

Submission to the United Nations Committee on the Elimination of Racial Discrimination

Response to the request for information in relation to Decision 1(53) concerning Australia: CERD/C/53/Misc.17/Rev.2, 11 August 1998.

Submission by the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner of the Australian Human Rights and Equal Opportunity Commission, 3 March 1999

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Introduction

1. On 11 August 1998 the United Nations Committee on the Elimination of Racial Discrimination (the Committee) adopted Decision 1 (53), which reads:

In view of the terms of article 9, para 1, in particular the provision that the Committee may request further information from the States parties, the Committee requests the Government of Australia to provide it with information on the changes recently projected or introduced to the 1993 Native Title Act, on any changes of policy in the State party as to Aboriginal land rights, and of the functions of the Aboriginal and Torres Strait (Islander) Social Justice Commissioner. The Committee wishes to examine the compatibility of any such changes with Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.¹

2. The Australian Government response will be considered under the early warning and urgent procedures at the Committee's 54th session in Geneva, 1 to 19 March 1999.

1 Decision 1(53); CERD/C/53/Misc.17/Rev.2, 11 August 1998.

3. On 3 December 1998 the Committee wrote to the Aboriginal and Torres Strait Islander Social Justice Commissioner at the Human Rights and Equal Opportunity Commission (HREOC) requesting information for consideration at the 54th session. This document responds to that request. It is understood that the purpose of the Committee's request for information is to assist in its examination of the matters specified in Decision 1(53) and their compatibility with Australia's obligations under CERD.
4. Since 22 January 1998, when Mr Michael Dodson completed his 5 year term, there has been no permanent appointment to the position of Aboriginal and Torres Strait Islander Social Justice Commissioner. Ms Zita Antonios, the Race Discrimination Commissioner within the Human Rights and Equal Opportunity Commission, has been acting in this position while simultaneously fulfilling her other full-time statutory role.
5. The information below is provided by the Acting Commissioner on behalf of HREOC. The information is based on material previously produced and published by HREOC, including Native Title Reports, public speeches given by the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, and discussion papers produced at seminars and conferences.

1) Changes to the Native Title Act 1993

i) *Relationship between the Native Title Act and the Racial Discrimination Act*²

6. A central issue for consideration is the relationship between the *Native Title Act* 1993 (NTA), as recently amended,³ and the *Racial Discrimination Act* 1975 (RDA).
7. Before considering this relationship, it is necessary to understand how the protective provisions of the RDA generally operate within the Australian legal and constitutional system.
8. Australia is a federation comprised of a Federal (or Commonwealth) Government, six state and two territory governments. For convenience, in this document references to states include references to territories.
9. The RDA embodies Australia's domestic implementation of its obligations under CERD.⁴ This Federal anti-discrimination statute was introduced in 1975. It makes discrimination on the basis of race, colour, descent or national or ethnic origin unlawful. It is designed to protect the rights of all Australians.
10. The RDA binds both state and federal governments. For example, it would be illegal to deny access to a federal or state government service on the basis of race.

2 This section is based on principles contained in *The RDA and Native Title: The implications of statutory extinguishment*, Race Discrimination Commissioner, Human Rights and Equal Opportunity Commission, Sydney 1998.

3 The NTA was amended by the *Native Title Amendment Act 1998* on 8 July 1998. This submission distinguishes between the original and the amended versions of the Act by referring to the original NTA and the amended NTA.

4 The preamble to the *Racial Discrimination Act 1975* (Cth) states that the purpose of the Act is 'to make provision for giving effect to the Convention' (ie CERD).

11. Under section 109 of the Australian Constitution, federal legislation overrides state legislation to the extent that the state law is inconsistent with the federal law. Accordingly, the RDA generally operates to nullify state legislation that is racially discriminatory.
12. However, the principle of parliamentary sovereignty enables the Federal Parliament to pass legislation that overrides previous legislation. Parliament is not bound by its own prior legislation. Accordingly, the Federal Parliament can pass legislation subsequent to the RDA that specifically authorises action inconsistent with the provisions of the RDA. Such later legislation (in the absence of explicit provision to the contrary) overrides, or impliedly repeals, the RDA to the extent that the subsequent legislation is inconsistent with it.
13. If federal legislation subsequent to the RDA specifically authorises action that is inconsistent with the RDA, and authorises states to act pursuant to this subsequent federal legislation, then state parliaments will be relieved of the constraints normally imposed by the RDA.
14. The NTA is federal legislation subsequent to the RDA. This fact is crucial to the interaction between the two acts and to the compatibility of native title legislation with Australia's obligations under CERD.
15. The RDA has protected native title from extinguishment by state legislation in the past. The High Court of Australia has directly considered the operation of the RDA prior to the enactment of the NTA. The Court has also considered the RDA's curtailed operation subsequent to passage of the NTA.
16. Recognition of native title under the common law of Australia was made by the High Court in *Mabo v State of Queensland (No2)* (1992) 175 CLR 1. It was preceded by the Court's judgment in *Mabo v State of Queensland (No 1)* (1988) 166 CLR 186. The earlier case dealt with the *Queensland Coast Islands Declaratory Act 1985 (Qld)* which sought to abolish retrospectively, without compensation, any native title rights of the plaintiffs, the Meriam people of the Murray Islands. Had the legislation been effective the Mabo action would have been terminated. The legislation was held to 'fail' because it contravened section 10 of the RDA.
17. In interpreting the scope of section 10 of the RDA, Justices Brennan, Toohey and Gaudron considered Australia's obligations under CERD.

Section 10 of the *Racial Discrimination Act 1975* (Cth) is enacted to implement art.5 of (ICERD) and the 'right' to which s 10 refers is, like the rights mentioned in art.5, a human right – not necessarily a legal right enforceable under the municipal law. The human rights to which s 10 refers include the right to own and inherit property... rights of that kind have long been recognised (such as in art.17 of the UDHR)...

When inequality in enjoyment of a human right exists between persons of different races, colours or national or ethnic origins under Australian law, s 10 operates by enhancing the enjoyment of the human right by the disadvantaged persons to the extent necessary to eliminate the inequality. As the inequality with which s 10 is concerned exists 'by reason of' a municipal law, the operation of the municipal law is nullified by s 10 to the extent necessary to eliminate the inequality.⁵

5 *Mabo v State of Queensland* (1988) 166 CLR 186 ('*Mabo (No. 1)*') per Brennan, Toohey and Gaudron JJ at pp216-17; see also Deane J at pp229-230.

18. The High Court considered whether the Queensland Act prevented the Meriam people from enjoying the human right to own and inherit property, free from arbitrary deprivation, to the same extent as other members of the community. The Court held that

By extinguishing the traditional legal rights characteristically vested in the Meriam people, the 1985 Act abrogated the immunity of the Meriam people from arbitrary deprivation of their legal rights in and over the Murray Islands. The Act thus impaired their human rights while leaving unimpaired the corresponding human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Meriam people...

The 1985 Act has the effect of precluding the Meriam people from enjoying some, if not all, of their legal rights in and over Murray Island while leaving all other persons unaffected in the enjoyment of their legal rights... Accordingly, the Meriam people enjoy their human right of the ownership and inheritance of property to a 'more limited' extent than others who enjoy the same human right.⁶

19. As a result, the Queensland Act was inconsistent with the protection afforded by section 10(1) of the RDA, which operates to clothe

the holders of traditional native title.. with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community.⁷

20. By virtue of section 109 of the Australian Constitution, the RDA prevailed over and nullified the operation of the *Queensland Coast Islands Declaratory Act*.

21. The equal protection of property rights was revisited by the High Court in *Western Australia v Commonwealth*.⁸ That case concerned the validity of a Western Australian act - the *Lands (Titles and Traditional Usage) Act 1993* (WA) - which sought to abolish native title in Western Australia and replace it with a subordinate right of 'traditional usage' that could be overridden by other interests, such as mining titles. The High Court affirmed the reasoning of its earlier decision in *Mabo (No.1)*, holding that where,

under the general law, the Indigenous 'persons of a particular race' uniquely have a right to own or to inherit property within Australia arising from Indigenous law and custom but the security of enjoyment of that property is more limited than the security enjoyed by others who have a right to own or to inherit other property, the persons of the particular race are given, by s.10(1)(of the RDA), security in the enjoyment of their property 'to the same extent' as persons generally have security in the enjoyment of their property... Security in the right to own property carries immunity from arbitrary deprivation of the property...⁹

22. Accordingly, as the effect of the Western Australian act was to prevent native titleholders from enjoying their human rights in relation to land to the same extent as people of other races, the legislation was in conflict with the RDA.

23. In *Western Australia v Commonwealth* the High Court also considered the interaction between the RDA and NTA as two potentially inconsistent federal Acts. The High Court found that the NTA and the RDA were complementary pieces of legislation insofar as both provide legal protection and standards for dealing with native title. The NTA provides more elaborate provisions than the RDA as it is 'purpose built' to deal with

6 *Ibid*, pp217-18.

7 *Ibid*.

8 (1995) 183 CLR 373.

9 *Ibid.*, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, at p437.

native title and related issues. The majority of the High Court observed in *Western Australia v Commonwealth* that the regime established by the Native Title Act is ‘more specific and more complex than the regime established by the Racial Discrimination Act.’¹⁰

24. The Court held that, as subsequent legislation dealing specifically with native title, the provisions of the NTA would impliedly repeal the protection of the RDA to the extent that there is inconsistency between the two Acts.

If the *Native Title Act* contains provisions inconsistent with the *Racial Discrimination Act*, both acts emanate from the same legislature and must be construed so as to avoid absurdity and to give each of the provisions a scope for operation. The general provisions of the *Racial Discrimination Act* must yield to the specific provisions of the *Native Title Act* in order to allow those provisions a scope for operation.¹¹

25. The court also considered the effect of section 7 of the original NTA. This section deals explicitly with the interrelationship of the NTA and the RDA.

Section 7

(1) Nothing in this Act affects the operation of the *Racial Discrimination Act 1975*.

(2) Subsection (1) does not affect the validation of past acts by or in accordance with this Act.

26. Section 7 was inserted in the original NTA to give some guarantee that its provisions would not override the RDA and would conform with the principle of non-discrimination. The specific exception to the general protection apparently offered by s.7(1), expressed in s.7(2) was intended to enable the validation of interests in land which had been granted by governments after the commencement of the RDA on 31 October 1975.
27. Following the *Mabo* decision, a question arose as to the validity of titles granted after the commencement of the RDA, given their consequential extinguishment or impairment of native title interests and the absence of any procedural protection or compensation. Such titles were clearly issued at a time when, while native title existed, it had not been recognised under the common law of Australia. In these circumstances, Indigenous representatives engaged in negotiations with the Federal government accepted the imperative to provide security of title.
28. In *Western Australia v Commonwealth* the High Court concluded that section 7 was in fact ineffective to provide general RDA protection in the face of the specific, subsequent provisions of the NTA.

Section 7(1) provides no basis for interpreting the *Native Title Act* as subject to the *Racial Discrimination Act*. The *Native Title Act* prescribes specific rules governing the adjustment of rights and obligations over land subject to native title and s 7(1) cannot be intended to nullify those provisions. It may be that s 7(2) is otiose but that provision is properly to be seen as inserted out of an abundance of caution.¹²

10 *Ibid.*, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ at p462.

11 *Ibid.*, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, at p484.

12 *Ibid.*

29. Accordingly, the NTA covers the field in matters pertaining to native title while the RDA continues to operate on matters outside the scope of the NTA.
30. The recent amendments to the NTA¹³ provided an opportunity to redraft section 7 in order to effectively apply the RDA to the provisions of the NTA.
31. The section could have made it unequivocal that the provisions of the NTA are subject to the provisions of the RDA. There was precedent for this level of protection. The *Social Security Legislation Amendment (Newly Arrived Residents' Waiting Periods and Other Measures) Act 1997* contained an equivalent section defining the interaction of the RDA with Social Security legislation.

Section 4 - Effect of the Racial Discrimination Act 1975

- (1) Without limiting the general operation of the *Racial Discrimination Act 1975* in relation to the provisions of the *Social Security Act 1991*, the provisions of the *Racial Discrimination Act 1975* are intended to prevail over the provisions of this Act.
 - (2) The provisions of this Act do not authorise conduct that is inconsistent with the provisions of the *Racial Discrimination Act 1975*.
32. A similar amendment was not adopted in the amended NTA. The section was amended in the following terms:

Section 7 - Racial Discrimination Act

- (1) This Act is intended to be read and construed subject to the provisions of the *Racial Discrimination Act 1975*.
 - (2) Subsection (1) means only that:
 - (a) the provisions of the *Racial Discrimination Act 1975* apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and
 - (b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the *Racial Discrimination Act 1975* if that construction would remove the ambiguity.
 - (3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.
33. As amended, section 7 does not ensure the protection of native title by the general standards of equality and non-discrimination enshrined in the RDA. The exercise of powers unambiguously authorised by the NTA are freed from the constraints of the RDA.
34. The amendment of section 7 offered an opportunity to guarantee that the operation of the NTA conforms with the RDA. However, section 7 does not determine whether the substantive provisions of the amended NTA are racially discriminatory or not.
35. To consider that question it is necessary to turn to the substantive provisions of the amended NTA.

13 The amendments were passed on 8 July 1998 and most came into effect from 30 September 1998.

ii) **Specific provisions of the amended NTA and Australia's compliance with CERD¹⁴**

36. There were difficulties with the original NTA. In particular:

- The High Court in *Brandy*¹⁵ held that provisions of the RDA for the registration and enforcement of decisions by HREOC were unconstitutional as they purported to confer judicial power on HREOC, a non-judicial body. Under the separation of powers doctrine of the Australian Constitution only courts of law may exercise judicial power.

The powers of the National Native Title Tribunal (NNTT) to make enforceable determinations were in all respects similar to those of HREOC.¹⁶ Amendments to the NTA were therefore necessary in order to vest the determination functions of the NNTT in a judicial body (ie the Federal Court).

- The registration test of the original NTA did not provide an effective screen to ensure that only bona fide native title claimants were entitled to access the future act provisions of the NTA, including the right to negotiate. A significant problem that resulted from this was the registration of multiple, conflicting claims, which rendered the right to negotiate and other provisions of the Act less workable.¹⁷

The High Court's decisions in *Lane*¹⁸ and *Waanyi*¹⁹ also had the effect of reducing the threshold requirements that had to be met for registration of a native title claim under the NTA. *Lane* held that the Registrar of the NNTT was limited in her ability to find that an application could not *prima facie* be made out. If information was supplied that constituted a *prima facie* case that the claim could not be made out then she would have a statutory obligation to refer the matter to a Presidential member of the NNTT. But if that information was not provided, the Registrar has no statutory obligation to look for that information independently.

Waanyi concerned an appeal against the decision of the President of the NNTT not to register a claim on the basis that the prior grant of pastoral leases had the effect of extinguishing the native title claimed. The High Court overturned this decision and held that a claimant should not be prevented from registering their native title claim where there was a legal doubt as to whether the rights claimed had been extinguished. In the end result this decision was consistent with the *Wik* decision, which held that pastoral leases under two Queensland statutes did *not* necessarily extinguish native title.

- The original NTA did not provide effective legal support to the process of agreement making. Section 21 of the original NTA provided that agreements could

14 This section is comprised of excerpts from chapters 4 and 5 of the Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report 1996-97*, HREOC Sydney 1997 (*Native Title Report 1996-97*). Note that references in the report to the Native Title Amendment Bill 1997 have been replaced with references to the actual provisions of the *Native Title Amendment Act 1998* (Cth). This section also contains some updated material.

15 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

16 These provisions were found to be unconstitutional in *Fourmile v Selpam* (1998) 152 ALR 294.

17 The National Native Title Tribunal has noted that some overlapping claims were the result of co-existing native title rights.

18 *Northern Territory v Lane* (1995) 138 ALR 544.

19 *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 ('*Waanyi*').

only be registered if they concerned native title rights which had been determined by the Federal Court. The agreements process was therefore left as an adjunct to the litigation process.

37. There was wide consensus on the need for amendments to the NTA on these grounds.
38. In December 1996, the High Court delivered its judgment in the *Wik* case.²⁰ This decision provided our country with a potential basis for co-existence between Indigenous and non-Indigenous Australians. It stands for the principle that pastoral rights prevail over, but do not necessarily extinguish, native title rights to the extent that such rights are inconsistent.
39. Indigenous representatives acknowledged that, in addition to amendments to deal with the issues raised above, the original NTA needed amendment to deal with issues raised by the *Wik* decision, including to confirm the extent of pastoralists rights. Indigenous representatives stated that the extent of the amendments required was minimal and could be done while still respecting the principle of co-existence as set down in the *Wik* decision.²¹
40. The majority of provisions of the *Native Title Amendment Act 1998* (Cth) are not consistent with the principle of co-existence. Instead they focus on the extinguishment and impairment of native title. They also set the registration test to be met by claimants at a high threshold, which is likely to make it more difficult for claimants to access the right to negotiate provisions of the Act.
41. The amendments to the NTA have the potential, when considered from a human rights perspective, to remove and diminish the rights of Indigenous Australians, in particular through:
 - the validation of intermediate period acts;
 - the ‘confirmation of extinguishment’ provisions;
 - the primary production upgrade provisions; and
 - the right to negotiate provisions.
42. On the other hand, the provisions relating to Indigenous Land Use Agreements remedy a deficiency in the original NTA and are a significant addition to the amended NTA. These provisions are discussed below at paragraphs 86 – 90.

The validation of intermediate period acts²²

43. The amendments to the NTA validate non-legislative acts which took place between the commencement of the NTA on 1 January 1994 and the handing down of the *Wik* decision on 23 December 1996. Those acts may have been invalid because of the failure of governments granting interests to take into account the possible existence of native

²⁰ *Wik Peoples v State of Queensland* (1996) 187 CLR 1 (‘*Wik*’).

²¹ See National Indigenous Working Group on Native Title (NIWG) *Co-existence: Negotiation and Certainty*. The National Indigenous Working Group is a working group comprised of elected Commissioners from the Aboriginal and Torres Strait Islander Commission, the Aboriginal and Torres Strait Islander Social Justice Commissioner, representatives of land councils and representative bodies.

²² Extracted and based on material from *Native Title Report 1996-97*, pp60-64.

title. Some acts performed **after** the *Wik* decision have also been validated – for example, options created before *Wik* which were exercised post-*Wik*.

44. The amendments also authorise States and Territories to validate acts if they do so on the same terms as provided in the amended NTA.²³ All of these previously invalid acts are defined as *intermediate period acts*.
45. Intermediate period acts are divided into different categories. The categories indicate the impact which different validated acts may have on native title. The grant of exclusive agricultural and pastoral leases, and community purpose leases are included in *category A* intermediate period acts.²⁴ Category A intermediate period acts extinguish native title completely. Subject to exceptions, leases which are wholly or partly inconsistent with native title are *category B* intermediate period acts and extinguish native title to the extent of the inconsistency.²⁵
46. Extinguishment is defined in the amended NTA as permanent.²⁶ Native titleholders are entitled to compensation for the extinguishment of their title by validated acts.²⁷
47. The rationale for such provisions is that when granting these interests, governments had acted on the assumption that native title was extinguished by the previous grant of a pastoral lease.²⁸ If native title had been extinguished, then such grants could validly be done without complying with the future act procedures of the NTA. However, the *Wik* decision proved this assumption to be wrong. Accordingly, grants made without complying with the NTA may have been invalid.
48. The 1995 *Native Title Report* of the Aboriginal and Torres Strait Islander Social Justice Commissioner articulated the risk of governments issuing mining titles without taking into account the possible existence of native title on pastoral lands, and therefore without utilising the future act regime of the NTA.

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 their use of the future act regime and the protection that it provides to Indigenous peoples on the basis of assumptions about extinguishment. Given the uncertainty around the issue, I find such an approach extraordinarily risky. The legal advice that state and territory governments are acting upon may ultimately be confirmed in the courts. However if it is wrong, governments have potentially issued tenements contrary to the NTA and the human rights of Indigenous peoples. Throughout the drafting of the NTA concerns were stated over the need to remove sovereign risk with regard to mining tenements. The right to negotiate provides a mechanism for interests to be granted without the risk of subsequent invalidity due to the existence of native title. The failure of state governments to use the right to negotiate process on assumptions relating to extinguishment which may be incorrect

23 NTA s22F.

24 NTA s.232B(5)(b), s.229(3)(a).

25 NTA s232C. Category C and D intermediate period acts are defined in ss232D and 232E NTA respectively.

26 NTA s237a.

27 NTA s22D, 22F.

28 This issue was not resolved at the time that the original NTA was passed. The preamble to the original NTA, which noted that leases extinguished native title, was ambiguous in the sense that it was understood by most to include pastoral leases (even though pastoral leases were not mentioned).

increases sovereign risk in circumstances where such risk could be easily avoided.²⁹

49. In the 1996-97 *Native Title Report* of the Aboriginal and Torres Strait Islander Social Justice Commissioner it was noted, in relation to the Native Title Amendment Bill,³⁰ 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. No doubt many governments had legal advice to which they referred in ignoring the future act procedures. But I doubt that such advice would have been unequivocal...³¹

50. Shortly after the government proposed the validation provisions, the Aboriginal and Torres Strait Islander Commission (ATSIC) identified the key concerns:

Validation will amount to retrospective sanctioning of conduct which was known to be potentially invalid at the time, on the part of State and Territory governments, and statutory authorities. Consequently, such a legislative provision, if enacted by the Parliament, would be unprecedented.

The legislation is discriminatory in that it purports to validate acts and to provide for extinguishment, only in relation to native title and not in relation to other forms of title. There is no countervailing benefit to be obtained from these proposals which could render this conduct a special measure.

The validation effected by the amendments, together with the ability under these amendments for State and Territory legislation to be passed with similar effect, will give rise to compensation where native title is extinguished. However, the provision for compensation, in relation to unidentified acts, may not constitute just terms compensation because native title holders may not be in a position to know whether their rights have been affected by the validation. Thus a question of constitutional validity arises.³²

51. The National Indigenous Working Group (NIWG) also stated that:

The basic unfairness is that blanket validation... damages native title rights [and] potentially provides up-front solutions to non-native title parties, whilst leaving compensation for native title holders to slow and expensive processes, possibly taking years.³³

29 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1994 – June 1995*, AGPS, Canberra, 1995, p. 158 (*Native Title Report 1995*). See also, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report January-June 1994*, AGPS, Canberra, 1995, p. 138 (*Native Title Report 1994*).

30 The validation provisions of the Native Title Amendment Act 1998 (Cth) are substantially similar to those contained in the Native Title Amendment Bill.

31 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996-97*, AGPS, Canberra, 1997, p62.

32 ATSIC, *The Native Title Amendment Bill 1997: Preliminary Commentary*, 25 July 1997, p. 2.

33 National Indigenous Working Group on Native Title, *Coexistence – Negotiation and Certainty: Indigenous Position in Response to the Wik Decision and the Government's Proposed Amendments to the Native Title Act, 1993*, April 1997, p. 18.

The 'confirmation of extinguishment' provisions³⁴

52. The amendments to the NTA classify certain land tenures, issued before 23 December 1996 (the date of the *Wik* decision), as *previous exclusive possession acts*. The acts include the following:
- interests scheduled to the amended NTA, in Schedule 1;
 - freehold estates;
 - commercial, residential or community purpose leases;
 - exclusive pastoral or agricultural leases;
 - other leases which are not mining leases and which provide exclusive possession.³⁵
53. If a title is classified as a previous exclusive possession act it is 'confirmed' as extinguishing native title completely.³⁶ Where state or territory governments have granted these titles the amendments authorise them to introduce complementary legislation that would have the same effect.³⁷
54. Where native title is extinguished such extinguishment is permanent.³⁸ Native titleholders are entitled to compensation but only to the extent (if any) that the common law has not already extinguished native title rights and interests.³⁹
55. If extinguishment by a grant is 'confirmed', then the extinguishing effects of validation, described above, do not apply. That is, while the grant itself can still be validated, extinguishment has already taken place under the confirmation provisions.
56. The Aboriginal and Torres Strait Islander Social Justice Commissioner criticised the confirmation provisions in the 1996-97 Native Title report. The criticisms can be grouped under the following headings.
- i) The confirmation provisions pre-empt the development of the common law*
57. The *Wik* decision provided that a clear and plain legislative intention is required to extinguish native title. This intention may be express or 'necessarily implied' by the legislation.⁴⁰
58. These provisions:
- 'confirm' extinguishment by grants that are yet to be found by the Australian common law to have extinguished native title. The legislation authorising the grants will not have expressly stated the intention that the grants will extinguish native title. Rather, the grants will be deemed to have extinguished native title on the basis that legislation authorising them 'necessarily implied' that this was intended.

34 Extracted and based on material from *Native Title Report 1996-97*, pp68-75.

35 NTA s23B(2)(c).

36 The amendments also define certain acts as 'previous non-exclusive possession acts.' The consequences of such a definition are set out in NTA, Part 2 Division 2B. They are not discussed in this section.

37 NTA, s23E, s23I

38 NTA s237A.

39 NTA s23J(1).

40 See, for example, *Wik*, *op.cit.* per Kirby J at pp282-284.

...Justice Kirby (in *Wik*) has indicated that the issue of whether a statute extinguishes by necessary implication ‘depends upon the language, character and purpose to which the statute was designed to achieve.’⁴¹ To date, the High Court has only considered a very limited number of interests with respect to the existence of such a ‘necessary implication’. It has done this in *Mabo (No.2)* and *Wik*...⁴²

59. The amended NTA confirms the extinguishment of native title by various grants that:

would have been made under a plethora of enactments stretching back well over a century under Colonial, State, Federal and Territory governments. There has been no opportunity to consider whether there is any foundation for extinguishment by ‘necessary implication’ due to ‘*the language, character and purpose*’ of these multitude of statutes...

As Justice Gummow observed (in *Wik*):

the further elucidation of common law principles of native title, by extrapolation to an assumed generality of Australian conditions and history from the particular circumstances of the instant case, is pregnant with the possibility of injustice to the many, varied and complex interests involved across Australia as a whole. The better guide must be ‘the time-honoured methodology of the common law’ whereby principle is developed from the issues in one case to those which arise in the next.⁴³

(The confirmation provisions of the amended NTA) generalise in precisely the manner criticised by Justice Gummow by creating national legislation about the extinguishing effect of a great variety of tenures. The legislation under which many of these tenures are granted may be devoid of any ‘clear and plain intention’ that extinguishment of native title should result from the grant. It is not the legal effect of a grant that is being ‘confirmed’. That legal effect, extinguishment’ is being created by the (amendments)...⁴⁴

ii) *The confirmation provisions deem that certain interests amount to exclusive possession*

60. Interests that are scheduled to the amended NTA are effectively ‘deemed’ to have conferred a right to exclusive possession, with the consequence that they permanently extinguish native title.⁴⁵ The schedule runs to 50 pages, and includes grants under regulations as early as 1829 and legislation dating back to 1860.

61. The confirmation provisions also deem that commercial, residential and community leases amount to exclusive possession. For example, s.242(1)(b) of the amended NTA provides that a ‘lease’ includes ‘*a contract that contains a statement to the effect that it is a lease*’. Under the amended NTA a residential or community purpose contract that contains a statement that it is a lease would be deemed to be a lease, and to confer exclusive possession.

62. As the *Wik* decision demonstrates, however, deeming that an interest is a lease, or confers rights of exclusive possession, does not mean that a court would reach the same conclusion. Rather than simply deeming such interests to amount to exclusive

41 *Wik, op. cit.*, per Kirby J at p. 283.

42 1996-97 *Native Title Report, op. cit.*, pp68-69.

43 *Wik, op. cit.*, per Gummow J at p. 232.

44 1996-97 *Native Title Report, op. cit.*, p69.

45 NTA s.249C.

possession these leases need to be analysed according to general law principles to determine whether this is in fact the case.

63. The High Court has also noted that there is, in Justice Kirby's words in *Wik*, 'a strong presumption that a statute is not intended to extinguish native title.'⁴⁶

iii) *The amendments apply the wrong test in determining whether native title has been extinguished*

64. The focus of the amendments on the issue of 'exclusive possession':

does not accurately reflect the common law, particularly for statutory titles. The questions put to the High Court in *Wik* linked exclusive possession to necessary extinguishment. In Justice Gummow's view, 'the posing of a question in those terms may have distorted the general issues.'⁴⁷ Earlier in his judgment he had explained:

Attention is to be focused upon the terms of the legislation and of the instruments themselves. In that examination, the term 'exclusive possession' is of limited utility...

To reason that the use of terms such as 'demise' and 'lease' in legislative provisions with respect to pastoral leases indicates (i) the statutory creation of rights of exclusive possession and that, consequently, (ii) it follows clearly and plainly that subsisting native title is inconsistent with the enjoyment of those rights, is not to answer the question but to restate it.⁴⁸

In my view, Professor Richard Bartlett has analysed the issue correctly:

'Exclusive possession' was not necessarily an element in an inquiry as to extinguishment by the grant of a pastoral lease. In order to determine if an instrument confers exclusive possession and should be characterised in law as a lease it is necessary to consider the entire range of rights and duties, and the condition and qualifications to which they are subject, with respect to the rest of the world and all persons in it. No such inquiry was necessarily appropriate in order to determine if the grant of an instrument extinguishes native title. 'The relevant inquiry was as to the nature of the relationship between the holder of the pastoral lease and the native title claimants, and in particular did the former have the power to exclude the latter such that a clear and plain intention to extinguish was manifested'⁴⁹ ...

(The confirmation provisions) answer the question of whether there is extinguishment by statutorily turning exclusive possession into extinguishment; permanent extinguishment. They create extinguishment where the Courts have not even been asked to look...

By purporting to 'confirm' the extinguishment by inconsistent grants, the Commonwealth is purposely pre-empting the development of the common law. For all the need for 'certainty' and 'workability' there is the balancing objective of allowing sufficient time to integrate the belated recognition of native title into Australia's land management system.⁵⁰

46 *Wik, op. cit.*, per Kirby., J, p. 282.

47 *Wik, op.cit.*, per Gummow J at p248.

48 *Wik, op. cit.*, per Gummow J at p.241.

49 Bartlett, R., 'The *Wik* Decision And Implications For Resource Development' (1997) 16 *Australian Mining and Petroleum Law Journal* 27, p30. Italics added.

50 1996-97 *Native Title Report, op.cit.*, pp75-76.

iv) *The Miriuwung Gajerrong case*

65. In a recent case in the Federal Court of Australia many of the concerns raised above were substantiated. In *the Miriuwung and Gajerrong case*⁵¹, Justice Lee was required to look closely at special leases that had been granted under Sections 152 of the Land Act 1898 (WA), and Sections 116 and 117 of the Land Act 1933 (WA). The leases were for the purposes of grazing, cultivation and grazing, market gardening, canning and preserving works, concrete production, and for an Aboriginal hostel and inter-cultural centre. These leases were ‘confirmed’ in the amended NTA as extinguishing native title.⁵²
66. Justice Lee found that these leases did *not* extinguish native title at common law. He found that the criterion used in order to ‘confirm’ extinguishment was directed at the wrong question. The question is not whether the title consists of the grant of exclusive possession but whether in granting that title there is a clear and plain intention to extinguish native title.
67. Justice Lee found that these leases amounted to temporary uses of the land, that in many cases the land had not been used for the purpose of the grant, that the grants were made for a limited time period, and that the land had in all cases reverted to being vacant Crown land. His conclusion was that in each instance a clear and plain intention by the Crown to extinguish native title could not be found, and that as a consequence no extinguishment had occurred.
68. Justice Lee’s decision has been appealed on 92 grounds by the Western Australian government. The grounds of appeal include the effect of the grant of the special leases mentioned above on native title.

Primary production upgrade provisions⁵³

69. The amended NTA allows pastoral leaseholders to upgrade the types of activities that they may conduct on their leases to the level of ‘primary production.’⁵⁴ ‘Primary production’ is defined as including agricultural activities (such as cultivating the land, and maintaining, breeding and agisting animals), forestry, aquacultural or horticultural activities, the taking or catching of fish or shellfish, de-stocking of land or leaving fallow, and farmstay tourism.⁵⁵
70. Section 24GB provides that leaseholders may do future acts at primary production levels regardless of the effect this may have on any continuing native title rights and interests, so long as the future act was authorised by legislation at some time before 31

51 *Ben Ward v State of Western Australia* (Unreported, Federal Court of Australia, Lee J, 24 November 1998. Ref: [1998] 1478 FCA (herein the *Miriuwung and Gajerrong case*). < www.austlii.edu.au > (10 December 1998).

52 For extinguishment to actually take place, the Western Australian parliament must pass legislation confirming extinguishment. The Titles Validation Amendment Bill 1998 (WA) is presently before the Western Australian Parliament. Section 12H(1) will have the effect of extinguishing native title in relation to the titles scheduled.

53 Extracted and based on material from *Native Title Report 1996-97*, pp87-92.

54 NTA, Part 2, Subdivision G. For example, NTA, s24GB, s24GD, s24GE.

55 NTA s24GA, s24GB(2).

March 1998.⁵⁶ Section 24GB(5) provides that ‘if this section applies to a future act, the act is valid.’

71. These provisions are one example of how the amendments allow non-native titleholders to conduct certain future acts without having regard to native title interests. See also the provisions relating to:

- grants of rights to third parties on non-exclusive pastoral or agricultural leases (s24GE);
- management of water and airspace (S24HA);
- acts involving the renewal and extensions of acts (s24IA);
- acts involving reservations, leases etc (s24JA);
- acts involving facilities for services to the public (s24KA);
- low impact future acts (s24LA);
- acts that pass the freehold test (s24MD); and
- acts affecting offshore places (s24NA).

72. On these provisions generally the Social Justice Commissioner has commented that

The draft Bill⁵⁷ does not facilitate the equitable co-existence of different property rights. Rather, it maximises the situations in which development can proceed on native title land. The Government’s apparent intention is to minimise the procedural protection available to native title holders and to increase the circumstances in which their rights can be overridden, leaving them with merely the ability to apply for compensation.⁵⁸

73. The requirement under s24GB that there be State legislation in place before 31 March 1998 authorising activities at primary production levels allows amendments to the *Land Administration Act 1997* (WA) introduced in March 1998, authorising leaseholders to conduct activities at primary production levels where such activities could not previously be done, to come within the federal native title amendments. Consequently, that Western Australian legislation is not subject to the application of the RDA, whose standards it would breach.

74. In the 1996-97 *Native Title Report* the Social Justice Commissioner noted the following on the potential for co-existence with native title:

Under *Wik*, once the extinguishment issue is resolved the focus shifts to the co-existence of native title and pastoralists’ rights. Pastoralists’ rights prevail over native title to the extent of any inconsistency between their co-existing rights...

There is significant potential for co-existence between pastoralists’ rights and interests and those of native title holders. In *Wik* Justice Kirby took the view, on the Mitchellton and the Holroyd pastoral leases, that:

The exercise of the leasehold interests to their full extent would involve the use of the land for grazing purposes. This was of such a character and limited intensity as to make it far from impossible for the Aboriginals to continue to utilise the land in accordance

56 Section 24GB(4) of the NTA provides two exceptions to this – (a) where the lease is for an area in excess of 5000 hectares and the future act would convert the use of the majority of the area from pastoral purposes; and (b) where the act would convert the lease into a right of exclusive possession.

57 As it then was.

58 *Native Title Report 1966-97, op.cit*, p106. The provisions commented on in the 1996-97 report are substantially similar to those contained in the amended NTA.

with their native title, as they did (*Wik*, per Kirby J at p284)⁵⁹

75. In relation to the primary production provisions,⁶⁰ the Social Justice Commissioner stated that:

Responding to the demands of pastoralists and governments from around the country, the Commonwealth has produced a package that seriously erodes the benchmark of equality that is central to the *NTA*. It paves the way for an enormous expansion of pastoralists' rights while removing the legitimate procedural rights of native titleholders. The enjoyment of native title is potentially rendered meaningless by the Commonwealth proposals for primary production activities on non-exclusive pastoral and agricultural leases.

Under the primary production provisions, leaseholders will have the ability to undertake extremely wide-ranging primary production activities. Native title holders, meanwhile, will be rendered powerless to prevent their country being put to a massive range of inconsistent uses. Under the principles espoused in *Wik*, pastoralists' rights will prevail over native title to the extent of any inconsistency. Thus, the dramatic expansion of pastoralists' rights will mean that native title is suppressed to a correspondingly greater extent. Native title will be suspended and rolled back on an unprecedented scale. Together with the so-called 'confirmation' and 'validation' provisions, this will constitute the greatest single and explicit impairment of native title in the history of Australia...⁶¹

Discrimination

The facilitation of primary production activities on leaseholds diminishes the exercise and enjoyment of native title rights. Native titleholders are denied any procedural rights in these situations. Only native title rights will be affected by the amendments. Holders of non-native title property interests which 'co-exist' with pastoral leases will not be affected in the same way as native titleholders. There will be no such impact on co-existing interests such as easements, *profits a prendre*, agistment rights and mining development rights.⁶²

76. Where an authorised primary production activity is conducted, the amended *NTA* provides that the 'non-extinguishment principle' applies. This principle means that native title is suspended while these activities are current. While better than clear extinguishment, when considered alongside the requirement for native title claimants to demonstrate that they have maintained a connection with traditional country in order to claim their title, the potential for permanent erosion of native title rights becomes clear.

The right to negotiate⁶³

77. Under the original *NTA*, people registered as possessing or claiming native title were entitled to a 'right to negotiate' in relation to certain kinds of 'permissible future acts', namely:

59 1996-97 *Native Title Report*, *op. cit.*, pp87-88.

60 The primary production provisions proposed in the Native Title Amendment Bill 1997 are substantially similar to those that were included in the Native Title Amendment Act 1998, except for one factor. The date at which primary production activities could be authorised by state legislation was moved from 23 December 1996 (the date of the *Wik* decision) to 31 March 1998 (to accommodate the passage of amendments to the *Land Administration Act (WA)*, as discussed above.

61 *Native Title Report 1996-97*, p90.

62 *ibid.*, p93.

63 Extracted and based on material from *Native Title Report 1996-97*, pp113-117.

- acts relating to mining (including both exploration and production); and
 - the compulsory acquisition of native title rights for the benefit of a third party.⁶⁴
78. There were some narrowly-defined exceptions to the application of the right to negotiate. It did not apply where there were no claimants registered within two months of notification.⁶⁵ Acts which had ‘minimal impact on native title’ could be excluded from the process by the Commonwealth Minister.⁶⁶ In addition, Governments could apply for an ‘expedited procedure’ avoiding the right to negotiate where the proposed act ‘does not directly interfere with the community life’ of native title holders or ‘involve major disturbance to any land or waters.’⁶⁷ Native titleholders or claimants could object to the application of this procedure.⁶⁸
79. The amended NTA substantially alters the right to negotiate provisions. This occurs in two ways. First, the amendments remove the application of the right to negotiate in relation to the following acts:
- a mining right for the sole purpose of constructing an infrastructure facility(s26(1)(c)(i));
 - a mining right at the exploration stage (s26A) ;
 - the renewal, re-grant, re-making or extension of a right to mine (s26D);
 - the compulsory acquisition of land for an infrastructure facility, for either a public or private purpose(s26(1)(c)(iii)(B));
 - approved gold or tin mining acts (s26B);
 - excluded opal or gem mining (s26C);
 - grants of rights to third parties on non-exclusive pastoral or agricultural leases (s24GE);
 - primary production activities (s24GB, 24GC);
 - off-farm activities directly connected to primary production activities (s24GD);
 - management of water and airspace (S24HA);
 - acts involving the renewal and extensions of acts (s24IA);
 - acts involving reservations, leases etc (s24JA); and
 - acts involving facilities for services to the public (s24KA).⁶⁹
80. Instead of a right to negotiate native title claimants or titleholders are now entitled to a right to be consulted and for any objection to be taken into account.⁷⁰

64 NTA s.26(2).

65 NTA ss.28(1)(a).

66 NTA ss.26(3),(4).

67 NTA ss.32 and 237.

68 NTA s.32(3).

69 Under the original NTA an act could be done if it was ‘permissible.’ To be permissible it had to be either an act that could be done to ordinary title (ie passed the ‘freehold test’), that related to an offshore place or was a low impact future act. These exceptions to the right to negotiate remain in the amended NTA. Where a proposed act did not fall within these exemptions under the original NTA and was not an act relating to mining (to which a right to negotiate applied), the act could only be done by compulsorily acquiring the native title. This would also activate the right to negotiate provisions.

70 There is no such right in relation to excluded opal and gem mining (s26C); or primary production activities on non-exclusive agricultural or pastoral leases (s24GC).

81. Second, the amended NTA allows states and territories to replace the right to negotiate with 'alternative provisions' that provide a right of consultation and objection on land that is or was pastoral leasehold land, reserved or dedicated land, or is within a town or city (s43A). When a state or territory passes legislation introducing such alternative provisions they must apply to the relevant Commonwealth Minister for a determination that the provisions meet the minimum standards laid down in s43A of the amended NTA. The Senate can set the Minister's determination aside (as it is a disallowable instrument).
82. The right to negotiate provisions establish the minimum acceptable standards for negotiating with native title claimants or holders about activities that may impact on their rights. Accordingly, the ability to replace the right to negotiate with a right of consultation and objection reduces the scope of these minimum acceptable standards, and may leave the titles of claimants more vulnerable to impairment.
83. In the 1996-97 *Native Title Report* it was noted that

In its original form, the right to negotiate attempted to provide native title with a meaningful level of protection in situations where it was particularly vulnerable to being overridden by governments that wanted to grant extensive rights to third parties. By contrast, the proposed amendments are entirely weighted in favour of governments and private parties.⁷¹

84. CERD requires governments to provide substantive rather than formal equality in protecting the rights of all races. In the 1996-97 *Native Title Report* the Social Justice Commissioner stated that:

I believe that the property rights of native title holders require different protection to those of other title-holders, due to factors such as the communal nature of native title, its independence of government action, its spiritual and cultural significance and the traditional decision-making processes which apply to it.⁷² In its original form, the right to negotiate could be said to have accommodated these features to a limited degree...

In defending amendments which curtail the right to negotiate, the Government has argued that in order... to respect the RDA, it is merely required to ensure that native title holders are left in a situation of formal equality with other title holders...

...the character of the (amended NTA undermines this argument)... It is clearly wrong to suggest that the amendments ensure that native titleholders are left in a situation of formal equality with other titleholders. In fact, the theme of the amendments is to move away from such a guarantee...

When it was originally enacted, categorisation of the NTA as a special measure saved it from being regarded as discriminatory, despite the fact that it contained discriminatory provisions validating Crown-granted titles. These provisions were portrayed as being outweighed by 'beneficial' provisions, such as the right to negotiate, which accommodated particular needs of native titleholders.⁷³

⁷¹ *Native Title Report 1996-97, op. cit.*, p114.

⁷² Clarke, J., 'Racial Non-Discrimination Standards and Proposed Amendments to the Native Title Act', *Lands, Rights, Laws: Issues of Native Title*, Issues Paper no. 16, April 1997, Native Title Research Unit, AIATSIS, Canberra, pp4-5.

⁷³ See The Hon. P. Keating, Prime Minister, 'Second Reading Speech: Native Title Bill 1993', *Hansard*, House of Representatives, 16 November 1993, p2879.

[the amendments] increase... the discriminatory aspects of the *NTA*, according to a test of formal equality. However, instead of providing additional assistance to native titleholders in order to 'balance' this increase in discrimination, the amendments allow native titleholders to be treated less favourably than other titleholders in a range of situations. They also wind back the right to negotiate to a significant degree. It is impossible to see how the *NTA*, as amended in this fashion, could be characterised as a 'special measure' for the benefit of Indigenous peoples.⁷⁴

85. The amendments to the right to negotiate provisions need to be considered in conjunction with the Indigenous Land Use Agreement (ILUA) provisions, discussed immediately below. The ILUA provisions provide substantial legal support to the agreement making process. However, while it is too early to know what will happen in practice, it is possible that the removal of the right to negotiate in some circumstances and replacement of it with a right to consult or object in others will reduce the incentive for non-Indigenous parties to reach agreements with Indigenous people. This is because the amended *NTA* authorises non-Indigenous parties to conduct the activity that they propose to do, so long as they meet the procedural requirements set out in the Act, without entering into full negotiations with native title claimants and holders.

Indigenous Land Use Agreements (ILUAs)

86. The amendments to the *NTA* introduced extensive provisions for the making of Indigenous Land Use Agreements (ILUAs). The ILUA provisions remedied a defect in the original *NTA*, which did not provide effective support to agreements made about native title.

87. The amendments provide the mechanisms by which a variety of agreements can be reached and registered under the *NTA*.⁷⁵ Agreements can be reached with or without government involvement, although if the agreement involves the surrender or extinguishment of native title the government must be a party to it.⁷⁶ Agreements can concern any matter on which the parties to the agreement have agreed. Body Corporate agreements and area agreements can change the effect of validation of an intermediate period act.⁷⁷

88. The agreement provisions also ensure that there are notification provisions for representative bodies and any other prospective claimants in an area, to ensure that the rights of people not a party to the agreement are not unknowingly affected.⁷⁸

89. The agreement making provisions offer significant potential for the achievement of positive outcomes for Indigenous and non-Indigenous parties. They offer an opportunity for Indigenous peoples to become more involved in the decision making process. These provisions offer the potential to assist the achievement of self-determination by Indigenous peoples.

74 *1996-97 Native Title Report*, pp115-116.

75 See *NTA* Division 3, Subdivisions B-E.

76 Governments do not necessarily have to be parties to either a body corporate agreement (under Subdivisions B) or an area agreement (under Subdivision C) so long as the agreement does not involve the extinguishment of native title: *NTA* s24BD(2), 24CD(2).

77 *NTA*, s24BB(ab), 24CB(ab).

78 *NTA*, s24BH, 24CK-CL, 24DI-DL.

90. However, the ILUA provisions must be placed into context. The potential gains from these provisions are limited by the focus of the amendments overall on the extinguishment and impairment of native title through provisions such as those on validation, confirmation and primary production upgrades discussed at paragraphs 43-76 above.

iii) Compliance of the amended NTA with Australia's obligations under CERD⁷⁹

91. The NTA and any amendments to it need to be seen in the context of the world-wide struggle for recognition of Indigenous peoples' land rights and the persistence of 'doctrines of dispossession' in the legal treatment of Indigenous peoples. Many of these discriminatory practices are historical and systemic. In many States, discrimination is reflected in the legal structures that Indigenous peoples are forced to deal with when seeking recognition of their rights to land. In the Australian context, the doctrine of *terra nullius* was long used to deny Indigenous people a right to their land. Indigenous peoples' historical disadvantage and dispossession further enhances the significance of the recognition of native title and the form of that recognition.

The principles of non-discrimination and equality

92. The principle of non-discrimination is generally considered to be one of the fundamental doctrines of the international legal order. The principle of non-discrimination and equality is contained in all major human rights treaties and declarations. It is recognised and protected in the following instruments.

- < Universal Declaration of Human Rights (UDHR), article 2;
- < International Covenant on Civil and Political Rights (ICCPR), article 2;
- < International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD), article 2;
- < Convention on the Rights of the Child, article 2;
- < International Covenant on Economic, Social and Cultural Rights (ICESCR), article 2; and
- < International Labour Organisation Convention No.169 concerning Indigenous and Tribal People in Independent Countries, article 2.⁸⁰

93. Furthermore, the International Court of Justice and eminent publicists have repeatedly observed that the principle of racial non-discrimination has the status of customary international law and is *jus cogens* and non-derogable.⁸¹

94. The principle cannot be set aside merely because it is inconvenient and does not accord with the policy of the day. The treatment of non-discrimination at international law involves the setting of standards and positive obligations in the treatment which States must accord minorities and Indigenous peoples. In this context, it is useful to examine the genesis of the principle of non-discrimination.

79 This section is based on chapter 6 of the *Native Title Report 1996/97*, *op. cit.*; and Paper presented to the Australian Property Institute, 'The valuation of native title and racial discrimination law' 27 March 1998, Sydney.

80 Australia has not ratified ILO 169.

81 Brownlie, I., *Principle of Public International Law*, Fourth Edition, Clarendon Press, 1990, p. 513; McKean, W., *Equality and Discrimination under International Law*, First Edition, Clarendon Press, 1983, p. 277; Judge Tanaka, *South West Africa* case (second phase) ICJ Reports (1966) 298; Judge Ammoun, *Barcelona Traction* case (second phase) ICJ Report (1970) 304; Judge Ammoun, *Namibia* Opinion ICJ Report (1971) 78-81.

95. At the conclusion of World War I, the newly established League of Nations adopted a treaty system which sought to protect racial, religious and linguistic minorities.⁸² From this system, a principle of non-discrimination, or equal treatment, emerged which recognised the need to protect the distinct identity of minorities.
96. The Permanent Court of Justice tackled this issue in 1934 in its famous advisory Opinion concerning the *Minority Schools in Albania* in which it stated that the underlying object of the League of Nations' treaties protecting minorities was to ensure members of racial, religious or linguistic minorities are "in every respect on a footing of perfect equality with the other nationals of the State" and were able to preserve 'their racial peculiarities, their traditions and their national characteristics.'⁸³ The desire to protect the integrity of minorities necessarily gives rise to questions about the relationship between difference and discrimination. This relationship can be reduced to three key principles which have been developed upon by treaty-based Committees and international courts.
- i) *Equality does not necessarily mean treating everybody in an identical manner.*
97. The notion of equality does not necessitate the rejection of difference. The relationship between non-discrimination and minority rights was further refined in the *South West Africa case*.⁸⁴ Judge Tanaka's famous dissenting judgment has shaped understanding of the principle of non-discrimination at international law.

The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal,...To treat unequal matters differently according to their inequality is not only permitted but required⁸⁵

98. The model of equality adopted by Judge Tanaka is one of substantial equality rather than formal equality. The principle of non-discrimination requires equal treatment of equals and consideration of difference in assessing the need for different treatment. Different treatment is appropriate when it allows groups to maintain their own traditions and practices. Formal equality, treating everybody in an identical manner, identifies such differential treatment as discriminatory. CERD adopts a substantive equality approach. It recognises that a differentiation of treatment is not necessarily discriminatory, as was made clear in the following general recommendation of the Committee:

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 (special measures)...In seeking to determine 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.⁸⁶

82 See generally: McKean, W., *Equality and Discrimination under International Law*, *op cit*, Chapters 1 and 2; Vierdag, *The Concept of Discrimination in International Law*, Martinus, The Hague, 1973, Chapter 6.

83 *Minority Schools in Albania* P.C.I.J. Series A/B No. 64 (1934), p17.

84 ICJ Reports 1966 248.

85 *South West Africa Case (Second Phase)* {1996} ICJ Rep 6, pp303-304, p305.

86 Committee on the Elimination of Racial Discrimination, *General Recommendation XIV on Article 1* (1993), para 2 *Compilation of General Comments and General Recommendations Adopted by Human Treaty Bodies*, UN Doc. HRI\GEN\1\Rev.1 at 67.

99. CERD defines racial discrimination in Article 1(1) as:

... 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 an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

100. This international definition has been incorporated into Australian law in subsection 9(1) of the RDA with some very minor rewording. Section 10 of the RDA also explicitly guarantees equality before the law for racial groups and has been held by the High Court to be particularly relevant in the context of native title. Generally, if a practice or measure offends section 10 of the RDA it would also offend section 9 and come within the international definition of racial discrimination.

101. The international definition of racial discrimination is generally considered to have two elements. First, ‘a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin’ is required. Second, the distinction based on race must nullify or impair ‘the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.’ This second element is generally taken to require that, to be considered discriminatory, any racially specific measure must be able to be characterised as detrimental to the racial group in question.

102. Native title is an example of a difference based on race which is not discriminatory. In fact the failure to recognise native title is discriminatory. Terra nullius, (no one’s land) was characterised by the High Court in *Mabo* as a discriminatory doctrine because it failed to recognise the customs and traditions of the Indigenous people of Australia in relation to land.

Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.⁸⁷

103. While the common law now recognises native title it does not define it. Native title has its ‘origin in and is given its content by the traditional laws acknowledged and the traditional customs observed by the Indigenous (group)...The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.’⁸⁸

104. The statutory definition of native title under the NTA does not displace the customary laws and traditions which constitute the content of native title. Native Title is defined in the NTA as follows:

223. The expression **native title** or **native title rights and interests** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

87 *Op cit.* p42.

88 *Op cit.* at p58.

- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.⁸⁹

105. Thus the legislation contains a recognition of difference which is non-discriminatory. The NTA seeks to incorporate this difference within the Australian property system and position it in relation to non-Indigenous titles. Where the NTA extinguishes native title without the consent of Indigenous people in order to benefit non-Indigenous titleholders, native titleholders are discriminated against. This is not to say that the Commonwealth or the State cannot compulsorily appropriate native title in a non-discriminatory manner. Where land needs to be appropriated for a public purpose then native title, like any other title, can be extinguished.

106. However, extinguishing native title in order to validate titles which were granted in contravention of the original NTA (the validation provisions); extinguishing native title in order to ensure that other titleholders will be unaffected by co-existing titleholders (the confirmation provisions); and permitting the upgrade of pastoral leaseholds without negotiation with co-existing native titleholders (the primary production provisions), cannot be considered a non-discriminatory form of appropriation.

ii) *'Special Measures' are sometimes required in order to redress inequality and to secure, for members of disadvantaged groups, full and equal enjoyment of their human rights.*

107. Special measures are a further type of differential treatment that is not discriminatory. They are aimed at achieving substantial equality. The rationale for allowing 'special measures' is that historical patterns of racism entrench disadvantage and more than the prohibition of racial discrimination is required to overcome the resulting racial inequality.

108. The definition of special measures is expressed in Article 1(4) of CERD:

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 of which they were taken have been achieved.

109. Not all non-discriminatory differential treatment qualifies as a special measure. Special measures have the following distinct characteristics: they must be taken for the sole purpose of securing the advancement of a particular group; such advancement must be necessary; they must not lead to the maintenance of separate rights for different racial groups; and they must not be continued once the objective of the measure has been achieved.

110. Native title cannot be described as a special measure. It is not a remedial measure taken by government for the purpose of overcoming the effect of historical patterns of racism. Native title does lead to the maintenance of separate rights for Indigenous people. Native title is not a temporary measure which can be removed once its objective has been achieved. The recognition of native title involves accepting a form of land title that

⁸⁹ NTA s223. This definition was not altered by the *Native Title Amendment Act 1998* (Cth).

derives from the traditional laws and customs of indigenous people. The protection of native title must reflect the substance of those traditional rights and customs. Different rights require different forms of protection to achieve substantive equality of treatment.

111. The High Court in *Western Australia v Commonwealth* observed that ‘the [original] Native Title Act can be regarded as either a special measure under the Racial Discrimination Act or a law which, though it makes racial distinctions, is not racially discriminatory’.⁹⁰ Given the evolution of the legislation from the common law definition of native title which in turn recognises the traditional laws and customs of Indigenous people, the appropriate characterisation of the legislation is that of a non-discriminatory racial distinction. The amendments which extinguish native title in preference to non-Indigenous titles cannot be characterised as the removal of a special measure. In fact such amendments satisfy the definition of discrimination at international law under Article 1(1) of CERD outlined above. These amendments are a distinction or exclusion based on race which has the purpose of ‘nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.’

iii) *Rights that recognise and protect the distinct cultural identity of minority groups are consistent with and sometimes required by the notion of equality*

112. Specific rights that recognise the distinct cultural identity of minority groups are consistent with a substantive approach to equality. Minority group rights, or cultural rights, are protected in article 27 of ICCPR which provides that:

Members in ethnic, religious or linguistic minorities shall not be denied the right, in community with the members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

113. As first peoples of a territory with a specific history and relationship to that territory, indigenous people are entitled to the protection afforded to all minority groups under Article 27 and also rights specific to their history. The CERD committee has recognised the relationship between the cultural rights of indigenous people and the principle of non-discrimination.

In many regions of the world Indigenous peoples have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardised.⁹¹

114. The Committee called on State Parties to take all appropriate means to combat and eliminate discrimination against Indigenous people, including by recognising and protecting their cultural identity.

The Committee calls in particular upon State parties to:

- a) recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State’s cultural identity and to promote its preservation;

90 (1995) 183 CLR 373 at 483.

91 Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, adopted on 18 August 1997. CERD\C\51\Misc.13\Rev.4, para 3.

- b) ensure that members of Indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on Indigenous identity;
- c) provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- d) 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;
- e) ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs, to preserve and to practice their languages.⁹²

115. The native title amendments fail to respect the cultural identity of Indigenous people and fail to promote the preservation of their culture as required by the CERD Committee. This is illustrated most clearly by the amendments to the validation and confirmation provisions.

116. The right to negotiate provisions under the original NTA enabled native titleholders to meet with other stakeholders to discuss how native title rights could be protected against the impact of mining developments and compulsory acquisitions and to involve Aboriginal owners in the management of the land.

117. The government sought to justify the amendments to the right to negotiate provisions on the basis that native titleholders should not be given different, preferential rights over their land than those of other titleholders. In doing so the government has taken the position that it is sufficient to provide formal equality.

The principle of formal equality

118. The Government has stated that it considers itself only bound to observe that the amendments to the NTA comply with a standard of formal equality.

In assessing the current government amendments, therefore, and advising in relation to them, the approach has been taken that the amendments need to leave the [Native Title] Act either as a special measure or provide formal equality. Provided that the amendments maintain provisions as special measures or provide formal equality, they comply with the Racial Discrimination Act.⁹³

119. On this basis, it was suggested, the ‘special right’ provided by the right to negotiate scheme could be wound back or removed without giving rise to racial discrimination.

120. This approach provides no secure way to recognise Indigenous peoples’ unique relationship to land and land rights as required by ICCPR and by CERD. The Government’s equality jurisprudence relies heavily on the High Court decision in *Gerhardy v Brown*⁹⁴ that conceptualises the *RDA* as a generalised prohibition of differential treatment on the basis of race with an exception for matters capable of being characterised as ‘special measures’.

121. There has been persistent criticism of the High Court’s approach to racial discrimination in *Gerhardy v Brown* as being broadly out of step with accepted international approaches to non-discrimination and providing no clear way to recognise the unique

92 *Ibid*, para 4.

93 The Attorney-General and Minister for Justice, the Hon Daryl Williams AM QC MP, Second Reading Speech, Native Title Amendment Bill 1996, p. 17.

94 (1985) 159 CLR 70.

position of Australia's Indigenous peoples other than through charitable 'special measures'.⁹⁵ In addition there is doubt whether the High Court's characterisation of discrimination as differential treatment can be applied to native title.

122. In *Gerhardy v Brown*, the Court was dealing with a legislative scheme to 'give' the Pitjantjatjara people rights to their traditional land. This was done in a context where Indigenous people had no recognised right to land independent of a crown grant. After *Mabo [No.2]* the situation fundamentally changed. Native title is a common law right and not a political gift of government. Native title exists because of Indigenous peoples' continuous and unbroken connection with their land.
123. *Gerhardy v Brown* provides no answers in the current debate over native title and pastoral leases. The *Native Title Amendment Act* is a subsequent specific enactment to the RDA. The RDA is impliedly repealed to the extent of any inconsistency by the amended NTA. The main racial discrimination issue is the compliance of the amended NTA with Australia's international obligations concerning non-discrimination and most significantly CERD. It is the NTA's compliance with international human rights law that the Government must address if it is concerned with acting in a non-discriminatory manner.
124. As a distinct interest in land that is racially based, native title must be accorded 'full respect' on a par with other interests in land. The fact that native title is a unique type of proprietary interest that non-Indigenous people cannot hold does not mean that it, or its protection, is a 'special measure' or detrimentally racially discriminatory. The principle of non-discrimination does not require that the treatment of all groups in society be the same. This is obviously relevant to Indigenous Australians who because of their unique history and cultural traditions, possess *sui generis* entitlements. The incidents of native title are determined by traditional laws and customs and warrant protection according to the particular terms of those laws and customs.
125. Moreover, the principle of non-discrimination is more than just about prohibiting discriminatory acts. It seeks to set the acceptable standard of treatment for preserving the distinct status of racial, ethnic, religious and linguistic minorities. It imposes obligations by State parties to eradicate racial discrimination as defined by Article 1. Article 2 comprises the central obligation in CERD in relation to the eradication of racial discrimination.
126. The amended Act contains few positive provisions for native titleholders to 'balance' its detrimental aspects. On the contrary, the amendments allow native titleholders to be treated less favourably than other titleholders in a range of provisions including the validation provisions, the confirmation provisions and the future act provisions.

2) Policy on Aboriginal land rights

127. The High Court of Australia's recognition of native title in 1992 was the first recognition of Indigenous land rights derived directly from the traditional laws and customs of Aboriginal and Torres Strait Islander peoples.

95 See: Brownlie, I., 'The Rights of Peoples in International Law', *op. cit.*, p.9; Nettheim, G., 'Indigenous Rights, Human Rights and Australia', (1987) 61 *Australian Law Journal*, 291, p.299; Sadurski, W., 'Gerhardy v Brown: Reflections on a Landmark Case that Wasn't', (1986) 11 *Sydney Law Review*, p.30; Pritchard, S., 'International Law' in *Aborigines and Torres Strait Islanders, Laws of Australia*, Law Book Company, 1993, pp.34-35.

128. Previously there were a variety of ways in which particular parcels of land could be used by Indigenous Australians: as Crown land reserved for Indigenous use; land granted to be held on trust for the use of Indigenous people; or land owned by Indigenous people through government grant. These various forms of land tenure were essentially based on government policy. The nature of tenure, the terms of tenure and the basis on which such tenure would be granted, was purely a creature of government policy.
129. The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) is a federal Act applicable in the Northern Territory of Australia. It was landmark legislation. Its provisions have returned a significant amount of land to the traditional owners. Land is granted on the basis that the traditional owners are able to prove the maintenance of their primary spiritual responsibility for the land claimed and to satisfy the Federal Minister for Aboriginal Affairs that the land should be returned, after the Minister has taken into account any objections to its return in whole or in part.
130. This legislation is the only statutory land claim mechanism, other than the Native Title Act 1993, for which the Federal Government has responsibility. It has recently been reviewed by John Reeves QC. The report, titled *Building on Land Rights for the Next Generation. Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, was presented to the Minister for Aboriginal and Torres Strait Islander Affairs in August 1998. A parliamentary committee, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, is currently considering the Report.
131. The Federal Government has yet to formulate its response to the Report's recommendations for substantial amendments to *the Aboriginal Land Rights (Northern Territory) Act 1976*.

3) Changes to the functions of Commissioner for Aboriginal and Torres Strait Islander Social Justice

132. Section 46C of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOCA) confers the following functions on the Human Rights and Equal Opportunity Commission to be performed by the Aboriginal and Torres Strait Islander Commissioner (the Commissioner):

46C. (1) The following functions are conferred on the Commission:

- (a) to submit a report to the Minister, as soon as practicable after 30 June in each year, regarding the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders, and including recommendations as to the action that should be taken to ensure the enjoyment and exercise of human rights by those persons;
- (b) to promote discussion and awareness of human rights in relation to Aboriginal persons and Torres Strait Islanders;
- (c) to undertake research and educational programs, and other programs, for the purpose of promoting respect for the human rights of Aboriginal persons and Torres Strait Islanders and promoting the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders;
- (d) to examine enactments, and proposed enactments, for the purpose of

ascertaining whether they recognise and protect the human rights of Aboriginal persons and Torres Strait Islanders, and to report to the Minister the results of any such examination.

133. The proposed amendments to the *Human Rights and Equal Opportunity Commission Act 1986* will not change the functions of the Commission, presently performed by the Aboriginal and Torres Strait Islander Commissioner.
134. The proposed amendments seek to abolish the Commissioner's position and replace it with the position of a Deputy President responsible for the current functions of both the Race Discrimination Commissioner and the Aboriginal and Torres Strait Islander Commissioner.
135. This change is part of a wider restructuring which proposes to replace each of the current specialist Commissioners within the Human Rights and Equal Opportunity Commission. There are currently six specialist positions, in the areas of privacy, race discrimination, sex discrimination, disability discrimination, human rights and Aboriginal and Torres Strait Islander social justice.
136. On 28 July 1998 the Human Rights and Equal Opportunity Commission made a submission to the Senate Legal and Constitutional Legislation Committee, the federal Parliamentary Committee considering the Government's proposed amendments to HREOCA.
137. Relevant parts of that submission are presented for the Committee's consideration. The primary concern is not with amendment to the functions currently performed by the Aboriginal and Torres Strait Islander Social Justice Commissioner, but the absence of a distinct position to perform those functions on behalf of the Commission. The absence of a dedicated position is aggravated by the proposed removal of the current mandatory qualifications for any person appointed to perform these functions.

Aboriginal and Torres Strait Islander Commissioner or Deputy President

(d) The Commission has expressed its views in the past on the need to maintain a specialist Aboriginal and Torres Strait Islander Commissioner or Deputy President. If the position is to be abolished, however, the Commission is concerned that the new Deputy President who will deal with both racial discrimination and Indigenous human rights may not be appropriately qualified to deal with the second part of the duties. This is because the repeal of the definition of the Aboriginal and Torres Strait Islander Commissioner in section 46B of HREOCA, also involves the repeal requirement that:

“A person is not qualified to be appointed unless the Governor-General is satisfied that the person has significant experience in the community life of Aboriginal persons or Torres Strait Islanders.”

(e) *The Commission is strongly of the view that at least one Deputy President should be able to satisfy the above criteria.*⁹⁶

138. The issue of the need for the functions currently performed by the Aboriginal and Torres Strait Islander Social Justice Commissioner to be performed by an appropriately

96 Submission by HREOC on the Human Rights Legislation Amendment Bill No. 2 considered by the Senate Legal and Constitutional Legislation Committee on 28 July 1998.

qualified person was also identified by the first Commissioner appointed, Michael Dodson, in his First Social Justice Report 1993.

Two very serious points need to be made about my appointment, as an Aboriginal person, to the position of Aboriginal and Torres Strait Islander Social Justice Commissioner.

First, it was not necessary for me to be an Aboriginal person or a Torres Strait Islander. Section 46B (2) requires only that the Commissioner be a person qualified by "significant experience in the community life of Aboriginal persons or Torres Strait Islanders." The arbiter of whether or not a potential appointee holds such qualification is the Governor-General.

It is my strong belief that the criterion for selection should be amended to require any future Commissioner to be an indigenous person. While there remains a need for the position of an Aboriginal and Torres Strait Islander Social Justice Commissioner such a mandatory requirement would be amply justified as a special measure for the purposes of Article 1, paragraph 4 of the Convention on the Elimination of All Forms of Racial discrimination and section 8(1) of the Racial Discrimination Act 1975.

General issues raised by the present method of appointment are addressed in Chapter 2, which considers the concept of self determination. Here it is sufficient to point out that the quality of intimate knowledge, the under the skin experience, of life as an Aboriginal person or Torres Strait Islander cannot be replicated. Such knowledge and direct experience is, in my view, an essential qualification for the job.

This leads me to my second point. The appointment of an indigenous person as the Aboriginal and Torres Strait Islander Social Justice Commissioner does not relieve another source of tension inherent in the position, in fact, it gives rise to it. I am acutely aware that to be identified as an 'aboriginal leader' and appointed by the Commonwealth to a position of influence may be viewed by some Aboriginal and Torres Strait Islander people as being co-opted by government.

Clearly, I am not of this view. However, I take the concern very seriously. It is a measure of the experience of indigenous Australians, as the subjects not only of harsh government policies but also (more insidiously) well-intentioned paternalistic policies, that there continues a deep distrust of governmental policies and appointees. It is only superficially ironic that such distrust can be most intense when the overt intention of the policy is to advance indigenous interests. The reasons for this appear in Chapter 2, Self Determination, in the section entitled 'Jack's not as good as his master'.

It is of critical importance, if I am to genuinely fulfil my Commission, that I accurately reflect the experience and aspirations of Aboriginal and Torres Strait Islander peoples throughout Australia. To this end, I will not only consult, as I am obliged to, with the Aboriginal and Torres Strait Islander Commission but will also consult with community organisations and individual communities as much as possible.

In attempting to reflect the broad and diverse range of views in the indigenous communities of Australia, I acknowledge to my country men and women that it is not appropriate that my views should be substituted for their own direct voices or that I can presume to speak for any person's particular traditional country. I ask for the support and assistance of the Aboriginal and Torres Strait Islander peoples in undertaking this work.⁹⁷

139. The full import of the repeal of the requirement for a person performing the functions, currently undertaken by Aboriginal and Torres Strait Islander Social Justice

97 Aboriginal and Torres Strait Islander Social Justice Commissioner, First Report 1993. Human Rights and Equal Opportunity Commission, Sydney, 1994. pp3-4.

Commissioner, to have ‘*significant experience in the community life of Aboriginal persons or Torres Strait Islanders*’ may be appreciated in the context of the former Commissioner’s observations.

140. It is also relevant to consider the proposed repeal of the specialist Commissioner’s position in the light of the reasons advanced for its original creation. They were described in 1992 by the then Attorney General of Australia as providing another example of the Federal Government’s

...commitment to implementing its undertakings to Aboriginal and Torres Strait Islander people arising from the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

There were many aspects of the report of the Royal Commission. The fact that the Commission was required at all and the extent of the recommendations made, clearly indicate a need for there to be an ongoing overall report on the exercise of basic human rights by Aboriginal and Torres Strait Islander people. The extent of the disadvantage suffered by indigenous Australians was graphically highlighted by the work of the Royal Commission.

The response of all Governments to the recommendations of the Royal Commission has been very positive. But there continues to exist a need for us as a nation to regularly focus on the extent to which Aboriginal and Torres Strait Islander people are able to exercise the basic human rights that the rest of us take for granted.

The creation of this office and the production of a yearly report will provide this focus. I hope that all governments will actively co-operate in the work of the Commissioner to allow for that office to be part of the on-going push to improve the everyday lives of the first Australians.⁹⁸

141. Given the continued disproportionate rate of Indigenous incarceration; the disproportionate numbers of Aboriginal and Torres Strait Islander people who die in police and prison custody; the chronic and distinct disadvantage of Indigenous Australians as demonstrated by all social indicators, it may be considered that the continued existence of an appropriately qualified, specialist position to report on the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islander people falls within the characterisation of a special measure required to comply with Australia’s obligations under CERD.

142. The Aboriginal and Torres Strait Islander Social Justice Commissioner also holds a function under the *Native Title Act 1993*:

Section 209. Reports by Aboriginal and Torres Strait Islander Social Justice Commissioner

Yearly report

- (1) As soon as practicable after 30 June in each year, the Aboriginal and Torres Strait Islander Social Justice Commissioner (appointed under the Human Rights and Equal Opportunity Commission Act 1986) must prepare and submit to the Commonwealth Minister a report on:

98 The Hon. M Duffy MP, Second reading speech on the Human Rights and Equal Opportunity Legislation Amendment Bill (No.2) 1992, 3 November 1992, as quoted in Aboriginal and Torres Strait Islander Social Justice Commissioner *First Report 1993*, HREOC, 1993, p1.

- (a) the operation of this Act; and
- (b) the effect of this Act on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders.

Reports on particular matters

- (2) The Commonwealth Minister may at any time, by written notice, direct the Commissioner to report to the Commonwealth Minister on any matter covered by paragraph (1)(a) or (b).

143. The abolition of the distinct position of Aboriginal and Torres Strait Islander Social Justice Commissioner will have the same impact on the performance of this particular function as with the Commissioner's core functions under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).
144. In paragraph 4 it was noted that this submission is provided by Ms Zita Antonios in her capacity as the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner. Ms Antonios has acted in this capacity since the completion of Mr Michael Dodson's five year term on 22 January 1998. On 3 March 1999 the federal government announced a permanent appointment to this position. This announcement is warmly welcomed by HREOC. At this stage it is unclear what effect this appointment may have on the proposed restructure of the Commission and the abolition of specialist Commissioner positions.