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COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION

REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 9 OF THE CONVENTION

Comments by the Government of Australia on the concluding observations of the Committee on the Elimination of Racial Discrimination

[5 April 2006]

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Additional report of Australia

1. In this document, the Government of Australia submits its additional report pursuant to rule 65, paragraph 1, of the rules of procedure of the Committee on the Elimination of Racial Discrimination in response to the request by the Committee, expressed in the concluding observations (CERD/C/AUS/CO/14) adopted on 10 March 2005 following the consideration of the fourteenth periodic report of Australia during the Committee's sixty-seventh session, to forward information within one year on the implementation of the recommendations contained in paragraphs 10, 11, 16 and 17 of the concluding observations.

2. Paragraph 10 of the concluding observations reads as follows:

> "The Committee notes that the Australian Human Rights Commission Legislation Bill 2003 reforming the Human Rights and Equal Opportunity Commission (HREOC) has lapsed in Parliament, but that the State party remains committed to pursuing the reform of the Commission. It notes the concerns expressed by the HREOC that some aspects of the reform could significantly undermine its integrity, independence and efficiency (art. 2).
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> **"The Committee notes the importance given by the State party to the HREOC in monitoring Australia's compliance with the provisions of the Convention and recommends that it take fully into account the comments expressed by the HREOC on the proposed reform, and that the integrity, independence and efficiency of the Commission be fully preserved and respected."**

Government of Australia response in relation to paragraph 10

3. The Government of Australia is committed to reform of the Human Rights and Equal Opportunity Commission Act 1986 in order to improve the structure and processes of the Commission. The Government welcomes comment and discussion about its proposed reform. Consistent with its usual approach, the Government will consider possible improvements to the bill that was previously introduced, including the comments expressed by the HREOC on the proposed reform. The content of the bill is a matter for the Government.

4. Paragraph 11 of the concluding observations reads as follows:

> "The Committee is concerned about the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC), the main policy-making body in Aboriginal affairs consisting of elected indigenous representatives. It is concerned that the establishment of a board of appointed experts to advise the Government on indigenous peoples' issues, as well as the transfer of most programmes previously provided by the ATSIC and the Aboriginal and Torres Strait Islander Service to government departments, will reduce the participation of indigenous peoples in decision-making and thus alter the State party's capacity to address the full range of issues relating to indigenous peoples (arts. 2 and 5).

"The Committee recommends that the State party take decisions directly relating to the rights and interests of indigenous peoples with their informed consent, as stated in its general recommendation XXIII. The Committee recommends that the State party reconsider the withdrawal of existing guarantees for the effective representative participation of indigenous peoples in the conduct of public affairs as well as in decision- and policy-making relating to their rights and interests."

Government of Australia response in relation to paragraph 11

Abolition of ATSIC

5. In 2004, the Government of Australia implemented reforms to the administration of Indigenous affairs to improve outcomes for Aboriginal and Torres Strait Islander people and to provide better coordinated services across government. These arrangements included the decision to abolish the Aboriginal and Torres Strait Islander Commission (ATSIC).

6. ATSIC was established in 1990 as a Commonwealth statutory authority to represent and advocate on behalf of Indigenous people, advise government on Indigenous policy issues, and deliver a range of services to Indigenous people.

7. An independent review of ATSIC, completed in November 2003, found that ATSIC had lost touch with the concerns of Indigenous people and no longer had the confidence of the Indigenous community. ATSIC was an elected body. However, despite the efforts to make it work, its election arrangements created internal tensions, and apparent conflicts of interests eroded public confidence in its funding decisions. Only one in five Indigenous Australians eligible to vote in ATSIC elections did so.

8. The Government of Australia has determined that ATSIC did not provide for the effective representative participation of Indigenous Australians in the conduct of public affairs or in decision- and policy-making relating to their rights and interests, as indicated by the independent review. The decision to abolish ATSIC did not remove any guarantees for effective representative participation of Indigenous Australians. Those guarantees are entrenched in Australia's representative system of government, its system of compulsory voting, and legislation that prohibits racial discrimination.

New forms of consultation

9. The Government of Australia continues to consult Indigenous Australians in a number of ways.

Indigenous Coordination Centres

10. The Government has established the Office of Indigenous Policy Coordination, which includes a network of 30 regionally based Indigenous Coordination Centres (ICC), each with staff from a range of government agencies, to coordinate service delivery to Indigenous Australians. Staff from the ICCs interact directly with community members who have direct input into matters that affect them. The ICCs, in turn, respond to the priorities and needs of Indigenous communities and seek to develop suitable service responses.

National Indigenous Council

11. The Government of Australia has also established a National Indigenous Council (NIC), which held its inaugural meeting in December 2004. The NIC is not a representative body and is not intended to be a replacement for ATSIC. Whilst it is a key source of advice to Government, the NIC will not be the Government's sole source of advice regarding Indigenous Affairs. Advice will not be sought from the NIC on specific funding proposals or specific planning or programme matters related to individual communities or regions.

12. Fourteen original members of the all-Indigenous NIC (currently 11) were appointed by the Government of Australia on the basis of their expertise in areas of importance to improving the lives of Australia's Indigenous people, including health, education and business. The NIC is chaired by Dr. Sue Gordon AM, the first full-time and first Aboriginal Magistrate appointed in the Children's Court of Western Australia (WA).

13. The Terms of Reference of the NIC are to:

(a) Provide expert advice to the Government of Australia on how to improve outcomes for Indigenous Australians in the development and implementation of policy affecting Aboriginal and Torres Strait Islander people;

(b) Provide expert advice to the Government on how to improve programme and service delivery outcomes for Aboriginal and Torres Strait Islander people, including maximizing the effective interaction of mainstream and Indigenous-specific programmes and services;

(c) Provide advice on Indigenous Australians' views on the acceptance and effectiveness of Government of Australia and state and territory government programmes;

(d) Provide advice on the appropriateness of policy and programme options being considered to address identified needs;

(e) Provide advice to the Government on national funding priorities;

(f) Alert the Government to current and emerging policy, programme and service delivery issues;

(g) Promote constructive dialogue and engagement between the Government and Aboriginal and Torres Strait Islander people, communities and organizations;

(h) Provide advice on specific matters referred to it by the Minister; and

(i) Report to the Minister as appropriate on the NIC's activities and achievements.

Representative networks

14. The Government of Australia has supported Indigenous people to develop representative networks through regional consultation processes. The consultations were held in most places before the abolition of ATSIC and were designed to facilitate the development of appropriate mechanisms for ongoing communication between Indigenous people and governments. The consultation time frames were set by the different Indigenous communities. The new networks will help articulate and draw together community views across a whole region, several communities or single community, and provide a means for contributing to the design and delivery of services or initiatives in that community or region.

Involvement in agreements

15. Regional Partnership Agreements and Shared Responsibility Agreements are two mechanisms through which governments and Indigenous communities work in partnership to achieve regional and local priorities. They are both key mechanisms to ensure effective representative participation of Indigenous peoples in decision- and policy-making relating to their rights and interests.

16. Regional Partnership Agreements (RPA) are agreements negotiated between Indigenous communities and governments (including federal, state and territory and local) to provide a coherent government intervention strategy across a region that addresses the priorities of Indigenous people. Two RPAs have been signed to date with many more being developed: one in the remote Ngaanyatjarra Lands in Western Australia and the other in western New South Wales.

17. At the local level, Shared Responsibility Agreements are agreements between communities or families and governments to work together and share responsibility for achieving community and family goals. These agreements challenge governments to craft appropriate service delivery responses, rather than standard responses, and challenge communities to actively contribute to the achievement of their goals.

18. The Government also notes that:

- Majority Indigenous boards govern a number of bodies such as the Indigenous Land Corporation and Indigenous Business Australia;

- There are a number of Indigenous advisers who are consulted by government agencies on a range of matters; and

- Indigenous Australians have a considerable degree of autonomy over land management and community governance.

Free, prior and informed consent

19. Under international law, citizens have the right to take part in public affairs and political processes (i.e. under art. 25 of the International Covenant on Civil and Political Rights, and art. 5 of the Convention on the Elimination of All Forms of Racial Discrimination). However, individuals and peoples do not have a right to participate in a State's political process in a specific way. ATSIC was a special measure which achieved little for Indigenous Australians, and there is no obligation on States to maintain a particular special measure in perpetuity.

20. The Government of Australia also does not accept that it cannot, or should not, make any decisions directly relating to the rights and interests of Indigenous Australians without their "informed consent", and is of the view that general recommendation XXIII is not binding. Although there have been some claims that Indigenous peoples have a right of "free, prior informed consent", recent international discussions indicate that this remains a highly contentious issue amongst many States, and there is much objection to such a broad, unqualified right. Indeed, there was much dissent on the issue in relation to the Committee on the Elimination of Racial Discrimination's general recommendation XXIII. In some situations, Governments must make decisions or take action that may not allow for prior informed consent procedures, or decisions may need to be made or action taken even if consent is refused (for example, because of public policy considerations or third party rights). It would be inconsistent with Australia's democratic system if Parliament's ability to enact and amend legislation was subject to the consent of a particular subgroup of the population.

21. Paragraph 16 of the concluding observations reads as follows:

> "The Committee notes with concern the persistence of diverging perceptions between governmental authorities and indigenous peoples and others on the compatibility of the 1998 amendments to the Native Title Act with the Convention. The Committee reiterates its view that the *Mabo* case and the 1993 Native Title Act constituted a significant development in the recognition of indigenous peoples' rights, but that the 1998 amendments roll back some of the protections previously offered to indigenous peoples and provide legal certainty for Government and third parties at the expense of indigenous title. The Committee stresses in this regard that the use by the State party of a margin of appreciation in order to strike a balance between existing interests is limited by its obligations under the Convention (art. 5).
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> **"The Committee recommends that the State party refrain from adopting measures that withdraw existing guarantees of indigenous rights and that it make every effort to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land. It further recommends that the State party reopen discussions with indigenous peoples with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all."**

Government of Australia response in relation to paragraph 16

22. The original concerns raised by the Committee regarding the 1998 amendments were the subject of an extensive inquiry by the Government of Australia Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (PJC). In June 2000, the PJC issued a majority report in which it found that "the amended Act is consistent with Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination". The Government of Australia's position on the 1998 amendments to the Native Title Act was clearly explained in Australia's thirteenth and fourteenth reports to the Committee, and the Government of Australia's view has not changed.

23. The Government of Australia does not consider that Australia has an international obligation to obtain the "informed consent" of a particular group in order to exercise executive or legislative power. The United Nations Human Rights Committee has accepted that the political rights in human rights treaties do not give rise to a right to participate in the political process in a specific fashion. For example, they do not permit an individual to demand specific representation in an assembly or as an individual or as part of a group. Nor do they require a Government to undertake a particular form of consultation in relation to legislative initiatives.

24. However, the Government of Australia has consulted and will continue to consult extensively with all stakeholders, including Indigenous groups, about proposed reforms to the native title system and reforms to the Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA).

25. In September 2005, the Government of Australia announced proposed reforms to the native title system to ensure native title processes work more effectively and efficiently. These reforms will not fundamentally alter the native title system, but are designed to promote resolution of native title issues through agreement making, wherever possible, in preference to litigation. As part of the consultation process for these reforms, the Government of Australia has undertaken extensive consultation with Indigenous people directly and through peak representative bodies. Officers from relevant government departments have also discussed the proposed reforms with the Aboriginal and Torres Strait Islander Social Justice Commissioner.

26. The Government of Australia has also recently announced that it would be reforming the ALRA. To date, around 45 per cent of land in the Northern Territory has been granted to Aboriginal traditional owners under ALRA. The reforms are aimed at allowing Aboriginal people to realize the long-term economic potential of their land, while maintaining fundamental features of inalienability, communal title and the traditional owner veto rights over development. Over the past eight years, there have been three public reviews of the ALRA and Land Councils, and Aboriginal people put forward their views in these processes. Many of the proposed changes were agreed by the Land Councils as part of joint proposals with the Northern Territory Government.

27. The proposed reforms to the native title system and the ALRA are consistent with the Government of Australia's commitment to preserving native title and land rights. As the Australian Prime Minister made clear in his address to the National Reconciliation Planning Workshop on 30 May 2005, the Government of Australia is not seeking to wind back or undermine native title or land rights.

28. Through the consultation process for both of these reforms, Indigenous people have been afforded the right of effective participation in developing the amendments, and it is expected this will have a significant contribution to the outcome.

29. Paragraph 17 of the concluding observations reads as follows:

> "The Committee is concerned about information according to which proof of continuous observance and acknowledgement of the laws and customs of indigenous peoples since the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title under the Native Title Act. The high standard of proof required is reported to have the consequence that many indigenous peoples are unable to obtain recognition of their relationship with their traditional lands (art. 5).
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> **"The Committee wishes to receive more information on this issue, including on the number of claims that have been rejected because of the requirement of this high standard of proof. It recommends that the State party review the requirement of such a high standard of proof, bearing in mind the nature of the relationship of indigenous peoples to their land."**

Government of Australia response in relation to paragraph 17

30. The Government of Australia understands that the reports to which the Committee refers relate to the implications of the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v. Victoria* [2002] HCA 58 (*Yorta Yorta*). The native title application covered 1,860 square kilometres of land and water in Victoria and New South Wales. In *Yorta Yorta*, the High Court upheld the Full Federal Court's decision that the appellants did not hold native title rights and interests in the claimed land.

31. The High Court's decision clarified fundamental principles of evidence of connection to land. In particular, it emphasized that for claimants to establish native title, they must be able to demonstrate that the native title they claim derives from their traditional laws and customs observed since sovereignty. The High Court noted that, while demonstrating the content of traditional laws and customs may present difficult problems of proof, it is open to a court to infer the content of traditional laws and customs in earlier times from the evidence.

32. Native title in Australia was first recognized through the common law (in the decision of *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1 (*Mabo*)). Whilst the Native Title Act provides a statutory framework to facilitate the recognition and protection of native title, the substance and level of native title rights and interests are subject to common law recognition, and will develop as the common law evolves.

33. As the High Court noted in *Western Australia v. Ward* (2002) 191 ALR 1 (*Ward*), the requirements in the Native Title Act that relate to connection are based on Justice Brennan's judgement in *Mabo*. The requirements to establish native title that the *Yorta Yorta* decision clarifies, namely that native title rights be sourced in pre-sovereignty laws and customs, can also be seen to be requirements of *Mabo* and the general law applying to native title.

Native title claims rejected on the basis of insufficient evidence

34. A native title determination is a decision about whether native title exists in the claimed area. Determinations of native title are made by either the Federal Court or the High Court. Native title applications can either be determined by consent (including unopposed applications) or through litigation.

35. As at 20 February 2006, there were 81 determinations made in relation to native title in Australia. Of these, 56 involved determinations in which native title was found to exist in the entire determination area or in parts of the area. Four of the 25 determinations in which native title was found not to exist were determined through litigation.

36. *Yorta Yorta* was the only fully litigated determination in which a determination of no native title was due to the claimants being unable to provide sufficient evidence of continuous observance and acknowledgement of traditional laws and customs.

37. In the Darug Peoples claim (*Gale v. Minister for Land and Water Conservation for the State of New South Wales* [2004] FCA 374), the Federal Court found that there was no native title in respect of a claim over 10 hectares of land on the basis that there was insufficient evidence of continuous connection with the land by the claimants. However, this finding followed the withdrawal of the native title claimants from the proceedings. The Court proceeded with the determination on the basis of preliminary evidence filed by the claimants and evidence presented by the other parties to the claim. Although no native title rights were found to exist in the claim area, the Court recognized that the relevant land had previously been granted to an Indigenous body under New South Wales land rights legislation.

38. In the remaining two litigated determinations in which native title was found not to exist, the finding of no native title was based on other reasons, such as extinguishment.

39. Of the remaining 21 determinations where native title was found not to exist, 17 were the result of applications made by non-native titleholders seeking a determination that native title did not exist over a particular area of land or waters. These applications generally cover discrete small areas, and many were made by Aboriginal groups in New South Wales who have been granted statutory rights over the land by the New South Wales government, but cannot deal with the land until native title is finally determined. Sixteen of these applications were not opposed by the traditional owners, and the remaining application was settled by consent.

40. The four remaining determinations that native title does not exist were settled with the consent of the native title claimants (consent determinations). There were two claims in *Wotjobaluk* (both in *Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v. State of Victoria* [2005] FCA 1795) and the *Ward* decision. In each of these three cases, the consent determination was also accompanied by a separate determination in which native title was recognized over particular areas. The remaining determination was made in *Kelly v. NSW Aboriginal Land Council* [2001] FCA 1479. In that case the native title claimants entered into an Indigenous Land Use Agreement (ILUA) surrendering their native title to the State of New South Wales and subsequently consenting to the determination that native title does not exist.

41. It should also be recognized that the existence of evidentiary difficulties in particular cases does not necessarily prevent native title claimants from reaching outcomes which enable them to maintain a relationship with their traditional lands. For example, in June 2004, notwithstanding the determination of no native title, the Victorian government concluded a joint management agreement with the Yorta Yorta people. The agreement creates a forum for including the Yorta Yorta people in the management of major public lands within their traditional country.

Review of the standard of proof

42. The High Court decisions in *Yorta Yorta* and *Ward* clarified important principles about native title, including fundamental principles concerning evidence of connection to land and what is required to establish native title. It would not be appropriate for the Government of Australia to significantly alter these principles, which have been articulated through judicial determination of native title matters.
