

National Indigenous Working Group on Native Title

NIWG

REPORT / INTERVENTION ON
AGENDA ITEM 5

Working Group on Indigenous Populations
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Agenda Item 5

Indigenous Peoples and their relationship to land

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Madam Chair,

I make this intervention on behalf of the National Indigenous Working Group on Native Title (NIWG) and the Foundation for Aboriginal and Islander Research Action (FAIRA).

In Australia the Aboriginal and Torres Strait Islander Peoples have experienced, in this decade, the 'highs' and 'lows' of our political struggle for recognition of our Land Rights

The high point is the recent 'discovery' in Australian law that our indigenous title to land must be respected. Some other important findings are:

- the Racial Discrimination Act protects us from racial discrimination by the Australian State and Territory Australian Governments; and
- the limitation upon all governments within Australia, where they can only extinguish indigenous land title by a deliberate intention, and not by 'trespass', as has happened in the past two hundred years.

Regrettably, the low points are many, including:

- the refusal by the Australian High Court to consider our rights of sovereignty as a Peoples;
- the legal interpretation, again by the High Court, that the Australian Government has the power to extinguish indigenous title to land;
- the failure of the Australian Government to accept that the Australian Constitution guarantees protection from racial discrimination;
- the failure of the Australian Government to accept our right to self determination;
- the creation in 1998, by Australian Government, of new laws which over-ride the Racial Discrimination Act and which breach the International Convention on the Elimination of All Forms of Racial Discrimination;
- the onus, under the discriminatory laws, upon indigenous people to prove their ownership of land;
- the absolute refusal by Australian Government to acknowledge any indigenous title to land unless the indigenous owners go to trial by the law courts;
- the paltry, one-off payment of \$1.4 billion to the Indigenous Land Commission for all our lands that have been stolen in the past two hundred years;
- the loss of control over mining or other extractive industries on indigenous lands;
- the restriction on indigenous owners undertaking cultural practices on their lands where pastoral activities are licensed;
- the failure of the Australian Government to take sufficient steps to eliminate racial discrimination;

The list goes on and on. In reality, many of the issues of concern for Indigenous Peoples in Australia emanate from the racial discrimination by the Australian Government.

The Australian Government has used its powers to make a law to extinguish indigenous title to land, or otherwise to impair the exercise of our ownership. The

law is a monstrosity because:

- firstly, it is of such complexity in the language of the law and in its legal concepts that no indigenous land holder can understand it;
- secondly, it contains the basis upon which the Australian Government may recognise indigenous land title, allowing the Australian Government to be blind to the obvious issues of Land Rights;
- thirdly, it generates a massive program of expenditures on lawyers, courts and administrators which become the focus of the processes, rather than indigenous title;
- fourthly, indigenous exercise of their rights can be suspended for years in the workings of the legal procedures, while all acts of extinguishment of indigenous title continue unimpaired; and
- finally, the legislation is racially discriminatory.

It is on this final point that this paper now focusses.

The *Native Title Act* was passed in Australia at the end of 1993. The legislation observed certain fundamental principles which had been established in limited negotiations with some Aboriginal and Torres Strait Islander persons. These principles included:

- the legal rights of the Indigenous Peoples, as identified in the High Court *Mabo* decision, were to be preserved and protected;
- the Racial Discrimination Act would apply to the legislation (except in one matter of law relating to the validation of previous titles issued by Australian Government, which, although of concern, will not be discussed in this paper); and
- the legislation would not extinguish indigenous title where it still exists (except in the same matter as listed above).

Following a change of Australian Government in 1996, the Australian Government set about to destroy the rights of indigenous people to own land. This was accomplished in June 1998 when the Australian Government passed the *Native Title Amendment Act 1998*.

Following the passage of the amendments to the *Native Title Act*, the United Nations Committee on the Elimination of Racial Discrimination (CERD), using its early warning procedure, called on Australia to provide it with information about these amendments.

After considering the Australian Government's written and oral submissions, the CERD committee expressed its concern over the compatibility of the amended *Native Title Act* with Australia's international obligations under the

Convention on the Elimination of All Forms of Racial Discrimination (the Convention).

In particular, the CERD Committee considered that to “wind back the protections of indigenous title offered in the *Mabo* decision and the 1993 *Native Title Act*” raises concerns about compliance with Articles 2 and 5 of the Convention.

The lack of effective participation by indigenous communities in the formulation of the amendments was also thought by the CERD Committee to breach Article 5(c) of the Convention.

The CERD Committee decided that the *Native Title Amendment Act 1998* discriminates against indigenous title holders by validating past acts, extinguishing native title, upgrading non-indigenous title and restricting our right to negotiate.

For these reasons, CERD called on Australia to:

“address these concerns as a matter of urgency...to suspend implementation of the 1998 amendments and reopen discussions with the representatives of 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”.

Aboriginal people, through the National Indigenous Working Group on Native Title, called on the Prime Minister to reaffirm the Australian Government’s commitment to the principles of non-discrimination by agreeing to meet with us to find ways of removing racially discriminatory provisions from the legislation.

To date the Prime Minister has not agreed to making such a commitment nor to meeting with our representatives to negotiate the matter.

Further, the Australian Government formally objected to a visit to Australia by members of the CERD Committee to meet with representatives of Aboriginal and Torres Strait Islander Peoples, Australian Governments and the Parliament.

Such a visit would have allowed the Committee to get a better understanding of the racially discriminatory nature of the day to day operations of the legislation.

Madam Chair, I conclude this paper by commenting upon the unanswered case of racial discrimination against the Australian Government.

Are we really expected to participate within the United Nations framework in a discussion of our rights with the Australian Government while it has an unaddressed case of racial discrimination against it?

Is the Australian Government going to explain here why it has recently passed legislation which is in breach of one of the most fundamental, the most central, planks of the United Nation’s jurisdiction on human rights?

Are the governments of the world prepared to accept that the Australian Government

can commit acts of racial discrimination, starting from 1998, to extinguish the Land Rights of Indigenous Peoples?

Madam Chair, you called for attention to the International Decade on the Rights of Indigenous Peoples. For the Aboriginal and Torres Strait Islander Peoples, we must ask:

- Should governments be supporting the Olympic Games in Australia in Year 2000 while the offending legislation is in force?
- What has the Australian Government done, and what is it going to do, to recognise and promote the rights of Indigenous Peoples during the decade?