

Submission to the United Nations Committee on the Elimination of Racial Discrimination

Response to the request for information in relation to Decision 2(54), Australia: CERD/C/54/Misc.40/Rev.2, 18 March 1999

Submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner of the Australian Human Rights and Equal Opportunity Commission, 11 August 1999

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Introduction

- 1 On 5 July 1999 the United Nations Committee on the Elimination of Racial Discrimination (the Committee) wrote to the Aboriginal and Torres Strait Islander Social Justice Commissioner at the Human Rights and Equal Opportunity Commission (HREOC) requesting information for consideration at the 55th session. The background to this follows.
- 2 On 11 August 1998 the Committee placed Australia under the early warning and urgent action procedure.¹ On 3 March 1999 the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner provided a written response to the Committee's request for information. Representatives of the Australian Government appeared before the Committee in Geneva at the 54th session on 12 and 15 March 1999 in relation to the early warning.
- 3 On 18 March 1999 the Committee adopted Decision 2(54) on Australia.² The decision expressed concern that:
 - amendments to the *Native Title Act 1993* (Cth)(NTA) favour non-Indigenous interests at the expense of Indigenous title, and consequently, do not strike an appropriate balance between Indigenous and non-Indigenous rights;
 - the validation, confirmation, and primary production upgrade provisions, and restrictions and exceptions to the right to negotiate, discriminate against native titleholders. In doing so, these provisions raise concerns that Australia is not acting in compliance with its obligations under Articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD or the Convention);

¹ Committee on the Elimination of Racial Discrimination, *Decision 1(53)*, 11 August 1998. UN Doc CERD/C/53/Misc.17/Rev.2.

² 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.

- the lack of ‘effective participation’ of Indigenous people in the formulation of the amendments raised concerns that Australia had breached its obligations under Article 5(c) of the Convention and had not acted in accordance with the Committee’s General Recommendation XXIII on Indigenous People.
- 4 The Committee also expressed the view in Decision 2(54) that the amended NTA cannot be characterised as a special measure under Articles 1(4) and 2(2) of the Convention.
 - 5 The Committee called on Australia to address these concerns as a matter of utmost urgency. The Committee also urged the Australian 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.
 - 6 The Committee, in light of the urgency and fundamental importance of these matters, decided to keep Australia under the early warning procedure to be reviewed at the 55th session of the Committee in August 1999.
 - 7 This response to the Committee’s request for information is provided by Dr William Jonas AM, the Aboriginal and Torres Strait Islander Social Justice Commissioner, on behalf of HREOC. It is understood that the purpose of the Committee’s request for information is to assist in its further consideration of the matters specified in Decisions 1(53) and 2(54) on Australia.

1. The compatibility of state and territory legislation authorised by the amended NTA with Australia’s obligations under CERD

- 8 Before outlining how internal states and territories of Australia have implemented the amendments to the NTA, it is important to explain the relationship between the legislative power of the federal government and that of the states and territories.³
- 9 Australia is a federation comprised of a Federal (or Commonwealth) Government, six state and two territory governments. For convenience, in this document references to states include references to territories.
- 10 Under section 109 of the Australian Constitution, federal legislation overrides state legislation to the extent that the state law is inconsistent with the federal law. For example, the *Racial Discrimination Act 1975 (Cth) (RDA)* is a federal law that generally operates to nullify state legislation that is racially discriminatory.⁴
- 11 However, the principle of parliamentary sovereignty enables the Federal Parliament to pass legislation that overrides its previous legislation. The Federal Parliament can therefore pass legislation subsequent to the RDA that specifically authorises action inconsistent with the provisions of the RDA. If the federal Parliament authorises states to act pursuant to this subsequent federal legislation then state parliaments will not be bound by the RDA.

³ This relationship was also considered in the previous submission to the Committee by HREOC: Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission by the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner of the Australian Human Rights and Equal Opportunity Commission - Response to the request for information by the United Nations Committee on the Elimination of Racial Discrimination in relation to Decision 1(53) concerning Australia: CERD/C/53/Misc.17/Rev.2, 11 August 1998, 3 March 1999, paragraphs 6 - 35.* (Herein HREOC submission in relation to Decision 1(53)).

⁴ The RDA is Australia’s domestic implementation of its obligations under CERD. It binds both state and federal governments.

- 12 The NTA is such a piece of federal legislation. As the High Court of Australia noted in 1995:

If the *Native Title Act* contains provisions inconsistent with the *Racial Discrimination Act*, both acts emanate from the same legislature and must be construed so as to avoid absurdity and to give each of the provisions a scope for operation. The general provisions of the *Racial Discrimination Act* must yield to the specific provisions of the *Native Title Act* in order to allow those provisions a scope for operation.⁵

- 13 The amended NTA authorises states to conduct activities that are inconsistent with the RDA. The amended NTA authorises state legislation that includes validation, confirmation and primary production upgrade provisions, and provisions that place restrictions or exceptions upon the operation of the right to negotiate.⁶ In Decision 2(54) the Committee expressed its concern that these provisions in the amended NTA breach Australia's obligations under the Convention.
- 14 Where state legislation is discriminatory it must be authorised by the amended NTA. Where state legislation contains provisions not authorised by the amended NTA, those provisions will be invalid (due to section 109 of the Australian Constitution) if they conflict with the RDA, NTA or any other federal law.
- 15 Section 7 of the NTA provides that the NTA is to be read and construed subject to the provisions of the RDA. The effect of this section is limited. As the Commission noted in its previous submission to the Committee, section 7 will only operate where the provisions of the NTA are ambiguous. In such a case the ambiguous provision will be read, so far as possible, consistently with the RDA. Where, however, the meaning of a provision is not ambiguous, its meaning will not be changed as a result of the operation of section 7.
- 16 So long as state legislation is authorised by the amended NTA, there is no requirement domestically for any subsequent state or territory legislation to comply with Australia's obligations under CERD. This does not, however, relieve the states and territories of their international obligations under the Convention.
- 17 While the power to enter into international treaties and conventions on behalf of Australia resides with the federal government, the states and territories of Australia are bound to act in compliance with Australia's international obligations. Article 27 of the Vienna Convention on the Law of Treaties, to which Australia is a party, provides that 'a party may not invoke provisions of its internal law as justification for its failure to perform a treaty.'
- 18 The Commission notes that the Committee has previously expressed concern at non-compliance of the states and territories with Australia's obligations under CERD. In its concluding observations on Australia's 9th periodic report in 1994, the Committee stated that:

Although the Commonwealth government is responsible for ratifying international human rights instruments, the implementation of their provisions requires the active participation of the states and territories which have almost exclusive jurisdiction over many of the matters covered by the Convention and cannot be compelled to change their laws.⁷

- 19 The Committee recommended then that, in relation to the treatment of Indigenous Australians:

⁵ *Western Australia v Commonwealth* (1995) 183 CLR 373 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, p484.

⁶ See Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *HREOC submission in relation to Decision 1(53)*, paragraphs 43 – 85; Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, HREOC Sydney 1999, pp 40-45, 56-58, Chapter 3.

⁷ Committee on the Elimination of Racial Discrimination, *Concluding observations on Australia*, 19 April 1994, UN Doc A/49/18, para 542.

The Commonwealth Government should undertake appropriate measures to ensure the harmonious application of the provisions of the Convention at the federal and state and territory levels.⁸

- 20 Accordingly, it is appropriate to examine the compatibility with CERD of legislation introduced by the states and territories under the authorisation of the amended NTA.
- 21 In paragraph 7 of Decision 2(54) the Committee expressed its concern that the following provisions of the amended NTA are discriminatory, and breach Australia's obligations under Articles 2 and 5 of the Convention:
- Validation provisions;
 - Confirmation of extinguishment provisions;
 - Primary production upgrade provisions; and
 - Restrictions concerning the right of Indigenous titleholders to negotiate non-Indigenous land uses.
- 22 While the CERD Committee, in paragraph 11 of Decision 2(54), urged the Australian government to suspend implementation of the 1998 amendments, most states and territories have proceeded to introduce legislation containing these provisions.⁹
- 23 This section of the submission provides details of state and territory legislation introduced under the authorisation of these provisions.

Validation in the States and Territories

- 24 Section 22F of the NTA provides that states and territories may validate intermediate period acts attributable to the state or territory. Table 1 provides details of legislation that the states and territories have introduced.

⁸ *ibid.*, para 547.

⁹ Note that states must already have had legislation in place prior to 31 March 1998 in order to conduct activities under the primary production upgrade provisions.

Table 1 – Validation legislation introduced by the states and territories

State or Territory	Legislative action	Status of Legislation
New South Wales	Native Title (New South Wales) Amendment Act 1998	Enacted by Parliament and in force
Victoria	Land Titles Validation (Amendment) Act 1998	Enacted by Parliament and in force
Australian Capital Territory (ACT)	Native Title (Amendment) Bill 1999	The bill is currently before the parliament
South Australia	Statutes Amendment (Native Title) Bill (No.2) 1998	The bill is currently before the parliament
Western Australia	Titles Validation (Amendment) Act 1999	Enacted by Parliament and in force
Northern Territory	Validation of Titles and Actions Amendment Act 1998	Enacted by Parliament and in force
Queensland	Native Title (Queensland) State Provisions Act 1998	Enacted by Parliament and in force
Tasmania	No proposed legislation has been introduced to date	N/A

25 The Commission notes the following about the state and territory validation legislation:

- *The right to negotiate is not restored in relation to validated titles.* State legislation validates actions where governments had granted titles relating to mining without complying with the right to negotiate provisions of the original NTA.

Where the state legislation has validated mining titles, the state government must notify claimants, registered bodies corporate and representative bodies of all mining titles that have been validated within 6 months of them introducing validation legislation. Validated grants suppress, for the life of the grant, rather than extinguish native title. However, there is no requirement for the mining companies to negotiate with Indigenous communities about the exercise of the grant, such as through the right to negotiate provisions. Such negotiation could ensure that the impact of the mining activity on native title would be minimised.

- *Blanket validation of all actions by the states and territories in the intermediate period.* The amendments to the NTA authorise states and territories to validate all intermediate period acts. However, states are only required to notify Indigenous people about mining titles that have been validated and not other activities, such as acts over Crown land and public works. There is very little information available about grants that have been validated despite the fact that many states have passed validation legislation. This has implications for the ability of native titleholders to claim compensation for loss of their title.

26 The discriminatory nature of the state and territory validation provisions is demonstrated by the approach of the Western Australian government to native title.¹⁰

27 Before the passage of the original NTA, the WA government introduced the *Lands (Titles and Traditional Usage) Act 1993 (WA)* (the WA Act). The WA Act extinguished native title across the state, substituting for it an inferior right of traditional usage that afforded substantially less protection to native title interests than the NTA.

¹⁰ See further: Acting Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report 1997-98*, pp 42-43.

- 28 During the operation of the WA Act, 9,828 titles were granted without complying with the future act procedures of the NTA, including the right to negotiate.
- 29 In March 1995, the High Court held that the Act was invalid.¹¹ The court found that the Act offended the principle of racial non-discrimination and failed to provide equality before the law for Indigenous people as required by s 10(1) of the *Racial Discrimination Act 1975* (Cth). Further, the High Court found that the WA Act was inconsistent with the NTA, and therefore invalid due to the operation of section 109 of the Constitution.¹²
- 30 Accordingly, the 9,828 grants made under the WA act were potentially invalid. The Western Australian legislation validates these titles despite the findings of the High Court.
- 31 In addition to being able to validate these titles, the Western Australian government issued a further 211 titles outside the provisions of the NTA following the High Court's decision of March 1995. The government acknowledged, during the debate on the validation legislation, that Cabinet approved the grant of these titles without complying with the provisions of the NTA in order to speed up the issuance of the titles.¹³ That the government was aware of the possibility that these actions may impact upon native title rights is demonstrated by the fact that the Government only granted the titles after it had received an indemnity from the recipient mining companies concerned in relation to any future compensation liability. These titles were validated in the Western Australian legislation.

Confirmation provisions

- 32 Section 23E of the NTA provides that states and territories may introduce legislation that deems certain tenures granted before 23 December 1996 to have either extinguished or impaired native title. Table 2 provides details of legislation that the states and territories have introduced under section 23E.

¹¹ *Western Australia v Commonwealth* (1995) 183 CLR 373.

¹² This process is described at para 12 above.

¹³ Mr Prince, *Hansard*, Legislative Assembly (Western Australia), 29 October 1998, p2920.

Table 2 – Confirmation legislation introduced by the states and territories

State or Territory	Legislative action	Status of Legislation
New South Wales	Native Title (New South Wales) Amendment Act 1998	Enacted by Parliament and in force
Victoria	Land Titles Validation (Amendment) Act 1998	Enacted by Parliament and in force
Australian Capital Territory (ACT)	Native Title (Amendment) Bill 1999	The bill is currently before the parliament
South Australia	Statutes Amendment (Native Title) Bill (No.2) 1998	The bill is currently before the parliament
Western Australia	Titles Validation (Amendment) Act 1999	Enacted by Parliament and in force
Northern Territory	Validation of Titles and Actions Amendment Act 1998 Lands and Mining (Miscellaneous Amendments) Act 1998 Statute Law Revision Act 1999	Enacted by Parliament and in force
Queensland	Native Title (Queensland) State Provisions Act 1998	Enacted by Parliament and in force
Tasmania	No proposed legislation has been introduced to date	N/A

33 In 1997 the Commonwealth estimated the percentage of the nation covered by tenures over which states and territories can ‘confirm’ extinguishment. These figures are reproduced at Table 3.¹⁴

Table 3 – Area of land covered by scheduled interests

State	Areas in hectares of major listed tenures	Percentage of State	Percentage of Australia
New South Wales	4,650,933	5.80	0.61
South Australia	7,278,882	7.39	0.94
Queensland	38,565,164	22.33	5.02
Western Australia	930,700	0.37	0.12
Total	51,425,679	-	6.69

Note 1: The Commonwealth notes that ‘the other tenures for which detailed tenure information is not available comprises less than 1% of each jurisdiction... The area of Australia that would be subject to the (confirmation) schedule would therefore be less than 7.7% of the total area.’¹⁵

Note 2: The figures for Western Australia are for the complete schedule listed in the NTA, and not the revised schedule passed by the Western Australian Parliament (which did not confirm extinguishment on some tenures – as discussed below).

¹⁴ Commonwealth of Australia, Commonwealth Government Submission on the Native Title Amendment Bill 1997 to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 16 October 1997, Attachment C. These figures are rough estimates drawn from the limited available tenure information.

¹⁵ *Ibid.*

34 The following concerns are raised by the various state and territory confirmation provisions.

Victoria

35 The Victorian legislation fully adopts the schedule of interests over which the state can confirm extinguishment of native title. This includes historic tenures, that is, grants which have expired or which have been resumed by the Crown. By including historic tenures, the Victorian Parliament has extinguished native title on land where, in some instances, there has been no conflicting tenure for over one hundred years. An example is the grant of freehold in the 1890s over land that is now part of, and indistinguishable from, the rest of Wilson's Promontory National Park. The entitlements of ordinary titleholders are not extinguished by historic tenures that lack current significance.

In this regard, the Victorian legislation reflects the common law position. The High Court have found that the grant of a freehold does extinguish native title permanently, even where the land has been subsequently resumed by the Crown.¹⁶

Queensland

36 The *Native Title (Queensland) State Provisions Act 1998* confirms that Grazing Homestead Perpetual Leases (GHPLs) extinguish native title. Under the authority of the amended NTA, the Queensland government was able to extinguish native title over these leases despite concerns from Indigenous people that it would not extinguish native title at common law.

37 A GHPL is a distinct type of tenure, created by statute, with features quite different to a lease created at common law. Senior Counsel, who succeeded in argument before the High Court in the *Wik People's* case, has provided the following advice to the Queensland Indigenous Working Group that GHPLs do not extinguish native title at common law:

A Grazing Homestead Perpetual Lease is a tenure of a kind that is entirely unknown to the common law... Consequently, even more so than in the case of a pastoral lease which was considered in the *Wik* case, it is important to bear in mind that this tenure creates an interest in land limited to the incidents prescribed by the Land Act and it would be a mistake to import into such a tenure any features of a common law lease by reference to the use of the word "lease" in the name of the tenure itself...

even more so than in the case of a pastoral lease, a "perpetual lease" cannot be taken to confer a right of exclusive possession simply because it is described as a lease: see *Wik* case at p 198 per Gummow J...¹⁷

38 By including GHPLs in the Schedule, the Queensland government has legislated to permanently extinguish native title on 12% of the land mass of Queensland, even though it is arguable that a court would find that native title survives on such a substantial area of the state. The inclusion of GHPLs on the schedule was strongly opposed by Indigenous representatives.¹⁸ The extinguishment is discriminatory. No other titleholders are subject to such a sweeping loss of proprietary interests.

¹⁶ *Fejo v Northern Territory* (1998) 156 ALR 721.

¹⁷ Walter Sofronoff QC, *Advice to the Queensland Indigenous Working Group*, 25 August 1998 at p3-4 in Queensland Indigenous Working Group *Collection of Papers of the Proceedings of the Queensland Native Title Working Group*, Brisbane, November 1998.

¹⁸ Queensland Indigenous Working Group, Letter to the Honourable Peter Beattie, Premier of Queensland, 25 August 1998 in Queensland Indigenous Working Group *Collection of Papers of the Proceedings of the Queensland Native Title Working Group*, November 1998.

Western Australia

- 39 The *Titles Validation Amendment Act 1999 (WA)* partially adopts the schedule to the NTA. Western Australia is the only state to date that has not extinguished native title to the extent that the amended NTA allows.
- 40 This is partially due to consideration by the Western Australian Parliament of the Federal Court decision of Justice Lee in *Ward v Western Australia*.¹⁹ In that case, Justice Lee was required to examine special leases that had been granted under Sections 152 of the *Land Act 1898 (WA)*, and Sections 116 and 117 of the *Land Act 1933 (WA)* and which had been ‘confirmed’ in the amended NTA as extinguishing native title. Justice Lee found that these leases did *not* extinguish native title at common law.²⁰
- 41 Despite native title not having been extinguished over the full range of interests scheduled in the amended NTA, the authorisation for the state to legislate extinguishment at some time in the future remains.

Discretions within the NTA to minimise the effect of validation and confirmation

- 42 There are a number of discretions within the NTA that can be exercised variously by the Commonwealth government, the states or territories to minimise the effect of the validation and confirmation provisions. None of these discretions have been exercised to date. They include:
- *Removing interests from the schedule of interests by regulation*
Section 23B(10) of the NTA allows the Commonwealth Minister to remove titles from the confirmation schedule by regulation.
 - *Indigenous Land Use Agreements*
Section 24EBA(6) of the NTA provides that parties to an Indigenous Land Use Agreement (ILUA) may agree to change the effect of validation of an intermediate period act.
 - *Restitution of land through the compensation provisions of the NTA*
The compensation provisions of the NTA provide that parties to a compensation negotiation must, if one of the other parties raises it, consider requests for non-monetary forms of compensation and negotiate in good faith in relation to such requests.²¹

The right to negotiate provisions

- 43 States and territories are authorised by the amended NTA to introduce legislation to implement provisions which replace the right to negotiate with the lesser right to be consulted and to object to the land use.²² Certain legislative schemes require the state or territory to meet minimum requirements set out in the amended NTA, and to obtain a determination of compliance with these minimum standards from the Commonwealth Minister. These include:
- Section 43A (replaces the right to negotiate with a right to be consulted and object, in relation to pastoral leasehold land, reserved or dedicated land or land within towns and cities)
 - section 26A (a mining right at the exploration stage);

¹⁹ (1998) 159 ALR 483.

²⁰ See further: Acting Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report 1997-98*, p44.

²¹ NTA, s79.

²² Section 43 NTA also allows states to replace the right to negotiate at the federal level with a state administered right to negotiate. This is one of the options which may be pursued by Queensland and Western Australia: see Table 4

- section 26B (approved gold or tin mining acts); and
- section 26C (excluded opal or gem mining).

44 Section 24MD of the amended NTA, includes further exemptions to the right to negotiate. There is no requirement of approval by the Commonwealth Minister. The state must merely meet the procedural requirements laid down in the amended NTA. This section applies to:

- the compulsory acquisition of native title rights for the purpose of conferring rights on persons other than the Commonwealth, State or Territory to which the act is attributable (s 24MD(6B)(a)) and
- the creation or variation of a right to mine for the sole purpose of constructing of an infrastructure associated with mining (s24MD(6B)(b)).

45 Most states and territories have now introduced legislation that contains provisions which restrict the ability of native titleholders to negotiate over non-Indigenous land uses. Table 4 provides details of legislation that the states and territories have introduced.

Table 4 – State and territory legislation that adopts exceptions to the right to negotiate provisions

State or Territory	Legislative Action	Status of Legislation
New South Wales	Ss 32-39 <i>Native Title (NSW) Amendment Act 1998</i> (NSW) provide that the Administrative Decisions Tribunal will hear objections arising in relation to s24MD(6B) Amendments to <i>Mining Act</i> and <i>Petroleum (Onshore) Act 1991</i> ensure that particular grants qualify as either approved exploration grants (s 26A) or approved opal or gem mining (s 26C). These provisions do not come into force until the Commonwealth Minister has made a determination. NSW has applied for a determination in relation to s26C, but not for s 26A.	Enacted by Parliament and in force.
Victoria	The <i>Land Titles Validation (Amendment) Act 1998</i> amends the <i>Pipelines Act 1967</i> in order to comply with the requirements of s24MD(6B) The Government is considering introducing a bill that enables them to introduce exceptions under ss26A, 26B, 43 and 43A of the NTA.	Enacted by Parliament and in force. No legislation as yet
A.C.T	No legislation is planned.	N/A
South Australia	South Australia has had a state based right to negotiate in place since 1994. Amendments in the Statutes Amendment (Native Title) Bill (No 2) modify this scheme so that it complies with s43 NTA. This Bill also proposes to introduce provisions consistent with s26A of the NTA.	The Bill is currently before Parliament
Western Australia	The States Provision Bill 1998 proposes to: - Replace the RTN with a state based scheme (s43); - Replace the RTN on pastoral leasehold land (s43A); - Comply with the requirements of s24MD(6B).	Bill not passed and has now lapsed. Expected to be reconsidered at the end of 1999.

Northern Territory	<p>The following acts and regulations have been passed:</p> <ul style="list-style-type: none"> - <i>Land Acquisition Amendment Act (No 2) 1998</i> - <i>Mining Amendment Act (No 2) 1998</i> - <i>Petroleum Amendment Act 1998</i> - <i>Petroleum (Submerged Lands) Amendment Act 1998</i> - <i>Land and Mining Tribunal Act 1998</i> - <i>Energy Pipelines Amendment Act 1998</i> - <i>Validation of Titles and Actions Amendment Act 1998</i> - <i>Lands and Mining (Miscellaneous Amendments) Acts (No 1) 1999</i> - <i>Lands and Mining (Miscellaneous Amendments) Act (No 2) 1999</i> - <i>Land Acquisitions Amendment Regulations 1998</i> - <i>Mining Amendment Regulations 1999 No 14</i> - <i>Petroleum Amendment Regulations 1999 No 15</i> - <i>Energy Pipelines Amendment Regulations 1998</i> <p>These seek to replace the RTN pursuant to s43A and to comply with the requirements of section 24MD(6B)</p>	Enacted by Parliament. The legislation is not yet operative in relation to s 43A as the determination of the Federal Attorney-General has not gazetted
Queensland	<p><i>Native Title (Queensland) State Provisions Amendment Act 1998</i> introduces the following provisions:</p> <ul style="list-style-type: none"> - Section 43 – State base right to negotiate; - Section 26A – exploration acts, but only on pastoral leasehold land; - Section 26B – gold or tin mining; - Section 26C – opal or gem mining. <p>The Native Title (Queensland) Provisions Amendment Bill (No 2) 1998 amends this Act. A further 100 amendments not contained in the Bill are expected to be introduced shortly.</p>	Act passed but not in force. It is intended that the Act will be amended further by the Bill.
Tasmania	No proposed legislation to date	N/A

- 46 Northern Territory is the first state or territory government to take up the option of the replacement of the right to negotiate, pursuant to the amended NTA. The Commonwealth Attorney-General approved the Northern Territory scheme on 27 April 1999.²³ However, a motion to disallow the Attorney-General's determination has been put in the upper house of the federal Parliament, the Senate. The motion must be debated before the end of August. If the motion is passed, the Northern Territory scheme will not come into operation. If the legislation becomes operative, the right to negotiate will be replaced with a lower standard of procedural rights consisting of the right to be consulted and to object to an independent person/body appointed by the Territory.
- 47 Indigenous people in the Northern Territory have vigorously opposed the Northern Territory's scheme, and propose that their concerns be resolved through Indigenous Land Use Agreements.²⁴
- 48 The following issues are raised by the scheme, and by section 43A of the NTA which authorises it.
- 49 The scope of s43A derives from a view of native title as a 'bundle of rights' which, at common law, may partially (and permanently) be extinguished by the grant of non-exclusive possession

²³ Section 43A(9) provides that the Commonwealth Minister may revoke the determination under certain conditions if the standard falls below the minimum standard of compliance set by the original determination. The Central Land Council has negotiated amendments to the scheme since the Commonwealth Minister's determination. They express concern that the NTA provides no protection for these "post-determination" amendments. Central Land Council, *Disallowance of Northern Territory Alternative s43A Schemes for Mining, Petroleum and Land Acquisition: Summary Position Document*, March 1999, p7.

²⁴ *ibid.*

acts (such as pastoral leases).²⁵ By interpreting the content of native title as a ‘bundle of rights’, rather than full ownership, the right to negotiate has been reduced to a right to object and consult.

- 50 This interpretation informs section 43A, and effectively allows states to codify the content and status of native title, although the common law understanding of what comprises native title is still unclear. Justice Lee of the Federal Court recently rejected the ‘bundle of rights’ approach in *Ward*.²⁶ He determined that the Miriuwung and Gajerrong peoples have exclusive native title interests in the vacant Crown land previously subject to a pastoral lease, which are equivalent to full ownership.

2. The registration test²⁷

- 51 The amended NTA introduces a registration test to be applied retrospectively to approximately 900 native title claims lodged since the inception of the NTA in 1994. The government has described the purpose of the registration test in the amended NTA as follows:

The registration test is not intended to provide a screening mechanism for access to the Federal Court... Instead, the purpose of the registration test is to ensure that only claims which have merit are registered on the Register of Native Title Claims.²⁸

- 52 Where registration of a claim does not meet the conditions of the test and is refused, the claim may be pursued through the court system. However, the claimant will be unable to access the right to negotiate provisions, and most other provisions of the future acts regime. Consequently, failure to be registered leaves the claimed native title rights and interests vulnerable to impairment or extinguishment in the period before a court may determine whether native title exists.²⁹
- 53 In the amended NTA a claimant application must not be accepted, and accordingly must not be registered by the Native Title Registrar, unless it meets the requirements of s190B and 190C of the NTA. The test requires that the Registrar, or an officer of the National Native Title Tribunal delegated the function of applying the test, be satisfied that the following conditions are met:

- *Identification of the group*
The persons in the native title claim group are required to be individually named in the application, or described sufficiently clearly so that it can be ascertained whether any particular person falls within the group.³⁰ The implications of this requirement are discussed at paras 74 – 87 below.;
- *Factual basis of the claim*
The information provided must be sufficient to support the assertions that the claimant group has, and the predecessors of the group had, an association with the area; that there exist traditional laws and customs acknowledged and observed by the group; and that the group has continued to hold native title in accordance with those traditional laws and customs;³¹
- *Prima facie case*

²⁵ *ibid.*

²⁶ The decision is currently on appeal to the full Federal Court.

²⁷ See further: Acting Aboriginal And Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, pp 48-51.

²⁸ Parliament of Australia, Native Title Amendment Bill 1997 – Explanatory Memorandum, paras 29.1, 29.2.

²⁹ This is subject to the availability of injunctive relief: see the High Court’s consideration of this issue in *Fejo v Northern Territory* (1998) 156 ALR 721.

³⁰ NTA, s190B(3).

³¹ NTA, s190B(5).

Claimants must supply information that enables the Registrar to be satisfied that, on the face of it, the claimants can establish at least some of the native title rights and interests claimed in the application.³² Note, however, that section 181(1)(g) of the Act provides that if the claim is accepted for registration, the Registrar must only enter those claimed native title rights and interests that have been established. The right to negotiate and other provisions will be limited to those rights that have passed the prima facie test and have been registered;³³

- *Physical connection to the claimed land*
Claimants must supply information that establishes that at least one of the claimants currently has, or previously had, a traditional physical connection with any part of the claimed land or waters.³⁴ There is an exception to this requirement, which allows a claimant to apply to the Federal Court for an order that the Registrar accept the claim for registration, where ‘at some time in his or her lifetime, at least one parent of one member of the native title claim group had a traditional physical connection with any part of the land or waters and would reasonably have been expected to have maintained that connection but for things done’ by the Crown, a statutory authority of the Crown, or a leaseholder;³⁵
- *No prior extinguishment*
The application must not disclose that the native title rights and interests claimed have been extinguished, including in accordance with the validation or confirmation provisions³⁶; and
- *Procedural requirements*
The application must satisfy all the procedural requirements, as set down in s190C and ss61-62 of the NTA.³⁷ For example, the following information must be provided to meet the test:
 - Maps and tenure information that clearly identifies the external boundaries of the claim;³⁸
 - Affidavits from claimants. Particular emphasis has been placed on this requirement in decisions to date³⁹ Affidavits must state that the applicants are authorised by all persons in the claim group to make the application and to deal with matters arising in relation to it. This requirement, under section 61(1)(a) NTA, has been interpreted as applying to all named applicants jointly. Some decisions provide that claimants can meet this requirement by providing a single affidavit sworn to be on behalf of all applicants,⁴⁰ whereas others require individual affidavits from each named applicant.⁴¹
 - Supporting evidence that has also been required includes anthropological evidence, reports about usage of the land and genealogical information.⁴²

54 Native title claims must be lodged in the Federal Court. Amendments of claims, such as where the registrar or delegate requests further information in order to satisfy the registration test, require an application to the court.

³² NTA, s190B(6).

³³ See for example NTA, s31(2), s39(1).

³⁴ NTA, s190B(7)(a).

³⁵ NTA, s190D(4). This is the so-called ‘locked gate exception’.

³⁶ NTA, s190B(9)(c).

³⁷ NTA, s190C(2).

³⁸ See for example the following registration test decisions: *Dja Dja Wurung (Combined Application)*, 4/12/98; *Barada Barna Kabalbara & Yetimarla*, 23/2/99. Note the decision in *Bullenbuk-Noongar*, 17/03/99, which failed the test on this ground.

³⁹ See for example the following registration test decisions: *Barada Barna Kabalbara & Yetimarla*, 23/2/99; and *Barunggam People*, 26/2/99, p6.

⁴⁰ *Powder Family*, 23/2/99, p12.

⁴¹ See for example: *Barada Barna Kabalbara & Yetimarla*, 23/2/99; *Darumbal #2*, 23/2/99.

⁴² See for example the following registration test decisions: *Dja Dja Wurung (Combined Application)*, 4/12/98; *Barunggam People*, 26/2/99; *Bullenbuk-Noongar*, 17/03/99.

- 55 Where the government has issued a notification of an intention to do a future act, claimants must meet the requirements of the registration test within a strictly limited time period. Where a claimant is unable to meet the requirements for registration, within this limited period, they may be denied the protection of the Act.
- 56 This is doubly so in circumstances where a claimant is required, within that limited time frame, to obtain a court order for registration of their interests (where they have been locked off the land or forcibly removed from their family (s190D(4)).

The impact of the registration test on the enjoyment of human rights by Indigenous Australians

57 The registration test has now been applied to more than a hundred claims across Australia.⁴³ While several decisions are currently subject to appeal⁴⁴, the application of the test to date raises concerns that its operation has prevented bona fide claimants from accessing procedures under the NTA designed to protect native title prior to a formal determination by the court recognising that title. Consequently native title rights and interests are left vulnerable to impairment or extinguishment. The application of the test also raises concerns about Australia's obligations under the Convention to ensure the 'effective participation' of Indigenous people in decisions that effect them.

58 The following concerns are raised by the registration test:

- i) Bona fide claims are being rejected on procedural grounds;
- ii) The requirement to demonstrate a physical connection sets a higher threshold than the common law;
- iii) The requirement to detail each native title right does not recognise native title as a system of law;
- iv) The requirement that there be no claimants in common may amount to a denial of cultural identity of Indigenous people; and
- v) The requirements for identification of the claimant group:
- vi) are socially intrusive and culturally inappropriate; and
- vii) set a higher standard than that required by the common law.

i) Bona fide claims are being denied the protection of the NTA on procedural grounds

- 59 Bona fide claimants may have been denied access to the right to negotiate and other future act provisions of the NTA for failure to meet the procedural requirements of the registration test.
- 60 For example, in the *Powder Family* decision the claimants established the merits of their claim. However, they failed the registration test on procedural grounds for not providing a copy of all tenure history searches that they had conducted to the Tribunal, and due to the failure of affidavits to demonstrate that the named applicants were authorised by the group to lodge the claim.⁴⁵
- 61 A second claim, *Cosmo Newberry*⁴⁶, also passed the merit requirements of the registration test yet failed the procedural requirement under s190C(3) that there be no previous overlapping claim groups. This decision is discussed further below.

⁴³ Registration test decisions can be viewed at the National Native Title Tribunal's Internet site: www.nntt.gov.au. A reference below to decisions includes the name of the claim and the date of the decision.

⁴⁴ Registration test decisions are made, in the first instance, by the Native Title Registrar or by officers to whom he has delegated the task (the delegate).

⁴⁵ *Powder Family*, 23/2/99, pp12,15. Note the inconsistency of this test with the decisions in *Western Wakka Wakka People*, 26/2/99; and *Barunggam people*, 26/2/99.

⁴⁶ *Cosmo Newberry*, 3/5/99.

ii) *The requirement to demonstrate a current physical connection sets a higher threshold than the common law standard*

62 The requirement to show a current physical connection with the land in order to be registered does not accord with the common law test for recognition of native title. In *Mabo (No.2)* the High Court held that claimants need to demonstrate a spiritual or physical connection to the land, such a connection being proven according to traditional laws and customs. The requirement in s190B(7) of the NTA of a physical connection to the land may operate to disentitle native title claimants who can demonstrate a continuing spiritual connection to the land from having their legitimate rights recognised and protected by the procedures of the NTA.

iii) *The requirement to detail each native title right does not recognise native title as a system of law*

63 Sections 190B(5) and (6) of the NTA require claimants to provide information about the factual basis for the claim and to identify each individual claimed native title right and interest. Where the Registrar or delegate is not satisfied that a right has been identified and proven sufficiently it is not entered on the Register of Native Title Claims, and claimants cannot exercise the right to negotiate or other future act provisions in relation to that right.

64 This requirement does not provide sufficient recognition to native title rights and interests, as they are defined at common law. Justice Brennan in *Mabo(2)* stated that:

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

65 Native title rights can encompass, at one end of the spectrum ‘the rights flowing from full ownership at common law... (or an entitlement) to come on the land for ceremonial purposes, all other rights in the land belonging to another group.’⁴⁸

66 The approach in sections 190B(5) and (6) of the NTA may limit the ability of claimants to define their rights and interests in accordance with their traditions and customs. It treats native title solely as a bundle of rights rather than as a system of law.

iv) *The refusal to register claimants in common amounts to a denial of the cultural identity of Indigenous people*

67 Section 190C(3) of the amended NTA requires that there be no claimants who have more than one native title claim. This requirement has operated to deny registration to bona fide native title claimants.

68 For example, in *Cosmo Newberry*, the claimants passed each merit and procedural requirement of the registration test but were denied registration as there were persons in the claim who were also members of the Wongatha claim group.⁴⁹

69 The issue of overlaps in claim group membership and multiple claims is complex. However, the desire for procedural efficiency sought through the registration test, appears to outweigh consideration of the rights of native title claimants.

⁴⁷ *Mabo v Queensland (No.2)* (1992) 175 CLR 1, per Brennan J, p58.

⁴⁸ *Wik Peoples and Thayorre Peoples v Queensland* (1996) 187 CLR 1, per Toohey J, pp126-127.

⁴⁹ *Cosmo Newberry*, 3/5/99, p21.

70 The existence of claimants in common between the *Cosmo Newberry* and *Wongatha* claims is a reflection of the vibrancy of both community groups, in that particular individuals are recognised as having custodial obligations within both groups. Claimants in common between groups, which frequently are the result of inter-marriage between members of groups, are often a reflection of different groups having custodial obligations over the same land. The registration test fails to acknowledge the complexity of family and group responsibilities within Indigenous communities, and that certain individuals will be identified as having responsibilities within more than one group.

71 Justice Lee in *Ward* noted :

Occupancy for the purpose of native title is not possession at common law but an acknowledged connection with the land arising out of traditional rights to be present on, and to use, the land. Such occupancy need not be exclusive to one community and may be shared between several communities in certain circumstances: see *Mabo (No.2)* per Toohey J at CLR 190; *Delgamuukw* per Lamer CJ at 259-60.⁵⁰

72 This requirement of the amended NTA is broadly analogous to the situation considered by the Human Rights Committee in *Lovelace v Canada*. In that communication, the Committee considered that the provision of the Indian Act that provided that an Indigenous women's status as an Indian would be withdrawn upon marriage to a non-Indian, was in breach of Article 27 of the International Covenant on Civil and Political Rights as it interfered with her 'right of access to her native culture and language in community with other members of her group.'⁵¹

73 The consequence of this requirement has been that the legitimate native title rights of the *Cosmo Newberry* claim group were not registered.

v) ***The requirements for identification of the claimant group***

74 The registration test requires native title claimants to either provide an exhaustive list of names of individuals within the claimant group (s190B(3)(a) NTA) or to provide information to the Registrar, or his delegate, which enables them to 'sufficiently' identify all individuals who are members of the claimant group (Section 190B(3)(b) NTA). The Registrar and his delegates have interpreted this stage of the test as requiring the claimants to provide information that allows 'some objective way of verifying the identity of members of the native title claim group.'⁵²

75 In registration test decisions to date, the following ways of describing the identity of native title claimants have been considered:

- *An exhaustive list of individuals who are within the claimant group.* Not a single claim has sought to provide an exhaustive list of members of the group (as can be done under s190B(3)(a) NTA). The Aboriginal Legal Service of Western Australia has argued that this requirement:

does not take account of the particular nature of communal title. Effectively requiring a group to provide the tribunal a list of individuals belonging to the claimant group does not reflect the nature of the group membership at law and is potentially divisive to the claimant group.⁵³

⁵⁰ *Ward* per Lee J, p501.

⁵¹ *Lovelace v Canada*, Communication 24/1977 in Selected documents of the Human Rights Committee under the Optional Protocol, UN Doc CCPR/C/OP/1 (1988), pp86-90.

⁵² *Dja Dja Warung*, 4/12/98, p2.

⁵³ Glenn Shaw, Aboriginal Legal Service of Western Australia, in Joint Parliamentary Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Section 206d inquiry into the operation of the Native Title Act 1993*, *Hansard*, 13 April 1999, page 131.

- *Self-identification by members of the group.* The Registrar rejected information that a system of customary law exists under which Aboriginal people are identified as custodians of the land and waters within the claim area. The registration test instead requires claimants to provide details of their system of law by listing specific rules, customs and laws ‘which an individual or group might use to demonstrate the basis of their self-identification.’⁵⁴
- *The practice of acceptance into the claimant group according to traditions and customs.* The Registrar rejected statements that people can be accepted within the group in accordance with traditional laws and customs. Instead, he considered that the registration test requires details of the specific rule or law through which such acceptance takes place.⁵⁵ This rule or law would need to be described in such a way that it could be applied or ‘objectively tested’ by the Registrar in relation to any individual.
- *General statement about the descendants of the group.* In the *Dja Dja Warung* claim, the Registrar considered that general statements to the effect that the claimant group includes Aboriginal people who are recognised as descendants of the Aboriginal people who have been custodians of the land since time immemorial, or that the claimant group has acquired responsibilities of custodianship from the original inhabitants of the area, are insufficient.⁵⁶
- *Acceptance into the group through customary adoption practices.* Statements that individuals can form part of the group through customary adoption practices have been considered insufficient where there is no ‘objective’ way of testing this assertion. Extensive information about customary rules and laws that detail how people are accepted into the claimant group through customary adoption practices have been required.⁵⁷
- *Genealogical evidence and proof of biological descent.* Registration test decisions to date reveal that proof of biological descent through anthropological reports, genealogical evidence and affidavits is the most commonly accepted form of evidence to meet this stage of the test.

76 The identification stage of the registration test is problematic for the following reasons.

77 *The requirements for identification of the claimant group are socially intrusive and culturally inappropriate.* The emphasis of the test on proving biological descent or revealing details of the system of customary law upon which identification of the group is based is socially intrusive and culturally inappropriate.

78 The Kimberley Land Council has expressed the following concerns:

Aboriginal ways of defining their relationships within a claimant group are belittled when they must do so according to Euro-centric notions of a biological descent group. This feature of the registration test and its administration is creating an artificially narrow definition of the claimant group... The laws and customs which underpin native title rights should be accorded legitimacy in the process of registering native title claims.⁵⁸

79 The failure of the identification requirements to recognise and accept Indigenous forms of social organisation *in their own terms* can be seen as a return to a *terra nullius* approach. As an eminent anthropologist and scholar has commented:

⁵⁴ *Dja Dja Warung*, 4/12/98, p3.

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ See for example the following registration test decisions: *Darumbal #2*, 23/2/99; *Gnaala Karla Booja*, 3/3/99; *Bullenbuk - Noongar*, 17/3/99.

⁵⁸ Kimberley Land Council, *Submission to section 206d inquiry*, pp 5-6.

In the jargon of earlier days, the more organised a society was, the more ‘advanced’ it was, and thus the more it had to be taken seriously by colonial powers. If a society failed to exhibit a certain ill-defined quantum of organisation – and especially if it failed to exhibit sedentism and horticulture – its lands might be regarded as *terra nullius*. Curiously this idea resonates again in the context of proof of native title, and at both historical ends of the process: the Indigenous society at the time of sovereignty has to be shown to have a system of a certain order, and the claimants themselves do also.⁵⁹

80 *The identification requirements of the registration test set the threshold to be met by claimants at a standard higher than that required by the common law.* The identification requirement of the registration test places a greater onus on claimants than is required to establish native title at common law.

81 The requirements of the common law, as recently re-stated by Justice Lee in *Ward v Western Australia*⁶⁰, include:⁶¹

- *The existence of an identifiable community.* The common law requires that there be an identifiable community at the time of colonization. Native title will survive so long as there remains an ‘identifiable community living under traditionally based laws and customs.’⁶² Difficulties in proving membership of that community will not prevent that community from being recognised as the holder of native title;
- *Biological descent.* Proof of biological descent does not constitute an exclusive test for defining the community that holds native title;
- *Maintenance of the connection to land.* The purpose of assessing information about descent is not to evaluate the adequacy of the description of the group, but to establish that the community, as identified, has substantially maintained its connection to the land since sovereignty⁶³;
- *Dynamic nature of Indigenous laws and customs.* Indigenous laws and customs upon which native title is based are dynamic, and not static⁶⁴; and
- *Distribution and exercise of native title rights.* The social organisation, and traditional laws and customs of the community will determine how native title rights are exercised. For example in *Ward*, Justice Lee found evidence of vibrant sub-groups within the broader native title group. How the community is organised and chooses to exercise their native title rights is irrelevant to a determination that native title exists.⁶⁵

82 Justice Lee considered extensive historical, linguistic, genealogical, anthropological and oral evidence in determining that the Miriuwung Gajerrong peoples had an identifiable community and were able to be recognised as the holders of native title at common law.

⁵⁹ Peter Sutton, ‘The system as it was straining to become: fluidity, stability and Aboriginal country groups’ in J. Finlayson, B Rigsby and H Bek, *Connections in Native Title: Genealogies, Kinship and groups*, Centre For Aboriginal Economic Policy Research, Australian National University, Canberra, 1999, page 42.

⁶⁰ (1998) 159 ALR 483. Note that this decision is currently on appeal to the full Federal Court of Australia.

⁶¹ See the discussion on this point in: Western Australian Native Title Support Team, Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund – Section 206d inquiry into the operation of the Native Title Act 1993, 14 April 1999, pp 6-8.

⁶² *Ward* per Lee J, p503; citing Brennan J in *Mabo (No.2)* at p61.

⁶³ *Ward* per Lee J, p503.

⁶⁴ *ibid*, p501.

⁶⁵ *ibid*, p541.

83 The higher threshold required by the registration test is demonstrated by the registration test decision in *Mirriuwung Gajerrong #2*.⁶⁶ The claimants in this application were the identical group that Justice Lee determined were the holders of native title, as the Mirriuwung Gajerrong peoples, in *Ward*. In their application for registration the claimants relied on the same definition of the group as had been accepted by Justice Lee in the Federal Court this definition was considered inadequate for the purposes of the registration test.

84 In applying the test, the Registrar's delegate acknowledged the implications of the different standard to the common law that is required under the registration test:

It is not difficult to see that many traditional means of defining membership of the group will not be accommodated by the subsection... The members of the group may say that traditional laws and customs are clear to them, and give certainty. However, in my view the section is intending that there must be a greater level of certainty for those outside the group, for example, non-Indigenous people who must negotiate with registered persons and the group they represent.⁶⁷

85 The result in *Mirriuwung Gajerrong #2* is a further demonstration of a bona fide claimant being denied access to the future acts regime of the NTA. By failing the registration test the claimants have lost the right to negotiate in relation to a proposed mining development for which the State of Western Australia had issued a notice of an intention to grant a mining interest under section 29 of the NTA on 14 October 1998.⁶⁸

86 This demonstrates the view expressed by the CERD Committee in Decision 2(54) that 'the amended (NTA) appears to create legal certainty for governments and third parties at the expense of Indigenous title.'⁶⁹

87 *Compatibility of the identification requirements with CERD*. The identification requirements of the test raise the following additional concerns about compliance with Australia's obligations under the Convention. In particular it raises concerns with:

- *Articles 2 and 5 of the Convention*. The registration test raises concerns about compliance with Australia's obligations under Articles 2, 5(d)(v) and 5(d)(vi) of the Convention.
- *Acceptance of self-identification test by the Committee*. General Recommendation VIII of the Committee, which concerns the ways in which individuals are identified as being members of a particular group, states that group membership 'shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.'⁷⁰
- *Self-determination*. General Recommendation XXI of the Committee refers to the right to self-determination. In the context of Indigenous Australians, reference is made to the internal dimension of this right.⁷¹ The Committee describes the right as 'a fundamental principle of international law' and also notes the existence, under Article 27 of the International Covenant on Civil and Political Rights of the right of minorities to enjoy their own culture.⁷² The Commission considers that the non-acceptance of self-identification and the requirement to detail customary laws and rules does not accord with this right.

⁶⁶ *Mirriuwung Gajerrong #2*, 26/3/99.

⁶⁷ *ibid.*

⁶⁸ *Mirriuwung Gajerrong #2*, *op.cit.*, p1.

⁶⁹ Decision 2(54), para 6.

⁷⁰ International Committee on the Elimination of Racial Discrimination, General Recommendation VIII – Identification with a particular racial or ethnic group (Article 1, paras 1 & 4), 24 August 1990, in UN Doc: A/45/18.

⁷¹ International Committee on the Elimination of Racial Discrimination, *General Recommendation XXI – Right to self-determination*, 48th session, 1996, para 9 in UN Doc: A/45/18.

⁷² *ibid.*, para 7.

- *Recognition of culture.* General Recommendation XXIII concerning Indigenous peoples calls upon States parties to ‘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.’⁷³

⁷³ International 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(a).