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Official Committee Hansard

JOINT COMMITTEE ON NATIVE TITLE AND THE ABORIGINAL
AND TORRES STRAIT ISLANDER LAND FUND

**Reference: Consistency of the Native Title Amendment Act 1998 with Australia's
international obligations under the Convention on the Elimination of all Forms of
Racial Discrimination**

WEDNESDAY, 23 FEBRUARY 2000

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**JOINT COMMITTEE ON NATIVE TITLE AND THE ABORIGINAL AND TORRES STRAIT
ISLANDER LAND FUND
Wednesday, 23 February 2000**

Members: Senator Ferris (*Chair*), Senators Abetz, Crossin, Mclucas and Woodley and Mr Causley, Mr Haase, Mr Melham, Mr Secker and Mr Snowdon

Senators and members in attendance: Senators Abetz, Crossin, Ferris and Woodley and Mr Causley, Mr Melham and Mr Secker

Terms of reference for the inquiry:

- a. whether the finding of the Committee on the Elimination of Racial Discrimination (CERD) that the Native Title Amendment Act 1998 is inconsistent with Australia's international legal obligations, in particular the Convention on the Elimination of all Forms of Racial Discrimination, is sustainable on the weight of informed opinion;
- b. what amendments are required to the Act, and what processes of consultation must be followed in effecting those amendments, to ensure that Australia's international obligations are complied with; and
- c. whether dialogue with the CERD on the Act would assist in establishing a better informed basis for amendment to the Act.

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Committee met at 9.09 a.m.**BASTEN, Mr John, QC (Private capacity)**

CHAIR—Welcome, Mr Basten. It is nice to have you back again. As you have appeared before this committee before, I am sure you are aware that we do prefer that all evidence be given in public. If any members of the committee ask you a question to which you would like to respond in private, please tell us and we will take your request into consideration. However, I should say to you that any evidence given in camera before this or any other Senate committee could be made public by an order of the Senate. If you would like to make some introductory remarks this morning my colleagues will then have some questions for you.

Mr Basten—There were three or four matters I thought I might mention by way of introductory remarks. I have tried to address issues which either have some obvious relevance to what the committee needs to report on or alternatively issues which might not have been fully addressed by others that the committee has heard from. Of course, in making that judgment, I am a little in the dark. I have not seen all the submissions and I have not heard everybody you have heard. Forgive me if I trespass on ground that has already been covered.

The first thing I want to note was something which gives rise to some concern. There might have been a misapprehension on the government's part as to an important aspect of the operation of the Native Title Act that may have led the government to say things to the committee on CERD which were not entirely accurate. I wonder whether or not this is an issue which this committee should address because, obviously, if there are unintended ramifications of the Act, that should be understood and addressed by the parliament. The concern is in relation to future acts generally.

The government's own submission to the CERD committee in January of last year argued that one of the major elements of the Native Title Act was that it would allow for procedural rights to be available to parties who had registered claims. Under 'Registration test' on page 7, the submission said:

Claimants who pass the registration test obtain significant procedural rights under the NTA and:

can be parties to a right to negotiate process;

will have the right to be notified and comment about certain activities done by governments, and about mining and compulsory acquisitions to which the right to negotiate does not apply;

My concern was that there and elsewhere in the document the government was putting the position that registration obtained significant procedural benefits for native titleholders. That, I understood, was always the government's position and that was one of the reasons for tightening the registration test.

What we understand from a recent decision in the Federal Court is that registration really gives you no procedural entitlement. If somebody is going to do something in relation to land over which you have a registered claim, you cannot require them to give notice unless you establish at least at an arguable case level that you have native title rights in relation to that land. In other words, the very purpose of the registration test, which was to make sure that only people who did have arguable claims might get the benefit, seems to have been subverted. The court is saying, 'No, if somebody is not going to give you notice they do not have to unless you come to court and prove your native title.'

Mr MELHAM—What is the case, Mr Basten?

Mr Basten—The case is one involving the Lardil people in the Gulf of Carpentaria. I am conscious of it because I was involved with it. I do not wish to comment on the correctness or otherwise of the case because the single judge's decision is under appeal. What troubled me, though, was that the proposition which I have just indicated which was upheld by the single judge was that for which the Commonwealth argued. In other words, the Commonwealth took a position in the case which seems to me to have been prima facie inconsistent with what it told the CERD committee and what I think we all thought was the intention of the Native Title Act. That was the first matter of concern I wanted to raise. You will all recall, no doubt, the extensive debates over the strengthening of the registration test.

Senator WOODLEY—Sure do.

Mr Basten—If it was for a purpose which has now been not met, as it were, by the terms of the Act, that seems to me to be a matter of major concern. The issue is of concern in relation to the Convention because, of course, the future act regime was one of the areas which was controversial and which the government needed to show contained significant benefits for indigenous people. So that was the first issue I thought should be noted.

The second issue I want to note concerns the question of offshore rights. In raising this, I do so in the knowledge that in the past there has been concern expressed about the protection of native title rights offshore.

There have been comments made before, which this committee would be well aware of, that, in the view of many indigenous people, offshore rights are simply not adequately protected. The future act regime under the Native Title Act, as now amended, provides unclear, imprecise and insubstantial protection to any native title holders who have rights offshore. That is of particular significance, of course, in the north of the country. As we know, Australia has been settled on a coastal basis to a large extent and, especially in the south-east and other parts of the south, there will have been a significant loss of native title rights anyway. But in the north it is still true that very many Aboriginal people subsist from their connection with their sea country. Their harvests of resources of the sea and their rights in offshore areas are very important. We now have all four members of the Federal Court who have had to consider whether native title extends offshore upholding that proposition, and of course that is consistent with the scheme of the Native Title Act itself. So that perhaps is not surprising.

I might add that the Commonwealth is still taking the position that it is not possible to recognise offshore native title at all under our law. Either it does not apply below the low watermark, despite the clear intention of the Native Title Act to go beyond the low watermark, or it does not apply beyond the territorial sea which extends three nautical miles from the baselines. That was not a matter which was raised in the CERD committee report. I do not know whether it was raised before the committee itself, but it seems to me to be a matter in which it could easily be said that our legislation falls short of that which is required by the Convention. That was my second point.

I want to make two other related points in relation to the operation of the Racial Discrimination Act and the substantive effect of the Convention. The first is perhaps something I need not develop at any great length. The approach that was adopted by the CERD committee was basically that, as at 1993, the Native Title Act did not contravene the Convention despite the fact that it had significant validation provisions which operated against the interests of native title holders. As I read their comments, the reason for that is that they accepted at that time that there was agreement between the government and the parliament and the native title holders or the representatives of indigenous people, perhaps more accurately, that as a whole the Act was acceptable and therefore constituted a special measure and therefore did not contravene the Convention.

One of the problems that arises with the amendments is that if one accepts – as the CERD committee does, and I do not think the government disputes it – that the new Act since 1998 no longer has the support of indigenous people, then the basis for considering it a special measure disappears, which means that the original validation provisions themselves must now be in contravention of the Convention. That, it seems to me, is a very serious consequence of the procedure that was followed in 1998 to make significant amendments to the Act in a way which did not have the support of indigenous people.

The fourth point – and it is a related point – goes to the question of what the requirements of the convention involve. It seems to me that there has been a debate, including in some of the submissions that have come to this committee, as to whether the Convention requires merely formal or substantive equality. The answer to that debate seems to me to be unequivocally that the Convention requires that substantive equality be provided. I can explain why that is, if necessary. The position at international law has been quite briefly and succinctly set out in the Australian Law Reform Commission's report some years ago on Aboriginal customary law, which is entitled *The Recognition of Aboriginal Customary Laws*. It was written by Professor James Crawford, who is now a professor of international law at Cambridge University. I just want to give the committee the reference at paragraphs 147 to 150, where he explains why that is the case.

Senator WOODLEY—Who is the professor?

Mr Basten—Professor James Crawford was the commissioner at the Australian Law Reform Commission when the Aboriginal customary law report was prepared. He was the commissioner in charge of the reference and, as I understand it, wrote a lot of it himself. I am sure that he wrote that passage which concerns the position in international law with respect to the conventions.

The consequence is that if you treat people within the terms of the Convention – simply providing equal rights for everybody in an abstract sense must be wrong because, at international law, the Convention recognises that race is not always an irrelevant consideration. People do differ in terms of race and differ in ways which must be taken into account in order to achieve equality. In terms of both physical and cultural differences, it is easy to think of examples. This is also reflected in the Racial Discrimination Act, which outlaws discrimination on the grounds of race, not only where the purpose of the discriminator was to take race into account, but also where a material effect of the discrimination was adverse on the grounds of race. There is now quite a bit of case law that establishes how the RDA operates in that context. But it does, I think, correctly reflect the Convention as a whole. Madam Chair, those were the matters I thought I might raise by way of introductory comment. I am happy to elaborate on any of them or deal with anything else the committee wishes.

CHAIR—I just had a couple of questions to clarify some of the comments that you have made, Mr Basten. The issue of substantive equality is an issue that has been raised by a number of witnesses yesterday. I notice this morning you also come down on the side of substantive equality. Do you have any comment on the status of a number of the other acts of the parliament where the question of substantive equality also arises? Do you have any suggestions on how the government might try to deal with that if we were to follow your pathway on that issue?

Mr Basten—What sort of legislation did you have in mind?

CHAIR—I suppose the question of substantive equality applies in a number of pieces of our government legislation where there has been a differentiation between what you might call the equal basis of all peoples. You could cite the immigration legislation, for example, and I am sure that if I thought about it there would be a number of others. I just thought about the question of how the environmental legislation has been framed. I just thought it is an issue that a number of people seem to be fixing on, and I wondered if you had thought about it in a wider context.

Mr Basten—I understand the problem in relation to the Migration Act. I do not believe that that gives rise to particular difficulties in respect of the Convention, because of the exclusion from the Convention of distinctions based on citizenship. That is largely the basis upon which our Migration Act distinguishes between those it allows into the country and those it does not. I will not perhaps go into that in too much detail. There was a case which went up to the High Court, in fact, where special leave was refused in which that point was sought to be made – namely, that the way the Migration Act operated was inconsistent with the RDA – and that was held not to be the case.

The concept of substantive equality probably has its greatest relevance in relation to the Native Title Act in the scope of the right to negotiate provisions. The way I understand it applying there is this: the concept of ownership by Aboriginal people of land is different from our concept. They do not see land, in legal terms, as simply an asset which may be acquired and disposed of at will. It is the responsibility of the owners under native title laws, Aboriginal laws and customs, to look after the land. So it cannot simply be disposed of in the marketplace. It has a specific quality and relevance to individual groups which land, as an entity in the legal system that we live under generally, does not have. It is for that reason that one wants to find something like the right to negotiate – which is not unique, I might add – which provides a mechanism for ensuring that that particular relationship of Aboriginal people with the land, something different from that of Australians generally with land they own, is respected. The right to negotiate gives Aboriginal people a chance to make clear what it is about the land which is important to them should a government wish to compulsorily acquire it.

Some people say that the right to negotiate is itself discriminatory. The approach that I have suggested is that one looks at the right to negotiate as a mechanism for ensuring equality of treatment, because of a relevant differential between the relationship between land of Aboriginal people and other members of the community. So that formal equality perhaps is missing – although that can argued about – but substantive equality is satisfied. But that means that one needs a proper and effective right to negotiate to ensure that there is substantive equality under this law.

Just by way of a footnote, I quibble about it being a unique provision and I quibble about it necessarily being a significant improvement for Aboriginal people because, if you go around the states and territories, there are similar rights to be found in most compulsory acquisitions statutes these days, although they may operate differently from the way in which they operate under the Native Title Act. It is certainly not a unique concept, though, but one way in which I think the Native Title Act actually does seek to pick up the concept of substantive equality.

CHAIR—In evidence received yesterday from Brad Selway from South Australia he contended that indigenous people would prefer to have the existing legislation than no legislation at all. I just picked up in your introductory comments what could be a view that you disagree with that and that you think that, as ATSIC does in their submission, we should actually repeal the current legislation, as amended, and start afresh. Can you clarify your views on that?

Mr Basten—I cannot comment specifically on the Solicitor-General's experience in South Australia. My first comment would be that his views would not trouble me greatly, whatever they were. One of the criticisms that the CERD committee made of what has happened in Australia is that there has not been an appropriate process by which Aboriginal views have been taken into account. Laws which we pass can be either beneficial or detrimental for particular groups in the community. Under the Convention one should not discriminate against a particular group unless the provisions constitute a special measure which means that they have been the subject of some form of acceptance at least by those to whom they are directed.

The problem is that the views of myself or Mr Selway or members of this committee perhaps are not of great importance in that context. What is important is that the views of the indigenous people are obtained and

reflected in legislation. This is why I resist the idea that one says, 'Should one repeal the whole Act or not?' That is a matter on which a consultation process would need to be undertaken. I can understand the proposition that, objectively, the Act is, as a whole, beneficial to indigenous people. But that is a view which I think they should express, not me.

Mr MELHAM—Mr Selway made a submission to us yesterday and I take you have not had a chance –

Mr Basten—I have not read his written submission nor heard his oral evidence.

Mr MELHAM—You will not be putting a written submission to the committee at this stage?

Mr Basten—I was not intending to unless there were particular points on which that was thought to be useful.

Mr MELHAM—If you have Mr Selway's written submission, I would be particularly interested if you could quickly have a look at pages 6 through to 10.

CHAIR—Do you have a particular paragraph or two to assist Mr Basten?

Mr MELHAM—Basically from the middle of page 6. On the proposition that you just put he says:

The state of South Australia accepts that the amendments reduce the extent of some of the protections that had been given in the 1993 Act, but the Act, considered as a whole, remains beneficial. It remains a special measure.

In light of your opening comments on future acts generally what concerns me is whether it really can be said that this act is beneficial in terms of its protection for native title. In light of what you say the single judges determined in the Gulf of Carpentaria, if that view were to be maintained on appeal that throws into doubt the whole structure of this act in terms of the protection of native title and future dealings in land.

Mr Basten—Yes, that is so because it also has the consequence, on one view, that the right to negotiate could be refused willy-nilly by any government in this country and the native title holder could not go to court and say, 'I am a registered native title holder.' All he or she could do is go to court and say, 'Give me a few weeks to prove my native title,' and it usually takes weeks in court. Then I might be entitled to something which will already, of course, have happened by that time.

Senator ABETZ—Could you go under common law seeking an injunction?

Mr Basten—You could but, again, the problem arises that you have to prove at least an arguable case of native title to get your injunction.

Senator ABETZ—Surely you would be at that stage in your own mind, wouldn't you? If you are going to assert native title you must have something to back that up. You do not wake up one morning and say, 'I am going to claim native title over this land.' There must be some substance to the community's thought processes.

Mr Basten—That is undoubtedly so. What you have to do, though, is to satisfy the judge of your rights and their relevance. It goes without saying that that is not an easy process and it requires extensive evidence. The more remote and traditional the people, and therefore probably the stronger the claim, the more the physical difficulties in complying with that within a court system within a relevant time. It is almost invariable that the Federal Court requires that evidence be given by way of affidavit or at least by written statement. You have to get lawyers. You have to get interpreters quite often, and anthropologists out to see people to take statements and all the rest of it. It is a process which tends to take months, not weeks, to get the matter ready for court as opposed to getting it ready for registration or making a claim.

Senator ABETZ—But you do not need to go through all those processes just to get an injunction. All you have to do is have an arguable case. You do not have to say, 'I am going to be calling X number of anthropologists, archaeologists and other people,' just to get an injunction, do you?

Mr Basten—You do not need to say that but what you do need is to call some of them in order to get your injunction. You have to satisfy the court. This would only arise really where a government is saying, 'We do not believe there is native title.'

Senator ABETZ—That is right.

Mr Basten—So they are going to come to court and cross-examine all the witnesses you do call and then the judge is going to have to decide whether you have got to a certain level of proof. It will be a disputed hearing on the assumption –

Senator ABETZ—But not necessarily on an initial application for an injunction. Quite often the courts will say, 'We will give you an injunction for a week or a fortnight and then you can have some sworn evidence or test the evidence for the purposes of an ongoing injunction.' It is not quite as you have been putting it, I would suggest.

Mr Basten—You are certainly right that you might get an injunction for a week or a fortnight whilst things were got into place. My view is from the cases that I have been involved with that even establishing an argu-

able case of native title, especially if it is disputed, may take two weeks of the court's time. You will not get two weeks from a Federal Court judge at the drop of a hat. Every delay which occurs gives rise to balance of convenience arguments. Just by way of example, in this particular case in the Gulf of Carpentaria the proposal was to put a mooring buoy in. The company wanted it done before the cyclone season started. Immediately you get close to that sort of area, the balance of convenience will be against granting any interlocutory relief. There is a third proposition which should be –

Senator ABETZ—I can understand that.

Mr Basten—Arguable case, balance of convenience and an undertaking as to damages in case you do not ultimately prove your native title.

Senator ABETZ—That is right.

Mr Basten—So you want these people who may or may not have native title to give undertakings to large companies as to the way in which their operations may be affected. Those undertakings may be worth millions of dollars. It is very difficult to advise people that they should give those undertakings except in the deceitful knowledge that they cannot honour them anyway, in which case the court might well not accept them.

Mr MELHAM—But in terms of the justification for the Native Title Act as against the common-law path, the preamble says, in the amended copy at page 2:

A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.

So, in light of what you are saying the single judge has said in the Gulf of Carpentaria case, the justification for this act is really out the window because, if registered claimants are not going to have that protection or be afforded procedural rights, then this act is pretty useless in protecting native title.

Mr Basten—Yes, indeed. As long as there is a representative body for a particular area which will itself get notice of acts, it seems to me that going through the registration process is of no benefit at all to the native title holder. They will ultimately get notice either through the rep. body or through the public notice of a particular act. If the registration gives them no basis for seeking to comment, which is often all their procedural right ultimately is, then why be registered? Why did you people go through that process of debating endlessly the strength and weaknesses of the registration test if this is really right? I just think that there has been a slip between the intention of the government, probably, and of the legislation which has resulted – in a way which is very serious – from the point of view of what we say to the CERD committee in a few weeks time.

Senator ABETZ—Is that case on appeal on that very issue, or not?

Mr Basten—Yes, it is, and I said that.

Senator ABETZ—Yes, but on that issue?

Mr Basten—Yes, on that issue. My comment about it was not whether that right was or wrong but that that Commonwealth's own counsel was arguing for the consequence which the single judge upheld.

Mr MELHAM—And it is inconsistent with what was put to the CERD committee and claimed publicly.

Mr Basten—It seems to me it is inconsistent with what was said to the committee. That is my concern. That is why I raised the issue.

Mr MELHAM—My understanding of the thrust of the submission of Mr Selway, in that area that I have directed you to, is that he asserts that CERD was in error in considering the amendment act rather than the act as amended when determining it as a special measure. Have you got any views in relation to the CERD committee's approach?

Mr Basten—I would have to read through it. I must say I have a great regard for Mr Selway, so I differ from him reluctantly, especially when I have not had an opportunity to read in detail what he said.

CHAIR—Mr Basten, you might like to take some of these questions on notice.

Mr Basten—I can do that.

CHAIR—Please do not feel obligated in any way to respond when you have not had an opportunity to read the submission.

Senator ABETZ—Do not let Mr Melham pressure you.

CHAIR—I am sure Mr Melham also appreciates the difficulty that you are working under. We would be very happy if you wanted to reflect on some of these questions and give us an opinion.

Mr MELHAM—But what about the approach, basically, that the CERD committee was wrong, for instance?

Mr Basten—I can answer it on the basis of your question, Mr Melham, on the assumption that that is what Mr Selway said. That is not how I read the committee's decision. I read the committee's decision as looking at the Act as a whole as a result of the amendments. Its report is brief. It is obviously put in lay terms, not lawyer's terms. But I do not understand them to have isolated the 1998 amendments and considered them in isolation from the rest of the Act. I do not really understand, frankly, how that could be done because the amendments really need to be seen in a context. For example, section 7 was amended in relation to the operation of the RDA, but you cannot really take that amendment out and then consider the rest of the Act as if it was not there.

Senator ABETZ—What you have just said to us is interesting. As I understand CERD, they have said we ought to suspend the 1998 amendments. So they have, in fact, seen the 1998 amendments in splendid isolation and not in the context of the Act as a whole.

Mr Basten—That is entirely consistent, as I would understand it, with their view that, prior to the amendments, the Act constituted a special measure because primarily it was the subject of support from the indigenous community. The amendments, which did not have that quality, therefore, take the Act outside the special measure area. That is why, as I understand it, they would say you need to suspend these amendments for the purposes of reconsidering how the Act will operate. I do not think that is necessarily consistent with saying that what you are looking for is consent to the Act as a whole. It does not mean that you have isolated the amendments in considering whether or not the amendments are a special measure. In fact, I think it is consistent with the opposite approach, namely, that you have to look at the Act as a whole and there is still an Act there even if you take the amendments out. The rest of the Act can continue to operate.

Mr MELHAM—One of the things in relation to what I was saying about Mr Selway is on page 8 at about the second or third paragraph where he talks about the second basis. That short paragraph. The other one is on page 7.

Mr Basten—I must confess that I can read this committee's report with one of two purposes. One purpose is to try to understand what it is the committee is saying in the context of the Convention about which they are experts. Another purpose is to read it to try to find inconsistencies and confusion in their report. If I wish to do that, I can do that too. I know that the term 'suspend' has been the subject of comment, and indeed the government commented that the committee must have been confused and did not understand that it could not suspend the operation of laws. I must confess that I found that a slightly trivial criticism. The government can put an amendment to the parliament – which may or may not pass it, I suppose – which would have that effect. How one goes about it, of course, is not a matter which the committee addressed. There are very significant aspects of this Act which require administrative activity by a government minister – for example, the Attorney-General – and he could decline to make decisions while these matters are considered.

I must confess that I do not think that is the correct approach to the committee's report. They are a committee dealing with an international convention, and international conventions are themselves not precisely formulated in the way that laws of this country would be domestically. Similarly, the committee's expertise should be respected, and it should be assumed that they well understand how the Convention does operate in international law, as opposed to domestic law. I do not see any reason from my reading of their report to doubt that.

Mr MELHAM—Can I take you to the three paragraphs which appear on pages 7 and 8 – another matter that Mr Selway takes up – particularly the paragraph on the approach of the CERD committee. Could you read those three paragraphs?

Mr Basten—Yes.

Mr MELHAM—That is really where he is submitting, again, his concern with the CERD committee saying that the 1993 act was delicately balanced and whether the benefits were only marginal as against –

Mr Basten—That, again, is all a matter of his opinion and his assessment of a process. What his knowledge of that process in 1993 was I simply do not know. As I recall the process – and I was only party, obviously, to some limited aspects of it – it was hotly debated amongst the Aboriginal leadership at the time as to whether or not they thought that the Act, as a whole, was or was not a good thing. At the end of the day, as the government understood it then – and as I think the current government believes – and as I understood it, the leadership came out in favour of the Act and said that they would accept it in the form that it went through the parliament. But, my God, it was a long and heated battle to get to that conclusion, and amendments were made on the way through which were arguably highly instrumental in obtaining that result. I think to call it a delicately balanced decision and Act is probably quite accurate, as a matter of a description of the process. But, again, the question for the CERD committee was not, as I understand their report, whether they thought the Act, as a whole, was or was not beneficial but was whether Aboriginal leadership thought it was or was not beneficial.

The material before them, again on my understanding, was that the Aboriginal community did not express that view after the 1998 amendments had been included.

Mr MELHAM—I do not want to do an injustice to what Mr Selway is saying, but his view was that if the 1993 act was clearly beneficial then, even if the 1998 amendments wound them back, on balance it still remained a special measure; whereas if it was delicately balanced in 1993 or only marginally beneficial, I think he conceded that the act, as amended then, would have problems standing up as a special measure.

Mr Basten—It does not seem to me to be correct to say that the Act in 1993 was or was not beneficial. The Act contained elements which were undoubtedly beneficial to indigenous communities. The Act also contained elements which were undoubtedly adverse to their interests. There was a question – and an international law question, I might add – as to whether it is appropriate to look at the Act as a package or whether one should be pulling it apart and considering, in terms of the Convention, various aspects of the package.

It seems to me that he is treating it as a package and saying it was clearly beneficial. That, as an objective question, is only one element of what is needed in order to establish a special measure. So this is important. The Convention says that you cannot discriminate on the grounds of race. If the Act is entirely beneficial, then you can assume that its beneficiaries might agree to it, but how is it beneficial? They might have a view, reasonably, that it was not beneficial in a way which they wanted. It might establish what they thought looked too close to a regime of apartheid in this country. They might, therefore, reject it, even though objectively the rest of us might think it was beneficial for them. One has to be careful about who is making the judgment. That is why I say it is obviously only one aspect of what Mr Selway is talking about, but it may not ultimately be the critical one.

Mr MELHAM—Thank you.

Senator ABETZ—Is the Native Title Act, as it is now, racially discriminatory in your assessment?

Mr Basten—There are two answers to that question.

Senator ABETZ—Yes or no?

Mr Basten—Neither of them is yes or no. Can I explain? I did not mean to be flippant.

Senator ABETZ—Yes.

Mr Basten—When you talk about beneficial aspects of the Act, it could be said on one view that those are discriminatory because they treat differentially on the basis of race. That would be a formalist position. My view, and I think it is the view supported by Professor Crawford, is that under the Convention that is not discrimination. Discrimination is not talking about benefits. Other aspects of the Act are undoubtedly detrimental. There can be no doubt that the validation of a grant of freehold – which extinguishes native title but which would otherwise have been invalid because of the operation of the RDA – is detrimental to the indigenous native titleholder's interests. I am inclined to accept the view that, nevertheless, it could be part of a special measure when you look at the Act as a package. If it qualified as a special measure following the four tests of Justice Brennan in *Gerhardy v. Brown* – which, at least for domestic purposes, is the test we follow – then it may still not be discriminatory in the sense that it is in contravention of the Convention, because the convention excludes special measures. So the answer is hard to say, but it depends on how one approaches it.

Senator ABETZ—There has been a lot of discussion about the concept of informed consent by the indigenous community. The CERD committee expressed a view that, seeing that there was not informed consent, therefore the 1998 amendments should be suspended, amongst other reasons. What does informed consent mean? Is it that basically the indigenous community have to agree or the sovereign government cannot legislate in that area? What does informed consent mean?

Mr Basten—Again, there are two questions involved. One is a question of domestic law – that is, if one is trying to determine whether it is a special measure under the Racial Discrimination Act – and the other is a question at an international level, when one is trying to determine whether there is a breach of the Convention.

Senator ABETZ—I am only talking about the CERD committee's determination in which they have said there was no informed consent. I think they get that out of determination 23, paragraph 5.

Mr Basten—Yes, I think there is general resolution 23.

Senator ABETZ—Yes, it is general resolution 23, paragraph 5. That is the term I need. They talk about informed consent. For the purposes of that general resolution, what does informed consent mean? To curtail time, does it equate to a right to veto?

Mr Basten—The concept of a veto does not assist me greatly in answering that question. It does seem to me that the concept of informed consent, in the context they are using it, is the same as it is used in the discussion of a special measure by Justice Brennan in *Gerhardy v. Brown* at pages 133 and following in the *Commonwealth Law Reports* volume 159.

It has this element to it, as I understand it. It is that unless people agree to being treated differentially on the grounds of their race, then there is a contravention of the Convention, and whether we think it is beneficial or not is ultimately not to the point. Somebody of course has to decide whether they agree that they wish to have this law passed for their supposed benefit. In our system it is ultimately the government, subject to review by the court, which will apply a test of non-intervention in the absence of a clear mistake on the part of the government. The CERD committee, as I would understand it, has formed its own view on the material before it as to whether the indigenous leadership of the country consented in 1998 as they did in 1993. I must confess I thought it was common ground amongst all the players in this game that there was not that level of consent in 1998, and therefore I do not understand the committee to have made any controversial comment in that regard.

Senator ABETZ—All I am asking – and you have given us a tour around it all, with respect – is about informed consent. What does that mean? Does that mean that if the Aboriginal community, for example, would have said, ‘We don’t like the 1993 act,’ that we would not have been able to legislate the 1993 act under CERD? I am not talking about domestic; I am just talking under CERD. Does that mean that we would not have had the authority, according to CERD, to legislate the 1993 act?

Mr Basten—As I recall it, much of the 1993 Act was uncontroversial with the Aboriginal leadership, and that the controversial provisions, including critically the validation provisions, were thought by everybody to be adverse to their interests. I would have thought that on any view of the Convention you could not legislate adversely to the interests of a particular racial group on the ground of race if they did not agree to that legislation.

Senator ABETZ—Then that really is a right to veto, isn’t it? In any other language, unless the indigenous group agree, you cannot legislate pursuant to the terms of CERD.

Mr Basten—Yes, I think that is absolutely right, and I would have thought that under –

Senator ABETZ—Because earlier on you said, ‘My concept of right to veto wasn’t of any assistance to you,’ but we must have been at cross-purposes then whereas now I think you are saying, ‘Yes, it is in effect a right to veto under CERD.’

Mr Basten—I would not describe, had it been in force then, a view of the Jewish community in Nazi Germany that they did not consent to be shot by the Nazis a veto on a Nazi law. That is not how I would describe it. That is why I do not find the concept of veto helpful in the context –

Senator ABETZ—That is, with respect, a very unhelpful and –

Mr MELHAM—It was spot on.

Senator WOODLEY—I thought it was helpful.

Senator ABETZ—offensive analogy because it goes against a whole lot of basic concepts that I would think are not in dispute. I am talking in principle about any legislation that might impact on an indigenous community in any country in the world. If the indigenous community says ‘No’ – and, with respect, if we are talking about indigenous communities it is interesting you would put the Jewish people in Germany as an indigenous group there; I would have thought technically there might have been some difficulty there.

Mr MELHAM—Read the transcript of Hindmarsh.

Senator ABETZ—But let us deal with the principle. In any country, any indigenous group, any legislation affecting them, does it have to provide its approval only under CERD? We are only talking under CERD.

Mr Basten—I apologise if you found my example offensive.

CHAIR—Mr Basten, Senator Abetz is a German-born senator, and I think it was quite an unfortunate example that you chose to give.

Mr MELHAM—So what?

CHAIR—Let us try to proceed on a slightly more intellectual basis.

Mr Basten—I am offering an apology, if I may, Madam Chair.

CHAIR—Thank you.

Mr Basten—My apology is based on the fact that the example I used was derived from the historical context in which this convention obtained international support.

Senator ABETZ—But then it never dealt with anti-Semitism as it turns out. That was refused in the international community which was interesting.

CHAIR—Let us try to get these responses back onto a firmer plane.

Mr Basten—I am sorry if you thought it was not firm. I was apologising for something which I did not think was inappropriate. Let’s go to South Africa. I am not talking necessarily about indigenous communities

because the Convention is not so limited but it is an example. I would have thought it right to say that the apartheid laws could not have been passed in South Africa consistently with the Convention unless the black community had consented. I do not find it useful to talk about a veto on the part of the black community in that context because, in relation to the convention, they do not have a vote. The question is whether the Convention applies or not and vetos deal with concepts of votes.

Senator ABETZ—You are dealing with negative examples that I think we would all agree with. What about a positive example? I think the analogy was used yesterday of our giving an extra \$100 a week for the indigenous community because of their disadvantage and the indigenous community says, ‘No, we oppose this; it ought to be \$200.’ Therefore, the Australian government does not have the consent of the Aboriginal community within this country because it is not good enough according to the indigenous community. They have rejected our legislation. Therefore, under CERD would it be invalid legislation?

Mr Basten—On that hypothesis, probably yes. May I give you authority for that proposition?

Senator ABETZ—Yes.

Mr Basten—There is a case under the English Sex Discrimination Act – but the principle is the same – in which men were offered a bonus payment for doing dirty work in colour bursting workshops and women were not permitted to do the work. The English Court of Appeal accepted that it might be discrimination against both men and women. If the men reasonably objected to having to do all this work, then they were discriminated against. If the women lacked the opportunity to get the benefit, they were also discriminated against.

When one distinguishes on the grounds of a prohibited factor such as sex or race, one is always in danger of contravening a law or a convention that prohibits that. It is because the Convention says basically that race is an irrelevant characteristic, so any law that does something on the ground of race requires strict scrutiny. The circumstances in which it will not be a contravention of the Convention are very limited and the informed consent of the individuals sought to be benefited on the ground of race is one of those conditions.

Senator ABETZ—Really, what you are saying is that any welfare programs in Australia should be based on an objective assessment of disadvantage as opposed to race.

Mr Basten—Welfare programs are generally beneficial in favour of particular groups in the community. As I said before, I do not accept that beneficial treatment of a group constitutes unlawful discrimination under the convention.

Mr CAUSLEY—I do not want to argue the pedantics of law because I am not a lawyer but I want to talk about practicalities. The fact was that the 1993 Act was not working. That was one of the reasons why the amendments were made. I suppose there are people out there who will say that the 1998 Act is also difficult. At the end of the day, it is up to governments to make statute law that is practical, isn't it?

Mr Basten—It is undoubtedly important to make sure that laws are workable. I think it was agreed on all sides that improvements could be made to the 1993 Act. The committee knows Mr Orr very well. He was one of the draftsmen of that Act. I think it is a remarkable achievement and was at the time. But he would probably have been the first to concede that there were improvements that could be made. I accept that amendments were necessary in 1998.

The question which is raised by the committee is almost a process one rather than one that looks at the substantives. That is why, as I understand it, the committee has not said which amendments it thinks offend against the convention, because its concern is rather the process by which they were achieved.

Mr CAUSLEY—I understand that – Senator Abetz was arguing that point – but how far does consultation go? There has to be a limit to consultation or government does not happen.

Mr Basten—Yes, the problem one faces is firstly to identify which aspects of the law are detrimental to indigenous people on the grounds of their race. When one has identified those provisions, then it is necessary to reach agreement with the indigenous community if one is going to legislate in those terms, otherwise one contravenes the convention. It is as simple as that.

Mr CAUSLEY—With respect, that will not happen. There will not be agreement, because we have had evidence from Aboriginal people before this committee and they are no different to us – they disagree.

Mr Basten—Of course, and there were disagreements amongst themselves in 1993, but they produced an extraordinary degree of unanimity in accepting an outcome. Might I say, you probably know Aboriginal people as well as I do –

Mr CAUSLEY—Probably better.

Mr Basten—but I perhaps have one benefit in that I have been privy to a lot of their discussions about this legislation. I would not have thought that it would have been very difficult in 1998 to have achieved legislation which would have had their consent. I genuinely believe that. I know that the government might have felt that

it was conceding points which, for whatever reasons, it did not wish to concede, but the suggestion that one can never get agreement about these things is, with respect, pessimistic.

Mr CAUSLEY—There are two sides to it – not only are there Aboriginal people but there are titleholders as well, who are quite concerned. So you have to get agreement between the groups. That is what government is about. You talked about validation. Isn't it a genuine attempt by the parliament to read what the High Court has said about the extinguishment of native title and to validate those titles where they see that extinguishment has occurred to stop a lawyers' feast?

Mr Basten—Those are the confirmation provisions in part 2B basically. In a sense I understood that that was the purpose. I think the debate between us, when I was arguing a case for the indigenous concerns at the time, was twofold. Firstly, that part 2B did appear to go beyond what the courts had been saying, and; secondly, that there was a real concern about the process. That schedule was put together in a way which involved no consultation with anybody. In part, it was ill-informed for that reason, and that was a pity. Subject to that, if what you are saying is, 'Can the parliament not appropriately clarify the law?' especially if it is in the direction that the High Court appears to be moving anyway, I would say yes.

CHAIR—Mr Basten, thank you very much for making yourself available this morning. We appreciate the time that you have given to this committee.

[10.08 a.m.]

REYNOLDS, Professor, Margaret, Chair, Commonwealth Human Rights Advisory Commission

CHAIR—Welcome. As the former deputy chair of the committee, I am sure you are pleased to be back with us today.

Prof. Reynolds—I am indeed.

CHAIR—I am sure I do not need to tell you that we, as a committee, would prefer that you are able to give us all your evidence in public, but if any members of the committee ask you a question which you would like to answer in private, please let us know. Again, I am sure you realise that answer could be made public by order of the Senate. Thank you very much for sending us your submission. I am sure that members of the committee have had an opportunity to look at it, but would you like to make a brief introductory statement and take us through some of your remarks.

Prof. Reynolds—Thank you very much. First of all, I would like to apologise for the committee not having the submission much earlier. I, of all people, should realise the amount of reading that senators have to do, yet I only got it to the committee about this time yesterday. So I do apologise for that. The submission is not what I originally intended because I found my original intention was quite daunting. Originally I intended to prepare a comparative study of indigenous land rights policies from a Commonwealth perspective because I believe, for other reasons that I will discuss if we have time, that it was important that the committee view its current inquiry from the perspective of being a member of the Commonwealth. However, the reading I did served only to remind me that it is quite a huge task to compare a comprehensive coverage of what is happening across Commonwealth countries in regard to indigenous land policies. So I decided that it was absolutely beyond me in terms of my time and it was better that I put a general concept plan to you and some examples from Kenya.

You will say that it is unusual to try to compare Kenya with Australia – and I am not trying to do that. What I am trying to do is to say to the committee that, having been a member of this committee and having worked in a political environment for many years – though, of course, you know that last July on the dot of midnight I turned not into a pumpkin but into someone who is absolutely objective and no longer partisan; that is a joke – that, seriously, I wanted to try to take a political view. I recognise that this committee could sit here for many months without making as much progress as I am sure many members of the committee would like simply because there is debate over whether the legislation in response to the Wik judgment is consistent with our obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. The community – the experts – are totally polarised on that. I felt that there was nothing I could say in either a legal capacity or a practical capacity that could change that. We have in Australia, I believe, this impasse. You can line up eminent experts on both sides of the debate to say, ‘No, it is consistent,’ or ‘No, it isn’t consistent.’ Where do we go from here?

So what I have done is to try to say, ‘I’m not going to get into the question of the legalities or the amendments (a) because I am not a lawyer and (b) because I feel there has been so much polarised debate about this that we are not making very much headway. I presume that is one of the reasons that the whole question has been referred back to this committee. So what I have put forward is what I believe is, let us call it, a ‘bridging process.’ It is a process that allows time for further analysis of the situation.

First of all, I note that a number of members of the committee constantly say, ‘We have consulted indigenous people. We are always consulting indigenous people. They have different views, just as any members of the community have different views. There is a limit to how much consultation you can have.’ I would agree with that position. But what we have to look at is not so much consultation but dialogue: genuine equal partners in dialogue in resolving this impasse. There is a vast difference. I have been to consultations with a whole variety of organisations in my time, both in government and in opposition, and consultations can be merely that – opportunities for people to have their say and then the parliamentarians and public servants go away and still do probably what we were going to do anyway. I speak very much from personal experience of that, so I am not pointing the finger at any particular administration.

Consultation is about giving the community an opportunity to have their say, but there is no guarantee that their views are fully taken into account, and often they cannot be because they are not practical. Being in government, facing the realpolitik of how to administer legislation, is very different from sitting in a position like I am sitting in now and saying how things would be in the perfect world. So that is the first point I want to make: dialogue with indigenous people; for the government to be prepared not to talk about amending the legislation – though I might have a view that that is what many people want – but just to have an open dialogue about what the aspirations of indigenous people are and what the problems are with the act in its current form.

Yes, there were problems with the original legislation. This whole question is so new for Australia it is not surprising that we have had some difficulties.

The second issue that cannot be avoided – though I understand why any administration is nervous about it – is that this particular issue has been so closely scrutinised, both at home and in the international community, that we cannot avoid the option of inviting one or two representatives of the CERD committee to come and tell us why their view is as it is. Many people will not agree with them, others will; still others do not fully understand the reasons for their decision though they might agree with their decision. So, sooner or later, whether it is this committee, whether it is the government, whether it is representatives of non-government organisations, it would be useful to open up that dialogue with indigenous people to include an opportunity for a visit by one or more members of the CERD committee.

CHAIR—Professor Reynolds, we are hoping to get a videoconference link with a member of the CERD committee. At this stage we have not got a firm date for it but we hope it will be in the first week in the next sitting period.

Prof. Reynolds—That is tremendous. Thank you. That is why I have presented what I am sure to some may seem to be two irrelevant papers about the current experience of the problems, the conflicts that still exist. That is one of the reasons I chose the Kenyan experience. I could have chosen Canada, but it is probably a little further down the track in resolving some of these issues. Also, the situations are very different.

I presented these two papers on the experience of the Masai and the Samburu simply because I think it is necessary for this committee to provide the base of knowledge about what is happening in relation to indigenous rights, indigenous issues, the indigenous agenda, across the world, although I have talked from a Commonwealth perspective. We did have the video link earlier with the United States.

CHAIR—I seem to recall one of them still negotiating a native title claim after 46 years, I think it was.

Prof. Reynolds—Yes. I do not know if that is reassuring or very pessimistic.

CHAIR—Challenging, I think.

Prof. Reynolds—The fact that we are still working through some of these issues does not indicate that we have failed completely; it is that it is an ongoing process. I would recommend that the committee consider commissioning research on what is happening in other countries that are committed to the convention to eliminate all forms of racial discrimination and how their legislation or their policy practice, as the case may be, is consistent; indeed, it may not be consistent. It is a field that – from my limited research, I would want to emphasise – really has not been explored here in Australia – or in a number of parts of the world, from what I can gather. It seems that if Australia is being held up as a bad example, that we are not meeting fully our obligations under CERD, then we should know who is and how they are making their legislation consistent. That would be much more useful and much more persuasive probably, with every respect to local experts, than us just saying, ‘Their situation is different over there.’ We have international obligations. The visit of the Secretary General has confirmed that, and we have now been named as a model state which in one sense is a huge compliment and a well deserved one, but in another sense it puts even more pressure on us to maintain high standards.

In conclusion – and I know not all witnesses talk too much but I guess former politicians would be guilty – that is the essence of my submission. First of all, dialogue and not more consultation with indigenous people; secondly, notwithstanding the video link, I still think participation in that process by a CERD member would be useful, but we can discuss that; and, finally, extensive comparative research about how other countries are fully meeting or partially meeting their obligations under CERD. Thank you, Madam Chair.

CHAIR—Thank you very much, Prof. Reynolds. Just before you arrived we were exploring with the previous witness, John Basten, the question of how you make law which is substantively equal. I notice on the second page of your submission you talk about land and environment laws. I just want to explore with you, if I can, how we can ensure that a law is substantively equal. I think particularly of the recent High Court case involving Mr Murrando Yanner in Queensland with native animals and the opportunity that has now been confirmed by the High Court for indigenous communities to allow individuals to kill native animals which are highly protected for food. Presumably you would regard that as a special measure; otherwise surely it would be considered discriminatory against the rest of the Australian community who would face huge penalties if they were to do the same. Can you just expand a little on those three points on the second page of your submission in relation to that particular focus?

Prof. Reynolds—I think you are absolutely right. These are very complex sociopolitical issues. The immediate response of the general community is to say, ‘That is discriminatory; I am being discriminated against.’ It is a very difficult issue in sociopolitical terms. It is also – and I am not the best person to comment – difficult within the legal framework of Australia to accommodate essentially two laws. Many governments, particularly

the governments responsible for the north of Australia – the Northern Territory and indeed the states of Queensland and Western Australia – have made statements over the years where they have said, ‘We are not going to have two laws. We are not going to administer two laws.’ Yet there have been recommendations that that is precisely what we have to consider.

We do have to recognise the law of indigenous people and ways have to be found for the two to live side by side. It is an extraordinarily difficult legal issue, I am sure. It is probably even more difficult for elected representatives because indigenous people are a very small minority. It is difficult to explain to the majority that just identifies indigenous people as this small minority. The majority says, ‘Why should they have special measures and special laws?’ So it is a conundrum. I suppose that is one of the reasons that I have come up with the very broad brush approach to your inquiry because it is highly complex. The legal issues are highly complex. If we think they are complex, the sociopolitical issues are even more complex. So that is why I came from a different position to look at what I thought to be some fairly realistic, practical steps that could start to move the debate forward out of this polarised position.

CHAIR—We have also had evidence from two perspectives on the question of whether indigenous people would prefer to keep the current legislation, that is, the 1998 amended legislation, or whether they would prefer to go away from that legislation altogether and start again with the 1993 legislation. Having been a member of the Senate through both of those parliamentary debates, would you have a view on what you think indigenous communities that you have contact with would feel about that particular aspect of this inquiry?

Prof. Reynolds—I think there are many indigenous people who, frankly, would go right back and not support either pieces of legislation. There were great celebrations about the initial High Court decision because it was seen for the first time that the highest legal authority in the country was recognising an indigenous right. For many indigenous people, particularly those living in areas I am most familiar with, in country towns not just in Queensland but also in other parts of Australia, there has been enormous attention and focus on native title issues – the legislation, the debate, the conflict – and many of them say to me, ‘That Mabo bloke did the right thing but he caused us a lot of trouble.’ I am not saying they necessarily want to turn the clock back and not have the recognition but there is a feeling of: why can we not have the recognition without all this hassle? That is very understandable.

CHAIR—It is certainly also the case, as I think you would recall from some of our visits to remote areas, that the native title legislation raised expectations, confusing many isolated communities especially. I well remember the visit to the island of Mer, where that issue was raised with this committee.

Senator ABETZ—Are you familiar with general recommendation 23 of the CERD committee?

Prof. Reynolds—Would you like to read it to me?

Senator ABETZ—I will not read the whole lot to you but paragraph 5, which I was going to ask you to comment on, states:

The Committee especially calls upon States parties to recognise and protect the rights of indigenous people to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

Where would you draw the line in Australia in relation to ‘to take steps to return these lands and territories’? Would you say to pastoralists, ‘Sorry, you have to move off?’ If not, why not, given what clause 5 of general recommendation 23 tells us?

Prof. Reynolds—This is not dissimilar to a recommendation that was made by the CEDAW committee about ensuring that women owned their own land. There is, in that recommendation, a need for the dialogue I mentioned earlier. I am sure that the committee does not mean that suddenly, in the light of our own High Court decision, all land has to be returned. It is the manner in which it is written. It then goes on to qualify in terms of just compensation. We already have our own High Court’s interpretation of the situation. Government representatives had a dialogue of a kind with the CERD committee, but no-one from the parliament has the practical responsibility of managing this balance between the legislative response and the sociopolitical response out there in the community. While that reads very well from a justice perspective, if it were taken literally it could indeed be interpreted in a very open-ended way. I am certainly not of the view, nor do I believe indigenous people are of the view, that land, holus-bolus, has to be returned in that sense. I think it is more the spirit of recognition of that particular statement and then moving to dialogue. I guess the main difference – and I will try to be objective about this – between the 1993 and 1998 legislation was that, right up until the last minute in finalising the 1993 legislation, indigenous people were at the table.

Senator ABETZ—But other interest groups were not.

Prof. Reynolds—They had been, yes. But right at the end –

Mr CAUSLEY—Wasn't Rick Farley phoned at midnight?

Senator ABETZ—Rick Farley got that phone call: 'Take it or leave it, and you have got five minutes to respond.'

Mr MELHAM—He did not do too badly with section 235(7), though – the Wik safety net – that you voted against, that allowed renewals without a right to negotiate. So someone was at the table.

Senator ABETZ—I was not even around at the time, Daryl. I know you missed me.

Mr MELHAM—'You' as in the government.

Prof. Reynolds—Senator Abetz, in answer to your question, I personally do not believe that that can be interpreted and acted upon literally. I do not know whether it is put in there by the CERD committee from a very strictly international law perspective and then we must negotiate through our interpretation of it with indigenous people. But, no, I think anyone who has been through this debate would know that it could not be interpreted literally and acted upon.

Senator ABETZ—Eight months ago, you were still an Australian legislator. Putting yourself back in that role, what would you have told the electors of Queensland in relation to whether the CERD committee determination should prevail or the Australian parliament should prevail in the event that there was a dispute or conflict of opinion between those two bodies? Which one should prevail?

Prof. Reynolds—I do not think it is a yes or no answer. We have to do much more to persuade Australian citizens that they are part of the international community and that there are enormous benefits to being part of the international community. It seems to me there is a big conflict in the analysis of globalisation and trade and how these economic structures are so important for the wellbeing of all citizens, and then when we talk about issues relating to compliance with international conventions we change the argument a little.

Senator ABETZ—And you do not do it in reverse?

Prof. Reynolds—I would not comment on that. To answer your question quite specifically, I have always had difficulties with my electorate because I am seen as someone who often puts principles that may come from the international community on a par with what I am doing at the local level. Even I would never say that we can be dictated to from outside, but we do have to take notice and we do have to aspire to those high standards. If we had a better education of what international standards are, the community would be less dismissive of them. I was the one who was on the receiving end of the 'dirty laundry' criticism on one of the talkback radio programs because I was seen as supporting people going to Geneva and airing their grievances. That would never be my preferred option. My preferred option is that we educate people to understand the international standards. Australia is right up there, usually, with our international standards, so when we slip a little – be it in environmental terms or indigenous or gender or children's rights, whatever – we notice it and people like me and others comment on it.

Senator CROSSIN—In your paper, Prof. Reynolds, you give us some examples of the Masai people and a report that was commissioned by the World Bank. Is that what you might be putting up as best practice to us in terms of consultation with indigenous people?

Prof. Reynolds—I think I know enough about some of the difficulties experienced in African countries to not claim that it is best practice. It is an example of how a government and indigenous people are starting to try to work in greater partnership. It is also important, I think, to note the World Bank policy, which is why I included it, and I also – with permission, Madam Chair – would like to table a report on a dialogue on indigenous rights in the Commonwealth that was prepared as an outcome of a meeting we had last year. Again, members of the committee may say this is extraneous to the very specific focus that you have in regard to the terms of reference at this inquiry. But I suppose what I have been trying to do, in addition to making suggestions at a practical level, is to just give a broad brush of what is happening in other parts of the world and what eventually, if Australia is not able to respond appropriately to the present situation, will eventually come back to our doorstep.

For instance, it is proposed by the new Commonwealth Association of Indigenous People to present to the Commonwealth Heads of Government Meeting in Brisbane in 2001 a plan of action for indigenous rights across the Commonwealth because the Commonwealth, the very agent of colonisation, has never collectively tried to address the outcome of colonisation policies, and the time has come in the indigenous community where there is going to be that focus on the Commonwealth, just as there is already a focus on the United Nations. So I suppose no is the short answer. I would not say Australia has to do it like Kenya. I am saying that this is one way that a government is working; these are the problems they are experiencing and here are the conflicts. The World Bank has a policy. Australia needs to look at a number of other countries and come up with its own solution.

Senator CROSSIN—We had a hearing last Thursday night, and I think there has been a fairly false interpretation of those hearings in respect of where Aboriginal people want to move from here. That false assumption, I think, has been that Geoff Clark and Patrick Dodson last week spoke about doing away with the Native Title Act. In fact, that is not entirely what they said. I think they referred to the fact that the act should be renegotiated from the beginning and, when that is done satisfactorily, the current act repealed. Do you believe that that would be one option that should be considered?

Prof. Reynolds—This is very much why my emphasis is on dialogue, not consultation. My only feeling about using what we are stuck with at the moment is as to what extent can it be amended. As soon as you start, you have got the original legislation, you have got amendments, and you and I know what it is like in the Senate when more amendments come forth.

Although I obviously support the view that it is up to the indigenous leadership to say what is best from their perspective, I sometimes feel that if you try to work with what is on the table in a situation of total polarisation, you are still going to have that polarisation; whereas you could set it aside and have a dialogue about the CERD report, with someone from CERD explaining what all the recommendations mean and the government and indigenous community members saying, 'Well, of course, that is not quite consistent with how we see it in practical terms here in Australia,' et cetera. It just seems to me that it is an extremely controversial piece of legislation that has to be dealt with. I am not saying that it can be set aside forever, but I just wonder if initially a dialogue could be around CERD and the current basic aims and aspirations of indigenous people in relation to land issues.

Mr CAUSLEY—We have heard a number of witnesses put forward the assertion that Australia has certainly been embarrassed in the world scene because of the findings of the CERD committee. Wouldn't it be true to say that it was opponents of the 1998 act who took that course instead of expending all of their legal options within Australia?

Prof. Reynolds—I think if you read certain history books that I would not dream of mentioning the names of, if you read certain reports of the long history of indigenous and non-indigenous people appealing beyond Australia because they have not been able to get recognition in Australia, you would understand that frustration. It is not the first time that indigenous people or their supporters have gone outside Australia, and it is the right of any citizen to go through those international procedures if they choose to. It has been happening since century in some form or other. So it is a right of Australian citizens. When people feel frustrated and feel that doors have been closed, that is what they will do. You and I could say, 'If only they had come to this committee or to certain members of the government,' and of course there are always other things you can do within your own country. I have no hesitation in saying that that is what I would always prefer, but if people choose to go outside, it is their right to do so.

Mr CAUSLEY—So both are culpable – those who disagreed and the government? They have all dragged Australia down?

Prof. Reynolds—Yes. There is a tendency for government to be very sensitive about criticism from overseas – and all governments will be sensitive about criticism at home, naturally – and they will try to dismiss it. That is human nature. I suppose that is why the tone of my submission is not to get into the argument of who was right and who was wrong. There was probably right on both sides at different stages of the debate, but it all has ended up with this current situation. Let us set all that aside and start again, not in abandoning the legislation because there practical problems with that but in setting it aside in terms of debate and moving down a more consensus approach.

Mr CAUSLEY—I happen to agree on that particular point and I was going to explore that issue of dialogue because I am probably one of the few on this committee who has had experience on both sides. I grew up with Aboriginal people and I have also had experience with graziers, being a former Minister for Lands in NSW. I believe that the Aboriginal people that I know do not see a great benefit out of native title and they would like to get some resolution to it. Graziers are the same. They are saying that if it is access to land for hunting, gathering and religious rites, how do we get the lawyers and the egos out of this and settle it?

Prof. Reynolds—Perhaps I can demonstrate my total objectivity by saying that right back at the time of the High Court recommendation there was a recommendation that went through to persons in high office that there not be an immediate legislative response and that Australia actually – I have been saying this for a long time – look at experience in other parts of the world and move more down a regional agreements approach that need not necessarily involve legislation. All the lawyers said, 'Don't be naive, Margaret, of course we have to have legislation, and we have to have it quick.' What does a non-lawyer say? Right from the beginning I had grave reservations about trying to legislate to take into account the particular decision at that time. This was pre-Wik, but I knew about Wik and I knew Wik was coming. I had hoped at the time there might be a negotiated out-

come at the state level, but I had some reservations about whether that would happen. And so we got two complex pieces of legislation that, as a non-lawyer –

Mr CAUSLEY—Is it possible to cut through it now and get agreement? Could you talk to the people and the graziers, which is where most of the conflict is, and just get agreement?

Prof. Reynolds—That is what the Cape York agreement was all about. If you had seen the protagonists involved in Cape York you would have said, ‘Them talk? Them come to an agreement? Impossible.’ But it took time. There were harsh words said on all sides. The environmentalists were going to walk away at one stage. Everyone was going to walk away at different stages, but because of some wonderful personalities in leadership positions in that debate, they sat there, they came back and they sat there and they finally got agreement. My view is that if you look at all the money that has been spent on the response to the Mabo decision, how much better would it have been, and how much cheaper would it have been, had we funded mediation units with trained mediators, not politicians, not well-meaning people, but people whose skill is sitting and resolving conflict.

Mr CAUSLEY—I agree.

CHAIR—Thank you, Mr Causley. Senator Woodley has some questions.

Senator WOODLEY—It is difficult for me to ask questions on this when I agree with you, and when I agree with the submission. It is easier if I have some disagreement with the submission. But let me say by way of comment that I believe you are absolutely right, right from the beginning, on what should have happened. I do not think at the end of the day the legislation actually solves very much at all. This is the experience that everyone is having – individually as I visit Aboriginal communities, as well as the committee – as we move around on our travels. However, we have to deal with the legislation that we have in front of us, so that is what we are seeking to do.

One thing that I find very useful in your approach is the whole idea of a comparative study of attitudes to land, because there is a residue of very similar attitudes to land amongst indigenous people wherever you find them, and that includes in Asia as well, for instance, in the Philippines with the struggle of some of the indigenous people there. And of course, in terms of needing to solve these problems, you can look historically at not just 100 years but thousands of years if you look at the Palestinians and Israel.

CHAIR—I am sure there is a question in there somewhere, Senator Woodley.

Senator WOODLEY—I am sure there is. In terms of the comparative study that you have done, I wonder whether it is too difficult a question for you to reflect on that residue of attitudes to land which would inform Western civilisation and on some of the things you have discovered that would inform this debate as well?

Prof. Reynolds—I suppose the final quote is pretty fundamental to the attitudes to land:

Development is a conversation ... a conversation which recognizes the traditional values, beliefs and practices of the tribe ... [and] ... attributes value to things which the fields of economics and accounting have not yet learned to measure and count.

That is really at the basis of all the land conflicts we have and have had. As long as land is only seen in economic terms it will be the subject of dispute. I suppose that is why I chose that in conclusion. But it is true that so many conflicts throughout the world today and the past have been over land. Australia had its own conflict over land, but we were so much in the majority that we were able to push the actual conflict to one side and pretend it did not happen until more recently. Now, the legacy of that has come back to haunt us. I suppose that is another reason I have never felt that it is only a question of legislation. I am not so anti-lawyer – as my friend Daryl Melham will know – that I do not recognise that, sooner or later, certain practices have to be set within the framework of the law. But, as with so many disputes, I just wish we could get to the table first and get some compromise in agreement and then go to the lawyers, rather than the other way round; that is much more the natural way of doing things.

Senator WOODLEY—Thank you.

CHAIR—Thank you for making the effort to come to Canberra to give us evidence. It is very nice to see you again, and we appreciate the effort you have made in putting together the submission. Thank you very much indeed.

Prof. Reynolds—Thank you. Should I table this?

CHAIR—Yes, that would be very helpful.

[11.00 a.m.]

CLARKE, Ms Jennifer Ann (Private capacity)

CHAIR—Welcome. I am sure you would know that the committee prefers all evidence to be given in public, but if any members of the committee ask you a question to which you would like to respond in private, please indicate and we will consider your request. However, I should tell you that any answers given in private could be made public as a result of an order of the Senate. I understand you are going to give us some introductory remarks this morning on our inquiry and then some of my colleagues will have some questions for you.

Ms Clarke—I plan to address terms of reference A and B of the committee's inquiry. I am not really an expert in the practice of international organisations. For that reason, I thought I might leave the term of reference C to people with that kind of expertise. On term of reference A, I think that the finding of the Committee on the Elimination of Racial Discrimination is certainly sustainable on the balance of informed opinion. The nature of obligations imposed by the Racial Discrimination Convention on Australia has been extensively aired in this forum. I think the committee members even have some publications of my own before them about the nature of the obligations to provide equality and to refrain from discrimination against citizens.

I will not go into the detail of how those obligations arise. In the 1997 submissions to this committee, I suggested four ways in which discrimination, as outlawed by the convention, might have arisen under the 1997 bill that eventually became the 1998 amendments. Those four ways are: firstly, situations where the bill prefers the rights of Aborigines over those of non-Aborigines, without a relevant difference in the quality of the rights justifying different treatment; secondly, where the bill failed to protect Aboriginal property rights in a manner approaching the protection according other property rights, again without a difference in the calibre of the rights justifying that difference; thirdly, where the bill required Aboriginal property rights to be treated like inferior property rights of a different kind, without a justification for that kind of analogy; and, fourthly, where the bill failed to provide appropriately different treatment for Aboriginal property rights where there was a cultural consideration justifying that appropriately different treatment.

I think we can find all of those types of discrimination in different places in the 1998 amendments. I will refer to them when I refer to particular amendments. It might also be added that, in light of recent comments by the committee on the importance to non-discrimination practice of political participation by indigenous people in decisions affecting them, it appears that there may be a breach of non-discrimination standards arising out of the processes leading up to the Native Title Amendment Act – that is, a lack of consultation on the basic structure of the bill and on some of its detail. I will not say a lot more about that. I think there has been international law expertise before the committee about those aspects of political participation rights.

What I have prepared in my notes is some introductory background about the manner in which racial discrimination is assessed under Australian law, some detail about how discrimination arises under the 1998 amendments themselves, and then some fairly bare suggestions relating to term of reference B on what amendments might be required and what processes of consultation might be followed.

CHAIR—Would it be your wish that you make those notes available to the committee?

Ms Clarke—I can make the notes available to the committee later on. I informed the committee staff that I started writing my submission at lunchtime yesterday, so they are not quite in a form to be provided now, but I am happy to do that. Does the committee want me to address the manner in which discrimination arises under the amendments, or have you taken sufficient evidence on those issues already?

CHAIR—It is entirely your choice. We have an hour to hear your evidence and to ask you questions. I am happy for you to use it as productively as you believe we can.

Ms Clarke—I will say something brief about the manner in which we assess discrimination. I think it is possible in this kind of debate to underestimate the extent to which an international body like the committee takes a global view of Australian law. The Commonwealth, as the international state party, is obliged to ensure that there is equality before the law in non-discrimination under Australian law generally. That means we need to understand the amendments in the context of the legislation that they amend – the Native Title Act in its original form – in the context of the common law and in the context of state land and resource legislation.

We also need to know that the convention protects human rights rather than property rights legally defined within our legal system. That means that the position of native title holders under the convention needs to be assessed globally by reference to the treatment of other holders of property rights in general, not necessarily by comparison with the treatment of holders of particular types of property rights. I think that is a flaw in the amending legislation, that it sometimes assumes that it is appropriate to make the relevant comparison between

native title and the position of other people holding particular tenures under Australian law in particular areas of Australia. The fact that native title is more likely to exist in those areas of Australia is really an accident of Australian history rather than a feature of the cultural beliefs or practices that underlie native title.

One of the aspects of Australia's international obligations that might have been downplayed in the drafting of native title legislation is the fact that the common law of native title laid down in the Mabo decision was itself racially discriminatory in two important respects: the title itself was more vulnerable to extinguishment without compensation than other titles; and native title could be lost by abandonment of land in ways that other titles cannot be lost – they can only be lost by adverse possession. Strictly speaking, Australia should have accounted internationally for that defect in the law, and that is one of the reasons why the original legislation introduced a non-extinguishment principle in part.

When we think about discrimination under the 1998 amendments, we also have to think about the position of other landowners under state and territory land and resource regimes. As the committee is aware, they are all quite diverse but they have some common themes. One of the them is the existence of compulsory acquisition legislation, which, at the very least, provides notice of government's intention to acquire property rights – that is, advance notice – and compensation for the loss of those rights. We need to understand the loss of native title rights under the 1998 amendments in that context, where the treatment of native title diverges from those basic standards.

Mr CAUSLEY—Do the states have to pay compensation?

Ms Clarke—They are not under a constitutional obligation to pay it. As a matter of legislation, they generally do.

Mr CAUSLEY—New South Wales does not. It is 'just terms', but they do not pay compensation as a general rule.

Ms Clarke—My understanding is that that is what 'just terms' means in the land acquisition legislation.

Mr CAUSLEY—I can give you recent examples.

CHAIR—Perhaps you ought to explore that in questions later, Mr Causley.

Ms Clarke—In terms of comparing the position of native title holders with the treatment of other landowners under mining legislation, that treatment varies depending on the jurisdiction and the tenement type being granted. But we need to be aware that there are some jurisdictions in which landowners enjoy quite full rights of veto, at least in relation to the grant of mining tenements, and to keep that background in mind when assessing the calibre of the amendments.

I was pleased to see there were some important changes made to the 1997 bill and that they found their way into the 1998 act to ameliorate some of the discrimination that the 1997 bill contained. They included changes amending the impact of the confirmation of extinguishment provisions on coexisting native title on pastoral leases and excluding national parks and crown grants from that regime and also provisions allowing the Federal Court to overlook some extinguishment on Aboriginal land rights land and other reserves and on vacant crown land. So they are all good, and parliament is to be congratulated on those improvements. Unfortunately, though, they have not improved the basic structure of the act and, really, it is the act's basic structure that has caused the international committee to identify the legislation as discriminatory.

The problem for us now in thinking about how to deal with that adverse international finding is that the extensive changes to the future acts regime are the things that have most antagonised the committee. They are also probably the things that the government is most wedded to and in many ways would be the most difficult to repeal.

In terms of the provisions of the legislation, I will not say much about the Act's Racial Discrimination Act clause. I think it is widely accepted and it is admitted in the government's own commentary that this does not have a substantive operation. It cannot override discriminatory provisions in the legislation itself.

It is sometimes argued that because the legislation provides compensation, that it uses extensively a non-extinguishment principle rather than an extinguishment principle, and that it provides exhaustively and in great detail for certain procedures in the case of land use affecting native title, that these criteria might make the legislation less discriminatory. It certainly would be possible to find legislation more discriminatory than this where compensation was not provided, where there was more extinguishment and fewer procedures, but the important discrimination question is: would other landowners be subject to the same kind of treatment? Would their property rights be similarly vulnerable? In other cases it might be important to ask whether the distinctive nature of native title justifies the treatment that it has been given. So these kinds of criteria really do not let Australia off the hook in terms of the discriminatory application of the legislation. That is particularly so when extinguishment under the act is permanent, which it often is.

Most of the discrimination of concern to the international committee arises out of the future acts regime. There is though some concern with the extension of the original past acts regime to cover more land, particularly land subject to what are called public works. They include things like stock routes and adjacent land. Some of those provisions are extinguishing and so extinguishment under the Act has been extended. This is a simple preferring of non-Aboriginal property rights, or land uses, over the rights of Aborigines – that kind of discrimination without a justifying difference in the calibre of the rights.

In terms of the intermediate period acts, those land dealings which had breached the original Act's standard of the same treatment of native title as freehold, there has been some extended extinguishment and some permanent suppression of native title under those provisions. In relation to these intermediate period acts where they do not deal with mining tenements, I think we are dealing with a simple preferring of non-Aboriginal property rights over Aboriginal property rights. When it comes to the dealings with mining tenements, I think we are dealing with a failure to provide the same kinds of procedures that would have been provided to other property holders. There is a tendency to try to give notice to people whose land has already been affected by these rights. That is really not the types of processes you find under state and territory mining law.

In terms of the so-called confirmation of extinguishment of native title, the titles that are in the schedule and other provisions relating to previous exclusive possession acts, a large part of the schedule and these provisions deal with tenures that probably are already extinguished under the common law. We might say there is a problem internationally with that because we should not have a principle of the extinguishment of native title as we do not have a principle of extinguishment of other property rights. But more importantly, there are some provisions contained in this part of the act that allow for extinguishment where the common law probably has not provided it. I think we can say that about some of the community purpose lease provisions, some of the commercial lease provisions, and some of those provisions relating to public works, considering we are dealing with possible extinguishment over a very long period of history. Again, we are dealing with a simple preferring of non-Aboriginal property rights over those of Aborigines.

The most controversial provisions obviously are those relating to primary production, diversification and off-farm activities. In this area, again we are dealing with the simple preferring of the rights of some property holders over others – those of lessees and, in some cases, freehold farmers over the property rights of coexisting or neighbouring native title holders. To the extent that there are procedures provided in this part of the act, they are clearly inferior to those accorded to other landowners who normally would only be subject to compulsory acquisition process if their rights were to be downgraded in favour of someone else.

I think the provisions relating to management or regulation of water and airspace are quite clear. There was power under the original act for governments to manage water, fisheries and air space if they did so in a non-discriminatory way, and some states did pass legislation of that kind. The equality principle has been removed and now it is possible for governments to grant all kinds of rights that suppress native title and do not have a similar impact on non-Aboriginal property rights. The fact that there are opportunities to comment provided in this part of the act just shows us that the commitment to procedure is really inferior to the kind of commitment that might be provided to other people.

Some of the renewals and extension provisions are unlikely to affect native title in a sense that it is already affected by original tenures. There are, though, some provisions that allow extensive upgrading, including to freehold. Again, we are in the territory of preferring the property rights of non-Aborigines over those of Aborigines and denying the ordinary procedural protections that would be provided to other property holders – that is, compulsory acquisition process.

When it comes to provisions about reservations and leases, we are dealing with the possible use of native title land for purposes to which other private land would not be put – that is, public works and national parks. We are dealing with simple opportunities to comment in situations where the landowners, if they were to be vulnerable to that kind of treatment, would be subjected to compulsory acquisition processes. There are provisions relating to public infrastructure projects. The interesting thing about those is that they provide the so-called same procedural rights to native title holders as would be available to coexisting landowners. In the case of titles other than termed titles like pastoral leases, that is likely to be a full-blown compulsory acquisition process. The interesting question is whether in other cases there is a lesser process available to coexisting landowners and whether or not that process is appropriate to be used on native title. We need to ask the question – I do not know the answer without looking at particular tenures – about whether there is discrimination involved in assimilating the position of native title holders with the position of their neighbours, when really native title may be a fuller right than those with which it coexists.

I should say in this context that I think these provisions have probably been drafted on the assumption, based on comments in the Wik decision, that coexisting native title on pastoral leases is a lesser and barer form of title because some of its rights have been removed by inconsistency with the pastoral lease. One of the

things that we are getting in Federal Court jurisprudence that deals with these kinds of cases now is a suggestion that perhaps that kind of partial inconsistency is not known to the common law and, in fact, it is more likely that the pastoral lease will merely prevail over the native title rights and suppress them for its duration. So we cannot be completely sure, given the order in the Wik case about pastoral leases not necessarily extinguishing native title, that coexisting native title on pastoral leases is a very bare set of rights.

I probably have just one other thing to say about discrimination in the future acts provisions, and that relates to the freehold test. The freehold test itself is defined in a discriminatory way because it permits the creation of opal and gem mining rights over native title land when these are not necessarily permitted to be granted over other types of title. So there is an inferior protection of the rights in that context.

I think there are some interesting questions to be asked about the way in which the freehold test permits compulsory acquisition of native title. The language of the legislation gives the impression that it is only ever possible for governments to acquire native title rights to land compulsorily, where they also do so in relation to other property rights in the land. The defect in these provisions, though, is, that there may be land in which only native title rights exist, and it is highly likely to be land that is under demand by development oriented state governments. In those circumstances, compulsory acquisition powers can be used in a way that soaks up native title. For political reasons it would be unlikely that governments would use their compulsory acquisition powers on other titles.

There are other interesting questions that arise out of the way in which the compulsory acquisition provisions relate to the payment of compensation money by beneficiaries who are lessees. It seems to me that these powers in the act can be used in a way that might take both a native title and a lease title and then give the double set of rights back to a lessee in the act at public cost. This act prefers non-Aboriginal property rights over Aboriginal property rights. There are procedural defects in the way in which the acquisition of native title for so-called infrastructure facilities is treated. There is an objection and consultation procedure where other people would probably be subject to compulsory acquisition.

Beyond that, most of the discrimination I have referred to in that part of the future acts regime arises out of the simple different treatment of native title holders as opposed to other title holders to land. We do know, though, that the act retains the skeleton of a process that is designed to address the uniqueness of native title; that is, the right to negotiate process in the mining context and in some contexts where private acquisition is involved. The reality of the present right to negotiate is that it is now so bureaucratic and has so many opportunities for its disapplication, that it lacks an underlying coherent policy in terms of a response to the cultural uniqueness of native title. It is much more likely to respond to the agendas of the states in terms of the kind of land on which the right might apply, and that is particularly evident in the provisions about displacement of the right by state law. One of the concerns I have about the right to negotiate is the amount of litigation that is likely to arise out of its bureaucratic procedures, and this seems to me to be undesirable in terms of the provision of equality of the two people affected.

That is really all I wanted to say on the provisions which might have concerned the UN committee. There are obviously other parts of the act that are not of concern. I think it is generally accepted that the indigenous land use agreement provisions are helpful, and I would regard them as discrimination neutral, considering that they allow native title holders to deal with other people who want to use their land in ways that other property owners are able to do. There are obviously other technical amendments to the act that are of no concern in terms of discrimination law – the Brandy amendments, the basic structure of a registration test and matters of that nature.

In terms of term of reference (b), it is a pretty interesting question on what we should do now in light of the UN committee's finding. It is fairly clear, I think, that there does need to be a level of consultation relating to amendments to the act. The interesting question is whether that kind of consultation could occur in the way that it occurred with the original legislation in 1993 and whether that would be sufficient for the committee's purposes. I think it is desirable that that kind of consultation be broader, although obviously limited in its scope, perhaps relating to consultation of existing Aboriginal representative bodies.

In terms of the content of possible amendments, I think you probably will not have a witness who comes before you who wants to see another round of amendments to the Native Title Act. Among other things, they ruin my academic career. The costs are obviously very high and there is a large amount of bureaucracy involved. There are elements of the amendments that we need, of course. We need for claims to be commenced in the courts and we do not want them to be commenced in a way that infringes the separation of powers. Most importantly, I think, we do need strong and accountable Aboriginal representative bodies, and the absence of those kinds of bodies accounts for many of the defects under the original act.

My own view is that, given the nature of Aboriginal land ownership and the impact on it of mining in particular, we do need a straightforward, nationally accessible right to negotiate that responds in some way to the

cultural sense of land ownership. Maybe we do not need it in all cases, maybe we do not need it in the exploration case, but I think it is probably needed in the case of mining. If we are to stay with the arrangements for commencing claims in the courts and having access to a right to negotiate, it is probably desirable to have some kind of reasonable registration test for claims to ensure that the right to negotiate is not abused. So I think all of those aspects of the amendments are desirable.

The real difficulty, obviously, relates to the government's commitment to the most discriminatory aspects of the future act's provisions. There are probably some things that could be done to remove some more discrimination from the act, but I am not sure that they would appease the CERD, even though they would be probably more acceptable to the government. I have always said, for example, that we do not need a concept of extinguishment in native title law. It is enough to have native title suppressed on the non-extinguishment principle. There is no connection between extinguishing native title and upholding the security of other property rights if you have a principle about which set of rights prevail over the other.

I have always said that we ought to replace the common-law extinguishment principle with a non-extinguishment principle as well. Some lawyers will try to tell you that we might run into trouble with other common-law doctrines that apply to the kinds of property right – things like the doctrine of waste, which is about what happens when one person has property rights and another person has them later in time and how they are accountable to one another. In my view it is clear from the court decisions that those principles do not apply to native title, that native title is a unique system and that we do not need to use those principles that derive from 1066 and Roman landlords who interpreted it. But even if there are concerns about those kinds of considerations, they can easily be excluded by statute.

Beyond that, I think it is always important to consider the possibility that we can do these things more cheaply and in a more straightforward way. I will say again that I think the Commonwealth should consider facilitating or encouraging direct transfers of land into indigenous hands where it is clear that claims will succeed, provided that the detailed identification of native titleholders can be carried out by indigenous representative bodies under a structured process that frees them from unnecessary political pressure from particular claimant groups.

There does not seem to be a good practical reason that areas of crown land in places like Western Australia, that are of considerable traditional significance, ought to be the subject of contested claims about traditional ownership where those claims are likely to succeed. Obviously not all governments are equally antagonistic to these claims. I think we have seen an example in the Alice Springs land claim where the Northern Territory government has been quite helpful in terms of the determination of traditional ownership of land. At least while we have crown land we are already in a position where the courts can disregard extinguishment, if there is Aboriginal occupation, and just focus on traditional ownership.

If we were to take the next step and transfer this land to Aboriginal hands directly on a crown grant of title similar to that of native title, we would avoid another problem, which is that it is almost inevitable that the lawyers for the parties in these cases end up using these claims in order to establish precedent for other cases. So although the Alice Springs land claim has been resolved quite helpfully in terms of that particular claim, there is an incredible temptation on all sides to try to get better principles on appeal that might be able to be used in less watertight cases. Land transfers would remove claims from that kind of pressure.

I was thinking on the way in about ways in which you might upgrade the indigenous land use agreement provisions and create more incentives for people to use them. They are obviously where we can get around some of the difficulties of the legal process. It is already possible to use these provisions in preference to other provisions but there is not really an incentive to do so particularly for governments and other land users that can see that they can get what they want more directly under the other provisions. I cannot think of a set of incentives right now. I started wondering whether it might be possible to provide them under tax legislation, better deductibility for the costs associated with involvement in indigenous land use agreement, as opposed to another process for the granting of a future act. Those kinds of suggestions about incentives are things that we should be pursuing.

There is an idea abroad perhaps that we should forget about the Native Title Act and revert to the Racial Discrimination Act. That might keep the UN committee happy but I think it might leave us with more problems than we anticipated. That particular strategy would involve a lot of litigation and that includes litigation by claimant groups attempting to injunct the use of land because they do not have the kinds of opportunities that the right to negotiate provides them with. Given the history of the legislation, it is probably better that we think about there remaining a Native Title Act on the books, but ways in which we might ameliorate the discrimination in it and perhaps create some incentive for its better operation.

CHAIR—Thank you very much. Just on the subject of ideas that you might have, have you got any thoughts on what the government could have done, post the Wik decision, in relation to pastoral leases and the

thought that there could be a great deal of uncertainty, let us say, before the 1998 legislation in terms of invalid grants? Have you got any thoughts on how the government could have acted during those couple of years in any other way than they did that perhaps might have been acceptable to CERD?

Ms Clarke—It is a difficult question because we keep redrawing the line in the sand in terms of how land administration occurs and how that relates to discrimination law principles. It seemed to me that we could anticipate, given the comments of the courts, the possibility that the Wik decision would go the way in which it did. So there was an element of unreality about the suggestion that the Wik decision could only go in the opposite direction. I think the courts generally regarded it as an open question and said so in several decisions. In light of that background obviously it was desirable that state governments, in particular, comply with the detailed provisions in the Native Title Act. They knew on the basis of the earlier decision in the Mabo litigation that the only result of not complying could have been invalidity of their land dealings.

Faced with fairly widespread invalidity in some jurisdictions, what should the Commonwealth do? There are two ways of looking at it: either insist that governments comply with the law – and the consequences of not doing so are problematic – or find a solution to the problem. One solution that I think came out at one point in Western Australia was to ask everybody to apply for the tenements again but give each an order of priority so that each person knew that other people were not jumping the queue. That is obviously important for miners to know that they have preferential access, say, to an ore body in those situations.

If you had to go with the kind of solution that has been found in the intermediate period act provisions, I would have suggested do not have any extinguishment. If you must legislate to validate things that were previously invalid, even though I think governments are responsible for that invalidity, then at least employ the non-extinguishment principle extensively and do not extinguish native title. It is my view that there is not a connection between the extinguishment of native title and the certainty of other titles. The connection is provided by a principle of one prevailing over the other. That is where we get certainty from.

CHAIR—Thanks for that suggestion. Mr Melham, did you have any questions for Ms Clarke?

Mr MELHAM—Yes, thanks. Ms Clarke, you prepared a paper for AIATSIS back in April 1997. It was an issues paper – No. 16.

Ms Clarke—That related to the 1996 proposed amendments.

Mr MELHAM—Yes, I know. But even back then in terms of those amendments you talked about the success of likely complaints to the United Nations as being possible. It would be fair to say there was informed opinion around that the way the government was proceeding could bring them into conflict with the CERD committee.

Ms Clarke—Yes. I think that is right.

Mr MELHAM—You also opened up by saying that the CERD committee's findings are certainly sustainable.

Ms Clarke—Yes.

Mr MELHAM—Is that your view in terms of informed opinion from people that you have been speaking to who have got some knowledge in the area?

Ms Clarke—I think you will find that it is opinion supported by the international lawyers who know a lot more about the detail of the international standards than I do, and it is widely supported by people who know something about the act.

Mr MELHAM—So in terms of restoring Australia's international reputation or not allowing it to be further damaged, is it your view that the government should not adopt a 'do nothing' approach but there should be some response to the CERD findings?

Ms Clarke—We certainly cannot remove the problems with our international reputation by doing nothing. So, in terms of wanting to deal with that problem, we do need to do something. Whether or not we want to deal with the problem is another issue, of course.

Mr MELHAM—But I think the thrust of some of your suggestions are that the non-extinguishment principle is something that should be investigated by law makers at the moment because it does not conflict with certainty – in other words, all that fear that was around that people would lose their backyards or their farms as a result of the Mabo and Wik decisions. A lot of that, in your view, was unsustainable.

Ms Clarke—It was unwarranted.

CHAIR—I noted in your introductory presentation that you made the comment that you thought Mabo 2 was discriminatory. Given that CERD found that it was not, what do you think CERD's view should have been, with the benefit of hindsight?

Ms Clarke—It is always interesting thinking about what goes on in international committees. I have never been in any United Nations committee hearing and I do not know how they behave. Obviously, there is some distance between them and the domestic legal system that sometimes inhibits their understanding of what is occurring. I think in 1993 the people who went before CERD probably convinced the committee in the way that they convinced a lot of other people in Australia that the Mabo decision was a fabulous thing. It does have a fabulous dimension if you are interested in native title – that is, it does recognise rights that were not recognised before. But it has the discriminatory extinguishment within it.

That element was not so strongly emphasised in 1993 before the UN committee because the original act ameliorated the extinguishment doctrine with a non-extinguishment principle for the future. That was quite significant in terms of the overall package. There were some discriminatory aspects of the original act but it is probably the case that the UN committee either did not notice them or did not think they were important because other aspects of the original act like that non-extinguishment principle, like the right to negotiate, like the land fund and perhaps like the proposed social justice package were treated as outweighing the discriminatory elements that were really confined to the past acts regime.

CHAIR—Picking up the point you made about the land fund reminds me that I was going to bring it up. In your introductory remarks you talked about the transfer of land. Of course, in my state of South Australia, a very large tract of land was transferred back in the 1970s – the Pitjantjatjara land. Do you still believe that there should be transfers of land in that way, notwithstanding that each year the Indigenous Land Corporation has an allocation of \$45 million, or thereabouts, to purchase land for dispossessed people? Is your comment based on trying to minimise the legal costs of so doing? Should the threshold test be simply the basis for that transfer? In other words, if they have passed the threshold test in their lodgment of an application to the tribunal, should the tribunal then determine that and make the transfer? Should there still be hearings?

Ms Clarke—In this area we do have to watch out for some separation of powers problems. I am suggesting transfer in order to avoid them. You have to talk Aboriginal people into accepting a crown granted title that is like native title. Otherwise, if we start having a legislative direction to a body like the Federal Court to find in a particular way, we might end up transgressing the separation of powers. My comments about land transfers for claims that will succeed are mainly based on the idea that we might save some money and hassle that way. If you looked at the cost of things like the Miriuwung Gajerrong claim or the –

CHAIR—Yorta Yorta.

Ms Clarke—Alice Springs claim. Yorta Yorta was a claim that was really always bound to fail, whereas those other two were bound to succeed on the traditional evidence. Where they related to areas of crown land, it may have been desirable just to transfer the areas over and save the litigation costs.

I have two views about the allocation to the Indigenous Land Corporation. One is that they need to be using some of their money for land management. We probably always underestimate how much money ought to be used for that purpose. Secondly, I regret the fact that the indigenous land fund legislation does not make explicit that the purpose of that fund is to fund purchases of land for people who are unable to benefit from native title principles because of historical removal or historical dispossession. I think it is highly desirable that we use the land purchase component of that money for those purposes and that we think about using things like simple land transfers in the case of people who clearly are able to prove native title. But I would not underestimate the cost of land management. I think that if we do not allow the Indigenous Land Corporation to spend on that, we will have some serious environmental problems, among other things, in the future.

CHAIR—We have taken evidence from the Indigenous Land Fund. In fact, we took evidence from them just last week. They are very clearly expecting to run many of those properties at a significant profit in due course. Presumably one would expect that some of those profits would be put into correct land management procedures as well as a component of the capital. But it is an issue that is being addressed by them and it is quite a difficult challenge for them. We have explored it with members of the ILC on a number of occasions. I move to other members of the committee. Senator Woodley, did you have questions?

Senator WOODLEY—No. I think that the presentation at the beginning answered most of mine.

Mr CAUSLEY—I have a few. Ms Clarke, wouldn't it be fair to say that you live in an ivory tower well away from reality?

Senator CROSSIN—I am not sure that is fair.

CHAIR—Just a moment, Senator Crossin. I am sure Ms Clarke is able to answer that question for herself. She does not need your assistance.

Senator CROSSIN—She might want to comment on the relevance of it.

CHAIR—She may wish to do so, but I do not think you need to.

Mr CAUSLEY—You can be a witness, Senator Crossin, if you want to. I would like to ask you some questions.

CHAIR—Mr Causley, that is not helpful.

Senator CROSSIN—Perhaps we won't insult our witnesses.

Mr CAUSLEY—Let me follow it up. At the core of some of the arguments here was the right to negotiate and the future acts, in particular. I took from your comments that you say that the 1993 act – and I think it is what CERD is asserting too – is better than the 1998 act on discriminatory grounds. But as legislators, not lawyers, we had a problem because this committee heard evidence on the 1993 act which showed it allowed any individual of Aboriginal descent to claim any piece of land and immediately have the right to negotiate. That was a particular problem.

Ms Clarke—I support the registration test which I think deals with that problem.

Mr CAUSLEY—It does. Therefore, those people who have then proved that they have an association with that land have the right to negotiate. I do not think that has been wound back substantially?

Ms Clarke—I think you will find that the registration test is able to exclude people who make unsupportable claims in relation to particular areas of land. As I said, I think it is one of the features of the legislation we ought to retain.

Mr CAUSLEY—On the validation of title, there are a myriad of titles across Australia. If you want to have people prove their native title right on every title, how long is that going to take, and what is it going to cost?

Ms Clarke—I am not sure where the question is leading.

Mr CAUSLEY—The validation took into account what the High Court was saying where in the Wik case, in particular, the granting of a title would not extinguish but override native title. What the schedule was intended to do was to put titles that were considered overriding title by the best legal advice the government could get. If we want to go back and try and prove native title on every lease or title, what is the practicality of that?

Ms Clarke—I am not opposed to the idea of having a schedule of interests that are accepted as overriding native title. I am just suggesting that we do not need to extinguish native title in those circumstances. We might employ a principle of non-extinguishment that ensures the security of the crown granted rights in an equally acceptable way. I do not have a problem with the detail of what has been inserted in the schedule in terms of whether or not the government sought to establish what the common law had extinguished. I think the difficulties I have identified are actually in the act itself. A broad definition of community purpose lease, commercial lease and public work, which really are not legal concepts, could catch a whole lot of things where common law principles have not extinguished native title. Maybe you say, 'So what, it doesn't matter?' But, the questions today relate to whether or not there is discrimination enhanced by the 1998 amendments. I think there is more extinguishment than the common law would have provided, so the answer to that question is yes, regardless of whether you think it is efficient land administration.

Mr CAUSLEY—I think you also said that you believe that native title was a more fragile title than other titles granted to other people.

Ms Clarke—That is the common-law position.

Mr CAUSLEY—Right. That makes a difference because other Australians do not have a common-law right in land, do they?

Ms Clarke—No, they do. Freehold titles are protected against that kind of extinguishment under the common law.

Mr CAUSLEY—They are not really because state governments are diminishing freehold title. They have state planning laws which overrule freehold title.

Ms Clarke—We agree that everybody is subject to those regulatory regimes – they apply to native title as well as to other property rights.

Mr CAUSLEY—Given the fact that governments are elected to govern, and they have to govern for practical reasons to see that the country continues to progress and to try and ameliorate social discord, what should come first: the right of the government to govern or the United Nations?

Ms Clarke—The questions I am asked today are about whether the UN finding is sustainable and what ought to be done if we decide to do something about it. They are not about rights of governments to govern.

Mr CAUSLEY—But if we did what you are suggesting, and took note of what the CERD committee was saying, then we would be back to social conflict and disruption?

Ms Clarke—As you can see, I have made suggestions that I think would improve the position of the existing legislation and make it less discriminatory. I have said they may or may not please the CERD. Those suggestions about things like land transfers and a greater use of the non-extinguishment principle, for example, make the legislation less discriminatory. Maybe they will not please the CERD; I do not know. But they are going in the right direction and perhaps they are worth considering for those kinds of reasons.

Mr CAUSLEY—Given that the 1998 act gives Aboriginal people a right that other Australians do not have, shouldn't it be considered as a special measure?

Ms Clarke—Are you talking about the right to negotiate?

Mr CAUSLEY—If we go back before 1993 when there was no act, the High Court had come down and said that, yes, they believed there was a common-law right of native title which was not protected by statute. Given the fact that the CERD committee have said that the 1993 act was not discriminatory – but they are looking in isolation at the fact that the 1998 act did wind back some of the provisions in the 1993 act – the 1998 act still gives Aboriginal people a greater right than other Australians in that area. So isn't it a special measure?

Ms Clarke—Why? Are you suggesting this because it is a different set of rights?

Mr CAUSLEY—No, it is recognising their common-law rights in native title.

Ms Clarke—But other people's common-law rights are recognised in Australia as well, either by the common law or under the statute that authorises –

Mr CAUSLEY—But not in land title.

Ms Clarke—I think you will find they are. There are principles in the common law, for example, that the Crown cannot derogate from a crown grant of freehold title unless it has an explicit parliamentary authorisation to do so.

Mr CAUSLEY—The parliaments do. They are interfering with title more and more. As far as leases are concerned, there are always conditions on leases.

CHAIR—Mr Causley, I am not sure that this is a productive line of questioning really.

Mr CAUSLEY—I want to know about a special measure. That is what I am asking.

CHAIR—Ms Clarke, you might like to reflect on that question and give us an answer in writing.

Ms Clarke—All right.

CHAIR—There is no requirement to answer now if it is something you would like to think about. We do appreciate the personal effort you have made to come before us today and the fairly comprehensive presentation and written material that you have which the committee will find very helpful in its deliberations. Thank you very much for coming today and for spending the time to prepare the material for us.

Ms Clarke—Thank you.

[11.52 a.m.]

LEWIS, Mr Peter, National Director, Covenanting, National Assembly of the Uniting Church in Australia

CHAIR—Welcome, Mr Lewis. Thank you for coming.

Senator WOODLEY—In the light of what Mr Secker said yesterday, I would like to declare that I am also a Uniting Church minister.

CHAIR—I think we may have a case of divine intervention here!

Mr MELHAM—If we are making declarations, Madam Chair, it is probably appropriate that I indicate at this stage that I did communicate to the CERD committee in their original determination suggesting that they do consider the amendments and also expressing the view that I thought they would benefit from a visit to Australia. I know Senator Woodley did so in similar terms. That is just for the record.

CHAIR—Goodness, Mr Melham, for a moment I thought you were going to tell us that you were a Uniting Church minister!

Mr MELHAM—No, I will stick to my Maronite Catholic background.

CHAIR—Mr Lewis, we do prefer that all evidence is given in public, but if any member of the committee asks you a question to which you would like to respond in private – that is, in camera – please indicate that you would and we will consider that request. Even if we were to accede to that request, I should tell you that your answer could be made public as a result of an order of the Senate at some future time. We do have your submission. Are there any introductory remarks you would like to make before we move to questions?

Mr Lewis—I thank the committee for this opportunity to speak before you and I would like to make some introductory comments. In a sense, the paper forms our argument in terms of your terms of reference, but it is important to put before you the context both from the church's view and also how we see it in relation to where the nation is going. It is important for us to say that, as the Uniting Church, we represent a body of Christian people and that one of the important aspects of our faith is the fact that we remember, and we maintain our connection with the beginning of our faith with the stories of the Hebrew and Christian Scriptures by remembering who we are before God. We do this in our worship, in our commitment to be disciples and as communities hooked into God's mission. We remember the texts of our faith and celebrate our communion and our connection with God by remembering our connection to Christ's last meal with his disciples. Our remembering defines who we are and who we will be. Without remembering, our faith will die and our connection with God may be lost.

But we recognise that we are not the only people who practise remembering to keep themselves alive. Indigenous people throughout the world also maintain their self-understanding by practising remembering in stories, ceremonies and customs. So as Christians in Australia we live in a country where 'dis-remembering' has been practised for over two centuries. As a colony we were taught to forget the humanity of the first Australians. Non-indigenous Christians were taught the lie of terra nullius, empty land, and indigenous Christians were taught to forget who they were before the colonials came. We non-indigenous Christians have been taught to forget the battles, the dispossession, the diseases, the disconnections. So for us to maintain a terra nullius faith and a terra nullius theology in this land is to maintain that cult of disremembering. Such a practice, we believe, is a denial of God's love and purpose for us in this land.

As a people who were called to remember the death and resurrection of a man who was killed by forgetful leaders of Judaism and the colonial leaders of Rome, we need to not only respect the remembering of other peoples, we are called to see Christ's presence in the spirit amongst the first Australians who have been disconnected by a forgetful church and an invading colonial power. That, in a sense, gives you a taste of our theological position.

The church has been involved in missions throughout the past two centuries. The way we are structured we have an association of indigenous church members called the Uniting Aboriginal and Islander Christian Congress. It was formed in the mid-1980s in terms of how the church was trying to re-understand our relationship and redefine our relationship with indigenous people, so it was based pretty much on a principle of self-determination. The church seeks to act in solidarity with both our indigenous church members but also with indigenous people throughout Australia.

In the current context, it is important to note in a broad sense that we have gone through a decade where there has been much hope, but I suspect a hope that has been continually disserved by negative political machinations and, at times, government inaction. There is a fear that reconciliation, which is an important pro-

cess and something we hope to celebrate soon, can be a mere pretence when you look at things like the deaths in custody recommendations, many of which have not been followed through, the stolen generations recommendations and, speaking to the issue we are looking at today, the fact that native title has been impaired, we believe, by the Native Title Amendment Act.

In our submission to the Council for Aboriginal Reconciliation on the draft document for reconciliation, we stressed the need for a process of negotiation to be established to address issues of coexistence and indigenous rights. The submission was based on decisions by the standing committee of the church's National Assembly. We believe that native title has been in a sense discovered in the nineties as an opportunity to exorcise the ghost of terra nullius, but we believe that the current act in many respects is actually a product of that ghost, in particular the lack of acknowledgment of a prior legal system in relation to the land. While the federal government appears to accept and adopt economic policy in the context of international economic instruments, authorities and standards, for it to perhaps disregard the decisions of CERD seems to be an imbalanced approach. If we accept the economic international principles, we should also accept human rights international principles.

Therefore, the main body of our submission suggests that, firstly, we need to go through a process of taking on board the comments of CERD, establishing an appropriate process of negotiations with indigenous leaders in order to address issues of racial discrimination in our nation's legislative approach to native title, amending the Native Title Amendment Act so that it is no longer inconsistent with the convention and ensuring that a process of negotiation is established concerning the coexistence of indigenous and non-indigenous systems of land ownership.

To explain what we are getting at with that three-pronged process: before suggesting what sort of amendments should be necessary to make the current act no longer racially discriminatory, a process of negotiation needs to happen first. Once that has gone through, the act could be amended according to that negotiation. The third stage, in a sense, is what the church believes is important for our nation to go through the actual process of looking at the different systems of land that operate. Understanding the indigenous system of land is something that has not been totally removed. It is something that needs to be respected and dealt with. Both this committee and also the parliament have tried to deal with a lot of the issues – cross-cultural issues, which are not at all easy to deal with. But we believe that it is necessary to have the dialogue and the conversations to try and get to a stage where reconciliation does not become just a cover for trying to feel better about each other, but rather looks at and addresses issues of injustice and disadvantage. That is probably enough in terms of a preliminary comment. Our actual argument is in the submission, so I will close with that.

CHAIR—Thanks very much, Mr Lewis. At the bottom of page 1 of the actual body of your submission, in the third dot point you say:

Ensure that a process of negotiation is established concerning the coexistence of Indigenous and non-indigenous systems of land ownership.

How do you see the indigenous land use agreements which are now expanding in their popularity as fitting into what is clearly a process of negotiation anyway? Do you see ILUAs as being a fundamental part of that process?

Mr Lewis—The short answer is yes. It is part of that process. In a sense, this is a major task that needs to be handled at the local, regional and national levels. But for it to occur in the context of the current act, we believe it creates an imbalance in those discussions.

CHAIR—On another page I notice you also address the expansion of the rights of the pastoralists. Unfortunately, they are not numbered, so I cannot assist you. You talk about the opportunity for pastoral leaseholders to upgrade their leases – the level of primary production – which of course many of them had already done in one way or another whether they were simply growing a paddock of feed. Do I read your comment there to suggest that that particular aspect of the Native Title Act 1998 should be suspended?

Mr Lewis—We believe that we would need to have negotiations to look at that issue.

CHAIR—But to have negotiations suggests that in some way the government should walk away from that particular aspect of the amendments in 1998. I just wonder, if we were to have negotiations, should we have negotiations based on leaving what is there or are you talking of compensation? What do you actually mean?

Mr Lewis—That is a fair comment because in a sense what the church is getting at is that the entire situation is discriminatory. The difficulty is to try and unscramble the colonial egg. How do you do that? I think the best process would be to start conversations – not negotiations because maybe that sounds too legalistic – based on trying to get that understanding of how each cultural group relates to land and understands its land laws. I certainly think that the problem with the expanding of the rights of pastoralists in terms of the primary

production is discriminatory and I would imagine it would need to be removed. But it is best not to do it bit by bit. I think it would be better to be an outcome of those negotiations.

CHAIR—One of the things that your church – and I am sure many other churches – found in regional and remote Australia was the degree of racial tension that was brought about during both the post-Mabo 2 decision and before the legislation in 1993, and during the process of the changes that were negotiated in 1998. It just concerns me, on reading this, that if I am to take literally what you appear to be saying here, you could be suggesting that we should require pastoralists to walk away from something they may have been doing even for generations now, in good faith, believing that they had the opportunity to do that. We confirmed it in 1998 legislation. I cannot believe that the Uniting Church would want to bring about a return to any circumstances that disadvantaged both groups in regional and remote areas of Australia. I am sure you don't mean that.

Mr Lewis—The problem is that the basis for upgrading one set of rights as against another set of rights is in itself discriminatory. We believe that that action was unjust.

CHAIR—And therefore should not any longer continue?

Mr Lewis—There needs to be a process to make sure that that problem is addressed, that injustice is addressed. The issue in terms of rights that everyone has – and in the case of pastoral leasehold owners, the terms of their lease, not what they thought they were able to do according to the terms of their lease – is the whole legal problem. That is why we do not say repeal all the amendments as necessarily a first point. The first point is that stage of negotiation. Through that stage of negotiation, that community involvement from all the different groups with an interest in the land, perhaps a much better framework can be established.

Senator WOODLEY—I wanted to pick up a little bit more on the business of negotiation, or whatever word we use. You heard some of former Senator Reynolds's evidence. I thought she gave pretty helpful evidence. She talked about dialogue as needing to precede any legislation. I am aware that the Uniting Church has involved itself in very significant dialogue over many years with indigenous people on these issues. I wonder if there is some help you can give the committee out of that experience. I know that the Uniting Church certainly does not claim that it always got it right because of dialogue – I think it would claim the opposite – but at least that dialogue, particularly with the Aboriginal Congress, has meant that there are insights that might be helpful to the committee.

Mr Lewis—When I introduced myself I said I was the National Director for Covenanting, which may sound a strange term to members of the committee, but it has a specific meaning in Christian terms. The covenant basically describes the relationship and the commitment between ourselves and God, ourselves and Christ. In the Australian context, the Uniting Church has used that term to describe our relationship with indigenous people. It is a firm and binding partnership where we try and act faithfully towards each other.

Through the church's historical experience in terms of what happened at the missions and the formation of Congress, we have suddenly discovered that by listening to our indigenous church members we get a better understanding of what it means to be Christians in this place. Certainly, one of the strong things that has come out from that open language, and trying not to be the dominant culture in those discussions, is to listen to what their relationship to land is about and the various complexities that exist.

I was fortunate and privileged to travel to the Territory last year when I had various discussions with indigenous leaders. I got an insight into what their land system is about and the fact that we make presumptions about their land systems which are just untrue. One of the presumptions is that their relationship to the land is a simple relationship or a nomadic relationship whereas it is quite complex. In fact, you could best describe it in terms of a series of trade alliances and relationships that are based in law. There is quite a complexity as to what groups have what rights or what parts of land, and the fact that it is not just a spiritual head thing; it is actually quite a legally defining thing and part of the creation of their identity. Out of those discussions we are growing in our understanding of what it is in terms of their indigenous relationship to land and that they do have a legal system that for us culturally is quite strange. Therefore, there is a need for cross-cultural education in order to even start the conversation. As I say, my time there was brief. It would probably take many years to fully understand the glimpses of understanding that I gleaned from that visit.

Senator WOODLEY—It does take many years. After 40 years I am not sure that I am very far advanced in that understanding; nevertheless it is something that you do not give up on. One of the other comments that is strong in your submission is that indigenous and non-indigenous land systems should be able to coexist. You have just said that some of their understanding of land seems strange to us; nevertheless, there have been some experiences where those two systems have been able to be integrated and in which the church has been involved. You might like to comment on that. I do not want to go into the realm of theology but, in terms of Christian faith, there has been an incredible amount of work done by indigenous people in reinterpreting theology in terms of cultural norms. You might want to comment on the two systems of land use and how they might be parallel.

Mr Lewis—I think in broad terms the ability to make them parallel existent is, firstly, for there to be mutual respect for those systems. Historically indigenous people have entered into new relationships with other groups that have perhaps come across their territory, so their system of law has been subject to development coming from that sort of contact. I do not have the evidence to actually say when and where, but certainly the complexity of trade relationships between different nation groups and clan groups demonstrates that whenever there has been a new group introduced into a region that there is then the ability by the indigenous owners of that land to enter into some sort of land coexistence agreement. It could be a simple process of trying to, firstly, understand how that practice was done, and then to seek to enter into those agreements, to enter into those discussions about how various and different interests can be shared. The difficulty is that our land system was imposed on the presumption that there was no other land system. As I said before, it is very difficult to unscramble that. An appropriate process of negotiation which involves cross-cultural education may enable those discussions to happen. Their success would depend on the goodwill of the participants.

CHAIR—And presumably indigenous land use agreements are part of that process.

Mr Lewis—They are certainly part of it, but I think that, because they are in the context of the wider implications of the bill, there are difficulties in how that thing would progress.

Mr SECKER—Again, it is not numbered, but I think it is on about page 2 or 3 of your main report under the ‘Areas of discrimination of the *Native Title Amendment Act 1998*’ which is the heading at the top. Under ‘Confirmation’ you talk about the provisions introduced in the Native Title Amendment Act. You say:

These provisions deem that certain interests amount to exclusive possession – freehold estates, exclusive agricultural and pastoral leases, commercial, residential and community purpose lease ... and that these interests permanently extinguish native title.

Are you suggesting that the Native Title Amendment Act be further amended to allow native title claims on freehold land, households and commercial businesses?

Mr Lewis—The issue there in the body of the argument is the permanent extinguishment of native title. It goes on to say:

This ignores the possibility of the survival or revival of native title and occurs regardless of whether the extinguishing interest continues to, or no longer does, subsist on the land.

The issue there is that of the permanent extinguishment rather than an issue of prevailing rights.

Mr SECKER—So you are suggesting we should remove the permanent extinguishment on native title claims on freehold land, and so on?

Mr Lewis—Again, the argument needs to be placed in the context of a process of negotiation about what it is that can be practically done. The fact that the extinguishment is permanent is the issue that we are highlighting here.

Mr SECKER—I think it is a fairly clear question. Do you believe that we should not have permanent extinguishment?

Mr Lewis—If there is a freehold that then is given back to the crown and there is a native title group involved, then I guess we are suggesting that there is the possibility that title could be revived.

CHAIR—On freehold land?

Mr Lewis—It depends on the circumstances. You are choosing only one from the list of several different types of –

CHAIR—It is a pretty important one though, Mr Lewis.

Mr Lewis—Certainly.

Mr SECKER—On exclusive agricultural and pastoral leases, most of the land in South Australia is under CLP leases or that sort of thing and they are basically deemed to have virtually the same ownership rights as freehold, so it is pretty important.

Mr Lewis—And we believe that those rights, given our land system, would be prevailing and would suppress but not permanently extinguish necessarily.

Mr SECKER—Has this particular point been discussed by the general assembly?

Mr Lewis—No. This particular report has gone through a process of consultation through the general secretary and the head of Congress. It is based on in-principle decisions made by the assembly.

Mr SECKER—A couple of pages on, under ‘Impact of registration test’, in the second paragraph you say: ... bona fide claims are being denied the protection of the NTA on procedural grounds.

Do you have any instances of where bona fide claims – and we are talking about bona fide claims, not just any claims – are being denied the protection of the Native Title Act?

Mr Lewis—My memory is – when I did the research for this – that in the body of the report it mentions that the Aboriginal and Islander Social Justice Commissioner of HREOC pointed out to the CERD committee some aspects of the native title registration tests that were doing so. I have probably got a copy here if you want me to look it up. Otherwise I can just suggest –

Senator WOODLEY—You can take it on notice.

Mr SECKER—But surely if they failed the registration test they have still got the right under common law – I do not think anyone denies that.

Mr Lewis—They still have what sort of rights?

Mr SECKER—The rights of taking it through the courts under common law.

Mr Lewis—Yes.

Mr SECKER—So they are not actually denied their –

Mr Lewis—But they are denied the protection of the NTAA.

Mr SECKER—I accept that point.

Mr Lewis—I see what you are getting at.

Mr SECKER—On the next page, the last paragraph says:

The registration test does not allow for the Indigenous and non-indigenous systems of land ownership and connection to co-exist.

Do you really mean the failure to pass registration test? It just seems to be a fairly broad statement to say that the registration test itself does not allow for the indigenous systems.

Mr Lewis—Yes, I guess the issue we are looking at there is that it is treating native title as a bunch of rights as opposed to a legal system. It is getting towards what I was saying earlier about the cross-cultural issue – that native title represents for us, and fairly dimly, the indigenous land ownership system. The way that the registration test is processed does not look at those rights as anything other than a group's set of particular rights. It does not necessarily recognise that there is a whole cultural system then imposed. Addressing that issue would require a process of cross-cultural education and understanding of what that means. Because it fails to recognise the system as opposed to the set of rights, it therefore takes away from indigenous people or has the potential to.

Mr SECKER—But if you pass the registration test, surely that does allow for the indigenous and non-indigenous systems of land ownership and connections to coexist, especially when you consider ILUAs?

Mr Lewis—Perhaps I misunderstood your question, but the statement that you are focusing on in my report is that the registration test does not allow for the indigenous and non-indigenous systems of land ownership in connection to coexist.

Mr SECKER—If it said a failure to pass it, I could see what you are saying, but not the registration test itself.

Mr Lewis—I guess I am saying that the composition of the registration test does not necessarily allow for that recognition of the system.

Mr SECKER—Does not necessarily, but may do so?

Mr Lewis—It would depend on the particular circumstances of the cases.

Mr SECKER—Exactly.

Mr Lewis—Most of my research on the impact of the registration test was based on the Aboriginal and Islander Social Justice Commissioner from HREOC's submission to CERD. I think it was to the March meeting last year.

CHAIR—Thank you very much, Mr Lewis. We appreciate your evidence. Thank you for bringing along a submission, which will be taken into account with all the other submissions that we have received on these terms of reference. I thank you very much for your appearance here today.

Mr Lewis—Thank you and I thank the committee for the opportunity of addressing you.

[12.24 p.m.]

SHEEHAN, Mr John Blair, Native Title Spokesman, Australian Property Institute

WARNER, Mr Grant, Director, Policy and Research, Australian Property Institute

CHAIR—Welcome. The committee does prefer all your evidence to be given in public, but if any member of the committee asks you a question to which you would like to respond in private, please indicate and we will take that into account. However, I should tell you that any answers given in camera could subsequently be made public by an order of the Senate. We do have a copy of your submission and I am sure colleagues have had an opportunity to peruse it.

Mr MELHAM—With your indulgence, Madam Chair, there is one clarification I would like on your submission, Mr Sheehan. On page 6, at paragraph 2.2, you cite section 51A and also section 53A. I do not whether it should be section 53 of the amended act, not 53A. Can you have a look at that so that we cite the right section?

Mr Sheehan—There was some discussion about that. It was intended that it should be the two sections of the act because –

Mr MELHAM—Yes, but it seems, on my quick reading of it, the limit to compensation is in section 51A, but I think the other reference to the Native Title Amendment Act is section 53, not 53A.

Mr Sheehan—You are quite right.

Mr MELHAM—I just wanted to clarify that. On the larger volume, it is section 53, not 53A.

Mr Sheehan—I apologise for that.

Mr MELHAM—That is okay.

Mr Sheehan—Could I also mention, Madam Chair, that we have spellcheck in the institute but sometimes something creeps away. If I could take you to paragraph 1.7 on page 5 – and I do apologise for these minor changes – on the first line you will see there is mention of a previous submission that our institute, in its former name, gave to the PJC on – and this is what it should read – 30 September 1997. I apologise for the mistake.

CHAIR—It is not the sort of thing you would be thinking about at the beginning of the new year.

Mr MELHAM—Where was that, Mr Sheehan?

Mr Sheehan—Page 5, paragraph 1.7. And at paragraph 1.8, it says, ‘This limit on compensation was ameliorated by the writer.’ That is not what I mean. It should be ‘rider’. That is what comes when you are dictating. I apologise to the committee for that.

CHAIR—Thank you. Would you care to make a brief introductory statement to supplement your submission? There is no need to unless you particularly want to, and then we will have some questions for you.

Mr Sheehan—Thank you. I notice that there are members of this committee who were on the committee I addressed a couple of years ago. For the record, the Australian Property Institute, formerly known as the Australian Institute of Valuers and Land Economists, commenced its existence in about 1926. Today, it represents something of the order of 7,500 valuers and land economists throughout Australia in the various ranks within the institute. In appendix 1, and I will not repeat it here, there is information about the institute’s background.

As a general introduction, I will take you to a number of points in the submission. We have been concerned to focus on the issue of compensation, which is the area which we did raise with the PJC in our September 1997 submission. We have made some comments in relation to the question of just why the holders of native title or, more correctly, indigenous property rights and interests, should be treated differentially in the amendments to those persons who would hold any other form of property right in this country. I draw your attention to page 5 at paragraph 1.6 and the quotation from the API press release on 5 February 1997, where our national president at the time indicated that, from the institute’s perspective, we considered that this differential treatment of those particular property rights known as native title would be an undesirable precedent for all Australians.

The institute remains concerned that, subsequent to the amending of the Native Title Act 1993 with the amendments in 1998, section 51A attempts to introduce a concept whereby compensation for this particular class of property right is capped to the notional concept of a freehold value. This really is at odds with compensation law in Australia which separates the notion of value of real estate as against compensation for compulsory acquisition or, in this particular case, extinguishment of native title.

The two things are partly related because one of the heads of consideration in compensation calculations which has been settled by the courts, certainly over the last 100 years, has been the value of the real estate. But of course there are other sorts of criteria which valuers and the courts have taken into account in compensation calculation, such as special value to the owner, injurious affection and solatium and other points. There is a division between the freehold value of a property and the compensation that a holder of that particular property right would get in the same manner as there would be compensation that would be due to a holder of a mining right in Australia. The freehold value of the property on which that mining right is located is irrelevant from the point of view of compensation when the mining right is being swept away by perhaps some executive decision and compensation is then due. As I said before, the value of that freehold estate on which that mining right is irrelevant to the calculation for compensation. It is a very good example of the way in which native title has to be treated in terms of compensation, particularly keeping in mind section 51(xxxi.) of the Constitution, just terms. That would be my opening submission to you.

CHAIR—Thank you very much.

Senator WOODLEY—What you are saying is that under the Native Title Amendment Act – and you are critical of the amendments, I notice, in your submission – the issue of compensation is still not dealt with properly. I presume you mean the interest that native title holders might have in land goes way beyond its freehold value. Some of those interests are intangible. Is it possible to value those? I suppose we are talking about compensation in terms of money. I am interested in that. Could you expand that a bit.

Mr Sheehan—Yes, that is the intention of our comments. If there is a freehold cap on the assessment of compensation when there is an extinguishment of native title, there are incidents of native title which obviously go beyond something it might be possible to equate to something called freehold value. The problem we face of course is that there have not been any court cases in Australia. In fact, for the record, my research since 1997 reveals that there has not been any work done effectively in any other common-law countries on trying to place a financial value on spiritual and cultural attachment to land in an indigenous sense. That is not to mean that there have not been attempts by the courts, even in this country, to place a monetary figure on intangible items. I often give the example of that well-known footballer that was photographed in public. There was a value placed on his concerns. I do not recall what happened, but the courts have never strayed away, when asked, from trying to put a monetary value on intangibles. I am often asked that question: what will happen ultimately with those court cases? I would not be presumptuous enough to say that I know the way the courts will deal with them. But certainly using what we know in current valuation and compensation law, the courts will look towards current precedents which are there. There are significant parts of native title which certainly can be assessed within that framework of a bundle of rights and can be made analogous to existing rights that we are familiar with.

Your point is valid in terms of the other incidents of native title. That does not mean, I believe, that we should ignore them. I point out that it is quite uncommon for this institute to be quite firm in its submissions. I draw your attention to paragraph 2.13 where we said in quite clear terms – and we do not say it lightly because we are, in fairness, a reasonably conservative organisation – that we believe it is a fatal flaw in the way in which the NTAA deals with native title. In our respectful view, we think that if it were placed before the court it would be seen as being certainly doubtful as to where it stands in relation to section 51(xxxi.) and from the reading of what is intended in terms of the convention. It certainly looks to our mind as if it does contravene them – for the government, I am sad to say.

Senator WOODLEY—That is very helpful. Thank you.

Mr CAUSLEY—I believe you are falling into the trap that we are all falling into at the present time: that we do not understand yet what the High Court is saying in native title. We are assuming that it is hunting, gathering and spiritual rights over land and therefore how do you value that and isn't the parliament trying to give some lead?

Mr Sheehan—They are in the sense – by passing that section 51A amendment and saying that, yes, when you are looking at compensation there is that cap of freehold. But I think the problem, as we said in the submission, is that the authors of those amendments, particularly by adding 53 and connecting it into 51, have recognised that there is something beyond whatever you could make as analogous to freehold value in native title. There is something else that could well be there and, to make certain that you have constitutionality, 53 was put there. I agree that the court has not fully explained what are the contents of native title. However, I think that Justice Gummow, as I recall, in the decision in Yanner recently, made a point that we ought not to be misled by being captured by this question of analogous estates.

There is a long history in case law. We were told by the Privy Council, for example, many years ago in an African case that we ought not to be equating indigenous rights and interests to Anglo land law – in this case, Anglo-Australian land law. We have been given that warning for a long time by the courts, and your point that

the High Court has not made any clear statements about what is the full ambit of native title is correct. But it certainly has not contracted native title either. That is the problem, I suppose, for members of this 7,000-odd strong organisation that I represent today.

As I have said in a number of forums, we have to provide guidance to government and to land owners, pastoralists, banks and indigenous people – a whole ambit of people who own any property rights in Australia – and we do see something that is not covered at the moment by the way in which those two sections sit with each other. There is, effectively, an exclusion of that area outside of whatever we can find that is analogous. Certainly the way that 51A is framed, limiting us to only looking at that part of compensation which can be made analogous to freehold value, is inherently dangerous. A valuer's long experience with compensation is that you never make assumptions unless you are absolutely certain that you can prove them. In this particular case, we already know that there are incidents of native title that are beyond what could be seen as being analogous to freehold. If that is the case, you are going to be calling upon section 53 all the time to add in that compensation. But the two do not sit easily with each other and that is the problem.

Mr CAUSLEY—Who pays the compensation?

Mr Sheehan—I suppose if there is a compulsory acquisition, it is the authority –

Mr CAUSLEY—If it is a compulsory acquisition, the government would have to pay?

Mr Sheehan—Yes.

Mr CAUSLEY—I think you also suggest that you are not happy with the 1998 act, that you want to wind it back. Is that correct?

Mr Sheehan—No, we are really speaking in terms of that particular section. We have been consistently concerned with the area of compensation. I have not dealt with that. I do not think it is necessarily our role, as the API, to be embarking in other areas of the act where I know that you have a particular brief from the Senate. What we are concerned about – and I would draw your attention there to my latter comments – is that if it is true that ultimately it is found by this committee that the compensation provisions run foul of the Australian Constitution and run foul of the convention, the other concerns that other people might have in the submissions they might make to this committee pale into relative insignificance, quite frankly.

CHAIR—Except that the convention is not legally binding.

Mr Sheehan—I understand that. That is the problem, of course, with international law. It is both soft and softer and hard and harder. In fairness, more and more international law is coming to bear upon us in very subtle ways. Coming down in the plane today I was reading about the precautionary principle in an article written by Justice Stein in the New South Wales appeal court. The amount of reference to ESD in the precautionary principle just in New South Wales legislation is quite extraordinary and yet we could occupy many hours on the discussion of the definition of the precautionary principle.

Mr CAUSLEY—Do you think the will of the ordinary person will prevail eventually, and not the judge?

Mr Sheehan—In which sense?

Mr CAUSLEY—I think that most people are revolting against such suggestions.

Mr Sheehan—In terms of international law?

Mr CAUSLEY—At the ballot box?

Mr Sheehan—I am not really competent to answer that question, except that I suppose my legal background indicates to me that it is a growing area of law.

Mr MELHAM—I take you to paragraph 2.12 of your submission which I think summarises your submission. It says:

Accordingly, the Institute notes that because the NTAA applies a freehold cap to the determination of compensation for extinguishment of native title, important incidents of indigenous rights and interests may be lost or diminished without compensation.

In summary, you are basically saying that the current act does not provide for just terms compensation for the acquisition of native title. The freehold cap is not consistent with this act providing just terms compensation?

Mr Sheehan—That is right.

Mr MELHAM—What we are doing is actually acquiring the native title, or other rights of indigenous Australians, for less than just terms.

Mr Sheehan—If you could think of native title as a pie, there is only a segment of that native title pie that is actually being compensated for. The problem that we face is we do not know how large that other segment is. It is residual. In certain cases, it may well be that a financial calculation as part of an assessment of compensation may show that the total package of compensation due to an indigenous holder may be less than freehold in

certain circumstances. I can quite conceive that that might be the case. In other cases, it may well be that any analogy with freehold value may be that the particular section of the pie might be very small.

One of the biggest issues which Graeme Neate, the President of the National Native Title Tribunal, mentioned in a talk in December last year was the misconception that, because there may not be a physical presence by Aboriginal people on land, it does not necessarily mean that the other incidents of native title, particularly the spiritual and cultural attachment, are automatically lost. In fact, I think that Justice Gummow's words in *Yanner and Eaton* tend to suggest that is where the High Court may well be going. I cannot second-guess the court though.

Mr MELHAM—I also come to the question where we say that international laws are not binding. We might have a problem here in terms of head of power. If the race power cannot be used to the detriment of indigenous Australians, and that is still up in the air, one of the bases for the Native Title Act was the external affairs power which brings us in conformity with the convention, so you have that head of power, the external affairs power. If there is an international law inconsistency, then that could lead to a constitutional problem with this act, couldn't it? If it does not fall within international norms and, therefore, cannot derive from the external affairs power, then that head of power is not something that will sustain this act.

Mr Sheehan—I think that is an argument that has got merit to it. I think there is also the concern about section xxxi of the Constitution, the just terms provisions – and I have to say that in 100 years I am amazed in this country that there has never been a court case trying to determine what the notion of just terms is. In some respects that is helpful because it means that we have to look at just and fair compensation, and that really came out of the Fifth Amendment of the American Constitution and was one of the main sources of that particular part of our Constitution.

The problem we face is that that in itself suggests questions of equality, fairness and justice. One of the things that our profession has been involved in in dealing with compensation for compulsory acquisition is that the courts always require the valuer to move towards the dispossessed owner's position if there is any question of doubt rather than the other way round. There have been lots of cases. In *Geita Sebea v. the Territory of Papua New Guinea*, for example, it is said that, if there is a question, it is not the value to the resuming authority in reality; it is effectively the value to the dispossessed owner. That discussion has taken place over many years in many court cases. Again, I come back to the fact that 51A and the way it has been tried to be reworked with 53 – and it was recognised by the drafters of those amendments that it possibly was unconstitutional – has not been tested yet. But, given the fact that we are talking about just terms brings you into contrast with the question of fairness and racial discrimination.

Mr MELHAM—But in terms of the Commonwealth, of course, if it were a Commonwealth acquisition the Constitution would prevail over this act.

Mr Sheehan—Yes.

Mr MELHAM—What worries me is the way this act would limit just terms if it were a state acquisition because, as you would be aware, there is no constitutional protection in terms of states acquiring on unjust terms. But it is a nonsense to say that this act, as currently structured, allows for just terms compensation by the states when they have got that freehold cap in there.

Mr Sheehan—It is not in our submission here, but in my background work for this submission and other work that the institute has been doing in the area of native title, many of the states in Australia have land acquisition legislation which includes the words 'just terms' – New South Wales, for example, has the Land Acquisition (Just Terms) Compensation Act. I have had some long discussions with lawyers much more skilled than I am in this area, and on a reading of the notion 'just terms' where do you go except to the Australian Constitution or perhaps to the Fifth Amendment of the American Constitution to find an understanding of the meaning for legislators when they are looking at those phrases? Maybe in the fullness of time there may be some tests in, say, New South Wales or other states where that phrase is used. We do not know.

Mr MELHAM—But, in terms of just terms it is not a notion that is simply about compensation. It is also about process or indeed procedure in relation to accessing just terms compensation.

Mr Sheehan—That is right. I point out that the institute has made submissions, for example, to the interdepartmental committee that was established last year by the Department of Finance and Administration in relation to the Commonwealth Land Acquisition Act because, as at last year anyway, as I understand, the notion of a holder of native title did not fit into the category of an owner. There were significant submissions that this institute made in relation to that to bring some of that legislation into line to ensure that those processes were in conformity with the NTA.

Mr MELHAM—Would it be fair to say that the concerns that you have expressed today would also go then to the validation provisions and the confirmation provisions of the 1998 act in terms of just terms?

Mr Sheehan—Yes.

Mr MELHAM—There is a real question mark that ‘just terms’ has been provided in the amendment act for validation and for confirmation.

Mr Sheehan—And I think that because of the way in which the compensation provision is struck, and it clearly talks about a cap to freehold, it just excludes other ambit rights which are a component of native title, recognising that we do not know what those components are, but we know they are there. The court tells us that we have to go to each individual dispossession, effectively, when we are dealing with a compulsory acquisition and look at what those rights are to claim by that particular indigenous group.

Mr MELHAM—Again, that might fall foul of the just terms section of the Commonwealth Constitution.

Mr Sheehan—That is true.

Mr CAUSLEY—If you disagree with the notion of freehold value, what would you suggest be in there?

Mr Sheehan—What would I suggest that you put in in lieu thereof? There is not, for example, in the Commonwealth land acquisition legislation, any direction to the court, nor to the valuer, leading up to a court case as to the compensation should be assessed, excepting that we have case law which relates to heads of consideration and those sorts of things for compensation. The simple placing of the words ‘a freehold cap’ has really led us to the problem that we are in at the moment.

In terms of your question of what alternative is there, I do not think it needs to be stated. That is to be decided in those particular cases. As I said before, in some cases it may well be that native title could well be considerably less than freehold value. In other cases, it could well be considerably more than freehold value.

Mr CAUSLEY—Would you leave it to the valuer and, if need be, test it in court?

Mr Sheehan—Yes, precisely, as we do for other property rights in this country. The problem that we face is, as we said in 1997 – and not facetiously did we say this; we have agonised as an institute about whether we would say this to you as a committee and also to the press in our recent media release – is that, in fairness, if you start introducing racially based criteria for the allocation of compensation for property rights, you are starting to move away from total equality in terms of property rights compensation. My wife has an Italian background, for example, and it is conceivable that you could end up having some other racial group focus for differential treatment in terms of compensation, and I think that is unacceptable.

CHAIR—Thank you.

Mr Sheehan—It is my pleasure.

CHAIR—We appreciate that you and Mr Warner have travelled to Canberra today to give evidence. Thank you very much for your thoughtful submission. That completes this morning’s evidence.

Proceedings suspended from 12.52 p.m. to 1.33 p.m.

ORR, Mr Robert, Deputy General Counsel, Australian Government Solicitor

CHAIR—I welcome Mr Robert Orr. I am sure you are familiar with our procedures but I shall just reiterate them. We do prefer all of your evidence to be given in public, but if any of the committee members ask you a question to which you would like to respond in private, please let us know. However, any response that we do get from you in that capacity may later be made an order of the Senate to become public. I understand that you are here to talk to us about the CERD meeting in Geneva that you attended, and not to make a presentation on behalf of the Australian government as a witness in that capacity. That will come at another time.

Mr MELHAM—Mr Orr, along those lines, have you had any opportunity to watch any of the proceedings?

Mr Orr—I have read some of the submissions and I have been informed of some of the matters.

Mr MELHAM—A number of issues have been raised. What I am hoping is that you can raise them in your written submission, and I would like to put you on notice on this rather than ask the questions now. There were submissions that the government made to the CERD committee on their understanding of the future acts processes and what happens when you become a registered claimant. There was a case in Cape York recently where the Commonwealth was arguing somewhat differently from what its public position appeared to be.

CHAIR—Perhaps, Mr Orr, without wanting to get into the detail, it may be worth having a look at Mr Basten's commentary this morning and his answers to questions so that when you do appear before us you are familiar with the issues that he raised. He has not made a submission.

Mr Orr—Certainly. I just want to confirm that the government will be making a formal submission to the committee. The reason for doing it now, as distinct from earlier, was so that that submission could address all the matters that had been raised before the committee. Whilst I am not aware of the particular case that Mr Basten spoke about, certainly we will make sure that the submission provides a response to that particular submission.

CHAIR—He does cover a summary of that in his presentation to us this morning.

Mr Orr—In so far as that submission is concerned, it will cover the main issues involved. That is what happened in the process. It will look at what the Australian government regards as its obligations under CERD. It will look at the decision of the committee. It will analyse why the government regards that decision as wrong and will try to pick up on any of the issues that have been raised before the committee to date.

Mr MELHAM—What particularly concerned me in your submission to CERD at page 7 was the registration test. It was submitting to CERD, and obviously asserting, that claimants who pass the registration test obtain significant procedural rights under the Native Title Act. It seemed to be, on the evidence that Mr Basten gave us today, that that was not the Commonwealth's position in this particular case in Cape York before a single judge of the Federal Court and that what the Commonwealth submitted in that case was vastly at odds with what was being submitted to the CERD committee and what was the understanding during the debate – at registration, certain procedural rights flow from that. I think it is relevant to your submission.

Mr Orr—I am not aware of that particular case, so I find it hard to respond at the moment. Certainly we will respond to it.

CHAIR—I think Mr Melham is flagging that this is an area he would explore at a later time. You will see that Mr Basten did comment on it at some length in the early part of his presentation. We are here today to hear from you about the Australian government's appearance in Geneva. Perhaps you could take us through that. If we have got any questions at the end, we will put them to you.

Mr Orr—I thought I might just outline the process generally. If you want more detail about particular things, I am more than happy to do that. As the committee will be aware, the CERD committee made the decision on 11 August 1998 – under article 9, paragraph 1 of the convention – to request information from the Australian government on changes to the Native Title Act and other issues. In response to that decision, the Commonwealth government put a submission to the committee in January 1999, which I am sure you have. That was a written submission which advised the committee of what had happened with regard to amendments to the Native Title Act, what those amendments were and the basis upon which those amendments were made. It also dealt with the other matters of concern to the committee. Following their decision in August, the committee then met in March of last year to consider the Australian government's position. It met in Geneva on 12 March in the afternoon and then on 15 March. There is an official summary of the proceedings on those days. If the committee does not have a copy, I could provide one.

I must say that I think there are some typographical errors in those official summaries. I was given a draft of the summary of 12 March and made some suggestions as to amendments that could be made with regard to

that. I note that those amendments do not appear ever to have been made so there are a number of minor typographical errors in that summary. I was never provided with a draft.

Mr MELHAM—When you say there are errors, are they significant errors?

Mr Orr—I do not think they are significant. If the committee is interested I am sure we could provide just the minor corrections I thought should have been made.

CHAIR—I think that would be very useful if you could do that.

Mr Orr—Yes, I will do that in due course. I was not ever provided with a draft of 15 March, but I also note that there are a few errors in that as well. I could do that as well. In addition, I note that there is also an unofficial transcript of those proceedings, which I think the Foundation for Aboriginal and Islander Research Action has compiled.

With regard to the committee hearing, I appeared before the committee with Mr Goledzinowski, who was the Charge d' Affaires of the Australian permanent mission at the United Nations in Geneva at that time. Mr Goledzinowski made some opening remarks, as did I. I then made some remarks that spoke to the submission the Australian government had made. Essentially, those remarks outlined the history of native title in Australia, looking to the Mabo decision, the Native Title Act and the things that the act did, the Wik decision and the Native Title Amendment Act. In particular, they outlined the process by which that amendment act was made and the key areas Australia thought would be of concern to the committee with regard to that act, in particular the validation regime and confirmation regime. I made some comments about the agreements provisions, the primary production provisions and the right to negotiate. I then made some comments about the Native Title Act, as amended, because in the Commonwealth view it is important to look not at the amendment act but at the Native Title Act, as amended, to assess whether it complies with the convention and put the Commonwealth government's position with regard to that, which is that it does comply with the convention.

After that, Ms Gay McDougall, the country rapporteur with regard to this issue on the committee, made an extensive statement that is set out in the official transcript. She handed to me a document which set out, essentially, what that said. She provided also an overview of native title in Australia, looked at the Mabo and the Wik decisions, and then focused on the Native Title Amendment Act, insofar as it dealt with the validation regime, the confirmation regime, primary production and the right to negotiate. She also dealt with the issue of the participation of indigenous people in the development of the Native Title Amendment Act and looked at the issue of the relationship between the Native Title Act, the Racial Discrimination Act and the CERD convention. During her presentation, she asked a large number of questions of me and Mr Goledzinowski arising from what she was commenting on. Some of those questions went into quite a bit of detail on the areas she was focusing on. She briefly mentioned the other issues.

The other members of the committee were given the opportunity to make comments. A number of comments were made and a number of other questions were put to us, none of them as detailed as Ms McDougall's, but more going to the general impact of the amendment act. After that, Mr Goledzinowski and I began to reply to those questions by Ms McDougall. At that time the hearing on that date ceased.

It did resume, as I said, on 15 March, at which I continued my response to her quite detailed questions. I set out in some detail why the Commonwealth government believed that the validation regime, the confirmation regime, the primary production provisions and the changes to the right to negotiate were made, what the policy and views of the government were, what the issues that were before the government were, and sought to address why it was that the government believed that they complied with the CERD convention, but, in particular, that the government's position was that it was important to look not just to the amendments but to the Native Title Act as amended. It involved weighing the position of native title holders under that act as amended with the position of others in the Australian community, and it was also important to look at the act as a whole because there were a range of matters dealt with in the act and it was necessary to weigh the act as a whole in so far as considering its compliance with CERD.

Having done that, other members of the committee then commented on those presentations and made some further questions. I must say again no other questions were as detailed as Ms McDougall's and it was very difficult to respond to the level of detail in Ms McDougall's questions in the time available, but responses were made to all of them. After further questions were provided, I then responded to those, and Ms McDougall made some closing remarks, as did the chairman of the committee. The committee then went and considered its position.

As this committee will be aware, the committee made its decision which is the subject of this committee's consideration on 18 March 1999. I should just note that most of the members of the committee were present during the presentations, although Mr Wolfrum was not present at all. Mr Van Boven, as he said, was only present on the Monday, and Mr Banton, who is from England, was only present on the Friday. The questioning

from the committee revealed that they come from a range of backgrounds. There is a range of members on the committee. I think this committee does have the make-up of the committee. Certainly that is something which we can provide information to you on in the formal submission. It includes members ranging from lawyers to diplomats, sociologists, theologians and others.

As I was saying, the committee made its decision on 18 March 1999. As is available under the convention, under article 9, the Commonwealth government is able to respond to that, and the Commonwealth government did lodge, under article 9 of the convention, a reply to the CERD committee findings of 18 March. I assume the committee has those but, again, I am happy to provide them if it doesn't. That in very brief outline is the process that has been involved, and I am happy to answer any of your questions.

Mr MELHAM—Then I think on 16 August the committee reaffirmed the position, and has decided to continue consideration of the matter, together with the 10th, 11th and 12th periodical reports, during its 56th session in March 2000.

Mr Orr—That is right. When this presentation was made, Australia had not made its periodical report, but it has now made its periodical report, and that report will be considered by the CERD committee in March of this year in Geneva. That is correct; there was the decision of the committee in August of last year to that effect.

Mr MELHAM—Will the Australian government be going along in terms of further dialogue with the committee in March in relation to the decision of 18 March?

Mr Orr—Yes, it will be.

Mr MELHAM—Who will be representing the government?

Mr Orr—I do not think it is quite finalised who will be doing that, but the Australian government will be represented there.

CHAIR—Mr Orr, do you have any further comments, or are you now happy to take questions?

Mr Orr—No, I am now happy to take questions.

CHAIR—Thank you.

Senator CROSSIN—I actually want to clarify something that was raised this morning in relation to the submission.

CHAIR—Mr Orr's submission?

Senator CROSSIN—No, in relation to a submission from an earlier witness. It was about the Australian government's submission to the CERD committee. I would appreciate your response to a position that was put to us this morning that –

CHAIR—Senator Crossin, it might be helpful if you could let Mr Orr know who put the submission.

Senator CROSSIN—It is the Australian government's submission and, in my papers, it is page 7, under the registration test.

Mr SECKER—Sorry, whose submission?

Mr MELHAM—The Australian government's submission to CERD.

CHAIR—Thanks for that clarification.

Mr MELHAM—It is what I had asked earlier, maybe in Senator Crossin's absence. I have asked for Mr Orr to respond to us when he comes before the committee.

Senator CROSSIN—All right.

CHAIR—Were you going to ask a question about Mr Basten's comments?

Senator CROSSIN—It was along similar lines. I was a bit late getting back after lunch, so I apologise for that.

CHAIR—Mr Orr has undertaken to consider Mr Basten's comments in his submission, which will be formal before the committee soon.

Senator CROSSIN—All right.

Mr CAUSLEY—Mr Orr, I see from going through the transcript that you have given us that several members of the committee expressed from time to time the complexity of the issue and their difficulty in coming to terms with it. Have you got any comment on that? Was it an issue that the members had difficulty with?

Mr Orr—I think the issues are very complex. First of all, they are complex because in the area of discrimination, to begin with, we are dealing with the rights of indigenous people which other peoples do not hold. I think that raises particularly difficult questions in terms of the approach to discrimination in that context, that

these are rights which are only held by indigenous people of Australia, and therefore to work out the proper approach with regard to discrimination to those is at times quite difficult. In addition to that, of course, native title issues in Australia are very complex and difficult. The Mabo decision, the Native Title Act, the Wik decision, the Native Title Amendment Act are extremely complex, both legally and in terms of their social implications. I think it is very difficult for any committee to come to terms with those.

Mr CAUSLEY—One particular member was looking at native title as being absolute ownership of land.

Mr Orr—Yes. The people come from a range of countries and, as I said, people come to it with a range of interests and skills. Some of the committee were lawyers, but many of them were not, and even as lawyers they come from a range of countries with a range of legal systems and a range of indigenous rights recognition regimes. So I think it would be extremely difficult for the committee to come to terms with the complexity of the matter.

Mr CAUSLEY—They were zeroing in on the difference between the 1999 act and the 1993 act. Is that what they were looking at?

Mr Orr—In terms of the comments of Ms McDougall, she was looking in particular at the four elements I mentioned: the validation regime, the confirmation regime, the primary production regime and the right to negotiate. She was essentially putting a position and asking questions to us with regard to those. In terms of the decision of the committee, it is quite short, as you will have seen, and, in my submission, does not include much reasoning as to how the committee reached the positions it does, so that is a difficulty that we have in understanding why the committee has reached these positions. But in doing so, whilst it says in the beginning of the decision that what should be done is to look at the amended act, that you look at what the Native Title Act now says and assess whether that is discriminatory, the focus of the questioning and the decision is much more on what the amendments did and the difference of position of indigenous people between their position under the amendments and under the original acts. The Commonwealth government's position is that that is not the right question, that you do not necessarily look at those differences, you now look at the amended act and see if there is discrimination in the treatment of native title rights as between the rights of others.

Mr CAUSLEY—I take it that Australia explained the situation with the 1993 act, that there were some problems and that it was an effort to try and overcome that?

Mr Orr—Yes. I tried. You are right in recognising the difficulty in doing this because a lot of those problems arise from the details and the law involved in the Mabo decision, the acts of the Wik decision. What I was particularly trying to persuade the committee to accept was that the amendments made in the amendment acts were not done for arbitrary reasons, that these amendments were made because there were particular issues which the government was required to address. I was trying to persuade them there were particular legitimate policies which they were trying to implement, that they were implementing those in a reasonable and not arbitrary way, and that they were doing so in a way which sought to support the underlying purpose of the Native Title Act, which is to protect native title rights.

It is not to be said that indigenous people agreed with those amendments. It was clear that they did not agree with those amendments. I made it clear that it was not possible to reach a consensus on the act, although I did point out to the committee that the government had made efforts to consult with, and had indeed consulted with, indigenous people. It was clear that a consensus or agreement could not be reached, but that did not mean that the amendments were arbitrary or unreasonable in so far as their approach to native title.

Mr CAUSLEY—I think the committee – and correct me if I am wrong – considered that the 1993 act was a special measure, but they did not consider that the 1998 act was a special measure. Is that fair comment?

Mr Orr—It is a bit unclear exactly what the committee thought. They seem to have reaffirmed that they thought the 1993 act complied with the convention, although again there is no reasoning as to why that is. The committee decision specifically says that in its view they could now no longer be regarded as a special measure, although how they reached the conclusion and what the consequences of that conclusion are is unclear.

CHAIR—Perhaps I could just pick up that point. We had some evidence this morning from Jennifer Clarke from the Australian National University, although she did appear in a private capacity. She made the comment that she believes the 1993 act was in fact racially discriminating. She made the point that although she recognised that the CERD had not found it so, she actually believed that it was. I imagine you are across and aware of the detail of the 1993 legislation. Was there ever any apprehension that in fact that would not pass the CERD? Was there a widespread view around at the time that it was seen to be racially discriminating?

Mr Orr—The view of the parliament was that it was not racially discriminatory, and the view of the government was that it was not racially discriminatory. There were issues at the time of its passage as to whether it did comply with the Racial Discrimination Act, or the CERD convention.

Mr MELHAM—The government received advice on those, didn't it?

Mr Orr—Yes.

CHAIR—Presumably, Mr Melham, the government sought advice on this. The view of the parliament this time, although there are dissenting views, is the same. I am simply making the point that Ms Clarke raised and asking Mr Orr to respond to it.

Mr MELHAM—Sure.

Mr Orr—In so far as one can gauge what the CERD committee believes, it believed that the 1993 act did comply with the convention.

CHAIR—Did you at any time think it might not?

Mr Orr—That is a very difficult question. The position of the government was that it did comply. These are difficult issues. We are talking about native title which only one group in the community owns. So, in a sense, it cannot be said that any law that affects native title is racially discriminatory. You would need to look at what the law does, compare what the rights of other people are, and then assess whether there is discrimination. The test may be formal equality and special measures, which is one test, or substantive equality with perhaps special measures, which is another test. And you must bear in mind that in the substantive equality test there is allowed to be differences between treatment, which is not discrimination.

These tests are difficult to apply in what is a complex area and to an act that was always complicated and difficult. But certainly the view of the government at the time was that it was consistent with the Racial Discrimination Act and the convention. It was not in breach of either of those.

CHAIR—One of the other comments made by a number of witnesses yesterday and today was on the degree of effective consultation that took place. There has been some criticism about the degree of effective consultation with indigenous communities and indigenous leaders. Was that an issue raised by the CERD committee and is there any comment that you would like to make on the question of effective consultation?

Mr Orr—It certainly was an issue that was raised by the CERD committee. It was clear that they were well informed and that indigenous leaders did not agree with the provisions of the Native Title Amendment Act and had told them so. I did not dispute that. As I said earlier, it is clear that the Native Title Amendment Act did not get the support of indigenous leaders in Australia. However, it is the government's view, and this is clearly the case, that there was significant consultation between the government and indigenous leaders about the Native Title Amendment Act, as there was consultation with other stakeholders, including the states and territories, miners, farmers, pastoralists and others, as is appropriate. There is a difference of position there, but the basic facts are fairly clear.

The submission by the government to this committee will restate the significant consultation that took place. The issue then becomes: what is the effect of the fact that indigenous leaders did not agree with the Native Title Amendment Act? The position of the government is that it can have no effect on whether the Native Title Act, as amended now, complies with CERD. It is for the democratically elected parliament of the nation to be making laws and for the parliament to be striving to make laws that comply with CERD. The fact that particular indigenous leaders agree or disagree with the measure does not make it discriminatory or not discriminatory.

CHAIR—It is difficult not to stray into what will be your substantive submission at a later time.

Mr Orr—We will certainly come back to this issue in our submission. I am sure that, when we are back here again in March, we will come back to the issue because it is quite an important issue. The government's position is that there is no support under the convention or international law for a submission that native title rights can only be affected with the informed consent of native title holders, which seems to be the position the CERD committee is putting. It is a position they articulate in the decision.

CHAIR—And it is also a position that has been put by a number of witnesses, it is fair to say.

Senator CROSSIN—Are you basically submitting to us today that you do not agree with the outcome of the CERD committee's deliberations?

Mr Orr—I am here as a public servant. I am putting forward what I did as a public servant and on behalf of the government.

CHAIR—I think the Attorney General has responded to that point, Senator Crossin.

Mr Orr—The government's position is that it believes that the Native Title Act complies with the convention.

Senator CROSSIN—Would you see a way, together with the government, to move forward – to get the parties affected by this legislation to move forward? We have an instance where native title holders and tradi-

tional owners do not agree with the amendments. Basically, people have locked their positions in each corner of the room. Do you see a way forward in this?

Mr Orr—That is a question you would have to ask the government. I do not feel in a position to answer that sort of policy question about what the government or indigenous leaders should be doing.

CHAIR—There is a two-page press release from the Attorney-General which does outline some of those issues. Mr Orr is really appearing as a representative of the Attorney-General's Department and not his office.

Senator CROSSIN—Okay.

Mr MELHAM—The case that Mr Basten was referring to was the case of Landil v. Queensland. I understand it might have been argued around October-November 1999. What concerns me with that is whether you think the Commonwealth now has a duty to go back to the CERD committee and amend its submission to the CERD committee in terms of the benefits that claimants who pass the registration test obtain if that decision were to not be overturned on appeal.

In your remarks you were saying that the thrust of the Native Title Act was to protect native title rights and that that is the government's submission in terms of the justification before the CERD committee. In terms of the amendment act, I do not think it could be said or argued, could it, that the validation provisions of the amendment act were about protecting native title rights?

Mr Orr—That is getting into the detail of the submission.

Mr MELHAM—But isn't that the problem that the government faced before the CERD committee, when you came to the specifics in these areas? What I am saying to you is that the CERD committee's findings are sustainable because, when you actually stand back, whether you are familiar with native title or whatever, the validation provisions that were the thrust of the Native Title Amendment Act of 1998 were not about protecting native title, nor was the confirmation of extinguishment, nor was the primary production upgrade, nor were the restrictions on the right to negotiate. Indeed, each of those areas had an adverse impact on native title and rights of native title holders or claimants. That, I would suggest to you, is the reason why the government found themselves in trouble.

The other question I want to ask is: at any stage has the government yet released the advice of Chief General Counsel, Mr Burmester, in relation to whether the amendment act would strike trouble in terms of our international obligations? My understanding is that there was some discussion at the time of the amendments in terms of Mr Burmester's opinion. Correct me if I am wrong, but what is publicly known is that Mr Burmester's advice to government said that the validation provisions, the confirmation of extinguishment provisions and the primary upgrade provisions of the amendment act could lead the government to be in contravention of our international obligations. Not having seen it, am I verballing the Burmester opinion?

CHAIR—This matter was extensively traversed in the Senate during the passage of the native title legislation.

Mr MELHAM—I accept that. The reason I raised it was –

CHAIR—Can I just finish. My understanding and recollection is that attempts were made by the opposition to require the Burmester opinion to be tabled in the Senate on a return to order or some such device. The decision of the government at the time was that the opinion was not to be tabled. I do not know that it is really appropriate to be asking Mr Orr, as a representative of the Attorney-General's Department, to traverse that issue in a way that is going to be productive.

Mr MELHAM—I am not asking him to traverse it. What I am trying to establish, Madam Chair, with the questioning and making a few comments, is that the CERD finding should not come as any surprise to this government. The first term of our reference is:

whether the finding of the Committee on the Elimination of Racial Discrimination (CERD) that the Native Title Amendment Act 1998 is inconsistent with Australia's international legal obligations, in particular the Convention on the Elimination of All Forms of Racial Discrimination, is sustainable on the weight of informed opinion; -

What I am putting to Mr Orr is that this government was on notice before those acts were amended, not only from informed legal opinion outside of government but from its own government advisers, that if they went down this path they could find themselves in contravention of our international obligations under CERD. Without revealing the Burmester opinion, there are a number of things in the public domain. Mr Orr, are you able to confirm that the government got an opinion from Henry Burmester in relation to the amendments and their conformity with our international obligations?

Mr Orr—I do not think I am able to confirm that. The government has a position on that. The government's position, as I understand it, is that it will not disclose whether advice was obtained or, if it was obtained, what that advice was.

Mr MELHAM—I accept that, and they claim privilege in relation to that advice.

Mr Orr—That is correct.

Mr MELHAM—Do you agree with me that there is an inference that is open that if the government will not release that advice that it is not consistent with the government's policy position?

Mr Orr—No, I disagree with that.

CHAIR—Mr Orr has not confirmed that there was any advice.

Mr MELHAM—I am not asking that. I am asking whether that inference is reasonably open. He is entitled to provide an opinion on that, I would have thought.

Mr Orr—That is for the government again to answer. But I do not think that inference is open at all. Governments of both persuasions often claim privilege with regard to advice that they receive, quite properly.

Mr MELHAM—And the government has released Mr Burmester's opinion on a number of occasions in relation to a number of incidents where his advice corresponds with their public position.

Mr Orr—On some occasions it has released the advice – that is right.

Mr MELHAM—It is not universal that they retreat to the argument that 'this is privileged and we will not release'.

Mr Orr—Of course. But it is the general practice of governments not to release confidential advice that it obtains. It is seen as being part of good governance for governments to be able to obtain advice in privilege and that is the way the system works, and appropriately so. Governments should not be compelled to release such advice.

Mr MELHAM—No, but they also have policy positions that sometimes run contrary to the advice that they receive. That is a policy decision.

CHAIR—But that, surely, is the purpose of getting advice, Mr Melham.

Mr MELHAM—I accept that, Madam Chair, but we are not talking about policy positions here; we are talking about legislation being consistent with our international obligations.

Mr Orr—As to your first questions, these issues were well traversed in the submission that the Commonwealth government made to the committee, in my presentations to the committee and in the reply to the committee, and they will be further traversed in the submission which will be made to this committee. But in my submission it is too simplistic to simply look at a provision and say that because that affects native title that that is racially discriminatory. It is just not possible to do that. For example, in terms of the confirmation regime, the government's purpose was to provide some certainty of what the law is in Australia – both certainty for native title holders and for non-native title holders.

In providing, for example, that freehold titles have extinguished native title, the Commonwealth parliament has simply put in place a law which reflects the common law of Australia. Firstly, there is a pursuit of certainty which is a legitimate objective. That objective has been pursued in a rational and not arbitrary way. This is a provision that reflects the common law. It has been pursued in a way which, on the submission of the government, does not affect native title holders because there is no native title under the common law and freehold land. In addition to that, there are significant balances in the acts notwithstanding that which allow native title holders to claim that freehold land even though it has been extinguished under section 47B of the act. There are also other measures that enable native title holders to purchase that freehold land in terms of the land fund. If you look at that balance which is then struck, in the government's submission that provision therefore is not racially discriminatory in an adverse sense. You cannot just stop at saying, 'This section only deals with native title.' You need a more sophisticated analysis than that.

Mr MELHAM—Isn't it the case, though, that it was native title holders whose title was basically impaired? When you talk about certainty, isn't it the case that, notwithstanding the Mabo and Wik judgments, every title in country – non-indigenous title, I am talking about – still retained certainty in terms of those judgments that title holders could do every thing their title allowed? Their title prevailed over native title and that the argument about certainty, when it came to non-indigenous title, was a fiction?

I am not talking about titles issued after 1 January 1994 in contravention of the Native Title Act. But the certainty argument was a nonsense, wasn't it, when it came to non-indigenous title? There is no doubt that a lot of farmers and a lot of others thought that their backyards could be successfully claimed. The question is: what does claim mean? A number of conservative members of parliament still equate claim with possession, as against coexistence, access and the status quo. When you talk about certainty, whose certainty are we talking about?

Mr Orr—These issues will be covered in the submission from the government but the basic point I am making is that you cannot just say, because these provisions affect native title, that they are racially discriminatory.

Mr MELHAM—I understand what you say.

Mr Orr—You need a more sophisticated analysis than that. The analysis which the government proposes is the correct one and the committee, to some extent, agrees that you need to look at the Native Title Act, as amended, and assess that against the rights of others in the community. You also need to look at the Native Title Act as amended as a whole to see the various measures that are included there in relation to native title.

Mr MELHAM—Indeed, if it was a special measure, that is a specific exemption and it is not deemed to be racial discrimination under the convention. So you can have positive discrimination that is not deemed to be racial discrimination.

Mr Orr—That is correct.

CHAIR—Mr Melham, with respect, I think we are getting into an area which we are going to have a lot of time to cover when Mr Orr reappears before the committee.

Mr MELHAM—Okay. I will go to other questions.

CHAIR—The intention today is to try to focus on the actual hearing and the meetings in Geneva. To be fair to Mr Orr, I think it is a little unreasonable to expect him to traverse the other areas without his submission before him.

Mr MELHAM—Okay. If I can then ask in generic terms, I take it that the Commonwealth accepts that the CERD committee has a legitimate interest in the Native Title Act and other matters regarding race relations in this country. We have signed up?

Mr Orr—Yes. The CERD committee does have responsibilities under the convention to which Australia is a party.

Mr MELHAM—I take it that the Commonwealth believes that they have a responsibility to respond to criticisms of the CERD committee?

CHAIR—They already have. The Attorney-General has responded. I do not think that is an appropriate question for a public servant either. We will let Mr Orr make that decision.

Mr Orr—I must say that I do not understand the question.

Mr MELHAM—The Commonwealth will be going back before the CERD committee at the next hearing, as I understand it, and continue to attempt to respond to criticisms of the CERD committee, or is it at an end? Is the Attorney-General's press release the only response that we will be getting from the government on the findings of the CERD committee?

Mr Orr—As I mentioned, the government has exercised its rights under article 9 of the convention and responded to the decision in this case. I understand the meeting of the CERD committee in March will look at the general report of Australia.

Mr MELHAM—Okay. So the committee will continue consideration of this matter, together with the 10th, 11th and 12th periodic reports, during its 56th session in March.

Mr Orr—Those periodic reports deal with native title matters which are relevant to Australia's compliance with the CERD convention. Insofar as those periodic reports deal with native title matters, then clearly they can be dealt with by the committee there. I cannot speak for what the committee will actually do.

Mr MELHAM—Obviously you see, in terms of the submissions, that the land fund was a central matter in relation to the benefits under the Native Title Act. Would you see a termination of the land fund, or a substantial curtailment of its scope, as being a threat to the conformity of the Native Title Act with CERD?

Mr Orr—That is, firstly, a hypothetical question and, secondly, a question that I am not here to answer at the moment.

Mr MELHAM—I think one of the thrusts of the submissions to the CERD committee was that the land fund, as it is presently constituted, was something that should have been taken into consideration in considering whether the Native Title Act, even as amended, was beneficial to indigenous interests.

Mr Orr—That is certainly correct. It was mentioned in the Commonwealth submission and it was mentioned a number of times by me in the presentation to the committee. The committee does not mention it in its decision, but it was re-mentioned by the Commonwealth in its reply to the committee's decision, and in particular suggesting that the committee should have taken into account that land fund in its assessment of the Native Title Act.

Mr MELHAM—It would then follow, wouldn't it, that any substantial curtailment of the land fund's scope, if that were to happen in the future, could lead to criticism by CERD?

Mr Orr—That is a hypothetical question which I cannot answer.

Mr MELHAM—Okay, I appreciate that.

Mr CAUSLEY—Mr Orr, this question is again from going through the transcript of the hearings of CERD. Are you sure that the committee understood that, at this stage, even in Australia we are not absolutely certain what the High Court is determining on native title?

Mr Orr—As I said, the members of the committee come from a range of backgrounds, none of them are Australian, some of them are lawyers, but even those who are lawyers come from very different backgrounds, and many of them are not lawyers. So, insofar as what they understood, they really only understood what they were told. As I said, this is a difficult issue. I and Ms McDougall took the members of the committee through the basic elements of native title, including the decisions of the High Court. But I tried to make it abundantly clear in my submissions that one of the primary objectives of the government in the amendment act was to try and bring a level of certainty to issues which remained quite uncertain in regard to native title in Australia. That uncertainty flowed not only from the things the High Court has not considered yet or things it has left unconsidered but also from things it cannot consider and, indeed, from the operation of the Native Title Act, as unamended, in areas where it was not intended to apply – for example, the pastoral lease issue.

Mr CAUSLEY—We have been told by witnesses before the committee that the CERD committee were eminent international lawyers. You are saying some of them were not?

Mr Orr—No, many of them are not, and I do not think they would hold themselves out as that.

Mr CAUSLEY—They are well versed in the convention, though?

Mr Orr—They are people who have responsibilities as a committee under the convention, so they are people with responsibilities in relation to the convention.

Mr CAUSLEY—Do you know whether the committee has ever dealt with a land issue such as this in the past?

Mr Orr—There are various decisions by various committees of the United Nations, in particular the Human Rights Committee, in relation to some land issues. There are a number of quite significant decisions – one involving Canada, one involving a French Pacific colony, one involving a Scandinavian position.

Mr CAUSLEY—The Sami people?

Mr Orr—Yes. I could get those together for you. In a sense they are getting close to this issue, but I am not aware of this committee or other committees looking at such a big picture and such a detailed picture in relation to indigenous rights. That is one of the problems with the decision and the process for the decision, and these are difficult issues which are complex and require detailed consideration.

Mr CAUSLEY—I note from the transcript that several of the commissioners note that they have had substantial representations from non-government organisations in Australia, so obviously they had a lot of information before them arguing the discrimination case.

Mr Orr—I think that is correct.

Mr MELHAM—The fact is that this is the second time that Australia has been before the committee in relation to native title matters – they had it before them after the 1993 act.

Mr Orr—I would need to check that. I am sure that was part of a periodic reporting appearance.

Mr MELHAM—Yes and, indeed, that is when they gave the 1993 act a tick as part of that periodic reporting.

Mr Orr—They seem to have done so, yes.

Mr MELHAM—Australia has never nominated anyone to this particular committee since 1975 when it ratified it?

Mr Orr—I am not aware of that.

Mr MELHAM—Justice Evatt was before us yesterday and gave that sort of advice. I will read to you article 8, paragraph 1:

There shall be established a Committee on the Elimination of Racial Discrimination (hereinafter referred to as the Committee) consisting of eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals.

That is the reputation that this committee enjoys, isn't it, in the United Nations?

Mr Orr—I cannot speak for the reputation of the committee. Yes, the committee is appointed under that provision.

CHAIR—Mr Orr has already talked about the qualifications of the members of the committee, Mr Melham.

Mr Orr—The question I was asked was whether the members of the committee were experts in international law. My answer to that was that I do not think they are and I do not think they would not see themselves as being experts. As I mentioned, three of the people who have high reputations as international lawyers were Mr Wolfrum from Germany, who was not present for any of the presentation, Mr Van Boven, who was only present for the presentation on Monday, and Mr Banton, who is not a lawyer but is a sociologist from England and who was only present on the Friday.

Mr MELHAM—But isn't it the case, as we heard from Ms Evatt yesterday, that this committee attempts to achieve a consensus in relation to its deliberations? Was congeniality the word?

CHAIR—Collegiality.

Mr MELHAM—Collegiality, not congeniality. Mr Orr, I am concerned at any attempts to try and disparage the committee, that is all.

Mr Orr—I have made no attempt to disparage the committee. I have just answered the questions that I have been asked. As I said, I do not think the committee would see itself as being comprised of international lawyers.

Mr MELHAM—But it is also fair to say that there are a number of academics and lawyers whose views are consistent with the CERD committee findings, that also express reservations, one of those being Jennifer Clarke.

Mr SECKER—There would be a number that would not be, too.

Mr CAUSLEY—Otherwise they would not make any money.

Mr Orr—I am well aware of that, Mr Melham. The other point I was making, and I certainly was not trying to disparage the committee, was that these are very difficult issues, they are complex issues, and it is difficult in a process such as this, which has unsatisfactory elements, to come to grips with those issues.

Mr MELHAM—I accept that.

CHAIR—Mr Melham, is it really productive to traverse the standing of this committee? Isn't Mr Orr here to talk about the actual meetings that took place in relation to the transcript and so on and not the credibility of these people who, presumably, he does not really know? I hardly think it is fair to ask him those questions, with respect.

Mr CAUSLEY—I probably started it because witnesses did say before us that they were lawyers.

Mr MELHAM—That is where I was trying to come in.

CHAIR—Mr Causley, the same comments apply to you.

Mr CAUSLEY—Well, it was evidence before the committee.

CHAIR—Any further questions for Mr Orr?

Mr MELHAM—Not at this stage, but there are some matters that Elizabeth Evatt raises in her submission that I would like Mr Orr to look at. She put in a written submission and cited a number of instances where countries have actually responded to recommendations in the past from United Nations treaty bodies and how they have responded in some instances has required amendment to legislation, amongst other things. I would like consideration in the government's submission of matters that Justice Evatt has raised.

Mr Orr—Certainly, and we will deal with that issue that Mr Basten raised as well.

CHAIR—Any further questions? Senator Crossin, you are happy? Mr Melham, you are always happy. Any further questions, Mr Causley?

Mr MELHAM—I just think poor old Mr Orr has got to defend the indefensible, if I could pinch a comment

CHAIR—That sort of comment is certainly not something Mr Orr agreed with. There are no further questions for you, Mr Orr, at this stage. We do look forward to having your submission. I have tried to arrange for the transcripts of yesterday and today to be made a high priority so that you are able to address the issues that were raised by all of our witnesses in your submission. Thank you very much.

Mr SECKER—Would that also be a high priority for the committee members?

CHAIR—If it is declared a high priority it will be on the Net as soon as possible. Thank you very much, Mr Orr, for making the effort to come over and speak with us today. We look forward to your further submission.

Committee adjourned at 2.30 p.m.