

1. Native Title

This issue relates to question 3 of the List of issues to be taken up in connection with the consideration of the third periodic report of Australia

Summary of issues

- Native title is the legal recognition given to the traditional laws acknowledged by and the traditional customs observed by Indigenous people. The relationship of Indigenous people to their land forms the basis of Indigenous culture and economy.
- In addition to recognising native title, the High Court of Australia has recognised the power of the State to extinguish native title.
- Article 1 of ICESCR requires States to protect the economy and culture of Indigenous people. The extinguishment or impairment of native title is a breach of these articles.
- Article 2.1 of ICESCR requires States to take steps to progressively achieve the full realisation of the rights recognised by the Covenant. The amendments to the *Native Title Act 1993* is a retrogressive step in that it extinguishes native title and limits the extent to which native titleholders can control and manage their land.
- Article 2.2 of ICESCR requires that the rights conferred by the Convention be enjoyed on a non-discriminatory basis. The priority given to non-Indigenous interests in land over Indigenous interests in land by the amended *Native Title Act 1993* is a breach of these articles.
- Article 15 of ICESCR provides for the right of everyone to take part in cultural life. The diminution of native title rights, through the legislation and the common law is a derogation from the cultural rights of Indigenous people
- The common law is developing a construction of native title which limits it to a right to do specific traditional activities over the land rather than a title to the land itself. This construction makes it vulnerable to permanent extinguishment. This construction is referred to as a bundle of rights approach to native title.
- The amended Native Title Act denies the economic social and cultural rights of Indigenous people in the following ways;
 - (i) The validation provisions prefer the interests of non-Indigenous titleholders whose rights were invalidly obtained between 1975 and 1996 over the interests of Indigenous titleholders. Native title is either extinguished or unenforceable as a result of these provisions.
 - (ii) The confirmation provisions prefer non-Indigenous interests which are specified in the Act or referred to generically as 'exclusive possession acts' and 'non-exclusive possession acts' over Indigenous titleholders. Native title is either extinguished or unenforceable as a result of these provisions.
 - (iii) The future act provisions prefer the future interests of non-Indigenous titleholders and government over Indigenous titleholders. For example, pastoralists have a right to carry out a range of activities outside of their lease, including agriculture, forestry, aquaculture, without consultation with Indigenous titleholders. Native title is unenforceable as a result of any inconsistency with these activities.
 - (iv) The right to negotiate, where mining or compulsory acquisition is proposed over native title land has been removed, or reduced in scope as a result of the amendments. For instance, the right to negotiate where native title co-exists on pastoral leasehold land has been reduced to a right to 'object and consult'.
- In each of these instances, where an inconsistency or potential inconsistency exists between the full enjoyment of Indigenous culture and title to land and the full enjoyment of non-Indigenous interests, Indigenous interests are either extinguished or impaired in order to ensure the full enjoyment of non-Indigenous interests in land.

Relevance to the ICESCR

- Article 1: Self -determination
- Article 2.1: Progressive realisation of rights
- Article 2.2: Providing for the rights to be enjoyed on a non-discriminatory basis
- Article 15: Cultural rights

The following section expands on this summary under the following headings:

- Background information on Native Title in Australia
- Requirement to recognise and protect Native Title under ICESCR
- Native title and self determination
- Native Title and the progressive realisation of rights
- Native title and non-discrimination
- Native title and cultural rights

Background information on Native Title in Australia

Developments in the common law of native title

- 1.1 Native title is the term used to describe the recognition in Australian law of the rights of Aboriginal peoples and Torres Strait Islanders to land and waters under the laws and customs of those peoples. The Australian legal system, including property law, was built on the assumption that the land was *terra nullius*, that is, belonging to no one, at the time of acquisition of sovereignty by Britain. This legal fiction was finally put to rest by the decision of the High Court of Australia in *Mabo v Queensland (No 2)*¹ in 1992. The Court declared that Australian law recognised the title of Indigenous Australians to their traditional lands and waters. However native title was vulnerable to extinguishment either by the loss of a connection to customary law and traditions, or by government acting in a way clearly inconsistent with the existence of native title.
- 1.2 The common law approach to native title 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. Secondly, if the claimant's connection to the traditions and customs of their forebears is established, the Court decides whether native title has been extinguished by the exercise of sovereign power 'to create and to extinguish private rights and interests in land within the Sovereign's territory'.²
- 1.3 A development of concern in the common law is its construction of native title as a bundle of rights such as a right to hunt, a right to traverse the land, a right to control access to the land.³ The relationship between these rights as a system of rights, with some rights being dependent on others, is not recognised in this construction. Instead native title is seen as a set of traditional practices which will only be protected by the law if they continue to be practiced as they were by the original inhabitants.
- 1.4 One of the results of this construction of native title is that contemporary Indigenous practices, such as hunting or fishing, fail to be recognised as instances of the broader system of laws and traditions which originated prior to British settlement. The *frozen*

¹ *Mabo v The State of Queensland* (1992) 175 CLR 1 (the Mabo decision)

² *Ibid*, p63

³ This approach has been adopted by Justices Beaumont and von Doussa in the majority decision of the Full Federal Court in *Ward and Others (on behalf of the Miriuwung and Gajerrong People) and Others v State of Western Australia* (1998) 159 ALR 483. It has also been adopted by Justice Olney in the Federal Court in *Yorta Yorta Aboriginal community v The State of Victoria and Others* (unreported, Federal Court of Australia), FCA 1606, 18 December 1998, Olney J ('Yorta Yorta')

rights approach to native title makes little allowance for the history of Indigenous dispossession in Australia in defining the parameters of contemporary native title claims. Where native title is cast as a system of rights rather than a bundle of 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.

- 1.5 Another result of this construction of native title is that where the exercise of rights pursuant to an act of the Crown is inconsistent with the exercise of a particular native title right then that particular native title right is permanently extinguished. Each native title right from the bundle of rights can be extinguished in this way.
- 1.6 Where native title is constructed as an Indigenous title to land, with particular practices, such as hunting and fishing, constituting an incidence of that title, extinguishment will only occur where there is an inconsistency between the non-Indigenous title and the underlying Indigenous title to land.⁴ Under this construction, native title is a stronger, more resilient title.
- 1.7 The position of the High Court of Australia in relation to these issues has not been finally decided. 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 Native Title Act 1993 (NTA)

1.8 The original *Native Title Act 1993* (Cth) (NTA) operated in the following way:

- Validated past acts which, because of the effect of the *Racial Discrimination Act 1975* (Cth) (RDA), were invalid. As a result of the enactment of the RDA in 1975, legislative or other acts that, after this date, failed to recognise Indigenous titleholders' procedural or substantive rights were invalid. The NTA validated these invalid acts.
- Applied the 'freehold test' to future acts proposed over native title land. The freehold test ensured that, in relation to acts which affected native title holders after the Mabo decision, they would be given the same procedural rights as ordinary titleholders. In other words, for future acts, the principle of equality would apply to ensure that native title was protected to the same extent as non-Indigenous titles to land.
- Gave native title claimants and holders a right to negotiate where mining and certain compulsory acquisitions were proposed on native title land. This right recognised, and sought to protect native title from the potentially destructive impact of mining on native title rights. It also gave native title holders a right to participate in the economic management of their land and resources.
- Established a process by which native title claims and determinations (including compensation determinations) could be registered and made and disputes could be resolved. The National Native Title Tribunal was established for these purposes.

1.9 The Committee on the Elimination of Racial Discrimination (the CERD Committee) has described the original NTA as delicately balancing the rights of Indigenous and non-Indigenous titleholders.⁵

⁴ This approach was adopted by Justice Lee in the Federal Court and Justice North in his minority decision in the appeal of *Ward and Others (on behalf of the Miriuwung and Gajerrong People) and Others v State of Western Australia* (1998) 159 ALR 483

⁵ Committee on the Elimination of Racial Discrimination, *on Australia*, paragraph 6. 18 March 1999, UN Doc CERD/C/54/Misc.40/Rev.2.

Native Title Amendment Act 1998 (Cth)

1.10 *The Native Title Amendment Act 1998 (Cth)* was passed largely in response to the perception that the High Court's decision in *Wik v Queensland* (1996) 187 CLR 1, (*Wik*) had pushed the balance between Indigenous and non-Indigenous interests too far in favour of native title holders.⁶ In *Wik* the High Court confirmed that native title was capable of co-existing with the grant of a pastoral lease. Where, however, the exercise of native title rights are inconsistent with the rights granted under the lease, the rights of the leaseholder will prevail. Native title rights in such a situation will be unenforceable.⁷

1.11 The amended NTA contains the following sets of provisions:

- Provisions which validate 'intermediate period acts';
- Provisions which 'confirm the extinguishment' of native title;
- Provisions which validate the doing of 'future acts', particularly 'Primary Production Upgrade' provisions, even though they may impair native title rights;
- Provisions which diminish the applicability and the effectiveness of the right to negotiate⁸
- Provisions which prevent the registration of bona fide native title claims and thus prevent access to the right to negotiate provisions
- The failure to incorporate the RDA into the native title legislative regime.

1.12 In their decision on 18 March 1999, the CERD Committee stated that the amended Act appears to create legal certainty for governments and third parties at the expense of native title holders.⁹ 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. The amendments were not acceptable to the Indigenous people whose rights are directly affected by them.¹⁰

1.13 The Human Rights Committee has also expressed its concern over the amended Native Title Act. In its recent decision it stated;

The Committee is concerned, despite positive developments towards recognising the land rights of the Aboriginal and Torres Strait Islanders through judicial decision (*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.¹¹

Validation of Intermediate Period Acts

1.14 The amended NTA contains provisions which validate 'intermediate period acts' done by the Commonwealth, and which authorise the States and Territories to introduce similar validating legislation for acts done by those States and Territories. All States, other than Tasmania have passed validating legislation.

⁶ The *Native Title Amendment Act 1998 (Cth)* was passed on 8 July 1998 and amends the *Native Title Act 1993(Cth)*. Most of the amendments came into force from 30 September 1998.

⁷ per Toohey, p126

⁸ The first four issues were cited by the CERD Committee as matters of particular concern in their Decision(2) on Australia, paragraph 7.

⁹ CERD, Decision (2) 54, paragraph 6.

¹⁰ *Ibid*, paragraph 9.

¹¹ Paragraph 10, CCPR/CO.69/AUS, 28 July 2000

1.15 An ‘intermediate period act’ is an act done by a government between 1 January 1994, the date that the NTA was introduced, and 23 December 1996, the date of the *Wik* decision.¹² The invalidity of the majority of these acts is due to the failure of governments granting interests after the enactment of the NTA to take into account native title interests co-existing on pastoral leaseholds. For instance, the grant of a mining tenement on a pastoral leasehold, without consideration of the rights of native title claimants or holders would have been invalid under the original NTA. These acts are validated by the amendments.

1.16 Intermediate period acts are divided into different categories. The categories indicate the impact which different validated acts may have on native title. The grant of exclusive agricultural and pastoral leases, and community purpose leases are included in category A intermediate period acts.¹³ Category A intermediate period acts extinguish native title completely. Subject to exceptions, leases which are wholly or partly inconsistent with native title are category B intermediate period acts and extinguish native title to the extent of the inconsistency.¹⁴ Extinguishment of native title is defined in the amended NTA as permanent.¹⁵ The grant of a mining lease is a category C act and the non-extinguishment principle applies.¹⁶ Native titleholders are entitled to compensation for the extinguishment or impairment of their title by validated acts.¹⁷

Confirmation of Extinguishment Provisions¹⁸

1.17 The amendments to the NTA classify certain land tenures, granted before 23 December 1996 (the date of the *Wik* decision), to have either extinguished or impaired native title. Where those interests were granted by the states the amendments authorise them to introduce complementary legislation to the same effect.

1.18 Where an interest is deemed to amount to exclusive possession (called and ‘exclusive possession act’) it is confirmed as permanently extinguishing native title, regardless of whether the extinguishing interest continues to subsist on the land or not.¹⁹ The acts include the following:

- interests scheduled to the amended NTA, in Schedule 1;
- freehold estates;
- commercial, residential or community purpose leases;
- exclusive pastoral or agricultural leases;
- other leases which are not mining leases and which provide exclusive possession.²⁰

¹² Some acts performed after the *Wik* decision have also been validated – for example, options created before *Wik* which were exercised post-*Wik*.

¹³ NTA s.232B(5)(b), s.229(3)(a).

¹⁴ NTA s232C. Category C and D intermediate period acts are defined in ss232D and 232E NTA respectively.

¹⁵ NTA s237a.

¹⁶ In such a case the native title continues to exist but the rights and interests have no effect in relation to the act, s238 NTA

¹⁷ NTA s22D, 22F.

¹⁸ Extracted and based on material from Native Title Report 1996-97, pp68-75.

¹⁹ S47B NTA allows for the restoration of native title extinguished as a result of the confirmation provisions. Only native title holders who currently occupy the land will benefit from these provisions. The section will only apply where the land is presently vacant Crown land and is not the subject of a reservation, dedication or resumption order.

²⁰ NTA s23B(2)(c).

- 1.19 Native titleholders are entitled to compensation as a result of the extinguishment resulting from these provisions but only to the extent (if any) that the common law has not already extinguished native title rights and interests.²¹
- 1.20 Section 23E of the NTA provides that states and territories may introduce legislation that deems certain classes of tenures as well as specifically scheduled tenures granted before 23 December 1996 to have either extinguished or impaired native title. All states, other than Tasmania have introduced legislation confirming the extinguishment of native title by the grant of the scheduled interests.
- 1.21 The confirmation provisions pre-empt the development of the common law on native title. As indicated, the common law, particularly with regard to extinguishment, is largely undecided. It is still open as to whether native title is totally extinguished, partially extinguished or merely suspended by the grant of an exclusive possession title.
- 1.22 However, whether or not the common law confirms the legislative position with regard to the many tenures deemed to extinguish native title, it is still incumbent on the State to ensure that their human rights obligations with respect to protecting Indigenous culture and ensuring equality between Indigenous and non-Indigenous people are met. Far from alleviating governments of their human rights' responsibilities, discriminatory developments in the common law place a greater onus on governments to provide additional protection to native title.
- 1.23 The 'confirmation' provisions, like the validation provisions result in the extinguishment or diminution of native title rights. They contravene Australia's duty to positively protect native title.

The Future Act and Primary Production Upgrade Provisions²²

- 1.24 The NTA recognises that there is a present and future dimension to native title. It seeks to determine, through the future acts regime, how native title and other interests in land will interact in the future.
- 1.25 The amendments project the denial of cultural rights of native titleholders into the future in relation to specific interests by preferring those interests ahead of native title. This is so in relation to the following interests:
- acts permitting primary production on non-exclusive pastoral or agricultural leases (s24GB);
 - acts permitting off-farm activities directly connected to primary production activities (s24GD);
 - grants of rights to third parties on non-exclusive pastoral or agricultural leases which permit the taking of timber and the removal of sand, soil and gravel (s24GE);
 - management of water and airspace (s24HA);
 - acts involving reservations, leases etc (s24JA);
 - acts involving facilities for services to the public (s24KA); and
 - acts that pass the freehold test (s24MD).²³

²¹ NTA s23J(1).

²² Native Title Report, 1998, pp. 56-57.

1.26 In relation to each of these interests, native titleholders have a right to be notified of an activity, and an opportunity to have their comments on the effect of the activity considered. There is no right to negotiate or right to have an objection heard and decided by an independent body.²⁴ That act will be valid regardless of whether native title holders' procedural rights are exercised.²⁵ These provisions do not extinguish native title although where there is an inconsistency, native title rights cannot be exercised. Where native title rights are impaired just terms compensation is available.²⁶

1.27 The amended NTA gives the non-Indigenous interests listed above a higher priority than native title interests. This higher priority can be demonstrated by looking at those provisions allowing holders of non-exclusive pastoral or agricultural leases to do future acts at 'primary production' levels.²⁷ 'Primary production' is defined to include agricultural activities (such as cultivating the land, and maintaining, breeding and agisting animals), forestry, aquacultural or horticultural activities, the taking or catching of fish or shellfish, de-stocking of land or leaving fallow, and farmstay tourism.²⁸ Future acts at primary production levels are valid regardless of the effect this may have on any continuing native title rights and interests, so long as the future act was authorised by legislation at some time before 31 March 1998.²⁹

Erosion of the Right to Negotiate

1.28 Under the original NTA, people registered as possessing or claiming native title were Under the original NTA, native title holders or claimants had an extensive right to negotiate with miners, developers and Governments where the Government intended to create, vary or extend a right to mine over native title land or intended to compulsorily acquire the land for the benefit of a third party. The changes to the right to negotiate provisions that reduce the ability of native title parties to be "at the table" to negotiate proposed uses of their land include³⁰:

- widening of the scope of the exception from the Right to Negotiate for low impact exploration (s.26A);
- the new exception from the Right to Negotiate for alluvial tin/gold mining (s.26B) and opal or gem mining (s. 26C);
- the removal of the Right to Negotiate from an infrastructure facility associated with mining (s.26 (1) (c));

²³ Under the original NTA an act was 'permissible' if it was an act that could be done to ordinary title (ie, it passed the freehold test), related to an offshore place or was a low impact future act: see section 235 of the original NTA. Where the proposed act did not fall within these exceptions the act could only be done by compulsorily acquiring the native title. The compulsory acquisition of native title then activated the right to negotiate provisions.

²⁴ On the rights of negotiation and objection,

²⁵ *Lardil, Kaiadilt, Yangkaal and Gangalidda People, v State of Queensland* (1999) FCA 1633 (24 Nov 99)

²⁶ The non-extinguishment principle applies in this circumstance.

²⁷ NTA, Part 2, Subdivision G. For example, NTA, s24GB, s24GD, s24GE.

²⁸ NTA, s24GA, s24GB(2).

²⁹ Section 24GB. Sub-section 24GB(4) of the NTA provides two exceptions to this—(a) where the lease is for an area in excess of 5000 hectares and the future act would convert the use of the majority of the area from pastoral purposes; and (b) where the act would convert the lease into a right of exclusive possession.

³⁰ Reference are to the *Native Title Act 1993*, as amended in 1998.

- the removal of the Right to Negotiate from compulsory acquisition of native title in respect of private infrastructure projects (broadly defined) (s.26(1)(c)(iii) and s.253);

Note: The loss of the Right to Negotiate in respect of infrastructure projects and mining related infrastructure (including roads, pipelines etc) fundamentally alters the application of the Right to Negotiate and represents a major winding back of negotiation rights.

- the removal of the Right to Negotiate from a wider range of renewals, re-grants and extensions of a right to mine (ss.26 and 26D);
- the removal of the Right to Negotiate from compulsory acquisition of native title rights within a town or city (s.26(2)(f));
- defining the inter-tidal zone so as to remove the possible application of the Right to Negotiate from it - potentially at significant cost to coastal Indigenous peoples (26(3));
- allowing the replacement by States and Territories of the Right to Negotiate on pastoral leases and reserves (including national parks) by minimum standard procedural rights (s.43A);

Note: These “43A schemes” mean the potential loss of the Right to Negotiate over approximately 40% of the land mass of Australia, and its replacement by substantially weaker rights of notification and consultation.

- reducing the area available for the Right to Negotiate to apply as the result of statutory extinguishment of native title through the validation and “confirmation of extinguishment” provisions.

Requirement to recognise and protect Native Title under ICESCR

1.29 The amendments to NTA have serious consequences for the enjoyment of economic social and cultural rights by Indigenous people in Australia. The extinguishment of native title through the validation and confirmation provisions limits the amount of land that can be utilised by native title holders. The primary production upgrade provisions enable pastoral leaseholders to diversify their production to more intensive uses of the land without consideration of its effect on native title holders.

1.30 The winding back of the right to negotiate, and its replacement in the States and Territories by lesser schemes of notification and consultation in the amended NTA significantly undermines the economic base of Indigenous peoples. Finally, the trend in the common law to define native title narrowly as a bundle of traditional rights (see below) rather than a title to land stultifies the opportunity for native title to provide the basis for the economic social and cultural development of Indigenous communities.

1.31 The action of the Government in deliberately winding back native title rights in its 1998 amendments to the NTA contravenes the following provisions of the Covenant:

1. Article 1, self-determination;
2. Article 2.1, progressive realisation of rights;
3. Article 2.2 providing for rights to be enjoyed on a non-discriminatory basis; and
4. Article 15, cultural rights.

Native title and self-determination

1.32 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.³¹

1.33 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.

1.34 In relation to the first of these bases, the amendments to the NTA represent serious incursions upon Indigenous people's right to self-determination.

- The changes to the right to negotiate provisions reduce the ability of native title parties to be "at the table" to negotiate proposed uses of their land. Native title holders are given no role in the development of Aboriginal communities beyond permitting the practice of traditions and customs as they were practiced by the predecessors of the native title parties before colonization. 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.
- the ability of native title holders to negotiate on pastoral and agricultural leases has been curtailed by the "primary production upgrade" and related provisions. These provisions provide minimal procedural rights for native title parties in response to proposed diversification of usage by the leaseholder. Permitted activities such as forest operations, cultivating land, horticulture, taking or catching fish or shellfish, aquaculture and farm tourism have the capacity to severely impair the use of the land by native titleholders.
- The effect of validation on native title can vary from extinguishment to impairment and suppression of native title. The effect of the confirmation provisions is to extinguish native title. Where native title is extinguished the opportunity for Indigenous people to use the land for economic and cultural purposes is permanently lost.

1.35 The Human Rights Committee recently expressed its concern at the lack of indigenous control over the traditional land of Indigenous people in Australia and the consequent breach of Article 1 of the International Covenant on Civil and Political Rights (self-determination). It advised the State party as follows;

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).³²

1.36 In relation to the second basis on which the protection of native title is required in order to meet the right of self-determination, the effective participation of Indigenous representatives was denied throughout the development of the Government's amendments to the NTA, (which came to be known in Australia as the "Wik amendments" or "The 10 Point Plan"). The Government consistently refused to enter into negotiations of the type that had characterised the development of the original legislation. The Government was only prepared to consult with Indigenous representatives on the same basis as it did with other stakeholders, such as industry bodies. In its decision of 18 March 1999, paragraph 9

³¹ See for example the 1990 case of *Chief Ominayak v Canada* UN Doc. A/47/40 (1992)

³² paragraph 9, CCPR/CO/69/AUS, 28 July 2000

the CERD Committee found that the failure to obtain the informed consent of Indigenous people in relation to the amended NTA was a breach of Australia's obligations under CERD;

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 State parties to "recognize 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".

Native title and progressive realisation of rights

1.37 Given the extent and injustice of the dispossession of Indigenous Australians as a result of colonisation, and given the vulnerable nature of the common law doctrine of native title, a positive obligation exists in international law for the Australian Government to go beyond merely recognising and protecting common law native title through the NTA. To the extent that the common law doctrine is itself discriminatory, the Australian Government must ensure that native title rights are treated in a non-discriminatory manner in order to meet the requirements of international human rights standards.

1.38 Noting the extent of dispossession recognised by the Parliament in the Preamble to the original NTA and the legacy of this dispossession in terms of socio-economic disadvantage, there is a positive obligation on the Australian Government to realise the full protection and enjoyment of native title rights. The Preamble states, *inter alia*:

They [the Aboriginal peoples and Torres Strait Islanders] have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal and Torres Strait Islanders concerning the use of their lands.

As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.

1.39 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.

1.40 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). This is due to the principle of parliamentary sovereignty, which ensures that previous Commonwealth legislation is overridden by subsequent inconsistent Commonwealth legislation

1.41 The NTA is an example of federal legislation enacted subsequent to the RDA. Thus, it will override the RDA to the extent of any inconsistency. The CERD Committee's findings in March 1999 confirm that 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.

Native title rights to be enjoyed on a non-discriminatory basis

1.42 As indicated above, in March 1999 the Committee on the Elimination of Racial Discrimination (CERD Committee) made a decision under its early warning and urgent action procedures in respect of Australia's compliance with its obligations under the International Convention on the Elimination of All Forms Of Racism (ICERD). This decision dealt in particular with the amended NTA.³³ HREOC agrees with the concerns expressed by the CERD Committee that amended NTA may put Australia in breach of the ICERD. The CERD Committee found that the amended NTA was discriminatory in that it preferred non-Indigenous interests over Indigenous ones. It urged the Australian Government to suspend the implementation of the discriminatory 1998 amendments and re-open negotiations with Indigenous representatives with a view to finding solutions acceptable to the Indigenous peoples and that would comply with Australia's international obligations. Despite strong pressure from the Australian Government, the CERD Committee re-affirmed its decision in August 1999 and March 2000.³⁴

1.43 The CERD Committee noted in particular four specific provisions that discriminate against Indigenous title holders. These were the validation provisions, the confirmation of extinguishment provisions, the primary production upgrade provisions, and restrictions concerning the right to negotiate. It also noted the "lack of effective participation by indigenous communities in the formulation of the amendments". As indicated, the CERD Committee has repeatedly affirmed its analysis after careful and extensive consideration of detailed government and non-government submissions. In these circumstances the analysis of the CERD Committee can be relied upon to support the conclusion that there is a contravention of the non-discrimination requirements of ICESCR as reflected in Article 2.2.

Native title and cultural rights.

1.44 Native title is a unique title. Its nature is set out in the following passage from the Mabo decision:

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.³⁵

1.45 The special relationship of indigenous people to their land is well known. Land can constitute an economic resource, a source of cultural identity, and a source of spirituality.

1.46 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.

³³ UN Doc CERD/C/54/Misc40/Rev2 (1999)

³⁴ UN Doc CERD/C/55/Misc.31/Rev.3 (1999); UN Doc CERD/C/56/Misc.42/Rev.3 (2000)

³⁵ *Mabo v Queensland* (No 2) (1992) 175 CLR 1 per Brennan J, p58