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## Australia's compliance with CERD

### FACT SHEET 3

### Aboriginal and Torres Strait Islander Peoples

### Native Title

The 2007 and 2009 amendments to the *Native Title Act* have not addressed the most discriminatory aspects of the native title system, and the current expenditure of time and resources in prosecuting a claim raises serious questions about the actual benefits of the system to Indigenous people.

#### ***The Right to Revitalise Tradition***

A traditional owner group who has revitalized their traditions in recent years cannot be recognized as native title holders under Australian law.

The UN *Declaration on the Rights of Indigenous Peoples* (2007) provides the right to revitalize Indigenous cultures (e.g., in Article 13), and the *Native Title Act* should be amended accordingly<sup>1</sup>.

#### ***The Burden of Proving Connection to Country***

We continue to call on the Australian Government to change the *Native Title Act* so that the burden of proof is lifted from traditional owners, and accept that the State bears the burden of rebutting a presumption of continuity.<sup>2</sup>

#### ***The Nature of Indigenous Rights in Comparison with Non-Indigenous Rights***

The Commonwealth Government has not addressed the statement of 18 March 1999 from CERD:

*The Committee, having considered a series of new amendments to the Native Title Act, as adopted in 1998, expresses concern over the compatibility of the Native Title Act, as currently amended, with the State Party's international obligations under the Convention... While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title.*<sup>3</sup>

#### ***Compensation for the Extinguishment of Native Title***

The *Native Title Act* has failed to deliver compensation for the wrongful extinguishment of Indigenous title. No litigation has yet led to a successful outcome.

"Just terms" compensation for compulsory acquisition of title was established by the Constitution (section 51), and therefore Aboriginal people have been denied their right to compensation in relation to native title since 1901. This obligation to provide compensation relates only to the period following the establishment of the *Racial Discrimination Act* (1975). There are a number of confidential negotiated agreements covering the management of compensation, and while we respect the right to maintain confidentiality, these agreements are not subject to scrutiny or evaluation.

## ***Indigenous Religious/Cultural Rights and the Use of Natural Resources***

Australian laws regularly presume a distinction between “Aboriginal cultural heritage”, and the rights to take natural resources.

### ***Procedures for Establishing Free, Prior and Informed Consent***

The UN *Declaration on the Rights of Indigenous Peoples* includes requirements for effective consultation (“free, prior and informed consent”) around all policies that affect the lives and resources of Indigenous peoples – notably in article 27:

*States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process... to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources...*

Such rights to participation have yet to be enshrined in Australian law.

### ***Self Determination and Cultural Rights***

Traditional owners consistently understand “culture” to encompass much more than what is found in current legal definitions, and there is an essential link between the exercise of Indigenous culture and the business of self-determination.

Australian law should be comprehensively reviewed in order to ensure its compatibility with article 31 of the UN *Declaration on the Rights of Indigenous Peoples*:

It is imperative that all forms of Indigenous cultural heritage be protected in effective Australian laws.<sup>4</sup>

### ***Securing Indigenous Rights***

Australia is now the only country with common law that lacks human rights legislation at the federal level. A nation without effective domestic protection of such rights is not likely to be in a position to provide secure protections against racial discrimination.

The suspension of the *Racial Discrimination Act*, in the context of the Northern Territory Intervention, illustrates the weakness of the legal instruments in Australia for protecting Indigenous rights.

The gains of the *Mabo* judgement have been wound back by subsequent jurisprudence, parliamentary processes and bureaucratic measures. Both the parliaments and the courts require a more substantial and more basic vision of a society free from racial discrimination, entrenched in human rights legislation. The Australian Government should investigate what legal measures will be required to implement in domestic legislation all the provisions of the UN *Declaration on the Rights of Indigenous Peoples*.

## ***Endnotes***

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<sup>1</sup> See the Australian Human Rights Commission *Native Title Report 2007*, recommendation 8.2 ‘That the Native Title Act be amended to insert a definition of ‘traditional’ for the purposes of Section 223 that provides for the revitalisation of culture and recognition of native title rights and interests’.

<sup>2</sup> Justice French, ‘*Lifting the Burden of Native Title – Some modest proposals for improvement*’. Paper presented to the Federal Court Native Title User Group, Adelaide, 9 July 2008. Cf. Justice AM North and T Goodwin, ‘Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform’, paper delivered to the AIATSIS National Native Title Conference, Melbourne, 4 June 2009.

<sup>3</sup> CERD Committee Decision on Australia, 18 March 1999, paragraph 6. Available at <http://www.austlii.edu.au/au/journals/AILR/1999/15.html>

<sup>4</sup> See the 2006 proposals of the World Intellectual Property Organization, “Revised Provisions for the Protection of Traditional Cultural Expressions / Expressions of Folklore” (WIPO/GRTKF/IC/9/4), available at [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=77573](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=77573).