



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

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

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

MONDAY, 13 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**

**Monday, 13 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, Ferris and McLucas and Mr Haase, Mr Melham and Mr Secker

**Terms of reference for the inquiry:**

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

**WITNESSES**

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**Committee met at 11.50 a.m.****GUEST, Ms Krysti, Legal Officer, Kimberley Land Council****YU, Mr Peter, Executive Director, Kimberley Land Council**

**CHAIR**—I call the committee to order and 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—that is, CERD. I now welcome Mr Yu and Ms Guest

**Mr Yu**—Thank you, Madam Chair. I am here today to represent the Western Australian Aboriginal Native Title Working Group, which covers the representative bodies in Western Australia, including the Aboriginal Legal Service. We have also been requested by the Northern Land Council and the Central Land Council to represent them at this stage. They are statutory authorities for the purpose of the Northern Territory Aboriginal land rights act as well as being representative bodies for the purpose of the Native Title Act. For the record, I would like to formally give an apology for Mr Dodson. He is unable to attend due to the heavy rains here; he is not able to get into town.

**CHAIR**—The committee prefers all evidence to be given in public, but should you at any time wish to give your evidence or part of your evidence or even answers to specific questions in camera you may make application to do so and the committee will give consideration to that application. However, I would point out that evidence taken in camera may subsequently be made public by an order of the Senate. I now invite you to make some opening remarks about the committee's inquiry into the consistency of the Native Title Amendment Act 1998 with Australia's obligations under CERD. At the conclusion of your remarks, I will invite members of the committee to submit questions to you.

**Mr Yu**—Thank you very much, Madam Chair. We apologise for being a little late this morning. We were trying to get Mr Dodson out of the bog. I would like to inform the committee that formal submissions will be presented to you in the next couple of days, one on behalf of the Western Australian Native Title Working Group and another from the Northern Land Council and the Central Land Council.

In broad terms, what we failed to realise with the Mabo decision in 1992 was that it was more than a matter of dealing with the question of the recognition of indigenous property rights within the common law and also as that was subsequently represented in the 1993 Act. For the first time, from an Aboriginal point of view, it represented formal and substantive recognition not only of our property rights but also of who we are as a distinct group of people in this country called Australia. I think the nature of the expectations and the aspirations of the community were quite clearly underestimated, given that it had taken something like 206 years to get legal recognition of those property rights. Our concerns are that it has now taken six to eight years to try to completely undermine those particular rights politically.

I think we also failed to know appropriately the nature of our concerns in relation to our non-status under the Constitution. It was not until recently that someone told me about clause 25 of the Constitution which gives the states the power to discount votes on the basis of race. I do not know if many Australians are aware of that, but it would seem to be a great cause for concern. It seems a strange way to act as a disincentive for the states in relation to allowing people to vote for the House of Representatives.

The other factor is that, when we were formally recognised within the census in 1967, most people would term that as becoming citizens. That is something which I think is debatable. The underlying principles of that recognition from an indigenous perspective were that governments would only have powers to make laws for the advantage and benefit of a race of people in Australia. But as we now know, there is still some uncertainty about the fact that there is some capacity to make laws to the detriment on the basis of race. I think that particular point underpins the nature of the uncertain relationship that exists between indigenous peoples and the broader communities represented through the governments of this country.

You cannot divorce the links between the recognition of native title, the Mabo decision and the subsequent Native Title Acts and the issue of reconciliation, because they are indistinguishable as far as the Aboriginal people are concerned. If the matter of native title is something that is not amicably settled and negotiated, then there will continue to be a sense of grave dissatisfaction by an important part of the Australian community.

I understand there has been some discussion about the issue of substantive and formal rights and the question of the Act being a special measure. Of course, we would argue that the Act is not a special measure. I refer to the distinctive nature of our culture and the recognition of common law in the Mabo decision which quite clearly said that our native title rights came from our custom and tradition. So the disintegration of the legal version of terra nullius said not only that this country was not empty, but that the people had a social,

political and economic order; there was a set of rules, there was a set of protocols, there was a set of procedures in the relationship between Aboriginal people. I think it is important to appreciate from an indigenous perspective the concern that we have that it is not solely a question of property rights, important as they are; it is a question of who we are as a race of people and the distinct nature of our existence in this country.

The 1993 Act, we believe, was an agreement with the Australian governments. It was not an agreement with Paul Keating, the Prime Minister at that time, nor was it an agreement with the Australian Labor Party. It was an agreement with the Australian governments in relation to the validation of non-indigenous title post 1975 and, in return, the recognition that, because of our special interest in land, there should be this right to negotiate provision and that freehold standards would be set in relation to recognition of native title.

The right to negotiate for the first time in Australian history provided indigenous peoples with the capacity to be able to sit around the table and to negotiate as equals. For the first time in Australian history it provided us with a legal right to do that. It is important for a whole range of different reasons, obviously, but more importantly from our point of view it was important because it gave us a say over the question of our ability to fulfil our cultural obligations to do with ritual or spiritual matters that were of concern to us. I refer to all Aboriginal people in the country. I think it can be seen quite clearly in terms of our situation here in the Kimberleys, where significant parts of the Kimberley area—52 per cent of the Kimberleys—are made up of pastoral leases. It gave us the opportunity to negotiate with mining companies, with exploration companies, with the tourist developers, with local state governments, about the importance and the concern that we have about the cultural maintenance and the integrity of those cultural practices. I think it was central to giving legs and wheels to the vehicle of native title, from our perspective, for the first time. Obviously, with the amendments in 1998, it has provided very severe restrictions on that ability in terms of our right to negotiate.

I could go on, Madam Chair, but I am not sure how long we have before you this morning. It might be better if we take questions directly on those concerns.

**CHAIR**—Mr Yu, we have another half an hour scheduled. In order to allow members of the committee to ask questions, it may be more appropriate to go to questions now unless you have something specific you want to add to your already complete introductory remarks.

**Mr Yu**—I just want to reiterate that there is a fundamental flaw in our relationship that allows this sort of legislation to be introduced. I should also mention that it seems to me that the underpinning principle of the original Act of 1993 was that there was a significant amount of goodwill on behalf of Aboriginal people in relation to the validation issue. Certainly the underpinning principle to that Act was one of mediation and negotiation. I would suggest that the 1998 amendments have created significant uncertainty for not only indigenous people but others as well. There is hardly any capacity from a representative body point of view to be able to facilitate those amendments, given that rule now before the Federal Court. It is going to take a significant number of years.

It is a pity that the opportunity to negotiate and to seek the informed consent of the indigenous community in relation to matters dealing with our fundamental rights has been ignored and continues to be ignored. It is quite clear that, if there is not some capacity to progress this through negotiations, the only way there will be any resolution will be through some political solution rather than a legal solution. It seems to me that the original appeal of the Miriuwong Gajerrong last Friday or the Friday before confirmed that there is going to be significant expense and uncertainty created for all stakeholders across the country in this matter. It is something that is particularly going to disadvantage the Aboriginal community, given the lack of resources and capacity to facilitate the processes through the Federal Court in getting formal determination of native title and not setting up a framework so that there can be some form of negotiation in relation to compensation where the title may have been extinguished through other activities.

**CHAIR**—Ms Guest, do you have any additional remarks to make?

**Ms Guest**—Not at this point.

**CHAIR**—Perhaps I could just lead off with one question. Mr Yu, you just referred to the Federal Court decision on Miriuwong Gajerrong. What do you think the CERD would have made of that judgment?

**Mr Yu**—I think it is discriminatory. If you look at the land act in Western Australia, where it talks about the reservations on pastoral leases for Aboriginal people, I think it says that, where there are enclosed and unimproved areas of land, people are entitled to access and to gain sustenance from that land. Some people might have the view that it is consistent with the schedule of extinguishment provisions under the amendment Act. I would suggest that it is highly complicated and something which is going to take a significant amount of time to unravel. You would have to ask whether fences were put up there to keep the Aboriginal people out or to keep the cattle in. You would have to ask whether or not Aboriginal people helped to build those fences and whether or not there was informed consent. You would have to ask what would happen if white ants ate all the fences, and you would have to ask about fencing at the back of the property that backed on to desert

country—whether it was entirely closed. You would have to have grave concerns that some unilateral decision to put up a fence at a bore would automatically extinguish Aboriginal people's rights.

In the old days, and in some cases still today, the pastoralists encouraged Aboriginal people in the off-work season to go out to their country to hunt, to fulfil people's cultural obligations in terms of rituals and other things. So it is not something that is straightforward. I am stating the obvious, but it seems to me that this is a matter of basing a judgment on the proposal or intent of a piece of paper, given that a lot of these properties were not even taken up after the wars. They were offered to soldiers who returned from the wars. A lot of these were ghost titles; people never took them up or covenants were breached and title was not taken off them. There would seem to have to be more consistency in relation to the position of the burden of proof having to be placed on us in regard to a continuing connection and association.

**Mr MELHAM**—Mr Yu, in 1993 you were involved in negotiations with the then government. I think it is true that you were also involved in 1997 and 1998. I am interested in your views as to whether there was a difference in the way you were treated by the government in 1997-98 in terms of negotiations and efforts to achieve informed consent as against what occurred in 1993. Could you expand on that.

**Mr Yu**—In 1993 it was perhaps the first time that there had ever been direct engagement in formal negotiations with the government at that particular level about such a major and fundamentally important issue to the nation. The only other time was when people like Faith Bandler and others in the sixties approached Prime Minister Menzies in regard to the 1967 referendum, but I do not think that there were formal negotiations. In 1997-98, I do not know if I would actually call them negotiations; there were a couple of meetings with the Prime Minister and some senior ministers. But I would not suggest that they were negotiations. It was more a case of being told what was going to be done rather than asking what our opinion was or whether or not there was an ability to negotiate. There certainly was no informed consent in terms of these amendments.

**Mr MELHAM**—Do you believe that in 1993 you had an opportunity with the government to at least shape the response that eventually went to the parliament, as compared to the 1997 and 1998 consultations?

**Mr Yu**—I would say that, without a doubt, while we did not agree with everything and at the end of the day we did not get everything, there was a capacity to be able to forcefully put our point of view and for the government forcefully to put its point of view. While the 1993 Act was not perfect and it was an entirely new field for us—for all parties involved with it—I think that is why there was this underpinning principle to the 1993 negotiations that there would be some capacity for mediation and negotiation. It was a new and complex area of law that we were all dealing with, and not all of us are lawyers.

We developed a yellow paper which was put to the government from the National Indigenous Working Group in 1998 which we thought was fair and reasonable and took into consideration the views and legal position of ordinary Australians who would be impacted by the legislation. Unfortunately, at the end of the day, the indigenous interests were excluded. I can recall that we wrote a couple of letters to the Prime Minister inviting him to talk to us in the Kimberleys or to get out in the bush, sit down and meet with us, in order to get a perspective and understanding outside the glare of the media. I do not think we ever got a response to those letters. Yet he went to Longreach and a few other places in Queensland quite readily. I think that, in itself, is indicative of the fact that we were not afforded the same opportunities as others to put our point of view.

**Mr MELHAM**—Can you just confirm as to whether indigenous people had provided the government with legal analysis or with their concerns that a number of the amendments might infringe our obligations under the convention?

**Mr Yu**—Yes, I think that is true. Are you talking about during the debates?

**Mr MELHAM**—Yes, during the debates. In other words, did indigenous people anticipate or put the government on notice during the debates on the amendment bill that they could be in breach of their international obligations if they persisted with the amendments?

**Mr Yu**—I do not have the formal reference in front of me of when they actually took place, but I would suggest that that was true, that there would have been a number of occasions when we would have expressed our concern fairly strongly to the government that we would have seen these amendments as being discriminatory and against the interests of this country's indigenous people.

**Mr MELHAM**—In particular, can you just confirm that indigenous people had problems with the validation, the confirmation of extinguishment, the expansion of use of pastoral leases and the curtailment of the right to negotiate—in other words, that the four key points that the CERD committee had problems with in their decision were concerns that indigenous people had put vigorously to the government?

**Mr Yu**—Yes, that is correct. I have just been given a reference. When Mick Dodson was the Social Justice Commissioner of the Human Rights and Equal Opportunity Commission, he certainly advised the government in his report that he felt the amendments would be in breach of the CERD convention. The matters you have raised were raised with the government in terms of our concern that they would be discriminatory, obviously. I have already raised aspects of the right to negotiate.

The other question you raised was about the validation provisions between 1994 and 1996. It would be quite false to suggest that people were somehow living in ignorance on the basis that the Wik decision was being determined in the courts, and that there was the possibility that there would be a coexistence of interests and rights, and that any acts in that intermittent period may have been found to be invalid. I think the validation of those acts is quite straightforward.

The so-called confirmation of extinguishment to the schedule obviously does not provide us with the capacity for a careful judicial analysis of the impact of native title rights on non-native title rights. I think also that the question of considering the compatibility of the amended Act with Australia's international human rights obligations under the standard of common law is incorrect. By declaring that there are certain classes of acts which extinguish native title in a way which protects non-indigenous title, the schedule explicitly breaches the requirements that the property rights be treated in a non-discriminatory way. There is a whole range of titles in the schedule where there may be questions of inconsistencies in terms of the particular form of tenure that the title holds so that it may not extinguish native title. It may, in the cases like the Wik decision, coexist with native title.

**Mr MELHAM**—Can you just confirm that indigenous people, in their discussions with government, offered an alternative to the amendments in terms of dealing with the perceived problems arising out of Wik? Is that that yellow booklet that you were referring to?

**Mr Yu**—Yes, that is right, but it was across the board in relation to the principles of coexistence which related fundamentally to an approach based on mediation and indigenous land use agreements—which is the only matter contained within these amendments in relation to the ILUAs. I think industry groups today may not want to acknowledge it, but quite clearly, as a result of the concern and frustration about the inflexibility and unworkability of the amendments, a significant number of agreements have been reached with indigenous organisations, representative bodies and communities directly.

In the Kimberley last year we signed a memorandum of understanding and a model agreement with about 90 per cent of the serious explorers and miners in the Kimberley area. That fundamentally is a much more efficient way of working because we get notification of the application for the exploration licence and then we put to the particular traditional owners concerned the capacity to enter into a model agreement, which is fundamentally dealing with a methodology of work program clearance, which allows the company to have on ground access without interfering or destroying, or possibly destroying, Aboriginal sites on the ground. That seems to be working very well. And we have just signed another agreement this year with another fairly important company for petroleum exploration in the desert area in the Kimberley. So there is significant concern, not only from our own point of view in relation to the terms of reference of this committee dealing with the CERD obligation, but also because, while it is not being expressed by industry and other groups, the mere fact that they are trying to come directly to us to negotiate indicates that they have some concern about the current operations of the Act.

**Mr MELHAM**—Is it indigenous people's view that there was another approach that the government could have taken to progress a response to Wik that was a nondiscriminatory approach that Aboriginal people would have been willing to be involved in?

**Mr Yu**—As I say, the issue of coexistence, the principles of coexistence in relation to being able to negotiate those agreements, access agreements on the pastoral leases, other forms of activities, that will allow the legitimate interests of the pastoralists to proceed with those of the cultural practices of the community.

**Mr MELHAM**—Thank you.

**Mr SECKER**—Mr Yu, I was interested in your belief that the Native Title Act 1998 as amended is not a special measure. I have used other examples. For instance, if the government decided to give \$100 extra a year per Aboriginal child for, say, education, would you consider that is a special measure?

**Mr Yu**—Under the current circumstances it probably would not be enough, but I think it would be some way towards addressing the concern about the disadvantage of the Aboriginal community, so in that way that would be a special measure—a special measure defined in terms of formal equality, so that when the indigenous community had equal access and capacity to be able to have a better education standard that special measure might then be done away with.

**Mr SECKER**—Say it was \$10,000 extra a child—would that be a special measure?

**Mr Yu**—It would be a special measure until such time as that child or that family had the capacity to have all their abilities recognised, similar to all other Australian citizens.

**Mr SECKER**—And if that figure is reduced, say, five years later, from \$10,000 to \$9,000, could it still be a special measure?

**Mr Yu**—Depending on the circumstances of that particular child or the family or the race of people, if they had achieved formal equality then I think all of it could be done away with.

**Mr SECKER**—But reducing it from \$10,000 to \$9,000 could still be termed a special measure?

**Mr Yu**—It would depend upon the circumstances as to whether the child had attained the level of formal equality and substantive equality to other citizens in the country.

**Mr SECKER**—I accept that .

**Mr Yu**—If they had not achieved that level, and it was inconsistent with the amount required to provide that service, then I would see it as not being a special measure.

**Mr SECKER**—I accept that you are putting those conditions on it, Mr Yu, but what I am asking is: could it still be a special measure if it was reduced from \$10,000 to \$9,000?

**Mr Yu**—If it was reduced and the kid did not have the same level of education as everybody else and was still subject to the same circumstances of social disadvantage, I cannot see how it would be a special measure to reduce it.

**Mr SECKER**—You do not see in any circumstance that it could be a special measure if it was reduced from \$10,000 to \$9,000, if it complied with all your conditions of substantive equality being achieved?

**Mr Yu**—You are talking about substantive equality, not formal equality, I take it.

**Mr SECKER**—That is what I said in my question.

**Mr Yu**—I do not think you can broadly generalise, given the level of disadvantage that Aboriginal people are currently at. If it is a trick question, you need to ask me exactly what you mean.

**Mr SECKER**—It is not a trick question, Mr Yu. All I am trying to find out is whether a reduction in funding could still be a special measure because it is still improving the lot of indigenous people. It may not be to the amount that you are looking for but it still could be a special measure.

**Mr Yu**—Let us put your question in the context of the current factual situation in relation to representative bodies being able to facilitate the particular statutory requirements under the amendments to the Act. The fact is that the current budget for ATSIC for the provision of support and services to facilitate the operation of the act is something like \$40 million. I understand there was a report done by Love-Rashid which indicated that if the government were serious about ensuring that the Act was workable and rep bodies were able to facilitate the interests of indigenous people, then that ought to be in the vicinity of \$87 million. There was a reduction of something like \$400 million to ATSIC when the government first came in. I do not see how you can say that that is a special measure when you have a legal situation occurring but you have no facility or capacity to be able to exercise your legal rights in that context. So I cannot see how that could be a special measure.

**Mr SECKER**—Surely, it would be more special than getting nothing.

**CHAIR**—Do you have any further questions?

**Mr SECKER**—Yes, I have, Madam Chair. Are you suggesting that the 1993 Native Title Act was a special measure?

**Mr Yu**—No, it was not a special measure.

**Mr SECKER**—I am asking whether you thought that the 1993 Native Title Act was considered a special measure by indigenous people.

**Mr Yu**—No, we did not consider that it was a special measure because it did not relate to the question of substantive equality. We see special measure being tied to the question of formal equality, on the basis that it is there to enable a significant improvement in the immediate situation. When the circumstances have improved significantly enough for indigenous people to participate as equal citizens in the country, then that measure could be done away with. The fact is that the issue of substantive equality is a matter of the inherent customary position of Aboriginal people.

**Mr SECKER**—I was interested in what you were saying earlier. You said the states have the power to discount votes on the basis of race. Could you explain that a bit further? I am not aware of that.

**Mr Yu**—Section 25 of the Australian Constitution states that—and this is the advice from lawyers—the states have the powers to discount votes on that basis. The supposed justification was that it was to create a

disincentive for states to discount votes so that there would be a greater amount of representation in the voting population in regard to House of Representatives seats in the federal parliament.

Obviously, from my perspective, it is a matter which relates to the original discussions on the Constitution in 1897 and 1901. If you remember when Henry Parkes tried to bring the states together to talk about a federated nation, one of the key attractive issues was to deal with the immigration legislation—the concern of the Chinese people on the goldfields. That is primarily why. Otherwise, I think we would have been quite happy squabbling with the states dealing with mother England. It seems to me that, if you have a constitution founded on that basis, you would have had to have some very serious concerns.

**Mr SECKER**—Thank you, Madam Chair. I have no more questions, but I do have duty in the House for a short while before I come back.

**CHAIR**—Mr Haase, do you have any further questions?

**Mr HAASE**—I have no questions, Madam Chair, and also I have to attend for a quorum in the House.

**Senator McLUCAS**—Going back to your comments earlier, Mr Yu, about the process of discussions leading up to the amendments in 1998, you told us that the working group advised the government that they were of the view that the amendments would contravene our international obligations. Did the government respond to your representations on those issues? If they did, what did they say?

**Mr Yu**—I was not at that particular meeting, but I cannot recall having seen any formal response by the government on the particular concerns that we raised. But, as I have indicated, that was formally raised as was required by the Social Justice Commissioner in his legal responsibilities. It was put formally to the governments, and I cannot recall having seen a formal response to those concerns raised by Mick Dodson when he was Social Justice Commissioner.

**Senator McLUCAS**—Thank you. I might put those questions to him. That might be more appropriate.

**Mr Yu**—Thank you.

**CHAIR**—Mr Yu, when we had evidence from Mr Geoff Clark in our previous hearings, he put the position that ATSIC would like to roll back the Native Title Act and start again. I am wondering whether you have any comments on that? I suppose the area that I was interested to explore with him when he made those comments was what he thought the ramifications of that might be in a wider sense in regional Australia. But I wonder, given the number of bodies that you are representing here today, whether you have any comments on Mr Clark's comments.

**Mr Yu**—I think Mr Clark's comments are probably consistent with the comments by the CERD committee itself that the discriminatory aspects of the amendments ought to be suspended until there is formal negotiation between Aboriginal people and the government to be able to establish an agreed process so that we might address ourselves specifically to those areas that have been nominated by the CERD committee. I concur and agree with Mr Clark's comments and proposition in that regard—that it is probably time, other than our immediate concerns about the discriminatory nature of the amendments and CERD's confirmation of that as far as we are concerned. In the context of reconciliation, it is certainly not doing very much for this country of ours. I think that it would be very useful as some form of expression of goodwill, on behalf of this government, to indicate that it is serious about, and interested in, reconciliation by engaging us in a more dignified and respectful manner so that we can jointly come to some arrangement with regard to replacing these discriminatory amendments.

**CHAIR**—I have just one other question, and that relates to pastoral leases. I wonder whether you would agree that it could have been quite easy for many Australian pastoralists prior to the Wik decision to be acting honestly and in good faith when they were subsequently found in the Wik decision to have impinged upon native title. Do you accept that that was an open question at that time and, therefore, pastoralists who did impinge on native title unwittingly could have been acting in good faith?

**Mr Yu**—I am not denying the view of the pastoralists that they would have been conducting themselves in good faith. I guess it is more a question of education and understanding the nature and history of our relationship. If you understood the operations of the respective acts that dealt with pastoral leases—and I can only refer to my situation here in Western Australia—the reservations would seem to indicate that there was a concern by the government that the ability for indigenous peoples to continue to practice and maintain their culture was something permissible by recognition of the reservations.

If one looks at the parliamentary debates that occurred at the turn of the century, there were general matters raised which did not specifically deal with Aboriginal people but which related to the fact that pastoral leases belonged to the public estate—that is, belonged to the entire community. The various covenants that were placed on pastoral leases reflected the government's concern about unilateral settlement without consideration

for the rights and interests of the entire Western Australian community. I think that there is some level of consistency with the Wik decision and our arguments about the continuing co-existing rights of pastoralists. It is not to denigrate the rights of pastoralists, because I think it would be wrong for one set of rights to be able to take away another set of rights. But I think you also have to be factually correct in terms of understanding the nature of history, particular legislation and the reasons why they were put in place in the first place.

**Ms Guest**—If I could expand on that slightly in the context of Western Australia: I think the validation of intermediate period acts in the 1998 act goes more to validating acts of governments rather than activities of a pastoralist. I think in WA it was quite clear that the government was on notice that taking those intermediate period acts would probably be invalid under the Native Title Act. I say that for two reasons. Firstly, because the tribunal in Western Australia had always accepted native title claims over pastoral leases from 1994 onwards. So anyone looking at granting a pastoral lease would know that the tribunal had considered that that was on foot.

Secondly, between 1996 and 1998, the Western Australian government, in relation to seven major development projects, primarily mining projects, granted 211 titles without reference to the Native Title Act. These were among the acts that were validated by the 1998 amendments. In the leases that the government granted in relation to those seven major developments, there is a specific indemnity in relation to the state. The companies had to agree to indemnify the minister and the state if there was invalidity in the lease due to the fact that it had been granted without reference to the Native Title Act. In another case, the recitals in the lease agreements contained a request that the companies had specifically asked for the leases without implementation of the right to negotiate provisions. I think in Western Australia, at the very least, the fact of those grants, which were, as I said, validated by the intermediate period acts, puts paid to the idea that validation was necessary to protect titles honestly granted without reference to the NTA by reason of a mistake. I think the WA government knew the situation perfectly well and has said it in specific leases.

**CHAIR**—Thank you very much for those comments, Ms Guest. We are running a couple of minutes over time for our next witness and we are on quite a tight time schedule today. Unless my colleagues have any further questions, I thank Mr Yu and Ms Guest for making the effort to come. I saw on the television last night the amount of water that you are surrounded by up there and I do sympathise with the difficulties you are facing in your region. Please convey our understanding to Mr Dodson for his non-appearance before us today. Thank you very much for making the effort to be available for us this morning.

**Mr Yu**—Thank you, Madam Chair.

**Ms Guest**—Thank you.

[12.34 p.m.]

**WILLHEIM, Mr Ernst (Private capacity)**

**CHAIR**—Welcome. Thank you for your patience. I hope you found this morning's hearing interesting and a little challenging.

**Mr Willheim**—Yes, I did. May I apologise for coming in during the private meeting. I had understood that it was already public.

**CHAIR**—That is perfectly all right. As you would have heard me say to the previous witnesses, we prefer all our evidence to be given in public but, if at any time you want to make a comment in private or answer a question that we have asked you, please let us know and we will take request into account. However, you should know that evidence taken in that way can subsequently be made public by an order of the Senate. We have received your submission and perhaps now you would like to make some opening remarks before my colleagues and I move to some questions.

**Mr Willheim**—Thank you, Madam Chair. May I first of all draw attention to one typographical error in the submission?

**CHAIR**—Yes.

**Mr Willheim**—I would ask you to go to page 14 of the opinion. In the middle paragraph, just below the middle, there is a sentence that reads:

It was specifically submitted that the public interest factors included uncertainty...

There should then be inserted the word 'faced', so it would be 'uncertainty faced by governments involving future land and resource management.' Bearing in mind the questions that have just been put to Mr Yu, that might be a convenient point for me to begin.

The committee may have been given the impression that, in the period between the commencement of the Native Title Act and the Wik decision, governments—both federal and state—were of the view that pastoral leases extinguished native title or, rather, were of the view that that question was, in fact, resolved or substantially resolved. It is a question that was relevant both to the Commonwealth, which subsequently enacted legislation to validate activities and to the states, because it was the states who were responsible for land administration. They were granting leases, permits and so on. That was essentially a legal issue and I think it is relevant to look at what governments were saying in the forums in which legal issues were resolved at that time—that is, in the courts.

I want to refer first of all to the submissions made in *Miriuwong Gajerrong, Ward v. Western Australia*, at a very early stage. The circumstances there were that the registrar of the tribunal had accepted an application which included pastoral leases. I think Ms Guest has just informed the committee that it was the practice of the tribunal in Western Australia to accept applications for native title that covered pastoral leases. In that case, *Ward v. Western Australia* or the *Miriuwong Gajerrong* case, both Western Australia and the Northern Territory sought to have determined as preliminary questions whether—and, if so, to what extent—native title had been extinguished in respect of relevant land by the grant of pastoral leases. The case on the preliminary questions point is reported in volume 40 ALD, page 150. I would like to read to the committee very briefly the Commonwealth's submissions in that case. These are submissions by the Attorney-General of the Commonwealth intervening. These submissions were made on 8 September 1995. The Commonwealth said, in paragraph 6:

It is in the public interest that uncertainty as to the effect of the past grant of a pastoral lease on any subsisting native title be resolved at the earliest opportunity.

The Attorney-General went on to say:

The public interest factors include the percentage of land in Australia that is subject to crown leasehold ... the effect on the performance of the functions of the native title registrar, the effect on the operation of the tribunal and—

this is the critical point—

...the uncertainty faced by governments in future land and resource management proposals involving pastoral leases.

It is quite clear that, at that stage, the Commonwealth government was saying to the Federal Court that there was uncertainty and that that was relevant for land management.

I would like to take the committee then to the High Court and the *Waanyi* case—it is known as the *North Galanjanja Aboriginal Corporation v. Queensland*. That is reported in volume 185 of the Commonwealth Law Reports at page 595. I would like to quickly read to the committee what the Attorney-General for the Com-

monwealth said in the High Court of Australia where again this question of whether pastoral leases extinguish native title was in issue before the High Court of Australia. That is very similar. In paragraph 10 of the Commonwealth's submissions, the Attorney-General says:

It is in the public interest that the uncertainty as to the legal effect on any subsisting native title of the past grant of pastoral leases, whether subject to reservations providing for Aboriginal access and usage rights or not, be resolved by this Court at the earliest opportunity.

The Attorney-General then sets out some of the public interest factors and they include the percentage of the land of Australia that is currently subject to leasehold title and the uncertainty for claimants and for other persons, including pastoralists and miners, as to whether land subject to pastoral leases might be subject to native title. He refers to the problems for the tribunal. In paragraph 11(6) the Attorney-General refers to:

... the uncertainty faced by governments in future land and resource management proposals involving land subject to current or historical pastoral leases.

The states and the territories were in that case. I do have copies of their submissions but I will not, unless the committee would wish me to, read out in full what they have said. But there are very brief summaries of their submissions in the Commonwealth Law Reports.

**Mr MELHAM**—Could you just cite the page of the Commonwealth Law Reports?

**Mr Willheim**—Yes, this is volume 185 of the Commonwealth Law Reports. I will be reading from page 603 where the Solicitor-General for New South Wales puts to the court that it must consider the effect pastoral leases have on native title. It states:

For it to refrain from doing so, would leave a state of uncertainty where the 42 per cent of all land in Australia is affected by pastoral leases and the uncertainty is causing the mediation processes in many cases to break down.

The Solicitor-General for South Australia, appeared for that state and also for Victoria. The Solicitor-General for South Australia said:

The court cannot ignore the substantial public interest in having the question of the effect of pastoral leases with or without a reservation determined.

Western Australia was represented by Ms Christine Wheeler, who is now a judge of the Supreme Court of Western Australia. At page 604, she says:

The submissions of the other interveners are adopted in relation to whether this court should answer the second question—

that is the pastoral lease question. The Solicitor-General for the Northern Territory appeared for the Attorney-General of the Territory and he adopted the submissions of the Commonwealth.

**Mr MELHAM**—In terms of the time frame, were submissions made in February or was a judgment delivered in February 1996 and a written judgment delivered later by the High Court? I am only going on memory. Maybe you can correct me. My understanding is that only Justice Kirby of the High Court at that time came out and said we should consider it, whereas the other judges said 'Not in this case, we will leave it to another day'. Can you give me the timing for this?

**Mr Willheim**—That is so. The written submissions of the Commonwealth Solicitor-General are dated 11 December 1995. The oral hearing in the court was on 7 and 8 February 1996 and the court's decision was handed down on 21 March 1996.

**Mr MELHAM**—And that is when they declined to entertain the pastoral lease question other than Justice Kirby saying, 'We should do it'?

**Mr Willheim**—Yes. They essentially said that the tribunal registrar, being an administrative official, should not have decided that point. In that case, contrary to what happened in Western Australia, the tribunal registrar had declined to accept the application, taking the view that the pastoral lease did extinguish native title. That was challenged. The court's decision, as I recall it, was that the registrar being an administrative officer should not have made that decision and should have accepted the application.

Governments were saying the court should also have decided the pastoral lease question. The court sent that back. At that time you had the Commonwealth government and the New South Wales, South Australian, Victorian, Western Australian and Northern Territory governments all saying in the forum where these issues are determined that there was uncertainty. It was in the public interest that this uncertainty be resolved and the uncertainty was affecting land administration.

**Mr MELHAM**—Basically, you are saying that everyone was on notice at that time. The issue had not been resolved. It certainly had not been resolved in the 1993 act when it was commenced on 1 January 1994.

**Mr Willheim**—The governments are saying to the High Court that it is uncertain and that this is causing difficulties for land administration.

**CHAIR**—Nevertheless, Mr Willheim, on the point that I was raising in relation to the pastoralists acting in good faith, you could say that the pastoralists took their information from the recital to the Native Title Act in which the Prime Minister of the country at the time said, ‘We expect native title has been extinguished on pastoral leases.’ I have a booklet from the minister of the day. Unfortunately, I have not got it with me here today, but I would be very happy to give you a copy of it if you were interested. In it Mr Tickner says, ‘We expect that native title will be found on a very limited number of very remote areas where crown land still prevails.’ The point I was trying to make was that pastoralists who may not follow the High Court proceedings and submissions by relevant Attorneys-General, but follow what the Prime Minister says in the parliament of the country, believe they are acting in good faith.

**Mr Willheim**—Madam Chair, I am not in the political arena. I can understand that you people are. I simply, as a barrister, thought it proper to draw to the attention of the committee what governments were saying to the High Court.

**CHAIR**—I am very grateful that you did. The balancing point that I was making is that farm organisations were at that time sending out copies of this document and assuring their relevant members of the information as I put it to you.

**Mr Willheim**—I could perhaps make one final point on this. That is that in the High Court’s decision—and so far I have taken the committee to what was put to them in court—the Chief Justice, Justice Brennan, and Justices Dawson, Toohey, Gaudron and Gummow at page 624 said:

It would be surprising if a question of law that is not settled, but is critical to the making of a valid claim to native title, could be decided administratively.

I am simply saying, as a lawyer, that it was abundantly clear. Governments were saying and the court was saying that this was not a settled question.

**Mr MELHAM**—So the more prudent way of operating would have been to operate within the Native Title Act and not on assumptions that a pastoral lease had necessarily extinguished native title.

**Mr Willheim**—The Native Title Act set down some procedures that were to apply. May I perhaps comment on one other issue that I think has arisen recently. That is a suggestion to the committee that governments have a margin of appreciation in relation to the application of international treaties. I think it is probably fair to say that there are circumstances where there is such a margin of appreciation but the point I want to make is that I do not think there is much margin of appreciation in relation to the racial discrimination convention.

The government submission drew very heavily on an article by Anne Bayefski called, *The principle of equality or non-discrimination in international law*. The case that is cited for authority on this margin of appreciation point drew on article 14 of the European Human Rights Convention. That is in very general terms. It covers a wide range of discrimination. It talks about, ‘without discrimination on any ground’. One can understand that when you have a convention expressed in those sorts of terms in such general language there is a margin of appreciation. One of the cases that is cited by the government, *Inze v. Austria*, concerned the question of whether illegitimacy was a ground of discrimination. Illegitimacy was not identified in the convention at all. One can understand that when seeking to apply a general ground of discrimination to a new area like illegitimacy, the court or the commission might say, ‘Yes, there is a margin of appreciation’. Most international conventions are in fact expressed in fairly general language.

I would like to compare the racial discrimination convention with another convention which is the subject of a bit of public discussion at the moment. I looked at it recently in the context of the public discussion on safe injecting rooms for heroin. It is the Single Convention on Narcotic Drugs. If members of the committee want to look at it I am using the United Nations treaty series volume 519, 520. I am reading from page 210. I just want to compare the language—this deals with prohibition of heroin and narcotic substances. Looking at article 2, paragraph 5(b):

A party shall, if in its opinion the prevailing conditions in a country render it the most appropriate means of protecting public health...

And so on. It talks about prohibition, manufacture and possession. But the operative words are ‘if in its opinion’. Then in subparagraph 8 of article 2:

The parties shall use their best endeavours to apply to substances which do not fall under this convention.

And so on. ‘Use their best endeavours.’ That is very common language in international treaties. There is a special measures provision which talks about prevailing conditions. The operative provision is where a party

‘in its opinion’ reaches a certain opinion, then it shall take certain measures. Then there is a provision on limitation on the production of opium:

A party shall not permit the production of opium if in its opinion such production may result in illicit traffic.

and—

The parties shall, so far as possible—

This is article 26—

—enforce the uprooting of all cocoa bushes—

And so on. The sort of language that you get there is, ‘in its opinion’, ‘use their best endeavours’, ‘as far as possible’. That is very common language in international treaties. One can understand that in that sort of case there is a margin of appreciation.

I do not know whether the government officers, when they appeared before you, drew the committee’s attention to another case in the same article that they relied on, the East African Asians v. UK case, which is at page 20 of the article, where the article actually quotes a decision of the European Commission of Human Rights where they say:

A special importance should be attached to discrimination based on race—

and they in effect say that matters which might not be discriminatory in other subject areas could be regarded as discriminatory in the case of race. I do not know whether the government officers drew that to your attention and I wondered whether they really would have gone so far as to say that this margin of appreciation concept applies to something quite so fundamental as racial discrimination. The point being that the International Convention on the Elimination of All Forms of Racial Discrimination is expressed quite differently and it is expressed in unusually clear and forceful language for an international convention. I have extracted some of it in the opinion, which I understand members of the committee have.

I should mention first that the International Court of Justice itself said that the norm of non-discrimination has become a rule of customary international law—and there is an extract at page 7 of that—and that:

To establish ... and to enforce distinctions ... based on grounds of race ... is a flagrant violation of the purposes and principles of the Charter.

So I think one does need to recognise that the international community sees race discrimination as something very special and something where the prohibitions are at a higher level than is normal in international conventions. If you look at article 2, it says states parties undertake to pursue:

... a policy of eliminating racial discrimination in all its forms ...

That is at page 8 of the opinion. In article 5, the states parties undertake, in compliance with the fundamental obligations laid down in article 2:

... to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race ... to equality before the law, notably in the enjoyment of ... rights...

which are then set out, and they of course include the right to own property, the right to inherit and so on.

The important point there is that this is not an area where exceptions are permitted. The prohibition relates to discrimination in all its forms, so it is not open to a state to implement the convention except in relation to members of a particular race, or it is not open to a state to implement the convention except in relation to a particular human right. It is quite extraordinary in the absoluteness of its terms, and that is fundamental to the international community’s perception of racial discrimination and has to be understood when looking at the nature of the obligations. It is different from the way most international conventions are expressed; it is not based on opinions, it is not based on best endeavours.

**CHAIR**—Mr Willheim, we should move to questions because we have limited time. Mr Melham, I understand you have some questions.

**Mr MELHAM**—Mr Willheim, I suppose the CERD committee’s findings, in your view, are not unexpected, they are well within the norm in terms of coming to those conclusions?

**Mr Willheim**—Absolutely, yes.

**Mr MELHAM**—And for anyone to be arguing that it is fanciful or that they went beyond proper considerations, what is your view in relation to that?

**Mr Willheim**—They clearly had the benefit of a range of submissions. It is apparent from what they have said that they had non-government as well as government submissions, and it is apparent from published

writing on the practice of the committee that that is in accordance with the practice of the committee. In fact, some of the non-government submissions were quite scholarly, if I can put it that way. They were serious analyses of the issues. I think it is the practice of the committee not to prepare what we might call something like a judgment of a court. In other words, I do not think it is the practice of the committee to set out at great length the background. It comes to its conclusions fairly quickly. For people who have put views to the committee, both government and non-government, that is a little disappointing because, unlike a court, the committee does not set out all the views and then analyse all the submissions put to it one by one, but I consider the conclusions to be unremarkable and legally sound.

**Mr MELHAM**—Did you read both the government submissions and the non-government organisations' submissions, as well as the unofficial transcripts? Did you familiarise yourself with the material that was before the committee?

**Mr Willheim**—I have read them quickly. I will not say that I can recall all the detail in all of them but, yes, I have read them quickly.

**Mr MELHAM**—Correct me if I am wrong, but my recollection and quick reading seems to be that in terms of the government's submissions and the discussion that took place before the committee, the government really did not submit in terms of the substantive points. The basis of their submission seemed to be, 'Well, what we are doing is constitutional.' But in terms of the individual findings on each of the four points—and correct me if I am wrong—I got the impression that the government was in avoidance mode in its submissions to the committee. Is that being too harsh on the government?

**Mr Willheim**—I would prefer not to make judgments like that, except to say that I think the government's submission approached it from what one might call a domestic law point of law.

**Mr MELHAM**—Yes.

**Mr Willheim**—They have set out the Act and the amendments, and what the Act as amended does, but they did not analyse the application of the racial discrimination convention to these provisions. That may be because they thought that was not asked for. It may be because the government chose, as its expert to attend, its leading expert in native title, but it did not send its leading expert in international law, and this was an international law forum. That is not a reflection on Mr Orr as Mr Orr is a very competent officer in the native title area.

**Mr MELHAM**—In their submissions to us, one of the justifications from the government is also that their actions were reasonable in all the circumstances in relation to overcoming the uncertainty aspect. That is my quick reading of one or two phrases they have used. Is it your view that other options were available of a non-discriminatory nature that the government could have embarked upon in their response to Wik?

**Mr Willheim**—Yes. I can answer it perhaps in two parts. What the government has failed to do, in my view, is to give weight to article 2.2 of the racial discrimination convention. The analysis has, in large part, relied on article 1.4. Article 1.4 is an exception to the definition of discrimination but article 2.2 represents a continuing obligation on states. Let us apply that to Australia, looking, for example, at the preamble to the Native Title Act. I have set out some of the relevant provisions of the preamble on page 3 of the opinion. The preamble is adopted by the parliament, of course—it is part of the Act—and it refers to dispossession of Aboriginal land, to disadvantage, to the principle of agreement of native title holders to future acts and to the need for and the intention to provide for the advancement and protection of Aboriginal people. In my view, an international monitoring or dispute resolution body, when applying article 2.2 to Australian circumstances, would properly have regard to the circumstances the Australian parliament has itself identified in the preamble—those circumstances of Aboriginal disadvantage, of dispossession and the need for advancement and protection of Aboriginal people—and would properly, therefore, take the view that those are circumstances such as article 2.2 talks about as particular circumstances enlivening the obligation. Those circumstances in the preamble, in my view, enliven an obligation under article 2.2.

As the second part of the answer to your question as to whether there were other ways of approaching this: at the time the 10-point plan was announced, I was in Canada, meeting with senior officials of both the federal and the provincial governments. The provinces are the equivalent of our states. I was meeting with officials at the level of secretary and deputy secretary equivalent—they call them deputy minister and other nomenclatures. They were all asking me about the 10-point plan which was released while I was overseas and they were all asking, 'How can you extinguish native title without people's consent? We would like to know how you can do it, because here we are forced into negotiation with each of the First Nations, with each of the tribes.' They are putting enormous resources into individual negotiations with each of the tribes and they just could not understand how Australia could deal with this by way of national legislation. I met with the deputy minister—I think that is his title—of the Department of Aboriginal Affairs in British Columbia. He headed a department where he had 80 people engaged in negotiations with First Nation, Indian communities in one

province, British Columbia, resolving native title issues. The approach there was to resolve these issues by agreement with each of the tribes. The Australian approach has been quite different, but the background here was that titles were granted and there was already the possibility of an underlying title. The legislation resolved that one way, but there must surely be other ways of dealing with that issue and the Canadian would be right out at one extreme.

**Mr MELHAM**—They do not have the equivalent of our race power under the constitution, though, do they?

**Mr Willheim**—Their constitutional structure is different. They have a charter of rights and freedoms, of course, and they entrench some rights under section 35 of their constitution. They have a power in relation to Indian people—I am not sure whether I am using the right term there, because there is some sensitivity in Canada as to which to use—and, without checking it, I am not sure of the extent of that power. But generally there is a federal power, as I recall, to legislate with respect to Indian affairs and Indian lands.

**Mr MELHAM**—Can I take you to page 20 of your submission. I just want to flesh out a view that you have expressed in line 3 which states:

In my view, the Act is not an Article 1.4 special measure ... It does not satisfy the 'sole purpose' requirement.

For the benefit of the *Hansard*, I will quote article 1.4 of the convention. It states:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedom shall not be deemed racial discrimination provided ...

I take it from that that you are saying that the reason the amendment Act or, indeed, the amended Act does not satisfy that article is that the sole purpose of the amendment act or, indeed, the original act or the act, as amended, was not for the advancement of indigenous people but, in effect, to provide certainty of title for non-indigenous people. Is that right?

**Mr Willheim**—What I am saying is that the Act had a number of purposes. It cannot, in my view, satisfy a sole purpose test, nor has one reached a situation where the circumstances for the withdrawal of an article 1.4 special measure are satisfied. One can see that an article 1.4 special measure is not to be continued after the objectives for which they were taken have been achieved, and it is a measure which is necessary to ensure enjoyment of human rights.

I think it clearly follows from that that if the measure was necessary then it can be withdrawn only when that objective has been achieved. If one then comes back to the preamble or, indeed, to the accepted position of Aboriginal disadvantage, the circumstances for withdrawal of a special measure have not been established at this stage in Australia in relation to these issues.

But the critical point in my view is article 2.2, which is a legal duty and a continuing obligation. It may be relevant to note that in *Gerhardy and Brown*, which is the case that a lot of people come back to, article 2.2 did not arise for decision by the court because article 2.2 imposes an obligation on states and it was therefore not enacted in the Racial Discrimination Act. Article 1.4 was. So Justice Brennan, when working through sections 9 and 10 of the Racial Discrimination Act, picked up article 1.4 but had no occasion to look at article 2.2. The second point I might make on that is that the special legislation in South Australia relating to the Pitjantjatjara lands may well satisfy a special purpose test, because it was a special grant of land to the Pitjantjatjara people and not a complex measure like the Native Title Act.

**Mr MELHAM**—Okay, but I am just wondering about constitutionality in terms of Australia and of both the original and the subsequent Native Title Act. Of course, there is the race power, from which the argument is that parliament derives its power to legislate both the original act and an argument more subsequent.

**Mr Willheim**—Yes, and can I respond to that by saying that I think there is a big difference between a power and an obligation. The race power enables the parliament to legislate in relation to race—

**Mr MELHAM**—As long as they do not abuse that power.

**Mr Willheim**—That legislation in reliance on the same power may probably be withdrawn. That, I think, was the basis of the High Court's decision in *Kartinyeri*—the Hindmarsh Bridge challenge—and it provides a legal basis, within the Australian constitutional framework, for withdrawing something favourable that has been put in place.

When you turn to the international obligation, you have to look at article 2.2, which is not equivalent to a power; it is an obligation. If the obligation continues, then the circumstances for withdrawal do not arise. There is, of course, a separate question: if the Australian legislation has now put Australia in breach of the racial discrimination convention, then the constitutional validity of the Racial Discrimination Act is in serious doubt, because the source of constitutional power for the Racial Discrimination Act is the external affairs

power and the Australian legislation must be in general conformity with the obligations under the treaty. If the Native Title Act puts Australia in breach of its obligations under the convention, bearing in mind, as I have said, that this is a convention where you cannot choose to implement it except in relation to people of a particular race or except in relation to particular human rights such as property rights, the effect would appear to be to cast doubt on the constitutional validity of the Racial Discrimination Act. That is a serious issue.

**CHAIR**—I see your comment on that but because it is not an issue that you were asked to give an opinion on, you actually have not said any more on page 31 than what you have already said. I was going to ask you about that but seeing you have commented on it now, I will leave that.

**Mr Willheim**—It is an important public issue for the parliament.

**Mr MELHAM**—I think that was also raised—correct me if I am wrong—by Mr Basten and others in the parliamentary hearings that took place during that period of debate over the Native Title Act and also in the Senate inquiry that was chaired by Senator Abetz. So that issue has certainly been put on the table before.

**CHAIR**—Mr Willheim, I have only one question, in the interests of time: I am wondering whether, in your opinion, you took into account the fact that CERD overlooked a number of measures which are part of the amendments—for example, the creation of a great deal more rep bodies, the creation of the land fund, which of course was in the original Native Title Act, and the fact that the amended act expressly provides that the court and the tribunal can take into account the cultural and customary concerns of indigenous people in their claim process.

**Mr Willheim**—I do not think that any of those provisions overcome what I consider to be discriminatory treatment, in terms of the convention and the obligation, of native title.

**CHAIR**—So the answer is that you did take them into account in forming your opinion?

**Mr Willheim**—I did, yes.

**CHAIR**—It appears we have come to the end of our hearing. Thank you very much for making your advice available to the committee through ATSIC and thank you for making yourself available this morning.

**Mr Willheim**—I think the committee understands that today I have appeared in a purely personal capacity, not to advance any particular views.

**CHAIR**—Your opinion was sent in to us by the Chair of ATSIC.

**Mr Willheim**—That is so, but I am appearing in a personal capacity.

**CHAIR**—Yes, I understand that. There being no further questions, the hearing now stands adjourned.

**Committee adjourned at 1.19 p.m.**