AGREEMENT-MAKING
The need for democratic principles, individual rights and equal opportunities in Indigenous Australia

SHIREEN MORRIS

The recent discussion paper published by the government’s Expert Panel on Constitutional Recognition of Indigenous Australians posed the addition of an agreement-making power as one of its ideas for reform. It is suggested that this power could be modelled on s 37 of the Canadian Constitution, which provides a mechanism to regular constitutional conferences or other processes to discuss Indigenous rights. Or, the provision could mirror s 105A of the Australian Constitution which allows the Commonwealth to make agreements with the states in relation to debts. Other ideas include a statement of values or recognition of Indigenous people in either the preamble or a substantive section, deletion of racist provisions currently in the Constitution, and the inclusion of a new non-discrimination guarantee for all Australians.

Non-discrimination
Reform which entrenches principles of non-discrimination would be beneficial not only for Indigenous people, but for all Australians. Currently, Parliament has an unchecked power to pass laws on the basis of race. There is no requirement that laws passed be beneficial. In fact, courts have confirmed that the ‘race power’ can be used adversely against particular races. Additionally, our weak Racial Discrimination Act 1975 (’RDA’) is not entrenched and can be easily suspended. In these regards, the United Nations Committee for the Elimination of Racial Discrimination (’CERD’) found Australia in breach of its international obligations against racial discrimination.

The race power and the laws it enables today have great impact on the lives of Indigenous people. Historically however, the power was intended to be used against other ethnicities to the exclusion of Indigenous people. To pass discriminatory laws against Chinese, Indian, Afghan and Japanese workers. As the 1988 Constitutional Commission noted, the allowance of racial discrimination in our Constitution is out of date and inconsistent with our modern values. Australia has ratified a number of international human rights instruments, all founded on implicit principles of non-discrimination, demonstrates that Australia has joined the many nations which have rejected race as a legitimate criterion on which legislation can be based. Our Constitution should be updated to protect Australians from racial discrimination and ensure equality before the law.

Any proposed agreement-making between the government and Indigenous people should therefore be implemented in a way that also embodies principles of non-discrimination. This article argues for some form of agreement requirement to be implemented as part of a new general non-discrimination protection, within an allowance for special measures in Australia’s Constitution. Special measures should only be implemented with the agreement of the targeted group. This agreement requirement should operate as part of new review mechanisms to ensure that any laws which target a racial group are necessary, justified, effective and proportionate. The measures must not unfairly impair individual rights and should not be contrary to community wishes.

Special measures
Special measures are positive laws to enable equal enjoyment of rights, or ‘effective equality’, and are allowed as part of non-discrimination principles under CERD. The special measures allowance has also been incorporated into domestic law through the RDA. A new constitutional non-discrimination protection with a special measures allowance would still enable law-makers to actively address disadvantage and the rights of Indigenous people and other groups, in pursuit of substantive equality.

But special measures are justified only on the basis that they enable equal opportunities and equal access to, and enjoyment of, rights for disadvantaged or historically oppressed groups. Mechanisms must be put in place so that the government is held to account to ensure this is the case. The question as to what constitutes benefit for the purposes of special measures is politically fraught. Interventionist measures targeted at Indigenous people are often criticised on the basis that they actually impair rights, perpetuate racism, or exacerbate disadvantage. Currently, there is no independent process by which special measures can be fairly adjudicated, except via the courts, which is costly and time consuming. Arguably, there should be a built-in review requirement for all special measures and race-based laws as a matter of protocol, to ensure compliance with non-discrimination principles, in addition to judicial review.

Under CERD specifications, special measures should be implemented with the informed consent of the targeted group; however this requirement is repeatedly ignored when it comes to laws targeting Indigenous Australians. The 2007 Social Justice Report, in assessing the Northern Territory Intervention, recommended that interventionist measures should be subject to ‘regular monitoring and review to establish whether they meet the purposes of a “special measure”.’ It noted:

"The consent of the intended beneficiary is important in determining whether an action should be classified as beneficial. … each proposed action or measure must be tested individually to establish whether it meets the criteria for a ‘special measure’."

From a policy perspective, special measures should be construed broadly to include any race-based laws, so that all such laws are subject to high levels of scrutiny to assess validity and compliance with non-discrimination principles. Special measures laws with regard to Indigenous people in particular could be characterised as falling into two categories. There are those special measures which are premised purely on disadvantage and need, and there are those that are better characterised as being based on rights rather than need. Measures falling into the latter category arise as matters of political justice, to address the pre-existing and continuing rights of Indigenous people. These may include land rights or language and cultural rights.
However there is overlap between the two categories. For example, land rights are matters of political justice, arising from Indigenous ownership pre-dating and surviving colonisation, but they should also address the disadvantage created by dispossession, work to ameliorate current socio-economic disadvantage, and allow equal enjoyment of rights. Land rights laws are race or ethnicity-based. Therefore such laws should also be subject to regular review to ensure compliance with non-discrimination principles. The two sub-categories of special measures are not necessarily always mutually exclusive. But the distinction is useful to articulate the different rules and review guidelines that should apply to special measures laws. Special measures based on disadvantage should be valid only so long as the disadvantage exists. Special measures predicated on rights need not be time limited or based on disadvantage, but they must still be reviewed for effectiveness in enabling equal enjoyment of rights and equal opportunities.

To ensure just and diligent review mechanisms, one idea may be to establish a new national Commission to monitor all special measures laws. The Commission’s role would be to ensure that all special measures comply with the overarching principles of non-discrimination and equality before the law, and would make regular recommendations to Parliament based on its findings.

Special measures ‘agreements’

The new Commission could also be empowered to investigate whether the specific special measures laws are in accordance with the views, aspirations and desires of the targeted community — in other words, it would assess whether there is sufficient agreement such that the special measures are not actually breaching rights. It would however be important that data regarding community views be collected in a democratic way, so that individuals have an equal say through fair methods of voting or polling. This formulation of an agreement-making requirement could be built into a non-discrimination provision to reiterate the over-arching principle of non-discrimination and equality. The review body should be transparent and fair, and should work to ensure that special measures cannot be used as a cloak for racist law.

It should also ensure that special measures are proportionate and do not operate to overshadow or impair individual rights within the targeted group. This approach is in keeping with the view that certain human rights should not be protected by breaching other human rights. Special Rapporteur James Anaya commented, also criticising the Northern Territory Intervention, that: it would be quite extraordinary to find, consistent with the objectives of CERD, that special measures may consist of differential treatment that limits or infringes the rights of a disadvantaged group in order to assist the group…ordinarily special measures are accomplished through preferential treatment … not by the impairment … of their human rights.

An agreement or consent requirement is therefore important where laws are being passed for the supposed benefit of groups. It would be unusual and suspicious if a law passed for ostensible benefit generated ongoing disagreement from the people to whom the benefit was directed. Incorporating a soft agreement requirement of this nature into a new constitutional non-discrimination provision would perhaps be preferable to the broader constitutional agreement-making power that is sometimes suggested.

Arguments for agreement-making

It has been argued that a broader entrenched agreement-making power would be beneficial, especially if it operated to give constitutional force to agreements negotiated. A provision based on s 105A of the Australian Constitution would give the government power to make agreements with Indigenous people. The enforceability of agreements would depend on the wording of this provision. But it is pertinent to ask whether, in a society based on equality, Indigenous people as one group within society should have a special power to make constitutionally-binding agreements with the government. Of course, some non-binding agreement-making already operates today, for example in the form of Indigenous Land Use Agreements under Native Title law. But constitutional entrenchment is another matter.

The New Zealand example shows us that treaties and agreements can be effective in equalising the status of Indigenous people, though the Treaty of Waitangi is not formally incorporated into New Zealand’s Constitution. Its legal status is ambiguous because it is only enforceable to the extent it has been incorporated into legislation. The Treaty of Waitangi has however been described as having ‘quasi-constitutional’ force in its extensive impact on law and policy in New Zealand. A similar approach to agreement-making in Australia may be helpful in shifting attitudes and affording Indigenous people more leverage in their affairs. Because of their extreme minority status, Indigenous people lack bargaining power in the wider Australian context. A constitutional agreement-making power could help ensure that Indigenous people have a more proactive say in laws regarding Indigenous rights, and enable Indigenous people to become more actively involved in formulating policies to combat disadvantage and poverty.

But why should Indigenous people have special agreement-making rights? White majorities are not usually consulted regarding laws made about them, except through their democratic vote. Special measures, being race-based laws, must be conceptualised differently as allowable exceptions to the non-discrimination rule in special limited circumstances. Consent is required because such laws are racially targeted, to protect citizens from adverse discrimination.

Conversely perhaps, the international human rights framework contextualises the unique political position that Indigenous people occupy within States, tending to justify a broader conception of agreement making for Indigenous people which is not restricted to the application of special measures. With regard to cultural determination, Anaya argues:

The non-discrimination norm, viewed in light of broader self-determination principles, goes beyond ensuring for indigenous individuals either the same civil and political freedoms accorded others within an existing state structure… It also upholds the right of indigenous groups to maintain and freely develop their cultural identities in co-existence with other sectors of humanity.

Similarly, de Varennes, focussing on language rights, explains that Indigenous peoples have special status in addition to their position as minorities under international law because ‘they occupy a unique political and legal niche, with corresponding ‘privileges’ not necessarily available to others.

Australia’s affirmation of the Declaration on the Rights of Indigenous Peoples (‘DRIP’) further affirms our purported commitment to principles of Indigenous self-determination, going beyond the less controversial right of Indigenous groups to maintain distinct cultural identities, and suggesting rights to self-government. While the general right of human beings to self-determination was already recognised in Article 1 of the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’) and the
International Covenant on Civil and Political Rights (‘ICCPR’), the notion of self-determination for a specific group such as Indigenous people raises interesting power questions for governing States. Specifically DRIP provides that Indigenous peoples’ self-determination includes ‘autonomy or self-government in matters relating to their internal and local affairs.’ The question perhaps can be boiled down to one of sovereignty: Should Indigenous people self-govern or not?

There is an argument that if sovereignty was not legally ceded at colonisation, then there could be some imperative or justification for Indigenous communities to truly self-govern today. In this context, a constitutional agreement-making power, giving force to agreements which depending on wording could have constitutional backing, may perhaps seem justifiable. But sovereignty, as was confirmed in the Mabo decision and as an observable matter of pragmatic fact, has been usurped by the colonising forces. As French CJ noted, the Mabo decision confirmed that when the Crown acquired the Australian colonies, it also acquired sovereignty of the land. That is why the Crown in exercising its sovereignty is able to extinguish Native Title. Conversely, Native Title was also constructed so as to recognise some form of continuing Indigenous authority to self-govern, as Mabo also describes Indigenous traditional laws and customs surviving colonisation. Nonetheless, the common quip that ‘these whitefellas are probably not going away’ rings true. The positive and pragmatic way to progress now would be to pursue a policy of empowered participation and equality which respects cultural identity and distinctness, but avoids simple separatism. For this reason, an agreement or consent requirement applicable to all groups subject to special measures would seem preferable.

Arguably, separatist structures should be avoided where possible, except to ameliorate the effects of past discrimination and colonisation, or to properly address disadvantage in accordance with non-discrimination principles. An agreement-making requirement inserted into the Australian Constitution as part of the requirements surrounding special measures in a non-discrimination provision may help change attitudes to create a more empowering and independence-fostering approach to Indigenous policy. The scope of such a requirement should not be limited to Indigenous people alone. Any group subject to special measures should be consulted. This broad construction would appear to align with principles of non-discrimination more than an agreement-making provision which was expressly restricted to Indigenous groups.

**Communal versus individual rights**

The concept of agreement-making between groups tends to treat individuals collectively. While Indigenous group rights do exist at international law, collective rights can be problematic in their competition with individual rights which may not be afforded vigilant protection under the collective cultural regime. As Davis notes, ‘in international law, “culture” frequently trumps women’s rights in a way that wouldn’t be tolerated in other areas.’ There is a risk therefore that agreement-making by Indigenous leaders on behalf of Indigenous people could be detrimental to individual rights.

There is also the question of group membership. How is membership of an ethnic group to be ascertained? And what if an Indigenous person does not want to have decisions affecting their rights made on their behalf, especially on the basis of their membership of a racial group? Thomas’ distinction between an ethnic and a civic nation is useful. He argues that in a civic nation, ‘a person’s deepest attachments can be chosen, not inherited, while “ethnic nations restrict people to the identities to which they are born.” Arguably, Australia is best described as a civic nation and should remain so.

The problem of individual rights being subsumed into the collective is evident in Australia’s current approach to the law of Indigenous affairs, and particularly in Native Title and Indigenous land law where individual land ownership rights are not recognised. However this need not be our approach to constitutional reform. The discussion about constitutional reform and Indigenous recognition presents Australia with an important opportunity to logically and honestly review our current practices in Indigenous affairs. Lack of respect for individual rights and democratic principles in Indigenous law and policy is an aspect we should self-consciously address. An agreement-making reform must be part of a new, more efficient and more transparent system which embodies principles of equality before the law, employs best practice policy-making, and implements policy based on principles of individual, rather than solely communal or collective rights and responsibilities.

**Agreement-making to empower Indigenous Australians**

Agreement-making between Indigenous Australians and government would, on one level, be a separatist arrangement. On one hand it would not seem conducive to the breaking down of separatist barriers, economic or otherwise. On the other hand, it may be the only way to equalise the imbalance of power so that Indigenous Australians have a fair chance at negotiating with government Indigenous-targeted policies which appropriately address the unique challenges of a colonised and dispossessed people. Those within disadvantaged communities are best placed to understand the distinctive challenges faced by those communities. Agreement-making may be a good way of giving Indigenous Australia a voice.

Given the importance of community ownership of advancement policies and the importance of empowerment in addressing poverty and welfare dependency, agreement-making is an idea we should pursue. Constitutional entrenchment will be important in providing security, so that subsequent governments cannot repeal the requirement. If formulated in the right way such a mechanism would help Indigenous people to take greater responsibility in their own ‘special measures’ development pathway.

Indigenous people themselves should be empowered to negotiate on equal terms the best ways to close the socio-economic gap, rather than passively accepting government policies which are delivered for their supposed benefit, but which in actual fact fail to deliver acceptable results, or perversely work to perpetuate racism and disadvantage.

History would indicate that top-down strategies to alleviate poverty in Indigenous communities are not as effective as strategies whereby Indigenous people are empowered and in control of their own development strategy. This was also the recommendation of the Little Children are Sacred Report which prompted the Northern Territory Intervention indicated that the income management strategies and alcohol bans should have been undertaken in consultation with communities. This also describes the recommendations of James Anaya, UN Special Rapporteur for Indigenous rights. Both Pearson and Helin also maintain that the key to solving Indigenous poverty is a return to Indigenous responsibility and economic engagement. As Helin asserts, ‘the responsibility for getting out of the welfare trap rests, first and foremost, squarely on the shoulders of indigenous people themselves.’ Legal structures should help make this happen.
An agreement-making model should therefore ensure mutual responsibility both on the side of government and Indigenous people. It should represent a distinct move away from passive delivery of services without active Indigenous engagement at the policy-making level. The model should also respect the rights of Indigenous individuals. The policies and legislative changes negotiated should allow for greater economic freedom in Indigenous communities, and should cover all policy areas, including education, health, housing, welfare and importantly, land. In designing the agreement-making structure there is a need to avoid creating the same problems which have been evident in the communal land rights system under native title law and state Aboriginal land acts.

**The need for self-interest and individual rights**

The way Indigenous land law has developed has not provided equality of opportunities to Indigenous people because of the inflexibly collective, communal and inalienable property rights that have been implemented by the law, which is distinctly different to the property rights enjoyed by non-Indigenous Australians. This land use and tenure structure arguably inhibits rather than encourages economic development.

Self-interest and individual ownership are crucial to economic development. Pearson correctly asserts that the main failure of Indigenous policy in alleviating poverty in Indigenous communities has been due to the failure of governments to recognise that ‘the main actor in development is the individual’. If we want to close the gap, then we need to employ the three maxims of liberal economic philosophy: ‘self-interest, choice and private property’.

Current Indigenous policy and land law treats Indigenous people communally. Whether or not an Indigenous individual, or an individual community, agrees with communal values over self-interest, if a person is born on Aboriginal land then he has no individual choice in managing his assets under Australian law, and therefore no fungible assets with which to propel his economic advancement (except through inefficient leasing arrangements requiring land trust, council or ministerial approval, and very limited opportunities for transferability). A communal land system without any well-defined commercial or private sphere, and without proper individual or documented title, curtails a person’s self-interest and renders land assets un-useable. Outside investment usually comes through mining royalties, which are again managed communally, and may not filter down to individuals or create individual opportunities. Non-Indigenous people cannot buy in, even if Indigenous people could sell (which they cannot).

Arguably, this system helps explain the ongoing poverty in Indigenous Australia. Indigenous people have received land rights, but they have not received adequate economic rights, individual rights or real ownership rights to their land. If the current land system — which allocates different rights based on race — is intended to be a special measure to address disadvantage as Gerhardt v Brown would suggest, then it is not working. If Indigenous land rights are not delivering equal enjoyment of human rights and fundamental freedoms, then the system requires reform.

Individual equal rights are integral to addressing poverty. Regular special measures review and investigation of community aspirations for land by a new Commission should help instigate improvement in this area. The new Commission should review and suggest appropriate reform for all race-specific laws to ensure that individuals’ equal rights are being realised. But the Commission itself should also ensure that the community views which it collects, or the representative structure it employs, adequately respect individual rights and freedoms, and do not also make the mistake of treating Indigenous people in a generalised and collectivist way. Indigenous individuals must be democratically represented to ensure fairness.

**The need for accountability**

In mainstream society, agreements made on behalf of people are done only after individuals have given, or are legally presumed to have given, their authority for a person or party to act or speak on their behalf. People vote for a political party or prime minister to speak on behalf of the nation. Employees in an organisation sign up to a contract, and directors make decisions which may affect their lives. But the employees still have a choice whether to join the company or not, and whether to leave if bad decisions are being made. Likewise, shareholders can vote at the General Meeting, and can sell their shares if they are unhappy with the company’s performance.

Currently, if an Indigenous person is discontent with the way their remote community leaders are speaking on their behalf, or running the land on which they live, they usually do not have a vote, because communal leaders generally lead by birth-right. Where community members are voted in, tribes are common and transparency is low. In general, if people are unhappy, they can ‘vote with their feet’ as Helin explains, describing the ‘mass exodus’ of Native Americans from Indigenous reserves, when people become tired of the corruption and lack of accountability in their Indigenous communal leadership. Australia should aim to do better than this. It is not acceptable that those who wish to enjoy individual rights in an environment of equality must leave their homelands in order to access the benefits of mainstream democracy.

What Helin describes in Native American reserves are wasteful and corrupt communal systems where chiefs are not accountable to the people they represent, but answer only to Ministers. Funds are wasted and resulting poverty, discontentment and aggression are directed within the community in manifestations of ‘lateral violence’ and dysfunctionality. Helin explains:

> Band Councils (were) gatekeepers for the only wealth coming into communities… a natural tension has been created between those in government and their community members. This technique of colonisation was employed by the British Empire throughout the world and served the brilliant purpose of distracting populations that might cause trouble externally by redirecting that aggression internally… Instead of striking out at those responsible for oppression, people long rendered powerless, strike out at each other.

The description here is analogous to the situation in some Indigenous Australian communities where social dysfunction is often high. As Mick Gooda described recently:

> native title processes also provide a platform where previously latent conflicts … can be played out, native title situations can exacerbate the potential for lateral violence within our communities. … All of us who are involved in native title claims or agreement-making know that at every step of the process, the requirement to legitimise our claims and our birth rights creates conflict and tension within our communities, and effectively results in lateral violence.

He asks the pertinent question: ‘How do we stop policies that are supposed to empower us, from destroying us?’
Communal systems arguably do not work for those inside them, except perhaps for those at the top of such structures who have a vested interest in maintaining the status quo. The imposition of communal systems has, however, worked well historically for those wishing to colonise, oppress or dispossess Indigenous people. Treating racial groups collectively has, of course, always worked in favour of the oppressors. In classic divide-and-conquer style, our imposed Indigenous land law — by separating traditional owners from other displaced Indigenous people on the basis of ethnicity, family-line, and descent, and indeed by subjecting Indigenous people to a different and inferior system of property rights — has subsequently created a feudalistic class system within Indigenous communities, and has arguably worked to keep Indigenous people separate and subjugated in Australia. Contemporary Indigenous land law can thus still be read as a colonialist tool to disempower and divide Indigenous people. Yes, land must be given back to Indigenous people; it just should have been given back in a non-discriminatory way. This needs to be rectified.

While it is true that the Australian government was a colonising force, disempowerment of Indigenous people must not be the aim of a modern Australian government and society committed to reconciliation and closing the gap. Our aim instead must be to avoid continuing the unintended consequences of native title law, and to properly reconcile the damage caused by dispossession and disempowerment through implementation of equal rights, equal choice and equal responsibility. This is the true aim of special measures as established at international law and we must be committed to this aim.

We must therefore consider the following questions. If we are to have Indigenous representative bodies as part of a new agreement-making mechanism, how are the Indigenous leaders to be selected? Will they be voted in by Indigenous people? How can they be voted out? How can we develop governance structures to guard against corruption and incompetence? How can we ensure that the standards of accountability and transparency are equal to those standards leaders are held to in the mainstream?

As noted, separatist collective rights can be detrimental to the individual rights of vulnerable people who may not have a voice within the group — for example, women and children. In the criminal law jurisdiction, the mentality which prefers communal cultural rights over individual rights has led in some cases to a legal attitude that prefers the rights of the perpetrator over the rights of the victim, arguably due to an incorrect emphasis on customary law. This is the approach we need to guard against.

Any constitutional agreement-making must be implemented with clear democratic principles and strong governance and accountability structures to protect individual rights. Indigenous governance structures should be as transparent on the Indigenous side as those we aim for in the mainstream. Australia should guard against overlooking the rights of vulnerable individuals in favour of collective group rights.

**State and Commonwealth agreements**

Many of the challenges faced by Indigenous communities are caused by state legislation, not Commonwealth. So, arguably, enacting an agreement-making power for the Commonwealth to make agreements with Indigenous people would not resolve the problematic aspects of Indigenous-state relations. Wild Rivers legislation, a Queensland Act which diminishes rights to economic development on Indigenous land is a good example of this, as is the infamous Koowarta case which was prompted by the Queensland government enacting racially discriminatory legislation that banned Aboriginal people from buying property.

Given that much discriminatory law disempowering Indigenous people comes from state legislation, any effective agreement-making mechanism needs to allow for agreements both at state and Commonwealth level, to address both state and Commonwealth race-based laws.

**Conclusions**

Australia should incorporate a constitutional agreement-making requirement into a special measures allowance as part of a new constitutional protection against racial discrimination. The provision should provide that any special measures be periodically reviewed to ensure effectiveness in addressing disadvantage and ensuring equal enjoyment of rights. It should also specify that the laws must ‘not be found to be contrary to the particular community’s wishes and aspirations’, and that laws to address disadvantage are only valid so long as the disadvantage exists.

Rather than a strict agreement-making structure, a national Commission could be established whose purpose would be to monitor and research the effectiveness of all special measures laws, and to research community views and aspirations with respect to the laws. This data must be collected in a democratic way. The Commission could then make regular recommendations to Parliament based on its findings.

This Commission should operate on the principles that service delivery must not create passivity, dependence or separatism, but must foster independence, and empowered and equal participation. The ultimate aim must be for the disadvantaged groups’ rights and responsibilities to become equal to those in mainstream Australia, so as capabilities improve service delivery and special measures based on disadvantage should decrease. Additionally, any racially-targeted laws should be proportionate and should not infringe other individual human rights. The Commission should act as a ‘watch-dog’ of constitutional rights, equality and closing the gap. It should track progress towards our ultimate aim of eliminating inequality, and ensure that the laws are not perpetuating disadvantage and racism.

Parliament should no longer have unchecked power to pass laws on the basis of race. The current system is inadequate in its protection against discrimination. We need strict rules and review procedures around any special measures. A special measures agreement requirement would hold the government to account and would help create the platform for a fundamental shift in paradigm, and improvement of all Indigenous law and policy in Australia.

SHIREEN MORRIS is a Constitutional Reform Research Fellow at Cape York Institute for Policy and Leadership. The views expressed in this article are the views of the author and do not necessarily reflect the views of the Institute.

© 2011 Shireen Morris
email: Shireen.Morris@cyi.org.au
REFERENCES
3. ibid.
5. Particularly s 51(xxvi), the ‘Race Power’ and s 25 which contemplates barring races from voting.
11. In 2010 the CERD Committee stated its concern about ‘the absence of any entrenched protection against racial discrimination in the federal Constitution and that sections 25 and 51 (xxvi) of the Constitution in themselves raise issues of racial discrimination… The Committee also recommends that the State party draft and adopt comprehensive legislation providing entrenched protection against racial discrimination’, Report of the CERD, Sessional/Annual Report of Committee A/65/18, 31/10/2010, 24.
14. CERD, Article 1(4) states, ‘Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.’
18. CERD, Article 1(4).
19. CERD, General Recommendation No 23, 'Indigenous Peoples', 18/08/97 (4(d)).
22. ibid 240.
27. ibid 111.
29. Brennan, above n 4, 139.
30. Pearson, above n 23.
33. UN Declaration on the Rights of Indigenous Peoples ('DRIP').
34. International Covenant on Economic, Social and Cultural Rights ('ICESCR').
35. International Covenant on Civil and Political Rights ('ICCPR').
36. DRIP, Article 4.
37. Brennan, above n 4, 72.
38. Mabo v Queensland [No 2] 175 CLR 1, 64.
40. Brennan, above n 4, 77.
43. Pearson, above n 23.
44. Responding to the Intervention, the HRC suggested Australia ‘redesign measures in direct consultation with the Indigenous peoples concerned, in order to ensure that they are consistent with the RDA and the ICCPR. This participatory approach was promoted in Stavenhagen’s 2007 HRC report on the human rights of Indigenous peoples, where he stated ‘no project should be imposed from outside,’ UN HRC, Report of the Special Rapporteur, Rodolfo Stavenhagen, ‘Situation of human rights and fundamental freedoms of indigenous people’, 15 November 2007, 219.
46. Anaya, above n 25, 28.
52. Hughes, above n 48, 4.
54. CERD, Article 1(4).
55. Helin, above n 47, 149–152.
56. Ibid 152.
57. Ibid 152–3.
59. Ibid 8.
61. Wild Rivers Act 2005 (Qld).
64. Pearson, above n 23.