CHAPTER 6

THE AMENDED NATIVE TITLE ACT AND AUSTRALIA'S OBLIGATIONS UNDER THE CERD

Summary of the CERD Committee Decision

6.1 Paragraphs 6-8 of the CERD Committee's decision 2(54) on Australia contain the findings relevant to an assessment of the amended Native Title Act's compliance with Australia's obligations under the CERD (as outlined in Chapter 3).

6.2 In summary, the CERD Committee compared the original and amended Acts and noted that:

- while the original Act recognises and seeks to protect native title, the amended Act contains provisions that extinguish and impair Indigenous rights and interests;

and that:

- while the original Act was delicately balanced between the rights of Indigenous and non-Indigenous interests, the amended Act appears to create legal certainty for governments and third parties at the expense of Indigenous title.[1]

6.3 The CERD Committee expressed concern that the validation, confirmation, primary production and right to negotiate provisions appeared to 'wind back' the protections to Indigenous title afforded by *Mabo (No 2)* and the original Act.[2] The CERD Committee also held that the amended Act was not a special measure within the meaning of Articles 1(4) and 2(2) of the Convention. It raised concerns about the compatibility of the amended Act with Australia's obligations under Articles 2 and 5 of the Convention, particularly as a result of these provisions in the amended Act.[3]

The Proper Approach

6.4 In order to determine the validity, or otherwise, of the CERD Committee's decision, it is necessary to assess whether the four sets of contentious provisions have 'wound back' the protections of the Native Title Act to such an extent that:

- the Act does not satisfy the obligations of Articles 2 and 5 of the Convention; and/or
- the Act is not a special measure.

---

1 Decision 2(54), para 6, CERD/C/54/Misc.40/Rev.2, at: http://www.faira.org.au/cerd/cerd-decision-on-australia.html.

2 Decision 2(54), para 8.

3 Decision 2(54), para 8.

The proper approach to this assessment involves two significant elements:

a) Considering whether the amended Act *as a whole* achieves either the standard of formal equality plus special measures, or substantive equality. It is not appropriate to look at the amendments to the Native Title Act in isolation from the other measures provided; and

b) Comparing the protections given to Indigenous interests by the Native Title Act with the protections offered under Australian law to comparable non-Indigenous interests. If the position regarding Indigenous interests in land is compared with that of non-Indigenous interests, the amended Native Title Act appears to strike a balance between native title interests and other competing interests in land. Further, significant benefits are provided to native title holders which non-Indigenous title holders do not enjoy.

Problems with the CERD Committee's Approach

6.5 In arriving at the conclusions expressed in decision 2(54), the CERD Committee does not appear to have followed the proper approach. Instead, it:

- appears to have considered only the *Native Title Amendment Act 1998* without giving any weight to the significant beneficial measures contained in the amended Act as a whole; and
- compares the position as regards Indigenous peoples' interests in the amended Native Title Act with the original Act. No comparison is made with the position as regards the interests of non-Indigenous Australians.

6.6 This error is reflected in the first term of reference of the Parliamentary Joint Committee's inquiry, which requires the Committee to consider whether the decision of the CERD Committee that the *Native Title Amendment Act 1998* is inconsistent with Australia's international legal obligations, in particular the CERD, is sustainable.[4]

6.7 As the South Australian submission pointed out:

> there are some indications that the [CERD] Committee in fact proceeded to determine only if the 1998 Amendment Act was a special measure, or at least was confused on what was the relevant question.[5]

Further, the South Australian Solicitor-General commented in evidence that:

---

4 ATSIC drew this to the Committee's attention, advising that the term of reference did not accurately reflect the CERD Committee's decision. ATSIC stated that the CERD Committee had actually considered the amended Act (ATSIC, Submission 10, p 4). This is certainly what the CERD Committee purported to do, but in fact it appears to have looked at the amendments to the Act in isolation from the amended Act as a whole.

5 State of South Australia, Submission 15, p 8.

> You cannot look at the 1998 amendments in isolation. You have to look at the 1993 Act with the 1998 amendments. And you cannot look only at parts of the 1998 amendments. You have to look at the whole lot.[6]

6.8 Ultimately, however, this issue is largely irrelevant: the amended Act, when taken as a whole, is not inconsistent with Australia's obligations under the Convention, and, as discussed below, the four provisions identified by the Committee are not inconsistent with Australia's obligations under the Convention. [7]

Comparing the Rights of Indigenous and Non-Indigenous people

6.9 The CERD Committee decision compares the rights of Indigenous people under the original Act and the amended Act. It comments that:

> While the original Native Title Act recognises and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act.[8]

6.10 While the Parliamentary Joint Committee does not accept this characterisation of the amended Act, it is not, in any case, a relevant consideration in deciding whether the amended Native Title Act is consistent with the CERD. The correct test is whether the rights of Indigenous and non-Indigenous people are comparable under Australian law.

6.11 The Government accepts that some of the benefits provided in the original Act, such as the Right to Negotiate, have been reduced by the amendments, but argues that:

> 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.[9]

6.12 As indicated above in Chapter 3, under international law the Government is entitled to 'weigh up' and 'balance' the rights of competing groups in society. To assess whether the Government has balanced these rights appropriately it is necessary to look beyond the native title legislation, which, for obvious reasons, does not deal with all of the rights to land held by Indigenous and non-Indigenous people in Australia.

6.13 As the Australian delegation explained to the CERD Committee:

---

6 Mr Brad Selway QC, *Official Committee Hansard*, 22 February, p 103.

7 Attorney-General's Department, Submission 24, Part I, p 7.

8 Decision 2(54), para 6, CERD/C/54/Misc.40/Rev.2, at: http://www.faira.org.au/cerd/cerd-decision-on-australia.html.

9 Attorney-General's Department, Submission 24, Part I, p 21.

> it is necessary to look at the overall substantive effect of the Native Title Act and the Native Title Amendment Act, and other relevant legislation and the balance that is struck between the various rights and interests. This balance isn't struck just in the Native Title Act and the Native Title Amendment Act.[10]

6.14 Dr Mick Dodson disagreed with the Government's argument that it was entitled to balance the rights of Indigenous and non-Indigenous title holders in the way that it did in amending the Act, arguing that:

> in terms of Australia's obligations under the Convention, international law and international jurisprudence do not require you to engage in a balancing act on rights. They require you to comply with your obligations under the Convention … A balancing act has nothing to do with it.[11]

6.15 This statement, however, fails to recognise that the CERD obligations do allow, even require, a comparison between the rights of various groups within a State. An assessment of whether our native title legislation is discriminatory cannot be made without regard to the position of other land holders in Australia.[12]

6.16 In his presentation to the CERD Committee in March 1999, Mr Robert Orr explained that the judgment about whether different treatment was required to achieve substantive equality, and the appropriateness of any such treatment, was a matter for individual States. He argued that international law recognised this through the allowance of margins of appreciation in how States implement their treaty obligations.[13] As discussed in Chapter 3, the margin of appreciation recognises that States are in the best position to determine the appropriate measures required to implement treaty obligations and to balance competing interests within their jurisdictions.

6.17 In evidence to the Committee, Mr Ernst Wilheim argued that given the specific and definite wording of the CERD, there is very little margin of appreciation or discretion allowed to State parties in implementing their obligations regarding racial discrimination.[14]

6.18 This issue was addressed during Australia's appearance before the CERD Committee in March 1999. Like Mr Wilheim, Mr Orr noted that in relation to discrimination on the basis of race:

---

10 Unofficial Transcript of Australia's hearing before the CERD Committee, 18 March 1999, p 20, at: http://www.faira.org.au/cerd/minutes-1323-cerd-meeting2.html.

11 *Official Committee Hansard*, 22 February 2000, p 55.

12 Attorney-General's Department, Submission 24, Part I, p 20.

13 Unofficial Transcript of Australia's hearing before the CERD Committee, 18 March 1999, p 19, at: http://www.faira.org.au/cerd/minutes-1323-cerd-meeting2.html.

14 *Official Committee Hansard*, 13 March 2000, p 185.

> the margin of appreciation is very narrow. This means that there'll be few instances where the State may treat racial groups in different ways. However, novel areas of law attract a wider margin of appreciation, thereby recognising a greater range of permissible treatment.[15]

6.19 Native title was only recognised by the High Court in 1992. It is, therefore, a relatively new and still developing area of law. Because of this, the Government's discretion in enacting or amending the Native Title Act is wider than it would normally be in relation to racial non-discrimination.[16] In support of this view, the submission from the Attorney-General's Department quotes a number of supporting references, including an article by Anne Bayefsky, '*The Principle of Equality or Non-Discrimination in International Law*'.[17]

6.20 In evidence to the Parliamentary Joint Committee, international lawyer and academic Dr Sarah Pritchard acknowledged the margin of appreciation, stating that international human rights standards are formulated 'at such a level of abstraction' that 'of course, in their interpretation there must be a certain margin of appreciation,' and that the dimensions of that margin of appreciation will vary depending on circumstances.[18]

6.21 Similarly, Professor Donald Rothwell and Ms Shelley Wright, from the Faculty of Law at the University of Sydney, stated in a submission to this inquiry that: 'States Parties, including Australia, have a discretion in how they are going to implement Article 5' of the CERD.[19]

Countervailing Beneficial Measures in the Amended Act

6.22 As stated above, one problem with the CERD Committee's decision is that it does not consider the many countervailing beneficial measures in the amended Act. The Act provides protection to native title that is at least the equivalent of the protection provided to comparable non-Indigenous interests. In addition, the amended Act contains additional measures which:

- are designed to protect native title from extinguishment in circumstances that would lead to extinguishment under the common law;
- are designed to take account of special features of native title; or
- address to some extent the effect of historical extinguishing acts of the Crown.[20]

---

15 Unofficial Transcript of Australia's hearing before the CERD Committee, 18 March 1999, p 19, at: http://www.faira.org.au/cerd/minutes-1323-cerd-meeting2.html.

16 Attorney-General's Department, Submission 24, Part I, p 19.

17 (1990) *Human Rights Law Journal*, Vol 11, No 1-2, p 18.

18 *Official Committee Hansard*, 22 February 2000, p 71.

19 Dr Donald Rothwell and Ms Shelley Wright, Submission 29, p 7.

20 Attorney-General's Department, Submission 24, Part I, p 22.

6.23 The general protection provided to native title, plus these additional measures, means that the amended Act meets the standards of either formal equality and special measures or substantive equality.[21]

Measures Providing for the Recognition and Protection of Native Title

6.24 An outline of the beneficial and positive measures contained in the amended Act is provided below.[22]

- Native title is explicitly recognised in s.10 of the amended Act.
- Where native title would normally be dealt with under State or Territory law, the amended Act ensures that it is dealt with either on a national basis or under State and Territory laws where those laws comply with national standards.
- The amended Act guarantees that once there is a determination of native title that determination can only be revoked or varied if later events demonstrate that the determination is no longer correct or the interests of justice require it.
- Under the common law, native title is vulnerable to extinguishment by the valid exercise of sovereign power to grant interests in land which are inconsistent with the continued exercise of native title rights and interests. However, under the amended Act native title can only be extinguished in two ways:
    - by agreement with the native title holders; or
    - by a non-discriminatory compulsory acquisition of land by the Crown.
- Where the Crown grants interest in land to third parties the amended Act provides for the suspension of native title (and its revival after the expiration of the interest) rather than for its extinguishment, regardless of what the position would have been at common law. For example, in the case of mining leases, the amended Act provides that native title is suspended for the duration of the lease, notwithstanding that at common law the grant of a mining lease would have extinguished native title.[23] The only exceptions to the suspension of native title in the amended Act are in the case of:
    - validated Crown grants made prior to 1996; and
    - grants made prior to 1996 which are confirmed to have extinguished native title.

---

21 Attorney-General's Department, Submission 24, Part I, p 22.

22 The following overview of the additional measures in the amended Act relies on Submission 24 from the Attorney-General's Department, Part I, pp 22-27.

23 The Full Court of the Federal Court recently found that native title is extinguished by the grant of a mining lease: *Western Australia v Ward* [2000] FCA 191; also at: http://www.austlii.edu.au/au/cases/cth/federal_ct/2000/191.html.

- The amended Act protects native title by providing that unless specifically authorised by the Native Title Act, an act by the Commonwealth or a State or Territory that affects native title is invalid.
- The amended Act guarantees the right of native title holders to hunt, fish, gather and undertake cultural or spiritual activity without having to comply with Commonwealth, State or Territory law regulating that activity if the exercise of their native title rights is in order to satisfy their personal, domestic or non-commercial needs.

Measures Addressing the Special Features of Native Title

6.25 The amended Act contains features designed to take account of the special nature of native title which are not generally available in relation to non-Indigenous property interests. These measures include:[24]

- The process by which native title can be claimed ensures that all those in the group can be involved in the process of authorising the application.
- The process of authorisation for native title and compensation applications and for Indigenous land use agreements is determined by reference to traditional laws and customs where this is appropriate.
- In determining native title the focus is on reaching agreement through negotiation.
- The National Native Title Tribunal (NNTT) is set up under the Act to provide mediation services and assistance to parties in reaching a negotiated resolution.
- The NNTT is also empowered by the amended Act to:
    - conduct inquiries, including on action that could be taken to assist Aboriginal people where native title has been extinguished; and
    - provide assistance in the preparation of native title applications.
- The amended Act sets national standards for the recognition of native title by:
    - requiring that any State or Territory tribunals set up to undertake the mediation function in place of the NNTT adhere to minimum standards; and
    - requiring that where State and Territory courts make determinations of native title in place of the Federal Court, procedures consistent with the procedures applicable to the NNTT and the Federal Court apply.
- The amended Act expressly provides that the Court and the NNTT can take account of cultural and customary concerns of Indigenous peoples.

---

24 The following overview of the additional measures in the amended Act relies on Submission 24 from the Attorney-General's Department, pp 22-27.

- The amended Act requires that the NNTT carry out its functions in a fair, just, economical, informal and prompt way and provides that the Tribunal is not bound by technicalities, legal forms or rules of evidence.
- The amended Act seeks to minimise the cost of the claims process in the Federal Court to native title claimants by provisions such as:
    - providing for the appointment of assessors to take evidence;
    - allowing parties to be represented by someone other than a lawyer or by appointing an agent to appear on their behalf;
    - providing that each party bears its own costs;
    - allowing the Federal Court to receive evidence from other proceedings or any other person or body (including an inquiry by the NNTT); and
    - generally exempting applicants and native title holders from fees otherwise payable under the Act.
- The amended Act enables native title holders to negotiate agreements with government to protect their title and, in particular, 'native title holders are able to negotiate with governments to change the impact of extinguishing acts on their native title and to validate acts that would otherwise have been invalid because of native title'.[25]
- Compensation on just terms is guaranteed under the amended Act for any extinguishment of native title, irrespective of the situation at common law.
- Special procedures, such as the right to negotiate, are provided by the amended Act to native title claimants as well as determined holders of native title, for the doing of future acts by the Crown; these special procedures are not available to other title holders.
- The amended Act provides a comprehensive regime for the establishment, regulation and funding of representative Aboriginal/Torres Strait Islander bodies solely for the purpose of assisting native title holders to establish their native title rights and to assist them in negotiating agreements.
- The amended Act guarantees access for traditional purposes to pastoral lease land by registered native title claimants pending determination of the native title claim.

Measures Addressing Prior Extinguishment

6.26 The amended Native Title Act contains the following measures that attempt to address the effect of historical extinguishing acts of the Crown:[26]

---

25 Attorney-General's Department, Submission 24, Part I, p. 25, which cites s.24EBA of the NTA.

26 The following overview of the additional measures in the amended Act relies on Submission 24 from the Attorney-General's Department, Part I, pp 22-27.

- Under ss.47A and 47B of the Native Title Act, both inserted by the 1998 amendments, native title can be recognised on land where it would otherwise have been extinguished as a result of historical tenures.
- The amended Act sets out the legal effect of particular historical acts of the Crown that were invalid, including the application of the non-extinguishment principle, irrespective of the common law position.
- Under s.23B(10) of the amended Act, tenures which could otherwise be the subject of the confirmation provisions can be removed.
- The Land Fund was established in 1993 (originally included in Part 10 of the Native Title Act but now dealt with in the *Aboriginal and Torres Strait Islander Commission Act 1989*) to enable those Indigenous Australians who had been dispossessed, and whose native title had been extinguished in the past, to purchase land. The fund will grow to a guaranteed capital base of 1.3 billion dollars.

The Four Contentious Sets of Provisions

Introduction

6.27 As stated above, the CERD Committee had particular concerns about the validation, confirmation of extinguishment, primary production and right to negotiate provisions of the amended Act.[27] The CERD Committee found that these four provisions raised concerns that the Act 'wound back' the protections to Indigenous title that had been provided by the *Mabo (No 2)* decision and the original Act. The Committee believed that this raised questions about Australia's compliance with its obligations under the CERD, particularly Articles 2 and 5.[28]

6.28 While, as noted above, the Government has accepted that superficially there might appear to be some discriminatory aspects of these individual provisions, there are two responses to this. First, the Government has a discretion to balance competing interests, and second, the Government does not accept that these provisions breach its obligations, because:

- the objectives for the amendments are legitimate in the circumstances;
- they are reasonable and not arbitrary;
- the provisions are designed to achieve their legitimate objective with little, or no, impact on native title;
- the amendments deal with historical acts and developing law, or attempt to balance competing interests, and therefore a margin of appreciation is allowed; and

---

27 Decision 2(54), para 7, CERD/C/54/Misc.40/Rev.2, at: http://www.faira.org.au/cerd/cerd-decision-on-australia.html.

28 Decision 2(54), para 8.

- there are countervailing beneficial measures for any effect these provisions have on native title, including compensation. [29]

6.29 In relation to the right to negotiate provisions, even after the amendments the right to negotiate remains either a special measure, or a measure providing substantive equality.[30]

Validation of Past and Intermediate Period Acts

Outline of the Provisions

6.30 The High Court in *Mabo (No 2)* had indicated that executive governments could validly undertake acts which affected native title. However, there was concern that some acts since 1975 would be invalid due to the operation of the provisions of the *Racial Discrimination Act 1975* (RDA). Therefore, the original Native Title Act provided for the validation of 'past acts'.[31] These were defined to cover acts done between the commencement of the RDA on 31 October 1975, and 1 January 1994 (the commencement of the NTA), which had affected native title rights and interests. States and Territories were also able to legislate to validate their own past acts.[32]

6.31 Under the original Act, validation of future acts was based on the concept of 'permissible' acts or those declared to be valid. These were limited to:

- acts which passed the 'freehold test';
- the grant or renewal of certain types of commercial, agricultural, pastoral or residential leases;
- offshore acts;
- 'low impact' future acts where there was no determination of native title;
- acts authorised by a s.21 agreement; and
- acts done after the relevant government or lessee had been through the non-claimant processes of the Act.

Any other act that affected native title was 'impermissible', and therefore invalid.

6.32 Therefore, from 1 January 1994, under the future act provisions of the NTA, there was a regime in place which prescribed the procedures for governments to follow in order to grant valid interests in land where native title might be affected. These provisions did not deal explicitly with pastoral leases (apart from limited

29 Attorney-General's Department, Submission 24, Part II, pp 10-32.

30 Attorney-General's Department, Submission 24, Part II, pp 40-41.

31 Section 22A.

32 Section 22F.

provisions allowing their renewal in certain circumstances)[33] as it was assumed that native title was extinguished by the grant of a pastoral lease.

6.33 Acting on this assumption, many governments proceeded to authorise future acts over pastoral leasehold land without complying with the NTA procedures. However, on 23 December 1996 the High Court held, in *Wik*,[34] that native title rights could potentially coexist with the rights of pastoral leaseholders. This raised the possibility that many of the future acts authorised by governments without reference to the future act regime of the Native Title Act were invalid because they affected native title.

6.34 In response to this problem, the *Native Title Amendment Act 1998* introduced further validation provisions into the NTA. The amended *Native Title Act 1993* now also provides for the validation of 'intermediate period acts'. These are acts done between 1 January 1994 (the commencement of the original NTA) and 23 December 1996 (the date of the *Wik* decision).

6.35 The new validation provisions are limited to acts done on or in relation to land where there is:

- a current or historical freehold grant;
- a current or historical lease that is not a mining lease; or
- the construction or establishment of a public work.[35]

6.36 These provisions predominantly apply to pastoral leasehold land and retrospectively prevent such acts from being invalid if they have affected native title. Native title holders whose native title rights or interests are affected by any validated act are entitled to compensation from either the Commonwealth or the relevant State or Territory. The Commonwealth, States and Territories are required to notify any mining rights granted in the intermediate period, in order to facilitate applications for compensation. Reservations for the benefit of Aboriginal or Torres Strait Islander peoples are not affected, and the ILUA provisions can be used to vary the effect of the validation provisions.[36]

Legitimate Objective: Certainty

6.37 The Government has advised that it was not clear whether any acts done in the relevant period were, in fact, invalid but:

---

33 Section 235(7) original NTA.

34 *Wik Peoples v Queensland* (1990) 187 CLR 1; also at: http://www.austlii.edu.au/au/cases/cth/high_ct/unrep299.html.

35 Attorney-General's Department, Submission 24, Part II, p 4. See also s.232A(2)(e) NTA.

36 Attorney-General's Department, Submission 24, Part II, p 4. See sections 22G, 22EA, 22C and 24EBA of the NTA.

> At any rate, the Government does not believe that the potential invalidity of third party tenements resulting from the findings of the High Court in *Wik* is an appropriate consequence for acts done on the basis of a legitimate assumption subsequently proved wrong.[37]

6.38 It is a contentious issue whether, prior to *Wik*, the assumption that the grant of a pastoral lease extinguished native title was valid. This assumption was derived from the leading judgment of Brennan J in *Mabo (No 2)*, who expressed the view that the grant of a leasehold interest extinguished native title.[38] As the Government argued before the CERD Committee in March 1999, this judicial understanding prevailed until *Wik* was decided.[39] It remains a fact that while there was still uncertainty and conflicting opinion and comment on this matter, the only judicial view was that pastoral leases extinguished native title.

6.39 In evidence to this inquiry, Dr Mick Dodson advised the Committee of his understanding that:

> The agreement with the then Labor Government and the Indigenous negotiators was that that was a matter that was to be left for the courts. It is a nonsense to suggest that people were not apprised of the dangers of what they did.[40]

6.40 As Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr Dodson warned the Government in his 1994-95 Native Title Report about the dangers of acting on the assumption that pastoral leases extinguished native title. In that report he stated that:

> It is one thing to take a position about extinguishment, but it is an entirely different matter for governments to act on that position before it is confirmed in law. It is alarming that state and territory governments have limited the use of the future act regime and the protection it provides to Indigenous peoples on the basis of assumptions about extinguishment. Given the uncertainty around the issue, I find that approach extraordinarily risky.[41]

---

37 Attorney-General's Department, Submission 24, Part II, p 4. This reflects the position outlined in the Commentary in the 2nd edition of the *Native Title Act 1993*, published by the Australian Government Solicitor, 1998, p 21.

38 Attorney-General's Department, Submission 24, Part II, p 3. Brennan J reiterated this understanding in the *Wik* case, where he held that the grant of a pastoral lease extinguished native title, although in this case, he was in the minority.

39 See Attorney-General's Department, Submission 24, Part II, p 3, footnote 17. This refers to several cases including the Full Federal Court in *North Ganalanja Aboriginal Corporation v Queensland* (1985) 132 ALR 565, and Drummond J in the Federal Court *Wik* case (1996) 134 ALR 637.

40 *Official Committee Hansard*, 22 February 2000, p 56.

41 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report, July 1994 – June 1995*, p 158.

6.41 And again, in his 1996-97 Report, the Social Justice Commissioner stated that:

> The Bill rewards those who ignored such warnings. Post-*Wik* validation is entirely different to the validation of land interests which occurred after *Mabo*. Ignorance of the existence of native title is one thing, denial of its existence is another.[42]

6.42 In its submission to this inquiry, the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), of which Dr Dodson is the Chair, stated that:

> all legal opinion, regardless of their conclusions, would have to have agreed that the question had not been resolved.[43]

6.43 As Dr Dodson pointed out in evidence to this inquiry, the *Wik* litigation commenced in 1993. However, to accept Dr Dodson's view would be to accept that governments are obliged to act on the assumption that litigation will be successful, even when the judicial precedent and the weight of legal and bipartisan political opinion suggests otherwise.

6.44 In an earlier inquiry conducted by the Parliamentary Joint Committee, Mr Noel Pearson, then Chairman of the Cape York Land Council, advised the Committee that until the *Wik* decision was handed down he had been of the view that native title most probably could *not* exist where a pastoral lease had been granted.[44]

6.45 In June 1993 the then Minister for Aboriginal and Torres Strait Islander Affairs, the Hon Robert Tickner, released a publication entitled *Rebutting Mabo Myths*, which states that:

> It is highly likely that the Mabo decision will only be of direct application to a small percentage of Aboriginal people and will apply mainly to remote Australia …
>
> Almost all farming and grazing land in Australia is held under freehold, perpetual leasehold or long-term leasehold titles. As a result of the High Court's decision, these lands cannot be successfully claimed because the grant of these titles extinguishes any native title.[45]

6.46 Similarly, in 1997 Justice Robert French, then President of the National Native Title Tribunal, told the Parliamentary Joint Committee that in 1993 the

---

42 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report, July 1996 – June 1997*, p 62.

43 Australian Institute of Aboriginal and Torres Strait Islander Studies, Submission 11, p 10.

44 Inquiry into the Native Title Amendment Bill 1997, *Official Hansard Report*, 8 October 1997, pp 1394-95.

45 Hon Robert Tickner, *Rebutting Mabo Myths*, Canberra, 1993, p 1.

'conventional wisdom of the time' was that native title would be found to exist 'in some fairly limited and fairly remote part of Australia' and that it would not be interacting with other ranges of interests in the way being asserted in 1997.[46]

6.47 It is abundantly clear that the Commonwealth, States and Territories were acting on the 'balance of legal opinion'. There was also the political understanding of the state of the common law regarding extinguishment. The Preamble to the *Native Title Act 1993*, which was not altered by the *Native Title Amendment Act 1998*, refers to the fact that the High Court in *Mabo (No 2)* held that native title was extinguished by the grant of freehold and leasehold estates.[47] While the Native Title Act ultimately left this matter to be determined by the common law, the then Prime Minister and other Government members referred to the understanding that at common law native title was extinguished by the grant of a pastoral lease.[48] The Hon Gareth Evans QC, who led the then Government's carriage of the original Native Title Act through the Senate, advised the Senate in December 1993 that:

> I am proceeding on the assumption that the native title has been extinguished by the pastoral lease concerned; that is the clear intimation from the High Court so far as the common law position is concerned. We have not determined that as a matter of statute. It has been left to be further explored if anyone wants to explore it. The working assumption is that the vesting of a pastoral lease extinguishes native title.

and that:

> the Government believes that the chances of success for any native title claim that may be made in respect of leases are negligible.[49]

6.48 While this position was overturned by the *Wik* decision, it was clearly a widely held view, across the political spectrum and in the general community. In their submission to this inquiry, Professor Donald Rothwell and Ms Shelley Wright from the Faculty of Law at the University of Sydney stated that: 'The *Wik* decision came as a surprise.'[50]

6.49 The accepted view informed the drafting of the Native Title Act, and was expressed publicly as the position on when and where native title might exist in Australia. Thus, the validation provisions in the 1998 amendments were enacted for the legitimate purpose of providing certainty and to respond to an unforseen legal problem.

---

46 Inquiry into the Native Title Amendment Bill 1997, *Official Hansard Report*, 23 September 1997, p 136.

47 Preamble to the *Native Title Act 1993*.

48 For example, *House of Representatives Hansard*, 16 November 1993, pp 2879-2880.

49 *Senate Hansard*, 20 December 1993, p 5338.

50 Dr Donald Rothwell and Ms Shelley Wright, Submission 29, p 4.

6.50 In addition, most of those who 'benefited' from the grant of potentially invalid acts in the intermediate period were not governments but farmers and pastoralists, who acted in good faith and relied on the statements of governments. The Committee does not believe that these people should bear the full consequences of any invalidity caused by reliance on this legitimate assumption.

Limited Effect on Native Title and the Margin of Appreciation

6.51 In many respects, these additional validation provisions mirror the 1993 provisions, but are more limited as they only apply to leasehold land. The Government noted in its submission to this inquiry that the CERD Committee 'apparently had no concerns with this much more extensive regime' in the original Act.[51]

6.52 In amending the Native Title Act, the Government expressed the intention of continuing to respect the objects of the Act as originally enacted, and to ensure that any amendments had a minimal effect on native title. In evidence to the Committee, officers of the Attorney-General's Department agreed with the proposition that the effect of the amendments on native title was minimal.[52]

6.53 The Government has conceded that it cannot say definitely that the validation provisions did not effect any extinguishment of native title. However, to date there have been no determinations that any acts were invalid and there have been no claims for compensation. The validation provisions only apply on pastoral leasehold land. Furthermore, the most common interests granted in the intermediate period without complying with the provisions of the Native Title Act were mining leases, which do not extinguish native title because the non-extinguishment principle applies. Therefore, if there has been any extinguishment of native title as a result of the validation provisions, it is likely to have been minimal.[53]

6.54 Furthermore, as the validation provisions are dealing with past acts, which provide a margin of appreciation at international law, and given the safeguards in place, in particular the availability of compensation for any effect on native title, the Committee believes that the requirements of the CERD Convention to minimise the effect of these provisions on native title rights and interests have been met.

Countervailing Beneficial Measures

As stated earlier, the CERD Committee appears to have considered that the 1993 Native Title Act was a special measure, notwithstanding that it had discriminatory validation provisions. The 1998 validation provisions are more limited than those in the original Act. Further, the validation provisions were enacted for a legitimate

51 Attorney-General's Department, Submission 24, Part II, p 10.

52 Ms Philippa Horner, Attorney-General's Department, *Official Committee Hansard*, 9 March 2000, p 169.

53 Ms Philippa Horner, Attorney-General's Department, *Official Committee Hansard*, 9 March 2000, pp 168-169.

purpose, they were reasonable and not arbitrary in that they tried to limit the effect on native title, and they were within the Government's margin of appreciation.

6.55 In addition, if countervailing beneficial measures are a relevant consideration in determining whether the validation provisions are discriminatory, there are a number of beneficial measures in the amended Act which concern the validation provisions. For example:

- The ILUA provisions allow native title holders and governments to agree to change the effect of validation on their native title, for example from extinguishment to application of the non-extinguishment principle, or to agree to validate acts that were not included in the validation provisions, or to validate future acts that are invalid;
- The amended Act allows the Federal Court to ignore prior extinguishment of native title where native title applicants can demonstrate they are in occupation of the relevant land. This introduced for the first time the concept of restitution of native title, a far greater protection than provided by the common law; and
- Compensation is payable to native title holders for any effect on their native title as a result of the validation provisions.

6.56 In summary, it is clear that in the light of the *Wik* decision steps had to be taken to resolve the uncertainty created by the fact that the original Native Title Act had not addressed the possible existence of native title on pastoral leases. It is equally clear that farmers and pastoralists who had acted in good faith, and relied on the statements of governments, could not be expected to bear the consequences of any invalidity arising from the Court's decision.

6.57 The Committee believes that the amendments introduced to address this issue were appropriate and reasonable. They are more limited in scope than the related provisions in the original Act, which do not appear to have been a concern to the CERD Committee, and they include significant countervailing benefits.

Confirmation of Extinguishment

Outline of the Provisions

6.58 Division 2B of Part 2 of the *Native Title Act 1993*, inserted by the *Native Title Amendment Act 1998*, 'confirms the effect of certain Commonwealth acts on native title'. It also allows States and Territories to legislate for similar confirmation of acts affecting native title.[54] These provisions were designed as part of the Government's response to the *Wik* decision and to the perceived need for greater certainty than was provided in the original Act in relation to when, and to what extent, native title was extinguished.

54 Commentary in the 2nd edition of the *Native Title Act 1993*, published by the Australian Government Solicitor, 1998, p 23.

6.59 This regime confirms that:

- all freehold grants, commercial leases, exclusive agricultural/pastoral leases, residential leases and community purpose leases extinguish native title regardless of whether or not they extinguish native title at common law (s.23B); and
- scheduled interests (s.249C) extinguish native title.[55]

6.60 The confirmation provisions distinguish between 'previous exclusive possession acts', which extinguish native title completely, and 'previous non-exclusive possession acts', which either extinguish inconsistent native title rights, if that is what the common law would do, or suspend native title rights.[56] Extinguishment is now also defined in the Act to mean permanent extinguishment.[57]

6.61 Schedule 1 of the amended Act contains a list of 'leases and other interests which the relevant State or Territory, and the Commonwealth, considered, on the basis of the common law, had conferred exclusive possession and had therefore extinguished native title'.[58]

6.62 Compensation is payable if native title is affected or extinguished by the confirmation provisions, and there are a number of other countervailing beneficial measures that apply to these provisions.

Legitimate Objective: Certainty

The confirmation provisions were necessary to provide certainty and to ensure the workability of the Native Title Act. Despite the assumption that the grant of a freehold or leasehold interest extinguished native title, the lack of clarity in the Native Title Act, and court decisions reducing the effectiveness of the threshold test, meant that claims could be made for native title over these tenures. This potentially involved thousands of respondents whose interests were, in fact, not affected by native title. Leaving it to the courts to resolve these issues would be a lengthy and expensive process and could not provide the desired certainty in a reasonable period. [59]

6.63 The Parliamentary Joint Committee considered this issue in its tenth report, accepting that it was appropriate for the Parliament to resolve the issue of what types of tenures extinguish native title. The Committee observed that:

---

55 Paul Burke, 'Evaluating the Native Title Amendment Act 1998', *Australian Indigenous Law Reporter*, Vol 3 No 3, September 1998, p 338.

56 Sections 23C, 23G.

57 Section 237A.

58 Commentary in the 2nd edition of the *Native Title Act 1993*, published by the Australian Government Solicitor, 1998, p 23.

59 Attorney-General's Department, Submission 24, Part II, p 23.

> Any confirmation that restricts itself to matters upon which the existing law is utterly clear and free from doubt will serve little useful purpose. Confirmation provisions that go beyond this (and enact what is, in effect, no more than a best estimate of what the law is) will result in an added measure of certainty.[60]

6.64 In deciding what interests to include in the Schedule, the Commonwealth has been accused of not going far enough.[61] Some States and Territories argued for the inclusion of tenures which they believed could reasonably be said to have granted exclusive possession, and therefore extinguished native title. The Commonwealth rejected many of these.

6.65 In addition, representative bodies were given an opportunity, through ATSIC, to comment on the Schedule before it was introduced into the Parliament, and as a result of consultations changes were made to the Schedule. In its tenth report the Committee accepted that the process for determining which interests should be included in the Schedule was appropriately thorough.[62]

Limited Effect on Native Title and the Margin of Appreciation

6.66 The Government argues that these provisions do not effect any further extinguishment of native title rights or interests.[63] The titles that are confirmed to have extinguished native title, including all of the Schedule 1 interests, were included because it was assessed that they conferred exclusive possession and had therefore extinguished native title.

6.67 Many of the submissions and oral evidence to this inquiry argued that the confirmation provisions are discriminatory because they go beyond the common law extinguishment of native title. The main example cited in support of this proposition is the decision of Justice Lee in *Ward v Western Australia* (the Miriuwung Gajerrong case).[64] In that case, Justice Lee found that some of the special leases included in the schedule would not have extinguished native title at common law. This decision was

---

60 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 10th Report, *The Native Title Amendment Bill 1997*, October 1997, p 35.

61 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 10th Report, *The Native Title Amendment Bill 1997*, October 1997, pp 40-41; Attorney-General's Department, Submission 24, Part II, p 13.

62 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 10th Report, *The Native Title Amendment Bill 1997*, October 1997, pp 41-42.

63 Particularly after the Full Federal Court decision in *Western Australia v Ward*; see Ms Philippa Horner, Attorney-General's Department, *Official Committee Hansard*, 9 March 2000, pp 168-169.

64 *Ward v Western Australia* (1998) 1478 FCA at: http://www.austlii.edu.au/au/cases/cth/federal_ct/1998/1478.html.

also referred to by the Country Rapporteur in her report to the CERD Committee as an example of the confirmation provisions going beyond the common law.[65]

6.68 Significantly, the decision of Lee J was appealed by the Western Australian Government and others to the Full Court of the Federal Court. The appeal decision was handed down on 3 March 2000.[66] Justices Beaumont, von Doussa and North all agreed with Justice Lee that the Miriuwung Gajerrong people had maintained a traditional and continuing connection with the claimed land and that they therefore held native title in the claimed land, to the extent that it had not been extinguished.

6.69 However, by a 2:1 majority (Justice North dissenting) the court rejected several of Justice Lee's findings in relation to the characterisation of native title, and the question of extinguishment over pastoral leasehold and other types of tenure. Notably, the majority held that the scheduled interests considered had permanently extinguished native title. The decision confirmed the Government's position that the confirmation provisions merely reflect the common law and are not discriminatory.

6.70 Contrary to the suggestion in the Country Rapporteur's presentation, the Government has advised that:

> The confirmation regime provided no divestment of native title rights. The regime represents a recognition of the historical position that native title had been extinguished by grants of freehold and leasehold in Australia over the past 200 years on about 20 per cent of the Australian land mass and that it was not contrary to the Convention to confirm this historical position.[67]

6.71 The confirmation provisions only apply to tenures issued before the date of the *Wik* decision. Mining leases are specifically excluded from the definition of scheduled interests. It is estimated that the confirmation provisions apply to 21 per cent of the land mass of Australia, with the scheduled interests accounting for 7.7 per cent of this total. This leaves 79 per cent of Australia over which a native title claim can potentially be made.[68]

6.72 As discussed in previous chapters, governments have a greater latitude in determining how to implement their treaty obligations when the subject matter relates to historical acts. The confirmation provisions are a clear example of where the margin of appreciation is applicable.

---

65 Unofficial transcript of the report to the CERD Committee by the Country Rapporteur, at: http://www.faira.org.au/cerd/racial-discrimination.html.

66 *Western Australia v Ward* at: http://www.austlii.edu.au/au/cases/cth/federal_ct/2000/191.html.

67 Attorney-General's Department, Submission 24, Part II, p 21.

68 Attorney-General's Department, Submission 24, Part II, p 14.

Countervailing Beneficial Measures

6.73 Some countervailing beneficial measures relevant to confirmation should also be noted:

- 'Just terms' compensation is provided for in the event that any of the defined 'previous exclusive possession acts' are found not to have extinguished native title according to common law principles.[69] The inclusion of the just terms compensation clause does not indicate that the Government accepts that the confirmation provisions go beyond the common law, but was included in the Act to put beyond doubt the constitutional validity of these provisions.
- Sections 47A and 47B of the amended Act, allow prior extinguishment of native title to be disregarded in certain circumstances.
- The Minister can remove interests from the Schedule by regulation.[70]

6.74 In summary, the confirmation provisions provide certainty and ensure the workability of the Act. They reflect the common law and avoid the possibility of the large number of lengthy and expensive court actions which would have been necessary in order to provide that certainty. The Government exercised caution as to what interests would be scheduled and responded to Indigenous concerns in relation to the schedule.

6.75 The Committee believes that the provisions are a measured and reasonable response to the uncertainty remaining in relation to past acts by governments following the passage of the original Native Title Act in 1993 and the *Wik* decision in 1996. The amended Act recognises the historical position in relation to the extinguishment of native title but ensures that native title can only be extinguished in the future with the agreement of native title holders or by a non-discriminatory compulsory acquisition process.

Primary Production Provisions

Outline of the Provisions

6.76 The *Native Title Amendment Act 1998* inserted Subdivision G of Division 3 of Part 2 into the *Native Title Act 1993*. These amendments were included to make it clear that:

- A pastoralist could carry on primary production activities on the pastoral lease and that those activities 'prevailed' over native title rights and interests;
- State and Territory Governments could continue to authorise primary production activities additional to those authorised by the pastoral lease, as well as related off-farm activities on adjacent land (such as grazing or water licences); and

69 Section 23J.

70 Section 23(10).

- State and Territory Governments could continue to authorise the taking of some natural resources from pastoral leases.[71]

6.77 The primary production provisions incorporate the Income Tax Assessment Act's definition of 'primary production'.[72] They therefore cover such activities as farm forestry, horticulture and farm stay tourism.[73] This broad definition was considered necessary to ensure that the full range of activities that pastoralists are currently authorised to undertake under the various State legislative regimes are covered under the NTA,[74] as in some states the terms of pastoral leases were worded in a general way, for example 'for pastoral purposes'.

Legitimate Objective: Balancing Competing Interests

6.78 As discussed in relation to the validation provisions, the original Native Title Act was drafted on the basis that it was highly unlikely that native title would be found to exist on pastoral leases. Therefore, the only provisions dealing specifically with the management of future acts on pastoral leasehold land were:

- section 235(7), which expressly provided for the renewal of pastoral leases (a safety net amendment, or 'what if' clause, not based on an assessment that it would be necessary but inserted against the possibility that native title might not be extinguished by the grant of a pastoral lease);[75] and
- the validation provisions, which allowed for the validation of pastoral leases granted between 31 October 1975 and 1 January 1994.[76]

6.79 Following the decision in *Wik*, it became clear that these provisions were not adequate to deal with the practical issues relating to the coexistence of native title. There were no mechanisms in the Act to recognise and provide for coexistence, and to govern which rights and interests would prevail, in what circumstances, and to what extent.

6.80 The need to clarify and provide explicitly for the continued activities of pastoral leaseholders was supported by a number of Indigenous leaders and groups, including the National Indigenous Working Group on Native Title (NIWG) and ATSIC. These groups accepted that an express acknowledgment of the right of pastoralists to carry on pastoral activities was necessary, and that it was also necessary to ensure that the concept of 'prevailing rights' was reflected in the amended Act.[77]

---

71 Attorney-General's Department, Submission 24, Part II, p 26. See sections 24GB, GC, GD and GE of the amended NTA.

72 Section 24GA.

73 But not tourism which involves observing activities or cultural works of Aboriginal peoples or Torres Strait Islanders: Section 24GB(2).

74 Attorney-General's Department, Submission 24, Part II, p 27.

75 Ms Philippa Horner, Attorney-General's Department, *Official Committee Hansard*, 9 March 2000, p 160.

76 Attorney-General's Department, Submission 24, Part II, p 24.

77 Attorney-General's Department, Submission 24, Part II, p 25 and footnote 128.

The difference in opinion between the Government and some Indigenous interests was about the scope of these provisions.

6.81 In introducing the primary production provisions into the Native Title Act, the Government faced the difficult task of balancing competing interests in land title in Australia. It was required to deal with the unique situation of coexisting rights in a manner that was reasonable and not arbitrary. Balancing the competing rights of native title holders and pastoral lessees was a legitimate objective, given that the original Act had not been drafted to address the possibility of coexistence.

Limited Effect on Native Title and the Margin of Appreciation

6.82 In achieving the objective of providing certainty and clarifying the relationship between native title holders and pastoral leaseholders, the amended Native Title Act aimed to minimise the impact on native title by:

- utilising the non-extinguishment principle to ensure that whatever the effect of primary production activities, native title cannot be extinguished;
- providing statutory access rights for native title claimants on pastoral leases, pending the determination of their claims;
- providing procedural rights in relation to some future primary production and other activities;
- providing compensation rights in relation to the effect of primary production activities on native title rights and interests; and
- maintaining the right to negotiate over mining on pastoral leasehold land (for native title holders but not pastoral leaseholders).

6.83 The margin of appreciation was discussed earlier. The reason that there is a margin of appreciation in relation to the primary production provisions is because:

- there is a need to balance competing interests. The need to deal appropriately with competing interests is a situation where a greater margin of appreciation will apply; and
- the primary production provisions deal with a new and developing area of law. They address the unforeseen consequences of the High Court finding that native title could exist in circumstances where judicial authority had previously indicated that it would have been extinguished.

Countervailing Beneficial Measures

6.84 The many countervailing or beneficial measures are considered above. They predominantly relate to the steps that were taken to ensure that the primary production provisions achieved their objective in a manner that was not arbitrary and had as little impact on native title rights and interests as possible.

6.85 Significantly, section 235(7) in the original Act contained no right to negotiate in the event of a renewal, no other procedural rights in those circumstances and no

right to compensation should there be impairment of native title by such a renewal. In the amended Act, however, the primary production provisions contain a range of protections, including the non-extinguishment principle and the possibility of compensation for any impact on native title rights of the granting of additional rights to carry on other activities.

6.86 In summary, the primary production provisions were introduced because the provisions of the original native Title Act were not adequate to deal with the existence of native title on pastoral leases. The provisions were designed to balance the rights of native title holders and pastoral lessees and to have a minimum effect on native title rights and interests. Compensating measures were included.

6.87 The Committee accepts that the provisions were necessary in order to provide a level of certainty and to clarify the relationship between pastoral leaseholders and native title holders. The Committee believes that the provisions strike an appropriate balance in achieving those ends.

The Right to Negotiate

Outline of the Provisions

6.88 The amendments to the right to negotiate are contained in Subdivision P of Part 2 of Division 3 of the amended Native Title Act. As the Government advised the CERD Committee, the right to negotiate:

> has been streamlined, its application in some circumstances has been removed and the ability of States and Territories to implement their own appropriate regimes has been increased.[78]

6.89 Under the original Act, the right to negotiate regime generally applied in relation to the creation of a right to mine (both exploration and production), and the compulsory acquisition of native title rights and interests for the grant of an interest to a third party.[79] However, there were exceptions to this general rule in the following circumstances:

- where there were no native title claimants or holders;
- where there was no objection to the proposed grant;
- where the expedited procedure applied; or
- where it had been determined by the Minister that the grant would have only minimal impact on native title.[80]

---

78 Australian Government Response to the United Nations Committee on Racial Discrimination Request for Information under Article 9, Paragraph 1 of the Convention on the Elimination of All Forms of Racial Discrimination, January 1999, p 11.

79 Attorney-General's Department, Submission 24, Part II, p 33.

80 Attorney-General's Department, Submission 24, Part II, p 33; see footnotes 170-172 on that page for the specific provisions of the NTA.

6.90 The submission from the Attorney-General's Department outlines further changes to the right to negotiate regime effected by the *Native Title Amendment Act 1998*. The right to negotiate no longer applies to:

- mining grants for the sole purpose of constructing an infrastructure associated with mining;
- the compulsory acquisition of native title rights and interests for an infrastructure facility;
- the renewal of a mining lease provided it does not extend the term or area of the lease, or grant more extensive rights than the original grant; and
- the compulsory acquisition of native title rights and interests in a town or city.[81]

6.91 In many cases, where the right to negotiate has been removed it has been replaced by other procedural rights, which range from a right to be consulted about proposed acts affecting native title, to significant rights such as the right to object, and to have the objection heard by an independent body.

6.92 States and Territories are able to implement their own right to negotiate regimes, as they could under the original Act.[82] They can now also legislate to replace the right to negotiate in certain circumstances (including over pastoral leases), provided they meet the criteria in the Act, and that the determination is not disallowed by either House of the Commonwealth Parliament.[83]

Legitimate Objective

6.93 The Government was of the view that:

> Not only have these [right to negotiate] procedures impeded resource and commercial development, but they have done so without giving Indigenous peoples substantial benefits in return.
>
> … the decision in *Wik* has made the need for change more urgent, as mining and certain compulsory acquisitions on pastoral lease land may now also be subject to the right to negotiate.[84]

6.94 The right to negotiate was enacted in its original form on the assumption that native title would primarily exist on vacant Crown land where the rights would be equivalent, or similar to rights of full ownership. Following the *Wik* decision, the Government believed that the full right to negotiate was not appropriate where native title could only be a coexisting right, or where the impact on native title was likely to

---

81 Attorney-General's Department, Submission 24, Part II, p 34.

82 Section 43.

83 Sections 43 and 43A. The Senate disallowed the determinations of the Commonwealth Minister in relation to the Northern Territory's s.43A scheme.

84 *House of Representatives Hansard*, 4 September 1997, pp 7890-7891.

be limited. The object of the amendments, therefore, was to ensure that the right available more closely reflected the nature of the native title rights that were likely to exist on pastoral leases and other tenures where future acts were proposed. [85]

Limited Effect on Native Title

6.95 The effect of the streamlining of the right to negotiate regime on native title rights is limited in a number of ways. In most cases, even where it is removed, native title holders retain a range of procedural rights. In some cases these are substantial rights, amounting almost to a right to negotiate. In other cases they may consist simply of the right to be consulted about acts which may affect their native title. The rights retained are determined by an assessment of what the existing native title rights are likely to equate to, whether something akin to full beneficial ownership or lesser coexisting rights.[86]

The Right to Negotiate as a Special Measure or Substantive Equality Measure

6.96 The Government has described the right to negotiate as a 'unique statutory right'.[87] The Government's position is that as the right to negotiate is a statutory right created by the Native Title Act it can similarly be removed, or reduced, by legislative amendment. This is in contrast to the view expressed in 1996 by the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr Mick Dodson, that the right to negotiate is an incident of common law native title, which cannot simply be removed at the will of the Parliament.[88]

6.97 The Committee accepts that the native title rights and interests that are likely to be able to exist on a tenure such as a pastoral lease, are, at the most, coexisting. They cannot amount to something akin to full ownership. The provision of a full right to negotiate is therefore not appropriate in those circumstances. A reduction in the right to negotiate is possible while the right to negotiate can still be characterised either as a special measure or as a measure providing substantive equality.

6.98 As Robert Orr advised the Committee in evidence in 1996:

> the right to negotiate was and is a special measure. But the fact that it is a special measure does not take away from the Parliament the ability to adjust that special measure … in order to remain a special measure it has to maintain those characteristics. But I also add that the Parliament can … take

85 Attorney-General's Department, Submission 24, Part II, p 41.

86 Attorney-General's Department, Submission 24, Part II, pp 40-41.

87 Australian Government Response to the United Nations Committee on Racial Discrimination Request for Information under Article 9, Paragraph 1 of the Convention on the Elimination of All Forms of Racial Discrimination, January 1999, p 11.

88 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1995 – June 1996*, pp 18-19.

> away either in whole or part the special measure provided what it is replaced with is formal equality.[89]

6.99 The Government has advised that it originally sought to provide formal equality to native title holders,[90] but that during the parliamentary debates it adjusted its position to ensure that the special nature of native title was taken into account.

6.100 The Committee agrees with the Government's position on the right to negotiate, which is that:

> the right to negotiate provisions are clearly either a special measure or provide substantive equality. These are rights which other Australian landowners do not enjoy. It is clear that under international law and the Convention that the Parliament can amend such provisions; there is simply no basis for the suggestion that the right to negotiate must remain forever in its 1993 form. The test must be whether the provisions continue to be a special measure, or provide substantive equality … the fact that in some cases the rights of native title holders under the amended Act are different to or less than those under the original Act is irrelevant.[91]

Conclusion

6.101 The amended Native Title Act strikes a balance between native title interests and other interests. It provides protection to native title that is at least the equivalent of the protection provided to comparable non-Indigenous interests, and provides significant benefits to native title holders which non-Indigenous title holders do not enjoy.

6.102 In relation to the four contentious sets of provisions, the Government acted to balance competing interests and to provide certainty. The amendments do not breach the Government's obligations for a range of reasons, including the fact that they are within the Government's margin of appreciation, that there is little or no impact on native title and that there are countervailing beneficial measures for any effect these provisions have on native title, including compensation.

6.103 Prior to *Wik*, the assumption that the grant of a pastoral lease extinguished native title was valid, and informed the drafting of the Native Title Act. The Commonwealth, States and Territories acted on the balance of legal opinion on the state of the common law regarding extinguishment. In the light of the *Wik* decision, however, steps had to be taken to resolve the uncertainty created by the fact that the original Act had not addressed the possible existence of native title on pastoral leases. The amendments introduced to address this issue were appropriate and reasonable and more limited in scope than the related provisions in the original Act.

---

89 Inquiry into the Native Title Amendment Bill 1997, *Official Hansard Report*, 27 November 1996, p 3616.

90 Attorney-General's Department, Submission 24, Part II, p 41.

91 Attorney-General's Department, Submission 24, Part II, pp 40-41.