CHAPTER 3

INTERNATIONAL STANDARDS

Discrimination and Equality at International Law

3.1 The terms of reference for this inquiry involve a consideration of whether the amended Native Title Act is consistent with Australia's international legal obligations, particularly the obligation to ensure racial equality. The fundamental issue is whether Australia's domestic laws, in particular the amended Native Title Act, and also the *Racial Discrimination Act 1975*, adequately implement Australia's obligations to ensure racial equality under international law. This chapter will begin by examining the content of Australia's obligations arising under international law, to ensure racial equality.

3.2 The principle of equality requires that all persons are entitled to enjoy equally their fundamental human rights and freedoms. Equality, as the opposite of discrimination, is sometimes expressed in the negative as non-discrimination.

3.3 The principle of equality or non-discrimination is of fundamental importance in international law:

> *The United Nations Charter* established non-discrimination in the enjoyment of human rights among the central tenets of the United Nations. Therefore one of the principal purposes of the United Nations is 'promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. The ideal of non-discrimination in the enjoyment of human rights was reiterated, and elaborated, in later human rights instruments including the *Universal Declaration on Human Rights,* the *International Covenant on Civil and Political Rights,* and the *International Convention on Economic Social and Cultural Rights.*[1]

3.4 In order to understand the obligations on States under an international instrument such as CERD it is necessary first to consider the meaning of equality in international law.

3.5 An understanding of the principle of equality at international law has been informed by consideration of the twin objectives of preventing discrimination (or, in other words, ensuring equality of treatment) and the protection of minorities. In its first session in 1947, the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities described these two objectives as follows:

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1 Australian Institute of Aboriginal and Torres Strait Islander Studies, Submission 11, p 2.

> Prevention of discrimination is the prevention of any action which denies to individuals or groups of people, equality of treatment which they may wish;
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> Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics they possess and which distinguish them from the majority of the population.
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> If a minority wishes for assimilation and is debarred, the question is one of discrimination and should be treated as such. [2]

3.6 The objectives of prevention of discrimination and protection of minorities appear to be irreconcilable, as the former requires the elimination of distinctions imposed, whereas the latter requires safeguards to preserve certain distinctions. However, they are both considered to be inspired by the desire to obtain and effectively maintain the factual equality of all peoples.[3]

3.7 The link between the two objectives, where the protection of minorities is concerned, was clearly stated in the advisory opinion of the Permanent Court of International Justice, on *Minority Schools in Albania*. The Court considered that in order to ensure the protection of minority groups incorporated in the population of a state, two things are particularly necessary:

> The first was to ensure that members of racial, religious or linguistic minorities should be placed in every respect on a footing of perfect equality with the other nationals of the State.
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> The second was to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

3.8 In other words, in the Court's opinion, what is required to ensure the protection of minorities is, in the first instance, a guarantee of equal treatment (or the prevention of discrimination) together with additional special protective measures to preserve the distinct characteristics of the group. The Court said that:

> These two requirements are indeed closely interlocked, for there would be no true equality between majority and minority if the latter were deprived of

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2 Quoted in Sarah Pritchard, 'Special Measures', in Race Discrimination Commissioner, *The Racial Discrimination Act: A Review*, Canberra, 1995, p 186, and Warwick McKean, *Equality and Discrimination under International Law*, Oxford, 1983, p 182.

3 Warwick McKean, *Equality and Discrimination under International Law*, Oxford, 1983, p 84, and Law Reform Commission, *The recognition of Aboriginal customary laws*, Report No 31, 1986, p 111 and also footnote 100.

> its institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.[4]

3.9 Similarly, in the post-war period, in his famous dissenting judgment Judge Tanaka in the *South West Africa Cases (Second Phase)* said, as regards the protection of minorities, that:

> the norm of non-discrimination as the reverse side of the notion of equality before the law prohibits a State to exclude members of a minority group from participating in rights, interests and opportunities which a majority population can enjoy. On the other hand, a minority group shall be guaranteed the exercise of their own religious and educational activities. This guarantee is conferred on members of a minority group, for the purpose of protection of their interests and not from the motive of discrimination itself. By reason of protection of a minority this protection cannot be imposed upon members of minority groups, and consequently they have the choice to accept it or not.[5]

3.10 Equal treatment, or formal equality, may not lead to equality in fact, and may even engender injustice. In her evidence to the current inquiry, the Hon Elizabeth Evatt said that:

> Equality is a concept that needs a lot of careful consideration. If you treat equally those who are equal, you cannot be seen to do wrong. If groups or individuals are not equal, then treating them equally can be just as bad as treating equals unequally.[6]

3.11 Additional special or differential treatment of groups may be necessary to achieve actual or substantive equality in situations where groups suffer disadvantage which prevents them from equally enjoying their rights and freedoms with the wider population; different treatment may also be required to ensure the protection of the unique characteristics of minority groups.[7]

3.12 The test for the legitimacy of any difference in treatment is its reasonableness. This was clearly articulated in the *Belgian Linguistics Case*, in which the European Court of Human Rights considered whether a difference in treatment contravened a

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4 Minority Schools in Albania (1935) PCIJ Ser A/B no 64, at p 17, quoted in Sarah Pritchard 'Special Measures', in Race Discrimination Commissioner, *The Racial Discrimination Act: A Review*, Canberra, 1995, p 185. The Commonwealth Government's position differs from international law in that it believes that formal equality and substantive equality are separate and distinct standards, so that in providing substantive equality (in the form of different treatment), it does not also need to guarantee a basic standard of formal equality. This position is set out in the submission from the Attorney-General's Department, Submission 24, Part I, p 24, and is also discussed in Chapter 6 in relation to the amendments to the NTA, in particular the reduction in the scope of the 'freehold standard'.

5 *South West Africa Cases (Second Phase)* p 307.

6 *Official Committee Hansard*, 22 February 2000 p 63.

7 See also Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission 32, p 7.

guarantee of equality and non-discrimination in Article 14 of the European Convention on Human Rights. The Court said that:

> the principle of equality of treatment is violated if the distinction has no objective or reasonable justification. The existence of such a justification must be assessed in relation to the aim and effect of a measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[8]

3.13 Importantly, the Court concluded that:

> Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention.

3.14 Thus, the principle of equality at international law does not require absolute equality or identity of treatment, but recognises relative equality, i.e. different treatment proportionate to concrete individual circumstances. In order to be legitimate, different treatment must be reasonable and not arbitrary, and the onus of showing that particular distinctions are justifiable is on those who make them.[9]

3.15 An understanding of the principle of equality at international law gives meaning to the concept of discrimination, which is the opposite of equality. Discrimination at international law has come to mean distinctions which are invidious in that they prevent or impede the achievement of equality. Conversely, legitimate or reasonable distinctions which promote the achievement of equality do not constitute discrimination:

> In ordinary parlance, both at international and domestic law, the word "discrimination" is understood as meaning an arbitrary, invidious or unjustified distinction, rather than no distinction at all. This involves a recognition that true, or substantive equality necessarily requires some difference in treatment, particularly where the circumstances of the individual or groups involved are necessarily different, and the term

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8 Law Reform Commission, *The recognition of Aboriginal customary laws*, Report No 31, 1986, p 109. ECHR Ser A No 6 (1968)

9 Warwick McKean, *Equality and Discrimination under International Law*, Oxford, 1983, pp 286-287. See also *South West Africa Cases (Second Phase)* Dissenting Opinion of Judge Tanaka p 305 and *Minority Schools in Albania* Advisory Opinion p 19 and Attorney-General's Department, Submission 24, Part I, p 18.

> "discrimination" is a pejorative term referring only to unacceptable differences.[10]

Differential Treatment: Special Measures and Minority Rights Measures

3.16 In considering different treatment a distinction can be made between temporary compensatory measures aimed at the advancement of disadvantaged groups (such as affirmative action programs) and measures aimed at the protection of minority groups.[11]

3.17 The latter are not discriminatory because they merely allow minorities to enjoy rights which are exercised by the rest of the population. Such measures produce 'an equilibrium' between different situations and should be maintained as long as the groups concerned wish.[12]

3.18 Dr Sarah Pritchard advised the Parliamentary Joint Committee in similar terms in relation to positive legislative measures aimed at the protection of native title:

> an analysis of international jurisprudence concerning the notion of equality requires a categorical rejection of the characterisation of positive measures to protect native title as special measures or prima facie discriminatory. Instead, an understanding of equality that is elaborated in international practice regards measures to protect the distinct identities of Indigenous Australians as required by the concept of equality rather than as an exception to it
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> …
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> …they are positive measures of protection necessary to achieve substantial equality and to accommodate the sui generis, or inherently different character of native title.[13]

The Requirement of Consent to Different Treatment

3.19 The Commonwealth Government claims in its submission that there is no authority at international law requiring the consent of affected groups to special measures or to measures providing substantive equality – that is, to measures providing differential treatment.[14] This view has been endorsed by the Government members of the Parliamentary Joint Committee in their report.

3.20 However, both international and domestic case law controvert the Commonwealth Government's position; the case law authorities establish that the

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10 State of South Australia, Submission 15, p 3.

11 Warwick McKean, *Equality and Discrimination under International Law*, Oxford, 1983, p 288.

12 Warwick McKean, *Equality and Discrimination under International Law*, Oxford, 1983, p 288.

13 *Official Committee Hansard*, 22 February 2000, pp 67- 68.

14 Attorney-General's Department, Submission 24, Part I, pp 17, 18 and 29.

consent of those affected by the different treatment – both in the form of temporary special measures or minority rights regimes – is important in determining whether the principle of equality is offended. As regards regimes for the protection of minority rights Judge Tanaka in the *South West Africa Cases (Second Phase)*, quoted earlier in this chapter, made the point that:

> a minority group shall be guaranteed the exercise of their own religious and educational activities. This guarantee is conferred on members of a minority group, for the purpose of protection of their interests and not from the motive of discrimination itself. By reason of protection of a minority this protection cannot be imposed upon members of minority groups, and consequently they have the choice to accept it or not.[15]

3.21 In the High Court decision in *Gerhardy v Brown*[16] Justice Gerard Brennan noted that the consent of those affected, to differential treatment in the form of special measures, was important, if not essential, in determining whether such treatment was beneficial and protective rather than adverse and discriminatory:

> A special measure must have the sole purpose of securing advancement … "Advancement" is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek to or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them. An Aboriginal community without a home is advanced by granting them title to the land they wish to have as a home. Such a grant may satisfy a demand for land rights. But an Aboriginal community would not be advanced by granting them title to land to which they would be confined against their wishes. Such a grant would be a step towards apartheid. … The difference between land rights and apartheid is the difference between a home and a prison. Land rights are capable of ensuring that a people exercise and enjoy equally with others their human rights and fundamental freedoms; apartheid destroys that possibility.[17]

3.22 Thus, the consent of groups affected to the differential treatment afforded them is essential in ensuring that the principle of equality is not offended.

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15 *South West Africa Cases (Second Phase)*, p 307.

16 *Gerhardy v Brown* (1985) 159 CLR 70.

17 *Gerhardy v Brown* (1985) 159 CLR 135.

Does the Requirement of Consent Constitute a 'Right of Veto'?

3.23 During this inquiry, the requirement of consent discussed above has been referred to as giving Indigenous people a 'right of veto' over legislation affecting their rights. For example, during a public hearing, a member of the Committee, Senator Eric Abetz, asked the following questions of a witness, Mr John Basten QC:

> **Senator ABETZ:** …what does informed consent mean? … does it equate to a right to veto?
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> …
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> All I am asking … is about informed consent. What does that mean? Does that mean that if the Aboriginal community, for example, would have said, 'We don't like the 1993 Act', that we would not have been able to legislate the 1993 Act under the CERD … Does that mean that we would not have had the authority, according to CERD, to legislate the 1993 Act?[18]

3.24 Mr Basten offered this answer in his evidence:

> The concept of a veto does not assist me greatly in answering that question. It does seem to me that the concept of informed consent, in the context that they [the CERD Committee] are using it, is the same as it is used in the discussion of a special measure by Justice Brennan in *Gerhardy v Brown* … It has this element to it, as I understand it. It is that unless people agree to being treated differently on the grounds of race, then there is a contravention of the Convention [the CERD which prohibits racial discrimination], and whether we think it is beneficial or not is ultimately not to the point.[19]

3.25 Mr Basten further elaborated on this answer in his written submission to this Committee:

> Some of our domestic laws prohibit "contracting out": in those cases, it is not open to the protected group to waive the benefit of the protection to which it is entitled, even by "informed consent". The CERD apparently takes the view that "informed consent" can amount to a waiver of the benefits of the Convention.[20] In that respect, the Convention is treated as more flexible than some of our domestic laws. However, the fact that particular people enjoy a protection which they are entitled to waive, is not helpfully reflected in the description of those people as "having a veto". If they were in the less flexible, but more protected, position of being unable to waive that protection, they could not be said to have a veto. Legislation in

18 *Official Committee Hansard*, 23 February 2000, pp 113-114.

19 *Official Committee Hansard*, 23 February 2000, pp 113-114.

20 Mr Basten was referring to the fact that the CERD Committee considers that the original Native Title Act, which was enacted in 1993, did not breach the Convention, notwithstanding that it included discriminatory provisions. The CERD Committee appeared to take this view of the original Act because it was passed with the support of Indigenous representatives.

> contravention of the Convention prohibition could not then be excused, but the protected class could not be accused of wielding power. [21]

3.26 Further, and importantly, Mr Basten pointed out that:

> The terminology of "veto" is simply inappropriate to describe the absence of consent. It is also unconstructive because it has an emotive connotation which clouds a rational consideration of the issues at stake. It militates against the important national objective of reconciliation.[22]

Summary of the Principle of Equality at International Law

3.27 The following points about the principle of equality can be drawn from the commentary and case law:

- The principle of equality requires, in the first instance, a basic guarantee of equal treatment in the enjoyment of fundamental rights and freedoms.
- It is recognised that a guarantee of equal treatment may not be sufficient to ensure that all individuals are able to enjoy their rights and freedoms equally because of their disadvantaged or vulnerable position, or because they differ in some way – for instance linguistically or culturally – from the majority of the population.
- Where equal treatment is not enough to ensure equality in fact the principle of equality requires different treatment to ensure actual, factual or substantive equality.
- Different treatment may take the form of special measures or affirmative action, which redresses inequality and secures for members of disadvantaged groups full and equal enjoyment of their human rights.
- Different treatment may also be special measures in the form of special regimes of minority rights for the recognition and protection of the distinct cultural identity of a group.
- A distinction – or dissimilar treatment – will not offend the principle of equality (or, in other words, such treatment is not discriminatory) if the criteria for its adoption is objective and reasonable and it pursues a legitimate aim.
- The obligation of showing that particular distinctions are justifiable are on those who make them.[23]
- A discriminatory motive is not necessary for a violation of the principle of equality, although it will make the finding of a violation easier.[24]

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21 Mr John Basten QC, Submission 21, p 5.

22 Mr John Basten QC, Submission 21, p 5.

23 Warwick McKean, *Equality and Discrimination under International Law*, Oxford, 1983, pp 286-287.

- The consent of those who are subject to the differential treatment is important in determining the reasonableness, and therefore the legitimacy, of the special measures.

The Obligations of State Parties under the CERD

3.28 The CERD is one of the key instruments of the international community in the legal protection and promotion of human rights. Its precise purpose is the combating of racial and related discrimination.[25] It has been described as:

> the international community's only tool … which is at one and the same time universal in reach, comprehensive in scope, legally binding in character, and equipped with built-in measures of implementation.[26]

3.29 The CERD requires parties to prohibit racial discrimination. The prohibition on racial discrimination reflects a fundamental universal value recognised as having the legal status of *jus cogens*, which means it is a peremptory norm of international law from which no derogation is permitted.[27] The ATSIC supplementary submission notes that:

> Perhaps reflecting the character of non-discrimination as a universal norm, CERD is funded not by the State Parties to the Convention but by the United Nations (Article 10) and CERD reports annually to the General Assembly of the United Nations (Article 9).[28]

3.30 Australia is a party to CERD which means that:

> in addition to Australia's obligations under customary international law, Australia has accepted the standards the Convention enshrines and the specific obligations the Convention imposes.[29]

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24 Warwick McKean, *Equality and Discrimination under International Law*, Oxford, 1983, p 287.

25 Michael O'Flaherty, 'Substantive provisions of the International Convention on the Elimination of All Forms of Racial Discrimination', in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights*, Leichhardt, 1998, p 162.

26 Committee on the Elimination of Racial Discrimination, *Report on the Committee on Racial Discrimination*, UN Doc A/33/18 (1978), quoted in Michael O'Flaherty, 'Substantive provisions of the International Convention on the Elimination of All Forms of Racial Discrimination', in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights*, Leichhardt, 1998, p 162.

27 Dr Sarah Pritchard, *Official Committee Hansard*, 22 February 2000, p 70; Aboriginal and Torres Strait Islander Commission, Submission 10(a), p 7. See also Gillian Triggs, 'Australia's Indigenous Peoples and International Law: Validity of the *Native Title Amendment Act 1998* (Cth)', in *Melbourne University Law Review*, Vol 23 1999, p 377.

28 Aboriginal and Torres Strait Islander Commission, Submission 10(a), p 7.

29 Aboriginal and Torres Strait Islander Commission, Submission 10(a), p 7.

The CERD Obligations

3.31 The fundamental obligations of State parties are set out in Article 2 of the Convention. Under Article 2(1) States condemn racial discrimination, and undertake to pursue, by all appropriate means and without delay, a policy of eliminating racial discrimination in all its forms, and promoting understanding among races. Thus there is an immediate obligation on States to act to eliminate racial discrimination. To this end States are required to undertake the actions enumerated in Article 2(1)(a) – (e) including, notably, Article 2(1)(c) which provides that:

> Each State party shall take effective measures to review governmental, national or local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

3.32 It has been noted that the scope of the obligations imposed by Article 2(1) is such that even in the absence of subsequent articles of the Convention it would be a formidable weapon in countering racial discrimination.[30]

3.33 In Article 5, States 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, colour or national origin, to equality before the law …
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> (d) Other civil rights, in particular: …
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> > (v) The right to own property alone as well as in association with others;
> >
> > (vi) The right to inherit.

3.34 Under Article 2(2) there is also an obligation on State parties, where the circumstances warrant, to take special measures for the development and protection of racial groups, for the purpose of guaranteeing them the full and equal enjoyment of human rights and freedoms.

3.35 Article 1(1) defines racial discrimination for the purposes of the Convention:

> In this Convention the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on equal footing, of human rights and fundamental freedoms in the political, economic, social cultural or any other field of public life.

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30 Michael O'Flaherty, 'Substantive provisions of the International Convention on the Elimination of All Forms of Racial Discrimination', in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights*, Leichhardt, 1998, p 169.

3.36 The ATSIC supplementary submission points out that:

> It is important to note that the Convention prohibits distinctions which have 'the purpose or effect' of impairing enjoyment of human rights. It is not necessary to establish that a distinction was motivated by racial prejudice. An action that has a discriminatory effect will breach the Convention. The test is therefore an objective one.[31]

3.37 In 1993 the CERD Committee adopted a General Recommendation XIV on Article1(1):

> The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4 of the Convention. … In considering whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.[32]

3.38 Article 1(4) expressly excludes from the definition of discrimination special measures taken for the sole purpose of securing the protection and advancement of certain groups or individuals, in order to ensure equal enjoyment or exercise of human rights and freedoms.

3.39 Thus, the meaning of discrimination and equality in international law has been incorporated into the CERD. Racial discrimination is defined in terms of invidious distinctions which nullify or impair equality in the protection, enjoyment or exercise of fundamental rights and freedoms.

3.40 The CERD places an immediate obligation on States to eliminate racially discriminatory practices within its jurisdiction. States are also obliged to provide a guarantee of equality before the law. However, it is also recognised that these measures alone may not lead to the achievement of equality. Thus, the CERD also requires that States take positive action, in the form of special measures, to ensure that equality is achieved.

Special Measures under the CERD

3.41 In the CERD special measures are mentioned both in Article 1(4) and in Article 2(2).

3.42 Article 1(4) provides that:

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31 Aboriginal and Torres Strait Islander Commission, Submission 10(a), p 8.

32 General Recommendation XIV quoted in Sarah Pritchard 'Special Measures', in Race Discrimination Commissioner, *The Racial Discrimination Act: A Review*, Canberra, 1995, p 189. Aboriginal and Torres Strait Social Justice Commissioner, Submission 32, p 7.

> 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 freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they have been taken have been achieved.

3.43 Under Article 2(2):

> State Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

3.44 While Article 1(4) exempts special measures from the definition of discrimination, Article 2(2) places an obligation on States to implement special measures. Article 2(2):

> goes much further than Article 1. The drafters of the Convention dealt twice with the affirmative action issue. Article 1 defines racial discrimination, to which Article 1(4) is an exception. … Article 2 and in particular Article 2(2), enunciates the policies States must follow in order to eradicate racial discrimination.[33]

3.45 Article 2(2) refers to special and concrete measures for the 'development and protection' of racial groups. It also allows for the maintenance of 'unequal and separate rights for different racial groups' until the objectives for which those measures have been taken have been fulfilled; it is possible that measures can be continued indefinitely where the permanent protective measures are required to ensure the enjoyment by minorities of their unique cultural rights. Thus, Article 2(2) is considered capable of supporting both temporary special measures for the advancement of disadvantaged groups and individuals (such as affirmative action measures), as well as a permanent regime of special measures for the protection of minority rights.

3.46 Mr Michael O'Flaherty, a former Secretary of the CERD Committee, has said of Article 2(2) that:

> The provision is of immense importance for racial and ethnic groups, and given the extent to which it surpasses the obligations in Article 27 of the

33 Aboriginal and Torres Strait Islander Commission, Submission 10(a), p 10.

> International Covenant on Civil and Political Rights in creating a regime of minority group rights, it is surprising that it has received so little attention from academics and NGOs.[34]

3.47 It has also been observed that 'Article 2(2) goes further than the Political Covenant, and opens up new vistas for the implementation of minority rights'.[35]

3.48 A guide to the interpretation of Article 2(2) is provided by the CERD Committee's General Recommendation XXIII concerning Indigenous Peoples. Dr Sarah Pritchard has said, as regards measures for the protection of minority rights, that:

> There is quite a comprehensive view of international jurisprudence in this regard, which goes back to the system for the protection of minorities established by the League of Nations in 1918.
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> …
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> It is precisely that understanding that was first articulated by the Permanent Court of International Justice [in its advisory opinion on Minority Schools in Albania referred to earlier in this chapter] that the UN Human Rights Committee and the UN CERD Committee have taken up in their approach to Indigenous issues, and which are reflected in their general recommendations on Indigenous peoples and also their decision concerning Australia, which is the subject of this inquiry.[36]

When does the Obligation to Implement Special Measures under Article 2(2) Arise?

3.49 The obligation under Article 2(2) is expressed to arise 'when the circumstance so warrant'.

> These words suggest that States parties to the Convention have some discretion in determining when the obligation arises … A former secretary to the CERD suggests, however, that 'the measure of necessity for the taking of affirmative action is an objective one and not dependent on the subjective view of the Government'.[37]

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34 Michael O'Flaherty, 'Substantive provisions of the International Convention on the Elimination of All Forms of Racial Discrimination', in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights*, Leichardt, 1998, p 171.

35 De Zayas A, 'The International Judicial Protection of peoples Minorities' in C Brolmann, R Lefeber and M Zieck (eds) *Peoples and Minorities in International Law*, London, 1993, quoted in Sarah Pritchard 'Special Measures', in Race Discrimination Commissioner, *The Racial Discrimination Act: A Review*, Canberra, 1995, p 192.

36 *Official Committee Hansard*, 22 February 2000, p 67.

37 Aboriginal and Torres Strait Islander Commission, Submission 10(a), p 10. See also Michael O'Flaherty, 'Substantive provisions of the International Convention on the Elimination of All Forms of Racial Discrimination', in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights*, Leichardt, 1998, p 171.

3.50 The obligation arises where there is disadvantage or vulnerability which prevents an equal enjoyment of human rights:

> the text suggests that the test is whether the group in question requires the protection and aid of the State to attain a full and equal enjoyment of human rights.[38]

3.51 Thus, the greater the disadvantage or vulnerability of a group, the greater the obligation on government to implement special measures under Article 2(2).

3.52 When Article 2(2) is read with Article 5 a very specific obligation arises for State parties to the CERD. Article 5, as noted earlier, requires that State parties guarantee the right of everyone to equality before the law in the enjoyment of fundamental rights, including the right to own property and the right to inherit. The obligation which arises for State parties is that if a particular group of people is in a position where its members cannot enjoy a fundamental human right equally with others in society – either because of the operation of a particular law or because of their social or economic disadvantage – measures must be taken to remedy the disadvantage and ensure that equality is achieved. Under the CERD, and under international law, equality means substantive, actual or true equality. This means that the measures undertaken by States to correct legal inequality *must* provide formal equality as a basic standard, and differential treatment where this is necessary, in particular, to ensure equal enjoyment of rights that are unique to the disadvantaged group.

3.53 In the case of Indigenous people in Australia it is beyond doubt that the circumstances warrant special measures under Article 2(2). For example, that its Indigenous people constitute a group for whom special and concrete measures are required to promote their development was stated by Australia before the CERD Committee in 1984.[39]

3.54 The preamble to the NTA is important in identifying the circumstances which necessitate special measures in the case of Indigenous Australians. The preamble to the Native Title Act commences by setting out the considerations taken into account by the Parliament of Australia in enacting the legislation, as follows:

> The people whose descendants are now known as Aboriginal and Torres Strait Islanders were the inhabitants of Australia before European settlement.

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38 Theodor Meron, 'The meaning and reach of the International Convention on the Elimination of All Forms of Racial Discrimination', *The American Journal of International* Law, Vol 79, p 308, and Sarah Pritchard, 'Special Measures', in Race Discrimination Commissioner, *The Racial Discrimination Act: A Review*, Canberra, 1995, p 192.

39 Theodor Meron, 'The meaning and reach of the International Convention on the Elimination of All Forms of Racial Discrimination', *The American Journal of International* Law, Vol 79, p 308, footnote 123.

> They have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.
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> As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.[40]

3.55 The ATSIC supplementary submission states that the words in the preamble are 'legally significant':

> They constitute recognition by the legislature of dispossession of Aboriginal land, Aboriginal disadvantage, the principle of agreement of native title holders to future acts and the need for and intention to provide for the advancement and protection of Aboriginal peoples and Torres Strait Islanders. That factual background, identified by the Parliament in 1993 and retained in 1998, is … beyond serous dispute.[41]

3.56 Another matter, and one that is not so clearly dealt with in the preamble to the Native Title Act, is the disadvantaged status of native title holders under the common law. To date, the common law has allowed for only a limited recognition of native title. In addition, under the common law native title is made vulnerable to extinguishment by valid acts of government without any right of compensation. The vulnerable status of native title under the common law was acknowledged only in passing in the preamble to the Act:

> It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented.

3.57 Under the common law, native title is not given the same degree of protection from extinguishment or impairment as that provided to other forms of title. Conversely stated, native title holders are not able to enjoy their title – their property rights – to an equal extent with the those who hold title under the general law.

3.58 The unequal position of native title holders under the common law places the Australian Government under an obligation to ensure, through legislation, that native title holders have equality in the enjoyment of their property rights. Further, as native title is a unique interest, the obligation on the Government may also involve implementing differential measures, where this is necessary, having regard to the rights and interests being protected. The greater the disadvantage of native title holders under the common law, the greater is the obligation on the Australian Government to remedy that disadvantage and ensure equality.

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40 Preamble to the Native Title Act; also, Australian and Torres Strait Islander Commission, Submission 10(a), pp 2-3.

41 Australian and Torres Strait Islander Commission, Submission 10(a), p 3.

Margin of Appreciation

3.59 The Commonwealth Government argues that governments have a 'margin of appreciation' in the implementation of their treaty obligations:

> International law accords States a 'margin of appreciation' in their implementation of certain international obligations including non-discrimination principles. The margin of appreciation is a degree of latitude allowed to individual States in the interpretation and application of treaty obligations.[42]

3.60 The Government argues that the 'margin of appreciation' recognises that:

- there are circumstances in which national institutions are better placed to assess needs and make difficult choices between conflicting considerations; and
- that there are circumstances where states will need to find a balance between a range of interests.[43]

3.61 The Government further argues that the margin of appreciation is wider where treaty obligations relate to new or novel areas of law so that a greater range of treatment will be regarded as meeting the treaty obligations.[44]

3.62 This view of the law was also put by Government representatives in evidence before this Committee:

> It falls ultimately to the State party to the convention to decide how to implement its obligations under the Convention within what is called a 'margin of appreciation' in international law. The margin of appreciation is an area of discretion that states have to determine how, in good faith, to implement their treaty obligations. In relation to substantive equality, the very nature of making decisions about how to treat different groups so that substantive equality is achieved requires states … to make judgments about the situations of different groups, what can be achieved and what is best to be achieved in order to bring about equality for those groups. International law recognises that national governments are in the best position to make those kinds of judgments about what can and should be done in their particular circumstances.[45]

3.63 The Government representatives claimed that in assessing whether Australia's treaty obligations were met:

> It is also necessary to ask whether the Government is operating within its margin of appreciation, especially where it is dealing with historical acts …

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42 Attorney-General's Department, Submission 24, Part I, p 18.

43 Attorney-General's Department, Submission 24, Part I, pp 18-19.

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

45 Ms Renee Leon, Attorney-General's Department, *Official Committee Hansard*, 9 March 2000, p 161.

> or where it is balancing the interests of native title holders with the interests of others.[46]

3.64 The arguments of the Commonwealth Government have been endorsed in Chapter 3 of the report of the Government members of this Committee. These arguments raise two questions:

i) whether a margin of appreciation exists in relation to the implementation of its obligations to prohibit and eliminate racial discrimination; and

ii) whether governments are entitled to compromise the fundamental rights and freedoms of a group of people in 'balancing' conflicting considerations.

3.65 The CERD prohibits racial discrimination. It has been noted earlier that the prohibition on racial discrimination – or, conversely, the obligation to ensure equality in the enjoyment of fundamental human rights and freedoms – has the status of *jus cogens* in international law; no derogation is permitted from this prohibition.[47]

3.66 Mr Ernst Willheim addressed the Parliamentary Joint Committee on the issue of whether a 'margin of appreciation' applies to implementation of the CERD obligations. He distinguished between conventions in which prohibitions and obligations are expressed in general language: a margin of appreciation in the implementation of such conventions may exist. Mr Willheim pointed out that 'most international conventions are … expressed in fairly general language'. However:

> 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.[48]

3.67 In a submission prepared on behalf of ATSIC Mr Willheim also said that:

> The Convention is notable for its unqualified language. Unlike many other international conventions which embody loosely expressed objectives, key obligations of the Racial Discrimination Convention are expressed in absolute terms.
>
> Thus, in Article 2 State Parties undertake to pursue
>
> ' … a policy of elimination of racial discrimination in all its forms … and, to this end:
>
> (a) Each State party undertakes to engage in no act of practice of racial discrimination'.

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46 Ms Philippa Horner, Attorney-General's Department, *Official Committee Hansard*, 9 March 2000, p 156.

47 Dr Sarah Pritchard, *Official Committee Hansard*, 22 February 2000, p 70; Aboriginal and Torres Strait Islander Commission, Submission 10(a), p 7.

48 *Official Committee Hansard*, 13 March 2000, p 185; see generally pp 184-185.

> 'Racial Discrimination' is defined in Article 1 to mean
>
> 'any distinction, exclusion, restriction or preference based on race, colour, descent … which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on equal footing, of human rights …'
>
> …
>
> In Article 5, State 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, colour or national origin, to equality before the law, notably in the in the enjoyment of the following rights…[49]

3.68 Mr Willheim further points out that:

> No exceptions are contemplated. A party cannot, for example, implement the Convention except in relation to members of a particular race or except in relation to a particular human right.[50]

3.69 The arguments put forward by the Commonwealth Government on the existence of a 'margin of appreciation', which have been endorsed by the Government members of this Committee, fail to take account of the fundamental nature of the prohibition on racial discrimination at international law, and the unqualified language of the CERD. The non-Government members of the Committee take the view that there is no margin of appreciation in respect of the implementation of Australia's obligations under the CERD.

3.70 As noted above, the Commonwealth Government claims that in implementing its obligations under the CERD, the margin of appreciation recognises that it must 'make difficult choices between conflicting considerations' and 'will need to find a balance between a range of interests'.[51] The Government claims that the amendments were not discriminatory because in the circumstances they were 'justifiable in the pursuit of purposes not inconsistent with the Convention. They were not arbitrary, but were reasonable in all the circumstances.'[52]

3.71 According to the Aboriginal and Torres Strait Islander Commissioner, Dr William Jonas, the Government's argument arises from its interpretation of the CERD Committee's General Recommendation XIV (the relevant passage is quoted at paragraph 37 of this chapter):

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49 Australian and Torres Strait Islander Commission, Submission 10(a), p 8.

50 Australian and Torres Strait Islander Commission, Submission 10(a), p 9.

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

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

> The purpose of General Recommendation XIV is to rebut the argument … that all differential treatment on the basis of race is discriminatory. The definition of discrimination under General Recommendation XIV allows differential treatment if its objectives and purposes are consistent with those of the Convention.
>
> …
>
> General Recommendation XIV is not a means by which the implementation of government policy which results in a negative disparate impact on a particular racial group can, nonetheless, be acceptable if it is reasonable in all the circumstances and adopts proportionate means. Nor does General Recommendation XIV provide a margin of appreciation to States in meeting their obligations under the Convention. Its purpose is to ensure that measures which do recognise and protect cultural identity and practices are not classified as discrimination merely because they treat people differently.[53]

3.72 Moreover, in claiming that it must balance the interests of native title holders with various other competing interests, the Government has misunderstood the nature of its obligations under the CERD. The CERD does not require States to mediate between competing interest groups, but to guarantee equality in the enjoyment of fundamental human rights:

> The Convention requires that State parties balance the *rights* of different groups identifiable by race. An appropriate balance is not between miners, pastoralists, fishing interests, government and Indigenous people, but between rights – civil, political economic, cultural and social – of Indigenous and non-Indigenous titleholders.
>
> …
>
> A relationship of equality is not one in which Indigenous people take their place, as just another interest group, among the vast range of non-Indigenous interest groups with a stake in native title. Rather, it is one where Indigenous interests are equal to the combined force of non-Indigenous interests, in all their forms and manifestations.[54]

3.73 The then Chairperson of the CERD Committee, Mr Mahmoud Aboul-Nasr made this point during the 1323rd session of the Committee in March 1999, when commenting on the Australian Government's representations to the CERD Committee:

> We were told about equal rights. There was no spelling out of which rights we are talking about. Can the Government say that there are equal rights on

53 Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission 32, p 13.

54 Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission 32, p 23.

> every human right which exists – all five of them – social, political, etc. All the five sets of rights?[55]

3.74 The amendments to the NTA have compromised the fundamental rights of Indigenous people in comparison with those of non-Indigenous people:

> In each of these instances where an inconsistency or potential inconsistency exists between the full enjoyment of Indigenous interests and the full enjoyment of non-Indigenous interests, the amended NTA ensures that non-Indigenous interests prevail over the indigenous interests.
>
> …
>
> The subordination of native title interests to non-Indigenous interests whenever a conflict arises cannot pass the government's own test of equal protection.[56]

3.75 In their submission to the Parliamentary Joint Committee, Dr Donald Rothwell and Ms Shelley Wright from the Faculty of Law at the University of Sydney, express the same view:

> Where private institutions (such as pastoral leaseholders, mining corporations or primary industry producers under the 1998) "influence the exercise of rights or the availability of opportunities" Australia is bound to ensure that this neither creates nor perpetuates racial discrimination. Australia, through the *Native Title Amendment Act 1998*, has arguably failed in this obligation.
>
> No other group in Australian society is singled out in this way. No legislative or judicial act preventing a specific racial or ethnic group from exercising property rights already exercised under the common law and by statute can be characterised as anything other than discriminatory on the basis of race or ethnic origin, specifically prohibited under the Convention.[57]

3.76 As Dr Mick Dodson said in his evidence to this inquiry:

> The international jurisprudence and international human rights standards do not require treaty partners to engage in a balancing act between the rights of one lot of people against the rights of another lot. You are required to comply with the provisions that you have agreed to under a treaty. You are bound to do it – that is your obligation. … you are required to honour the treaty.[58]

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55 Unofficial Transcript of Australia's hearing before the CERD Committee, 18 March 1999, p 39, at: http://www.faira.org.au/cerd/minutes-1323-cerd-meeting3.html.

56 Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission 32, pp 11-12.

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

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

The Requirement of Informed Consent of Indigenous Peoples to Decisions Affecting Their Rights.

3.77 In its decision 2(54) the CERD Committee said, at paragraph 9:

> The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention. Calling upon State parties to "recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources," the Committee, in its General Recommendation XXIII, stressed the importance of ensuring "that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent".

3.78 Under Article 5(c) of the CERD State parties undertake to guarantee the right of everyone to equality before the law in the enjoyment of:

> Political rights, in particular the right to participate in elections – to vote and stand for election – on the basis of universal and equal suffrage, and to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.

3.79 In General Recommendation XXIII(51) concerning Indigenous Peoples, in paragraph 4(d) the Committee called upon State parties to:

> ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.

3.80 In his address to the CERD Committee at is 1323rd session the Commonwealth Government representative, Mr Robert Orr, said:

> I note … that the CERD's general recommendation in Paragraph 4(d) goes on to say that no decisions directly relating to the rights of Indigenous people are to be taken without their informed consent. This is a higher level of responsibility, a higher level of obligation than simple providing equal rights. This is a requirement to provide for the informed consent of Native Title holders. Australia admits that the informed consent of Native Title holders and Indigenous peoples was not obtained in the Native Title Amendment Act. Australia regrets this. As I said at the beginning on Friday, the Government attempted to obtain a consensus with regard to the Act but despite a lengthy process, that consensus was not possible and in the end the Parliament had to make the laws which it judged were appropriate. In this case, much of the Native Title Amendment Act is concerned with balancing rights, balancing rights of Native Title holders with pastoral lessees and others. As I also said on Friday, there was no consent to these provisions neither from Indigenous People nor from pastoralists and miners. Australia regards this requirement essentially as aspirational and it tried to meet and

> aspire to this requirement but it admits honestly before this Committee that the requirement was not met.[59]

3.81 This view – that extensive consultations with Indigenous people were conducted over the amendments, although no consensus was reached – has also been put by the Commonwealth Government in one of its submissions to this inquiry.[60] The views of the Government have been endorsed by the Government members of this Committee in their report.[61]

3.82 However, the CERD Committee disagreed with the Commonwealth's view that consent was merely an aspirational requirement:

> in our General Recommendation XXIII, we referred to the informed consent, … it was said that this requirement of informed consent is only aspirational. Now it is not understood by this committee in that sense. I think there we tend to disagree.[62]

3.83 The submission to this inquiry from the State of South Australia has suggested that a requirement of 'informed consent' is not possible to fulfil:

> If there were a legal obligation to obtain relevant consent it would then need to be determined whose consent was required. The answer to this for political purposes is likely to be quite different to what is required for legal purposes. As the relevant native title rights are held by individual Aboriginal groups then for legal purposes it is likely that each group would have to give its individual consent to any measures which affect its title. … However, those groups were not involved in the negotiations for the 1993 Act. They did not give their 'informed consent' (or indeed any consent) to legislation which affected their rights. If, as the CERD Committee suggests, there was a legal requirement for informed consent, it is not obvious how this could be given by the National Indigenous Working Group, or by ATSIC, or by anyone other than those holding the relevant title.[63]

3.84 The submission makes problematic the issue of informed consent. However, the simple fact is that a lack of Indigenous consent to, or support for, the original Native Title Act was not an issue in 1993.

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59 Unofficial Transcript of Australia's hearing before the CERD Committee, 18 March 1999, pp 33-34, at: http://www.faira.org.au/cerd/minutes-1323-cerd-meeting3.html.

60 Attorney-General's Department, Submission 24, Part I, pp 30, 34.

61 Chapter 7.

62 Unofficial Transcript of Australia's hearing before the CERD Committee, 18 March 1999, p 38 (Mr Van Boven), at: http://www.faira.org.au/cerd/minutes-1323-cerd-meeting3.html. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission 32, p 22.

63 State of South Australia, Submission 15, p 7, footnote 23.

3.85 If the suggestion of the South Australian Government is to be accepted, it would mean that a government is free to act to treat groups differently from the rest of the community – and, in fact, adversely – entirely at its own behest.

3.86 As observed earlier in this chapter, the informed consent of those individuals and groups who are the subject of differential treatment is essential in determining whether the principles of equality have been breached. In other words, governments are under an obligation, both under the CERD and under international law generally, to seek the consent of groups affected to the differential treatment proposed for them.

3.87 It appears to the non-Government members of the Committee that this requirement would be particularly important where some of that differential treatment is detrimental to the group, or groups, concerned. The *Native Title Amendment Act 1998* has introduced a range of provisions that discriminate against Indigenous people, but the Government argues that there are countervailing beneficial measures which render the amended Act, as a whole, beneficial. This argument has also been put to the Committee by the Solicitor General for South Australia.[64] However, without the consent of the Indigenous people, the assessment of overall benefit to Indigenous people of the amended Act has been made by the Government alone.

3.88 In contrast, the original Native Title Act also contained discriminatory validation provisions which were detrimental to the rights – that is the fundamental rights – of Indigenous people and also included countervailing benefits. However, in the case of the original Act, as the Executive Director of the Kimberley Land Council Mr Peter Yu has said:

> 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.[65]

3.89 Further, negotiations with Indigenous people aimed at securing their informed consent to the measures that affect them are important in ensuring their effective participation in public life and, in particular, in the political process as required by Article 5(c) of the Convention. Mr Peter Yu commented that, in relation to the amendments to the Native Title Act:

> 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.

3.90 Securing the effective participation of Indigenous people in public life is particularly important given that they have more often experienced marginalisation in

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64 Attorney-General's Department, Submission 24, Part I, pp 20-27; State of South Australia, Submission 15, p 6.

65 *Official Committee Hansard*, 13 March 2000, p 176.

public life in Australia than non-Indigenous Australians. Mr Yu made this observation:

> 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.[66]

3.91 In imposing a solution without the consent of Indigenous groups, the Government has ensured that Indigenous people are marginalised in terms of their participation in the political process, in relation to a matter of great significance to them. This point was observed by the Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr Jonas:

> A legislative regime which is imposed rather than negotiated with the Indigenous people it directly affects is not based on a relationship of equality.[67]

3.92 Also, in evidence before this Committee, Dr Mick Dodson observed that:

> the amendment process largely marginalises and isolates Indigenous participation.[68]

3.93 The unequal position of Indigenous people was also observed by the Chairman of the CERD Committee:

> We were told that consultations took place. Alright, the first point that you were under pressure. By who? Consultations took place. Wonderful. That proves that the government is doing a wonderful job. We were told about equal rights. There was no spelling out of which rights we are talking about. Can the government say that there are equal rights on every human right which exists – all five of them – social, political, etc. All the five sets of rights?
>
> Mr Van Boven spoke about substantive rights and I'm not going to elaborate on this. Then we were told that we were not able to achieve a consensus. So? The parliament acted. That means what in lay man's words? That the

66 *Official Committee Hansard*, 13 March 2000, p 177.

67 Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission 32, p 23.

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

> point of view of the Indigenous population was not accepted? No consensus was achieved. So the parliament which is the white man again took the matter into their hands and they decided and they imposed on the Indigenous people, so what consensus resulted? You put it in such a way, in a legal way as a good lawyer, but as someone who's working in the field of human rights the conclusion that I achieve is that the Indigenous population's point of view is not taken into consideration. The pressure was not felt. Consultation with them did not achieve anything, of course, why should it achieve anything? Equal rights were mentioned. Few rights and not all rights we were not told about that. Consensus was not achieved so parliament imposed whatever they want to impose. I must say that this is a bit of an alarming picture.[69]

3.94 Non-Government members of the Committee agree with the view expressed by the Aboriginal and Torres Strait Islander Social Justice Commissioner in his submission to the Committee:

> Consultation and negotiation with Indigenous representatives and native title representative bodies is the most essential component of establishing legislation which meets Australia's obligations under CERD.[70]

Summary of the Obligations of State Parties under the CERD

3.95 The following points can be made about the obligations that the CERD imposes on State parties, as discussed above:

- Equality under the CERD, as in international law generally, is understood as substantive equality. Conversely, racial discrimination is defined in terms of invidious distinctions based on race, colour, descent or national or ethnic origin which impair equal protection, enjoyment or exercise of fundamental human rights and freedoms.
- The CERD places an immediate obligation on State parties to eliminate racial discrimination in all its forms and to guarantee equal enjoyment of fundamental human rights.
- Under Article 2(2) of the CERD States are also obliged to take 'special measures' for the development and protection of racial groups or individuals, for the purpose of guaranteeing them the full and equal enjoyment of their human rights 'whenever the circumstances so warrant such measures'. The measure of necessity for the taking of affirmative action is an objective one arising where there is disadvantage or vulnerability that prevents an equal enjoyment of human rights. Thus, the greater the disadvantage or vulnerability of a group the greater the obligation on government to take action under Article 2(2).

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69 Unofficial Transcript of Australia's hearing before the CERD Committee, 18 March 1999, p 39 (Mr Aboul-Nasr), at: http://www.faira.org.au/cerd/minutes-1323-cerd-meeting3.html.

70 Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission 32, p 25.

- Special measures under Article 2(2) can be either temporary affirmative action measures for the advancement of disadvantaged groups and individuals or regimes of minority rights aimed at protecting inherently different characteristics of minority groups.
- Minority rights regimes are non-discriminatory as they are aimed at allowing a minority to preserve and fully enjoy their particular rights and characteristics.
- Where differential treatment is proposed, in the form of special measures, State parties are required to obtain the informed consent of the groups affected.
- Obtaining the informed consent of Indigenous people to measures which affect their rights is important in ensuring their effective participation in public life, in accordance with Article 5(c) of the CERD and the General Recommendation XXIII.
- Given the fundamental nature of the prohibition on racial discrimination at international law, and the unqualified language of the CERD, there is no margin of appreciation in the implementation of the obligations under the CERD. This means, in particular, that State parties are not entitled to compromise the fundamental rights of groups for the benefit of other more powerful interests in the community.