

## **Australia, Indigenous Rights and International Law**

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On behalf of the Australian Branch of the ILA I wish to express our congratulations to the Canadian Branch for the focus at this Conference on Indigenous matters. The Australian Branch supports further ILA participation in the elaboration and elucidation of international norms in respect of the rights of Indigenous peoples.

Today, drawing on Australian experience, I propose to highlight the inter-relationship between the protection of Indigenous rights in the domestic sphere, and international norms and practice. Developments in Australian law and policy concerning Indigenous rights during the last 10 years have in fact raised a number of international law issues.

These issues have revolved around the norm of non-discrimination on the grounds of race. They raise questions such as: What is the application of the principle of non-discrimination when it comes to Indigenous peoples? What actions of a state will potentially place that state in jeopardy of non-compliance with its international undertakings and obligations? Do democratic states have an unfettered right to legislate to the detriment of Indigenous peoples in the name of national sovereignty?

Issues have also arisen concerning the role of United Nations treaty bodies in monitoring compliance with UN human rights instruments and the application of the principle of the so-called 'margin of appreciation' in implementing treaties. A central issue has been the right of informed consent in relation to decisions affecting Indigenous peoples.

Over recent years there have been allegations that Australia has failed to comply in particular with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (referred to as CERD). I propose to focus on these allegations and the ensuing interaction between Australia and the UN human rights treaty monitoring system. They provide a useful case study.

These allegations are serious for a country such as Australia with its previous generally good reputation in respect of human rights. The allegations refer in particular, but not exclusively, to legislation of the Australian federal parliament, that is the Parliament of the Commonwealth of Australia. The legislation in question, the *Native Title Act 1993*,<sup>1</sup> purports to recognise and protect native title in Australia.

By way of context, it should be noted that the Indigenous peoples of Australia comprise two major groups, namely the Aboriginal peoples of the mainland of Australia and associated islands, and the Torres Strait Islanders who traditionally occupy a number of islands in the waters between mainland Australia and its nearest neighbour, Papua New Guinea.

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<sup>1</sup>*Native Title Act 1993* - current compilation (12 April 2006) at <http://www.frli.gov.au/comlaw/comlaw.nsf/homepage?OpenForm&Expand=1.1> as at 10 May 2006.

It should also be noted that no credible commentator would claim that there has been a reconciliation between the state of Australia, as the successor to the colonising power of Great Britain, and the Indigenous peoples of that continent in respect of dispossession of lands, loss of sovereignty and consequent social and economic disruption. There has been no treaty, compact or other instrument, no constitutional entrenchment of Indigenous rights, nor any other measures of restitution or compensation to provide adequate redress. In Australia, Indigenous issues remain contentious and contested.

However, in the latter part of the 20<sup>th</sup> century some progress had in fact been made in addressing the outstanding issues between Indigenous and non-Indigenous Australians. In particular, there was, finally, recognition by the Australian courts that the rights of Indigenous Australians to their lands and waters had survived the acquisition of sovereignty by the British. Two landmark decisions of the High Court in the 1990s<sup>2</sup> determined that such rights, known as native title, were cognisable by the common law of Australia. By these decisions the pernicious doctrine of *terra nullius*, that the land had been owned by no-one, was finally overthrown in Australia.

These developments were explicitly based on international norms of non-discrimination.<sup>3</sup> However, native title still remained subject to extinguishment by valid acts of government. The fact that, despite its recognition, native title could be extinguished provided a discriminatory loophole and left it vulnerable to a range of Government actions. Unlike Canada, there is no accepted doctrine of fiduciary duty in relation to Indigenous peoples in Australia to provide a measure of protection.

Because of the consequent vulnerability of native title, and to provide a process for land management where common law native title might apply, the Labour Government of the day passed the *Native Title Act* 1993. This piece of legislation was hammered out in protracted negotiations between the Government and Indigenous representatives. Lowitja O'Donoghue, Chairperson of the Aboriginal and Torres Strait Islander Commission, the elected Indigenous peak body, since abolished, observed:

What was particularly important was that *for the first time* indigenous people were at the table negotiating their future<sup>4</sup> (emphasis added).

The Preamble to the *Native Title Act* makes explicit that the Act is based on Australia's acceptance of its obligations under international law to protect the rights of all of its citizens, and in particular its Indigenous peoples. It refers to the key UN human rights instruments which Australia has ratified. Thus the recognition and regulation of native title in Australia is rooted in international law. The process of negotiation with Indigenous representatives at the time of the passage of the legislation was consistent with the principle of free and informed consent.

However, the election of a Conservative Government in 1996 brought changes – the promise of reconciliation based on Indigenous rights soon began to fade. From 1997 the Government developed amendments to the *Native Title Act*, the purpose of many

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<sup>2</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1; *Wik Peoples v Queensland* (1996) 187 CLR 1.

<sup>3</sup> See *Mabo v Queensland* (Brennan J), 107 ALR at 28-29.

<sup>4</sup> Aboriginal and Torres Strait Islander Commission, *Proposed Amendments to the Native Title Act 1993 – Issues for Indigenous Peoples*, Canberra, November 1996, p1.

of these amendments being to restrict the scope of native title rights and to truncate the processes available to holders of native title to negotiate uses of their land.

Indigenous Australia believed that the compact of the 1993 *Native Title Act* was unravelling in front of them. The categorical refusal of the Government to base its proposed changes on Indigenous consent and agreement was seen by Indigenous representatives as a major breach of faith.

Such developments may appear to be domestic matters and of little concern outside of the country. This proved not to be the case. International law and its compliance monitoring machinery soon became part of the story. The Government had in fact been warned at the outset that its proposed amendments might breach its international obligations under human rights instruments ratified by Australia. Nevertheless, it chose to go ahead<sup>5</sup> and after a protracted and bitterly fought parliamentary process, the *Native Title Act* was extensively amended in 1998.

The Government justified its actions on the grounds that it needed to restore what it saw as a necessary balance between all stakeholders in the native title process, arguing that the pendulum had swung too far towards the Indigenous side.<sup>6</sup> However, the Australian Government increasingly came under international scrutiny. In particular, the Committee on the Elimination of Racial Discrimination became alarmed at the prospective derogation by Australia from the norm of non-discrimination in respect of the protection afforded to native title and land rights.

Indigenous representatives claimed that the 1998 changes to the *Native Title Act* made it more difficult to bring native title claims, provided legislative confirmation of extinguishment of native title and significantly reduced their rights in negotiations over use of their land. The effect of the changes, they said, would be to marginalise native title holders in decision-making processes. It seemed to Indigenous people that the interests and titles of other Australians were being privileged in comparison to their own residual rights, that is they claimed that the amendments were racially discriminatory.

In August 1998, CERD, acting under its early warning and urgent action procedures, requested the Government of Australia provide it with information on proposed or introduced changes on land rights.<sup>7</sup>

The CERD Committee, after examining the information provided and arguments made by the Australian Government upheld the claims of discrimination made by Indigenous representatives. In its decision of March 1999 CERD observed that:<sup>8</sup>

While the original Native Title Act recognises and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests *pervade* the amended Act. (emphasis added)

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<sup>5</sup> Ibid, p 2.

<sup>6</sup> See Second Reading Speech of the Attorney General and Minister for Justice, the Hon Darryl Williams 4 September 1997, in *Native Title – 2<sup>nd</sup> Edition – Native Title Act 1993 and Regulations*, Australian Government Solicitor, 1998 at 7886 – 7893.

<sup>7</sup> CERD, *Decision 1(53) concerning Australia*, 11 August 1998. UN Doc CERD/C/53/Misc.17/Rev.2

<sup>8</sup> CERD, *Decision 2 (54) on Australia – Concluding observations/comments*, 18 March 1999. UN Doc CERD/C/54/MISC.40/rev.2, paragraph 6.

and

..the amended Act appears to create legal certainty for governments and third parties *at the expense of* indigenous title.<sup>9</sup> (emphasis added)

Note the term ‘pervade’. This is strong language for a United Nations Committee. CERD identified four specific provisions in the amended *Native Title Act* that it said discriminated against Indigenous title holders.<sup>10</sup> In addition, it stated that the lack of effective participation by Indigenous communities in the formulation of the amendments raised concerns about Australia’s compliance with its obligations under CERD.<sup>11</sup>

The Committee urged the Australian Government<sup>12</sup> to suspend implementation of the 1998 amendments and to re-open discussions with the representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the Indigenous peoples and which would comply with Australia's obligations under the Convention.<sup>13</sup>

The Government, however, refused and expressed its disagreement with the conclusions reached by CERD. The then Attorney-General, Darryl Williams, in setting out the Government's position, criticised CERD’s approach as unbalanced.<sup>14</sup>

The importance of the CERD decision cannot be over-stated and bears directly on the content and scope of international norms. The principle of non-discrimination on the grounds of race is one of the foundational principles of the United Nations, and is contained in the United Nations Charter<sup>15</sup> and in the 1948 Universal Declaration of Human Rights.<sup>16</sup> The Racial Discrimination Convention was the first of the human rights treaties. Non-discrimination on the grounds of race is generally considered to have become a fundamental norm of customary international law (*ius cogens*) from which no derogation is permitted.<sup>17</sup>

Nevertheless, Australia argued, both before the CERD in 1999<sup>18</sup> and before a Joint Committee of the Parliament of the Commonwealth of Australia inquiring into the

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<sup>9</sup> CERD, above n 8, paragraph 6.

<sup>10</sup> Ibid, paragraph 7. These included the Act’s ‘validation’ provisions, the provisions for ‘confirmation of extinguishment’, the primary production upgrade provisions and restrictions concerning the right to negotiate non-Indigenous land uses.

<sup>11</sup> Ibid, paragraph 9 referring to Article 5 (c) of the Convention.

<sup>12</sup> In conformity with the Committee's General Recommendation XXIII: CERD, *General Recommendation XXIII – Indigenous Peoples – General Comment 1997* at <http://www.unhchr.ch/tbs/doc>

<sup>13</sup> As per footnote 8 above, paragraph 10.

<sup>14</sup> Darryl Williams, Attorney-General, *United Nations Committee misunderstands and misrepresents Australia* (News Release, 19 March 1999).

<sup>15</sup> Charter of the United Nations, June 26, 1945, 557 UNTS 143, Article 1 (3).

<sup>16</sup> Universal Declaration of Human Rights, Dec 10, 1948, UN Doc. A/810/, at 71, Article 2.

<sup>17</sup> See Sam Blay, Ryszard Piotrowicz and B Martin Tsamenyi (eds), *Public International Law – An Australian Perspective* (1999) 69; and Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (1996) pp14 – 15.

<sup>18</sup> Mr Robert Orr, Australian Government representative before CERD Committee 18 March 1999. Quoted in the Parliament of the Commonwealth of Australia, ‘Sixteenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund - CERD and the *Native Title Amendment Act 1998*’, June 2000, p33.

CERD findings in 2000,<sup>19</sup> that at international law there is a degree of latitude that allows States a ‘margin of appreciation’ in the implementation of international obligations. According to the Australian Government, the margin of appreciation is accorded in recognition that national institutions are best placed to assess the need for substantive equality measures and to find a balance between a range of competing interests. The Government further argued that this margin of appreciation applied in the case of its far-reaching amendments to the *Native Title Act*.

Although admitting that in relation to discrimination on the basis of race the margin of appreciation is narrow, Australia nevertheless argued before CERD that novel areas of law attract a wider margin of appreciation and that as native title was a relatively new area of Australian law, the Government’s discretion was wider than it would normally be in a matter of racial discrimination.<sup>20</sup>

It is worth spending a little time on this particular, if apparently somewhat arcane, argument. The dangers of such an argument are clear, especially when it comes to human rights and racial discrimination. The danger is that the margin of appreciation may be used as an excuse for avoiding obligations previously entered into. That is to say, unless criteria are carefully set out, it can become a licence to backslide and it can provide a veneer of respectability for internationally illegal behaviour. Put simply, it can substitute the self-interest of domestic political judgment for expert international opinion. This is even more so in respect of Indigenous rights with their underlying claims of autonomy against the States in which the Indigenous peoples find themselves. The States are hardly in the position of being impartial arbiters.

It must be said that the margin of appreciation argument appeared to cut little ice, so to speak, and generally failed to convince. The reasons for this outcome are quite straight forward. For one thing, the language of CERD, unlike many other conventions which are expressed in fairly general language, is clear-cut and straightforward. It simply does not contemplate exemptions to allow for negative treatment of racial groups. And given the *ius cogens* status of the norm of non-discrimination, there appears little likelihood of the application of a margin of appreciation being acceptable in any racial discrimination matters.<sup>21</sup>

In the end, the dispute between Australia and CERD may have had little impact on the outcomes for Indigenous people on native title, although it does appear that the Australian Senate did take into account CERD’s findings when considering regulations to implement the amendments. This provided some protection to native title rights. However, in the main the Government refused to budge and ostensibly ignored the CERD findings.

But there are other outcomes, perhaps less tangible, but which appear significant. One is the knowledge that discriminatory actions in respect of Indigenous people can be the subject of intense scrutiny. International concern and domestic politics can

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid, p 33.

<sup>21</sup> As the separate report of the non-Government members of the Parliamentary Committee pointed out: ‘The arguments put forward by the Commonwealth Government on the existence of a ‘margin of appreciation’ ... fail to take account of the fundamental nature of the prohibition on racial discrimination in international law, and the unqualified language of the CERD’ at Ibid, p 130.

develop a degree of synergy, which was certainly the case in Australia. The episode with CERD was obviously one of considerable discomfort for Australia, and brought a degree of unfavourable international comment. Such an outcome may well act as a brake on future discriminatory behaviours, whether by Australia or others.

Secondly, the situation shows clearly that Indigenous rights, especially around lands and waters, are not merely aspirational, they are matters of real substantive law, at the international level as well as the domestic. These norms are of increasing coherence and cogency. The jurisprudence of CERD, the Human Rights Committee, the ILO's Committee of Experts and other bodies has developed rules and standards that require the free and informed consent of Indigenous peoples for actions directly affecting their interests and welfare,

Lastly, the convoluted arguments that took place over the margin of appreciation show that the rights and well-being of Indigenous peoples and communities can ultimately revolve around fine legal points and relatively obscure legal principles. Significant resources were applied to running these arguments, both internationally and at home. The issues were taken very seriously because they were real, and because ultimately a lot depended on how they were resolved. Put simply, Indigenous rights are legal rights.

It is a truism that in settler states such as Australia there is an ongoing tension between the rights of Indigenous peoples and the interests of the wider society. Rights already gained, unless constitutionally entrenched, are always vulnerable to revision. The overarching difficulty for Indigenous people in Australia is in fact the lack of constitutional entrenchment of their rights, leaving them vulnerable to discriminatory legislation. As noted, there has been no treaty, compact or other arrangement.

CERD noted this fundamental problem in the arrangements for race relations in Australia in its Concluding Observations in 2000 on the eleventh and twelfth periodic reports submitted by Australia. CERD observed;

The Committee is concerned over the absence of any entrenched guarantee against racial discrimination that would override subsequent law of the Commonwealth, states and territories.<sup>22</sup>

For Australia, like most settler democracies, there is a long way to go before a true reconciliation is achieved between the Indigenous peoples and the descendants of the settlers. But it is a journey that must be undertaken. International law can play an important and positive role in this journey.

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<sup>22</sup> CERD, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*.24/03/2000. UN Doc.CERD/C/304/Add.101 19 April 2000, paragraph 6.