



COMMONWEALTH OF AUSTRALIA

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**

THURSDAY, 17 FEBRUARY 2000

CANBERRA

BY AUTHORITY OF THE PARLIAMENT

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is <http://www.aph.gov.au/hansard>

To search the parliamentary database, go to: <http://search.aph.gov.au>

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

Thursday, 17 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, Ferris and McLucas and Mr Causley, Mr Haase, Mr Melham, Mr Secker and Mr Snowdon

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.

WITNESSES

CLARK, Mr Geoff, Chairman, Aboriginal and Torres Strait Islander Commission	8
DOCTOR, Mr Russell, Chairperson, ATSIC, South East Queensland Regional Council, Aboriginal and Torres Strait Islander Commission.....	25
FITZGERALD, Mr James Peter, Legal Adviser, Queensland Indigenous Working Group.....	14
HOFFMAN, Mr Shane, International Officer, Foundation for Aboriginal and Islander Research Action	25
MALEZER, Mr Robert Leslie, General Manager, Foundation for Aboriginal and Islander Research Action.....	25
O'SHANE, Mr Terence Joseph, Chairman, Queensland Indigenous Working Group	14
SPINDLER, Mr Sid, Member, Coordinating Committee, Defenders of Native Title (Vic.) Inc.....	1

Committee met at 6.02 p.m.

SPINDLER, Mr Sid, Member, Coordinating Committee, Defenders of Native Title (Vic.) Inc.

CHAIR— I declare open this public meeting of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund. The hearing this evening is the first of the committee's inquiry into the consistency of the Native Title Amendment Act 1998 with Australia's obligations under the United Nations Convention on the Elimination of All Forms of Racial Discrimination, known as CERD.

I welcome a former distinguished senator, Mr Sid Spindler. The committee prefers that all evidence be given in public but, should you at any time wish to give your evidence, part of your evidence or an answer to a question in camera, you may make application to do so and the committee will give consideration to that application. However, I would point out – and I am sure this is well known to you – that evidence taken in camera may subsequently be made public by an order of the Senate. I now invite you to make some opening remarks about the committee's inquiry into the consistency of the Native Title Amendment Act 1998 with Australia's obligations under CERD. At the conclusion of your remarks I will invite members of the committee to submit questions to you.

Mr Spindler—Thank you, Madam Chair. First of all, I will expand on the organisation which I represent today. Defenders, for short, is an organisation incorporated under the Victorian associations act. It has about 700 financial members, a mailing list of over 3,000 individual supporters and supporting organisations, and local branches in most of Victoria's 37 electorates. I will summarise very briefly the submission we have made by running through it. I turn, first of all, to the two pages of summary and conclusions. I must confess that my typing skills, which were very poor during my Senate days, have not improved because I must beg your indulgence for a correction to the very first line of the summary. Could we please insert the words 'on March 18 1999, the United Nations committee monitoring compliance' et cetera.

We know that what has brought us here to this inquiry and what has brought Australia before the United Nations committee that is monitoring compliance with the Convention on the Elimination of All Forms of Racial Discrimination, CERD, is the fact that the committee has had a look at the 1998 amendments to the Native Title Act 1993. This submission examines the concerns of the CERD, Australia's obligations and the amendments to the Native Title Act. On the basis of this analysis, to state the conclusion first, it is submitted in relation to part (a) of the terms of reference that, first of all, Australia has accepted the legal obligation and, secondly, has broken its commitments under that obligation.

The provisions of the 1998 act as identified by the CERD are, we believe, discriminatory in that they reduce the rights of native title holders and claimants but not the rights attached to other land titles. In so doing, we are basing our arguments on the criterion that we are dealing with discrimination and equality on substantial and not just formal grounds. It is also noted that the 1998 amendments expressly weaken the Racial Discrimination Act. We believe the government has also failed in its obligations to ensure that indigenous Australians should be able to participate effectively in decisions affecting them and, finally, that there is in fact a solid body of informed opinion to the effect that Australia is in breach of its international legal obligations.

I will turn to the main body of the submission and draw the committee's attention to a number of the matters that we will be dealing with. First of all, there are the concerns of the CERD. The committee notes continuing discrimination, saying that the effects of Australia's racially discriminatory land practices have endured as an acute impairment of the rights of Australia's indigenous communities. The committee had welcomed the High Court's Mabo decision and, in particular, the Native Title Act 1993 but found that the 1998 amendments contain provisions that extinguish or impair the exercise of indigenous title rights and interests and that these pervade the amended act. The committee is particularly concerned about the validation provisions, the confirmation of extinguishment provisions, the primary production upgrade provisions and the restrictions concerning the right to negotiate. The committee does not consider that the amendments that were made in 1998 can be classified as special measures and therefore permissible under the antidiscrimination provisions.

The committee states, and we agree with this, that these provisions, actually and effectively in substantive and formal form, reduce the rights of indigenous people. We also submit that the government has failed to involve indigenous people in the formulation of the 1998 amendments. While we recognise that the position of the ATSI Social Justice Commissioner has been reinstated, this was originally one of the concerns of the CERD. We add it simply as a matter of completeness.

Let me turn now to Australia's international legal obligations. What we are dealing with is first and foremost governed by the Convention on the Elimination of All Forms of Racial Discrimination, signed by Australia in 1966 and ratified in 1975. That convention prohibits any distinction, exclusion, restriction or preference based on race. Article 2 requires governments to engage in no act or practice of racial discrimination. It also asks state parties to pursue all appropriate means and without delay implement a policy of eliminating race discrimination. Further, it asks the state parties to amend, rescind or nullify any laws which are discriminatory.

Article 5, which is particularly important for our considerations, asks state parties to guarantee certain specific rights: the right to equal treatment, the right to own property, the right to inherit and the right to equal participation in cultural activities. Article 6 requires the state to assure to everyone within their jurisdiction effective protection and remedies through the competent national tribunals and other state institutions. It is quite clear, and perhaps I need not go into a lot of detail, that these provisions apply to Australia's indigenous people. On the question of participation in government processes, the CERD's general recommendation 11 in item 2 goes into considerable detail. Again to save time of the committee, I will not go into it in greater detail.

There are other international instruments which support the convention on the elimination of racial discrimination in more general human rights terms. We have got the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and other instruments which state in general terms very basic rights of not being discriminated against and of being entitled to participate in decisions that affect indigenous people's rights.

The central question to the inquiry is whether the Native Title Amendment Act 1996 is in fact inconsistent with Australia's international legal obligations. I am dealing with that on page 7. To answer that question, we need to ask two particular questions. First, does Australia have relevant legal obligations as a result of signing and ratifying the various international documents? Secondly, what are the effects of the 1998 act provisions on indigenous Australians, and in particular are they discriminatory within the meaning of CERD? First of all, to what extent is Australia compelled to observe the legal obligations imposed by international conventions. International conventions usually create standards of behaviour or rules of behaviour in a particular area. In this case it is the convention on the elimination of racial discrimination. I would argue that, by signing and ratifying, Australia has accepted the obligation of acting in accordance with the convention. In fact, to deny that would be to put an utterly cynical interpretation on Australia's motives in signing and ratifying that particular convention.

Perhaps the nub of the question then is, in line with the terms of reference of your committee, whether the obligation is a legal one. International law differs from domestic law inasmuch as direct sanctions for non-compliance are as a rule not as readily and as automatically available. Nevertheless, we should note that the international community is moving towards that. At the extreme end of human rights protection there are the economic sanctions on South Africa and the armed interventions such as in East Timor. In the trade area there are the WTO with inbuilt sanctions and the activities of the IMF and the World Bank. Leaving aside these more drastic sanctions, there is for Australia the danger of besmirching our reputation and earning the world's contempt for actions or omissions which fall short of the basic standards that have been globally accepted in the human rights area and to which we have committed ourselves. We might ask whether the international body of law amounts to global regulation. Very clearly, we need to examine here that nation states are in fact prepared to come together to regulate their member states in trade behaviour and are increasingly doing so in the human rights area as well. They thereby seek to maintain generally accepted behaviour through the system of, for instance, regular reporting designed to monitor states' compliance with the treaties and conventions they have signed, which in fact has been illustrated by the actions of the CERD.

There is another aspect that we can look at when we want to establish whether the obligations are in fact legal, and that is the inclusion of the basic obligations in domestic law. In this case, of course, Australia has enacted the Racial Discrimination Act 1975, which reproduces the main features of the convention. There is the case of *Newcrest Mining versus the Commonwealth* in 1997, where the High Court has suggested that in fact the right to own property can be recognised as customary international law because of the large extent to which it has been included in domestic law, as an example of that principle. I think we have also got the factor of general acceptance by the global community. Again in the *Newcrest* case the High Court has acknowledged that the Universal Declaration of Human Rights is a highly influential statement on the understanding of universal and fundamental rights. In fact, it has acquired the status of customary international law and probably the status of *jus cogens*, a body of essential general rules of law. Finally, we have in the convention, which again I would emphasise Australia has signed and ratified, direct obligations to implement. I have mentioned them before. They are to engage in no act or practice of racial discrimination, to pursue by all appropriate means a policy of eliminating discrimination, and so on. In summary, I would submit that the conclusion is inescapable: that Australia has in fact accepted legal obligations within the current framework of international law.

We then turn to the question whether there is discrimination against indigenous people. In determining this question, we need to examine first of all the amendments contained in the 1998 NTA Amendment Bill which are said by the CERD to discriminate against indigenous people. We need to perhaps remind ourselves that article 1 of CERD defines discrimination as any distinction, exclusion, restriction or preference based on race and that people should be treated on an equal footing. The analysis must be carried out on the basis that we are pursuing substantive rather than formal equality. The distinction is probably best defined in the South-West

Africa case in 1965 before the International Court of Justice. The judgment reads: 'The principle of equality before the law means to treat equally what are equal and unequally what are unequal. To treat unequal matters differently according to inequality is not only permitted but required.' In other words, if you are starting off from a position where a particular group in the community is disadvantaged compared with either the mainstream or most of the other people, you cannot argue that they should be treated equally with everybody else because that would mean that you are perpetuating the injustice. What you need is positive discrimination and, indeed, affirmative action. In this context, the argument put forward on many occasions by the Prime Minister, Mr Howard – and, it must also be said, by Ms Pauline Hanson – that all people should be treated equally must be rejected.

Turning to the amendments, four groupings have been identified by the CERD. First of all, there is the validation of intermediate period acts. This validation covers non-legislative acts carried out between 1 January 1994 and 23 December 1996 that ignored the provisions of the Native Title Act as it was then in force. These amendments retrospectively sanction these acts which, firstly, were illegal and, secondly, in many cases extinguished native title that, particularly following the Wik decision, may have still been in existence. The second group of amendments encompass the confirmation of extinguishment provisions, which have been taken by custom in many cases to have extinguished native title because the pastoralists occupying that land were in exclusive possession or carrying out activities that required exclusive possession. However, there are contrary opinions – for instance, by Mr Justice Kirby in the Wik case – suggesting that exclusive possession is not the only necessary criterion to determine extinguishment but that the grant's language, character and purpose is just as important. This statement was confirmed by Mr Justice Lee in the Miriuwung Gajerrong case. Then there is a group of primary production upgrade provisions which allow pastoral land-holders to upgrade the activities on their leases to a statutory defined level of primary production thereby extinguishing native title without recourse to the negotiation rights of indigenous people. Perhaps the greatest loss to the future development of reconciliation and harmony between all Australians is the fact that by these amendments we have cut short the negotiations between pastoralists and indigenous people. If we remember, the essence of the Wik decision was coexistence, which would have necessitated that pastoral leaseholders and indigenous people talk about how this coexistence was to be determined. As we know, once people start talking to one another we might have a chance to get substantive reconciliation.

Turning to the right to negotiate, in the NTA the right to negotiate existed mainly in relation to mining exploration and production but also in some other situations where native title was endangered, including compulsory acquisitions. In most cases this right to negotiate has been abolished and it has now been emasculated to the point where indigenous people may be consulted and their objections considered but there is no requirement for actual negotiation in these matters. We should note that the statutory requirement is simply that they move through the procedures of consultation and listen to the objections without any substantive response or action. That very clearly has reduced to virtually zero the right to negotiate. I also want to quickly mention amendments to the Racial Discrimination Act which now provide that this act is brought into play only to resolve ambiguities in the Native Title Act. Finally, turning to effective participation by indigenous people, it is quite clear that the government in preparing these 1998 amendments did not effectively consult the National Indigenous Working Group, which includes Aboriginal land councils, ATSIC and the ATSI Social Justice Commissioner and is the most broadly representative forum of peak indigenous organisations. The working group invited the Commonwealth to its 1997 summit and the Commonwealth did not appear. Furthermore, also in 1997, the working group issued a document entitled *Coexistence, Negotiation and Certainty* and did not receive an answer from the government.

In summary, it is clear that in the preparation and passage of these amendments the government did not meet its obligations to ensure effective participation by indigenous people. The final item to look at is the term of reference requiring that the question be considered on the weight of informed opinion. I think the committee will find that there will be an embarrassment of riches. The arguments and conclusions that we have set out in our submissions have been supported by and are in large measure based on authoritative opinions expressed by the Australian Law Reform Commission; the Law Institute of Australia; the Commonwealth government's own chief counsel; the Human Rights Commissioner, Chris Sidoti; and the Race Discrimination Commissioner, Zita Antonios. I could continue, but I will not to save time. I simply say that, while this list could be expanded at will, it might be more useful to the committee if Defenders offered to provide responses to any contrary views expressed to the parliamentary committee.

I have at the beginning outlined our conclusions and I briefly restate them. We believe that the amendment act 1998 to the Native Title Act is inconsistent with Australia's international legal obligations; that the amendments that are required are essentially to reverse these amendments. In addition, perhaps these amendments should look at the mechanics of implementing the High Court's Wik decision and streamline some administrative matters. We also believe that the Commonwealth government should establish an effective

process of genuine consultation with the indigenous community in Australia and it should ultimately give urgent consideration to the implementation of the social justice package to ensure that Australia complies with all its international legal obligations to indigenous Australians. Finally, we were asked to offer a conclusion as to the value of dialogue with the CERD. We believe that continuing dialogue with the CERD is a must concurrently with the negotiations with the Australian indigenous community. We believe that Australia is in danger of having its international reputation severely damaged, if it has not already been so, but that it can still be retrieved.

CHAIR—Thank you very much, Mr Spindler, for your presentation tonight.

Mr SNOWDON—How would you describe the 1993 Native Title Act and any special measures which it may have introduced?

Mr Spindler—The 1993 Native Title Act was designed to rectify some injustices of the past. In places, for instance in the provisions installing a right to negotiate, it provided measures which were different to those available to other members of the community. I have heard the whole act described on this basis as a special measure, as a measure to try and create some sort of degree of equality where previously there was none.

Mr SNOWDON—So in contrast how would you characterise the 1998 amendments?

Mr Spindler—I believe that the 1998 amendments are very clearly discriminatory. They cannot be considered a special measure. They are not designed to rectify injustices that are apparent in the conditions affecting indigenous people in Australia. They actually reduce the rights, as I have outlined, in quite a number of areas, including the right to negotiate, but they also quite seriously affect their rights and their capacity to claim native title.

Mr SNOWDON—Will you talk briefly about the right to negotiate? What is your understanding of how the right to negotiate provisions have affected the rights of Aboriginal people generally?

Mr Spindler—The right to negotiate means that if, say, a mining corporation wishes to exercise its right to explore and to carry out mining production on land which is already or which is potentially affected by native title rights it confirmed under the 1993 act, it is the right of indigenous people to say, 'Hey, wait a minute; let's negotiate.' It is necessary for the parties then to examine the respective rights and to examine the extent to which they would affect the rights of indigenous people. I should say that this is balanced by the capacity of the other party to approach the government and to bypass the detailed provisions if time delays are too extreme and to ask that an accelerated process be taken. So the right of indigenous people to have their concerns heard and considered is not absolute even under the 1993 act, but is circumscribed to that extent. I would argue that it therefore is a very balanced provision between the parties.

Mr SNOWDON—So how was it affected by the 1998 amendments to make it less balanced?

Mr Spindler—The 1998 amendments have removed the right to negotiate per se. They have substituted it with a request to consult indigenous people – those that have a native title entitlement in the area – but not necessarily, under the provisions, to take any notice of their views. The mining corporation in that case would simply have to go through the motions, as it were, to consult with indigenous people and then say, 'Thank you. We have consulted, but we now proceed with our mining activities whether it affects certain areas which are of significant cultural importance to you or not.'

CHAIR—I would like to take you back to the time before the government started to negotiate amendments to the Native Title Act. I believe from my memory that there were 700 claims, largely unresolved. The Native Title Act was generally then being described as unworkable. I wonder, given the comments that you have made tonight, whether at a time when indigenous land use agreements are producing outcomes with pastoralists and are enabling pastoralists and indigenous communities to work together, you would really like to go back to a time when Australia had 700 claims – largely unresolved – and when Australia had a significant and quite substantial degree of racial tension.

Mr Spindler—I believe that there are two answers to the questions you raise. You mentioned land use agreements. I would certainly agree, and I believe indigenous people agree – they should speak for themselves; I shouldn't put words into their mouths, but I have heard it said – that where agreement can be reached, indigenous people are prepared to negotiate and to reach agreement. I note that the agreement provisions, these negotiating provisions, have been left untouched by the 1998 amendments. I commend the government for that. That is one side. I think we should emphasise and pursue that. However, when we are saying that there is a difficulty in sorting out claims, I do not think we can very well take the position that the only way to speed that up is to simply demolish the rights of one of the parties and to ensure that the other party can proceed and win right along the way. This is what, in our submission, the 1998 amendments have actually done. So yes, there have been delays, there have been difficulties, but we are dealing with an extremely difficult situation.

We are dealing with 200 years of injustice and neglect, so it may take a few more years to fix it. But let us not fix it in a way which severely disadvantages an already disadvantaged community.

CHAIR—Can I just clarify? You are saying that you would like to entirely roll back the threshold test?

Mr Spindler—No, I have not said that. What I have said is that we should reverse essentially the 1998 amendments but only following very detailed and substantive negotiation and consultation with the peak organisations of indigenous people. The final shape of the Native Title Act may well be different from the one that we had in 1993.

CHAIR—I am still not quite clear. Do you want to maintain a threshold test in the Native Title Act? As you know, there was no threshold test in the original act.

Mr MELHAM—No, that is not right.

CHAIR—I just want to clarify this. Do you want there to be a threshold test? In your submission you do not really cover that.

Mr Spindler—No, I don't. I believe that the threshold test, together with all the other factors, is something that should be arrived at and determined after consultation. I do not believe that it should be imposed on indigenous people.

CHAIR—I shortcut that by saying that the Brandy judgment changed it.

Mr MELHAM—That is right.

CHAIR—I was just trying to save time. I should have taken longer to say it.

Mr MELHAM—To summarise it – I do not want an incorrect matter on the record – in the 1993 act the threshold test for all the stakeholders was thought to operate at a particular level, and it was as a result of court judgments that it came to a lower level.

CHAIR—I am sorry. I should not have shortcut it; I was trying to save some time.

Mr MELHAM—Then obviously there was the debate. You do not see indigenous land use agreements as a substitution for the right to negotiate.

Mr Spindler—Of course not.

Mr MELHAM—You see them as an alternative.

Mr Spindler—I see that as an alternative which should always be available. I do not see it as an alternative to a process which gives both sides of the question a fair go. That is essential.

Mr MELHAM—I suppose you also see them as an alternative to common law claims. The whole thrust of the Native Title Act was that it was supposed to be a special procedure that allowed conciliation as an alternative to common law claims. Wasn't that the basis of the act?

Mr Spindler—Indeed, yes.

Mr MELHAM—Mr Snowdon asked you some questions in relation to special measures. You are aware that in the preamble to the Native Title Act it was put in the alternative – that it was either a special measure or an act of benefit to indigenous people.

Mr Spindler—That is right.

Mr MELHAM—And the High Court in the challenge of *Western Australia v. the Commonwealth* found seven to nil that they did not have to decide whether it was a special measure, but that it was a beneficial exercise under the race power of the Constitution. The question of special measures and as to whether the act is a special measure has not been decided. Can I also point out that the 1993 act did go to the CERD and they approved it as conforming with the convention. That is your understanding, isn't it?

Mr Spindler—That is my understanding and in fact I am quoting their statement in the body of the submission.

Mr MELHAM—In effect you do not have this committee consistently finding against the native title legislation that this parliament has passed?

Mr Spindler—No.

Mr MELHAM—The first effort went through with a tick. It is only the amendment bill that has struck problems in the CERD.

Mr Spindler—That is correct. The CERD expressed strong approval of two things: firstly, the Mabo High Court decision, and secondly, the 1993 NTA which was based on the Mabo decision.

Mr MELHAM—One of the terms of reference of this committee is 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. In terms of the right to negotiate, I suppose one of the options is for the Senate to continue to reject any state scheme that does not retain the right to negotiate under section 43.

Mr Spindler—That indeed is a possibility, yes.

Mr MELHAM—Because the fact is that, until the Senate passes through an alternative scheme, the right to negotiate on pastoral leases remains.

Mr Spindler—That is for any pastoral leases and negotiations dealt with under state and territory legislation.

Mr MELHAM—Is that an action that you would urge senators and political parties to consider, that is, to continue to reject any state regime that does not retain section 43?

Mr Spindler—Yes, I personally do, and Defenders as an organisation does.

Mr MELHAM—Of course, the South Australian Liberal government has not made any attempts to wind back section 43 or go to a section 43A scheme as yet, have they, to your knowledge?

Mr Spindler—Not to my knowledge. I am not aware of it.

CHAIR—Mr Haase, did you have any questions?

Mr HAASE—I am sorry. I have not heard the majority of the evidence given because of circumstances. I apologise to the witness.

Mr SECKER—If we are interested in outcomes, would you agree that more rights have been given back to Aborigines in the 18 months since the amendments than in the previous five years with the ILU agreements?

Mr Spindler—The ILU agreements are an option for indigenous people to negotiate. It is one avenue. I do not know that you could say that they have been given certain rights through that measure. I am not aware of any other rights. I am only aware that the rights that they were given by the 1993 act have been severely reduced. I am afraid I cannot possibly agree with your statement.

Mr SECKER—Would you agree that there have been greater outcomes in the 18 months since the amendments than in the previous five years?

Mr Spindler—No. I personally wouldn't, from what I know, but then my knowledge may be limited. Perhaps you could assist me and itemise where you believe the rights have been increased and the advantages of indigenous people have been actually increased, because, frankly, I am not aware.

Mr SECKER—I am asking the questions here; not answering them. I think it is pretty much on the public record that there are several ILU agreements registered in the 18 months since the amendments and which are far greater outcomes than in the previous five years.

Mr Spindler—That no doubt was the result of negotiations between the parties, and I am not aware of the detail of those agreements. But, if we are talking about improvements in living conditions or improvements in actual rights, to my knowledge there have been no such improvements.

Senator McLUCAS—I was very impressed with your positive ending to your submission this evening where you said that it still can be retrieved. As a former legislator, do you have any advice to legislators or politicians wherever we may be? What principles would you suggest we keep in the front of our minds when making decisions about native title?

Mr Spindler—I believe that in a sense the submission addresses that, but in specific answer to your question I believe that we should examine the effects of the 1998 amendments. When I say 'we', I mean politicians and the government. We should consult with indigenous people and identify where the difficulties have arisen and as a result arrive at legislation that in my view essentially brings us back to the 1993 act. But I do realise that there may be some administrative streamlining. There may be some additional amendments that are necessary to implement the Wik High Court decision. So I am not saying I want to go back to the 1993 act word for word in a literal sense, but certainly I would like to go back to it in spirit, if you like, as it was designed to enable indigenous people in Australia to lay some claim to their land. I do not want to be misunderstood as saying that I think that that was an ideal solution. I think personally we need to go a lot further if we are going to get justice for indigenous Australians, but, at the very least, we should not destroy what has been provided in 1993.

CHAIR—Thank you very much, Mr Spindler. We appreciate the efforts you have made to come and give evidence to the committee tonight. We thank you very much for the comprehensive submission that you have made to the committee.

Mr Spindler—Thank you.

[6.48 p.m.]

CLARK, Mr Geoff, Chairman, Aboriginal and Torres Strait Islander Commission

Mr SNOWDON—Madam Chair, before Mr Clark gives his evidence, I just want to declare an interest to ensure it is on the public record. During the 1998 debates on the amendments, I was employed by the National Indigenous Working Group. Mr Clark was a member of the National Indigenous Working Group, as were other witnesses who are going to give evidence this evening. Subsequent to that, I was also employed by a private company to negotiate native title matters over land in South Australia, and I was on the other side of the negotiating table to some of the witnesses this evening. I just wanted to put that on the public record.

CHAIR—Thank you very much, Mr Snowdon. Welcome, Mr Clark.

Mr Clark—Let me assure Mr Snowdon that we certainly expect that he would use a very valued, fair and honest assessment of our evidence. Tonight I will place before the committee a submission on behalf of ATSIC dealing with the terms of reference of this inquiry. The submission will present ATSIC's considered views on the issue of whether the Native Title Act, as amended in 1998, meets Australia's international legal obligations. We may wish to make a supplementary submission at a later date, including expert legal advice.

There can be no doubt in ATSIC's view that, by the 1998 amendments to the Native Title Act, Australia is in significant breach of its international obligations. We warned the government that this would be the outcome of the infamous 10-point plan. ATSIC was not alone in warning the government of this risk. A number of respected commentators made the same point.

There are two major reasons why it is important to recognise that Australia is not in compliance with international legal obligations. The first concern is the injustice which has been perpetrated upon the indigenous people of this country by the 1998 amendments. The second concern is the damage that has been done and continues to be done to Australia's international reputation. Non-discrimination is a fundamental norm of modern international law. Racial discrimination is universally condemned and there are no excuses for its practice, not even the government's excuse of workability.

CERD spells out what the principle of non-discrimination means when applied to national law and practice. It provides the yardsticks and the benchmarks. The CERD's job is to keep us honest; to ensure that the convention is not just empty words but functions to provide a real level of protection against racism. As a member of the international community and as a signatory to CERD, Australia is obliged to take the deliberations of the CERD seriously and to engage in dialogue with CERD, as necessary. Unfortunately, the Australian government's response to the CERD decision in March 1999, reaffirmed in August 1999, has been simply to deny that the Native Title Act, as amended, is discriminatory and even, by an attempt in some quarters, to cast doubt on the competence of the CERD.

However, this committee is composed of independent experts. They are highly distinguished lawyers, academics and diplomats. They come from a range of legal backgrounds and are able to bring a wider perspective to the assessment of compliance. CERD has sought to establish a dialogue with the Australian government, without success. Indeed, the attempt by three members of the committee to visit Australia was not supported by the Australian government. The government prefers to rely on an approach of formal equality to justify its position that the legislation is non-discriminatory. However, it is clear that in today's world it is not enough simply to look at equality of treatment without considering differing circumstances and differing outcomes. In particular, the rights of indigenous people are unique arising out of prior occupation from time immemorial and from special attachment to the land. Any interference with these rights requires consultation and negotiation and requires the informed consent of the people concerned. This is fundamental and is the international standard.

CERD has called upon state parties to recognise and protect the rights of indigenous people to own, develop, control and use their common lands, territories and resources. CERD expressed a view in relation to the Native Title Act amendments that there were concerns about a lack of effective participation by indigenous communities in the formulation of the amendments. The record will show that this is correct. CERD has identified four specific provisions of the amended Native Title Act that discriminate against indigenous title holders. There is no doubt in the view of ATSIC that, in identifying these areas of discrimination, the CERD has got it right.

Here I would refer to our written submission, which I have a copy of here. One of the most outrageous of these provisions was the confirmation of extinguishment. This was driven by political expediency in response to a false atmosphere of hysteria generated in response to the Wik decision. ATSIC warned at the time that there would be considerable risk to native title holders and, if the so-called confirmation turned out to be wrong, native title would end up being arbitrarily extinguished.

As expected, the government has got it wrong. The Miriuwung Gajerrong decision has shown this to be very clear. The confirmation of extinguishment provisions were always bad policy and bad law. The CERD decision has now shown that they represent a breach of international law. The new primary upgrade provisions, identified by CERD as discriminatory, turn native title holders into bystanders in their own land as their assets are used and exploited. They have no real say in what happens.

In effect, these provisions nullify potentially beneficial results of the Wik decision. It is as if the Native Title Act does not exist for any real and practical purposes. The opportunity provided by Wik for native title holders to be active partners in the management of their country and use of their resources has been forgone. As well, the amendments allow the states and territories to establish or attempt to establish regimes of lesser rights in respect of mining on pastoral leases. By these changes, the most valuable part of the Native Title Act – the right to negotiate – has been potentially lost to many indigenous Australians. All this adds up to a damning indictment of injustice and, in the end, racial discrimination.

ATSIC warned from the start that some of the amendments did not comply with CERD. The negative effects of the amendments continue through state and territory complementary legislation. There is no doubt CERD have got it right. They are experts in this area and have looked very closely at the arguments put before them.

The amendments have had a major detrimental effect on the rights of indigenous holders, including arbitrary extinguishment of rights recognised by the courts. The amendments allowing the states to replace the right to negotiate by lesser rights on pastoral leases, et cetera, are very unfair. They take away the benefits to native title holders which should have followed the Wik decision.

The parliament should disallow state and territory legislation which is discriminatory when such legislation comes before it. The government should enter a genuine dialogue on these matters with CERD. The government should negotiate with indigenous representatives to find a fair and acceptable solution as recommended by the CERD. The government should be prepared to make further amendments to the act to remove discriminatory provisions. The ATSIC submission provides a detailed account of where the amendments fail to meet the requirements of fairness and racial equality. ATSIC is prepared to assist in finding fair and just solutions to these issues.

Let me finish by saying this: help us turn the tide of extinguishment and restore the common law rights of indigenous people. Let me appeal to you to relay this to your political masters: we need to finish the unfinished business before reconciliation can be achieved in this country. How can we walk together when your laws discriminate and take Aboriginal people's lives? World views will not change this. We appreciate this point and recognise this point. A domestic solution is required and needed.

We will take this issue and related issues – the extinguishment, the confirmation, right to negotiate, mandatory sentencing, heritage legislation, land rights, customary law, stolen generation; the list goes on and on and on – to any forum in any quarter. I can only speak of these in general terms. You give us little incentive to walk together to find solutions when we are faced with such discriminatory laws that take away any benefits that indigenous people require. Even your process of agreements – if I understand the nature of the questions earlier – to find some resolution in agreed processes lacks incentive, and my experience from speaking to local government is that it lacks incentive for them and may of itself be discriminatory in that it does not attempt to look at a contractual arrangement but binds future generations.

So there are many aspects contained in this legislation that need serious consideration. I would like to conclude with that and I thank you for allowing me to make my presentation.

CHAIR—Thank you, Mr Clark. Mr Melham, would you like to begin questions?

Mr MELHAM—Mr Clark, you went to observe the deliberations of the CERD, didn't you?

Mr Clark—On two occasions.

Mr MELHAM—I notice in the ATSIC submission there is a suggestion that in effect the committee was a bit disappointed at the way the Australian government seemed to be evading key issues in their submissions. Is that a fair summary?

Mr Clark—I would say that is a very fair summary – the fact that they reserved additional time for the Australian government delegation to stay over – an additional weekend in Geneva to deliberate; some three or four hours additional time for them to explain the situation. I think they were given ample opportunity. I think the CERD decision in their findings has kept the decision on their earlier warning procedure, which also indicates that the Australian government has not explained the nature of the legislation to them satisfactorily.

Mr MELHAM—And it was to do with a lack of the government submitting the details of the legislation?

Mr Clark—Yes, the details of the legislation.

Mr MELHAM—So is it your understanding that the committee tried valiantly to engage the Australian government on the detail of the legislation?

Mr Clark—Absolutely. I believe the Australian government had every opportunity and still has the opportunity to do that, and I believe it is heading back with quite a large delegation to this forthcoming meeting to continue that same process.

Mr MELHAM—One of the defences of the government is that their legislation is constitutional within the Australian Constitution, but that is not what the CERD was looking at, was it?

Mr Clark—No, I think they are looking at the unfairness and the lack of consent and reasonableness about how this process occurred. I commend Mr Spindler on his presentation, but the outcomes have been detrimental to the degree that the full use and enjoyment of native title rights still are ended by this legislation.

Mr MELHAM—Has ATSIC sought advice since the CERD's findings? I notice you have tabled Mr Fajgenbaum's opinion. Has ATSIC sought legal advice in terms of the CERD findings and their consistency?

Mr Clark—No, I believe we have not.

CHAIR—Perhaps at this point I can say, Mr Clark, that we have received your fairly weighty submission and, given the constraints of time and the fact that we have not had the opportunity to go through it, it may be that some members of the committee may want to put some questions on notice to you when they have had an opportunity to look at the submission. Mr Haase, do you have any questions?

Mr HAASE—That is an excellent idea, Madam Chair. The complexity of this submission is more than we can absorb here in moments, but I thank the witness for his comments.

Mr SNOWDON—Mr Clark, I note in your formal submission you raise the issue of formal consent and the failure, as you have put it, of the government to negotiate effectively with Aboriginal people during 1998. Can you outline to us what you understood the process to have been?

Mr Clark—We believe that we were merely consulted in the process. We believe there were forums which gave insufficient time for us to relay our genuine concerns and, if those forums did exist to some extent in the consultation, that they were not real negotiations. They certainly were of a timely nature so that they prevented us from negotiating any real outcomes in this debate. Other states were given ample opportunities, we believe, along with the farmers federations, the pastoralists and other interests groups. We believe we were unfairly treated in this manner and did not have the appropriate opportunity to put a reasonable position that could be negotiated.

Mr SNOWDON—Mr Clark, could you inform us as to how you would describe the term 'informed consent'?

Mr Clark—I believe you would need to sit down with indigenous people to find common ground and common agreement with the same resources available in an equally negotiated position. I believe that the opportunity is often lost in the tight time frames in which governments wish to resolve some of these matters. The indigenous people's system of consent requires an intense process, as you would be familiar with, Mr Snowdon. I believe that it needs to look at the manner in which Aboriginal people arrive at that consent. There are various forums in this country, including ATSIC, and there are various work groups, land councils, state bodies, et cetera. In order to reach a clearer understanding of those people, it is quite an in depth and complicated process. I believe that that needs to be well resourced. If it were well resourced, time permitting and provided that the political will was there to find proper resolution – as I suggested, it does not always meet government timetables – I believe that is when you would find some informed consent.

Mr SNOWDON—Would you say, therefore, that the amendments in 1998 did not have your informed consent?

Mr Clark—Exactly.

Mr SNOWDON—In the context of processes to change that, what do you think would satisfy your needs in terms of any future amendments that might be made to the legislation, bearing in mind, of course, that this committee is going to have to report on the 1998 amendments already?

Mr Clark—It might sound like an impossible situation, Mr Snowdon, but I believe that it needs to be unravelled. We need to go back to the start and reframe some of these amendments to better describe our consent in some of these areas, particularly the right to negotiate, the confirmation, et cetera. At the end of the process, the extinguishment provisions, et cetera, take away any advantage that we may have in enjoying our rights to our land.

Mr SNOWDON—Could you describe how you perceive or understand the implications of the validation provisions on the rights of indigenous people?

Mr Clark—Concerning validation, I believe that in good faith in 1993 indigenous people agreed to validating, and that process in return was a recognition of the right to negotiate as a formality. I believe that the 1998 processes have turned that somewhat on its head and have breached the confidence that we had in the negotiations to find proper negotiated outcomes.

Mr SNOWDON—You may take this on notice. What would you assert the impact of the confirmation of extinguishment provisions to have been on the ability of indigenous Australians to have access to their native title land?

Mr Clark—There are a number of areas. As you say, it is quite complex. But the fact is that an unwieldy test, particularly in some of the settled areas, led to a process whereby in the first instance people were rounded up and put on reserves. Now we have a test where you have to show, via the legal processes, attachment to that land, the physical connections, et cetera. It is almost an impossible task for indigenous people to gain any benefits in that, I believe. The confirmation has further excluded us from even making a claim in lots of these cases.

Mr SNOWDON—Like Mr Haase and other members of the committee, I have not had time to read through the whole submission, but can I take you to the CERD. Do you have a view about whether or not it would be appropriate for there to be continuing consultation with that committee in ascertaining what amendments to the Native Title Act are required to ensure that it complies with Australia's international obligations?

Mr Clark—I challenge the government to invite the CERD. As we all know, this issue is very complex. It requires a certain level of understanding and expertise in relation to its interpretation. The CERD made reference, when we were in Geneva, to the large amount of documentation, probably the most documentation they have ever received in the history of the committee on this one issue. I believe not only continued representation but a visit by the CERD to help clarify this matter would be of huge benefit to this debate.

CHAIR—Mr Clark, I think I heard you say, in response to a question from Mr Snowdon, that you would like to see the Native Title Act, as it now stands, unravelled.

Mr Clark—Yes.

CHAIR—How would you see placing existing legal agreements made under the Native Title Act, as it now stands, if it were to be unravelled?

Mr Clark—I am just not convinced that the number of agreements outweighs the potential for us to go back and to redress the legislation. I do not believe that there are more than a mere handful of agreements and I think that if they are legal outcomes that have been negotiated or arrived at they would not be under any threat to any considerable amount because, if their nature is consent, that overcomes some of those matters.

Mr SECKER—In your evidence you cited, as proof of discrimination, the Miriuwung Gajerrong decision. Do you accept that this decision is still under appeal and could change and, therefore, cannot really be cited as proof of anything yet?

Mr Clark—It reasserts our belief that exclusive possession could be an outcome of the native title debate. I think it also proves that within the legal framework of this country, including the original decision, the interpretation that the amendments attempt to create are not in line with the general philosophy or understanding of what common law benefits could be for indigenous people, even though you say the jury is out. This is probably one of the outstanding matters. Going on my international experience and taking the Canadian experience, after the Sparrow decision it took them some 25 years of litigation and confrontation before these matters were resolved. We have a unique opportunity in Miriuwung Gajerrong to resolve this by some negotiated outcome agreement, rather than the litigation agitation through the courts. When is it that this government is going to wake up? The way to settle native title is not through agitation and litigation; it is through negotiated outcomes. I think that has been our position from the outset. We would like to think that, if at all possible, we can get back to that point. I believe we can. I believe that CERD has also identified that possibility and I believe it is an issue that can become a reality if the political will were also there.

Mr SECKER—So you think you can still cite it as proof even though it is not a legally ratified decision?

Mr Clark—It is a legal decision of the court and it has now been appealed, I understand. In my mind, it is a decision that you can hang some weight to.

Mr SECKER—If it changes would you still hang the same weight to it?

Mr Clark—My belief is that exclusive possession, from the point of view of indigenous people, is unmoveable.

Mr SECKER—In your evidence you also cited the Wik decision which was that pastoralists needing to operate in their normal manner had precedence over any native title claims. Do you accept that part of the Wik decision?

Mr Clark—In all these legal decisions, if you are searching for my political position – and I think I am restating this point – it is not by litigation through legal decisions that we will find a resolution to the land matters in this country: it is through negotiated outcomes. In terms of Wik, Miriuwung Gajerrong and other decisions that have been made, I think they further complicate what is justice and what is logic. I do not believe in continuing that process if we are to find a real resolution.

Mr SECKER—That may or may not be the case. I find it interesting that you are not prepared to commit to that part of the Wik decision in your answer.

Mr Clark—I think it is only a small part, and in isolation it could be used as some sort of a tool to suggest that I am thinking otherwise.

Mr SECKER—You still have not answered my question, Mr Clark.

Mr Clark—Maybe I am a good politician like you.

Mr SECKER—I try to answer my questions truthfully.

Mr Clark—Are you suggesting that I am untruthful?

Mr SECKER—I do not make any suggestion like that at all. I made the suggestion about myself.

Mr Clark—You might just apologise to me.

CHAIR—Mr Secker, I think you did reflect on the answer the witness has given in terms of the truthfulness of his evidence.

Mr SECKER—No, I did not mean that, Madam Chair.

CHAIR—I am sure you did not mean that.

Mr Clark—Surely my integrity is not in question. I would think, in attempting to find some truthful answers, as we sit on opposite sides of the political divide, that there would be some respect for my opinion in this matter.

CHAIR—We are working to some terms of reference on this inquiry.

Mr MELHAM—A number of the amendments that went through the parliament placed extra burden on representative bodies. I am interested in what is happening on the ground, what those amendments have meant for land councils and people acting on behalf of indigenous interests. Has that resulted in more red tape and frustration at a local level?

Mr Clark—We have had an independent consultant look at this. Some of the people who are associated with those who would probably be considered the opposite side during the debate – the National Farmers Federation and people who are very familiar with their arguments – have independently pointed out to ATSIC that we are probably some \$80 million in shortfall in terms of being able to address these amendments once the processes are fully in train. I believe that we have an enormous problem on our hands. In fact, if their 10-point plan did anything, it created more uncertainty. That is an issue that will turn around and bite this legislation at some particular point and it is something that will not go away unless it is properly addressed. We can proceed down this track and continue to hope and think that the native title legislation will resolve this and provide certainty. It is my opinion that it will not, given that, if the resources and the finances are not available in terms of people and dollars, we will have an absolute disaster on our hands.

Mr MELHAM—In other words, it is not just going to be amendments that are required; it is going to be proper resources, so that indigenous land use agreements can be the way forward.

Mr Clark—Absolutely.

CHAIR—I would like to have a look at your submission. I know there are other members who may also wish to put some questions to you on notice.

Mr SNOWDON—Can you relay to us your experience of the attitude of indigenous native title holders to negotiating ILUAs and regional agreements? In other words, do indigenous people have a positive attitude to the negotiation of ILUAs and regional agreements?

Mr Clark—Yes. Since becoming the chair, I think I have demonstrated, including through my Australia Day address, that my opinions are formed from a huge and well-developed network amongst indigenous people, which has been reinforced by my election. I think I understand exactly the issue that they are confronted with. They would wish to resolve these matters by agreements, if possible, but I think even that will be hindered by the current legislation. It stands in the way of reasonable agreements being reached. The fact is, why negotiate – and this is my experience with local governments, state governments, et cetera – if there is no legal requirement to do so? There is not all that much goodwill out there in the community. There is such confusion about this amended process that I think it stands in the way of the opportunity for properly negotiated agreements.

Mr SNOWDON—On the resourcing of native title rep bodies, can you provide us with an assessment – you have mentioned an independent assessment – from ATSIC of how much its budget would need to be supplemented to provide adequate coverage for these rep bodies?

Mr Clark—Yes, I think there is an \$80 million shortfall.

CHAIR—Thank you very much. It may very well be that ATSIC does receive some questions on notice from the committee following our opportunity to read your submission.

Mr MELHAM—Can I congratulate Mr Clark informally on his election as chairman. This is the first time Mr Clark has addressed a committee of the parliament in his role as chairman of ATSIC. It is a historic occasion that he is the first elected chairman of ATSIC amongst indigenous people as against a chairman appointed by government. I think it would be wrong for this occasion to pass without personally congratulating him on what is a prestigious honour. There can be only one first elected chair of ATSIC, and it is Geoff Clark. You are to be congratulated and commended, Mr Clark.

Mr SNOWDON—Hear, hear!

CHAIR—Thank you very much for those words. I join with Mr Melham, and I am sure other members of the committee do as well, in extending our congratulations to you, Mr Clark.

Mr Clark—Thank you.

[7.21 p.m.]

FITZGERALD, Mr James Peter, Legal Adviser, Queensland Indigenous Working Group
O'SHANE, Mr Terence Joseph, Chairman, Queensland Indigenous Working Group

CHAIR—Welcome. Do you have anything to say about the capacity in which you appear?

Mr Fitzgerald—I am also a senior associate at Arnold Bloch Leibler Solicitors, Melbourne. I would like to note for the record that in 1997 I was seconded to the Department of the Senate to assist this committee. Also I was seconded to the offices of the Hon. Gareth Evans and Senator Nick Bolkus during the 1997-98 debate about the amendments to the Native Title Act.

CHAIR—We do prefer all evidence to be given in public but, if at any time you want to answer in camera a question that any of the committee members ask you, please indicate that you would like to do so and we will consider that request. However, I should tell you that any evidence that you give in camera could be made public by a subsequent order of the Senate. Would you like to make some opening remarks, Mr O'Shane, followed by Mr Fitzgerald, and then we will have some questions for you.

Mr O'Shane—Thank you, Madam Chair. It is good to see you again. I remember you from the previous time I was here. Mr Haase, Senator Abetz, my colleagues from North Queensland and Senator Jan McLucas, it is good to see you here. As a representative of the Queensland Indigenous Working Group, I have to say that I need to recognise other members of the working group here today. One organisation, the Foundation for Aboriginal and Islander Research Action, will be presenting in their own right. My colleague Les Malezer will represent that with Shane Hoffman. I also need to recognise the commissioner for ATSIC from south-east Queensland, Patricia Thompson, who sits here today. There are also members of the regional council of chairs, Mr Eddie Smallwood, Russell Doctor and myself as a chairperson, and there are members of the land councils in Queensland: the Central Queensland Land Council, the Cape York Land Council, the Carpentaria Land Council and the Goolburri Land Council.

We have come today to talk to members of parliament about the Queensland legislation that will be going before the Senate. We have very strong objections as a collective arrangement to that going through the Senate. We come at an opportune time. We are able to come before you and at the same time do the work that we need to do on behalf of our constituents in Queensland. I need to say that we recognise ATSIC in the form of Mr Geoff Clark. For the purposes of this committee, let me say that the Queensland Indigenous Working Group and I have absolute faith in the honesty and integrity of Mr Geoff Clark and of ATSIC. I think the connotations in the question from the honourable member were out of order. We object to that from this side of the room. I also support Mr Spindler in terms of what he had to present.

The previous time I was in Canberra before this committee, we were talking about the amendments to the Native Title Act. Some of the results of those amendments have been that, in terms of the international arena, the issue is now subject to international scrutiny by the Committee on the Elimination of Racial Discrimination. In 1988-89, we presented at the ILO in terms of drafting convention 169 about indigenous peoples' rights, and we had inserted in the document, which was recognised by a number of countries – while it is not ratified by Australia, it has been ratified by particular countries – the requirement for informed consent. This government is aware and this country is aware of that requirement. At no time in terms of the amendments did this government receive our informed consent.

Our submission has been presented to you this morning. I am not sure whether you are across that, but my presentation here this evening will certainly just be a summary. We will not go through the entire document; we will do a two-page summary. I should leave my comments now in case my colleague James has a few comments to make.

Senator ABETZ—I am grateful that you are not going to take us through the submission tonight.

CHAIR—Mr Fitzgerald, did you want to make any further comments?

Mr Fitzgerald—Not at this time. I am just suggesting that perhaps the chair of the working group would like to at least read the executive summary of the submission.

CHAIR—Can I say to you what I previously said to our ATSIC representative – that is, it is a fairly weighty document that was delivered to us this morning, and I would like to flag that we may have some questions on notice when we have had an opportunity to look through the detail of your submission. Today has been a parliamentary sitting day for all of us, so it has not been possible for us to spend the time to go through this as we might like. Can I just flag that there may well be some questions on notice which may follow your appearance before us today.

Mr Fitzgerald—The executive summary is only two pages.

Senator ABETZ—Have we as a committee skimmed it? We could possibly incorporate it into the *Hansard* for the record rather than having it read out. It would be easier for everybody.

Mr MELHAM—I am happy to move that it be incorporated word for word, which would mean that it appears both in the submission and in the transcript.

Mr O'Shane—Let me say, Madam Chair, that I understand that parliament sat today, and we appreciate the fact that you have taken the time to come here and allowed us to appear before you.

CHAIR—That is our responsibility, Mr O'Shane.

Mr O'Shane—Other people should see the hard work that politicians do. They bag you all the time.

Mr SNOWDON—They do too, don't they?

CHAIR—Mr O'Shane, did you still want to read it as well as incorporate it?

Mr O'Shane—I will read it briefly just to give you a good feeling.

CHAIR—Before we go any further, is everybody in favour of incorporating the document? There being no objection, it is so ordered.

The document read as follows—

EXECUTIVE SUMMARY

The Queensland Indigenous Working Group (“QIWG”) is an unincorporated association of indigenous organisations including the Representative Bodies of Queensland determined pursuant to Section 202 *Native Title Act 1993* (Cth) (“NTA”); the Aboriginal Coordinating Council; the Islander Coordinating Council; and the Aboriginal and Torres Strait Islander Commission.

Through the representations of the National Indigenous Working Group (among other avenues), the native title holders of Queensland have previously expressed their strenuous objection to the provisions of the *Native Title Amendment Act 1998* (Cth) (“1998 amendments to the NTA”). The QIWG also objects to the provisions of the 1998 amendments to the NTA, and to legislation passed in Queensland since 1998 which relies upon the 1998 amendments to the NTA.

In March 1999 the United Nations Committee on the Elimination of Racial Discrimination (“CERD Committee”) issued a decision¹ in which it expressed concern over the compatibility of the 1998 amendments to the NTA with Australia's international treaty obligations under the international Convention on the Elimination of All Forms of Racial Discrimination (“CERD”).² The CERD Committee noted particular provisions of the 1998 amendments to the NTA as discriminating against native title holders³.

Between August 1998 and July 1999 the State of Queensland has enacted legislation in reliance upon the 1998 amendments to the NTA to validate intermediate period acts; to “confirm” the extinguishment of native title which may otherwise have survived; to provide for compulsory acquisitions for the benefit of third parties; and to remove native title holders' right to negotiate in relation to a range of future acts where the right to negotiate would otherwise apply under the NTA.

The CERD Committee's finding that the 1998 amendments to the NTA are not compatible with Australia's obligations under the CERD is sustainable on evidence including the evidence referred to in this submission. The overwhelming weight of evidence is that significant features of the 1998 amendments to the NTA are racially discriminatory, both in their own right and in their empowerment of states and territories to pass further racially discriminatory laws. The Queensland experience demonstrates the actual discriminatory effects of the 1998 amendments to the NTA.

Since 1996 the Commonwealth Government's dealings with Australia's native title holders have been characterised by heavy-handedness and antipathy. Clearly Commonwealth Government would benefit from the advice of the CERD Committee in relation to its dealings with Australia's indigenous people.

The first essential step in any action to remedy the injustices caused by the 1998 amendments to the NTA is to suspend the operation of the amendments to the extent possible. That includes not allowing any state or territory alternative provisions which rely upon the 1998 amendments to the NTA to come into effect. Where states and territories have relied on the 1998 amendments to the NTA to enact legislation which operates to subordinate, impair or extinguish native title, there should be immediate investigation into ways to avoid retrospectively the effects of such legislation upon native title, or to provide proper and timely restitution where the effects of the legislation are found to be irreversible.

Secondly, the Government should enter into detailed negotiation with indigenous Australians to identify the extent, if any, of *real* problems arising out of the late recognition of native title, and to explore consensual solutions to any such problems. The Government should not take any action or adopt any measures which affect native title without first obtaining the informed consent of native title holders.

In the interests of justice, and of preserving Australia's international reputation, the Parliamentary Joint Committee is urged to draw the attention of the Parliament to the matters referred to above, and to recommend appropriate remedial action as soon as possible.

¹ Decision (2)54 on Australia, reference CERD/C/54/Misc.40/Rev.2, 18 March 1999.

² *Ib id* Paragraph 6.

³ *Ib id* Paragraph 7.

Senator ABETZ—One of the recommendations of the committee under the convention was to suspend the native title amendments of 1998. You touched on that. How do you propose that that be done?

Mr O'Shane—Any state legislation coming before this parliament needs to be not passed. It needs to be stopped. In that way, we suspend the operations of the 1998 amendments.

Senator ABETZ—Has any legislation gone through parliament?

Mr Fitzgerald—Can I assist in that answer? Paragraph 11 of the CERD decision of March 1999 includes the recommendation that Australia suspend implementation of the 1998 amendments to the Native Title Act. This group would propose that that can be done in a number of practical ways. As this committee will be aware, measures which CERD has found to be racially discriminatory or incompatible with Australia's treaty obligations include the obligation to not discriminate, to prevent others from discriminating and to guarantee all persons equality before the law. I assume that the committee is aware of those findings. In Queensland, the Beattie government has passed legislation to validate intermediate period acts under the 1998 amendments and to confirm in full measure extinguishment of native title – so-called 'confirmation of extinguishment'. Both of those measures are under the state provisions act (No. 1) of 1998.

Perhaps more importantly for the purposes of the question, the Beattie government has made use of sections 26A, 26B and 43A of the 1998 amendments, all of which require the determinations of the Commonwealth Attorney-General, which are disallowable instruments on the part of the Senate, before they come into operation. Whilst the effect of the validation and confirmation legislation is immediate, there would need to be some investigation about whether or not there can be retrospective measures put in place to either avoid the effect of that legislation or mitigate it. It is practically possible for this government to suspend the implementation of the state future acts schemes, the state alternative provisions schemes, by, for example, the Attorney-General putting a moratorium on any further determinations of compliance of state schemes until these matters have been considered by this committee and until the parliament has considered what amendments are necessary to bring Australia into compliance with its international treaty obligations.

Senator ABETZ—If I am to take CERD's determination seriously and read it word for word, it tells me that the Australian government should suspend the native title amendments of 1998. It does not seek to indicate which amendments. As I read it, it says all of them, which would include, for example, the Brandy amendments. I would have thought that would be in nobody's interest. It appears the CERD did not even address this. So what sense should I make of the CERD's determination?

Mr Fitzgerald—There are two answers to that. First of all, I remind you again that the words are 'to suspend implementation of the 1998 amendments'. To some extent, time has worked against suspension of the implementation, for instance, in respect of the amended threshold test. Time has not worked against suspension of implementation in relation to, say, state alternative provisions for future acts. Secondly, the CERD decision – and I will not refer to the paragraph number – is a short decision, and I am sure you are aware of it.

Senator ABETZ—Yes, I have read it.

Mr Fitzgerald—The point of that decision is that, where the 1993 Native Title Act was a special measure, it can no longer be characterised as such. Special measures are not considered on any particular provision of the act. There is no point in particularising the act for these purposes. They are saying that it no longer represents, on balance, a measure for the benefit of indigenous people. To that extent I would simply say that, whilst there may be practical problems in taking up the committee's recommendation, these are matters that were brought to this committee's attention in 1997 and brought to the government's attention in the course of the Senate debates. So to say now, 'What can we do? It's too late,' is somewhat disingenuous – with respect – given that the government was on notice of the matters that the CERD has referred to in its decision.

Senator ABETZ—With respect, I asked a pretty direct question, which was: what should I make of the fact that the CERD said – as I read it – to suspend the lot? If we were to suspend the lot, that would include, would it not, the Brandy amendments, for example?

Mr Fitzgerald—If you are referring to the amendments to section 190A and 190B in relation to the threshold test, the answer is that the problem is total and therefore the resolution of it must be total as well.

Senator ABETZ—So your submission is that we should suspend – which is a funny term – if we could the operation of all the amendments of 1998? Is that your submission to us?

Mr Fitzgerald—I think you will find in the words of our submission that we say that there should be suspension to the extent that it can be done now and, to the extent that the measures under the 1998 amendments are irreversible, that there should be investigation of ways to mitigate the effects of those amendments.

Senator ABETZ—But it would be possible for us as a parliament to, let us say, repeal the Brandy amendments. Would you want us to do that? Surely, the answer is no. It is within nobody's interests that the Brandy amendments be repealed, I would have thought.

Mr Fitzgerald—With respect, as I have mentioned before, the point is not in relation to any particular provision. What CERD has found is that the weight of the amendments shifts the balance of the act and, just as there was a process to amend the act, there should now be a process to unamend it and restore it to a balance that characterises it as a special measure under the CERD and so brings Australia back within its treaty obligations.

Senator ABETZ—I understand all that but, with respect, it is a pretty straightforward question. The CERD has said, 'Suspend the lot.' I am asking you whether you agree with the suspension of the lot, which would include the Brandy amendments.

Mr Fitzgerald—Clearly, native title is with us every day, and therefore there need to be practical measures put in place to deal with the issues of the development of native title and the recognition in this country. There are a number of claims around the country that have already been through two threshold tests now. I can see the import of your question, which is what about the practicality of the CERD recommendation. My answer is that to the extent that it can be followed it should be.

Senator ABETZ—Yes, but not only the practicality but the appropriateness of it. As I understood it, everybody basically accepted the Brandy amendments, yet we have now got this international committee telling us to suspend the whole lot. To my mind, that indicates that they did not really fully understand the extent of the amendments that were carried in 1998. They were undoubtedly concentrating in some areas but must have overlooked in their decision other areas, and as a result the question is what weight I should put on their determination when they are telling me as a legislator of this country that we ought to suspend the lot, yet there are sections of the amendments of 1998 that I thought had universal agreement.

Mr O'Shane—I am not quite sure how fair dinkum the question is in regard to whether this committee would make a recommendation to the government to actually do that, but I think we need to take on board the previous comments from the chairperson of ATSIC and indicate that the recommendation from this committee should go to the government and indicate that CERD should be invited out here and to go through with the government those very issues that need to be addressed in this question that is being asked. We are not members of the CERD, but we certainly see that the amendments to the act and their application have disadvantaged indigenous people in this country in terms of our common law and native title rights. So the question should be asked to the members of CERD, and you can do that by this committee going to the government and recommending that you invite the CERD out here, and the sooner the better.

CHAIR—We do plan to try and speak to a member of CERD in a videoconference call later in our hearings.

Mr O'Shane—Very good.

CHAIR—Senator Abetz, did you have any further questions?

Senator ABETZ—I suppose the bottom line in this debate then is: would indigenous people in this country be better off with the Native Title Act 1993 as amended, with all its amendments, as it is now, or with no legislation whatsoever? So no Native Title Act at all or the legislation as it is now.

Mr Fitzgerald—With respect, I think that is a theoretical question.

Senator ABETZ—You see, we had just been told, I thought, that the Native Title Act was no longer sustainable as a special measure. If it is not sustainable as a special measure, I think an argument could be made out from the non-indigenous communities that it is in fact racially discriminatory. If that is the argument, that it is not a special measure and we cannot sustain it on that basis, there is no basis for the native title legislation. As a result, potentially the whole lot can be thrown out. Therefore, I would like to know what is within the best interest, in your view, of the indigenous people: to have the whole lot thrown out or to say, 'Well, the amendments of 1998 weren't too flash, but it is better than nothing.'

Mr O'Shane—We need to go back to what ATSIC indicated. I will just take you back through a bit of history. In the discussion we had with the Prime Minister, Mr Howard, we could not reach agreement on the composition or the structure of the so-called 10-point plan or the amendments. What should have happened at that particular time is that there should have been a process of negotiation with the indigenous leadership in this country and the government itself should have recognised and given respect to the 1992 decision of the High Court. Collectively, we should have worked through that decision to work out how we would frame legislation that would embrace the 1992 High Court decision, to embrace the aspirations of indigenous peoples and to recognise the necessity of the broader community in their requirement to access the country in terms of development and anything else that needed to go on.

We could bring all those issues together through a negotiated arrangement, but when we have a situation where it is enforced upon a group of people that group of people – which in this case is indigenous peoples – will be forever fighting against that because we were not party to that and we are not stakeholders; we are not the owners of that decision.

So the process is fundamentally wrong in the way in which it was done. As we go into the new millennium, we cannot be in the situation where people like this committee and this government can be bloody minded about how they will treat a section of their community on the basis of race. Those days are long gone. You will come under international scrutiny and we will continue to go there to ensure that the international community will view Australia in a very poor light for its treatment for a section of this community. That could have been done. It was not done. I think the commission indicated that that needs to be unravelled to the extent that we can actually now go into that process and have it worked out properly.

Senator ABETZ—I can understand those sentiments. I suppose that was not the –

Mr O’Shane—Intent of your question?

Senator ABETZ—Not necessarily responsive to the question which, I suppose, was, one, a technical question and then also your assessment of it. The technical part is: if we can no longer sustain the native title legislation as it is, as a special measure, how on earth can it be justifiable? Surely it could be struck out if it is no longer a special measure. I would have thought non-indigenous people could claim it is racially discriminatory. And, if the High Court were to say that it is racially discriminatory but it cannot be a special measure and therefore there is no justification for it, the potential is that the whole thing gets struck out. Would the indigenous people of Australia be better off with a High Court decision striking the whole lot out or with the current act as it is, albeit you might not be very happy with it?

Mr Fitzgerald—Can I just make these two points to answer that question. First of all, it is not for this group to talk about the indigenous people of Australia. This group represents a number of organisations in Queensland. In relation to Queensland, I can –

Senator ABETZ—The people that you represent, the Queensland Indigenous Working Group – I accept that.

Mr Fitzgerald—Obviously this group also works on instructions and those instructions may vary from group to group, but I can give you a couple of examples. As recently as this morning, I have read that there are two groups of Aboriginal traditional owners from the Fraser Island area of Queensland who have chosen to pursue their rights through the Supreme Court of Queensland because they have absolutely lost faith and confidence in the procedures of the Native Title Act, as amended.

Senator ABETZ—So they are pursuing common law?

Mr Fitzgerald—So they are pursuing their common law rights through a common law organ. Secondly, I would take you to the example of Aboriginal traditional owners who have land which was or is covered by a grazing homestead perpetual lease in Queensland. Grazing homestead perpetual leases are a species of tenure which, according to the advice of Walter Sofronoff QC, who acted on behalf of the Wik people in their High Court victory, are more amenable to coexistence with native title than pastoral leases considered in the Wik decision. In relation to those leases, they are a species of tenure included in your government schedule 1 to the 1998 amendments to the federal act, and in relation to which the Beattie Queensland government has chosen to confirm so-called confirm extinguishment. In other words, it has effected the legislative extinguishment of native title over those areas. We are talking about leases which in some cases, I understand, go up to between 50 and 250,000 hectares. They are not small homestead plots; they are essentially grazing licences.

If you were to ask any person who has a traditional interest in an area covered by a grazing homestead perpetual lease in Queensland whether they believed that the provisions of the Native Title Act would be better off not in force, I am sure the answer would be a resounding yes, because their rights have now been extinguished. Perhaps more savagely, their rights have been extinguished by the joint actions of your government and the Beattie Queensland government in circumstances where both those governments had actual notice that there was a real issue as to whether native title survived in those areas.

Senator ABETZ—With respect, it is a pity when you do not get an answer.

Mr Fitzgerald—I have attempted to answer on behalf of quite a number of Queensland native title holders.

Senator ABETZ—I can understand your anecdote but overall the point is –

Mr Fitzgerald—With respect, grazing home perpetual leases, according to the Queensland government, cover an area up to 12 per cent of the state of Queensland, so I do not think it would be called an anecdote. Let us say that we can talk for native title holders over at least 12 per cent of Queensland. I would say that was a substantial number.

Senator ABETZ—So all the organisations and people that the Queensland Indigenous Working Group represents would prefer the Native Title Act to be repealed?

Mr Fitzgerald—That is a separate question. We simply do not have the instructions to answer that.

Senator ABETZ—Sorry, I thought you knew what my question was. Given your submission, if the Native Title Act cannot be sustained as a special measure and if, as I think, it may well be declared illegal if that argument were to be upheld, you could be faced with a ruling from the High Court that it is illegal and therefore you could be faced without a Native Title Act, full stop. Do you believe that the people that you represent in the Queensland Indigenous Working Group as a group and all the people that you represent would be better off with a Native Title Act as it exists at the moment or without? That is the question.

Mr Fitzgerald—It is a very difficult question to answer because, first of all, you are asking for my personal opinion and I am a solicitor acting under instructions. It is not for me to say who would be better off with what, but what I have particularly endeavoured to do –

CHAIR—Would Mr O’Shane care to answer? Senator Abetz has asked the question several times.

Senator ABETZ—We do not seem to be eliciting an answer.

CHAIR—If we cannot get an answer, we are going to need to move on.

Mr O’Shane—The question is framed with two options but there is a third option that he misses out on, and it is a very cunning question.

CHAIR—Would you like to answer it?

Mr O’Shane—Absolutely.

Senator ABETZ—With respect, the question has not been too cunning and I am trying to get an answer.

Mr O’Shane—I thought I gave the answer originally when we talked about supporting the chairman of the commission, where we wind this thing right back and we unravel it to the point where we can actually collectively bring up the legislation that will actually bring together the aspirations of the indigenous community, the governments and the industry. As for doing away with the legislation, if you had no legislation that would be a problem. As for the current legislation, that is a problem. There is a third requirement.

Senator ABETZ—Which is the worst problem from a Queensland indigenous perspective?

Mr O’Shane—The worst problem is the ignorance that exists among the legislators in terms of their lack of

Senator ABETZ—That was not one of the options you put.

Mr O’Shane—Hang on! It is the lack of commitment to indigenous people about getting together to find a solution to the High Court decision of 1992. That is what the problem is.

Senator ABETZ—Well, Chair, I do not think we are going to get an answer.

CHAIR—Senator Abetz, I think you have got as broad an answer as you are going to get to that question and I think we do need to move on.

Senator ABETZ—I was very polite.

Mr O’Shane—We do not need tricky questions about the serious business here.

CHAIR—Mr O’Shane, we will now move to Mr Melham for some questions.

Mr MELHAM—Mr O’Shane, isn’t it fair to say that it was not indigenous people but non-indigenous Australians who clamoured for legislation after the original Mabo decision?

Mr O’Shane—A terrible thing happened to the Australian community when you had politicians at the federal level getting out into the broader community and creating hysteria in saying what the High Court decision meant. They said it meant that 92 per cent of the landmass of Australia was going to be claimed under native title by Aboriginal people. They created hysteria based on the race question, and it was a shameful display by our elected officials in this country. This government carried that out in terms of the amendments in 1998. There can be no forgiveness for what happened over that period of time.

Mr MELHAM—Can I just repeat the question. It was not indigenous people who called for legislation back in 1992 after the original Mabo decision, or indeed after the 1996 Wik decision; it was non-indigenous Australians who called for legislation, wasn’t it, to overcome their fears or phobia about certainty?

Mr O’Shane—That is right.

Mr MELHAM—Have you met any non-indigenous person who has lost their backyard in the last seven years since the Mabo decision, or their squatter’s lease, as a result of native title?

CHAIR—Mr Melham, is that the best way to frame that question?

Mr MELHAM—Perhaps I will reframe it. Part of the fear was that people would lose their backyards and farms as a result of native title and that they needed legislation to have the certainty of that title enshrined. Have you met anyone in the interim who has successfully claimed a backyard or a farm?

Mr O'Shane—The only backyards and the only farms that I have seen that have been lost to anyone is through the banks foreclosing on them. There is nothing through native title ever.

Mr MELHAM—If the Native Title Act was repealed and the validation provisions were also repealed, there would be a bit of an outcry from the farming community and the rest of the non-indigenous community, wouldn't there, because that might bring into question their titles – in their eyes, that is; not necessarily legally.

Mr O'Shane—Their title in where?

Mr MELHAM—Given the fear campaign from the non-indigenous community and the scramble for legislation after 1992, Mabo, and Wik, wouldn't it be fair to say that the fear campaign could be reimposed if the Native Title Act was repealed?

Mr O'Shane—Absolutely. They would be out there in busloads doing it all.

Mr MELHAM—And in terms of the certainty question, are the only people who have uncertain title at the moment indigenous Australians?

Mr O'Shane—Absolutely. And there is nothing in the state regimes or in the federal regime where certainty is guaranteed in terms of a native title right. There is nothing in terms of any proposal where it says that the guarantee will be given. It is all about extinguishment. There is not one line, there is not one document, there is not one word written about certainty for indigenous peoples. After all the nonsense that goes on, indigenous people have to go back and prove who they are and where they sit and go through a whole process of identifying who we are in terms of our right to claim.

Mr MELHAM—Have indigenous people been able to identify, in either the original 1993 act or indeed the subsequent amendment act, where any of their claim for title has been given more certainty or improved?

Mr O'Shane—Not to my knowledge.

Mr MELHAM—So there is no benefit where their title was confirmed in any of those acts.

Mr O'Shane—No.

Mr MELHAM—So, in effect, the thrust of most of that initial act or the amendment act was about confirming non-indigenous title. The confirmation of extinguishment provisions were all about confirming non-indigenous title.

Mr O'Shane—If it only confirmed the existing title of non-indigenous people it would be fine, but it has also gone and extinguished native title rights over vast tracts of land, which has been indicated in terms of GHPLs in Queensland.

Mr MELHAM—Okay. A number of questions were asked of you by Senator Abetz in relation to the Brandy decision and this suspension recommendation of the CERD. Would it be fair to say in terms of the submissions to the CERD that many aspects of the amendment bill were not canvassed before the CERD; in other words, those making decisions did not really concentrate on, say, the Brandy amendments, amongst other amendments?

Mr Fitzgerald—While we are not aware of exactly what was received by the CERD, certainly there were a number of provisions which recurred, including validation of intermediate period acts, confirmation of extinguishment and the loss and reduction of the right to negotiate. I would be very surprised if all the provisions of the 1998 amendments – some of which were proposed, if I recall, by the National Indigenous Working Group in the first instance – would be objected to. Can I also just say in answer to your question that paragraph 11 of CERD's decision of March 1999 includes a couple of recommendations:

The Committee urges the state party to suspend implementation of the 1998 amendments and reopen discussions with representatives of Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to indigenous peoples and which would comply with Australia's obligations under the Convention.

Senator Abetz appears to have lighted on the first of those recommendations, which is to suspend implementation of the 1998 amendments. I just note that it is now almost a year since this recommendation and, to my knowledge, there has been no reopening of discussions with Aboriginal and Torres Strait Islander people by this government. So, if you take the mechanical Senator Abetz approach of saying (1) suspend and (2) reopen negotiations, then you will of course fall into trouble. If, on the other hand, you are acting in good faith and instead reopen negotiations, you could by now, by this date, be in a position where you could amend the Native Title Act to bring it within the confines of Australia's international treaty obligations.

Senator ABETZ—For the *Hansard* record, I did not say what Mr Fitzgerald is trying to put into my mouth. I simply asked questions. For the *Hansard* record, I reject Mr Fitzgerald's interpretation of my questions.

Mr MELHAM—What I am trying to establish is that it is a nonsense to suggest that indigenous people came to the table when they were forced to come to the table in 1998 and objected to every single amendment. Indeed, a number of amendments that the government picked up specifically in relation to indigenous land use agreements were proposed by the Indigenous Working Group because it was felt that they would encourage more agreements at a local level. I think it is fair to say – tell me if I am wrong – that after initial resistance by the government, because it only wanted them to apply I think in relation to future acts – it was as a result of the technicians acting on behalf of the working group that the government in the end accepted those amendments because it could see a way through for past, present and future acts.

Mr Fitzgerald—Yes. I was not a party to those discussions but that does accord with my general recollection of what occurred.

Mr MELHAM—Again, tell me if I am wrong – indigenous interests recognised in some respect that the threshold test did need to be improved after the Brandy amendments because there had been a general understanding in 1993 that it would operate at a certain level and that as a result of a number of court decisions it was becoming too easy to register claims and so the whole system was being clogged up.

CHAIR—I am sure you are flagging that as a question, Mr Melham.

Mr MELHAM—I was trying to shorten it; that is all.

Mr Fitzgerald—If I can just answer that, Chair – the 1993 Native Title Act included a so-called threshold test for native title determination applications in the interest of ensuring that there was some degree of scrutiny, some degree of credibility, to claims to which the right to negotiate would apply. That was a robust test. It was struck down in the Brandy decision on my understanding on a technicality that it involved an exercise of judicial power by a non-judicial body. It was not the nature of the threshold test itself that was under scrutiny but the power that underpinned it.

Mr MELHAM—Correct me if I am wrong, but again a number of amendments were proposed by the Labor Party and the Democrats at the behest of indigenous interests because they felt, in terms of indigenous interests from their experience, they would help improve procedures on the ground in relation to the Native Title Act.

Mr Fitzgerald—Yes, that is my recollection.

Mr MELHAM—And a number of technicians that had been advising indigenous interests felt that if those practical amendments had been picked up by the government it would have helped rep bodies and other interests on the ground.

Mr Fitzgerald—Yes.

Mr MELHAM—Again, correct me if I am wrong – some suggested amendments that were not picked up by the government, for instance, that might have benefited this problem with cross-claims and individual claims involved giving power to rep bodies to sort out differences and sort out claims within particular regions so that they would end up sifting through a lot of the problems at the ground, were rejected by the government.

Mr Fitzgerald—That is my general recollection, yes.

Mr MELHAM—Again, to summarise: indigenous interests are of the view that the act can be improved without violating rights of any of the parties but by improving processes and that there is still a long way to go in terms of this current act. It is not a perfect act. Even if we take out the areas of dispute at the moment, is it your experience, as someone who has worked in the native title area, that this act needs improvement in a lot of other areas?

Mr Fitzgerald—It is my understanding that it has never been suggested that the 1993 Native Title Act would never undergo amendment. Necessarily, as a result of the late recognition of native title in Australia in the Mabo decision, there is a need for an ongoing legislative, executive policy and other response to the issues that are raised from time to time as the common law develops in this area. There will be, I would suggest, a need to continue to amend the Native Title Act for a number of years to come, and in fact probably other legislation as well, to take into account the development of the common law. I would simply say that the CERD decision recommends a formula for the way in which those sorts of amendments ought to occur. So there is not only a problem that faces Australia now in the aftermath of the debacle of the 1998 amendments to the federal act but also a formula for ongoing, if we could put it this way, world's best practice for accommodating the development of the law of native title in Australia.

Mr MELHAM—Mr Secker earlier asked a question of an earlier witness or implied in his question to do with the Miriuwung Gajerrong case, for instance, that a court determination subject to appeal is of no effect

until the appeal is determined. I think that was the import of his question. Are you aware of statements by justices of the High Court, particularly Justice McHugh, that actually repudiate that approach?

Mr O'Shane—I was thinking about Mr Clark's answer and the question in terms of the appeal. If you get done for murder you are in jail, and if you want to appeal you are still in jail while the appeal is on. So, as far as we are concerned, all of us, the issue stands. There is a decision, and if you do not support the decision you can appeal it. That is how we feel about it. That was a funny question. I do not know why the question was asked.

Mr MELHAM—What I am saying is that that determination is a determination in place till it is overturned on appeal.

Mr O'Shane—No, not the question you asked but the previous question asked to Mr Clark. I thought that was a funny question in terms of stopping everything on the basis of an appeal. You do not get out of jail on the basis of appeal; you sit in there if you get done for murder.

Mr Fitzgerald—In answer to Mr Melham's question, I am not familiar with the particular passage you may be considering. It is my general understanding as a lawyer of over 10 years practice that the common law is as developed by the court of highest standing from time to time. At the moment in relation to the Miriuwung Gajerrong decision some of the issues in that decision have been decided by the Federal Court, that is, the law of this country for the time being.

Mr MELHAM—I think it is fair to summarise –

CHAIR—Mr Melham, this is going to be short, isn't it?

Mr MELHAM—Yes, last one. In the first case decided after the amendment bill went through, when we were all assured that the schedule was ridgy-didge and they were exclusive acts, Justice Lee in the Federal Court in the first instance found that one of those titles that was on the list from Western Australia was not an exclusive tenure and indeed had a specific reservation that by that reservation gave strong likelihood that native title had survived, and he found accordingly.

Mr Fitzgerald—Yes, that would be a textbook example of discrimination on the grounds of race and deprivation of the rights of a group of people on the grounds that their interests come to them as Aboriginal people. Only Aboriginal people's interests are extinguished or impaired by both the validation and confirmation provisions of the 1998 amendments to the federal act.

CHAIR—Thanks, Mr Melham. Could I just clarify something, Mr O'Shane, that I thought I heard you say earlier on in response to a question Mr Melham asked? I take you back to the comments you made when we were talking about the original Mabo decision and the period leading up to the passing of the first Native Title Act. I thought I heard you say that there was a lot of racial tension, a lot of unhappiness, by non-indigenous people in the community. Was I correct in hearing you say that you would not want to see a return to that situation which could have occurred if we were to repeal this act? Mr Fitzgerald, it was Mr O'Shane who made the comment and I just wanted to clarify what I thought I heard him say.

Mr O'Shane—Do not get too defensive, Madam Chair. I do not think I said that, but I would not like to see this country embroiled in that sort of situation again.

CHAIR—That is what I thought you said and the *Hansard* record will show it. I agree with you. I know Mr Snowden has some questions and we only have five minutes left.

Mr O'Shane—Madam Chair, I was going to suggest that we actually take questions because we are out of time.

CHAIR—Yes. Mr Snowden has some questions and Mr Haase might have one or two.

Mr HAASE—Mr O'Shane, I was recalling something you had commented on earlier. It was about returning to the situation where the arrangements were that the judiciary were picking winners and losers in debates over native title rights. I believe you did say something about not wanting to have that situation and how a long period of time had gone by in the Canadian situation.

Mr O'Shane—Excuse me – that was Mr Clark.

Mr HAASE—Mr Clark, I do beg your pardon. I am attributing all his –

Mr O'Shane—You must have come in late.

Mr HAASE—It is irrelevant who said it. I will frame it in another way. The Canadian situation, which has recently seen a great deal of movement towards independence for indigenous people, is still relying on the judiciary to select winners and losers in disputes over native title to land. Would you agree with that? Are you aware of the Canadian experience?

Mr O'Shane—A little bit.

Mr HAASE—I am not fully aware of it, but I know these small details. If the last amendments to the act were repealed, can you quite honestly imagine a situation where the judiciary would be totally removed from the final decision making process?

Mr O'Shane—Perhaps I will answer like this. I am reluctant to talk in a manner where we have winners and losers. What I like to see is that we have a result and that the result is the best result for all of us. People are not going to get in ships and go back to England, I can tell you that, so we have to learn to live together. We understand that process, but there is still an opportunity here for us. We would love to see a situation where the 1992 decision is embraced and is given respect and recognition in terms of how it should occur. That should only occur where we come to the table in an equal arrangement and negotiate through with the government of the day how in fact we will develop legislation. That has not occurred and, as a consequence, friction occurs because of that situation developing.

Industry and others thought in their interest that they should get out and create that racial tension that we talked about in the previous question, which we do not like at all. You create the temperature in the community and we all have a responsibility to try to settle that down, but we cannot settle it down when they use it as some sort of political ploy. And the worst thing about it is that people like yourselves then respond to it. That is the problem that we have.

CHAIR—Does that answer your question, Mr Haase?

Mr O'Shane—I understand that the judiciary are going to be part of it. It is the overriding authority within the country. But native title is a component of our legal and social arrangement now in Australia and has been for 100,000 years. It has been recognised since 1992, but it is not covered under the Westminster system. So we have to develop an understanding within the Westminster system of how they embrace the common law and native title rights of indigenous people in this country. They have to become sensitive too. That will occur down the track. We are going to be around and the judiciary will always be around in this arrangement because that is the way in which at the end of the day you enforce the result, whatever it may be.

Mr HAASE—You are implying to me that you agree that it is an unsatisfactory outcome that all decisions are going to be made by the judiciary and that there will always be winners and losers.

Mr O'Shane—I do not say winners and losers; I say we chase a result.

Mr HAASE—Surely the reality is that there are going to be winners and losers if we cannot negotiate a settlement in a reasonable period of time.

Mr O'Shane—Our position is that we need to negotiate. There was an absolute requirement to negotiate.

Mr HAASE—From what position?

Mr O'Shane—It should be from all of our positions because it is a new component in terms of the Westminster legal system. Native title is a new component in Australia anyway, not in places like Canada and that. What has happened is that the people who make the laws have not embraced our Commonwealth native title right; they have not given it respect and they have not given it recognition. What they want to do is stay under the old pre-1992 regime and they think that they can marginalise the indigenous peoples through a process of legislation or by a win-lose decision through the courts. That is wrong.

CHAIR—Mr Haase, we are going to have to leave it there.

Mr HAASE—I accept that. Thank you, Mr O'Shane.

Mr O'Shane—Thank you.

Mr SNOWDON—Mr Fitzgerald, general recommendation 23 issued by the CERD calls on state parties 'to ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly related to their rights and interests are taken without their informed consent.' As a lawyer, would you accept that the amendments to the 1998 act were taken without the informed consent of indigenous Australians?

Mr Fitzgerald—I do not think you need a lawyer's opinion on that. There were very clear statements made publicly by indigenous leadership that the 1998 amendments did not enjoy the consent, agreement or support of indigenous people.

Mr SNOWDON—Does the legislation passed by the Queensland government have the informed consent of indigenous people in Queensland?

Mr Fitzgerald—Absolutely not. The position of the Queensland Indigenous Working Group is that all the pieces of the Beattie government's native title legislation – which comprises the native title state provisions act No. 1, native title state provisions act No. 2, and amendments to the state development and public works

organisation amendment act and to the land and resources tribunal act – are objected to and that they tend to diminish indigenous people's procedural rights and to extinguish native title.

Mr SNOWDON—Would you argue, if the Senate were to allow that piece of legislation to stand, that that would further abrogate from the already abrogated rights of indigenous Australians?

Mr Fitzgerald—Yes, it certainly would. Further than that, it would constitute a flagrant renunciation even of the recommendations that were made by the CERD. It may be argued on one view that certain parts of the 1998 amendments to the federal Native Title Act cannot now be overturned. Certainly, there is an opportunity for the Senate to make right part of the wrong that was done in those amendments by rejecting any state and territory scheme.

Mr SNOWDON—I refer you back to paragraph 11 of the CERD report, to the discussion which was held previously and to the questions which were asked about whether or not it would be preferable to have the existing act. Do you think it is possible that you could suspend implementation of the 1998 amendments, subject to negotiation with indigenous Australians? What I want to get to here is that presumably, if you accept the nature of informed consent as the underlying principle under which you negotiate, it would be pretty simple – and I would imagine fairly easy – to get agreement on such things as the Brandy amendments. Wouldn't that be so?

Mr Fitzgerald—I imagine that there would be some part of the Native Title Act amendments which would be uncontroversial.

Mr SNOWDON—So, if there were a negotiation which was open and fair, do you think it would be possible to seek to review the 1998 amendments in such a way that there could be further amendments to the act to make it better or so that it actually meets the requirements of the CERD?

Mr Fitzgerald—Yes. While I do not purport to act for the National Indigenous Working Group, it is my understanding, based on general knowledge, that that group had made a general offer to participate in proper, informed and decent negotiations to solve any real problems that needed to be solved legislatively arising from the decisions of the High Court since Mabo.

Mr SNOWDON—Can I ask just one final question? Has the Attorney-General sought to discuss with the Queensland Indigenous Working Group any concerns that they might have about the Queensland legislation?

Mr Fitzgerald—Yes. The Attorney-General met with members of the Queensland Indigenous Working Group from recollection in December 1999. At that time a large number of concerns were put to him and those are contained in documents which can be made available to the committee. The Attorney-General's response was that he viewed – if I can paraphrase – his obligations under the relevant provisions, section 26A, 26B and 43A of the federal act, as being to examine the issue of whether the Queensland state provisions complied with the technical requirements of the federal act. The Queensland Indigenous Working Group was very dissatisfied with that response, particularly given that the Attorney-General also has responsibility for native title. Secondly, arguments were put to him in submissions that in fact his duty goes far beyond ticking the boxes of technical compliance and includes, for example, the issue of taking into account Australia's international treaty obligations.

Mr SNOWDON—Could you make those documents available to this committee?

Mr Fitzgerald—With pleasure.

CHAIR—Thank you. As I said at the outset, when the committee has had time to look at your comprehensive submission, there may be some further questions that we will place on notice with you. Thank you very much for appearing this afternoon.

[8.23 p.m.]

Mr DOCTOR, Mr Russell, Chairperson, ATSIC, South East Queensland Regional Council, Aboriginal and Torres Strait Islander Commission

HOFFMAN, Mr Shane, International Officer, Foundation for Aboriginal and Islander Research Action

MALEZER, Mr Robert Leslie, General Manager, Foundation for Aboriginal and Islander Research Action

CHAIR—I think you were here earlier when I explained that we do like all our evidence to be given in public, but if any of my colleagues tonight ask you a question that you would like to answer in camera please ask us to consider that request and we will do so. However, I should tell you that information that is given in camera may subsequently be made public by an order of the Senate. I do not believe that we have a submission from FAIRA tonight. Would you like to make a short introductory statement and then we will follow with questions.

Mr Malezer—We apologise. We have not yet provided the committee with a submission. I would like to add that because of our resources we have difficulty being able to provide written submissions, but it is our intention to do so. We feel a bit embarrassed by the fact that we cannot operate with enough capacity to be of most help to this committee by having a submission beforehand, but we believe that we will still be able to provide quite positive input into the processes. I would also like to add that we do have access to a number of documents which have related to the period during which native title negotiations have occurred here in Australia in the 1993 legislation and the 1998 amendments, as well as the conduct of the Committee on the Elimination of Racial Discrimination during 1999. If those documents are not available – for example, I refer to the general recommendations of the CERD – we would take an opportunity to table those documents as we refer to them.

The introduction we would like to work on would be specifically in relation to paragraph (a) of the terms of reference as to whether the findings of the CERD that the amendment act is inconsistent with Australia's legal obligations is sustainable on the weight of informed opinion. We will not be able to participate to any great extent in relation to terms of reference (b) in relation to what amendments are required to the act, and also in relation to paragraph (c), whether dialogue with CERD on the act would assist in establishing a better formed basis. In terms of paragraph (c), we certainly do support dialogue with the CERD, but our understanding of the committee is that it would not make itself available to comment in relation to amendments that might be proposed on a part by part basis, in the sense that the committee would consider legislation that is in force. It would not see itself as being a reference or source body for what legislation might be in place. The understanding and experience that we have had through seeing the CERD in operation is that the committee would again comment in relation to the legislation as an entire piece of legislation, rather than comment in relation to specific bits. However, that is our view, and it would certainly be of benefit for the CERD or the members of that committee, to have an opportunity to be able to comment on that, as you have already suggested may be possible tonight. We would like to emphasise also under those terms that the proposal by the CERD to visit Australia should be considered under that term of reference in the sense that it may help answer questions that are being asked back here in Australia in relation to the international decision that has already been made.

Also, I would like to point out that this organisation, FAIRA, has been involved in the issue of combating racism since its formation in 1976. It was formed during the time of what we call the black axe in Queensland under the Bjelke-Petersen government. Our objective was to remove racial discrimination from the legislation in Queensland. It is something that we have campaigned tirelessly on and which we believe we have had a role in undertaking. Personally, I have also been involved in the implementation of the Racial Discrimination Act in 1975. It was my job then when I worked with the Commonwealth government to move around the state of Queensland to inform Aboriginal and Torres Strait Islander people of the implementation of the act and that they in fact had a right to challenge their treatment under laws and other actions in Queensland with the benefit of the Racial Discrimination Act. The organisation has also had successes very recently in negotiations with the Queensland government in relation to receiving compensatory payments for Aboriginal and Torres Strait Islander people who did not receive award wages up to 1984. The government is now participating in a program with us to ensure that people are now paid a settlement for the racial discrimination and the loss of wages that occurred for a period between 1975 and 1984.

Our organisation has been particularly interested in matters of racial discrimination and the application of the Racial Discrimination Act in Australia. Because the Native Title Amendment Act has largely suspended the operation of the Racial Discrimination Act, we have maintained an interest in what are the provisions in Australia to protect from racial discrimination and how they might be applied and the circumstances that have led to a situation where an international committee has found reason to engage the Australian government, under its early warning provisions, as to acts of racial discrimination committed not by one race of people against another race of people but by a national government against a race of people. On that point I would like Mr Hoffman to briefly enhance my presentation by reiterating certain aspects of the committee's decision, particularly in trying to unravel whether the committee's decision is sustainable, and to point out the opportunity that has been provided to the government to give information to the committee so that the committee can make a well-informed decision.

Mr Hoffman—Australia has had ample opportunity to provide information to the CERD to demonstrate that the amendments to the Native Title Act in 1998 were not racially discriminatory and did not breach the International Convention on the Elimination of all Forms of Racial Discrimination. The committee sought information from the Australian government at its August meeting in 1998, just after the amendments to the Native Title Act had been passed by the Australian parliament. The government provided a response to the committee and the document is entitled "The Australian government response to the United Nations Committee on Racial Discrimination: requests for information under article 9, paragraph 1, of the Convention

on the Elimination of all Forms of Racial Discrimination'. It is dated January 1999. This submission was considered by the committee – and it is on the record – as were submissions that were provided by the Human Rights and Equal Opportunity Commission and the Aboriginal and Torres Strait Islander Commission. Many others were provided by NGOs, including a comprehensive submission by the national indigenous working group on native title. The committee made its decision in March last year.

The Australian government's immediate response was provided in a news release by the Attorney-General, the Hon. Daryl Williams, dated 19 March 1999, entitled 'United Nations committee misunderstands and misrepresents Australia'. The government's response, basically, was that the committee did not understand the issues and had not properly taken account of representations made by the Australian government. I should point out that I was at the hearings in March. The Australian government was initially scheduled to appear for 1½ hours but that was extended to six hours. I can attest that there was a good deal of dialogue between the committee and the government. The committee also sought to be invited to send a subcommittee to Australia to further engage the government in dialogue. That request was refused. One would have thought that that would have been an ideal opportunity for the government to very clearly put its case to the committee as to why the committee's views were wrong.

The committee kept the issue on its early warning agenda for the meeting in August last year. The Australian government had a right of reply and could have appeared before the committee had it wished to do so. The Australian government did provide a right of reply which was to be annexed to the committee's report, and that is what happened. The Australian government did not appear formally before the committee, but one interesting thing is that the committee, in its decision of August, in reaffirming its decision of March, also made the point that in part 2 of the decision it did consider the representations made by the Australian government, the written and oral presentations. The decision in August last year quite clearly indicated that the committee still stood by its March decision, that it did not accept the Australian government's position that the Australian government's submissions had not been considered properly and called on the Australian government to do what it asked be done in March, and that is to suspend implementation of the amendments and negotiate with the indigenous peoples.

Mr Malezer—In our presentation we would like to cast doubt upon the ability of the government, or the governments of Australia, and the institutions and the population of Australia, to identify racism and to determine when racism occurs and when it does not occur. We believe that there is not sufficient identification of national codes or national standards which show what is racism – that is, what is a breach of what would have been the Racial Discrimination Act, in the case of the Native Title Act, or of the International Convention on the Elimination of all Forms of Racial Discrimination. We are aware that there are also a number of Commonwealth standards that Australia has been a party to in preparing, implementing or approving. These deal with the elimination of racial discrimination. In these cases that I refer to the emphasis is upon the elimination of racial discrimination – not necessarily upon having in place a law that outlaws discrimination but in fact to remove racism and the effects of racism as a responsibility of government and media.

The Racial Discrimination Act in Australia has been suspended for the purpose of the Native Title Amendment Act and yet there seems to be an understanding that that in itself is not allowing an avenue for racial discrimination to occur. As was presented at the time by the national indigenous working group, if racial discrimination is not occurring, there is no need to remove the operations of the Racial Discrimination Act or in certain aspects, such as the validation of interim period titles, that the suspension of the Racial Discrimination Act could occur for those specific purposes but not in relation to the blanket removal of the operation of the Racial Discrimination Act as occurred in the Native Title Amendment Act. Similarly, you cannot be a party to the elimination of all forms of racism and continue to toggle on and off legislation or protection from racial discrimination. We will not elaborate as we would like to as to whether we have fundamental protection – that is, constitutional protection that cannot be removed by the federal government or any government – but we are simply at the hands of the legislation which was removed for this purpose.

We would also like to emphasise that the role of government, and the role of the media, has been a major disappointment over the last five years in its requirement that it eliminate racial discrimination. There has been much incitement to racial discrimination and we have already heard tonight members of the committee refer to a rise of racist sentiment being expressed in Australia over the last two or three years and whether we would want to go back to that. It is our contention that we had such extreme racism before the Racial Discrimination Act in 1975 throughout this country, which did not necessarily lead to public tension but in fact led to major denial of the rights and interests of Aboriginal and Islander people to the point that Islander people suffered physically, mentally and economically as a result of that discrimination. It is that to which we do not wish to return. It is not whether there is a heated debate in Australia about the rights of Aboriginal people in this country; it is a case of whether there is a return to the loss of rights, the suspension of rights, by the removal of the Racial Discrimination Act.

I will not elaborate because of the shortage of time, but we did want to also present the case that we believe the High Court decision on *Mabo* is discriminatory in a fundamental way – and if a question is put to us on that, we will comment further – and, as a result, the Native Title Act 1993 is discriminatory. However, we note that is not the CERD view – that CERD did earlier this decade or the last decade make a comment that the Racial Discrimination Act 1993 was not in breach of the convention. We have a view which is different from even that view. If members of the committee are interested in why we have that view, we are quite happy to present that.

I will end the presentation there and just again emphasise that our particular concern is in relation to paragraph (a) of the terms of reference. If we are asked questions on (b) or (c), we will, to our best capacity, answer those questions.

CHAIR—Thanks. Do you have any questions, Mr Snowdon?

Mr SNOWDON—No, not at this stage.

CHAIR—Senator Abetz, do you have any questions?

Senator ABETZ—No.

CHAIR—My goodness, it looks as though you have made a very comprehensive presentation.

Mr MELHAM—I will ask some questions. I do not know whether you did this, but can you tell the committee your role in the CERD hearing? You kicked it off, didn't you, Mr Malezer?

Mr Malezer—I would like to claim that I in fact had a responsibility in kicking it off. I was in Geneva at a Working Group on Indigenous People's meeting at the time the CERD met in 1998. I was introduced to a member of the committee and I asked the question: does the committee look at things such as the Native Title Amendment Act in Australia, or does it operate in a different way? As a result, that member took to inquire further into the Native Title Amendment Act and then discussed it with other committee members. They then made a decision to ask Australia to provide information to that committee in March 1999. That was my participation. I do not believe I had any say or influence over how that member acted.

Since that point, I have been appointed by the National Indigenous Working Group to coordinate and prepare its submissions. We cannot submit direct to the committee but we can submit to members of the committee, so we have directed submissions to there. I was asked to coordinate that role because I was aware of the committee and I had the experience in Geneva at that time, and that became a portfolio responsibility for me.

I attended both CERD meetings in March and August last year where decisions were given. I had the opportunity to interact with both Australian government representatives as well as committee members during that time. In that point, I believe I have become something of a quasi expert. I am not a lawyer and I do not understand jurisprudence on racial discrimination, but I have become a quasi expert in relation to the operations in that regard. That has been the background of my involvement.

My participation in 1993 and 1996 to 1998 on discussions of amendments to the Native Title Act, combined with the fact that FAIRA itself is a native title representative body and responsible for delivering on-the-ground services to clients and is able to understand, I believe, the impact of legislation on the ground – as I believe some questions here today have been raised – means that I do believe myself to be something of an expert in this area, although I would never go so far as to claim to have legal expertise.

Mr MELHAM—The committee has a summary record of the 1323rd meeting of the CERD. You were there throughout the whole of the proceedings, weren't you?

Mr Malezer—Yes.

Mr MELHAM—I think the Attorney-General's Department have provided us with the official summary of the commission. There has been a bit of disparagement of that committee in the Australian media by some politicians and others. Was it your observation that they took their role seriously?

Mr Malezer—Most certainly. In fact, I had the honour to meet members who sit in international courts on various matters of international law. People such as Theodore Van Boven, for example, who is responsible for the Van Boven principles, and Professor Wolfram, who is involved with the Max Planck Institute in Germany, are very much respected jurists in their areas of expertise. They are a committee of experts. That was the design under the treaty under the convention. The individual members themselves have qualifications which verify their standing.

It was very disappointing to see that some newspapers, and particularly editorials, took to attack the committee members because of the decision. I believe they did not even know the background of the committee members. It was very disappointing. As I have already pointed out, we are about the elimination of racial discrimination in this country. It is a big issue for the government; it is a big issue for Aboriginal and

Torres Strait Islander people. The international documents target governments and target media as being the people who have the responsibility to eliminate racial discrimination. It is so unfortunate to see in Australia the way in which the Australian media have behaved and reacted, as a general comment. Some media have tried to provide information to the population so that they can make informed opinions, but some media have simply expressed taxi cab opinions to the public – with all respect to taxi drivers.

Senator ABETZ—You are talking to a former one; be careful.

Mr Malezer—We do not want to discriminate against taxi drivers, either. It is an expert committee, and it is a very impressive experience to be sitting and watching this committee in its process.

Mr MELHAM—Whilst we have got only a summary, in the questions they asked in their attempts to elicit information from the government and others, was it your observation that you were dealing with people who actually knew what they were on about? In other words, these are experts in that area and, indeed, that is the reason that they are on that committee.

CHAIR—I think that is what Mr Malezer has just said.

Mr MELHAM—I know, but in the summary that we have got, it seems to me that a lot more questions were asked. If the Australian government was before the committee for some six hours, we have only got a portion of that transcript of proceedings. I am trying to get from you the flavour of how those hearings went, given that you were an observer throughout the whole proceedings.

Mr Malezer—I did leave my answer incomplete in that regard. In our opening presentation particularly, we tried to point out that there was an opportunity to provide information to this committee. There was no limitation on the part of government or anybody to provide information, so they provided a decision based upon the information that came before them. I think it is quite obvious from the reports that are available from the committee, to which you have already referred, that the committee was very well informed. The committee's decision was therefore a decision based upon good information and knowledge about the amendments and how they operated. If there is going to be an accusation or a case made that the committee did not understand, I do not think that can be supported in light of the way in which the government has tried to deal with this committee. It has refused to appear before it, it has refused to allow the committee the opportunity to come to Australia; it has been given the opportunity to present written submissions, et cetera. I believe the evidence is there for people to see that the committee has endeavoured in the best possible way to engage with the government and make a well-informed decision.

Mr SNOWDON—I am assuming, Mr Malezer, that your submission will go into the detail of your concerns about those terms of reference, so I do not have any questions.

Mr Malezer—Yes, it will.

CHAIR—Thank you very much, Mr Malezer. We look forward to receiving that submission. In due course, I should flag, we might have some questions on notice to take up with you when we have had an opportunity to look at that submission. That completes our hearing this evening. I thank the witnesses tonight and also those members who have been our guests in the audience this evening for their patience and interest in this issue.