

AUSTRALIA

Special Decisions Re: Reporting, Including Urgent Action Procedure

CERD A/53/18 (1998)

Chapter II

Prevention of racial discrimination, including early warning and urgent procedures

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B. Decisions adopted by the Committee at its fifty-third session

Decision 1 (53) on Australia

1. In view of the terms of article 9, paragraph 1, of the Convention, in particular the provision that the Committee may request further information from States parties, the Committee requests the Government of Australia to provide it with information on the changes recently projected or introduced to the 1993 Native Title Act, as well as on any changes of policy in the State party as to Aboriginal land rights and in the functions of the Aboriginal and Torres Strait Social Justice Commissioner. The Committee wishes to examine the compatibility of any such changes with Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.

2. The Committee wishes to consider the information, in the presence of a representative of the State party, at its fifty-fourth session (1-19 March 1999) and would therefore appreciate receipt of this information by 15 January 1999.

1287th meeting
11 August 1998

CERD A/54/18 (1999)

Chapter II

Prevention of racial discrimination, including early warning and urgent procedure

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A. Decisions adopted by the Committee at its fifty-fourth session

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Decision 2 (54) on Australia*

1. Acting under its early warning procedures, the Committee adopted decision 1(53) on Australia on 11 August 1998 (A/53/18, para. 22), requesting information from the State party regarding three areas of concern: proposed changes to the 1993 Native Title Act; changes of policy as to Aboriginal land rights; and changes in the position or function of the Aboriginal and Torres Strait Islander Social Justice Commissioner. The Committee welcomes the full and thorough reply of the Government of Australia to this request for information (CERD/C/347). The Committee also appreciates the dialogue with the delegation from the State party at the Committee's 1323rd and 1324th meetings to respond to additional questions posed by the Committee in regard to the State party's submission.

2. The Committee received similarly detailed and useful comments from the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner of the Australian Human Rights and Equal Opportunity Commission, the Aboriginal and Torres Strait Islander Commission and members of Parliament.

3. The Committee recognizes 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 recognizes 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 recognized.

* Comments of the Government of Australia were submitted on decision 2 (54) of the Committee pursuant to article 9, paragraph 2, of the Convention and are reproduced in annex VIII.

5. In its concluding observations on the previous report of Australia, the Committee welcomed the attention paid by the Australian judiciary to the implementation of the Convention (A/49/18, para.

540). The Committee also welcomed the decision of the High Court of Australia in the case of *Mabo*

v. Queensland, noting that, in recognizing the survival of indigenous title to land where such title had not otherwise been validly extinguished, the High Court case constituted a significant development in the recognition of indigenous rights under the Convention. The Committee welcomed, further, the Native Title Act of 1993, which provided a framework for the continued recognition of indigenous land rights following the precedent established in the *Mabo* case.

6. 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 Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act. 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.

7. The Committee notes, in particular, four specific provisions that discriminate against indigenous title holders under the newly amended Act. These include the Act's "validation" provisions; the "confirmation of extinguishment" provisions; the primary production upgrade provisions; and restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses.

8. These provisions raise concerns that the amended Act appears to wind back the protections of indigenous title offered in the *Mabo* decision of the High Court of Australia and the 1993 Native Title Act. As such, the amended Act cannot be considered to be a special measure within the meaning of articles 1(4) and 2(2) of the Convention and raises concerns about the State party's compliance with articles 2 and 5 of the Convention.

9. 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 "recognize 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."^{4/}

^{4/} [Official Records of the General Assembly], Fifty-second Session, Supplement No. 18

(A/52/18), annex V, para. 4 (d).

10. While welcoming the State party's recognition of the important role that has been played by the Human Rights and Equal Opportunity Commission, the Committee also notes with concern the State party's proposed changes to the overall structure of the Commission, abolishing the position of the Aboriginal and Torres Strait Islander Social Justice Commissioner and assigning those functions to a generalist Deputy President. The Committee strongly encourages the State party to consider all possible effects of such a restructuring, including whether the new Deputy President would have sufficient opportunity to address in an adequate manner the full range of issues regarding indigenous peoples that warrant attention. Consideration should be given to the additional benefits of an appropriately qualified specialist position to address these matters, given the continuing political, economic and social marginalization of the indigenous community of Australia.

11. The Committee calls on the State party to address these concerns as a matter of utmost urgency. Most importantly, in conformity with the Committee's general recommendation XXIII concerning indigenous peoples, the Committee urges the State party to suspend implementation of the 1998 amendments and reopen 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.

12. In the light of the urgency and fundamental importance of these matters, and taking into account the willingness expressed by the State party to continue the dialogue with the Committee over these provisions, the Committee decides to keep this matter on its agenda under its early warning and urgent action procedures to be reviewed again at its fifty-fifth session.

1331st meeting
18 March 1999

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C. Decisions adopted by the Committee at its fifty-fifth session

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Decision 2 (55) on Australia

1. The Committee reaffirms the decisions concerning Australia which it took during its fifty-fourth session in March 1999.

2. In adopting those decisions, the Committee was prompted by its serious concern that, after

having observed and welcomed over a period of time a progressive implementation of the Convention in relation to the land rights of indigenous peoples in Australia, the envisaged changes of policy as to the exercise of these rights risked creating an acute impairment of the rights thus recognized to the Australian indigenous communities. It considered in detail the information submitted and the arguments put forward by the State party.

3. The Committee takes note of the comments received from the State party which, in accordance with article 9, paragraph 2, of the Convention, will be included in the Committee's annual report for 1999 to the General Assembly.*

4. The Committee decides to continue consideration of this matter, together with the tenth, eleventh and twelfth periodic reports of the State party, during its fifty-sixth session in March 2000.

1353rd meeting
16 August 1999

* See annex VIII.

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Chapter II: Prevention of racial discrimination, including early warning and urgent procedures

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15. During the reporting period, the Committee again considered a number of situations under its early warning and urgent action procedure, including in particular the following.

16. At its seventy-fourth session, the Committee considered information concerning a Government intervention in the Northern Territory of **Australia** aimed at improving the well-being of Aboriginal communities, which, however, had included measures affecting the autonomy of the communities concerned and involved the suspension of the Racial Discrimination Act. The Committee requested the Government of Australia to submit information on plans to elaborate redesigned measures and to reinstate the Racial Discrimination Act. At its seventy-fifth session, the Committee took note of the Government's timely response, submitted by note verbale dated 30 July 2009, and requested that further relevant information be included in the next periodic report of the State party.

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CERD, A/65/18 (2010)

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Chapter II

PREVENTION OF RACIAL DISCRIMINATION, INCLUDING EARLY WARNING AND URGENT ACTION PROCEDURES

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15. During the reporting period, the Committee also considered a number of situations under its early warning and urgent action procedure, including in particular the following.

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22. At its seventy-sixth session, the Committee considered issues related to the situation of significant underfunding of Aboriginal legal aid in **Australia**. The Committee expressed its concern in a letter dated 31 May 2010 and requested the State party to submit detailed information addressing the issue. During the consideration of the periodic report of Australia at the seventy-seventh session in August 2010, the Committee was advised by the State party that the Aboriginal Legal Rights Movement had withdrawn the complaint received by the Committee. The Committee addressed the need for adequate funding of Aboriginal legal services in its concluding observations (CERD/C/AUS/CO/15-17).

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