term. In order to ensure that the Committee is representative, membership is intended to be equitably distributed according to 'geographical distribution and to the representation of the different forms of civilisation as well as of the principle legal systems'.⁵

The CERD Committee monitors and reviews the actions of States who are signatories to the CERD to ensure that they comply with their obligations under the Convention.⁶ The Committee introduced the early warning and urgent action procedure in 1993 to improve mechanisms by which it could scrutinise the compliance of States Parties with the Convention, and to ensure greater accountability of States Parties.

1 *Native Title Report*, July 1996 – June 1997, Chapter 5.

2 *Native Title Report*, July 1995 – June 1996, p18.

3 International Convention on the Elimination of All Forms of Racial Discrimination (Herein CERD), Article 8(1).

4 The terminology of CERD refers to States Parties, or States. States in this sense refers to nation states, ie the nation state of Australia, and not to internal states and territories within a nation.

5 CERD, Article 8(1).

6 The convention entered into force in Australia on 30 October 1975. For an overview of the Committee's functions and procedures see United Nations High Commissioner for Human Rights, *Fact Sheet No 12: The Committee on the Elimination of Racial Discrimination*, <http://www.unhcr.ch/html/menu6/2/fs12.htm>.



The need for such mechanisms was identified by the then Secretary-General of the United Nations, and the Security Council in 1992. The Security Council observed in 1992 that international peace and security is not assured solely by the absence of military conflicts among States. It is also influenced by non-military sources of instability in the economic, social, humanitarian and ecological fields.⁷ The Secretary-General noted that the stability of States would be enhanced by the commitment to human rights standards, with a special sensitivity to the rights of minorities, and by increasing the effectiveness of the United Nations human rights system.⁸

On 11 August 1998, acting under its early warning and urgent action procedure, the CERD Committee requested Australia to provide it with information relating to the amendments to the *Native Title Act 1993* (Cth) (NTA), any changes of policy in relation to Aboriginal land rights, and the functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner.⁹ The request was as a result of the concern of members of the Committee that the situation in Australia 'was clearly deteriorating'¹⁰ since Australia's previous appearance before the Committee in 1994.

Australia is the first 'western' nation to be called to account under the early warning procedure. Other countries that were placed under the procedure at the same time as Australia were the Czech Republic, the Congo, Rwanda, Sudan and Yugoslavia. Countries previously considered under the procedure include Papua New Guinea, Burundi, Israel, Mexico, Algeria, Croatia, Bosnia and Herzegovina.

The Committee's decision to consider the situation in Australia under the procedure is highly significant. It indicates that the Committee was concerned that the situation in Australia might involve serious violations of Australia's obligations under CERD, which ought to be given immediate consideration. As one Committee member commented, 'the issues in question were so important that they deserved to be dealt with in their own right, and not merely in terms of Australia's regular reporting obligations under the Convention'.¹¹

The CERD Committee's Decision of 18 March 1999 on Australia

On 18 March 1999 the CERD Committee delivered its concluding observations on Australia, which included the following.

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- 7 Security Council Summit, 31 January 1992, cited in Committee on the Elimination of Racial Discrimination, *Annual Report of the Committee on the Elimination of Racial Discrimination*, UN Doc A/48/18 (1993), Annex 3, para 1.
 - 8 Secretary-General of the United Nations, *An agenda for peace*, cited in the CERD Committee's *Annual Report of the Committee on the Elimination of Racial Discrimination*, *op.cit.*, Annex 3, paras 2-4.
 - 9 Committee on the Elimination of Racial Discrimination, *Decision 1(53) concerning Australia*, 11 August 1998. UN Doc CERD/C/53/Misc.17/Rev.2.
 - 10 Committee member Mr Wulfrum, in Committee on the Elimination of Racial Discrimination, *Summary record of the 1287th meeting (53rd session)*, 14 August 1998, UN Doc CERD/C/SR.1287, para 32. See also comments by Mr Van Boven, Ms McDougall and Mr Garvalov at paras 29, 38 and 42 respectively.
 - 11 Mr Garvalov, *Summary record of the 1287th meeting (53rd session)*, *op.cit.*, para 42.



3. The Committee recognizes that within the broad range of discriminatory practices that have long been directed against Australia's Aboriginal and Torres Strait Islander peoples, the effects of Australia's racially discriminatory land practices have endured as an acute impairment of the rights of Australia's indigenous communities.

4. The Committee recognizes further that the land rights of indigenous peoples are unique and encompass a traditional and cultural identification of the indigenous peoples with their land that has been generally recognized.

5. In its last Concluding Observations on the previous report of Australia... the Committee welcomed, further, the Native Title Act of 1993, which provided a framework for the continued recognition of indigenous land rights following the precedent established in the Mabo case.

6. The Committee, having considered a series of new amendments to the Native Title Act, as adopted in 1998, expresses concern over the compatibility of the Native Title Act, as currently amended, with the State Party's international obligations under the Convention. While the original Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act. While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title.

7. The Committee notes, in particular, four specific provisions that discriminate against indigenous title-holders under the newly amended Act. These include: the Act's "validation" provisions; the "confirmation of extinguishment" provisions; the primary production upgrade provisions; and restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses.

8. These provisions raise concerns that the amended Act appears to wind back the protections of indigenous title offered in the Mabo decision of the High Court of Australia and the 1993 Native Title Act. As such, the amended Act cannot be considered to be a special measure within the meaning of Articles 1(4) and 2(2) of the Convention and raises concerns about the State Party's compliance with Articles 2 and 5 of the Convention.

9. The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention...

11. The Committee calls on the State Party to address these concerns as a matter of utmost urgency. Most importantly, in conformity with the Committee's General Recommendation XXIII concerning Indigenous Peoples, the Committee urges the State Party to suspend implementation of the 1998 amendments and re-open discussions with the representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention.

12. In light of the urgency and fundamental importance of these matters, and taking into account the willingness expressed by the State Party to



continue the dialogue with the Committee over these provisions, the Committee decides to keep this matter on its agenda under its early warning and urgent action procedures to be reviewed again at its fifty-fifth session.¹²

In summary the Committee expressed concern that:

- Provisions that extinguish or impair the exercise of native title pervade the amended NTA. The Committee considered that the amended Act favours non-Indigenous interests at the expense of Indigenous title, and consequently, does not strike an appropriate balance between Indigenous and non-Indigenous rights;¹³
- In particular, the validation, confirmation, and primary production upgrade provisions, and restrictions and exceptions to the right to negotiate, discriminate against native title holders.¹⁴ In doing so, these provisions raise concerns that Australia is not acting in compliance with its obligations under Articles 2 and 5 of the Convention (the non-discrimination principle and the requirement to provide equality before the law);¹⁵
- The amended NTA cannot be characterised as a special measure under Articles 1(4) or 2(2) of the Convention;¹⁶ and
- The lack of 'effective participation' of Indigenous people in the formulation of the amended Act was a breach of Australia's obligations under Article 5(c) of the Convention and contrary to the Committee's General Recommendation XXIII on Indigenous People.¹⁷

The Committee called on Australia to address their concerns 'as a matter of utmost urgency'.¹⁸ They urged the Government to immediately suspend implementation of the amendments to the NTA and re-open discussions with Indigenous representatives 'with a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention'.¹⁹

The Committee reaffirmed its decision at its fifty-fifth session on 16 August 1999. The Committee stated that it was:

prompted by its serious concern that, after having observed and welcomed over a period of time a progressive implementation of the Convention in relation to the land rights of indigenous peoples in Australia, the envisaged changes in policy as to the exercise of these rights risked creating an acute impairment of the rights thus recognized to the Australian indigenous communities.²⁰

12 Committee on the Elimination of Racial Discrimination, *Decision 2(54) on Australia*, 18 March 1999, UN Ref: CERD/C/54/Misc.40/Rev.2 (Herein *CERD Decision 2(54)*). The decision can be accessed through the FAIRA webpage, see note 1 above.

13 CERD Decision, para 6.

14 CERD Decision, para 7.

15 CERD Decision, para 8. For an analysis of these obligations see Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, HREOC, Sydney, 1999, pp30-51.

16 *ibid.*

17 CERD Decision, para 9.

18 CERD Decision, para 11.

19 *ibid.*

20 CERD/C/55/Misc.31.Rev.3, 16 August 1999, para 2.



The Committee also decided to 'continue consideration of this matter together with the Tenth, Eleventh and Twelfth period reports of the State party, during its fifty-sixth session in March 2000'.²¹

The findings of the CERD Committee are highly significant. They vindicate the position maintained over the past two and a half years by many Indigenous organisations, human rights advocates, lawyers and community leaders that the amended NTA is racially discriminatory. They provide international recognition of the human rights of native titleholders.

The basis of the Committee's decision

Australia has an obligation under Articles 2 and 5 of CERD to treat all people equally and in a non-discriminatory manner.

- i) Article 2 of CERD places an obligation on States Parties to the Convention not to discriminate, as well as to prevent others within their jurisdiction from discriminating.
- ii) Article 5 requires that, in accordance with the principle of effective participation, States guarantee the right of everyone to equality before the law, including in relation to political rights, the right to own property (individually or communally), the right to inherit and the right to equal participation in cultural activities.²² The principle of effective participation is set out in General Recommendation XXIII of the CERD Committee and requires that the informed consent of Indigenous people be obtained in decisions that affect them,

The Committee found that Australia had breached these obligations on the following bases;

i) The principles of non-discrimination and equality

The CERD Committee adopted an approach to equality which requires States to redress past racially discriminatory practices.²³ States must also give equal respect and protection to different cultural values and ensure these values are protected.

In contrast to this substantive approach to equality is the formal equality approach which merely requires that everyone be treated in an identical manner regardless of such differences.

The substantive approach to racial equality requires that differences be treated differently if such treatment seeks to overcome past discrimination or to protect cultural values.

21 *ibid*, para 4.

22 The meaning of these principles has been considered in detail in previous Native Title reports: Acting Aboriginal and Social Justice Commissioner, *Native Title Report 1998, op.cit.*, Chapter 2; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996-97*, HREOC, Sydney, 1997, Chapter 6; and in the HREOC CERD Submission, paras 92 – 126 www.hreoc.gov.au

23 Committee on the Elimination of Racial Discrimination, *General Recommendation XX on Article 5*, UN Doc CERD/48/Misc.6/Rev.2 15/03/96, para 2 and Committee on the Elimination of Racial Discrimination, *General Recommendation XIV – Definition of discrimination*, 19/03/93, para 2.



In its oral submission to the CERD Committee in March 1999 and in its submissions before this Committee on 9 March 2000, the government's representatives have stated that the standard of equality adopted in CERD is one of substantive equality.

More recently, the concept of substantive equality has been used to consider issues of equality and non-discrimination in international law. In relation to substantive equality, the concept encompasses treating like groups or like things alike, but treating different groups differently, in accordance with the differences between them, provided that the differences you focus on are ones that are legitimate ones to focus on in relation to the objects of the convention, and provided that the different treatment is proportional to the nature of the difference between the groups. We speak in the submission about the application of those concepts to the situation of native title.²⁴

This is consistent with the definition of racial discrimination in Article 1 of the Convention referring to a distinction on the basis of race 'which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights...' It is also consistent with the Committee's General Recommendation XIV which excludes from the definition of discrimination, differential treatment which is consistent with the objectives and purposes of the Convention.²⁵

A differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate... In seeking to determine whether an action has an effect contrary to the Convention, it (the Committee) will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race...²⁶

A special measure is defined under Articles 1(4) or 2(2) of the Convention. Special measures would be legitimate differential treatment, as would measures aimed at recognising and protecting the traditions and customs of Indigenous people. The distinction between these two types of differential treatment is significant.

I indicated to the Joint Parliamentary Committee in response to a series of questions put to me when I appeared before it on 22 February 2000 that the amended NTA as a whole could not be considered a special measure but to the extent that the amended NTA recognises and protects the traditions and customs of Indigenous people then this recognition and protection was a non-discriminatory differential treatment of Indigenous people. This latter description arises from the High Court's identification of the original NTA in *Western Australia v Commonwealth* (1995) 183 CLR 373 as either a special measure or 'a law which, although it makes racial distinctions, is not racially discriminatory so as

24 *Proof Committee Hansard*, Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Renee Leon, 9 March 2000, p154

25 Committee on the Elimination of Racial Discrimination, *General Recommendation XIV – Definition of discrimination*, 19/03/93, para 2. See Acting Aboriginal and Social Justice Commissioner, *Native Title Report 1998*, *op.cit* pp32-34.

26 *ibid*, para 2.



to offend the *Racial Discrimination Act* or the International Convention on the Elimination of All Forms of Discrimination' (p483 -484).

This matter was also dealt with by the Acting Social Justice Commissioner in her submission to the CERD Committee in March 1999.

Native title cannot be described as a special measure. It is not a remedial measure taken for the purpose of overcoming the effect of historical patterns of racism. Native title does lead to the maintenance of separate rights for Indigenous people. Native title is not a temporary measure which can be removed once its objective has been achieved. The recognition of native title involves accepting a form of land title that derives from the traditional laws and customs of indigenous people. The protection of native title must reflect the substance of those traditional rights and customs. Different rights require different forms of protection to achieve substantive equality of treatment.²⁷

The significance of the distinction between differential treatment which can be characterised as a special measure and differential treatment that arises from the unique cultural identity of a distinct cultural group was illustrated during the parliamentary and public debates over the amendments to the NTA and in particular over the amendments which sought to remove the right to negotiate from the Act. Having identified the right to negotiate as a special measure the government argued that amendments which remove a special measure are not discriminatory because they merely take away an additional right extended to Indigenous people. By removing the right to negotiate it was argued that Aboriginal people are put in the same position as other titleholders and are thus not discriminated against. It is also suggested in the government's written submission to the Joint Parliamentary Committee that the removal of a special measure is permissible at international law and does not require the consent of Indigenous people.

There is no authority at international law however to suggest that the consent of the racial group that is to benefit from the special measure is necessary... Nor is there authority to suggest that amendment of a special measure requires consent.²⁸

The Acting Social Justice Commissioner dealt with these arguments in Chapter 3 of the 1998 Native Title Report. In summary, her response to these arguments was twofold. Firstly she argued that the right to negotiate was not a special measure but was a reflection, albeit a poor one, of the traditional mechanisms used by Indigenous people to control access to their land. Moreover a statutory measure, like the right to negotiate, which protects the customs of Indigenous people from the devastating effect of mining and other developments is not a special measure but a recognition and protection of cultural difference. It is not a gift to Indigenous people from government but arises from the identity of Indigenous people themselves and the recognition that this identity is entitled to protection.

27 HREOC CERD Submission, *op.cit* para 110. A copy of this submission is on the HREOC web page at www.hreoc.gov.au

28 Attorney General's Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Submission No: CERD 24, paragraphs 55 & 56, 29 February 2000



Secondly she argued that even if it is assumed that the right to negotiate is a special measure its removal cannot be justified by reference to a notion of equality. Where the basis of the implementation of a special measure is to redress the inequalities created by past discriminatory practices and enable Indigenous people to enjoy their human rights equally, the removal of such a measure can only be justified where such equality has in fact been achieved. This argument is supported by the wording of Article 1(4) of CERD.

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided however, that such measures do not, as a consequence, lead to the maintenance of separate rights from different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

The CERD Committee has recognised that State Parties have a positive obligation to recognise and protect Indigenous cultures and identity.

Through General Recommendation XXIII the Committee has recognised that the culture of Indigenous peoples worldwide needs to be recognised and protected against ongoing discrimination:

...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... Consequently the preservation of their culture and their historical identity has been and still is jeopardised.²⁹

The Committee has called on States to:

- a) recognize 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;
- b) ensure that members of Indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on Indigenous identity;
- c) provide Indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- d) 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;
- e) ensure that Indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs, to preserve and to practice their languages.³⁰

²⁹ Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII – Indigenous Peoples*, 18 August 1997, Un Doc CERD/C/51/Misc.13/Rev.4, para 3.

³⁰ *ibid*, para 4.



The Committee especially called on States Parties:

to recognize and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources...³¹

The Committee's decision of March 1999 reflects these factors. Paragraph 4 of the decision states:

4. The Committee recognizes... that the land rights of indigenous peoples are unique and encompass a traditional and cultural identification of the indigenous peoples with their land...

Members of the Committee also made it clear that the Committee 'links the obligation of non-discriminatory respect for Indigenous culture to the question of control over land'.³² One member of the Committee stated the issue as follows:

To what extent were the traditional rights of indigenous peoples affected by the provisions of the Act? That was the Committee's starting point: the special relationship between the Aboriginals, their culture and way of life, and the land. Native property rights should not simply be given the same protection as any other property rights but should be subject to special protection measures; anything else was tantamount to not protecting them.³³

This influenced the Committee's findings in paragraph 7 of the Decision that the amended NTA, particularly those provisions relating to confirmation, validation, primary production upgrades and changes to the right to negotiate, raised concerns about Australia's compliance with Articles 2 and 5 of the Convention.

A substantive equality approach to native title

The test of equality which the government applies to the amended NTA is whether the rights of Indigenous titleholders are afforded the same protection as non-Indigenous interests. This test should not be confused with the question of whether the protective mechanisms applied to Indigenous interests are the same as the protective mechanisms applied to non-Indigenous interests. Rather the test is whether the two sets of interests are equally protected.

Further, the committee's view appears to be that the assessment of the balance should be undertaken by reference only to a comparison between the interests of indigenous people under the 1993 act when compared with the interests of indigenous people under the amendment act. The government's view is that approach is wrong; that, rather, the assessment should be between the position of indigenous interests on the one hand and non-indigenous interests on the other, and that applying the law as described by Ms Leon, that where analogous existing rights exist, the protection given to indigenous rights should be comparable to those of existing interests. Given the different nature of native title interests from other interests, the protection will not always be the same, but on balance, it should be comparable. The fact that the provisions under the act as

31 *ibid*, para 5.

32 Ms Ali, in FAIRA, CERD Transcript, p19; Ms McDougall, *op cit*, p 60.

33 Mr Diaconu in CERD Summary Record, para 45.



amended may be different in some cases to the provision in the 1993 act cannot itself amount to discrimination.³⁴

There is no dispute by the Aboriginal and Torres Strait Islander Social Justice Commissioner that the test proposed by the government is consistent with a substantive approach to equality. What is disputed is that the amended NTA satisfies the test of equal protection.

Application of the principles of equality to the amended Native Title Act

Whether the amended NTA provides the same level of protection to native title as is provided to non-Indigenous title holders is most clearly discerned where the full enjoyment of native title and the full enjoyment of non-Indigenous interests are inconsistent. What an analysis of the amended NTA reveals is that, in every situation in which there is an inconsistency between Indigenous interests and non-Indigenous interests, the Act provides that non-Indigenous interests will prevail. The four sets of provisions which the Committee identified in paragraphs 7 & 8 as a cause for concern are precisely those provisions in the Act which deal with such an inconsistency.³⁵

In relation to the validation provisions, the inconsistency is between the legal rights of Indigenous title holders and the enjoyment by non-Indigenous titleholders of rights illegally obtained (either because of the invalidity of past acts under the *Racial Discrimination Act, 1975, (Cth)* or because of the invalidity of intermediate period acts, under the original NTA). In relation to the confirmation provisions the inconsistency is between Indigenous interests on the one hand and non-Indigenous interests specified by way of a schedule to the Act or referred to generically as either 'exclusive possession acts' or 'non-exclusive possession acts'. In relation to the primary production upgrade provisions, the inconsistency is between the exercise of native title rights and the carrying out of a range of activities that the leaseholder may wish to pursue, in addition to the rights granted under the lease. In relation to the right to negotiate provisions the inconsistency is principally between the exercise of native title rights and the interests of miners to explore and exploit the land. They also involve a conflict between native title holders and third parties benefiting from the compulsory acquisition of native title land.

In each of these instances where an inconsistency or potential inconsistency exists between the full enjoyment of Indigenous interests and the full enjoyment of non-Indigenous interests, the amended NTA ensures that non-Indigenous interests prevail over the Indigenous interests. The CERD Committee recognised the failure of the Act to give native title holders equal protection to that provided to non-Indigenous interests.

34 *Proof Committee Hansard*, Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Ms Horner, 9 March 2000, p156

35 For reasons why the Acting Social Justice Commissioner had argued to the Committee that the validation, confirmation, primary production upgrade and the amendments to the right to negotiate provisions are discriminatory see: HREOC CERD submission, paras 43-90. An analysis of these provisions and their application by State and Territory governments is also contained in the *Native Title Report 1999*, pp49-67.



While the original Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act. While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title.³⁶

The subordination of native title interests to non-Indigenous interests whenever a conflict arises cannot pass the government's own test of equal protection.

The government's arguments against a finding of discrimination

The government's response to the Committee's decision that the amended NTA is discriminatory is fourfold. Firstly, it maintains that the purpose behind the amendments to the NTA are legitimate and that insufficient attention was paid by the Committee to the reasonableness of the government's objectives and the proportionate means by which these objectives were achieved.³⁷ Secondly, it maintains that the Committee's analysis fails to take account of the range of measures contained in the whole of the act that 'purport to treat native title in a way that is different or takes account of the special nature of native title'.³⁸ Instead it focuses on the amendments to the original NTA and in particular the four sets of provisions which prefer non-Indigenous interests over Indigenous ones. Thirdly, and particularly in relation to the NTA's response to past acts of dispossession, it maintains that the Committee failed to allow the government a margin of appreciation in meeting its obligations under the Act.³⁹ Finally it argues that, to the extent that the Act merely confirms past acts of dispossession, as it does through the validation and confirmation provisions, this is not discriminatory under CERD.

1. In relation to the first point, the government's representative emphasised to the CERD Committee when he appeared before it in March 1999 that the government's purpose in enacting the validation, confirmation and primary production upgrade provisions as well as the amendments to the right to negotiate provisions was legitimate in that it sought to balance a range of interests affected by the legislation using proportionate means to do so.

Of course Australia recognises that in determining if a particular case complies with CERD it is important to have regard that decisions regarding treatment are not arbitrary. In other words, they must have an objectively justifiable aim and proportionate means. And, that's another reason why in my introductory remarks I went to some length to explain the objective, the justifiable objective that some of the measures in the Native Title Amendment Act seek to meet and the proportionate means by which they seek to meet them.

36 CERD Decision, para 6.

37 *Proof Committee Hansard*, Ms Horner, *op cit*, p156.

38 *ibid.*

39 *ibid.*



Now I understand from some of your comments that you're uncomfortable with some of those; both as to the objectives and as to the proportionate means and again I'll come back to that when we look at the particular areas of concern that the committee has expressed in relation to the Amendment Act but suffice it to say at this stage that Australia is aware of the need to have objectively justifiable aims and proportionate means in dealing with this issue.⁴⁰

The justifiable aims proposed in relation to the amendments included the need to provide certainty to non-Indigenous and Indigenous titleholders; the need to deal with the High Court's decision in the *Wik* case; and the need to balance the interests of all the stakeholders in the legislation, including farmers, miners, developers, governments, and native title holders.

The government's argument that where particular provisions within the Act have an objectively justifiable purpose or adopt proportionate means then they are not discriminatory arises from their interpretation of the CERD Committee's General Recommendation XIV quoted above. In my view General Recommendation XIV makes it clear that where differential treatment on the basis of race addresses the disadvantage suffered by a particular racial group as a result of discriminatory practices or where the cultural identity of a particular racial group is recognised and protected by differential treatment, such beneficial measures will not constitute discrimination within the Convention. The purpose of General Recommendation XIV is to rebut the argument, not unfamiliar in domestic deliberations within Australia on the meaning of discrimination in the *Racial Discrimination Act*, that all differential treatment on the basis of race is discriminatory. The definition of discrimination under General Recommendation XIV allows differential treatment if its objectives and purposes are consistent with those of the Convention.

In seeking to determine whether an action has an effect contrary to the Convention, it (the Committee) will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race...⁴¹

General Recommendation XIV is not a means by which the implementation of government policy which results in a negative disparate impact on a particular racial group can, nonetheless, be acceptable if it is reasonable in all the circumstances and adopts proportionate means. Nor does General Recommendation XIV provide a margin of appreciation to States in meeting their obligations under the Convention. Its purpose is to ensure that measures which do recognise and protect cultural identity and practices are not classified as discrimination merely because they treat people differently. It cannot be said, and the government has not demonstrated in either its submissions to the CERD Committee or its

40 *Transcript of Australia's Hearing before the CERD Committee*, Mr Orr, Australian representative in FAIRA, CERD Transcript, pp21-22.

41 *ibid*, para 2.



submissions to the present Committee, that the disparate impact of the four abovementioned sets of provisions can be justified by reference to the aims of CERD ie to overcome racial discrimination and to protect the cultural identity of Indigenous people.

2. The government's second point of rebuttal against the CERD Committee's decision is that the Committee failed to take account of the range of measures contained in the whole of the act that 'purport to treat native title in a way that is different or takes account of the special nature of native title'.⁴² Rather the Committee merely focused on the way in which the original NTA had been amended as a result of the *Native Title Amendment Act, 1998*, (Cth). While I do not intend to deal with each of the differential measures identified in the government's submission as 'provisions that recognise the unique nature of native title rights and go beyond the requirements of formal equality'⁴³ it is important to establish the criterion by which these measures can be assessed against Australia's international obligations under CERD.

As discussed above, the fundamental criterion put forward by the CERD Committee in General Recommendation XIV as to whether differential treatment complies with CERD is whether its objectives and purposes are consistent with the aims of the Convention; namely overcoming racial discrimination and protecting cultural identity.

Many of the measures identified by the government as responding to the unique nature of native title rights, fail to address this criterion. The majority of the measures identified in the government's submission provide the machinery by which native title is incorporated into the property law of Australia. Thus in relation to measures that establish 'special tribunals to deal with native title matters',⁴⁴ there is no particular requirement that these tribunals meet Australia's obligation to overcome racial discrimination or protect the cultural identity of Indigenous people. Measures that emphasise 'low cost, expeditious and informal proceedings to reduce the cost of establishing claims and encourage the use of agreements'⁴⁵ similarly have no substantial impact upon the level of protection afforded native title interests compared with non-Indigenous interests but merely ensure that the machinery is in place to incorporate native title into the legal system.

Measures that emphasise 'agreements through negotiation and mediation' and provide the machinery for enforceable agreements between parties to a native title claim,⁴⁶ do not in themselves meet Australia's international obligation. What is significant in terms of Australia's international obligations is whether the bargaining power of Indigenous parties to a native title agreement is equal to that of non-

42 *Proof Committee Hansard*, Ms Horner, *op cit*, p156. The range of measures referred to by the government can be found at Submission No 24(b), *op cit*, pp2-4.

43 Submission No 24(b), *op cit*, p2.

44 *ibid*, point 4, p2.

45 *ibid*, point 5, p3.

46 *ibid*, points 4,5 and 6, p3.



Indigenous parties. There is no measure in the amended NTA identified in the government's submission which addresses this requirement.

In relation to measures identified in the government's submission that are intended to protect native title interests the significant question is whether the level of protection provided to native title under the amended NTA is sufficient to meet Australia's international obligations. In order to determine this question two factors need to be taken into account. Firstly, the nature of the interest requiring protection and secondly the extent of the threat affecting the interest.

The provision 'to those who claim native title as well as those who have established they have native title'⁴⁷ of 'special national procedural rights (that are not available in relation to other forms of property) to ensure there is consultation about mining and other activity on native title land',⁴⁸ will only meet Australia's international obligation if it effectively protects native title interests against mining and other developments.

In determining whether the right to negotiate provisions as amended provides sufficient protection to native title from the destructive impact of mining and other developments, the Committee was entitled to compare the amended right to negotiate provisions with the level of protection that was previously provided to native title in the same situations under the original NTA.

The Government report explains that the right to negotiate provisions were merely being 'streamlined' or 'reworked' but I think this may mask the substantial nature of the changes made in those provisions. The amended Act alters the right to negotiate in, I believe three fundamental ways and I would like to hear the Government's response.

First of all, it rescinds altogether the right to negotiate in certain circumstances.

Second, it reduces the scope of the right to negotiate to a right of consultation and objection in certain other circumstances, and it authorises States and Territories to replace the right with their own regimes. Mr Orr you spoke of this.

The amended Act effectively rescinds the right to negotiate in certain instances, the amendments allow States and Territories to introduce an alternative provisions replacing that right with a lesser right of consultation and objection – where this provision applies, native title claimants are provided with a right to object to various land use activities and they have a corresponding right to be consulted when determining whether there may be ways to minimise environmental and other land use impacts.

Unlike the right to negotiate, however, the government is not required to act in good faith, a very specific standard which can otherwise invalidate actions when there is a right to negotiate attached to it.

47 *ibid*, point 2, p3.

48 *ibid*, point 1, p3.



Nor does the validity, as I said, of the grant being sought depend on proper consultation having taken place – the right to consult and object is clearly a lesser procedural right.⁴⁹

On the basis of a comparison of the right to negotiate before and after the amendments, the Committee was able to measure the extent to which, under the amended NTA, native title is exposed to the threat posed by mining and other developments. It concluded that the amended right to negotiate provisions did not provide sufficient protection to native title and failed to meet the standards set by CERD. The Committee's view concurs with the view expressed by the acting Aboriginal and Torres Strait Islander Social Justice Commissioner in Chapter 3 of the 1998 *Native Title Report* and Chapter 3 of the 1999 *Native Title Report*.

Another protective measure identified in the government's submission is the provision of 'organisations to assist native title holders to establish and deal with native title'.⁵⁰ As indicated previously the provision of machinery to deal with native title is not of itself sufficient to meet the aims of the Convention in overcoming racial discrimination and protecting Indigenous culture. What needs to be established is that such organisations are adequately funded and managed in order to provide protection to native title interests. This is not demonstrated in the government's submission.

A further category of measures, which the government identifies as addressing 'historical extinguishment of native title rights', includes the restitution of native title pursuant to s47B of the NTA. Section 47B provides that in certain circumstances native title claimants may apply for a determination on land where native title would otherwise have been extinguished (including scheduled interests under the Act)⁵¹ because of previous Crown grants. The section will only apply where the area is presently vacant Crown land and is not subject to a reservation etc for a public or particular purpose or subject to a resumption order.⁵² In addition native title claimants must occupy the land at the time of application.⁵³

There is no doubt that s47B provides protection to native title where it may otherwise be vulnerable to permanent extinguishment at common law or through the confirmation provisions of the NTA (where the confirmation provisions extend beyond the common law). The issue that concerned the CERD Committee is whether the protection of native title through the NTA is sufficient to meet Australia's international obligations. The fact that the provision may provide some protection against extinguishment of native title at common law is not itself determinative of this issue.

49 *Report by Ms G. McDougall*, Country Rapporteur, to the 1323rd meeting of the Committee in the Elimination of Racial Discrimination, 12 March 1999.

50 Submission No 24(b), *op cit*, point 5, p2.

51 That is, grants which are included in the Schedule to the Act as a result of the 1998 Amendment Act.

52 Section 47B(1)(a) and (b), NTA.

53 Section 47B(1)(9c), NTA.



Because much of the government's argument is that its actions have been justified because they meet the standard of the common law, it is important to note that the common law itself is racially discriminatory.

As defined by the High Court in the Mabo decision, under common law, native title is a vulnerable property right, it is inferior to sovereign title which has the power to extinguish native title without notice, consent or compensation...⁵⁴

As indicated previously, the level of protection required to meet Australia's international obligations under CERD depends on the nature of native title and the extent of the threat that is posed to its existence. The extent to which native title is vulnerable to extinguishment at common law is a relevant factor in determining the appropriate level of protection required by the legislation. As yet this issue has not been finally decided by the High Court although the majority Full Federal Court decision in *Western Australia v Ben Ward & Ors* [2000] FCA 191 constructs native title as a very vulnerable bundle of rights each of which is extinguished permanently where its enjoyment is inconsistent with the enjoyment of non-Indigenous interests.

Rather than seeing this development in the common law as a basis for alleviating governments of their duty to Indigenous titleholders under international law, it places a greater onus on governments to provide additional protection to native title in order to overcome the discriminatory effect of the common law.

Section 47B allows for the restoration of native title on vacant Crown land when specific criteria are met by claimants. There is of no benefit from s47B to claimants who have been forced off their land by historical grants, and are therefore unable to occupy their land. The protection of 47B is not available to claimants where the government has any proposal for use of the land, either for public benefit or for the benefit of third parties. Claimants whose title co-exists on pastoral leasehold land will receive no benefit from the provision.

3. The third point of rebuttal by the government to the CERD decision is that the Committee did not allow a margin of appreciation in legislating in such a novel area of the law. This argument is dealt with in the submission of Ernst Willheim. I wish only to add a further decision which, although concerning a State's obligations under Article 27 of ICCPR, is relevant to the extent to which States are permitted a margin of appreciation where the pursuit of economic activities is inconsistent with the culture and tradition of Indigenous people. In relation to Article 27 the Human Rights Committee expressed the following view.

A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken

54 Australian Country Rapporteur, *op cit*, Opening Remarks, pp4-5.



in Article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under Article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under Article 27.⁵⁵

4. The fourth point of rebuttal against the CERD Committee's finding of discrimination is that past discrimination cannot be undone and the recognition and acknowledgment of past discriminatory practices is not, in itself, a discriminatory act.

In dealing with this point it is necessary to understand the significance that the Committee placed on overcoming past discrimination against Indigenous people. Paragraph 3 of the decision states:

3. The Committee recognizes that within the broad range of discriminatory practices that have long been directed against Australia's Aboriginal and Torres Strait Islander peoples, the effects of Australia's racially discriminatory land practices have endured as an acute impairment of the rights of Australia's indigenous communities.

Comments by Committee member Mr Van Boven reflect the Committee's view that, in formulating the amendments to the NTA, the Australian Government did not recognise or acknowledge the impact of the historical treatment of Indigenous people.

I would have liked in fact if the government would have made an explicit recognition and acknowledgment that the Aboriginals have been marginalised and disadvantaged over the years and over the decades and over the centuries. And that their rights and their entitlements should be recognised in that light, in that perspective. So we can raise a smokescreen of definitions but we have to relate it to people... when we deal with human rights after all and issues of discrimination, it relates to people and that should have been more explicitly stated.⁵⁶

In contrast to the Committee's views that past discrimination should be addressed, the Australian government representatives appearing before the Committee argued that the injustices of the past cannot be undone and that a State Party is not required to do this under the Convention. Accordingly, it was argued, the validation and confirmation provisions of the amended NTA were not discriminatory:

There is an issue for Australia as to whether it can go back and undo discriminatory actions which have taken place in the period since settlement and before the Mabo decision in 1992... I think

55 Communication No 511/1992: Finland. Ilmari Lansman *et al.* 08/11/94. CCPR/C/52/D/511/1992.

56 Mr Van Boven in FAIRA, CERD Transcript, *op cit*, p43.



it's an issue that needs to inform our discussion about the validation regimes and the confirmation regime...⁵⁷

It is necessary to recognise that past acts, historical acts and the effects of these cannot be undone... Past acts, however discriminatory, which have resulted in dispossession of Australia's Indigenous people cannot be undone, though of course, present and future policies can remedy the effects, the current effects, of such acts...⁵⁸

(The validation regime)... is much more limited than the regime in the (original Native Title Act)... (This regime) only provides for validation of acts between 1993 and 1996... with regard to this validation regime we are talking about things that happened in the past, between 1993 and 1996. In acknowledging and recognising things that happened in the past the government doesn't believe that it is acting discriminatorily.⁵⁹

(The Native Title Act) protects native title much more than the common law does but what the Native Title Act doesn't and Australia believes that it is not obliged to do is to go back and undo the past...⁶⁰

The government's position is that the confirmation regime provides no divestment of native title rights. It is simply a recognition of the historical position that native title has been extinguished by grants of freehold and leasehold... over the past 200 years... The Australian government believes it is not contrary to CERD to confirm this historical position... The provisions are simply an acknowledgment of past dispossession and extinguishment and the government does not believe that this is contrary, as I said, to CERD.⁶¹

The Australian Country Rapporteur⁶² noted that there is some merit in the view that one cannot undo that which has already been done.⁶³ However the acknowledgment and recognition that one gives to past acts of injustice are quite another matter.

The Australian government believes that it cannot go back and cure the injustices of the past. Of course there is some merit in that view. What concerns me however is that the validation and confirmation of extinguishment provisions in the amended Act... are provisions that do not only apply to the distant past. They appear to also apply to actions that in some cases took place as recently as 1994 and 1996...⁶⁴

57 FAIRA, CERD Transcript, *op cit*, Mr Orrp 21.

58 *ibid*, p23.

59 *ibid*, pp28-29.

60 *ibid*, p31.

61 *ibid*, p33. See also Australia's written report: Committee on the Elimination of Racial Discrimination, *Additional information pursuant to Committee Decision: Australia*, *op cit*, para 37.

62 The Country Rapporteur is the committee member who leads the Committee in its consideration and questioning of the country.

63 FAIRA, CERD Transcript, *op cit*, Ms McDougall, p60.

64 Ms McDougall in FAIRA, CERD Transcript, *op cit*, p60.



I would welcome a discussion within the Committee about how we might continue our urgent deliberations on Australia's Native Title Amendment Act... before other rights get extinguished in such a way that they would be referred to as the injustices of the past which cannot now be rendered right.⁶⁵

In its justification of the provisions of the amended NTA which validated intermediate period acts the government sought to draw an analogy with the validation provisions in the original NTA. However, the bases of the enactment of each of these sets of provisions were quite different. One of the effects of the High Court rejecting terra nullius in *Mabo (No.2)* as a past discriminatory practice, and recognising native title as a pre-existing right was that acts of dispossession which failed to recognise the procedural or substantive rights of native title holders were, after the implementation of the *Racial Discrimination Act (Cth)* (RDA) in 1975, unlawful. The purpose of the validation provisions in the original NTA was to validate these otherwise unlawful acts. Far from being a recognition that past injustices cannot be undone, the validation provisions were a response to the discontinuity which is created when injustices of the past are, for the first time, legally recognised as such.

The validation of intermediate period acts in the amended NTA took place in very different circumstances. The failure of states and territories to observe the substantive and procedural rights of native title holders between 1994 and 1996 cannot be seen as an anomaly created by the belated denunciation of past injustice. In granting mining tenements on pastoral leaseholds without negotiating with native title holders, states knowingly took a risk that these acts would be unlawful if the High Court found (as it did) that native title co-existed on pastoral leasehold land.⁶⁶ The Committee did not accept that acts that took place between 1994 and 1996 could conveniently be dismissed as 'actions of the past'.

The Government's argument that the confirmation provisions comply with the standards of the common law was also considered to be unacceptable to the Committee. The importance of acknowledging the historical treatment of Indigenous people as unjust was influential to the Committee in this regard. As the Australian Country Rapporteur noted:

Since... European settlement... the native land rights of Aboriginal peoples have been systematically undermined... (Terra nullius) completely discounted the cultural value of Aborigines traditional and complex land distribution system...

65 *ibid*, p61.

66 Prior to the High Court's decision in *Wik v Queensland*(1996) 187 CLR 1, (Wik), state governments carried out many acts on pastoral leasehold land without negotiating with native title holders. As a result of the Wik decision, which found that native title co-existed on pastoral leasehold land, these acts were invalid. The amended NTA validated these invalid acts, called intermediate period acts (Part 2 Division 2A). The effect of the validation of intermediate period acts depended on whether they were category A, B, or C intermediate period acts (see ss 203A-232E). The grant of a freehold or exclusive leasehold had the effect of extinguishing native title. The grant of a non-exclusive lease has the effect of extinguishing native title to the extent of the inconsistency. The grant of a mining lease does not extinguish native title.



Because much of the government's argument is that its actions have been justified because they meet the standard of the common law, it is important to note that the common law itself is racially discriminatory.

As defined by the High Court in the Mabo decision, under common law, native title is a vulnerable property right, it is inferior to sovereign title which has the power to extinguish native title without notice, consent or compensation...⁶⁷

As indicated above the Committee rejected the argument that the common law is the standard against which actions by Government should be judged as discriminatory or non-discriminatory. The common law cannot constitute a benchmark of equality where it fails to meet Australia's obligations under the Convention. As discussed previously s47B of the amended NTA is an example of a provision which does seek to undo the discriminatory practices, upheld by the common law, of the past extinguishment of native title by inconsistent acts of the Crown. The issue is not whether past discriminatory practices can be undone but whether the measures taken to do this in the amended NTA are sufficient to meet our international obligations. The Committee's decision was that the amended NTA does not provide sufficient protective measures to ensure that native title interests are equal to those of non-Indigenous interests.

ii) The principle of effective participation of Indigenous peoples

In determining whether the amendments to the NTA were discriminatory the Committee was not only concerned with the standards of equality and non-discrimination contained in the Convention, but also with the procedure by which the amendments were settled. In this regard the Committee asked whether Indigenous people had participated in the formulation of the amendments and whether the amendments were acceptable to the Indigenous people whose rights are directly affected by them. The unequivocal answer to these questions was that Indigenous people did not give their consent to the amendments and that their participation in the process 'had not been given the legitimacy by the Australian Government that [they] expected'.⁶⁸ This was made quite clear by the National Indigenous Working Group the day before the legislation passed through Federal Parliament on 8 July 1998:⁶⁹

... We confirm that we have not been consulted in relation to the contents of the Bill, particularly in regard to the agreement negotiated between the Prime Minister and Senator Harradine, and that we have not given consent to the Bill in any form which might be construed as sanction to its passage into Australian law.

We have endeavoured to contribute during the past two years to the public deliberations of Native Title entitlements in Australian law.

67 Australian Country Rapporteur, Opening Remarks, *op cit*, pp4-5.

68 *Hansard*, Senate, 7 July 1998, p4352.

69 *ibid*, pp4352-54.



Our participation has not been given the legitimacy by the Australian Government that we expected, and we remain disadvantaged and aggrieved by the failure of the Australian Government to properly integrate our expert counsel into the lawmaking procedures of government...⁷⁰

In finding that Australia had not allowed effective participation by Indigenous people in the formulation of the amendments to the NTA, the Committee was concerned that the power to approve or disapprove of the legislation was not appropriately located with Indigenous people whose rights were directly affected by it. Even the Committee could not usurp the final responsibility which Indigenous representatives had in deciding whether their people could live with the amendments. In 1993 the Committee's decision to support the original NTA was largely as a result of the consent of Indigenous representatives. In 1999 it was obvious to the Committee that this consent had been withdrawn.

Significantly, the original 1993 Act was the subject of extensive negotiations with indigenous groups and attracted the 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 in the future.

The original 1993 Act was considered in Australia's periodic report in 1993.

The Committee accepted that the original Act was compatible with the Convention...

Let me say again that in raising these questions concerning the application of the amended Act, it is also important to evaluate the overall effect of these amendments in light of the initial compromises that were reached in the original 1993 Act between the rights of Native title holders and the rights of non-Native Title holders.⁷¹

The Committee's decision concerning the native title amendments criticises both the exercise of the Government's power in removing native title rights and the location of that power within the non-Indigenous arena. The Committee made it clear that unless the legislative regimes which affect native title are negotiated with Indigenous people the Committee will continue to criticise and scrutinise State Parties at an international level.

The Committee also expressed its concern that Australia had not complied with Article 5(c) of the Convention and General Recommendation XXIII concerning Indigenous Peoples:

The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention. Calling upon States Parties to "recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources", the Committee, in its General Recommendation XXIII, stressed the importance of ensuring "that

70 *ibid*, p4352.

71 Australian Country Rapporteur, Report, *op cit*, pp5-8.



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".⁷²

The government representatives presented a very different view of what was required of State Parties under the Convention in ensuring that Indigenous representatives participated in the formulation of legislation and policies which directly affect them:

I note also that the CERD's general recommendation in Paragraph 4d goes on to say that no decisions directly relating to the rights of Indigenous People are to be taken without their informed consent. This is a higher level of responsibility, a higher level of obligation than simply providing equal rights. This is a requirement to provide for the informed consent of Native Title holders. Australia admits that the informed consent of Native Title holders and Indigenous Peoples was not obtained in the Native Title Amendment Act. Australia regrets this. As I said at the beginning on Friday, the government attempted to obtain a consensus with regard to the Act but despite a lengthy process, that consensus was not possible and in the end the parliament had to make the laws which it judged were appropriate. In this case, much of the Native Title Amendment Act is concerned with balancing rights, balancing rights of Native Title holders with pastoral lessees and others. As I also said on Friday there was no consent to these provisions neither from Indigenous People nor from pastoralists and miners. Australia regards this requirement essentially as aspirational and it tried to meet and aspire to this requirement but it admits honestly before this Committee that the requirement was not met.⁷³

The Committee disagreed with this interpretation of the Convention:

(I)n our general recommendation 23, we referred to the informed consent... it was said that this requirement of informed consent is only aspirational. Now it is not understood by this committee in that sense. I think there we tend to disagree.⁷⁴

In mediating an outcome in native title the Government claims to have given Indigenous interests the same weight as the interests of other stakeholders such as miners, pastoralists, governments and other industries. So long as the balancing exercise has an 'objectively justifiable aim' and adopts 'proportionate means', then, in the Government's view, the Convention is not contravened. The outcome of such an approach is that Indigenous interests will always be overwhelmed by the combined force of non-Indigenous interests who, on the whole, seek to contain native title.

The responsibility of a government undertaking this 'balancing exercise' does not extend to ensuring that the native title legislation, which so fundamentally affects Indigenous people is directly negotiated with and agreed to by Indigenous people.

The Committee's response to the government's position on the extent of their obligations under CERD is reflected in paragraph 6 of the decision. The

72 CERD Decision, para 9.

73 FAIRA, CERD Transcript, *op cit*, Mr Orr, p38.

74 FAIRA, CERD Transcript, *op cit*, Mr Van Boven, p43.



Convention requires that State Parties balance the *rights* of different groups identifiable by race.⁷⁵ An appropriate balance based on the notion of equality is not between miners, pastoralists, fishing interests, governments and Indigenous people, but between the rights – civil, political, economic, cultural and social - of Indigenous and non-Indigenous titleholders. Paragraph 6 states:

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

The justification for making a commitment towards a negotiated outcome with Indigenous people is the recognition that the relationship between Indigenous and non-Indigenous people should be an equal one. A relationship of equality is not one in which Indigenous people take their place, as just another interest group, among the vast range of non-Indigenous interest groups with a stake in native title. Rather, it is one where Indigenous interests are equal to the combined force of non-Indigenous interests, in all their forms and manifestations. A legislative regime which is imposed rather than negotiated with the Indigenous people it directly affects is not based on a relationship of equality.

The Chairman of the Committee pointed out the implications for Indigenous people of the Government seeing its role as the mediator of interest groups, rather than as a negotiator with Indigenous people who had equal bargaining power in the negotiation process.

We were told that consultations took place. Alright, the first point that you were under pressure. By who? Consultations took place. Wonderful. That proves that the government is doing a wonderful job. We were told about equal rights. There was no spelling out of which rights we are talking about. Can the government say that there are equal rights on every human right which exists – all five of them – social, political, etc. All the five sets of rights?

Mr Van Boven spoke about substantive right and I'm not going to elaborate on this. Then we were told that we were not able to achieve consensus. So? The parliament acted. That means what in lay man's words? That the point of view of the Indigenous population was not accepted? No consensus was achieved. So the parliament which is the white man again took the matter into their hands and they decided and they imposed on the indigenous people, so what consensus resulted? You put it in such a way, in a legal way as a good lawyer, but as someone who is working in the field of human rights the conclusion that I achieve is that the Indigenous population's point of view is not taken into consideration. The pressure was not felt. Consultation with them did not achieve anything, of course, why should it achieve anything? Equal rights were mentioned. Few rights and not all rights we were not told about that. Consensus was not achieved so parliament imposed whatever they want to impose. I must say that this is a little bit of an alarming picture.⁷⁶

75 See also Mr Aboul-Nasr, in FAIRA, CERD Transcript, *op cit*, p44.

76 FAIRA, CERD, *op cit*, The Chairman, p44.



The Committee's decision concerning the native title amendments criticises both the exercise of the Government's power in removing native title rights and the location of that power within the non-Indigenous arena. The Committee made it clear that unless the legislative regimes which affect native title are negotiated with Indigenous people the Committee will continue to criticise and scrutinise State parties at an international level.

(b) Amendments to the Act

Consultation and negotiation with Indigenous representatives and native title representative bodies is the most essential component of establishing legislation which meets Australia's obligations under CERD.⁷⁷ The importance of informed consent to ensure effective participation by Indigenous people is recognised in international human rights standards. Domestically, a recent review of the operation of Northern Territory land rights legislation named informed consent as the most effective means of decision-making concerning land use issues.⁷⁸

Standards for consultation, the first step in negotiation, are set out in the document prepared by the Social Justice Commissioner for the Australian Heritage Commission appended to this submission, and provided to this Committee at the Public Hearing. This document deals specifically with heritage issues, however, the standards are consistent with those set out by the CERD.

Without pre-empting the outcome of negotiations with Indigenous representatives, amendments which require most urgent attention are those identified by the CERD Committee as discriminatory.

(c) Dialogue with the CERD Committee

The CERD Committee members could have an invaluable role in assisting in such a dialogue. They would certainly benefit from first hand experience and knowledge of the situation in Australia. The first priority however, is to establish a better informed basis for amendment through consultation and negotiation with Indigenous people.

Question taken on Notice

Senator Ferris addressed the following question to the Social Justice Commissioner when he appeared before the Committee on 22 February 2000.

CHAIR – Dr. Jonas, we had some evidence last Thursday night from ATSIC in which they called for a scrapping of the Native Title Act and suggested that we should start again. Clearly, that is not your position, but would you like to comment on the suggestion that we should abandon the current Native Title Act and begin again? How would you see that operating in the Australian community if it were to occur?

77 Committee on the Elimination of Racial Discrimination *General Recommendation XXIII – Concerning Indigenous Peoples*, 18 August 1997, UN Doc CERD/C/51/Misc.13/Rev.4, para 4(d).

78 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs "Unlocking the Future" August 1999, para 1.29.



In answering this question it is important to understand that, in meeting its international obligations a State party is required to ensure that the rights of indigenous people are equal to the rights of non-indigenous people. Where the common law does not adequately protect Indigenous interests then the legislature is under a duty to rectify any discrimination that exists. What has happened in relation to the NTA is that the legislature has failed to provide the additional protection that would bring about equality between Indigenous and non-indigenous interests in land.

If the amended NTA were 'scrapped' then the rights of Indigenous people would be left to the common law. The common law of native title is still in a stage of development. The High Court has not resolved the nature of native title, nor the circumstances in which it is able to be extinguished. Until these matters are resolved it is impossible to tell whether the rights of Indigenous people are better protected under the common law compared with the legislature. What is important at this stage is that as a result of consultation and negotiation with Indigenous representatives, the Native Title Act be further amended so as to conform with the principles of equality and non-discrimination.⁷⁹ Amendment of those provisions would require a process which could be referred to as "unravelling"⁸⁰ but this does not require "scrapping of the Act".

79 Committee on Elimination of Racial Discrimination. Decision 2(54) on Australia: Australia 18/3/99 CERD/C/54/Misc.40/Rev.2 para 7.

80 Mr Geoff Clark, Chairman of ATSIC suggested that the amendments could be "unravelling" rather than "scrapped". Proof Committee Hansard. Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund. Consistency of the Native Title Amendment Act 1998 with Australia's international obligations under the Convention on the Elimination of all Forms of Racial Discrimination, Thursday February 2000, Canberra page NT 10-11.



Information concerning native title provided by the Human Rights and Equal Opportunity Commission to United Nations Committees in 2000

The following is an extract of the information on native title provided to:

- 1) Committee on the Elimination of All Forms of Racial Discrimination (CERD): additional information to Australia's 10th, 11th and 12th periodic reports under CERD, March 2000;
- 2) Human Rights Committee: additional information to Australia's third and fourth periodic reports, for consideration during the 69th session, July 2000; and
- 3) Committee on Economic, Social and Cultural Rights: information in relation to consideration of Australia, August 2000.

All information was brought to the attention of the Australian government through a range of HREOC publications and submissions.

1. Native Title

Summary of Issue

- Native title is the legal recognition given to the traditional laws acknowledged by, and the traditional customs observed by, Indigenous people. The High Court of Australia has also recognised the power of the State to extinguish native title.
- The common law is developing a construction of native title that makes it vulnerable to permanent extinguishment. This construction is referred to as a bundle of rights approach to native title. Rather than the relationship between these rights being perceived as a system of rights, native title is seen as a set of traditional practices that will only be protected by the law if they continue to be practised as they were by the original inhabitants.
- Amendments to the following aspects of the Native Title Act prefer non-Indigenous title to land over Indigenous title to land:
 - (i) The validation provisions;
 - (ii) The confirmation provisions;
 - (iii) The future act provisions; and
 - (iv) The right to negotiate.



- In each of these instances, Indigenous interests are either extinguished or impaired in order to ensure the full enjoyment of non-Indigenous interests in land where there is any inconsistency between Indigenous and non-Indigenous interests.¹
- Native title holders *are* relevantly different to other persons vested with interests in land, given their level of dispossession and disadvantage. It is fitting that native title should be given particular protection consistent with the internationally recognised rights to enjoy one's culture and not be arbitrarily deprived of property.²

Relevance to the ICERD

- Article 1(1): A distinction based on race which has the purpose of nullifying or impairing the recognition, enjoyment or exercise of rights on an equal footing;
- Article 2(1)(a): States not to engage in discrimination;
- Article 2(1)(c): States to repeal all discriminatory laws;
- Article 5: Equality before the law; and
- Article 6: States to assure to everyone effective protection and remedies against acts of racial discrimination.

The amendments to the Native Title Act and their relevance to ICERD: Decision 2(54) of the CERD noted that the validation, confirmation and primary production upgrade provisions, and restrictions and exceptions to the right to negotiate discriminate against native title holders. Since August 1999, state and territory native title legislation continues to be considered or has been enacted under the authority of the above discriminatory provisions. The Commonwealth legislation's authorisation of state and territory native title regimes also denies Indigenous peoples 'effective protection and remedies' against acts of racial discrimination that violate their human rights and fundamental freedoms, as required under Article 6.

- '*Validation*' provisions: Generally states and Territories have been unwilling to negotiate an alternative to blanket validation legislation. The validation of intermediate period acts deprives native title holders of procedural rights to engage in decisions about land, substituting a compensation scheme for rights removed.
- '*Confirmation*' provisions: All states and Territories except Tasmania have introduced confirmation legislation. Since August 1999, Western Australia has passed legislation confirming extinguishment on further titles.
- '*Right to negotiate*' provisions: In paragraph 7 of Decision 2(54) the CERD expressed its concern that provisions within the NTA that place 'restrictions

1 The Committee on the Elimination of Racial Discrimination (the CERD) has observed that the amended Act appears to create legal certainty for governments and third parties at the expense of native title holders. They also noted that the process by which the NTA amendments of 1998 were enacted did not involve the informed consent of Indigenous people or their representatives, nor were the amendments acceptable to the Indigenous people whose rights are directly affected by them. Committee on the Elimination of Racial Discrimination, *On Australia*, paragraphs 6 & 9. 18 March 1999, UN Doc CERD/C/54/Misc.40/Rev.2.

2 Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native title report 1998*, HREOC, Sydney, 1999, p105. The HRC has confirmed that different rights for vulnerable and disadvantaged groups are permissible under the ICCPR at paragraph 10 of General Comment 18.



concerning the right of indigenous title holders to negotiate non-indigenous land uses' are discriminatory. Most states and territories have introduced legislation that contains provisions that restrict the ability of native title holders to negotiate over non-Indigenous land uses.

- *Failure of the amended Native Title Act to incorporate the principles of equality:* In order to reconstitute the principles of equality and non-discrimination in state legislation it would be necessary to amend the Commonwealth Native Title Act so as to make it consistent with the RDA.
- *Lack of consultation and informed consent for the amendments:* The failure of the government to enter into negotiations with native title holders to amend the Native Title Act also places Australia in breach of its obligations under the Convention.

Relevance to the ICCPR

- Articles 1 and 27: Self-determination and the rights of minorities; and
- Articles 2 and 26: Non-discrimination and equality.

Articles 1 and 27: Self-determination and the rights of minorities

The extinguishment or impairment of native title is a breach of Articles 1 and 27 of the ICCPR, which require the state to protect the culture of Indigenous peoples. The HRC has confirmed that Indigenous peoples are minorities for the purposes of Article 27 in a number of cases, such as in *Kitok v Sweden* (197/85), *Ominayak v Canada* (167/87), and the *Länsman* cases (511/92 and 671/95). The HRC has also recognised the special place of land rights within Indigenous cultures, and that this 'does not prejudice the sovereignty and territorial integrity of a State party'.³

The following provisions of the amended NTA and developments in the common law subordinate Indigenous interests to those of non-Indigenous interests:

- *Future act provisions:* The absolute protection of future acts on native title land means that native-title holders do not have any meaningful right to participate in the decision of whether the act will be performed. In this regard, the 'future acts' and especially the 'primary production' breach Articles 1 and 27 of the ICCPR; the 'upgrade' provisions also breach Australia's positive duties to protect native title under Article 1.
- *Right to negotiate:* Diminution of the right to negotiate diminishes Article 1 rights of self-determination, as interpreted by UN treaty bodies, by rolling back opportunities for Indigenous peoples to participate in the management of their land and resources.⁴ Denial of native title holders' right to negotiate also amounts to denial of a minority's exercise of cultural rights, which constitutes a breach of Article 27.
- *'Validation' and 'confirmation' provisions:* The validation provisions, which retrospectively validate all land grants issued in contravention of native title rights, and the confirmation provisions, which *wholly extinguish* native title rights, or authorise such extinguishment, and therefore *wholly deny* cultural rights associated with affected land, to a breach of Article 27 rights.

3 HRC, General Comment 23 at paragraphs 3.2 and 7.

4 Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *op cit*, p62.



- *Lack of consultation and informed consent for the amendments*: The failure to consult constitutes a breach of Article 27. In particular, General Comment 23 states, at paragraph 7: 'The enjoyment of [cultural] rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them'.
- *Common law of native title*: Article 27 of the ICCPR protects minority contemporary cultural practices as well as traditional practices.⁵ Under the 'bundle of rights' approach, each particular native title right can be extinguished on the basis of inconsistency with the exercise of rights pursuant to an act of the Crown.
- Where the common law is developing in a direction contrary to Australia's obligations under ICCPR it is incumbent on Australia to legislate to ensure that appropriate protection is extended to Indigenous people.

Articles 2 and 26: Non-discrimination and equality

Articles 2 and 26 of ICCPR require the State to protect Indigenous rights to land to the same extent that non-Indigenous interests in land are protected. The priority given to non-Indigenous interests in land over Indigenous interests in land is a breach of these Articles.

The following provisions of the NTA breach these articles:

- *'Validation', 'confirmation' and future act provisions*: These provisions diminish the property rights of native title holders and increase the property rights of non-native title holders. Although property is not a protected ICCPR right, Article 26 prohibits discrimination in relation to the exercise of all human rights, including non-ICCPR rights.⁶
- *Right to Negotiate*: Even if the 'right to negotiate' is classified as a 'special measure', it cannot be said to have exhausted its purpose. There is no evidence that Indigenous people no longer suffer the effect of past discrimination on pastoral leasehold land.⁷ Such positive measures must also respect the provisions of both Articles 2(1) and 26 of the Covenant as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population.
- *Failure of the amended Native Title Act to incorporate the principles of equality*: The *Racial Discrimination Act 1975* (Cth) embodies Australia's domestic implementation of its obligations under CERD.⁸ It makes discrimination on the basis of race, colour, descent or national or ethnic origin unlawful. It binds both state and federal governments. The recent amendments to the NTA⁹ provided an opportunity to apply the RDA unequivocally. As amended, section 7 of the NTA does not ensure the protection of native title by the general standards of equality and non-discrimination enshrined in the RDA.

5 See *Länsman v Finland* (511/92).

6 See HRC definition of discrimination in General Comment 18 at paragraph 7.

7 Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *op cit*, p114.

8 The preamble to the *Racial Discrimination Act 1975* (Cth) states that the purpose of the Act is 'to make provision for giving effect to the Convention' (ie. CERD).

9 The amendments were passed on 8 July 1998 and most came into effect from 30 September 1998.



Relevance to the ICESCR

- Article 1: Self-determination;
- Article 2.1: Progressive realisation of rights;
- Article 2.2: Native title rights to be enjoyed on a non-discriminatory basis; and
- Article 15: Native title and cultural rights.

Article 1: Self-determination

There are two bases on which the protection of native title is required in order to meet the obligation under Article 1 in relation to the right to self-determination.

- The first is the strong link established in international law between the right of self-determination for Indigenous peoples and control over their lands and resources.¹⁰
- The second basis for the protection of native title encompasses political participation rights, including the right to be consulted and to give or withhold consent on an informed basis in respect of decisions that will directly affect Indigenous peoples. The right of effective participation applies to the decision to enact and amend legislation in respect of native title.
- The fact that traditionally Aboriginal and Torres Strait Islander people used their land as a resource for the sustenance and well being of their community is not, under the amended NTA, translated into a right to participate in the modern management of their land. Native title rights are isolated from the day-to-day lives of the communities that observe and integrate their traditions into the texture of contemporary life. In this way native title is quarantined from the broader principle of self-determination.

Article 2.1: Progressive realisation of rights

- Article 2.1 of ICESCR requires States to take steps to achieve progressively the full realisation of the rights recognised by the Covenant. Where the common law is developing in a direction contrary to Australia's obligations under ICESCR it is incumbent on Australia to legislate to ensure that appropriate protection is extended to Indigenous people.
- The amended NTA does not overcome the inadequate protection extended to native title by the common law. Indeed the confirmation provisions seek to confirm, and at times go beyond, the extinguishments permitted by the common law.
- The NTA also displaces, to the extent of any inconsistency, the only explicit protection against the discriminatory exercise of sovereign power against the Indigenous inhabitants, the *Racial Discrimination Act 1975* (Commonwealth) (RDA).
- Significant aspects of the amended NTA are discriminatory and thus inconsistent with the RDA. Without any constitutional entrenchment of either non-discrimination norms or Indigenous rights in Australia, through a Bill of Rights, there is no domestic mechanism to ensure that the cultural and economic rights of Indigenous people are protected.

10 See for example the 1990 case of *Chief Ominayak v Canada* UN Doc A/47/40 (1992).



Article 2.2: Native title rights to be enjoyed on a non-discriminatory basis

- Article 2.2 of ICESCR requires that the rights conferred by the Convention be enjoyed on a non-discriminatory basis.
- The CERD's March 1999 decision under its early warning and urgent action procedures in respect of Australia's compliance with its obligations under the ICERD found that the amended NTA was discriminatory in that it preferred non-Indigenous interests over Indigenous ones.
- The CERD's analysis supports the conclusion that there is a contravention of the non-discrimination requirements of ICESCR as reflected in Article 2.2.

Article 15: Native title and cultural rights

- Article 15 provides for the right of everyone to take part in cultural life (15(a)). Accordingly, any diminution of native title rights is a derogation from the right of Indigenous people to take part in and enjoy their cultural life. The amendments to the NTA will make it more difficult to protect important cultural and sacred sites from mining and other developments, to undertake ceremonies, to instruct children in culture and law and to carry out traditional activities such as camping, hunting and fishing.



Concluding observations on Australia of the International Committee on the Elimination of Racial Discrimination, 24 March 2000

UNITED
NATIONS

CERD



**International Convention
on the Elimination
of all Forms of
Racial Discrimination**

Distr.
General
CERD/C/304/Add.101
19 April 2000
Original: English

**Concluding observations by the International Committee on the
Elimination of Racial Discrimination : Australia. 19/04/2000.
CERD/C/304/Add.101.
(Concluding Observations/Comments)**

**COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION**

Fifty-sixth session
6-24 March 2000

**CONSIDERATION OF REPORTS SUBMITTED BY STATES
PARTIES UNDER ARTICLE 9 OF THE CONVENTION**

**Concluding observations of the Committee on the
Elimination of Racial Discrimination**

Australia

1. The Committee considered the tenth, eleventh and twelfth periodic reports of Australia, submitted as one document (CERD/C/335/Add.2), at its 1393rd, 1394th and 1395th meetings (CERD/C/SR.1393, 1394 and 1395), held on 21 and 22



March 2000. At its 1398th meeting, held on 24 March 2000, it adopted the following concluding observations.

A. Introduction

2. The Committee welcomes the reports submitted by the State party and the additional oral and written information provided by the delegation, while regretting the late submission of the tenth and eleventh periodic reports. Appreciation is expressed for the comprehensiveness of the report and of the oral presentation. The Committee was encouraged by the attendance of a high-ranking delegation and expresses its appreciation for the constructive responses of its members to the questions asked.

3. The Committee acknowledges that the State party has addressed some of the concerns and recommendations of the Committee's concluding observations on the ninth periodic report (A/49/18, paras. 535-551).

B. Positive aspects

4. The Committee is encouraged by the attention given by the State party to its obligations under the Convention and to the work of the Committee.

5. The Committee notes with appreciation the many measures adopted by the State party during the period under review (1992-1998) in the area of racial discrimination, including those adopted to implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody. The Committee welcomes the numerous legislative measures, institutional arrangements, programmes and policies that focus on racial discrimination, as comprehensively detailed in the tenth, eleventh and twelfth reports, including the launching of a "New Agenda for Multicultural Australia" and the implementation of the "Living in Harmony" initiative.

C. Concerns and recommendations

6. The Committee is concerned over the absence from Australian law of any entrenched guarantee against racial discrimination that would override subsequent law of the Commonwealth, states and territories.

7. The Committee reiterates its recommendation that the Commonwealth Government should undertake appropriate measures to ensure the consistent application of the provisions of the Convention, in accordance with Article 27 of the Vienna Convention on the Law of Treaties, at all levels of government, including states and territories, and if necessary by calling on its power to override territory laws and using its external affairs power with regard to state laws.

8. The Committee notes that, after its renewed examination in August 1999 of the provisions of the Native Title Act as amended in 1998, the devolution of power to legislate on the "future acts" regime has resulted in the drafting of state and territory legislation to establish detailed "future acts" regimes which contain provisions further reducing the protection of the rights of native title claimants that is available under Commonwealth legislation. Noting that the Commonwealth Senate on 31 August 1999 rejected one such regime, the Committee recommends that similarly close scrutiny continue to be given to



any other proposed state and territory legislation to ensure that protection of the rights of indigenous peoples will not be reduced further.

9. Concern is expressed at the unsatisfactory response to decisions 2 (54) (March 1999) and 2 (55) (August 1999) of the Committee and at the continuing risk of further impairment of the rights of Australia's indigenous communities. The Committee reaffirms all aspects of its decisions 2 (54) and 2 (55) and reiterates its recommendation that the State party should ensure effective participation by indigenous communities in decisions affecting their land rights, as required under Article 5 (c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of securing the "informed consent" of indigenous peoples. The Committee recommends to the State party to provide full information on this issue in the next periodic report.

10. The Committee notes that the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund is conducting an inquiry into "Consistency of the Native Title Amendment Act 1998 with Australia's international obligations under the Convention on the Elimination of All Forms of Racial Discrimination (CERD)". It is hoped that the results will assist the State party to re-evaluate its response to decisions 2 (54) and 2 (55). The Committee requests the State party, in accordance with the provisions of Article 9, paragraph 1, of the Convention, to transmit the report of the Joint Parliamentary Committee's inquiry to the Committee when it is tabled.

11. The establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC) and of the Aboriginal and Torres Strait Islander Social Justice Commissioner within the Human Rights and Equal Opportunity Commission (HREOC) were welcomed by the Committee. Concern is expressed that changes introduced and under discussion regarding the functioning of both institutions may have an adverse effect on the carrying out of their functions. The Committee recommends that the State party give careful consideration to the proposed institutional changes, so that these institutions preserve their capacity to address the full range of issues regarding the indigenous community.

12. While acknowledging the significant efforts that have taken place to achieve reconciliation, concern is expressed about the apparent loss of confidence by the indigenous community in the process of reconciliation. The Committee recommends that the State party take appropriate measures to ensure that the reconciliation process is conducted on the basis of robust engagement and effective leadership, so as to lead to meaningful reconciliation, genuinely embraced by both the indigenous population and the population at large.

13. The Committee notes the conclusions of the "National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families" and acknowledges the measures taken to facilitate family reunion and to improve counselling and family support services for the victims. Concern is expressed that the Commonwealth Government does not support a formal national apology and that it considers inappropriate the provision of monetary compensation for those forcibly and unjustifiably separated from their families, on the grounds that such practices were sanctioned by law at the time and were intended to "assist the people whom they affected". The Committee recommends that the



State party consider the need to address appropriately the extraordinary harm inflicted by these racially discriminatory practices.

14. The Committee acknowledges the adoption of the Racial Hatred Act 1995 which has introduced a civil law prohibition of offensive, insulting, humiliating or intimidating behaviour based on race. The Committee recommends that the State party continue making efforts to adopt appropriate legislation with a view to giving full effect to the provisions of, and withdrawing its reservation to, Article 4 (a) of the Convention.

15. The Committee notes with grave concern that the rate of incarceration of indigenous people is disproportionately high compared with the general population. Concern is also expressed that the provision of appropriate interpretation services is not always fully guaranteed to indigenous people in the criminal process. The Committee recommends that the State party increase its efforts to seek effective measures to address socio-economic marginalization, the discriminatory approach to law enforcement and the lack of sufficient diversionary programmes.

16. The Committee expresses its concern about the minimum mandatory sentencing schemes with regard to minor property offences enacted in Western Australia, and in particular in the Northern Territory. The mandatory sentencing schemes appear to target offences that are committed disproportionately by indigenous Australians, especially juveniles, leading to a racially discriminatory impact on their rate of incarceration. The Committee seriously questions the compatibility of these laws with the State party's obligations under the Convention and recommends to the State party to review all laws and practices in this field.

17. Taking note of some recent statements from the State party in relation to asylum-seekers, the Committee recommends that the State party implement faithfully the provisions of the 1951 Convention relating to the Status of Refugees, as well as the 1967 Protocol thereto, with a view to continuing its cooperation with the United Nations High Commissioner for Refugees and in accordance with the guidelines in UNHCR's "Handbook on Refugee Determination Procedures".

18. The Committee acknowledges the efforts being made to increase spending on health, housing, employment and education programmes for indigenous Australians. Serious concern remains at the extent of the continuing discrimination faced by indigenous Australians in the enjoyment of their economic, social and cultural rights. The Committee remains seriously concerned about the extent of the dramatic inequality still experienced by an indigenous population that represents only 2.1 per cent of the total population of a highly developed industrialized State. The Committee recommends that the State party ensure, within the shortest time possible, that sufficient resources are allocated to eradicate these disparities.

19. The Committee recommends that the State party's reports be made widely available to the public from the time they are submitted and that the Committee's observations on them be similarly publicized.

20. The Committee recommends that the State party's next periodic report, due on 30 October 2000, be an updating report and that it address the points raised in the present observations.



***Concluding observations of the Human Rights Committee: Australia.
28/07/2000. CCPR/CO/69/AUS. (Concluding Observations/Comments)***

HUMAN RIGHTS COMMITTEE
Sixty-ninth session

ADVANCED UNEDITED VERSION

CONSIDERATION OF REPORTS SUBMITTED UNDER ARTICLE 40
Concluding observations of the Human Rights Committee

Australia

1. The Committee examined the third and fourth periodic reports of Australia (CCPR/C/AUS/99/3 and 4) at its 1855th, 1857th and 1858th meetings, held on 20 and 21 July 2000. At its 1867th meeting on 28 July 2000, the Committee adopted the following concluding observations.

Introduction

2. The Committee appreciates the quality of the reports of Australia, which conformed with the Committee's guidelines for the preparation of State party reports and provided a comprehensive view of such measures as have been adopted by Australia to implement the Covenant in all parts of the country. The Committee also appreciated the extensive additional oral and written information provided by the State party delegation during the examination of the report. Furthermore, the Committee expresses appreciation for the answers to its oral and written questions and for the publication and wide dissemination of the report by the State party.

3. The Committee regrets the long delay in the submission of the third report, which was received by the Committee ten years after the examination of the second periodic report of the State party.

4. The Committee expresses its appreciation for the contribution of non-governmental organisations and statutory agencies to its work in considering the State party's reports.



Positive aspects

5. The Committee welcomes the accession of the State party to the Optional Protocol to the Covenant in 1991, thereby recognizing the competence of the Committee to consider communications from individuals within its territory and subject to its jurisdiction. It welcomes the action taken by the State party to implement the views of the Committee in the case of communication 488/1992 (Toonen vs. Australia) by enacting the necessary legislation at the federal level.
6. The Committee welcomes the enactment of anti-discrimination legislation in all jurisdictions of the State party, including legislation to assist disabled persons.
7. The Committee welcomes the establishment of the Aboriginal and Torres Strait Islander Social Justice Commissioner in 1993.
8. The Committee notes with satisfaction that the status of women in Australian society has improved considerably during the reporting period, particularly in public service, in the general workforce, and in academic enrollment, although further equality has yet to be achieved in many sectors. The Committee welcomes the initiatives to make available to women facilities to ensure their equal access to legal services, including in rural areas, and the strengthening of the Sex Discrimination Act, 1984.

Principal subjects of concern and recommendations

9. With respect to Article 1 of the Covenant, the Committee takes note of the explanation given by the delegation that rather than the term “self-determination” the Government of the State party prefers terms such as “self-management” and “self-empowerment” to express domestically the principle of indigenous peoples exercising meaningful control over their affairs. The Committee is concerned that sufficient action has not been taken in that regard.

The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources (Article 1, para 2).

10. The Committee is concerned, despite positive developments towards recognising the land rights of the Aboriginals and Torres Strait Islanders through judicial decisions (Mabo 1992, Wik 1996) and enactment of the Native Title Act of 1993, as well as actual demarcation of considerable areas of land, that in many areas native title rights and interests remain unresolved and that the Native Title Amendments of 1998 in some respects limits the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands.

The Committee recommends that the State party take further steps in order to secure the rights of its indigenous population under Article 27 of the Covenant. The high level of the exclusion and poverty facing indigenous persons is indicative of the urgent nature of these concerns. In particular, the Committee recommends that the necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands, including by considering amending anew the Native Title Act, taking into account these concerns.



11. The Committee expresses its concern that securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities, that must be protected under Article 27, are not always a major factor in determining land use.

The Committee recommends that in the finalization of the pending Bill intended to replace the Aboriginal and Torres Strait Islander Heritage Protection Act (1984), the State party should give sufficient weight to the above values.

12. While noting the efforts of by the State party to address the tragedies resulting from the previous policy of removing indigenous children from their families, the Committee remains concerned about the continuing effects of this policy.

The Committee recommends that the State party intensify these efforts so that the victims themselves and their families will consider that they have been afforded a proper remedy. (Articles 2, 17 and 24).

13. The Committee is concerned that in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the Covenant, there remain lacunae in the protection of Covenant rights in the Australian legal system. There are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated.

The State party should take measures to give effect to all Covenant rights and freedoms and to ensure that all persons whose Covenant rights and freedoms have been violated shall have an effective remedy (Article 2).

14. While noting the explanation by the delegation that political negotiations between the Commonwealth Government and the governments of states and territories take place in cases in which the latter have adopted legislation or policies that may involve a violation of Covenant rights, the Committee stresses that such negotiations cannot relieve the State party of its obligation that Covenant rights will be respected and ensured in all parts of its territory without any limitations or exceptions (Article 50).

The Committee considers that political arrangements between the Commonwealth Government and the governments of states or territories may not condone restrictions on Covenant rights that are not permitted under the Covenant.

15. The Committee is concerned by the government bill in which it would be stated, contrary to a judicial decision, that ratification of human rights treaties does not create legitimate expectations that government officials will use their discretion in a manner that is consistent with those treaties.

The Committee considers that enactment of such a bill would be incompatible with the State party's obligations under Article 2 of the Covenant and urges the government to withdraw the bill.

16. The Committee is concerned over the approach of the State party to the Committee's Views in the Communication No. 560/1993 (A. v. Australia). Rejecting the Committee's interpretation of the Covenant when it does not correspond with the interpretation presented by the State party in its submissions to the Committee undermines the State party's recognition of the Committee's competence under the Optional Protocol to consider communications.



The Committee recommends that the State party reconsider its interpretation with a view to achieving full implementation of the Committee's views.

17. Legislation regarding mandatory imprisonment in Western Australia and the Northern Territory, which leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed and would seem to be inconsistent with the strategies adopted by the State party to reduce the over-representation of indigenous persons in the criminal justice system, raises serious issues of compliance with various Articles in the Covenant.

The State party is urged to reassess the legislation regarding mandatory imprisonment so as to ensure that all Covenant rights are respected.

18. The Committee notes the recent review within Parliament of the State party's refugee and humanitarian immigration policies and that the Minister for Immigration and Multicultural Affairs has issued guidelines for referral to him of cases in which questions regarding the State party's compliance with the Covenant may arise.

The Committee is of the opinion that the duty to comply with Covenant obligations should be secured in domestic law. It recommends that persons who claim that their rights have been violated should have an effective remedy under that law.

19. The Committee considers that the mandatory detention under the Migration Act of "unlawful non-citizens", including asylum seekers, raises questions of compliance with Article 9, paragraph 1, of the Covenant, which provides that no person shall be subjected to arbitrary detention. The Committee is concerned at the State party's policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organizations to the detainees in order to inform them of this right.

The Committee urges the State party to reconsider its policy of mandatory detention of "unlawful non-citizens" with a view to instituting alternative mechanisms of maintaining an orderly immigration process. The Committee recommends that the State party inform all detainees of their legal rights, including their right to seek legal counsel.

20. The Committee requests the fifth periodic report to be submitted by 31 July 2005. It requests that the present concluding observations and the next periodic report be widely disseminated among the public, including civil society and non-governmental organisations operating in the State party.



Appendix 5

The international standards relevant to heritage protection

The relevant international human rights standards can be broadly identified as following:

- the right to self-determination,
- the right to protect indigenous heritage, including the right to manifest, practice, develop and teach indigenous heritage,
- the right of indigenous people to participate in matters effecting their heritage,
- the right to equality of treatment,
- the right to freedom of thought, conscience and religion.

The following instruments, declarations, principles and guidelines set out Australia's

International human rights obligations with regard to cultural heritage protection.

*International Covenant on Civil and Political Rights (ICCPR)*¹

Article 1

1. *All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
2. *All people may, of their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*
3. *The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self Governing and Trust Territories, shall promote the realization of the right of self-*

¹ In addition to the articles listed here, Articles 17.1 and 23.1 are also relevant to heritage issues. *In Hopu and Bessert v France* (543/93), an individual communication under the first optional protocol, the Human Rights Committee found that the construction of a hotel on an ancestral burial site of indigenous Tahitians was a violation of Covenant Articles 17, the right to privacy, and Article 23, the right to protection of the family.



determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 18

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with other and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*

International Commentary on Article 18

United Nations Human Rights Committee – General Comment 22

General Comment 22 of the Human Rights Committee provides guidance on the interpretation of the limitation clause, 18(3).

Limitations may be applied only for the purpose for which they are prescribed and must be directly related to and proportionate to the specific need on which they are predicated.

Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.²

Article 27

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

International Commentary on Article 27

United Nations Human Rights Committee – General Comment 23

– General Comment 23(50) (art. 27) */, CCPR/C/21/Rev.1/Add.5, 26 April 1994.

3.2 The enjoyment of the rights to which Article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the

2 Human Rights Committee *General Comment 22*, para 8.



same time, one or other aspect of the rights of individuals protected under that article – for example, to enjoy a particular culture – may consist in a way of life which is closely associated with territory and use of its resources. ... This may particularly be true of members of indigenous communities constituting a minority.

6.1 Although Article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a right and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and exercise of this rights are protected against their denial and violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

6.2 Although the rights protected under Article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language and religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with other members of the group. In this connection, it has been observed that such positive measures must respect the provisions of Articles 2(1) and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under Article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.

7. With regard to the exercise of the cultural rights protected under Article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land and resources, specially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.³

The International Convention on the Elimination of All Forms of Racial Discrimination

Article 1 of CERD provides:

1. *In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose*

³ See in particular *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*, Communication No 167/1984, CCPR/C/38/D/167/1984, 28 March 1990, 13.4.



or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

4. *Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.*

Article 2

- 2(1) *State parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.*
- 2(2) *State Parties shall, when circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms...*

Article 5

guarantees all people equality before the law and the enjoyment of specific rights without distinction as to race, colour or national or ethnic origin. The article includes:

5(d)(v) *The right to own property alone as well as in association with others;...*

5(d)(vii) *the right to freedom of thought, conscience and religion*⁴

International Commentary

CERD Committee – General Recommendation XIV

The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of Article 1, paragraph 4, of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In

4 The meaning of these principles has been considered in detail in previous Native Title reports: Acting Aboriginal and Social Justice Commissioner, *Native Title Report 1998, op.cit.*, Chapter 2; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996-97*, HREOC, Sydney, 1997, Chapter 6; and in the HREOC CERD Submission, paras 92-126.



seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon the group distinguished by race, colour, descent, or national or ethnic origin.

CERD Committee – General Recommendation XXIII

4. The Committee calls in particular upon States parties to:...
 - (d) 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*. (emphasis added)

CERD Committee – General Recommendation XXI

10. In accordance with Article 2 of the International Convention of All Forms of Racial Discrimination and other relevant international documents, Governments should be sensitive towards the rights of persons belonging to 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 in which they are citizens. Also, Governments should consider, within their respective constitutional frameworks, vesting persons belonging to linguistic groups comprised of their citizens, where appropriate, with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.

Convention on the Rights of the Child⁵

Article 30

In those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.⁶

UNESCO Convention for the Protection of the World's Cultural and Natural Heritage

As a party to the Convention Australia has made a commitment to ensure that cultural and natural heritage of outstanding universal value in Australia is identified, protected, conserved, presented and transmitted to future generations.⁷

5 Ratified by Australia in 1990.

6 The CROC text adopts the formula used in Article 27 of the ICCPR, to apply a positive duty on states to prevent the enjoyment of rights. The application to children imports the rights enunciated in the draft Declaration on the Rights of Indigenous People and the UNESCO Convention for the Protection of the World's Cultural and Natural Heritage including protection of the right to maintain, practice, develop and transmit culture, religion and language.

7 The obligations imposed by this Convention are detailed in the Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984. Report by Hon Elizabeth Evatt AC, 21 June 1996 at p35.



The *World Heritage Properties Conservation Act* is the Commonwealth's domestic implementation of the Convention. It provides for the protection of properties which are on the World Heritage list, nominated for listing or the subject of a Commonwealth Inquiry into whether they should be listed. While the Act only protects property falling within these categories, it specifically provides for the protection or conservation of artefacts or relics of particular significance to Aboriginal people where these exist on protected sites [Section 8(2)].

*Convention on Biodiversity*⁸

Article 8(j)

Each Contracting Party shall, as far as possible and appropriate:

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Commentary:

Article 8(j) gives explicit mention firstly to the Traditional knowledge, innovations and practices of Indigenous people and local communities while also speaking strongly for its protection, preservation and maintenance. Article 8(j) also provides that the use of Indigenous traditional knowledge, innovations and practices should only occur with the approval and involvement of the Indigenous or local community and that any benefits that arise from its use is to be shared with the people or community from which that knowledge originated.

Article 10

Sustainable Use of the Components of Biological Diversity

Each Contracting Party, shall as far as possible and appropriate:

(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements

Commentary:

Article 10(c) is also extremely important for the representation of Indigenous interests.

This article is directly relevant to the hunting and gathering of biological resources by indigenous peoples and local communities and lays down

8 This section is adapted from Henrietta Fourmile-Marrie and Glen Kelly *The Convention on Biological Diversity and Indigenous People: Information concerning the implementation of decisions of the Conference of the Parties under the Convention on Biological Diversity*, Centre for Indigenous History and the Arts, University of Western Sydney, 2000, pages 3-4.



a powerful obligation to parties in regards to the recognition of continued cultural maintenance through the ongoing use of biological resources. It also calls upon parties to “protect and maintain” these practices and in doing so recognises that the customary use of biological resources is as much a cultural practices as it is one of sustenance”.⁹

Draft Declaration on the Rights of Indigenous Peoples

Article 12

Indigenous peoples have the right to practice and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13

Indigenous peoples have the right to manifest and practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access in their privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

*Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*¹⁰

Article 1

Everyone shall have the right to freedom of thought, conscience and religion. This shall include the right to have a religion or whatever belief of his choice and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Article 6

– elaborates a number of particular freedoms protected by the Declaration including the freedoms:

(a) *To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;...*

⁹ *ibid.*

¹⁰ The Declaration was proclaimed by the UN General Assembly in 1981, and is annexed to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).



(c) *To make acquire and use to an adequate extent the necessary articles and material related to the rites or customs of a religion or belief;...*

(e) *To teach a religion or belief in places suitable for these purposes;...*

Commentary:

The *Draft Declaration* is the pre-eminent statement of the rights of Indigenous peoples at the international level. Although it does not yet have any formal status in the United Nations system, it provides a guide for the rights which Governments should seek to recognise when drafting policies regarding Indigenous peoples.

Part III of the *Draft Declaration* is concerned with cultural rights.

*UNESCO Declaration of the Principles of International Cultural Co-operation*¹¹

This declaration recognises that ignorance of the ways and customs of peoples still presents an obstacle to friendship amongst nations, peaceful co-operation and progress. It provides that:

Each culture has a dignity and value that must be respected and preserved.

Every people has the right and duty to develop its culture.

Article 1

In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.

Article 2

Nations shall endeavour to develop the various branches of culture side by side, and... to establish a harmonious balance between technical progress and the intellectual and moral advancement of mankind.

11 Declared 1966.

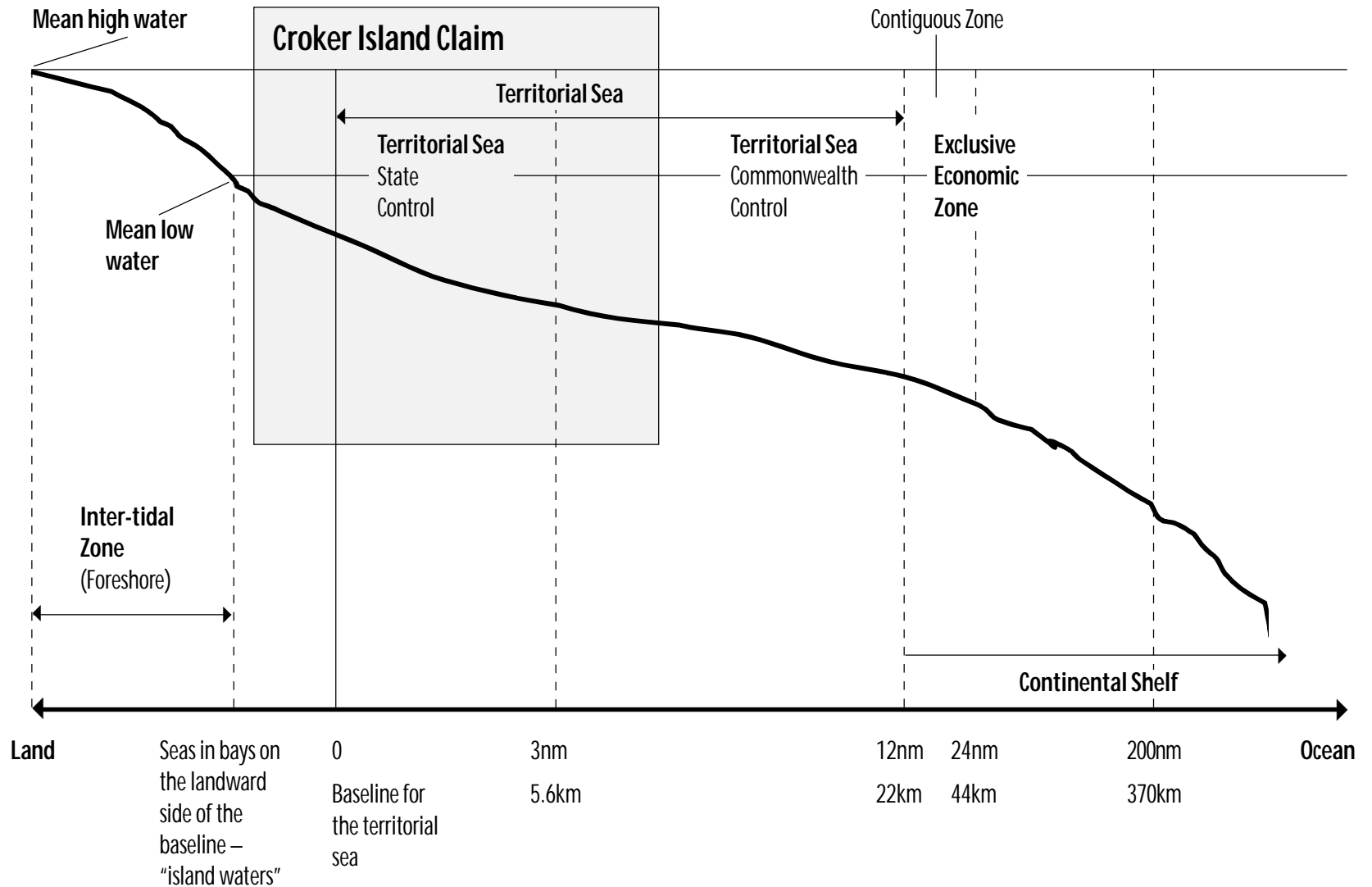


Figure 1: Schematic Diagram of the Divisions of Maritime jurisdiction showing the extent of the Croker Island claim in section view [not to scale].