

1. Native Title

This material relates to question 7 of the List of issues to be taken up in connection with the consideration of the third and fourth reports of Australia

Summary of issue

- Native title is the legal recognition given to the traditional laws acknowledged by and the traditional customs observed by Indigenous people.
- In addition to recognising Indigenous rights, the High Court of Australia has recognised the power of the State to extinguish native title.
- Articles 1 and 27 of ICCPR require the State to protect the culture of Indigenous people. The extinguishment or impairment of native title is a breach of these articles.
- Articles 2 and 26 of ICCPR require the State to protect Indigenous rights to land to the same extent that non-Indigenous interests in land are protected. The priority given to non-Indigenous interests in land over Indigenous interests in land is a breach of these articles.
- The common law is developing a construction of native title which 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 prefers non-Indigenous title to land over Indigenous title to land 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 prioritise specified activities of non-Indigenous titleholders and government over Indigenous control of native title land. 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 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, in some instances 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 interests 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 ICCPR

- Article 1: Self -determination
- Article 27: The rights of minorities
- Articles 2 and 26: Non-discrimination and equality

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

- Requirement to recognise and protect Native Title under ICCPR
- Common law of native title
- The Native Title Act 1993
- The amendments to the Native Title Act and their relevance to ICCPR
- Failure of the amended Native Title Act to incorporate the principles of equality
- Lack of consultation and informed consent for the Amendments.

Requirement to recognise and protect Native Title under the ICCPR

1.1 The recognition and protection of native title rights, which vest only in Indigenous Australians, is an essential component of Australia's compliance with the ICCPR. Their recognition constitutes the recognition of inherent rights which have been ignored without Indigenous consent since European settlement in 1788. Indeed, the Committee on the Elimination of Racial Discrimination (hereinafter CERD) has noted in their General Recommendation 23 at paragraph 3:

The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently the preservation of their culture and their historical identity has been and still is jeopardised.

1.2 The historical oppression of Indigenous peoples was also noted by the Human Rights Committee (hereinafter HRC) in *Ominayak and the Lubicon Lake Band v Canada* (167/87), and was relevant to its finding of a violation in that case at paragraph 10.3:

Historical iniquities, to which the State party refers, and certain more recent developments [expropriation of territory and energy exploration] threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue. ...

1.3 CERD has recognised the historic dispossession, and the need for Australia to provide redress for such dispossession, of Australia's Indigenous people in its Decision(2)54 on Australia, at paragraphs 3 and 4:

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

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

- 1.4 Indigenous Australians are undoubtedly entitled to minority rights under article 27 of the ICCPR. The HRC has confirmed that indigenous peoples are minorities for the purposes of article 27 in a number of cases, such as in *Kitok v Sweden* (197/85), *Ominayak v Canada* (167/87), and the *Länsman* cases (511/92 and 671/95). The special place of land rights within Indigenous cultures has been recognised by the HRC in General Comment 23 at paragraphs 3.2 and 7:

The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. ...

- 1.5 In Concluding Comments on Sweden, the HRC stated, with regard to that State's protection of its Indigenous Sami people:¹

18. The Committee notes that legislative provisions adopted recently by the Riksdag ... providing for the right for everyone to fish and hunt on public lands may have adverse consequences on the traditional rights of the members of the Sami people. ...

26. The Committee recommends that the recognised customary rights of the Sami people be fully protected in the light of article 27 of the Covenant.

- 1.6 This comment clearly acknowledges that article 27 requires the recognition and protection by States of the unique land interests of Indigenous peoples. General Recommendation 23, issued by CERD, also addresses the minority rights of Indigenous peoples.

4. The [CERD] Committee calls in particular upon States parties to:

(a) recognise and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation; ...

(c) provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics.

(e) ensure that indigenous communities can exercise their rights to practice and revitalise their cultural traditions and customs, to preserve and to practice their languages.

- 1.7 Paragraph 5 of this General Recommendation is particularly pertinent to land rights:

The Committee especially calls upon States parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and

¹ Concluding Comments on Sweden, (1995) U.N. Doc. CCPR/C/79/Add.58.

informed consent, to take steps to return these lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

1.8 Finally, the protection of native title is necessary in order for Australia to comply with the ICCPR guarantee of self-determination to peoples in article 1. The CERD has confirmed, in its General Recommendation 21, that the right to self-determination has a significant 'internal' aspect. At paragraph 5:

In order to respect fully the rights of all peoples within a state, governments are again called upon to adhere to and implement fully the international human rights instruments and in particular the International Convention on the Elimination of All Forms of Racial Discrimination. Concern for the protection of individual rights without discrimination on racial, ethnic, tribal, religious, or other grounds must guide the policies of governments. In accordance with article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination and other relevant international documents, governments should be sensitive towards the rights of persons of ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth, and to play their part in the government of the country of which its members are citizens. Also, governments should consider, within their respective constitutional frameworks, vesting persons of ethnic or linguistic groups comprised of their citizens, where appropriate, with the right to engage in such activities which are particularly relevant to the preservation of the identity of such persons or groups.

1.9 The HRC itself has stated recently, in Concluding Comments on Canada, at paragraph 8:²

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

1.10 The diminution and extinguishment of native title breaches Australia's obligations under articles 1, 2, 26 and 27. Though many of these 'breaches' predate Australia's 1980 ratification of the ICCPR, instances of diminution and extinguishment have continued after that date, and even since the *Mabo (no 2)* case.³ The diminution and extinguishment of native title after the decision of the High Court in *Mabo v Queensland* (hereinafter *Mabo (no 2)*), especially by the 1998 legislative amendments, is detailed below.

Developments in the common law of native title

² (1999) UN doc. CCPR/C/79/Add. 105.

³ (1992) 175 CLR 1

- 1.11 The common law approach to native title is to delineate two issues for its 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'.⁴
- 1.12 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.⁵ The relationship between these rights as a system of rights, with some rights being parasitic 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.
- 1.13 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 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.
- 1.14 Article 27 protects minority contemporary cultural practices as well as traditional practices.⁶ For example, in *Länsman v Finland* (511/92), the Human Rights Committee has stated, at paragraph 9.3:
- The right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant.
- 1.15 The bundle of rights approach also effects the outcome of the second issue considered by the Court in native title cases; extinguishment. Where the exercise of rights pursuant to an act of the Crown is inconsistent with the exercise of a particular native title right then, under the bundle of rights approach, that particular native title right is permanently extinguished by such inconsistency. Each native title right from the bundle of rights can be extinguished in this way.

⁴ *Ibid*, p63

⁵ 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')

⁶ See B. Kingsbury, 'Claims by non-State Groups in International Law' (1992) 25 *Cornell ILJ* 481, at 491.

1.16 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.⁷ Under this construction, native title is a stronger, more resilient title.

1.17 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 ICCPR it is incumbent on Australia to legislate to ensure that appropriate protection is extended to Indigenous people.

The Native Title Act 1993 (NTA)

1.18 In summary 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 and substantive rights, were rendered invalid.

1.19 In the first Mabo decision, *Mabo v Queensland (No 1)* (1988) 166 CLR 186, the High Court found that the *Queensland Coast Islands Declaratory Act* (Qld) 1985, which extinguished Indigenous title to land in the event of its actual existence,⁸ contravened the RDA and was therefore invalid.⁹ The High Court found that the Queensland statute contravened section 10 of the RDA, which guaranteed that members of all racial groups would enjoy recognition of their 'rights' to the same extent as each other. 'Rights' within section 10 included, *inter alia*, freedom from the arbitrary deprivation of legal rights to property.¹⁰ The High Court held that the Queensland Act purported to lower the legal rights of indigenous peoples to property compared to other racial groups, contrary to section 10. The Queensland Act was thus invalid.

1.20 The confirmation of the continued existence of native title at common law in the second Mabo decision, *Mabo 2*, combined with the interpretation given to the RDA in *Mabo 1*, meant that many legislative or other acts by the States or Territories¹¹ from 1975, and possibly some non-legislative acts by the Commonwealth government, which ignored substantive and procedural native title rights, were invalid. The NTA retrospectively validated these past invalid acts. The validation of these titles by the NTA prevailed over the invalidation of these titles by the RDA because the NTA was a subsequent piece of

⁷ 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

⁸ The existence of native title was of course not confirmed until four years after, in 1992 with *Mabo (no 2)*. The *Mabo (no 1)* decision found that, in the event that an Indigenous title to land existed, the *Queensland Coast Islands Declaratory Act* (Qld) 1985, would be invalid because of the operation of the RDA.

⁹ Under section 109 of the Constitution, Commonwealth Acts prevail over State Acts in the case of an inconsistency. State Acts are invalid to the extent of any such inconsistency.

¹⁰ *Mabo 1* at 216-17 (Brennan, Toohey, Gaudron JJ) and 229-230 (Deane J).

¹¹ The RDA also prevails over inconsistent territorial legislation. The Commonwealth has plenary power over the territories under section 122 of the Constitution.

legislation and dealt more specifically with the relationship between native title and other non-Indigenous titles to land.

- 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.

1.21 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.¹²

Native Title Amendment Act 1998 (Cth)

1.22 The *Native Title Amendment Act* 1998 (Cth) was passed largely in response to the perception that the *Wik* decision had pushed the balance between Indigenous and non-Indigenous interests too far in favour of native title holders.¹³ In *Wik v Queensland* (1996) 187 CLR 1, (*Wik*) the High Court confirmed that native title could survive the grant of a pastoral lease, depending on the terms of the grant. Unless the terms of the grant showed a clear and plain intention to extinguish native title, native title was held to be capable of co-existing with that 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.¹⁴

1.23 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.¹⁵ 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.¹⁶

1.24 The amended NTA subordinates Indigenous interests to those of non-Indigenous titleholders in the following ways:

¹² Committee on the Elimination of Racial Discrimination, *on Australia*, paragraph 6. 18 March 1999, UN Doc CERD/C/54/Misc.40/Rev.2.

¹³ 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.

¹⁴ per Toohey, p126

¹⁵ CERD, Decision (2) 54, paragraph 6.

¹⁶ *Ibid*, paragraph 9.

- 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 negotiate¹⁷
- 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.

Validation of Intermediate Period Acts¹⁸

1.25 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.

1.26 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.¹⁹ 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.

1.27 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.²⁰ 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.²¹ Extinguishment of native title is defined in the amended NTA as permanent.²² The grant of a mining lease is a category C act and the non-extinguishment

¹⁷ The first four issues were cited by the CERD Committee as matters of particular concern in their Decision(2) on Australia, paragraph 7.

¹⁸ Extracted and based on material from Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996-97* (hereafter Native Title Report, 1996-7), pp60-64.

¹⁹ Some acts performed after the *Wik* decision have also been validated – for example, options created before *Wik* which were exercised post-*Wik*.

²⁰ NTA s.232B(5)(b), s.229(3)(a).

²¹ NTA s232C. Category C and D intermediate period acts are defined in ss232D and 232E NTA respectively.

²² NTA s237a.

principle applies.²³ Native titleholders are entitled to compensation for the extinguishment or impairment of their title by validated acts.²⁴

Confirmation of Extinguishment Provisions²⁵

1.28 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.

1.29 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.²⁶ 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.²⁷

1.30 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.²⁸

1.31 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 confirming the extinguishment of native title by the grant of the scheduled interests.

1.32 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.

1.33 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

²³ 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

²⁴ NTA s22D, 22F.

²⁵ Extracted and based on material from Native Title Report 1996-97, pp68-75.

²⁶ 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.

²⁷ NTA s23B(2)(c).

²⁸ NTA s23J(1).

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.

ICCPR compatibility of 'Validation' and 'Confirmation' Provisions

1.34 The retrospective validation provisions breach the non-discrimination provisions of the ICCPR. They diminish the property rights of native-title holders, by definition Indigenous peoples, and increase the property rights of non-native title holders. Though property is not a protected ICCPR right, article 26 prohibits discrimination in relation to the exercise of all human rights, including non-ICCPR rights. In General Comment 18, the HRC has defined discrimination at paragraph 7:

The Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

1.35 The distinctions cannot be deemed reasonable and objective distinctions, which are compatible with article 26. For all the need for certainty and workability there is a balancing objective of allowing sufficient time to integrate the belated recognition of native title into Australia's land management system.²⁹

1.36 The 'validation' and 'confirmation' provisions result in the extinguishment or diminution of native title rights. They contravene Australia's duty to positively protect native title.

1.37 At paragraph 9.4 of the first *Länsmän* case (511/92), the HRC stated:

Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27.

1.38 In the two *Länsmän* cases, the HRC found that the interference with traditional Sami reindeer husbandry posed by certain economic interferences (logging and quarrying with limited geographical impact) did not have such a detrimental impact on Sami tradition as to amount to a breach of article 27. In contrast, the validation provisions, which retrospectively validate all land grants issued in contravention of native title rights, and the confirmation provisions, which *wholly extinguish* native title rights, or authorise such extinguishment, and therefore *wholly deny* cultural rights associated with affected land, must be deemed to have such a detrimental effect on article 27 rights as to amount to a breach thereof.

1.39 Furthermore, the *Länsmän* cases indicated that the cumulative effects of past and current activities on a minority culture would be taken into account in considering

²⁹ Native Title Report 1996-7, p. 75-76.

whether those current activities breached article 27.³⁰ The NTA amendments unjustifiably exacerbate pre-*Mabo* extinguishments of native title.

1.40 While the amended NTA provides for compensation for extinguishment or impairment, this does not substitute for the right of Indigenous people to their land. In this respect, note paragraph 5 of CERD General Recommendation 23:

... where [Indigenous peoples] have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. *Only when this is for factual reasons not possible*, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories. (emphasis added)

The Future Act and Primary Production Upgrade Provisions³¹

1.41 In addition to ordering the relationship between native title and previously granted interests, 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.

1.42 The amendments project the denial of cultural rights of native titleholders into the future in relation to specific interests by prioritising 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).³²

1.43 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

³⁰ *Länsman v Finland* (671/95), paragraph 10.7.

³¹ Native Title Report, 1998, pp. 56-57.

³² 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.

considered. There is no right to negotiate or right to have an objection heard and decided by an independent body.³³ That act will be valid regardless of whether native title holders' procedural rights are exercised.³⁴ Native title is not extinguished by these provisions although where there is an inconsistency, native title rights cannot be exercised. Where native title rights are impaired just terms compensation is available.³⁵

1.44 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.³⁶ '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.³⁷ 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 1998.³⁸

ICCPR compatibility of the Future Act Provisions

1.45 The provisions clearly breach article 26 of the ICCPR as they constitute racial discrimination with regard to property rights.

1.46 The 'future acts' and especially the 'primary production' provisions constitute such a threat to the enjoyment of meaningful native title rights that they breach articles 1 and 27 of the ICCPR (see paragraphs 8-15 above). Primary production activities are far more intensive uses of the land than pastoral activities such as grazing. They each have the ability to severely reduce the extent of possible co-existence of pastoral leases with native title. As the *Wik* decision holds that pastoral leases prevail over native title rights in the case of inconsistency, these provisions may have the effect of *de facto* extinguishment in the future. Therefore, it is argued that these provisions, unlike the challenged acts in the *Länsman* cases, breach article 27 as they have a severe detrimental impact on native title rights. Indeed, the level of interference with native title authorised by these 'future act' provisions is more akin to the interferences in the *Lubicon Lake Band* case, which were found to breach article 27.

1.47 The 'upgrade' provisions also breach Australia's positive duties to protect native title. Furthermore, the absolute protection given to the performance of future acts on native title land means that future acts may impact detrimentally on native title rights without any meaningful right of native-title holders to participate in the decision of whether the act will be performed. This breaches Article 1 of ICCPR.

³³ On the rights of negotiation and objection,

³⁴ *Lardil, Kaiadilt, Yangkaal and Gangalidda People, v State of Queensland* (1999) FCA 1633 (24 Nov 99)

³⁵ The non-extinguishment principle applies in this circumstance.

³⁶ NTA, Part 2, Subdivision G. For example, NTA, s24GB, s24GD, s24GE.

³⁷ NTA, s24GA, s24GB(2).

³⁸ 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.

Erosion of the Right to Negotiate

1.48 Under the original NTA, people registered as possessing or claiming native title were entitled to a 'right to negotiate' in relation to acts relating to mining (including both exploration and production); and the compulsory acquisition of native title rights for the benefit of a third party.³⁹

1.49 The amended NTA substantially alters the right to negotiate provisions. This occurs in two ways. First, the amendments remove the application of the right to negotiate in relation to the following acts:

- a mining right for the sole purpose of constructing an infrastructure facility(s26(1)(c)(i));
- a mining right at the exploration stage (s26A) ;
- the renewal, re-grant, re-making or extension of a right to mine (s26D);
- the compulsory acquisition of land for an infrastructure facility, for either a public or private purpose(s26(1)(c)(iii));
- approved gold or tin mining acts (s26B);
- excluded opal or gem mining (s26C);

1.50 Furthermore, the right to negotiate will not apply in the offshore and inter-tidal zones,⁴⁰ confining the right to negotiate to the landward side of the high water mark of the sea.⁴¹

1.51 Instead of a right to negotiate in relation to the above, native title claimants or titleholders are now entitled to the lesser procedural rights of a right to be consulted and for any objection to be taken into account by the decision maker.⁴²

1.52 In addition, the amended NTA allows states and territories to replace the right to negotiate completely with 'alternative provisions' that provide only a right of consultation and objection on land that is or was pastoral leasehold land, reserved or dedicated land, or is within a town or city (s43A).

Relevance of the ICCPR to the Right to Negotiate

1.53 There are a number of reasons why the new regime regarding the right to negotiate breaches the ICCPR. First of all, the right to negotiate with regard to the use of land over which one has native title rights can be seen as a cultural right in itself in which case its denial amounts to a breach of article 27.

1.54 The government has maintained that the right to negotiate, as conceived in the original NTA, was itself discriminatory as this right was denied to other persons with co-existing land interests such as pastoralists.⁴³ In this respect, the government argument is

³⁹ NTA s.26(2).

⁴⁰ NTA, section 26(3).

⁴¹ G. Triggs, 'Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)' (1999) 23 *Melbourne University Law Review* 372, 406.

⁴² There is no such right in relation to excluded opal and gem mining (s26C); or primary production activities on non-exclusive agricultural or pastoral leases (s24GC).

⁴³ *Ibid*, p. 94.

flawed as it adopts a narrow ‘formal’ interpretation of equality as opposed to a more dynamic, meaningful ‘substantive’ interpretation. Formal equality means that all are treated equally. Substantive equality takes into account that people are relevantly different, and may therefore need different treatment in order to attain true equality. Judge Tanaka in the *South West Africa Case* put the argument eloquently:

The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal,...To treat unequal matters differently according to their inequality is not only permitted but required.⁴⁴

1.55 The Human Rights Committee has confirmed that reasonable and objective differences are permissible under article 26 ICCPR. Native title holders *are* relevantly different to other persons vested with interests in land. Firstly, it has taken over 200 years for native title rights and interests to be recognised by the common law. To treat native title on the basis of formal equality would ignore the impact of the dispossession of Indigenous people in the first 200 years of white settlement.⁴⁵ Secondly, native title holders are already, in terms of the *Wik* judgment, disadvantaged in comparison with pastoral leaseholders as the rights of the latter prevail in the case of inconsistency.⁴⁶ Given the vulnerability of native title rights at common law, it is fitting and consistent with the internationally recognised rights to enjoy one’s culture and not be arbitrarily deprived of property that native title should be provided particular protection.⁴⁷ These arguments indicate that the distinctive rights conferred on indigenous persons are objective.

1.56 The HRC has confirmed that different rights for vulnerable and disadvantaged groups are permissible under the ICCPR at paragraph 10 of General Comment 18:

The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

1.57 The categorical justification for the withdrawal of special measures is that they have done their job⁴⁸. Indigenous peoples are still disadvantaged in most socio-economic spheres within Australia. If the right to negotiate must be classified as a ‘special measure’, it has certainly not exhausted its purpose. There is no evidence that Indigenous people no longer suffer the effect of past discrimination on pastoral leasehold land.⁴⁹

⁴⁴ *South West Africa Case (Second Phase)* [1996] ICJ Rep 6, pp303-304, p305.

⁴⁵ Native Title Report 1998, p.34

⁴⁶ *Wik*, Toohey J at 126.

⁴⁷ Native Title Report 1998, p. 105.

⁴⁸ Native Title Report 1998, p 114.

⁴⁹ *Ibid*

1.58 Paragraph 10 of General Comment 18 indicates that special measures are not only permissible under the ICCPR's non-discrimination provisions, but that they are occasionally mandatory.

1.59 In any case, differential treatment of minorities, including Indigenous peoples, is mandatory under article 27. The HRC has stated in General Comment 23:

¶ 6.1. Although article 27 is expressed in negative terms, that article, nevertheless, does recognise the existence of a 'right' and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

¶ 6.2. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2(1) and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.

1.60 The preservation of the right to negotiate is essential to preserve the sanctity of native title itself, which is undoubtedly a cultural right. Therefore, the right to negotiate is a positive measure which must be taken to ensure the preservation of Indigenous cultural rights in accordance with General Comment 23.

1.61 Finally, diminution of the right to negotiate diminishes article 1 rights of self-determination, as interpreted by UN treaty bodies. The diminution of the right to negotiate rolls back opportunities for Indigenous peoples to participate in the management of their land and resources.⁵⁰

Failure to incorporate the principles of equality into the amended Native Title Act

1.62 The RDA embodies Australia's domestic implementation of its obligations under CERD.⁵¹ Australia also has an obligation under ICCPR to ensure equality on the basis of race. The RDA makes discrimination on the basis of race, colour, descent or national or ethnic origin unlawful. It is designed to protect the rights of all Australians. The RDA binds both state and federal governments. For example, it would be illegal to deny access to a federal or state government service on the basis of race.

1.63 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.

⁵⁰ *Ibid*, p. 62.

⁵¹ The preamble to the *Racial Discrimination Act 1975* (Cth) states that the purpose of the Act is 'to make provision for giving effect to the Convention' (ie CERD).

Accordingly, the RDA generally operates to nullify state legislation that is racially discriminatory.

1.64 However, the principle of parliamentary sovereignty enables the Federal Parliament to pass legislation that overrides previous legislation. Parliament is not bound by its own prior legislation. The NTA is federal legislation subsequent to the RDA and thus, to the extent of any inconsistency, overrides the RDA. As federal legislation, the NTA can relieve states of the constraints normally imposed by the RDA by authorising states to pass legislation or carry out acts that are discriminatory.

1.65 One way of ensuring that the principles of equality are incorporated into the NTA is to expressly provide that the NTA is bound by the RDA. Section 7 was inserted into the original NTA to give some guarantee that its provisions would not override the RDA and would conform with the principle of non-discrimination. Section 7 provides:

(1) Nothing in this Act affects the operation of the *Racial Discrimination Act 1975*.

(2) Subsection (1) does not affect the validation of past acts by or in accordance with this Act.

1.66 In *Western Australia v Commonwealth* the High Court concluded that section 7 was in fact ineffective to provide general RDA protection in the face of the specific, subsequent provisions of the NTA.

1.67 The recent amendments to the NTA⁵² provided an opportunity to redraft section 7 in order to effectively apply the RDA to the provisions of the NTA. The section could have made it unequivocal that the provisions of the NTA are subject to the provisions of the RDA. As amended, section 7 does not ensure the protection of native title by the general standards of equality and non-discrimination enshrined in the RDA. The exercise of powers and functions by the state unambiguously authorised by the NTA are freed from the constraints of the RDA.

Lack of Consultation and Informed consent for the Amendments

1.68 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. This was made quite clear by the National Indigenous Working Group the day before the legislation passed through Federal Parliament on 8 July 1998:⁵³

...We confirm that we have not been consulted in relation to the contents of the Bill, particularly in regard to the agreement negotiated between the Prime Minister and Senator Harradine, and that we have not given consent to the Bill in any form which might be construed as sanction to its passage into Australian law.

We have endeavoured to contribute during the past two years to the public deliberations of Native Title entitlements in Australian law.

Our participation has not been given the legitimacy by the Australian Government that we expected, and we remain disadvantaged and aggrieved by the failure of the

⁵² The amendments were passed on 8 July 1998 and most came into effect from 30 September 1998.

⁵³ Hansard, Senate, 7 July 1998, pp4352-54. pp 4352-54

Australian Government to properly integrate our expert counsel into the lawmaking procedures of government....⁵⁴

- 1.69 The failure to consult constitutes a breach of article 27 of the ICCPR. In particular, General Comment 23 states, at paragraph 7:

The enjoyment of [cultural] rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

- 1.70 CERD has talked in stronger terms of the specific rights of Indigenous peoples to participate in decisions affecting them in their General Recommendation 23:

¶ 4 (d) ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent;

- 1.71 The need for meaningful participation in the amendment process was cited as a breach of the International Convention on the Elimination of All Forms of Racial Discrimination by CERD at paragraph 9 in its 1999 Decision on Australia:

The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention. Calling upon States Parties to "recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources," the Committee, in its General Recommendation XXIII, stressed the importance of ensuring "that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent".⁵⁵

- 1.72 CERD found that the consultation process did not comply with article 5(c) ICERD, which prohibits racial discrimination in relation to the right of political participation. This indicates that the same consultation process breaches article 25 ICCPR in conjunction with article 2(1) and 26. The HRC is urged to adopt the CERD view of the requirements of the rights of political participation, rather than its own narrow view of article 25 in *Mikmaq Peoples v Canada* (205/86).⁵⁶

- 1.73 The requirement of internal self-determination under article 1 is also breached by the failure of the Australian government to adequately consult and accommodate the wishes of Indigenous peoples with regard to the NTA amendments.

⁵⁴ *ibid*, p 4352

⁵⁵ CERD, Decision (2) 54, paragraph 9.

⁵⁶ See generally on the *Mikmaq* decision, M. Turpel, 'Indigenous Peoples and Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition' (1992) 25 *Cornell International Law Journal* 579