matters to the full Federal Court for separate determination as to the legal effect of the establishment of certain public works by or on behalf of, and on land owned by, the Erub Island Council under a Deed of Grant in Trust (DOGIT).

The Court held that the Island Council is a statutory authority under the NTA because it was established by a specific Act of incorporation, rather than a more general Act such as the *Aboriginal Councils and Associations Act 1976* (Cth). The parties had agreed that the works in question were valid public works, although their validity may have been arguable.

The Court found that works constructed prior to 1996 were previous exclusive possession acts (PEPAs), under s23B(7), which specifically includes public works. PEPAs are deemed to extinguish native title. The Court held that the exception in favour of grants or vesting for the benefit of Aboriginal and Torres Strait Islander peoples (s23D) did not apply because the creation of a public work is not a grant or vesting.

Works constructed after December 1996 did not extinguish native title. Although the Court found that the DOGIT itself was a valid past act, it contained no specific reservation to authorise the later works (s15(1)(b)).

The Court considered whether s47A applied to enable the courts to disregard certain extinguishing acts for the purpose of native title. The Court determined that the grant of the DOGIT fell squarely within the provision. However, like their conclusion with respect to s23D, the Court found that public works are not a grant or a vesting, and nor are they the creation of an interest. The pre 1996 works did not fall within s47A and their extinguishing effect remains.

The Court alluded to the fact that the extinguishing effect in this case may come from the NTA and not from the common law. The NTA provides for compensation to be payable in such circumstances (s23J). The compensation question was not addressed.

The applicants have sought leave to appeal.

The Combined 13th and 14th Periodic Report of the Government of Australia under Article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination.

A Summary of Australia's Report

By Serica Mackay

Australia ratified the Convention on the Elimination of All Forms of Racial Discrimination (hereafter 'CERD' or 'the Convention') on 30 Sept 1975 and implements it primarily through the *Racial Discrimination Act 1975 (Cth)*.

Countries that have ratified the Convention are obliged to submit comprehensive reports to CERD every four years and brief updating reports every two years regarding their implementation of and compliance with the Convention. These reports are considered by the CERD Committee and 'concluding observations' – which include positive comments as well as concerns and recommendations – are provided to the country.

The Report, submitted to both the United Nations and Federal Parliament in late November 2003 covers the period since the last reporting period, which ended in June 1998 and addresses issues raised by the CERD Committee during its consideration of Australia's 10th, 11th and 12th Reports.

The Report begins by noting the increasing number of consensual agreements and the simultaneous move away from litigation as a means of recognising native title. In documenting the outcomes that the move towards agreement making has delivered for Indigenous people, the Report contrasts the number of determinations of native title following the 1998 amendments to the *Native Title Act* (43 as at 30 June 2002) with the number of determinations prior to its enactment (five, including *Mabo*). However, it is interesting to note the statement implies that the increase in determinations is a result of the 1998 Amendments and underestimates the time involved in suc-

cessfully resolving native title claims through litigation, mediation or settlement.

After emphasising these seemingly positive developments in native title, the Report goes on to address the CERD criticisms regarding the 1998 amendments to the *NTA* and the effective participation of Indigenous people in decisions that affect their land rights. The Report focuses on the Parliamentary Joint Committee – asked in 1999 to report on Australia's obligations under CERD and the amended *NTA* – and their findings that "the amended *Native Title Act* is consistent with Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*". The Federal Government, both at the time of the initial concerns and in the present Report, argue that the amendments maintain "an appropriate balance between the rights of native title holders and the rights of others" (Report, p27). Further highlighting the tension between international and domestic law, the Report quotes from the PJC Report finding that "national institutions are best placed … to find a balance between a range of competing interests" (PJC Report, p9).

In response to the CERD Committee's concern that Indigenous people are not effectively participating in decisions that affect their rights, the Report quotes from the Parliamentary Joint Committee on Native Title's findings that political rights in international instruments do not give rise to a right to participate in political processes in a *specific* fashion, it is only a general right. The Report also points to ILUA provisions as the means through which Indigenous people have a 'seat at the table' in relation to future developments and negotiations.

Briefly, the role of the Federal Government is described as 'significant', noting the $86 million increase in funding for the native title system to "enhance its efficient operation". Details of the Federal and State Government's role in opposing native title claims are not mentioned nor are any details as to where the $86 million went. In fact, the 2001 Native Title Report by the Aboriginal and Torres Strait Islander Commissioner found that most of the $86 million went to the Attorney General, the NNTT, the Federal Court and away from the NTRB's – whose primary role it is to protect native title.

In summary, the Report defends the state of native title in a fairly partial manner. The criticisms and concerns of the CERD Committee are either not explored in any detail or are justified on the basis that they provide 'certainty' (the fact that this comes at the cost of Indigenous rights seems to be the whole point of CERD concerns but this is not addressed). There are no formal structures in international law that can force Australia to comply with the recommendations of the CERD Committee. However, given the right political climate, the findings of the Committee have the potential to influence government policy and legislation in an informal way. Unfortunately, the Report indicates the reluctance of the current Federal Government to be swayed by international concerns, even where those concerns are legitimate, and its determination to continue with its policies regardless of international disapproval.

NATIVE TITLE IN THE NEWS

New South Wales

A Wiradjuri traditional owner and Police came into conflict when Police extinguished a fire at a protest camp near Lake Cowal. According to Mr 'Chappie' Williams, it was a sacred fire and he was asserting his native title rights to practice his religion on the land. A representative of the Rural Fire Service stated that the fire was in breach of regulations and had to be extinguished. *West Wyalong, pg 3.* 07 November 2003. Wiradjuri claim: NC02/3, N6002/02.

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Bega Valley Shire Council was recently awarded 'Council of the Year' as a result of their Memorandum of Understanding with