



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
obligations under the Convention on the Elimination of all Forms of Racial
Discrimination**

THURSDAY, 9 MARCH 2000

CANBERRA

BY AUTHORITY OF THE PARLIAMENT



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

Thursday, 9 March 2000 Thursday, 9 March 2000

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

Senators and members in attendance: Senators Abetz, Crossin, Ferris, McLucas and Woodley and 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

**HORNER, Ms Philippa, First Assistant Secretary, Native Title Division, Attorney-General’s
Department153**

**LEON, Ms Renee, Assistant Secretary, Office of International Law, Attorney-General’s
Department153**

ORR, Mr Robert, Deputy General Counsel, Australian Government Solicitor153

COMMITTEE MET AT 6.06 P.M.

HORNER, Ms Philippa, First Assistant Secretary, Native Title Division, Attorney-General's Department

LEON, Ms Renee, Assistant Secretary, Office of International Law, Attorney-General's Department

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

CHAIR—I call the committee to order and welcome you here tonight. I declare open this public meeting of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund. Today's hearing is a continuation 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, CERD.

AS EACH OF YOU WOULD ALREADY BE AWARE, THE COMMITTEE PREFERS ALL EVIDENCE TO BE GIVEN IN PUBLIC BUT SHOULD YOU AT ANY TIME WISH TO GIVE YOUR EVIDENCE, PART OF YOUR EVIDENCE OR ANSWERS TO SPECIFIC QUESTIONS IN CAMERA, PLEASE ASK US AND WE WILL CONSIDER YOUR REQUEST. HOWEVER, AS YOU WOULD ALSO BE AWARE, I AM SURE, ANY EVIDENCE TAKEN IN CAMERA CAN SUBSEQUENTLY BE MADE PUBLIC BY AN ORDER OF THE SENATE.

WE HAVE YOUR SUBMISSION, MR ORR. I NOW INVITE YOU TO MAKE SOME BRIEF OPENING REMARKS ABOUT THE COMMITTEE'S INQUIRY INTO THE CONSISTENCY OF THE NATIVE TITLE AMENDMENT ACT. AT THE CONCLUSION OF THOSE REMARKS, MY COLLEAGUES AND I WILL HAVE SOME QUESTIONS FOR YOU.

Ms Horner—Senator Ferris, before we start I want to ask if you have all received copies of the supplementary submission which was sent up on Tuesday morning?

CHAIR—I certainly have.

Ms Horner—Right. We might talk about some of the things that are in the supplementary submission.

CHAIR—It might be useful if you could take us briefly through them for the benefit of those people who did not have time to read them.

Ms Horner—Ms Leon was going to talk about the international law aspects, if that is convenient to the members of the committee.

Ms Leon—Because the issues before the committee turn on matters of international law, I thought you might find it helpful if I outlined some of the international law issues that are germane both to the CERD committee's findings and, therefore, to your deliberations.

THE CERD COMMITTEE ESSENTIALLY MADE TWO PARTICULAR FINDINGS IN RELATION TO THE NATIVE TITLE ACT—ONE THAT TURNS ON THE ISSUE OF DISCRIMINATION AND ONE THAT TURNS ON THE ISSUE OF WHETHER INDIGENOUS PEOPLE ENJOYED EFFECTIVE PARTICIPATION IN POLITICAL LIFE IN THE FORMULATION OF THE NATIVE TITLE ACT. I PROPOSE TO OUTLINE FOR YOU THE MEANING OF EACH OF THOSE TERMS IN INTERNATIONAL LAW. BEFORE I DO SO, I ALSO WANTED TO MAKE SOME COMMENTS ABOUT AUSTRALIA'S RELATIONSHIP AND INVOLVEMENT WITH THE COMMITTEES THAT MONITOR THE UNITED NATIONS TREATY BODIES, INCLUDING THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION.

AUSTRALIA IS A PARTY TO THE SIX MAJOR HUMAN RIGHTS TREATIES AND HAS ACCEPTED THE OPTIONAL PROCEDURES THAT EXIST UNDER THREE OF THOSE TREATIES FOR COMPLAINTS TO BE MADE, EITHER BY INDIVIDUALS OR IN SOME CASES BY STATES, TO THE TREATY BODIES, SUCH AS THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION. AUSTRALIA ALSO PROVIDES COMPREHENSIVE REPORTS TO THE COMMITTEES AS REQUIRED

UNDER ITS TREATY OBLIGATIONS AND IS, IN RELATION TO THE RACIAL DISCRIMINATION CONVENTION, COMPLETELY UP TO DATE WITH THE PROVISION OF ITS REPORTS. WE SEND HIGH LEVEL DELEGATIONS TO THE COMMITTEES. WE ENGAGE WITH THEM IN GOOD FAITH IN RELATION TO THE FINDINGS THAT THEY MIGHT MAKE IN INDIVIDUAL CASES AND THE COMMENTS THAT THEY MAKE ON OUR REGULAR REPORTS UNDER THE TREATIES. WHILE WE DO NOT ALWAYS AGREE IN EVERY DETAIL WITH WHAT THE COMMITTEES MIGHT SAY ON PARTICULAR CASES, AUSTRALIA NEVERTHELESS DOES ENGAGE WITH THE COMMITTEES ON A BASIS OF MUTUAL RESPECT AND RESPONDS AT AN APPROPRIATE LEVEL TO THE OBSERVATIONS OF THE COMMITTEE IN A REASONED FASHION.

Mr MELHAM—That is contained in the supplementary submission.

Ms Leon—That is correct. We have also been involved in a process with the committees and with the United Nations of endeavouring to improve the operation of the treaty bodies, including the Racial Discrimination Committee. In relation to the particular legal issues that were under consideration by the Racial Discrimination Committee, the first that I wanted to touch on briefly was the issue of equality and non-Discrimination. These concepts are explained at some length in our original submission but I thought the committee might find it helpful if I simply outlined them briefly for your consideration this evening.

IN RELATION TO NON-DISCRIMINATION AND EQUALITY, THERE ARE TWO WAYS IN INTERNATIONAL LAW IN WHICH EQUALITY CAN BE CONCEPTUALISED. ONE IS ON THE BASIS OF FORMAL EQUALITY WHERE DIFFERENT GROUPS ARE SIMPLY TREATED ALIKE, AND THIS IS COMBINED WITH AN ALLOWANCE FOR SPECIAL MEASURES, WHICH MEANS SPECIAL TEMPORARY MEASURES THAT CAN BE TAKEN TO BRING A DISADVANTAGED GROUP UP TO A POSITION OF EQUALITY. THE SPECIAL MEASURES ARE ENCOMPASSED WITHIN THE NOTION OF THE CONCEPT OF FORMAL EQUALITY IN THAT THE AIM IS TO BRING ABOUT A POSITION OF ACTUAL EQUALITY BETWEEN THE TWO GROUPS.

MORE RECENTLY, THE CONCEPT OF SUBSTANTIVE EQUALITY HAS BEEN USED TO CONSIDER ISSUES OF EQUALITY AND NON-DISCRIMINATION IN INTERNATIONAL LAW. IN RELATION TO SUBSTANTIVE EQUALITY, THE CONCEPT ENCOMPASSES TREATING LIKE GROUPS OR LIKE THINGS ALIKE, BUT TREATING DIFFERENT GROUPS DIFFERENTLY, IN ACCORDANCE WITH THE DIFFERENCES BETWEEN THEM, PROVIDED, OF COURSE, THAT THE DIFFERENCES YOU FOCUS ON ARE ONES THAT ARE LEGITIMATE ONES TO FOCUS ON IN RELATION TO THE OBJECTS OF THE CONVENTION, AND PROVIDED THAT THE DIFFERENT TREATMENT IS PROPORTIONAL TO THE NATURE OF THE DIFFERENCE BETWEEN THE GROUPS. WE SPEAK IN THE SUBMISSION ABOUT THE APPLICATION OF THOSE CONCEPTS TO THE SITUATION OF NATIVE TITLE.

THE ISSUE OF DISCRIMINATION HAS BEEN CONSIDERED SPECIFICALLY BY THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION AND IT HAS ISSUED A GENERAL RECOMMENDATION ON THE SUBJECT. BECAUSE THE GENERAL RECOMMENDATIONS ARE RELEVANT TO A NUMBER OF ISSUES BEFORE US TONIGHT, I WILL JUST INDICATE TO YOU WHAT THE NATURE AND SOURCE OF THOSE GENERAL RECOMMENDATIONS ARE. THE COMMITTEES DRAW TOGETHER THEIR OWN JURISPRUDENCE AND OTHER SOURCES OF INTERNATIONAL LAW FROM TIME TO TIME AND PRODUCE FROM THAT JURISPRUDENCE A GUIDE FOR STATES PARTIES TO THE CONVENTION TO PARTICULAR ISSUES THAT WILL ARISE IN THE INTERPRETATION OF THE CONVENTION. SO WHILE THE GENERAL RECOMMENDATIONS ARE NOT BINDING, THEY ARE A USEFUL SUMMARY OF EXISTING INTERNATIONAL LAW.

THE GENERAL RECOMMENDATION ON DISCRIMINATION THAT THE COMMITTEE HAS ISSUED SETS OUT THAT DIFFERENT TREATMENT IS NOT NECESSARILY DISCRIMINATION AND THAT WHAT NEEDS TO BE EXAMINED IF TREATMENT OF GROUPS IS DIFFERENT IS WHETHER THE CRITERIA FOR THE DIFFERENT TREATMENT ARE LEGITIMATE, AS MEASURED AGAINST THE OBJECTIVES AND PURPOSES OF THE CONVENTION. A SIMILAR COMMENT HAS BEEN MADE BY THE HUMAN RIGHTS COMMITTEE IN RELATION TO DISCRIMINATION UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS TO THE EFFECT THAT DISTINCTIONS ARE NOT DISCRIMINATORY IF THE CRITERIA FOR THE DISTINCTIONS ARE REASONABLE AND OBJECTIVE AND IF THE AIM IS TO ACHIEVE A PURPOSE THAT IS LEGITIMATE UNDER THE COVENANT.

IN SUMMARY IN RELATION TO DISCRIMINATION, WHAT NEEDS TO BE LOOKED AT WHEN CONSIDERING WHETHER THERE IS DISCRIMINATION UNDER THE CONVENTION IS NOT SIMPLY LOOKING AT WHETHER THERE ARE DIFFERENCES OF TREATMENT, BUT LOOKING AT THE BASES FOR THE DIFFERENT TREATMENT, THE AIM OR PURPOSE OF THE DIFFERENT TREATMENT, AND THE REASONABLENESS AND JUSTIFICATION OF THE TREATMENT THAT HAS BEEN UNDERTAKEN.

THE SECOND FINDING OF THE COMMITTEE THAT I WANT TO MAKE SOME REMARKS ABOUT TONIGHT CONCERNS THE COMMITTEE'S FINDING THAT THERE WERE CONCERNS ABOUT COMPLIANCE WITH ARTICLE 5(C) OF THE CONVENTION. ARTICLE 5(C) GUARANTEES POLITICAL RIGHTS, INCLUDING PARTICIPATION IN PUBLIC AFFAIRS. THE COMMITTEE DREW ON ITS OWN GENERAL RECOMMENDATION 23 IN RELATION TO EFFECTIVE PARTICIPATION IN PUBLIC LIFE. I SHOULD NOTE IN THIS RESPECT THAT GENERAL RECOMMENDATION 23 IS NOT PER SE AN INTERPRETATION BY THE COMMITTEE OF THAT CLAUSE ABOUT EFFECTIVE PARTICIPATION IN PUBLIC LIFE, BUT IS A GENERAL RECOMMENDATION ABOUT INDIGENOUS ISSUES UNDER THE CONVENTION. THE POSITION THAT WE HAVE NOTED IN THE SUBMISSION IS THAT THAT GENERAL RECOMMENDATION 23 IN ONE RESPECT DOES NOT DO WHAT GENERAL RECOMMENDATIONS ARE INTENDED TO DO, WHICH IS TO REFLECT THE STATE OF INTERNATIONAL LAW. IN THIS RESPECT, GENERAL RECOMMENDATION 23 GOES FURTHER THAN ANYTHING THAT EXISTS ELSEWHERE IN INTERNATIONAL LAW IN INTERPRETING THE MEANING OF POLITICAL RIGHTS UNDER THE CONVENTION, EVEN TAKING ACCOUNT OF THE MOST RECENT DEVELOPMENTS IN INTERNATIONAL LAW.

AT INTERNATIONAL LAW, THE REQUIREMENT OF PARTICIPATION IN POLITICAL LIFE IS TO ALLOW THE PARTICIPATION OF RELEVANT GROUPS AND NOT TO REFUSE THEIR PARTICIPATION, FOR EXAMPLE, ON RACIAL GROUNDS. BUT THAT DOES NOT INVOLVE PARTICIPATION IN ANY PARTICULAR WAY AND THE TREATIES DO NOT PRESCRIBE ANY PARTICULAR FORM OF PARTICIPATION, NOR HAVE ANY OF THE TREATY BODIES IN PARTICULAR CASES REQUIRED THERE TO BE PARTICIPATION IN ANY PARTICULAR WAY. EVEN QUITE NEW TREATIES ON INDIGENOUS MATTERS REFER TO CONSULTATION IN RELATION TO PARTICIPATION IN POLITICAL LIFE, NOT TO A REQUIREMENT OF INFORMED CONSENT, AS APPEARS IN GENERAL RECOMMENDATION 23. SO OUR SUBMISSION INDICATES THAT IT IS CLEAR FROM BOTH DEVELOPING TREATY LAW AND FROM THE JURISPRUDENCE OF ALL THE HUMAN RIGHTS BODIES THAT THERE IS NO INTERNATIONAL REQUIREMENT OF INFORMED CONSENT IN RELATION TO THE EXERCISE OF

POLITICAL POWER AND THAT THAT NEEDS TO BE BORNE IN MIND WHEN CONSIDERING THE COMMITTEE'S INTERPRETATION OF ARTICLE 5(C).

FINALLY, I WANT SIMPLY TO NOTE WHAT MY ROLE HERE IS TONIGHT AND THE FORM OF ASSISTANCE I AM ABLE TO GIVE YOU. I AM ABLE TO PROVIDE YOU WITH ASSISTANCE AND INFORMATION IN RELATION TO INTERNATIONAL LAW, ANY FACTS ABOUT INTERNATIONAL LAW AND ANY WORDS IN THE CONVENTION THAT MIGHT NEED INTERPRETATION, BUT NOT TO PROVIDE YOU WITH LEGAL ADVICE AS TO THE CONSISTENCY OF THE CONVENTION WITH AUSTRALIAN LAW OR OTHERWISE. THANK YOU.

CHAIR—Thank you very much for that very helpful explanation. Mr Orr or Ms Horner, do you have any introductory remarks?

Ms Horner—I wanted to say a little bit about our main submission and then to describe very briefly what is in the supplementary submission, because there have been a number of developments since some of the other witnesses gave evidence and a number of other submissions were made to the committee—in particular, the Miriuwung Gajerrong case which came out last Friday.

VERY GENERALLY, I OUGHT TO MENTION THE GOVERNMENT'S RESPONSE TO THE COMMITTEE'S TERMS OF REFERENCE. THE FIRST TERM OF REFERENCE WAS WHETHER THE FINDING OF THE COMMITTEE THAT THE NATIVE TITLE AMENDMENT ACT IS INCONSISTENT WITH AUSTRALIA'S OBLIGATIONS, IN PARTICULAR UNDER THE CERD, IS SUSTAINABLE ON THE WEIGHT OF INFORMED OPINION. BASICALLY, OUR SUBMISSION IS THAT THE GOVERNMENT DOES NOT ACCEPT THAT THE AMENDED NATIVE TITLE ACT IS IN BREACH OF AUSTRALIA'S OBLIGATIONS AND QUERIES WHETHER THE COMMITTEE ACTUALLY MADE A FINDING ABOUT THE NATIVE TITLE AMENDMENT ACT. IT PURPORTED TO TALK ABOUT THE AMENDED NATIVE TITLE ACT, NOT THE AMENDMENT ACT. EVEN SO, THE GOVERNMENT MAINTAINS ITS POSITION THAT THE AMENDED NATIVE TITLE ACT IS NOT IN BREACH OF AUSTRALIA'S OBLIGATIONS UNDER THE CONVENTION. OUR SUBMISSION DESCRIBES THE WAY IN WHICH THE GOVERNMENT HAS IN THE PAST ARGUED BEFORE THE CERD COMMITTEE, AND CONTINUES TO ARGUE, THAT THE AMENDED ACT IS NOT IN BREACH.

WITH RESPECT TO THE SECOND TERM OF REFERENCE, THE GOVERNMENT DOES NOT BELIEVE THAT ANY AMENDMENTS ARE REQUIRED BECAUSE IT DOES NOT BELIEVE THAT WE ARE IN BREACH. THE THIRD TERM OF REFERENCE RELATED TO WHETHER DIALOGUE WOULD ASSIST IN ESTABLISHING A BETTER INFORMED BASIS FOR AMENDMENTS TO THE ACT. THE GOVERNMENT DOES NOT BELIEVE THAT IT IS NECESSARY TO HAVE A DIALOGUE WITH CERD ON THE FORM OF THE AMENDMENTS BECAUSE IT DOES NOT BELIEVE ANY AMENDMENTS ARE NECESSARY IN ORDER TO BRING THE NATIVE TITLE ACT INTO LINE WITH THE CERD CONVENTION. OF COURSE, THAT IS NOT TO SAY THAT THE GOVERNMENT IS NOT IN DIALOGUE WITH CERD. INDEED, WE ARE APPEARING BEFORE THE CERD COMMITTEE IN ABOUT TWO WEEKS IN GENEVA TO DISCUSS OUR REPORT

ON THE ISSUE OF THE FIRST TERM OF REFERENCE, IT REFERS TO WHETHER THE FINDING IS SUSTAINABLE ON THE WEIGHT OF INFORMED OPINION. OUR SUBMISSION MAKES THE POINT THAT THE QUESTION IS REALLY WHETHER YOU BELIEVE THE COMMITTEE'S FINDINGS ARE CORRECT OR NOT; THERE ARE DIFFERENCES OF VIEWS ON THAT. THE GOVERNMENT DOES NOT BELIEVE IT IS LEGITIMATE TO COUNT HEADS IN THAT RESPECT. THE QUESTION IS WHETHER THE COMMITTEE'S FINDING IS SUSTAINABLE, BASED ON

INTERNATIONAL LAW AND THE PROPER INTERPRETATION OF THE AMENDED NATIVE TITLE ACT.

THE SUBMISSION GOES ON TO TALK ABOUT THE BACKGROUND TO THE CONVENTION; TO OUR APPEARANCE BEFORE THE COMMITTEE BACK IN MARCH 1999 AND MR ORR'S APPEARANCE TO THE OUTCOME OF THE HEARINGS AND WHAT HAS HAPPENED SINCE. IT THEN TALKS A LITTLE BIT ABOUT THE MARCH DECISION AND THE FINDINGS THAT WERE MADE IN MARCH, THE STATE OF INTERNATIONAL LAW, WHICH MS LEON HAS JUST SUMMARISED FOR YOU, AND THE COMMITTEE'S APPROACH TO THE NATIVE TITLE ACT COMPARED WITH THE GOVERNMENT'S APPROACH AND WHERE THEY DIFFER. I WILL VERY BRIEFLY TALK ABOUT THAT.

I WILL SAY FIRST THAT SOME OF THE PREVIOUS WITNESSES TO THIS COMMITTEE HAVE MADE MENTION OF THE FACT THAT THE MARCH CONCLUSIONS OF THE CERD COMMITTEE WERE VERY BRIEF, AND IT IS QUITE HARD TO DISCERN THE LEGAL BASIS ON WHICH SOME OF THEIR CONCLUSIONS OR FINDINGS WERE MADE. INDEED, IT APPEARS FROM THE WITNESSES THAT VARIOUS PEOPLE HAVE DIFFERENT VIEWS ABOUT THE BASIS ON WHICH SOME OF THOSE CONCLUSIONS WERE REACHED. THE GOVERNMENT WOULD SAY THAT THE COMMITTEE DO NOT APPEAR TO HAVE FOLLOWED THE APPROACH THAT THEY SAID THEY WERE, WHICH WAS TO LOOK AT THE OVERALL SUBSTANTIVE EFFECT OF THE AMENDED NATIVE TITLE ACT, MEANING THE NATIVE TITLE ACT 1993 AS AMENDED BY THE 1998 AMENDMENTS. THE DECISION IN FACT FOCUSED ON FOUR PARTICULAR ASPECTS OF THE 1998 AMENDMENTS AND DID NOT, IN ANY GREAT DETAIL, TALK ABOUT THOSE AMENDMENTS AND HOW THOSE AMENDMENTS OPERATED IN THE CONTEXT OF THE 1993 ACT AND IN THE CONTEXT OF THE OVERALL CHANGES THAT WERE MADE BY THE 1998 AMENDMENTS, NOTWITHSTANDING THAT BOTH THE AUSTRALIAN GOVERNMENT SUBMISSION TO THE COMMITTEE AND MR ORR'S PRESENTATION BEFORE THE COMMITTEE DID TALK ABOUT NOT ONLY THE AMENDMENTS MADE IN 1998 BUT HOW THE OVERALL ACT WOULD CONTINUE TO OPERATE IN RELATION TO NATIVE TITLE.

THE GOVERNMENT BELIEVES THAT THE COMMITTEE DID NOT GIVE SUFFICIENT WEIGHT OR, INDEED, ANY WEIGHT TO ASPECTS OF THE NATIVE TITLE LEGISLATION THAT ARE CLEARLY BENEFICIAL TO INDIGENOUS AUSTRALIANS AND REMAIN BENEFICIAL. THE COMMITTEE'S APPROACH APPEARS TO HAVE BEEN PREMISED ON AN ASSUMPTION THAT EITHER THERE WERE NO AMENDMENTS IN THE AMENDED ACT OR IN ANY OTHER ACTION BY THE GOVERNMENT THAT WERE BENEFICIAL THAT COULD COUNTERBALANCE WHAT WERE DESCRIBED AS DISCRIMINATORY PROVISIONS, OR THAT THERE WERE NOT ENOUGH MEASURES THAT WERE PERCEIVED AS POSITIVE TO COUNTERBALANCE THE DISCRIMINATORY PROVISIONS. BUT, AS I SAID, THE COMMITTEE'S REASONS DO NOT DEMONSTRATE THAT IT HAD REGARD TO THE CLEARLY BENEFICIAL MEASURES IN THE NATIVE TITLE ACT AS AMENDED.

FURTHER, THE COMMITTEE'S VIEW APPEARS TO BE THAT THE ASSESSMENT OF THE BALANCE SHOULD BE UNDERTAKEN BY REFERENCE ONLY TO A COMPARISON BETWEEN THE INTERESTS OF INDIGENOUS PEOPLE UNDER THE 1993 ACT WHEN COMPARED WITH THE INTERESTS OF INDIGENOUS PEOPLE UNDER THE AMENDED ACT. THE GOVERNMENT'S VIEW IS THAT APPROACH IS WRONG; THAT, RATHER, THE ASSESSMENT SHOULD BE BETWEEN THE POSITION OF INDIGENOUS INTERESTS ON THE ONE HAND AND NON-

INDIGENOUS INTERESTS ON THE OTHER, AND THAT APPLYING THE LAW AS DESCRIBED BY MS LEON, THAT WHERE ANALOGOUS EXISTING RIGHTS EXIST, THE PROTECTION GIVEN TO INDIGENOUS RIGHTS SHOULD BE COMPARABLE TO THOSE EXISTING INTERESTS. GIVEN THE DIFFERENT NATURE OF NATIVE TITLE INTERESTS FROM OTHER INTERESTS, THE PROTECTION WILL NOT ALWAYS BE THE SAME, BUT, ON BALANCE, IT SHOULD BE COMPARABLE. THE FACT THAT THE PROVISIONS UNDER THE ACT AS AMENDED MAY BE DIFFERENT IN SOME CASES TO THE PROVISIONS IN THE 1993 ACT CANNOT ITSELF AMOUNT TO DISCRIMINATION.

THE OTHER POINT IS THAT THE COMMITTEE DOES NOT ADDRESS THE GOVERNMENT'S ARGUMENT THAT THE FOUR PROVISIONS IT FOCUSED ON WERE IN FACT JUSTIFIABLE IN PURSUIT OF PURPOSES THAT WERE NOT INCONSISTENT WITH THE CONVENTION; THEY WERE NOT ARBITRARY BUT WERE REASONABLE IN ALL THE CIRCUMSTANCES. THOSE ARGUMENTS WERE PUT TO THE COMMITTEE BY MR ORR, BUT THEY WERE NOT ADDRESSED IN THE COMMITTEE'S DECISION, SO IT IS UNCLEAR TO US HOW THEY REGARDED THOSE ARGUMENTS AT ALL.

THE GOVERNMENT'S VIEW IS THAT THE CORRECT APPROACH WOULD HAVE BEEN TO LOOK AT THE NATIVE TITLE ACT, AS AMENDED, AS A WHOLE; TO LOOK AT THE RANGE OF MEASURES AND ASSESS WHETHER, AS A WHOLE, THEY ARE DISCRIMINATORY; AND, FOR THAT PURPOSE, CONSIDERATION SHOULD BE GIVEN TO WHETHER, AS A WHOLE, THE ACT ACHIEVES SUBSTANTIAL EQUALITY OR ACHIEVES FORMAL EQUALITY AND SPECIAL MEASURES. IT IS NOT APPROPRIATE TO LOOK AT THE AMENDMENTS IN ISOLATION OR PARTICULAR AMENDMENTS IN ISOLATION. AN ASSESSMENT AS TO DISCRIMINATION MUST HAVE REGARD TO THE POSITION OF OTHER LANDHOLDERS IN AUSTRALIA. IT IS NOT SUFFICIENT TO SAY THAT BECAUSE THE ACT DEALS WITH NATIVE TITLE IT IS THEREFORE DISCRIMINATORY, OR BECAUSE IT DEALS WITH NATIVE TITLE DIFFERENTLY AFTER THE AMENDMENTS IT IS THEREFORE DISCRIMINATORY.

WITH REGARD TO SPECIFIC PROVISIONS WHICH AFFECT NATIVE TITLEHOLDERS, IT IS APPROPRIATE TO ASK WHETHER THOSE HAVE A LEGITIMATE OBJECTIVE IN THE CIRCUMSTANCES, THAT IS NOT INCONSISTENT WITH THE CONVENTION. IT IS ALSO NECESSARY TO ASK WHETHER THE PROVISIONS ARE REASONABLE AND NOT ARBITRARY AND HAVE A MINIMUM EFFECT ON NATIVE TITLE. IT IS ALSO NECESSARY TO ASK WHETHER THERE ARE COMPENSATING PROVISIONS FOR THIS EFFECT.

IT IS ALSO NECESSARY TO ASK WHETHER THE GOVERNMENT IS OPERATING WITHIN ITS MARGIN OF APPRECIATION, ESPECIALLY WHERE IT IS DEALING WITH HISTORICAL ACTS—WHICH IS ACTS OF THE CROWN UP UNTIL THE HIGH COURT RECOGNISED THE EXISTENCE OF NATIVE TITLE IN 1992—OR WHERE IT IS BALANCING THE INTERESTS OF NATIVE TITLEHOLDERS WITH THE INTERESTS OF OTHERS. IN RELATION TO THE USE OF THE WORD 'BALANCING', WHERE THE GOVERNMENT IS ACTUALLY MAKING DECISIONS OR JUDGMENTS WHERE THERE IS CONFLICT BETWEEN PROPERTY RIGHTS OF ONE GROUP AND PROPERTY RIGHTS OF ANOTHER, WHICH WAS THE CASE IN 1993 AND 1996 AFTER THE WIK DECISION, MR ORR HAD MADE THE POINT TO THE COMMITTEE IN GENEVA THAT THE GOVERNMENT DID NOT BELIEVE THAT THE CONVENTION OBLIGES IT TO GO BACK AND UNDO PAST GRANTS TO THIRD PARTIES OVER A PERIOD OF MORE THAN 200 YEARS, THOUGH OF COURSE ITS CURRENT POLICY SHOULD SEEK TO ADDRESS HISTORICAL DISPOSSESSION.

PROVISIONS WHICH PROVIDE SUBSTANTIVE EQUALITY OR SPECIAL MEASURES CAN BE AMENDED. AGAIN, THE COMMITTEE DID NOT ADDRESS THIS PROPOSITION WHICH WAS PUT TO THEM IN GENEVA. THE TEST MUST BE WHETHER THE PROVISIONS AS AMENDED CONTINUE TO PROVIDE SUBSTANTIVE EQUALITY OR A SPECIAL MEASURE AND OTHERWISE PROVIDE FORMAL EQUALITY. THOSE ISSUES WERE DISCUSSED WITH A NUMBER OF WITNESSES BEFORE THE COMMITTEE IN THE PREVIOUS MEETINGS FOR THIS INQUIRY AND A NUMBER OF THE WITNESSES AGREED THAT THAT IS THE APPROPRIATE TEST. SO LONG AS THE OBJECTIVE IS MET, THE FACT THAT IN SOME CASES THE RIGHT TO NATIVE TITLEHOLDERS UNDER THE AMENDMENTS ARE DIFFERENT TO, OR LESS THAN, THOSE UNDER THE ORIGINAL PROVISIONS IS NOT TO THE POINT.

THE SUBMISSION THEN GOES ON TO LIST, IN OVER 3½ PAGES, THE MEASURES IN THE AMENDED NATIVE TITLE ACT THAT PURPORT TO TREAT NATIVE TITLE IN A WAY THAT IS DIFFERENT OR TAKES ACCOUNT OF THE SPECIAL NATURE OF NATIVE TITLE. THESE CAN BE DIVIDED INTO THREE KINDS OF TREATMENT: MEASURES DESIGNED TO PROTECT NATIVE TITLE FROM EXTINGUISHMENT, WHERE EXTINGUISHMENT WOULD OCCUR AT THE COMMON LAW; MEASURES WHICH ARE DESIGNED TO TAKE ACCOUNT OF THE SPECIAL FEATURES OF NATIVE TITLE; AND MEASURES THAT TO SOME EXTENT ADDRESS THE EFFECT OF HISTORICAL EXTINGUISHING ACTS OF THE CROWN. I WILL NOT READ THROUGH ALL THOSE BUT I WOULD RECOMMEND THAT MEMBERS OF THE COMMITTEE HAVE A LOOK AT THEM BECAUSE THROUGH MS MCDUGALL'S ADDRESS TO THE COMMITTEE IN MARCH 1999 AND THROUGH SOME OF THE SUBMISSIONS THAT WERE MADE TO THIS COMMITTEE, MANY OF THESE EXAMPLES OF THE WAY IN WHICH THE SPECIAL NATURE OF NATIVE TITLE IS TAKEN ACCOUNT OF ARE NOT REFERRED TO, AND I THINK IT GIVES A MUCH BETTER GENERAL PICTURE ABOUT HOW THE AMENDED ACT OPERATES.

I DRAW ATTENTION TO ONE OF THOSE AND THAT IS A VIEW THAT HAS BEEN IMPLIEDLY PUT TO THE COMMITTEE ON A NUMBER OF OCCASIONS ABOUT THE EFFECT OF THE VALIDATING PROVISIONS IN THE 1998 AMENDMENTS. THOSE VALIDATING PROVISIONS ONLY OPERATED ON CERTAIN KINDS OF LAND. THEY DID NOT VALIDATE THE GRANT OF PASTORAL LEASES. THERE WAS NO GENERAL EXTINGUISHMENT OF NATIVE TITLE ON PASTORAL LEASES BY MEANS OF THE VALIDATION PROVISIONS IN THE 1998 ACT. THE VALIDATION PROVISIONS—TO THE EXTENT THAT THERE MAY HAVE BEEN ACTIVITIES OR ACTS AUTHORISED ON PASTORAL LEASES BETWEEN 1994 AND 1996—VALIDATED THOSE ACTS OR ACTIVITIES. SO IT IS NOT THE CASE, THOUGH IT HAS CERTAINLY BEEN IMPLIED BY SOME OF THE WITNESSES BEFORE YOU, THAT NATIVE TITLE ON PASTORAL LEASES WAS GENERALLY EXTINGUISHED BY THE VALIDATION OF THOSE PROVISIONS.

JUST VERY QUICKLY I MIGHT MENTION SOME OF THE MATERIAL THAT IS IN THE SUPPLEMENTARY SUBMISSION. I SUPPOSE THE MOST IMPORTANT THING ABOUT THAT IS A DESCRIPTION OF THE MIRIUWUNG GAJERRONG DECISION OF THE FULL FEDERAL COURT LAST FRIDAY. WE CAN PROBABLY DISCUSS IT IN MORE DETAIL LATER BUT, IMPORTANTLY, FROM THE POINT OF VIEW OF THE GOVERNMENT, THE MAJORITY OF THE COURT, JUSTICES VON DOUSSA AND BEAUMONT, ACCEPTED THAT THE APPROACH USED BY THE GOVERNMENT IN DETERMINING ITS APPROACH TO THE CONFIRMATION PROVISIONS IN THE 1998 AMENDMENTS WAS A LEGITIMATE ONE AND TOTALLY IN ACCORDANCE WITH THE DECISION OF THE HIGH COURT IN WIK, AND THAT IN A LATER CASE OF LARRAKIA IT WAS APPROPRIATE TO LOOK AT THE

NATURE OF THE RIGHTS GIVEN BY THE GOVERNMENT WHEN IT MADE THE GRANT AND DETERMINED WHETHER THOSE RIGHTS WERE SUCH THAT THE CONTINUATION OF NATIVE TITLE COULD NOT HAVE BEEN INTENDED. THAT IS THE TEST THAT THE MAJORITY OF THE COURT APPLIED IN MIRIUWUNG GAJERRONG.

THE FULL COURT WENT THROUGH THE CASES AND SOME OF THE SPECIAL LEASES THAT MR JUSTICE LEE HAD FOUND HAD NOT EXTINGUISHED NATIVE TITLE BASED ON THE ACTIVITIES WHICH WERE CONDUCTED ON THE LEASE OR THE PARTICULAR FACTS OF THE CASE. THE MAJORITY OF THE FULL FEDERAL COURT FOUND THAT MR JUSTICE LEE'S APPROACH HAD NOT BEEN CONSISTENT WITH THE HIGH COURT FINDINGS IN THE WIK AND FEJO CASE, WHICH IS THE ONE WHERE THEY DETERMINED THAT NATIVE TITLE IS PERMANENTLY EXTINGUISHED BY THE GRANT OF A FREEHOLD ESTATE. THEY ALSO FOUND THAT NATIVE TITLE HAD, IN FACT, BEEN EXTINGUISHED ON ALL THOSE LEASES.

THE FULL FEDERAL COURT ALSO FOUND THAT THE EFFECT OF THE RESERVATION IN WESTERN AUSTRALIA WAS THAT, FOR AS LONG AS THE RESERVATION CONTINUED TO OPERATE IN RELATION TO THOSE PASTORAL LEASES, THEN NATIVE TITLE HAD NOT BEEN EXTINGUISHED. BUT WHEN THE RESERVATION STOPPED OPERATING BECAUSE EITHER THE LAND WAS IMPROVED OR ENCLOSED—OR IMPROVED AND ENCLOSED, DEPENDING ON THE PARTICULAR TERMS OF THE RESERVATION AS IT APPLIED—THEN NATIVE TITLE WOULD HAVE BEEN EXTINGUISHED.

THE OTHER IMPORTANT FINDING FROM THE MIRIUWUNG GAJERRONG CASE WAS THAT THEY ENDORSED THE COMMONWEALTH'S PROPOSITION THAT NATIVE TITLE IS A BUNDLE OF RIGHTS NOT EQUIVALENT TO OWNERSHIP OF THE LAND. THEY CONFIRMED THAT LEGISLATION REGULATING EXTRACTION OF MINERALS AND PETROLEUM EXTINGUISHES NATIVE TITLE. THEY ALSO FOUND THAT THE GRANT OF THE MINING LEASE, OR THE MINING LEASES BEFORE THEM, EXTINGUISHED NATIVE TITLE. IN FACT, UNDER THE NATIVE TITLE ACT THE GRANT OF A MINING LEASE CANNOT EXTINGUISH NATIVE TITLE. SO THAT IS ANOTHER EXAMPLE OF A CASE WHERE THE NATIVE TITLE ACT OPERATES TO MODIFY THE OPERATION OF THE COMMON LAW TO THE BENEFIT OF INDIGENOUS PEOPLE.

THAT IS THE MIRIUWUNG GAJERRONG CASE. THE PARTIES HAVE 28 DAYS IN WHICH TO ADDRESS THE COURT ON THE NATURE OF THE DETERMINATION SO THE TIME FOR SEEKING LEAVE TO THE HIGH COURT HAS NOT STARTED YET THOUGH THERE ARE PRESS REPORTS THAT THE RESPONDENTS IN THAT CASE OR THE INDIGENOUS PARTIES MAY BE SEEKING LEAVE TO APPEAL TO THE HIGH COURT.

THE SUPPLEMENTARY SUBMISSION ALSO DEALS WITH A FEW OTHER ISSUES THAT CAME UP IN THE SUBMISSIONS TO THE INQUIRY. ONE OF THEM WAS THE OPERATION OF THE FREEHOLD TEST UNDER THE 1993 ACT. THERE WAS AN ASSUMPTION UNDERLYING A NUMBER OF THE SUBMISSIONS THAT PROVISIONS SUCH AS THE AUTHORISING OF PRIMARY PRODUCTION, THE MANAGEMENT OF WATER AND AIR SPACE, ACTIVITIES ON RESERVATIONS, AND FACILITIES FOR SERVICES TO THE PUBLIC, COULD HAVE BEEN DONE UNDER THE 1993 ACT PROVIDED THE RIGHT TO NEGOTIATE WAS PROVIDED. PROVIDING THE RIGHT TO NEGOTIATE DOES NOT MEAN THAT A GOVERNMENT COULD HAVE CARRIED ON THOSE ACTS. I THINK IT IS WORTH

MAKING THE POINT THAT THE ONLY WAY IN WHICH ACTS COULD BE DONE ON THE LAND UNDER THE 1993 ACT WAS WITH THE AGREEMENT OF NATIVE TITLE HOLDERS OR, GENERALLY SPEAKING, IF THE ACT PASSED THE FREEHOLD TEST.

THE ONLY ACTS WHICH GENERALLY PASS THE FREEHOLD TEST WERE THE GRANT OF A MINING LEASE OR THE COMPULSORY ACQUISITION OF RIGHTS. THE COMPULSORY ACQUISITION OF NATIVE TITLE RESULTS IN ITS EXTINGUISHMENT. SO IF THE ARGUMENT IS THAT UNDER THE 1993 ACT THESE ACTS, SUCH AS THE MANAGEMENT OF WATER AND ACTIVITIES ON RESERVATIONS AND THE PROVISION OF FACILITIES FOR SERVICES TO THE PUBLIC, COULD HAVE BEEN DONE, THEN THE ONLY WAY THEY COULD HAVE BEEN DONE IS BY THAT EXTINGUISHMENT OF NATIVE TITLE OR ELSE BY AGREEMENT.

THAT IS NOT CONSISTENT WITH THE NOTION OF THE UNDERLYING PRINCIPLES IN THE 1993 ACT BECAUSE THE UNDERLYING PRINCIPLE WAS THAT NATIVE TITLE HOLDERS SHOULD NOT GET A VETO. SO IF THE ONLY WAY IT COULD BE DONE WAS BY AGREEMENT OR BY COMPULSORY ACQUISITION, WHEN STATE LAWS IN MANY CASES DID NOT ALLOW THE COMPULSORY ACQUISITION OF RIGHTS FOR THIRD PARTIES, IT IS NOT THE CASE THAT YOU CAN ARGUE THAT THESE COULD HAVE BEEN DONE. UNDERSTANDABLY, IN MANY OF THESE IN RELATION TO PRIMARY PRODUCTION, IT DID NOT HAVE TO BE DONE BECAUSE IN 1993 THE THEN GOVERNMENT ARGUED THAT NATIVE TITLE HAD BEEN EXTINGUISHED ON PASTORAL LEASES. IT LEFT IT TO BE DETERMINED BY THE COURTS, BUT IT IS THE CASE THAT THE 1993 ACT DID NOT MAKE PROVISION FOR THESE ACTIVITIES ON PASTORAL LEASES BECAUSE IT WAS BELIEVED THAT IT WAS NOT NECESSARY TO DO SO AT THE TIME.

THE POINT HAS ALSO BEEN MADE TO THE COMMITTEE ON A NUMBER OF OCCASIONS THAT THE GOVERNMENT ARGUED IN RELATION TO THE 1998 AMENDMENTS THAT THEY WERE BASED ON FORMAL EQUALITY, AND THERE HAVE BEEN A NUMBER OF QUOTES MADE ABOUT THINGS THAT SENATOR MINCHIN OR THE PRIME MINISTER MAY HAVE SAID IN RELATION TO THAT. IT IS THE CASE THAT, WHEN THE BILL CAME INTO PARLIAMENT IN 1997, THERE WERE PROVISIONS IN SECTION 43A OF THE ACT WHICH RELATED TO THE APPLICATION OF THE RIGHT TO NEGOTIATE ON PASTORAL LEASE LAND, WHICH DID REFER TO NATIVE TITLE HOLDERS HAVING EQUIVALENT RIGHTS TO PASTORAL LEASEHOLDERS.

THAT PROVISION WAS REPLACED IN JULY 1998 BY PROVISIONS WHICH GIVE NATIVE TITLE HOLDERS A RIGHT TO BE NOTIFIED, TO OBJECT AND TO BE CONSULTED ABOUT MINING ON PASTORAL LEASES AND RESERVED LAND. THAT IS NOT A RIGHT THAT IS AVAILABLE TO PASTORAL LEASEHOLDERS OR INDEED ANY OTHER. SO THAT NOTION THAT THE 1998 AMENDMENTS ARE ALL BASED ON A FORMAL EQUALITY IS MISGUIDED, AND THE BILL AS IT EMERGED FROM PARLIAMENT IN JULY WAS CERTAINLY NOT BASED ON A NOTION THAT FORMAL EQUALITY WAS APPROPRIATE IN ALL CASES, THOUGH, OF COURSE, FORMAL EQUALITY IS SOMETHING THAT APPLIES WHERE THE FREEHOLD TEST IS SATISFIED, WHICH IT STILL IS IN MANY CASES.

THE ADDITIONAL SUPPLEMENTARY SUBMISSION ALSO REFERS TO AN ARGUMENT MADE BY THE AUSTRALIAN PROPERTY INSTITUTE WHICH ARGUED THAT THE JUST TERMS ARE NOT PROVIDED FOR COMPENSATION UNDER THE ACT. I MUST SAY THAT BOTH MR ORR AND I HAVE BEEN AT A LOSS TO REALLY

UNDERSTAND THIS ARGUMENT BECAUSE IT IS QUITE CLEAR THAT SECTION 51A THAT WAS REFERRED TO DOES PROVIDE FOR JUST TERMS. IT PROVIDES EXPRESSLY FOR JUST TERMS. SO WE DO NOT THINK THAT ARGUMENT, WHICH WAS BOTH IN TERMS THAT IT WAS CONSTITUTIONALLY QUESTIONABLE AND PROBABLY A BREACH OF CERD BECAUSE IT DID NOT PROVIDE JUST TERMS, HAS ANY LEGAL BASIS.

MS LEON TALKED ABOUT THE RESPONSE OF AUSTRALIA TO UNITED NATIONS' COMMITTEES, SO I WILL NOT MENTION THAT AGAIN. THE ONLY OTHER THING I WOULD MENTION IS THAT IN THE SUPPLEMENTARY SUBMISSION THERE WAS THE INCLUSION OF SOME MATERIAL THAT WAS PROMISED TO MEMBERS OF THE COMMITTEE, SOME MATERIAL ABOUT THE LAARDIL CASE THAT JOHN BASTEN QC REFERRED TO IN HIS ORAL EVIDENCE AND HIS SUBMISSION THAT MR ORR UNDERTOOK TO PROVIDE, AND SOME CORRECTIONS TO THE FORMAL RECORD OF THE COMMITTEE'S HEARINGS IN APRIL THAT HE ALSO UNDERTOOK TO PROVIDE. MR ORR HAS ALSO BROUGHT ALONG SOME REFERENCES TO SOME CASES THAT HE HAD UNDERTAKEN TO PROVIDE AT THE HEARINGS.

CHAIR—Thanks very much, Ms Horner.

Mr Orr—I just want to add one thing which I think is in the supplementary submission. When I was here before at this inquiry Mr Causley asked questions about whether the CERD committee or another United Nations committee had looked at indigenous rights issues before. I briefly mentioned three matters and I have just brought along the decisions in those matters. None of them is particularly relevant. They are all in relation to complaints to the human rights committee under the ICCPR. One of them is Ominayak—he was the chief of the Lubicon Lake band—v. Canada. It dealt with a quite complicated situation with regard to that band's rights to particular lands and their dealings essentially with the provincial government with regard to resource allocation.

THERE WAS A LATER CASE IN 1994, LANSMAN V. FINLAND, WHICH ALSO DEALT WITH THE RIGHTS GRANTED TO QUARRY IN RELATION TO AN AREA OF LAND WHICH WAS USED FOR REINDEER HUSBANDRY. A MORE RECENT CASE CALLED HOPU AND BESSERT V. FRANCE DEALT WITH SOME LAND IN TAHITI ON WHICH THERE WAS GOING TO BE CONSTRUCTED A HOTEL COMPLEX. I JUST PROVIDE THOSE CASES TO THE COMMITTEE. I CAN PROVIDE COPIES FOR THEM.

AS I SAID, THEY ARE NOT PARTICULARLY RELEVANT BECAUSE THEY ARE LOOKING AT PARTICULAR COMPLAINTS BY PARTICULAR PEOPLE UNDER ICCPR, BUT THEY DO SHOW THAT THE COMMITTEE IS GRAPPLING WITH ISSUES TO DEAL WITH INDIGENOUS RIGHTS IN THOSE CONTEXTS—BUT IN VERY NARROWLY CONFINED AREAS. I THINK THE POINT OF MR CAUSLEY'S QUESTION WAS WHETHER COMMITTEES HAD DEALT WITH SOMETHING AS BROAD AS THE NATIVE TITLE ACT BEFORE, AND TO MY KNOWLEDGE THEY HAVE NOT. WE ARE HAPPY TO ANSWER ANY QUESTIONS THAT THE COMMITTEE MIGHT HAVE.

CHAIR—Ms Horner, you talked about Miriuwung Gajerrong and gave us the summary that is in your additional material. What do you think CERD would have made of the full Federal Court's decision on Miriuwung Gajerrong?

Ms Horner—Certainly, the material in the presentation that Ms McDougall made to the committee on the Friday seemed to provide a basis for the committee's findings. She certainly mentioned the finding of Justice Lee in Miriuwung Gajerrong as demonstrating that the approach of the government in determining what should be in the schedules and how the confirmation provisions should have been put together; and she argued that the confirmation provisions did not follow the common law and the common law is discriminatory in any event. But she argued that the confirmation provisions went further than the common law and that they did not apply the appropriate test was not applied. The appropriate test, she implied, is one that looks at whether there was an intention to actually extinguish native title as opposed to an intention to

give rights which would be inconsistent with the continuation of native title. So the full Federal Court has confirmed that the question is not what parliament's intention was about the existence of non-existence of native title or whether the activities that take place on the lease are relevant, but goes solely to an interpretation of the rights and interests that were intended to be given by the parliament by that grant and whether the exercise of those rights is inconsistent with the continuation of native title. Obviously that has implications for what they would have said about the discriminatory nature of the confirmation provisions.

Mr Orr—As I understand it, the only suggestion which has been made that the confirmation re1994 regime has gone too far was the decision of Justice Lee in *Miriuwung Gajerrong*, and I do not know that anybody has come forward and shown any other evidence that it has. So I agree with what Ms Horner said: if that is the only evidence then that is no longer correct and, therefore, the position is that the confirmation regime, in fact, does not affect native title because it simply confirms what the common law position is.

THE SECOND POINT TO NOTE IS THAT IT DOES CONFIRM THE ARGUMENTS THAT HAVE BEEN MADE THAT THE NATIVE TITLE ACT AS AMENDED STILL CONTAINS VERY SIGNIFICANT MEASURES TO THE BENEFIT OF INDIGENOUS PEOPLE. UNDER THE COMMON LAW, AS THE FEDERAL COURT HAS NOW SAID, MINING LEASES EXTINGUISH NATIVE TITLE. THAT IS SOMETHING THAT DOES NOT HAPPEN IN THE VALIDATION REGIME AND IS PREVENTED INTO THE FUTURE. WE CANNOT OVERSTATE THE POSITION BECAUSE THERE IS A POSSIBILITY OF APPEAL TO THE HIGH COURT BUT CERTAINLY I THINK IT DOES DEMONSTRATE THAT SOME OF THE CRITICISMS BY CERD ARE UNFOUNDED.

Ms Horner—The point Mr Orr was making demonstrates inconsistency with the common law. There has certainly been evidence before the committee in this inquiry about the grazing homestead perpetual leases in Queensland, and the evidence and advice that was prepared in a discussion between indigenous representatives and the Queensland government about whether the grazing homestead perpetual leases should or should not have been in the schedule may be the subject of different views. But certainly the approach that the Commonwealth took to the inclusion of leases on the schedule which resulted in GHPLs being included, which was then picked up by the Queensland government—I must reiterate that the decision to put the GHPLs in there was a matter for the Queensland government alone—was based on an interpretation of the High Court in *Wik* which, as we made the point, has been confirmed in the full Federal Court in *Miriuwung Gajerrong*.

CHAIR—On the subject of *Wik*, and before I move to Mr Haase because he does need to leave early, we had some evidence from Dr Mick Dodson that suggested that he had given a number of warnings, post *Mabo* (No. 2), that pastoral leases were likely to be found to be open to claim native title and suggested that there were these warnings around that *Wik* was likely to occur in a judgment, which begs the question about pastoralists acting in good faith during that period of time. Do you have any comment to make in relation to Dr Dodson's evidence to the committee just a week or so ago? Also, do you have any comments that you would like to make in relation to pastoralists acting in good faith and perhaps following the words of the preamble to the Act.

Ms Horner—Yes. He made the point, and it has been made on a number of occasions, that governments were on notice because in his 1994-95 native title report he had commented that governments were taking a risk by making grants on pastoral leases when the issue of whether native title might have survived on pastoral leases had not been finally determined by the courts.

THAT ISSUE IS COVERED QUITE COMPREHENSIVELY IN PART 2 OF OUR SUBMISSION. I DRAW YOUR ATTENTION TO THE PROVISIONS AT PARAGRAPH 7 ONWARDS. FIRST OF ALL, I MIGHT SAY SOMETHING ABOUT WHAT IS IN PART 2. PART 2 IS AN ANALYSIS OF THE QUESTIONS AND THE COMMENTS MADE BY MS MCDUGALL IN HER PRESENTATION, WHICH APPEARED TO UNDERLINE THE DECISION IN THE COMMITTEE'S FINDINGS. IN OTHER WORDS, IT IS AN ANALYSIS AND REFUTATION IN MANY CASES OF THE ANALYSIS THAT SHE HAD BY IMPLICATION EXPRESSED OF THESE FOUR SO-CALLED DISCRIMINATORY PROVISIONS, ONE OF WHICH WAS THE VALIDATION PROVISIONS. THE COMMENT SHE MADE IN RELATION TO VALIDATION PICKED UP ON COMMENTS THAT HAD BEEN MADE BY THE SOCIAL JUSTICE COMMISSIONER

AT THE TIME, MICK DODSON, THAT THERE HAD BEEN WARNINGS IN 1994-95 THAT GOVERNMENTS HAD CHOSEN TO IGNORE.

I THINK IT IS IMPORTANT TO NOTE THAT THE POSITION IN 1994, WHEN THE ACT CAME INTO OPERATION, WAS THAT EVEN THOUGH THE PARLIAMENT HAD NOT EXPRESSLY SAID WHETHER NATIVE TITLE COULD OR DID NOT EXIST ON PASTORAL LEASES—AND THE ISSUE IS IN FACT LEFT FOR THE COURTS TO DETERMINE—IT WAS CERTAINLY BASED ON THE MATERIAL THAT WAS ON THE PUBLIC RECORD. IN THE DEBATES IN THE PARLIAMENT, THE GOVERNMENT BELIEVED AND TOLD STAKEHOLDERS, INCLUDING THE NATIONAL FARMERS FEDERATION, THAT THEY BELIEVED NATIVE TITLE HAD BEEN EXTINGUISHED.

WHAT CAME AFTER THAT, AND THE POINT WE MAKE IN OUR SUBMISSION, IS THAT, UNTIL THE WIK DECISION WAS MADE BY THE HIGH COURT ON 23 DECEMBER 1996, THE STATE OF THE JUDICIAL PRECEDENTS WAS THAT NATIVE TITLE HAD BEEN EXTINGUISHED BECAUSE IT HAD BEEN CONSIDERED BY A NUMBER OF COURTS. MABO NO. 2 WAS THE FIRST CASE IN WHICH THE HIGH COURT SAID THAT THEY BELIEVED THAT NATIVE TITLE HAD BEEN EXTINGUISHED BY LEASES. THEY DID NOT EXPRESSLY ANALYSE PASTORAL LEASES. BUT THAT HAD BEEN FOLLOWED BY A MAJORITY OF THE FULL COURT IN THE WAANYI CASE AND BY JUSTICE DRUMMOND IN THE WIK PEOPLE ITSELF. IT IS THE CASE THAT IN WAANYI THE HIGH COURT WOULD NOT DEAL WITH THE ISSUE OF WHETHER PASTORAL LEASES DECISIONS HAD BEEN EXTINGUISHED. SO DURING THE PERIOD FROM APRIL 1996 TO DECEMBER 1996 WE WERE IN A SITUATION WHERE THE HIGH COURT HAD SPECIFICALLY DECLINED TO COMMENT.

BUT THE FACT IS THAT, AS A MATTER OF THE LAW, THE LAW IN AUSTRALIA AT THE TIME WAS THAT THE COURTS REGARDED NATIVE TITLE AS HAVING BEEN EXTINGUISHED BY A PASTORAL LEASE.

Mr MELHAM—Why was there the need then for section 235(7), as it then was?

Ms Horner—Section 235(7), as you probably remember, Mr Melham, was—

Mr MELHAM—A Wik safety—

Ms Horner—Mr Orr might correct me on this but my understanding is that, because of the expression of concern by some members of the now government, there was a concern about whether pastoral leases could be renewed. An amendment was moved in the Senate which expressly said that pastoral and other forms of leases could be renewed. That is not saying that native title does or does not exist on pastoral leases. That was my understanding and it was put in there as a just-in-case provision.

Mr MELHAM—It is a fact, though, that whilst there might have been concerns from some members of the current government, most of them did not vote for that; it was actually moved by the Democrats and supported by the government and some renegade Nationals, including Senator O'Chee and Senator Boswell.

Ms Horner—I guess that might say something about the nature of the government's belief about the status of native title on pastoral leases. But I think everyone agrees that there were provisions put into the Native Title Act at that time for reasons not necessarily connected with people's understanding of what the law might be at that time.

Mr MELHAM—There were different views within—

CHAIR—Mr Melham, could I make the point that Mr Haase needs to leave. As I said a few minutes ago, could we let him ask his questions and then I will move to the opposition's questions.

Mr HAASE—Thank you, Madam Chair. I am prepared to take an answer from either Ms Horner or Mr Orr on this. I refer to the question of discrimination and equality. Mentioned earlier was the question of substantive equality. Many of the submissions received by this parliamentary joint committee concluded that the government had not provided substantive equality for indigenous people in the amended Native Title Act.

In what respect does the amended Act take into account indigenous people's specific cultural and historical experience, in your opinion?

Ms Horner—I referred to some paragraphs in the additional submission—actually an attachment to the supplementary submission.

Mr HAASE—Pages 17 to 19 is where you will find your submission regarding that.

Ms Horner—Page 22. As I mentioned very briefly before, these provisions can be divided into three parts—the ones that recognise and protect native title. The most important provision, which is still there, is that there is an express provision which says native title is recognised by the Act—that is section 10—and then it goes on to say that native title can only be extinguished in conformity with the Act. That is still there. The fact is that under the amended Act, the only way in which native title can be extinguished is in exactly the same way as it can be extinguished under the 1993 Act, which is either by agreement or by the non-discriminatory acquisition of native title rights; in other words, an acquisition which is done in the same way as any freeholder would have their rights extinguished. So that provision is unaffected by the amendments and continues on.

IN OTHER RESPECTS, IRRESPECTIVE OF THE POSITION AT COMMON LAW, THE AMENDED ACT GUARANTEES THAT ONCE NATIVE TITLE HAS BEEN DETERMINED OR RECOGNISED, IT CAN ONLY BE VARIED OR REVOKED IF LATER EVENTS DEMONSTRATE THAT THE DETERMINATION IS NO LONGER CORRECT AND THE INTERESTS OF JUSTICE REQUIRE IT. THE VULNERABILITY OF NATIVE TITLE, AS I HAVE JUST MENTIONED, AT COMMON LAW IS BEING REMOVED AND IS NOW RESTRICTED TO ACQUISITION OR AGREEMENT. THE AMENDED ACT PROVIDES THAT UNLESS AN ACT BY THE COMMONWEALTH, STATE OR TERRITORY AFFECTING NATIVE TITLE IS SPECIFICALLY AUTHORISED, IT CANNOT BE DONE. IN OTHER WORDS, UNLESS YOU CAN FIND A PROVISION IN THE NATIVE TITLE ACT THAT SAYS THE GOVERNMENT CAN DO THE ACT, YOU CANNOT DO IT; IT WILL BE INVALID. THE AMENDED ACT GUARANTEES THE RIGHT OF NATIVE TITLE HOLDERS TO HUNT, FISH, GATHER AND UNDERTAKE CULTURAL AND SPIRITUAL ACTIVITY WITHOUT HAVING TO COMPLY WITH REGULATORY LAWS, PROVIDED THAT IT IS DONE FOR PERSONAL, DOMESTIC OR NON-COMMERCIAL NEEDS.

THOSE ARE WAYS IN WHICH NATIVE TITLE IS EXPRESSLY RECOGNISED AND PROTECTED. THERE ARE A NUMBER OF SPECIAL FEATURES WHICH ADDRESS THE UNIQUE NATURE OF NATIVE TITLE. THERE IS A WHOLE CLAIMS PROCESS WHICH INVOLVES LOTS OF FEATURES WHICH ADDRESS THE PARTICULAR SENSITIVITIES OF NATIVE TITLE. THERE IS A PROCESS FOR AUTHORISATION WHICH RECOGNISES THAT DECISION MAKING BY NATIVE TITLE HOLDERS MAY BE DIFFERENT FROM THAT OF OTHER PEOPLE WITH PROPERTY RIGHTS.

THERE IS A PROCESS BY WHICH THERE IS A DETERMINING BODY SET UP, THE NNTT—THE NATIONAL NATIVE TITLE TRIBUNAL—WHICH ENDEAVOURS TO REACH AGREEMENT THROUGH MEDIATION. THERE ARE PROVISIONS THERE WHICH DETERMINE THAT THE METHOD OF ITS CARRYING OUT ITS FUNCTIONS SHOULD BE LOW COST AND THOSE SORTS OF THINGS. A NATIONAL TRIBUNAL IS SET UP, AS I MENTIONED, AND STATE AND TERRITORY TRIBUNALS CAN ONLY BE SET UP IF THEY REFLECT THE KIND OF SPECIAL FEATURES THAT THE NATIONAL NATIVE TITLE TRIBUNAL HAS. THE AMENDED ACT CREATES A NATIONAL STANDARD FOR RECOGNITION OF NATIVE TITLE BY ONLY ALLOWING STATE AND TERRITORY COURTS WHICH HAVE BEEN RECOGNISED BY THE MINISTER AND THEN BY THE COMMONWEALTH PARLIAMENT AS BEING ABLE TO MAKE DETERMINATIONS OF NATIVE TITLE. THEY HAVE TO HAVE ABORIGINAL AND TORRES STRAIT ISLANDER EXPERTISE AVAILABLE TO THEM AND THEY HAVE TO CARRY OUT THEIR PROCEDURES IN AN INFORMAL, ACCESSIBLE AND EXPEDITIOUS MANNER.

THE ACT PROVIDES THAT THE COURT AND THE NNTT CAN TAKE ACCOUNT OF CULTURAL AND CUSTOMARY CONCERNS. THE PROVISIONS TRY AND ENSURE THAT NATIVE TITLE CLAIMS CAN BE DEALT WITH IN A LOW COST MANNER. I WILL NOT GO THROUGH ALL OF THOSE, BUT I WILL MENTION THE THIRD KIND OF BASIS ON WHICH THE SPECIAL FEATURES OF NATIVE TITLE ARE ADDRESSED, AND THAT IS MEASURES ADDRESSING PRIOR EXTINGUISHMENT. UNDER THE AMENDED ACT, THERE ARE A NUMBER OF FEATURES THAT ATTEMPT TO ADDRESS THE EFFECT OF HISTORICAL EXTINGUISHING ACTS. NATIVE TITLE CAN BE RECOGNISED ON LAND WHEN NATIVE TITLE HAS BEEN EXTINGUISHED BY HISTORICAL TENURE OR BY CURRENT INDIGENOUS GRANTS—IN OTHER WORDS, NATIVE TITLE HOLDERS WHO HAVE HAD THEIR RIGHTS EXTINGUISHED CAN HAVE THOSE RIGHTS RESTORED UNDER THE AMENDED ACT, WHICH IS THE KIND OF RESTITUTION THAT WAS MENTIONED BY THE CERD COMMITTEE. THOSE PROVISIONS—SECTIONS 47A AND 47B—HAVE ACTUALLY BEEN APPLIED BOTH IN THE MIRIUWUNG GAJERRONG CASE AND IN THE ALICE SPRINGS CASE AT THE END OF LAST YEAR. IN OTHER WORDS, LAND ON WHICH NATIVE TITLE WOULD HAVE BEEN TAKEN TO HAVE BEEN EXTINGUISHED HAS BEEN FOUND TO HAVE NATIVE TITLE STILL THERE BECAUSE PREVIOUS EXTINGUISHING ACTS HAVE BEEN IGNORED BY THE COURT, AS PROVIDED FOR IN THE ACT.

THE AMENDED ACT SETS OUT THE LEGAL EFFECT OF PARTICULAR HISTORICAL ACTS OF THE CROWN WHICH WERE INVALID, ENSURING THAT THE NON-EXTINGUISHMENT PRINCIPLE APPLIES. IT ALSO ENSURES THAT THE NON-EXTINGUISHMENT PRINCIPLE APPLIES TO ALL FUTURE ACTS OF GOVERNMENT. MR ORR HAS ALREADY MENTIONED IN RELATION TO MINING THAT THAT HAS A SUBSTANTIALLY BENEFICIAL EFFECT COMPARED TO THE COMMON LAW. THE COMMON LAW WOULD HAVE EXTINGUISHED THEM, EVEN IF THE GRANT WAS ONLY FOR, SAY, FIVE YEARS. WHAT THE NATIVE TITLE ACT SAYS IS THAT IT DOES NOT MATTER IF THE MINE IS GRANTED FOR A PERIOD OF 20 YEARS, THE NON-EXTINGUISHMENT PRINCIPLE APPLIES, WHICH MEANS NATIVE TITLE CANNOT BE PERMANENTLY AFFECTED BY THAT GRANT. SO IN MANY WAYS THE AMENDED ACT STILL CREATES A REGIME WHICH NOT ONLY TAKES ACCOUNT OF THE SPECIAL FEATURES OF NATIVE TITLE BUT HAS MEASURES IN IT DESIGNED TO PRESERVE IT.

Mr HAASE—So, in other words, numerous respect, there is consideration, and there are many there that you have not read into *Hansard*.

Ms Horner—That is right. There are five or six pages of this.

Mr HAASE—Indeed. Along similar lines, some submissions, especially the one we received from ATSIIC, argue that substantive equality requires particular measures and not others. For example, ATSIIC submission 8 argues, on page 6, that substantive equality required the government to develop something like the right to negotiate. Who decides what is required by substantive equality? Perhaps, Ms Leon, you could give me an interpretation.

Ms Leon—It falls ultimately to the state party to the convention to decide how to implement its obligations under the convention within what is called a ‘margin of appreciation’ in international law. The margin of appreciation is an area of discretion that states have to determine how, in good faith, to implement their treaty obligations. In relation to substantive equality, the very nature of making decisions about how to treat different groups so that substantive equality is achieved requires states—and, in this respect, I mean governments rather than states and territories—to make judgments about the situations of different groups, what can be achieved and what is best to be achieved in order to bring about equality for those groups. International law recognises that national governments are in the best position to make those kind of judgments about what can and should be done in their particular circumstances. So there would not be any international law basis for an argument that substantive equality requires any particular measure to be applied or any particular right to be conferred. These decisions need to be made by governments in light of national circumstances.

Mr HAASE—So it is fair to say that the fact that provisions were agreed to by an extensive parliamentary process support the government's view that the substantive equality test has been met?

Ms Leon—There has been some international case law in Europe to the effect that it is a factor to be considered in determining the appropriateness of measures that have been enacted to provide for substantive equality that they have gone through a proper democratic process in a fully-functioning democracy. That certainly would be a factor that should be taken into account in determining whether a government has acted in good faith to provide substantive equality.

Mr HAASE—Thank you very much.

Ms Horner—I have a comment on this notion about the right to negotiate. The right to negotiate is an expression that is given to particular procedural rights that were set up in the 1993 Act. What that involved was native title holders and registered claimants having a right to be consulted prior to a mining lease being granted, an exploration lease being granted or their rights being compulsorily acquired. But, importantly under the 1993 Act, there was provision that allowed different procedures to be put in place. For instance, under the 1993 Act, there was a provision in subsection 26(4) which said that, in relation to exploration permits, you could have different procedures applying because, as I think was commented in the second reading speech, the idea was that exploration was a different kind of mining tenement, which might be regarded as having a lesser impact on native title rights and interests. Therefore, it was open for the Commonwealth minister to make the determination that slightly different procedural rights should apply in that case.

I AM SURE IF PEOPLE WENT BACK AND LOOKED AT THE POSITION IN 1993, THEY WOULD SAY, 'YES, CERTAINLY, IN RELATION TO EXPLORATION PERMITS, THE FACT THAT IT IS NOT A RIGHT TO NEGOTIATE DOES NOT MEAN TO SAY THAT IT IS NOT A SPECIAL MEASURE.' IT STILL MIGHT BE A SPECIAL MEASURE OR PROVIDE SUBSTANTIVE EQUALITY IF IT TAKES ACCOUNT OF THE SPECIAL NATURE OF NATIVE TITLE. THE REASON THAT IT TAKES ACCOUNT OF THE SPECIAL NATURE OF NATIVE TITLE IS THAT IT ALLOWS NATIVE TITLE HOLDERS AND CLAIMANTS TO MAKE COMMENT ON THE PROPOSAL BEFORE IT IS DONE—IN OTHER WORDS, TO INFLUENCE THE WAY IN WHICH THAT ACT IS GOING TO IMPACT ON THEIR RIGHTS AND INTERESTS.

Mr MELHAM—It also benefits non-indigenous people because it compresses the process, does it not, as against going down the common law route itself?

Mr HAASE—On that point, it is interesting that you should have led me to this question, unintentionally I am sure. With regard to the committee and then the government introducing legislation that had a consideration for substantive equality, I know the intention when determining the right to negotiate this part of that legislation was there specifically for the expression of equality. I believe it was—in part, certainly—to give equality to other forms of title holders on land—pastoralists or freehold titleholders—such as access to the warden's court and conferred the right of native title claimants to also have right of access to the mining warden's court. In my opinion, it certainly would not fly in the face of substantive equality. Is it reasonable that we should be accused of having an Act that is racially discriminating when we go to such an extent to have substantive equality?

Ms Horner—I will let the others talk about what substantive equality means in this situation. The Native Title Act, both in 1993 and in the Act as amended after 1998, does not purport to say anything about the rights of non native title holders in relation to Acts occurring on that land.

Mr HAASE—I accept that.

Ms Horner—What it does is guarantee that native title holders and registered claimants will have certain rights, irrespective of what the nature of the rights of other people might be on that land. What it means is that in some states the rights of non native title holders may vary considerably from what native title holders and claimants will get under this Act. But the important point is that, whether you call it the right to negotiate, whether you call it a subsection 26(4) right, which relates to Acts which will have a minimal impact, which is what the parliament agreed to in 1993, or whether you call it a section 26A right, which is what this section 26(4) matter was converted to under the 1998 amendments, what it said was that, because native title interests have an interest in particular land—they may have a connection with that particular land—what is important is having an ability to talk about how that Act impacts on their rights before it happens. They are guaranteed a right to talk about the impact before it happens, irrespective of other people's rights.

IN SOME STATES THE PASTORALISTS' ONLY RIGHT IS TO GET COMPENSATION OF A VERY SMALL AMOUNT PER HECTARE THAT IS IMPACTED ON BY A MINING RIGHT. IN FACT, WHEN YOU LOOK AT THE AMENDED ACT AS IT ACTUALLY CAME OUT OF THE PARLIAMENT, IT DOES NOT TRY TO COMPARE IT WITH ANY OTHER RIGHTS OF NON NATIVE TITLE HOLDERS. IT SAYS, 'BECAUSE THE INTERESTS OF NATIVE TITLE HOLDERS ARE SUCH, THEY WILL HAVE CERTAIN RIGHTS AND THEY ARE SET OUT IN THIS ACT.'

Mr HAASE—Do you have something to contribute to that, Mr Orr?

Mr Orr—No.

Mr MELHAM—You are not adopting these earlier submissions alone, are you, in terms of substantive equality?

Mr Orr—This is dealt with in the submission: the thinking about what 'equality' means has developed and changed. I think the submission indicates that formal equality was, in the early stages of the convention, seen to be the test—formal equality, everybody treated the same, but with special measures. As the submission on pages 17 and following notes, there has been a development towards the concept of substantive equality which Ms Leon outlined. So there are actually two ways of looking at it: one is an older, more traditional way and the other is a newer way. The problem with characterising the Native Title Act, in 1993, 1998 and now, is that there is that change in approach, both internationally and also domestically. The outline mentions the case of Gerhardy and Brown in the High Court of Australia, which concerned the Racial Discrimination Act. The High Court took a formal equality approach and in fact rejected any concept of substantive equality, notwithstanding that that is what South Australia and the Commonwealth argued. We just have to bear those factors in mind when talking about these issues. But as Philippa and Renee have said, in terms of the international law, substantive equality is the test. Insofar as the CERD regards that as the test, the Australian government's position is that that test has been met.

Mr HAASE—Thank you, Mr Orr.

Mr SNOWDON—Can I firstly ask you, in relation to the special measures which you read out, Ms Horner: you have given us a taxonomy of special measures as you currently see them. Could you provide us with a similar list of special measures as you would have seen them post 1993? What I want to do is compare the special measures under the 1993 Act with the special measures under the 1998 Act.

Ms Horner—I am quite happy to do that. I am not sure that I described them as special measures.

Mr SNOWDON—Special features addressed—however you describe them.

Ms Horner—I am not trying to characterise them as special measures or not special measures, but I am certainly happy to do that.

Mr SNOWDON—What would you characterise them as?

Ms Horner—It says ones that are there designed to recognise and protect native title. There are features in there which take account of the special features in native title that are generally not available in relation to non-indigenous property interests, and then there are ones which try to address the previous extinguishing effect under common law on native title. I suppose the point that Mr Orr was making is that we are in a time of transition of both the international law and domestic laws in relation to discrimination and I do not know whether it is particularly advantageous to try and describe each of these in terms of whether it is a special measure or substantive equality. Obviously, the Act has got elements of formal and substantive and special measures.

Mr SNOWDON—But presumably this evolution has been going on for some time, well before 1993. In the second reading speech of the 1993 Act, the special measures that were attributed to that Act in terms of the Racial Discrimination Act were outlined. I am wondering if you could tell us what you believe the special measures are in the current Act, as amended, and how they equate with the special measures outlined in the 1993 Act? I am conscious that CERD looked at the 1993 Act and found nothing of great consequence to deal with. Why have conditions changed?

Ms Horner—I do not know that we are arguing that conditions have changed. I think the CERD is arguing that conditions have changed. Certainly, in the second reading speech in 1993, the then Prime Minister, Mr Keating, did identify a number of features in the 1993 Act which he described as 'special measures'. From memory, one of the people who appeared before the committee at its second hearing on 22 February, I think it was Dr Dodson's offside, Ms Donaldson, was asked if she could identify anything in the amended Act which was a special measure, and she could not. She did identify the land fund. I hope I am not doing her an injustice in this. I think in 1993 the right to negotiate was identified as a special measure. Obviously, the state

of the law in 1993 was that we had a High Court decision in Gerhardy and Brown that said the appropriate way to approach the question of whether there is discrimination is to ask whether there is formal equality and whether there are special measures. Mr Orr might be able to speak a bit more on this. No doubt that influenced the way in which the Act was characterised both in 1993 in the preamble and before the committee in 1994.

Mr Orr—It is interesting, but it leads us up a bit of a blind alley in terms of the actual substance of the question you are asking. The 1993 Act talks about itself as a special measure, and that was certainly the language of the time. If that is still the way we are talking about discrimination, that is, formal equality and special measures, then the government's position is that it would still meet that test of formal equality and special measures. The point I was trying to make before, perhaps a little clumsily, was that in terms of the CERD committee it is my understanding that they would not see that as the proper test. They would see substantive equality as the proper test, especially with regard to indigenous people. There are hints that the High Court itself has moved on and has moved to that test as well. The proper question is, whatever the test—and when we are talking about the CERD committee it probably is substantive equality—can the Native Title Act as amended in 1998 still be seen as providing substantive equality and as not discriminating against indigenous people? I think your question was: what are the positive things or the non-discriminatory things that the 1998 Act added to the mix of the 1993 Act?

Mr SNOWDON—Or what did it do to subtract from the mix.

Mr Orr—Yes, that is right, and that is our position. You need to look at the new mix. You need to look at the 1993 Act as amended, at that bundle of provisions, and assess them.

Mr SNOWDON—That is right, but what I have understood here though is that you have actually given us that bundle of provisions in paragraphs 83 to 88. What I am asking is that you look at that bundle of provisions as opposed to the bundle of provisions you have identified in 1993.

Ms Horner—Mr Snowdon, this is a second reading speech from Mr Keating. There are two aspects: the second reading speech when Mr Keating was talking about the International Convention and the RDA. On 16 November 1993 he said:

The legislation complies with Australia's international obligations in particular under the International Convention on the Elimination of All Forms of Racial Discrimination. As indicated in the preamble, the legislation constitutes a special measure under the Racial Discrimination Act for the benefit of Aboriginal and Torres Strait Islander people—providing as it does significant benefits such as special processes for determining native title—

which, of course, is still there—

protection of native title rights—

which, as I indicated, is still there—

just terms of compensation for any extinguishment of native title—

which are still there—

a right of negotiation on grants affecting native title land—

which in many cases is still there—

designation of Aboriginal and Torres Strait Islander organisations to assist claimants—

which is, of course, still there but in a more explicit and accountable fashion—

and establishment of a national land fund—

which, of course, is still there in the ATSIC Act. So the things identified by the Prime Minister at that stage as being a special part of a special measure or the things which made the Act as a whole a special measure, are still there. But in terms of the things that were included in the 1998 amendments, I suppose the first thing would be that the 1998 amendments do not have an operation of their own. They operate only in the context of the Act as it was amended after 30 September 1998.

I WOULD MENTION THAT, GENERALLY SPEAKING, THE PROVISIONS IN 47A AND 47B, WHICH ALLOW FOR THE RESTITUTION OF NATIVE TITLE RIGHTS, WERE A COMPLETELY NEW IDEA THAT WERE NOT PRESENT IN THE 1993 ACT. I WOULD NOT BE SURPRISED IF THEY HAVE A SUBSTANTIAL EFFECT ON HOW THE ACT OPERATES IN THE FUTURE. THE PROVISIONS WHICH CHANGED THE OPERATION OF THE COMMON LAW IN RELATION TO THESE ACTS I IDENTIFIED BEFORE AND WHAT CAN BE DONE ON PASTORAL LEASES AND THOSE KINDS OF

**THINGS, WHICH COULD ONLY HAVE BEEN DONE PREVIOUSLY—IF AT ALL—
UNDER A COMPULSORY ACQUISITION WOULD EXTINGUISH NATIVE TITLE,
ENSURE THAT THE NON-EXTINGUISHMENT PRINCIPLE APPLIES.**

Mr SNOWDON—Perhaps we could talk about that then. In relation to the Miriuwung Gajerrong case, do you agree that the appeal court held that a statutory lease containing a reservation in favour of Aboriginal people exercising their traditional rights preserved native title rights?

Mr Orr—It is going to get a bit more complicated than that but, essentially, yes.

Mr SNOWDON—If you accept that, are you aware whether any of the thousands of leases referred to only generically in the Act and the accompanying schedule as previous exclusive possession Acts, contain any such reservation?

Mr Orr—There are no pastoral leases on the schedule. The schedule specifically does not include any pastoral leases.

Ms Horner—None of the leases on the schedule contain reservations in the form that the WA pastoral leases are subject to, which of course is the important thing. The full Federal Court found that the form of the reservation was very important. The distinction between the reservation in the Northern Territory and a reservation in WA was vital because the full Federal Court found that in the Northern Territory the reservation preserves indigenous rights but in a certain form. In Western Australia it said it preserves them unless and until the pastoral lease is improved or enclosed.

Mr SNOWDON—What about Mabo No. 2 and the sardine factory leases where there was a reservation?

Mr Orr—That leads us into a more complex situation which we are happy to talk about. But the Miriuwung Gajerrong case was specifically talking about pastoral leases and drawing a distinction between those and the Wik leases and the finding with regard to those leases. So if we are moving to more commercial leases, I think that the case does not deal with commercial leases with reservation. I think they are different.

Mr SNOWDON—Therefore if any of these thousands of leases which I have talked about have a reservation in them that is not similar to a pastoral lease reservation, then there are no rights attached to it—is that what you are saying?

Mr Orr—I think the High Court found with regard to that sardine factory lease that it did extinguish native title. It seems to be what the High Court found in Mabo No. 2, notwithstanding the reservation. It is only when you get to pastoral leases which have more limited rights and are not, in fact, real leases, which was what the Wik decision found, that issues like the reservations come into play. Now this might get more complicated but at the moment that is the position.

Mr SNOWDON—Can I take you for a moment to the comments you made about Miriuwung Gajerrong in relation to mining and can you explain to me again what your observation was. I am aware of what the court has said. Were you arguing that, because the Native Title Act provides that mining leases do not extinguish native title, the Native Title Act therefore has a special measure in it?

Ms Horner—What it does is result in the somewhat ironic situation that with leases that might have been validated under either 1993 validation provisions or the 1998 validation provisions, the effect of the validation provisions will be that, notwithstanding what the common law says or would have said, the only effect on native title is that the non-extinguishment principle applies. So when the lease terminates, native title will spring back. With leases that were always valid, the common law will apply because that is what the 1993 Act says, that the common law determines what the impact of crown grants is on native title; that is what the principle of the 1993 Act is. So now the common law says that native title is extinguished by the grant of a mining lease. In relation to valid leases that were granted before 1994, native title may well have been extinguished, but that depends on an interpretation by the court of the relevant mining legislation. It may well be that in other states the mining legislation is not such that it has extinguished. But in relation to all mining grants made in the future, the Act says that the non-extinguishment principle will apply.

Mr SNOWDON—In your supplementary submission you say at paragraph 7 that the courts findings are consistent with the fundamental principles underlining the amended Native Title Act. Is that right in relation to mining?

Ms Horner—That was in relation to the pastoral leases and the interpretation of the effect of non native title. You are right. The fact is that in relation to a thing which was beneficial to indigenous people, in that the Native Title Act, both in 1993 and 1998, said, 'Mining leases are a special case, we will say that the non-extinguishment principle applies,' yes, it does depart from what the common law says. But what it says in relation to the effect of leases generally, whether they be commercial or pastoral, is determined by what the common law says. And the common law says now in relation to WA that there are circumstances in which,

notwithstanding there is a reservation, once the reservation no longer applies, native title may well have been extinguished. That is not the case in the Northern Territory or Queensland, so we have a different effect.

Mr MELHAM—Back in 1993 that was part of a package that was about encouraging future mining. The question was still a live question. It really was about, say, protecting native title and so there was the non-extinguishment principle. The fact is that this Act, if properly used, is a pro-development Act and an alternative to the common law. When we talk about the right to negotiate or the right to be consulted, if you establish common law native title then you are able to be consulted in relation to that land. This was one way of compressing the period for consultation to allow, say, mining to go ahead.

Ms Horner—When you say ‘this Act’ are you referring to the amended Act or the 1993 Act?

Mr MELHAM—Both Acts. Even in 1993, the right to negotiate was for a limited period; it was not a veto. If there were negotiations in good faith, mining could proceed on a much quicker basis if you went down the Native Title Act route than, for instance, if you had to wait for common law native title to be established. That is a general—

Ms Horner—I am not sure what you could say about the nature of the making of a grant of a mining lease over where native title land would have been. There would have been no right to negotiate. There would have been a situation where maybe people who asserted they had native title tried to seek an injunction in court to prevent it happening, but I do not know that you could say that was a process that was truncated by the right to negotiate; they are obviously different.

IN RELATION TO THE RIGHT TO NEGOTIATE UNDER THE CURRENT ACT, THAT IS ANOTHER EXAMPLE WHERE, FROM MEMORY, THE TIME PERIODS IN RELATION TO THE AMENDED ACT ARE PRETTY MUCH THE SAME AS THEY WERE FOR THE 1993 ACT, WHICH IS FOUR AND SIX MONTHS. IN THAT RESPECT, THINGS HAVE NOT REALLY CHANGED IN RELATION TO THE RIGHT TO NEGOTIATE, TO THE EXTENT THAT WHERE IT APPLIES IT OPERATES.

Mr MELHAM—Am I correct in saying one of the bases for the non-extinguishment principle for future mining was to encourage agreements between indigenous people and mining companies and then to allow native title to spring back after the miners moved on?

Mr Orr—That is right. It could have had both effects. It was beneficial to the indigenous people. It may well have been beneficial to the miners as well in encouraging agreement. Either way, if the common law is that some mining leases do extinguish native title, then the Native Title Act improves the position of native title holders.

Mr MELHAM—I accept that; I am not arguing that. Back in 1993, the government at the time had one or two cases to deal with when it was framing its legislation. It had to bring together an Act to try and appease all stakeholders. There was a bit of give and take both ways in terms of validation amongst other things.

Mr Orr—Exactly.

Ms Horner—I think your point is right. The right to negotiate did not then, and does not now, provide a veto. Irrespective of whether indigenous people were strongly against the grant of a mining lease, or whether they were happy to negotiate about it, ultimately, they could not prevent it necessarily if the National Native Title Tribunal was persuaded that it was a legitimate thing.

Mr MELHAM—In relation to stated common law, as far as Miriuwung Gajerrong is concerned, we have had four Federal Court judges. There have been two one way and two the other way. If the matter goes to appeal the final determination will obviously be in the High Court.

Mr Orr—That is quite right. We have to be a bit cautious because it may well go on appeal. We were in a similar position with Wik, as you will remember.

Mr MELHAM—Yes.

Mr Orr—I think it was three to one in favour of extinguishment with Wik.

Mr MELHAM—But it is also fair to say, isn't it, Mr Orr, without revealing the advice, that the government within the Attorney-General's Department was receiving different advice in relation to the impact of pastoral leases and native title? It was not all one view that a pastoral lease necessarily could extinguish native title.

Ms Horner—Whether or not one wants to speculate about what the legal advice was, the question that goes—

Mr MELHAM—I am just trying to say it was a live issue.

Ms Horner—Okay. It was a live issue in the sense that the government said, and I understand part of the deal was to say, let that issue be determined by the courts. But that is not quite the same thing as what was generally—

Mr MELHAM—Believed.

Ms Horner—believed or said by people to be believed.

Mr MELHAM—I accept that.

Ms Horner—I guess that goes to the legitimacy of the basis on which governments acted after that, if you understand the point I am making.

Mr MELHAM—As you well know, ignorance of the law is no excuse, or no defence. At the end of the day, this is the problem with the validation provisions.

Ms Horner—Obviously, governments have to make a choice based on what they understand the law to be. As a matter of fact—and we make this point in the submission—the question about the status of freehold and whether it permanently extinguished native title, was not decided until after the amendments passed the parliament and came into operation in the Fejo case in 1998. I know it is hard to talk about freehold without a suggestion that people are arguing about people's backyards. While it is not the case that there was a strong argument that native title might have survived on freehold land, the fact is that it was not determined by the High Court until some years after. Up until then it was a live issue. In that case, the applicants in the Northern Territory argued quite strongly that native title was not permanently extinguished by freehold title. So when you say that things are a live issue, they are and can be a live issue. The question is: what is a legitimate response to a government in the case of uncertainty? That is a decision that governments have to make.

Mr MELHAM—I will come back to that because I know that Mr Snowdon is pressed for time.

CHAIR—Mr Melham, I was going to allow Senator Woodley to ask some questions now.

Senator WOODLEY—I just wanted to deal with some of the issues in your supplementary submission under 24(a).

Ms Horner—We do not have the numbering.

Senator WOODLEY—In paragraph 22, you comment on the Lardil case—the Lardil people versus Queensland. In paragraph 22, you say:

Claimants who pass the registration test will obtain significant procedural rights.

I have a couple of questions on that. Are you aware that there are many more people unable to pass the registration test under the 1998 amended Act than were able to pass the test under the 1993 Act?

Ms Horner—There are a couple of comments that can be made on that.

Senator WOODLEY—Could you answer the question first?

Ms Horner—The changes to the registration test were designed, firstly, to address the problem that occurred in the 1993 Act whereby people could get onto the register even if the claim was not accepted. Getting onto the register was a decision that was made immediately the application was lodged. I do not think there are many people who would argue now that it was not appropriate that the registration test should be changed. I think the dissension was in the level of the registration test and what kind of obligations are put on native title applicants when they come to the NNTT to seek registration.

IN TERMS OF WHETHER PEOPLE ARE NOW NOT ABLE TO GET REGISTERED OR ARE ABLE TO, THE FACT IS THAT, AS YOU PROBABLY KNOW, MOST OF THE CLAIMS OF THE APPLICATIONS THAT WERE ON THE REGISTER PRIOR TO THE 1998 AMENDMENTS COMING INTO EFFECT HAVE HAD TO BE RETESTED. THAT WAS PART OF THE TRANSITIONAL PROVISIONS IN THE ACT. I DO NOT THINK THE NATIVE TITLE TRIBUNAL HAS FINISHED IN THAT PROCESS BUT I THINK THE LATEST STATISTICS ARE THAT ABOUT HALF ARE PASSING AND HALF ARE FAILING. THAT IS NOT TO SAY THAT THE PEOPLE WHO ARE FAILING ARE NO LONGER TAKING PART IN GETTING THESE PROCEDURAL RIGHTS.

WHAT IS HAPPENING AT THE SAME TIME IS THAT MANY OF THE CASES HAVE BEEN CONSOLIDATED AND JOINED SO GROUPS PREVIOUSLY APPLYING TO THE FEDERAL COURT AS SEPARATE PARTIES ARE NOW JOINING TOGETHER. THIS WAS CERTAINLY ONE OF THE PURPOSES OF THE AMENDMENTS—JOINING

TOGETHER AND BEING COVERED BY A SINGLE APPLICATION THAT MAY WELL BE REGISTERED. THE FACT IS THAT A MAJORITY OF APPLICATIONS TO THE FEDERAL COURT MADE AFTER THE 1998 AMENDMENTS CAME INTO OPERATION ARE IN FACT GETTING REGISTERED. IN OTHER WORDS, THE ONES THAT HAVE BEEN PREPARED ON THE BASIS OF THE REQUIREMENTS OF THE ACT NOW ARE OVERWHELMINGLY GETTING REGISTERED UNDER THE NEW REGISTRATION TEST.

CHAIR—Did that answer the question, Senator Woodley?

Senator WOODLEY—In a roundabout way, yes. I was trying to help the committee by just having short answers, but we are not going to get short answers.

CHAIR—It is very difficult to get short answers on a complex issue like this; I think the most important thing that we need to be sure on is clarification.

Senator WOODLEY—I was depending on the evidence that this committee had gathered that, in fact, there was great difficulty for many people in passing the registration test according to the 1998 amended Act. That is the evidence this committee has received, but I did not want to give all that preamble as well.

Mr HAASE—Except that they have just said that is not the case.

Senator WOODLEY—That is interesting.

Ms Horner—To clarify something in relation to that, what the registration test tried to say, speaking very generally, was that you should be able to get the right to negotiate or these other procedural rights where you can demonstrate that prima facie you are likely to succeed in the Federal Court. In other words, they are asking the applicants to come along and demonstrate the kind of case that they are going to make to the Federal Court when they have to demonstrate that they have got native title.

Mr MELHAM—That is going back to Mabo, isn't it?

Ms Horner—We might discuss the findings of that case in a minute.

CHAIR—We will go back to Senator Woodley's question.

Ms Horner—I suppose the point is, in relation to the registration test, the way we were operating before is that people did not have to provide any information in order to get registered, so naturally they are finding it harder because they are required to provide the kind of information that they will now have to provide to the Federal Court.

Senator WOODLEY—I refer to paragraph 28. I was interested in this comment:

The 1993 Act was drafted on the basis that there was no native title on pastoral leases (though it is true that matter was left to the courts to determine);

And the end of dot point three says:

— this was not the intention of the 1993 Act.

I then went to the footnote. It is a quote from the Prime Minister in his second reading speech, which says:

[The right to negotiate] is not a veto.

The comments 'The 1993 Act was drafted on the basis' and 'This was not the intention of the 1993 Act' are based on the Prime Minister's comment in the second reading speech.

Ms Horner—The material about no native title on pastoral leases is described in a great deal of detail in the second part of the first submission about the basis on which we say that, including quotes from the relevant government ministers at the time that they did not believe there was native title on pastoral leases. I do not think anyone would deny that the Native Title Act was not drafted on the basis that there was native title on pastoral leases. The Prime Minister does say in the second reading speech that the right to negotiate is not a veto; that is true.

Senator WOODLEY—That was the reference in your footnote. Paragraph 32 reads:

... in relation to mining, and other development through compulsory acquisition (ie where native title can be extinguished), the amended Native Title Act generally requires procedural rights to be provided that are greater than that available to landholders of any kind, including freeholders.

I am wondering about that. Certainly, there is an argument that the diminished native title rights under the 1998 amendments are still greater rights than those available to pastoralists as against miners, But one of the questions that was asked in that debate was the question: should not pastoralists actually be provided with the

same rights as native title holders as against miners? Certainly, in the state of Queensland that debate has gone on and on, and through the courts. Pastoralists have had to take miners to court because miners have greater rights than pastoralists and native title holders, certainly in relation to some parcels of land that they have moved onto. So do miners not have greater rights than native title holders?

Ms Horner—You are right because mining grants are Acts which passed a freehold test, which means that, irrespective of whether freeholders want a mine on their land or not, in nearly all states, freeholders do not, by definition, have a right to say no. They have a right of compensation and they make it a right to be told or notified. In some cases the rights of a freeholder are no better or worse than those of a pastoralist, and they are certainly much less substantial than those of native title holders, even under the amendments in 1998.

Senator WOODLEY—I grant that; that is true. But the problem I have is that there is a right that miners have which seems to me to be greater than anyone else's right. It seems to me we ought to be making some arguments about that. We will leave it for now.

Ms Horner—That is a matter for the states.

Senator WOODLEY—I was interested in your comment in paragraph 47:

It does not follow that the Government must unquestioningly accept the views of treaty bodies where it believes, in good faith and on reasonable grounds, that they are wrong.

I grant that, but do you accept at all the findings of a body which, after all, does have considerable international expertise or is it the case that, simply because the government believes they are wrong, then that opinion is rejected out of hand?

Ms Leon—The attitude that the government takes to the findings of the treaty monitoring bodies is determined on a case-by-case basis. It is based on not simply a belief on, for example, policy grounds about what a desirable outcome in a particular matter would be; it is based on an analysis of the appropriate international law and the correct interpretation of the treaty under consideration. For example, I outlined in my opening comments the reason why the government has taken a view that aspects of the decision of the Committee on the Elimination of Racial Discrimination were wrong in that the requirement that it read into the convention of informed consent is not one that has any basis in international law. So the government is not coming at the findings of a committee like the Committee on the Elimination of Racial Discrimination and simply coming to a view as to whether it likes or dislikes the view that the committee has come to; it comes at the finding of the committee on the basis of thorough, reasoned analysis of the appropriate international law and it would do that on a case-by-case basis in relation to any such finding by one of the treaty monitoring bodies.

Senator WOODLEY—Thank you. Madam Chair, I will leave it there.

CHAIR—I know a number of people have to go by 8 o'clock. If there are any questions outstanding, we may put them on notice if that is acceptable to you. Senator Abetz has been delayed, and he may also have some questions to place on notice.

Mr SECKER—Many of the submissions that we had assumed that the amendments to the Native Title Act 1998 resulted in lots of extinguishment of native title. To what extent have those amendments actually resulted in the extinguishment of native title?

Ms Horner—Mr Orr says I should say, 'None'—I am not sure we could say that. The four provisions that they identified were the validation, the confirmation, the primary production provisions and the changes to the right to negotiate. The changes to the right to negotiate do not result in any extinguishment of native title. The primary production provisions: for all the provisions which were included to allow governments to authorise activities on pastoral leases and in relation to the running of pastoral lease and primary production businesses, the non-extinguishment principle applies. So they cannot result in, by definition, an extinguishment. The confirmation provisions: now we have the Miriung-Gajerrong decision, the government believes that that will be confirmed to demonstrate that the confirmation provisions did not in fact result in any extinguishment, they merely confirmed extinguishment that had previously occurred.

IN RELATION TO THE VALIDATION PROVISIONS, IT IS POSSIBLE, BUT WE DO NOT KNOW THE EXTENT OF IT, THAT SOME EXTINGUISHMENT COULD HAVE OCCURRED UNDER THE VALIDATION PROVISIONS. BUT AS I MENTIONED BEFORE, THE VALIDATION PROVISIONS APPLY ONLY ON LAND WHERE RIGHTS WERE ALREADY COEXISTING. IN OTHER WORDS, IF THE GOVERNMENT GRANTED A PASTORAL LEASE ON VACANT CROWN LAND IN THE PERIOD 1994 TO 1996, IT WOULD NOT HAVE BEEN VALIDATED. THAT PASTORAL LEASE

WOULD STILL BE INVALID. SO THE ONLY THINGS THAT COULD HAVE BEEN VALIDATED ARE ACTIVITIES OR ACTS DONE ON OR IN RELATION TO PASTORAL LEASE LAND. FOR MOST OF THOSE, UNLESS IT WAS THE GRANT OF THE CONSTRUCTION OF A PUBLIC WORK, SUCH AS CONSTRUCTING A RAILWAY OR SOMETHING LIKE THAT, OR THE GRANT OF A FREEHOLD OR EXCLUSIVE LEASE OVER AN ALREADY EXISTING PASTORAL LEASE, THERE WILL BE NO EXTINGUISHMENT. IF IT WAS THE GRANT OF A MINING LEASE, WHICH IS WHAT WE THINK MAY HAVE BEEN THE MOST LIKELY KIND OF INVALID ACT DONE DURING THAT PERIOD, THE NON-EXTINGUISHMENT PRINCIPLE APPLIES.

JUST IN THAT RESPECT, ALL THE STATES AND TERRITORIES UNDER THE 1998 PROVISIONS AND THE COMMONWEALTH WERE REQUIRED TO LIST AND GAZETTE PUBLICLY EVERY MINING LEASE AND TENEMENT THEY GRANTED IN THAT PERIOD TO ALLOW NATIVE TITLE HOLDERS TO IDENTIFY THOSE AND SEEK COMPENSATION IF THEY CHOSE TO DO SO. THE ONES THEY HAD TO IDENTIFY AND LIST WERE NOT ONES WHICH WERE INVALID; THEY HAD TO LIST EVERY SINGLE GRANT MADE IN THAT PERIOD OVER PASTORAL LEASE LAND AND THE COMMONWEALTH ALSO LISTED GRANTS MADE IN OUR OFFSHORE AREAS TO ALLOW PEOPLE TO SEEK COMPENSATION IF THEY CHOSE TO. BUT, AS I SAID, THE MOST LIKELY VALIDATED ACTS IN THAT PERIOD ARE MINING ACTS AND THEY DO NOT EXTINGUISH NATIVE TITLE. SO THE ANSWER IS, GETTING BACK TO MR ORR'S POINT, WE HOPE NONE, BUT WE CANNOT SAY FOR SURE.

Mr SECKER—So the amendments would have had a minimal impact on native title at worst but perhaps none?

Ms Horner—Perhaps none, but I do not think we could predict the extent of it. Now we know a bit more about pastoral leases in Western Australia, it may be that all the activities done on many pastoral leases in WA will not have been validated because there is no native title there in any event.

Mr SECKER—But minimal at worst.

Ms Horner—Yes.

Mr SNOWDON—Can I just follow that question up. The first sentence of paragraph 85 of the court's decision says:

If the grant of statutory rights is a grant only for a short finite period, the grant may not be inconsistent with the continuance of native title rights.

Would you agree with that?

Ms Horner—That is certainly what the court said, yes. Was that page 85, Mr Snowdon?

Mr SNOWDON—Yes. If that is the case, what about the thousands of leases referred to only generically in the Act and the accompanying schedules previous exclusive possession Acts? Do you think any of those were granted for a short finite period?

Mr Orr—It depends in what context we are looking at it. The point to be made again is that essentially we are talking about pastoral leases. There are no leases on the schedule. What is on the schedule are things which are closer to being real leases, where exclusive possession is being granted. There may be an issue there about timing.

CHAIR—Mr Snowdon, Mr Secker has been waiting quite patiently since quarter past six.

Mr SNOWDON—I am sorry, I was just helping with confirmation.

CHAIR—I think we will go back to you if we have some time at the conclusion of his questions.

Mr SECKER—Many of the submissions this committee received used the Miriuwung Gajerrong decision to support their claims, even though it was under appeal. It was suggested that we accept that decision as evidence, even though it was under appeal. Would you agree that now we have a new decision from the full Federal Court that logically we should now use that decision for evidence rather than the old decision under Justice Lee?

Ms Horner—I think all we can say is what the current state of the law is, bearing in mind that it may well be subject to appeal in the High Court. I must say the position is the same in relation to the existence of native title offshore. That is also subject to a High Court appeal. It goes with the nature of this being a very new and emerging area of law. There is a certain amount of uncertainty.

Mr MELHAM—Surely, yours is getting up.

Ms Horner—I would have thought soon, but I do not know.

Mr SECKER—The CERD committee urged Australia to suspend implementation of the 1998 amendments and re-open discussions with representatives of the Aboriginal and Torres Strait Islander people. Under the Westminster form of government it is not possible for executive government to suspend amendments, so how could we possibly accede to CERD's request?

Ms Horner—There has certainly been speculation by witnesses before the committee here that the use of the expression 'suspend' was not intended to be taken literally. In relation to the provisions which came into effect on 30 September 1998, those provisions are in operation and there is nothing the executive can do about that. Comments have been made in our submission that the only way in which those provisions which are already in operation can be changed is through future legislative Acts by the Commonwealth.

I SHOULD SAY THAT THE CONFIRMATION AND VALIDATION PROVISIONS WHICH THE STATES HAVE NOW ENACTED ARE ALSO IN PLACE AND WILL BE IN PLACE UNTIL THOSE STATE PARLIAMENTS CHOOSE TO CHANGE THOSE. IN SOUTH AUSTRALIA, THE ACT AND TASMANIA THERE HAS BEEN NO LEGISLATION ENACTED SO FAR. HOWEVER, SOME OF THE WITNESSES BEFORE THE COMMITTEE HAVE SUGGESTED THAT, WHERE THE ATTORNEY-GENERAL WAS PROPOSING TO MAKE DETERMINATIONS WHICH WOULD ALLOW STATE LAW TO APPLY INSTEAD OF THE COMMONWEALTH LAW, THOSE PROVISIONS COULD BE SUSPENDED. THAT IS A SUGGESTION THAT HAS BEEN MADE. THE ATTORNEY-GENERAL HAS THE STATUTORY POWER TO MAKE THOSE DETERMINATIONS AND HE MAKES THOSE DETERMINATIONS IN ACCORDANCE WITH THE LAW AS IT IS IN THE NATIVE TITLE ACT AT THE MOMENT.

CHAIR—Senator Abetz, you have arrived late. Perhaps we can reserve the right for you to put questions on notice.

Senator ABETZ—Yes.

CHAIR—Senator McLucas or Senator Crossin, would you like to pick up at this point?

Senator CROSSIN—Could you clarify something for me? It goes back to something you said earlier this evening. There was a question in relation to the right to negotiate or an interpretation you gave about the right to consult being permissible or available when we come to mining explorations in the 1993 Act. Are you using that example to link to and equate with the right to negotiate in the 1998 amendments?

Mr Orr—I think so. I think Ms Horner was saying that in the 1993 Act the right to negotiate applied in some circumstances but that there was an ability in a sense for alternative regimes to be put into place—in other words, not the right to negotiate but something else in particular circumstances, and that included exploration.

Senator CROSSIN—Ms Horner then talked about the right to consult when it came to mining explorations as opposed to negotiation.

Mr Orr—That is right.

Senator CROSSIN—Is that the rationale that was used then and was translated into the 1998 legislation?

Mr Orr—The point to be made is that the 1993 Act allowed for, where there was only exploration, a different regime to be put into place. It was not the full right to negotiate, but a regime which sought to allow a measure of consultation about exploration. I think this was addressed in the second reading speech as well. It was recognised that exploration almost always is not as intrusive as an actual mine and therefore the level of consultation could be more focused and not need to be the full right to negotiate. I think the point that was being made was that in the 1998 amendments that thinking was carried on. In other words, it is not a different thinking; it is the same issue. With regard to exploration, perhaps the full right to negotiate is neither appropriate nor necessary; therefore, as long as the key issues with regard to exploration are addressed—that is consultation about access, consultation about sacred sites and other relevant matters—that addresses the concerns of native title holders and you do not need necessarily to have the full right to negotiate process.

Ms Horner—Can I make one comment in relation to the 1998 amendments. The justification for allowing the right to negotiate to be removed on pastoral leases also went not just to the nature of the kind of Acts which might be done on it but to the nature of the native title that might exist there. Some of the witnesses before the committee during this inquiry have made the point that the nature of native title on pastoral lease land is a residual right. It is what is left over. I might say that the Miriuwung Gajerrong has confirmed that because the full Federal Court in Miriuwung Gajerrong said that what the grant of a pastoral lease does is to remove any exclusivity that native title holders might have had. In other words, what they have got left after the grant of a pastoral lease must be less than they had before because they have lost that right of exclusivity.

Senator CROSSIN—Thank you. I just needed that clarified.

Mr SNOWDON—Can I take you back to that issue of confirmation of extinguishment and the lease issue. What can we conclude about the possibility that the court's determination might create the serious possibility that the confirmation provisions in the Act go beyond the common law in extinguishing native title?

Mr Orr—I think we have addressed that. The Miriuwung Gajerrong decision is a complex and long decision and we need to recognise that it may well be appealed. But I think the government's position is that it confirms, firstly, that the approach which the Commonwealth and the states took to developing a schedule for the confirmation regime was essentially the right approach and that, generally, not only in approach but in the actual substance of the leases which were put on the schedule, the decision does seem to confirm that the substance of the regime, the actual leases put on the schedule, were leases which extinguished native title.

Mr SNOWDON—But doesn't it also raise the possibility that if a grant of one of those leases was for a short, finite period, that that is not inconsistent with the continuance of native title and therefore been extinguished by the schedule?

Mr Orr—There is an issue about timing, that is correct.

Mr SNOWDON—So there is a possibility therefore that there is an issue about compensation?

Mr Orr—There is a possibility, but what the court was saying was that the statutory right—and that is what they are talking about; they are not talking about real leases, they are talking about leases which are more akin to pastoral leases and other types of leases, statutory rights—may need to be an exception for very short leases which are not leases, and that exception does not include leases which are renewed, which they go on to say in paragraph 85. Yes, they are identifying the issue there.

Mr SNOWDON—And consistent with that, they are also identifying the issue in terms of the reservation, are they not? With the discussion we had earlier, there is a possibility that the reservation issue is alive?

Mr Orr—Yes.

Mr SNOWDON—Therefore, that may also have compensation implications?

Mr Orr—In terms of reservations, they are talking about pastoral leases. I do not think that they are talking about reservations in other types of leases. But I agree, in terms of what the Wik court did, one of the things that it looked at was the rights of others, not specifically indigenous people protected by reservations, because in the Wik leases there were not any. But it certainly looked at the fact that other people were given rights to come onto the land. In terms of developing the schedule, the rights of other people, including indigenous people, were also taken into account. Most importantly, that is why the pastoral leases in Western Australia were not on the schedule and were not confirmed to have extinguished native title, even though on the basis of the Miriuwung Gajerrong decision it would seem that some of them have extinguished native title.

Mr SNOWDON—Okay. Madam Chair, I am conscious that it is four minutes to eight.

CHAIR—Yes, and Mr Melham has a couple of more questions that he wanted to ask.

Mr SNOWDON—It is marvellous how he does, isn't it?

CHAIR—He is nothing if not consistent.

Mr MELHAM—There are a number of questions that I will put on notice later on to shorten it.

CHAIR—We would appreciate that.

Mr MELHAM—There are some that I think it is appropriate that I ask the witnesses, notwithstanding the fact that I do anticipate they might not be able to answer them, but I do think it is appropriate they are asked. Mr Orr, can you confirm that the criticism of the CERD committee, the four points of criticism, were not unexpected, that the government was on notice that they could be criticised for those particular provisions in the amendment Act?

Mr Orr—It is beyond debate that the Native Title Amendment Act was a controversial piece of legislation. There was significant debate and controversy following the Wik decision. There was debate and controversy following the 10-point plan. There was debate and controversy following the very extensive legislative passage. I think you are correct, I do not see how anyone in Australia could think that this was not a piece of legislation on which there were differing views.

Mr MELHAM—Are you able to confirm that the government took advice in relation to the consistency of the 10-point plan, for instance, with the Racial Discrimination Act?

Mr Orr—We dealt with this last time when I was here. My position is that the government is not willing to disclose whether it took legal advice on those issues, nor, if it did, what that advice was.

Mr MELHAM—Are you able to confirm whether on 3 February 1997, the Commonwealth received advice from Mr David Jackson QC that legislative wholesale extinguishment of native title on all pastoral leases by the states or territories or the Commonwealth, even with just terms compensation, would be contrary to the Racial Discrimination Act?

Mr Orr—I would have to give the same answer that I gave before.

CHAIR—I do not wish to frighten you, but I do recall that you traversed a lot of this ground when Mr Orr appeared before us previously.

Mr MELHAM—Not some of it.

CHAIR—I did not say all, and I did not wish to frighten you.

Mr MELHAM—Are you able to confirm whether that is advice consistent with previous advice by the Solicitor-General and the Attorney-General's Department.

Mr Orr—I would have to give the same answer to that. There is a proviso with regard to the particular issue you mentioned, just leaving aside completely the substance of any advice. You described the advice as dealing with a situation of wholesale extinguishment of native title on pastoral lease land. I did say that the committee, and I think the government, has said on a number of occasions that, whilst that was a policy option, it was an option which was rejected by the government—

Mr MELHAM—I accept that.

Mr Orr—and is not included in the Native Title Act and that one of the reasons for doing that was because—and I have said this to the CERD committee—it was thought that that would be in breach of the convention.

Mr MELHAM—And I think it is fair to say that just terms compensation of itself is not a defence to a discriminatory Act.

Mr Orr—That is a very general hypothetical question, but yes.

Mr MELHAM—So you could be in breach of the convention even if you are providing just terms compensation?

Mr Orr—That is a hypothetical question so it is very difficult to say, but one can envisage circumstances where compensation does not remedy the discrimination.

Mr MELHAM—I will be very quick, Madam Chair. I know I have put this but I want to put it again to confirm the point, and I accept that Mr Orr might not be able to answer it. I put to you, Mr Orr, that, on 25 July 1997, the government received advice from the Chief General Council, Henry Burmester, that he was of the view that in some circumstances the proposals in the 10-point plan may involve an inconsistency with the Racial Discrimination Act or with CERD and that in particular, this inconsistency arises, particularly in relation to the validation regime, the confirmation regime, especially the provision for permanent extinguishment, if that were found not to be the common law, and the provisions which enable rights of pastoral leases to be enhanced at the expense of coexisting native title rights.

Mr Orr—I will have to give the same answer we gave before.

Mr MELHAM—I will leave it there, Madam Chair.

CHAIR—I am sure you were not surprised at Mr Orr's answer to your question.

Mr MELHAM—No I am not, but the point I am trying to make is that—and let me finish with this—in recent times the government has released advice from Chief General Counsel, Mr Burmester, to the parliament, so it is not a situation where advice from Mr Burmester that is known to have been given to government has not been released.

Mr Orr—No, but in response we have—

CHAIR—That is a comment, Mr Orr, not a question.

Mr Orr—I made the comment last time that traditionally governments regard legal advice and other advice it obtains as being privileged, and that is being supported on the basis of principles of good government and privileged communications law.

Mr MELHAM—What I am saying to you is that, in the last couple of years in particular, a number of advices from Chief General Counsel, Mr Burmester, have been given to parliamentary committees and tabled in parliament. Indeed, in relation to Mr Colston, as I understand it—I think it was Mr Colston; correct me if I am wrong—

CHAIR—You mean the former Senator Colston?

Mr MELHAM—The former Senator Colston. There was a tabling of some advice recently. My recollection is that it was in this term of parliament. Perhaps you could look at that.

Ms Horner—Can I just make the comment, Mr Melham, that what the CERD committee was looking at was the Native Title Act as amended.

Mr MELHAM—What I am suggesting to you, Ms Horner, is that the government was not getting advice from its own legal advisers on the amended Act. They were getting it on the amendment bill. But there is some criticism by the government that it is not appropriate to look at amendments in isolation. What they actually did was get legal advice on the 10-point plan. They actually did get some legal advice on amendments in isolation, and that advice is consistent with the CERD findings. That is it in a nutshell.

Ms Horner—I suppose the point I was making is that the CERD committee was looking at the amended Native Title Act. That is what they purported to look at and that is all we have been asked to comment on—the amended Native Title Act. The government's argument is—

Mr MELHAM—What I am saying to you—

CHAIR—This is going to be the last comment, Daryl, isn't it?

Mr MELHAM—Yes.

CHAIR—I do have a number of questions that I will put on notice. I am sure Mr Snowdon has some and Mr Melham has already foreshadowed that he has some. In the interests of time, we will make sure that those come over to you as quickly as possible, and we would appreciate early answers to them.

Ms Horner—Can I ask a question about that, because I am conscious you are due to report by 13 April: you are probably aware that some of us who are participating in this are going off to Geneva next weekend, so is it likely we will get the questions early next week before we go?

CHAIR—Yes. We could try and get some of them over tomorrow. The questions that I have are prepared now, so I will try and get them tidied up and over to you tomorrow. Thank you very much indeed. We have appreciated the way in which you have tried to answer the questions tonight. I especially thank Ms Leon for coming over and giving us those introductory remarks. I found them very helpful.

Committee adjourned at 8.06 a.m.

