

**SUBMISSION TO THE
PARLIAMENTARY JOINT COMMITTEE
ON NATIVE TITLE AND THE
ABORIGINAL AND TORRES STRAIT
ISLANDER LAND FUND.**

*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 Racial Discrimination (CERD).*

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1. Introduction.

Community Aid Abroad welcomes the opportunity to provide input to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund 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 Racial Discrimination (CERD).

Community Aid Abroad works with indigenous peoples in approximately 21 countries, including Australia where it has run a community development programs for many years. It is important to emphasise that Community Aid Abroad does not in this submission purport to represent the views of indigenous Australians. Instead, Community Aid Abroad's primary interest is in maintaining and enhancing the basic rights of indigenous peoples with whom we work - including indigenous Australians - and as such seeks in this submission to comment from this rights based perspective.

Given the breadth of our international experience, what is striking to Community Aid Abroad is the similarity of underlying problems that confront indigenous peoples; usually they are the most marginalised of the poor, have the least political power and, because of their prior ownership of land, find themselves in conflict with commercial interests wishing to exploit their natural resources. Reluctance by dominant cultures to acknowledge often complex indigenous land ownership systems is nearly universal, and Australia is no exception.

With the Mabo decision, and the Native Title Act 1993, Australia had the makings of a just settlement within its grasp. The 1998 Amendments to the NTA do not, as the Prime Minister claimed at the time, "swing the pendulum back to the centre" - they reverse a small gain made under the original negotiations around the NTA and significantly diminish the rights of Native Title claimants and holders.

Community Aid Abroad believes that the finding of the CERD Committee that the Native Title Amendment Act 1998 is inconsistent with Australia's international legal obligations is sustainable on the weight of informed opinion and indeed consistent with the analysis provided to members of this Committee by many individuals and organisations in previous inquiries into the Amendments prior to their enactment.

For example, in its 1997 submission to the Joint Parliamentary Committee on Native Title inquiry into the then proposed Amendments to the Act, Community Aid Abroad said;

"Community Aid Abroad is concerned that the new amendments raise numerous human rights concerns. As a signatory to the major international instruments on human rights, Australia's previously sound reputation of respecting human rights will be drawn into detailed examination if many of the proposed amendments are enacted.

Even though Australia has acted on its obligations under the Convention on the Elimination of All Forms of Racial Discrimination by enacting the Racial Discrimination Act 1975, the new amendments may conflict with the principles underlying that Act. It is clear that any of the amendments contained in the Bill which appear to cross the Racial Discrimination Act 1975 will be challenged in the courts, resulting in ongoing uncertainty and possible subsequent amendments to the Act.

For example, legislation which directly or indirectly extinguishes the property rights of only one race, namely Aboriginal and Torres Strait Islander people, is racially discriminatory legislation."

Despite subsequent events, this statement was not prophetic - it was based on an objective assessment of the facts. The facts were presented by Community Aid Abroad and many other individuals and organisations in 1997, and again in 1999 by the CERD Committee. To date, they have been ignored.

Community Aid Abroad's comments in relation to the terms of reference of this inquiry follow.

2. Term of Reference (a).

"Whether the finding of the Committee on the Elimination of Racial Discrimination (CERD) that the Native Title Amendment Act 1998 is inconsistent with Australia's international legal obligations, in particular the Convention on the Elimination of all Forms of Racial Discrimination, is sustainable on the weight of informed opinion."

2.1 Australia as a State Party to the CERD Convention.

Established in 1970 in accordance with Article 8 of the Convention on the Elimination of all Forms of Racial Discrimination (CERD), the Committee on the Elimination of Racial Discrimination consists of 18 experts of high moral standing and acknowledged impartiality, elected by States Parties from among their nationals. Members are elected by secret ballot at a meeting of the States Parties, and serve in their personal capacities.

The Committee on the Elimination of Racial Discrimination has found that the Australian Government's 1998 amendments to the Native Title Act 1993 are inconsistent with Australia's obligations under the United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD). On March 12 1999 the CERD Committee requested the Howard Government take urgent action to address this, including immediately suspending its amendments to the Native Title Act and re-opening negotiations with Aboriginal people with a view to finding solutions which comply with Australia's international obligations.

To date the Australian Government's response to the CERD finding has been to blame the messenger by questioning both the competence of the Committee to consider this matter and whether Australian domestic legislation should be subject to review by this and other United Nations Committees. Community Aid Abroad considers the Australian Government response to the CERD Committee finding to be an exercise in placing narrow political interests ahead of Australia's international human rights obligations.

Australia prides itself on its reputation as a good international citizen. As a party to all the major human rights treaties, Australia has in the past taken its human rights responsibilities seriously. Australia signed the CERD in 1966 and passed complimentary legislation in 1975 in the form of the Racial Discrimination Act, demonstrating Australia's commitment to the elimination of racial discrimination and respect for the international Convention.

As a result, Australia enjoyed the respect of the international community and the freedom to comment on international issues relevant to the Convention, playing an important role in promoting human rights in the Asia- Pacific region and beyond. It is clear that if Australia wants its opinions to continue to be regarded seriously by the international community, it must be prepared to respect international criticism of its own human rights record and respond appropriately to the urgent concerns expressed by the CERD Committee. It is not appropriate for the Government to simply dismiss these international concerns on such fundamentally important matters.

The Australian Government's dismissive reaction to the CERD Committee finding is both fundamentally inconsistent with its obligations under the Convention and Australia's previous acknowledgement of the competence of the CERD Committee.

Australia is a State Party to the Convention on the Elimination of All Forms of Racial Discrimination and, as such, has formally accepted the powers provided to the CERD Committee under the Convention. In addition, Australia has formally acknowledged the competence of the CERD Committee as recently as 1993. One of the tasks of the Committee, as set out in Part II of the Convention, is to receive and consider communications from individuals or groups of individuals within the jurisdiction of those States Parties which have recognised the competence of the Committee under Article 14 of the Convention. Australia lodged its Article 14 declaration recognising the competence of the Committee to consider such matters in February 1993.

Community Aid Abroad's interpretation of the CERD Convention is that any action by the Commonwealth Government that has the effect of discriminating against indigenous peoples with respect to their property rights does place Australia in violation of the International Convention on the Elimination of All Forms of Racial Discrimination, specifically Articles 2(1)(a), 2(1)(c), 5(d)(v)-(vi) and 5(e)(vi).

These Articles are as follows;

Article 2

States 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 and, to this end:

(1)(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.

(1)(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

Article 5

States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights;

(d)(v) The right to own property alone as well as in association with others.

(d)(vi) The right to inherit.

(d)(vii) The right to freedom of religion.

(e)(vi) The right to equal participation in cultural activities.

Given the above, and the international respect held for the CERD Committee, Community Aid Abroad believes there is no choice for the Australian Government.

It must publicly affirm its commitment to the Convention on the Elimination of All Forms of Racial Discrimination and the powers provided to the CERD Committee therein, suspend those amendments to the Native Title Act found by the CERD Committee to be racially discriminatory under Articles 2 and 5 of the Convention and re-open negotiations with indigenous peoples.

The alternative would be unthinkable for Australia, that is, to withdraw as a State Party to the CERD Convention. (Under Article 21 of the Convention a State Party may denounce the Convention by written notification to the Secretary General of the United Nations, with denunciation taking effect one year after receipt of notification by the Secretary General.) But continued affirmation of the CERD cannot be half-hearted or undermining of the Committee itself, simply to avoid unpalatable findings.

Sections 2.2 - 2.5 of this submission now examine in more detail the four aspects of the 1998 amendments which the CERD Committee found to discriminate against indigenous title holders and as such raise concern for Australia's compliance with Articles 2 and 5 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination.

2.2 The Act's Validation Provisions.

A number of States issued a range of licences and leases to pastoralists and mining companies during the three year period between the passage of the 1993 Native Title Act and the 1996 High Court Wik decision, acting on the assumption that native title had been extinguished on pastoral leases - an assumption proved wrong by the High Court Wik decision. These licences and leases - granted without reference to potential native title holders - are validated by the Native Title Amendment Act 1998. As the amendments only affect the rights of indigenous people as native title holders, the CERD Committee found that they are racially discriminatory.

In its 1997 submission to the Joint Parliamentary Committee on Native Title, Community Aid Abroad opposed the above amendments which retrospectively validate intermediate period grants and allow for compensation to native title claimants for any loss of rights. Community Aid Abroad argued that because the action was unlawful, any intermediate period grant is invalid if native title exists over the land affected. The findings of the CERD Committee appear to be consistent with this analysis.

The fact that some State Governments continued to grant mining licenses and other interests over pastoral leasehold land between the time the Native Title Act came into force (1 January 1994) and the handing down of the High Court's Wik decision (23 December 1996) reflects a blatant disregard by the States' for the rights of Aboriginal people under the Act. The States' justification of these illegal acts, based on belief that native title had been extinguished by the grant of pastoral leases, does in no way justify such ill considered policy.

It was widely understood during the three year period before Wik that the law on this point would not be known for certain until such time as the High Court handed down its decision. The States were aware that acting on an assumption that native title had been extinguished was a risky strategy and we believe that such an assumption could not have been made in good faith on the basis of competent legal advice.

This action was unlawful because the States did not follow the procedures set out by the Commonwealth in the NTA - that is, the parties should have entered into formal negotiations. Community Aid Abroad also opposed the fact that the new amendments go further than simply making valid intermediate period grants on existing pastoral leases. The amendments also make any intermediate period grant valid if it was done in relation to land which has ever been the subject not only of a lease (other than a mining lease), but of a grant of freehold or had a public work constructed on any part of it. This includes land over which there are no private interests other than native title interests - for example, land once subject to a pastoral lease which expired long ago, or land on which a memorial of some sort was once erected.

Community Aid Abroad agrees with the CERD Committee finding that the Act's 'validation' provisions are racially discriminatory. Only native title is affected, not other forms of title. There must also be serious doubt as to whether compensation provided would really be on just terms.

2.3 The Confirmation of Extinguishment Provisions.

The CERD Committee found that the confirmation of extinguishment provisions of the Native Title Amendment Act 1998 - which retrospectively ensure that any pre-Wik grant giving a right to "exclusive possession" over land will have permanently extinguished native title - are racially discriminatory against indigenous Australians.

In its 1997 submission to the Joint Parliamentary Committee on Native Title, Community Aid Abroad opposed the above amendments to retrospectively ensure that any pre-Wik grant giving a right to "exclusive possession" over land will be valid and will have permanently extinguished native title. Community Aid Abroad argued that Government claims that these amendments were essentially to confirm and codify the existing common law were misleading. In reality, the amendments go beyond the common law, in that they extend the scope of acts which are to permanently extinguish native title. The findings of the CERD Committee appear to be consistent with this analysis.

Thus, in all cases where people own their land as freehold or hold a lease which grants them the right to exclusive possession, a residential lease or a community purpose lease, native title will have been extinguished permanently over that land. Also now included are leases to statutory authorities where the authorities can deal with the land as if they own it and public works.

Previously, some community purpose leases may not give exclusive possession at all. In addition, not all public works would extinguish native title - stock routes are not covered by structures and it would still be possible to exercise native title rights on them. Similarly, underground gas pipelines would not necessarily impede native title rights at all, just as they do not impede freehold.

2.4 The Primary Production Upgrade Provisions.

The CERD Committee found that the primary production upgrade provisions of the Native Title Amendment Act 1998 - which allow pastoral lessees to upgrade or extend the range of permissible activities on their leases without having to acquire the native title rights or to negotiate with native title holders - discriminate against indigenous Australians.

In its 1997 submission to the Joint Parliamentary Committee on Native Title, Community Aid Abroad opposed the above amendments allowing for pastoral lease activities to be upgraded to full primary production (eg intensive agriculture, construction of tourism facilities, agribusiness such as rice and cotton production) without negotiation with native title holders. Community Aid Abroad argued that this was a defacto upgrading of

leases and a compulsory acquisition of native title rights, a gross act of racial discrimination. The findings of the CERD Committee appear to be consistent with this analysis.

Prior to passage of the Native Title Amendment Act 1998, the Native Title Act did not permit activities beyond those permitted under a pastoral lease without formal negotiations being conducted with native title holders. However, State and Territory Governments did have the power to extend lease activities through compulsorily acquiring any inconsistent native title rights, so long as they did not breach the Racial Discrimination Act.

More intensive land use for primary production may not involve outright extinguishment of native title, but it is likely to increase the inconsistencies between the two sets of rights, giving rise to de facto extinguishment of native title. For example, farmstay tourism could involve the construction of major tourist facilities which could be inconsistent with the enjoyment of native title rights, particularly in the area of the development. Similarly, large-scale agribusiness operations could see vast tracts of land turned over to cotton or rice production, which again could be inconsistent with the enjoyment of native title rights.

It is clear that the that the primary production upgrade provisions of the Native Title Amendment Act 1998 offer a cheap, powerful incentive for the States and Territories to extinguish native title given the commitment by the Commonwealth to pay 75% of the compensation to which native title holders may be entitled where their rights are extinguished as a result of these upgrades. Legislating to permit compulsory acquisition of native title rights alone is a gross act of racial discrimination.

The primary production upgrade provisions in practice are akin to de-facto mass upgrading of pastoral leases to grant lessees rights in many ways similar to the rights of landowners holding freehold title. Although this amendment does not go so far as to permit conversion to freehold title, it is clear that, at some stage, an upgrade will "cross the boundary" and become a conferral of rights of exclusive possession, identical to freehold in all but name.

2.5 Restrictions Concerning the Right of Indigenous Title Holders to Negotiate non-Indigenous Land Uses.

The CERD Committee found that the restrictions to the right to negotiate provisions of the Native Title Amendment Act 1998 discriminate against indigenous Australians. The 1998 Amendments restrict native title holders rights to negotiate exploration, mining and public and private infrastructure projects on their land and as such curtail their property rights under Articles 2 and 5 of the CERD Convention.

The right to negotiate would enable native title holders to protect areas of their land while allowing other areas to be used for non-indigenous purposes. The amendments also increase the power of Ministers, including State and Territory Ministers, to intervene in negotiations and override the right to negotiate for native title holders.

In its 1997 submission to the Joint Parliamentary Committee on Native Title, Community Aid Abroad argued that the right to negotiate was one of the cornerstones of the Native Title Act 1993 and fundamental to broader community recognition of Aboriginal people's cultural and spiritual attachments to land. In this light, Community Aid Abroad welcomed the original provisions of the Native Title Act 1993 providing native title claimants and holders with a right to negotiate over some permissible proposed developments and vigorously opposed the diminution of these rights in the Amendments.

Specifically, native title claimants and holders should maintain the right to negotiate with respect to public and private infrastructure facilities (e.g. electricity structures and pipelines) and should retain their rights to negotiate with respect to exploration and mining as prescribed in the original provisions of the Native Title Act 1993.

The argument put forward at the time by some elements of the mining industry that the industry will be crippled by the right to negotiate provisions of the Native Title Act 1993 is based on a fallacy. The fortunes of the mining industry are based on responses to international commodity price movements and not the right to negotiate provisions of the Native Title Act. The Act simply defines a process for access to resources.

This has been emphatically proven in the Northern Territory, where traditional owners have a right of veto (as opposed to the right to negotiate) over exploration and mining activity under Part IV of the Aboriginal Land Rights Act (Northern Territory) 1976. Here, more than 80% of the value of minerals extracted within the Northern Territory come from Aboriginal land accessed by the industry through negotiated agreements with traditional owners through the Land Councils. By January 1995, the Northern Territory Land Councils had entered mineral exploration agreements covering more than 73,000 square kilometres of land and mining agreements for the establishment of nine operating mines, together injecting more than \$300 million into the Northern Territory economy.

The Amendments also increase the powers of Ministers, including State and Territory Ministers, to intervene in negotiations. The amendments allow the Minister to remove the right to negotiate from "approved...acts," such as granting exploration or prospecting licenses, where certain preconditions are met. The Minister already has this power, but the Amendments weaken the preconditions, making it easier for the Minister to remove the right to negotiate.

Another feature of the Native Title Amendment Act 1998 with the potential to curtail the property rights of indigenous Australians under Articles 2 and 5 of the CERD is the provision for the Native Title Act to no longer apply where the Commonwealth Minister is satisfied that a State or Territory is providing alternative procedures.

In its 1997 submission to the Joint Parliamentary Committee on Native Title, Community Aid Abroad stated that it would only support this amendment where further subsequent

amendments to State and Territory procedures make it binding on the Commonwealth Minister to be satisfied that these procedures will provide at least an equivalent level of protection in comparison to the right to negotiate provisions in the Native Title Act. This condition has not been accepted.

3. Term of Reference (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 legal obligations are complied with.

In its decision, the CERD Committee urged "the State Party [Australian Government] to...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."

The CERD Committee found that the process of negotiation around the Native Title Amendment Act 1998 lacked effective participation by indigenous communities in the formulation of the 1998 amendments, raising concerns of compliance with Article 5c the CERD.

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's General Recommendation XXIII stresses 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."

Consistent with General Recommendation XXIII, the CERD Committee has urged the Australian government to suspend implementation of the amendments and to reopen discussions with the representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to indigenous Australians and which would comply with Australia's obligations under Articles 2 and 5 of the Convention.

It is clear that the intent of the Committee decision is that the Act be amended such that Articles 2 and 5 of the Convention are not called into question. Such action will require substantial further amendments to Act's validation, confirmation of extinguishment, primary production upgrade and right to negotiate provisions such that they are no longer inconsistent with Articles 2 and 5 of the Convention.

It is not appropriate for Community Aid Abroad to prescribe what processes of consultation with indigenous Australians must be followed by the Australian Government in effecting amendments to the Act to ensure that Australia's international legal obligations are complied with. This is a matter for resolution between the Australian government and indigenous Australians and should be resolved such that Article 5(c) of the Convention is not contravened.

Community Aid Abroad draws the Committee's attention to the fact that Article 5c of the CERD Convention is also reflected in other proposed international human rights instruments. In particular, Article 20 of the Draft Declaration of the Rights of Indigenous Peoples affirms the rights of indigenous peoples to participate in law and policy making that affects them and places the onus on Governments to obtain the consent of indigenous peoples before adopting these laws and policies.

4. Term of Reference (c)

Whether dialogue with the CERD on the Act would assist in establishing a better informed basis for amendment to the Act.

Community Aid Abroad fully supports ongoing dialogue between the Australian government and the CERD Committee should the Australian Government comply with the 12 March 1999 decision of the CERD Committee by suspending the Amendments to the Act and reopening discussions with indigenous representatives with a view to further amending the Act to comply with Australia's obligations under the CERD Convention.