REPORT

OF THE

SELECT COMMITTEE ON NATIVE TITLE

Presented by the Hon Tom Stephens MLC (Chairman)

Report

SELECT COMMITTEE ON NATIVE TITLE RIGHTS IN WESTERN AUSTRALIA

Date first appointed:

1 December 1998

Terms of Reference:

That:

(1) A select committee of 7 members, a majority of whom constitute a quorum, be appointed to inquire into and report on any bill or bills referred to it in this session that proposes or propose to enact law under, or in reliance on, the *Native Title Act 1993* of the Commonwealth.

(2) The committee have power to send for persons, papers, and records.

(3) The proceedings of the committee during the hearing of evidence be open to accredited representatives of the news media and the public.

(4) The committee report a bill to the House on a date [if any] specified in the motion referring it and in any event not later than Thursday December 10 1998.

Members at the time of this inquiry:

Hon Tom Stephens MLC (Chairman)
Hon Helen Hodgson MLC
Hon Barry House MLC
Hon Mark Nevill MLC
Hon Murray Nixon MLC
Hon Greg Smith MLC
Hon Giz Watson MLC

Staff at the time of this inquiry:

Michael Smyth, Advisory/Research Officer
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ISBN 0 7309 8918 6

Table of Contents

CHRONOLOGY

31 October 1975	*Racial Discrimination Act* came into operation.
8 December 1988	Decision by the High Court in *Mabo v Queensland (No 1).*
3 June 1992	Decision by the High Court in *Mabo v Queensland (No 2).*
2 December 1993	The Western Australian *Land (Titles & Traditional Usage) Act* came into operation
1 January 1994	Commonwealth *Native Title Act* came into operation.
16 March 1995	Decision by the High Court in *Western Australia v Commonwealth.*
23 December 1996	Decision by the High Court in *The Wik Peoples v The State of Queensland.*
8 May 1997	Federal Government's 10 Point Plan released.
16 September 1997	Establishment of Select Committee on Native Title Rights in Western Australia
8 July 1998	Amendments to the *Native Title Act* pass the Senate.
27 July 1998	Royal assent to the amendments to the *Native Title Act*.
30 September 1998	Amendments to the *Native Title Act* came into operation.
14 October 1998	*Titles Validation Amendment Bill 1998, Native Title (State Provisions) Bill 1998* and *Acts Amendment (Land Administration, Mining and Petroleum) Bill 1998* introduced into the Legislative Assembly.
10 November 1998	Tabling of Report of the Select Committee on Native Title Rights in Western Australia.
17 November 1998	*Titles Validation Amendment Bill 1998* introduced into the Legislative Council.
24 November 1998	Decision of the Federal Court in *Ben Ward & Ors v State of Western Australia & Ors* ("the Miriuwung Gajerrong Peoples Case")
1 December 1998	Establishment of Select Committee on Native Title Rights.

1 December 1998	Introduction of *Native Title (State Provisions) Bill 1998* and *Acts Amendment (Land Administration, Mining and Petroleum) Bill 1998* into the Legislative Council and referral of *Titles Validation Amendment Bill 1998* to the Select Committee.
2 December 1998	*Native Title (State Provisions) Bill 1998* and *Acts Amendment (Land Administration, Mining and Petroleum) Bill 1998* referred to the Select Committee.
10 December 1998	Tabling of Report of the Select Committee on Native Title Rights.

1. Introduction

On 1 December 1998 the Legislative Council appointed the Select Committee on Native Title ("**Committee**"). The Committee's term of reference is to inquire into and report on any bill or bills referred to it in this session that proposes or propose to enact law under, or in reliance on, the *Native Title Act 1993* of the Commonwealth.

On 17 November 1998 the *Titles Validation Amendment Bill 1998* was received from the Legislative Assembly and on motion of the Leader of the House, the bill was read a first and second time. On 1 December 1998 the bill was referred to the Committee.

On 1 December 1998 both the *Native Title (State Provisions) Bill 1998* and *Acts Amendment (Land Administration, Mining and Petroleum) Bill 1998* were received from the Legislative Assembly and on motion of the Leader of the House, the bills were read a first and second time. On 2 December 1998 the bills were referred to the Committee.

The work of this Committee follows close upon the detailed report of an earlier Select Committee on Native Title presented to the Legislative Council in 10 November 1998. That report represents a very important backdrop to consideration of the legislation that is before this Committee:

- *Titles Validation Amendment Bill 1998*
- *Native Title (State Provisions) Bill 1998*
- *Acts Amendment (Land Administration, Mining and Petroleum) Bill 1998*

Each of these Bills has been drafted in response to the amendments made to the Federal *Native Title Act* and passed earlier this year. They each deal with the application of native title in Western Australia. This backdrop of the Legislative Council's First Select Committee report needs to be again noted.

2. Public hearings

The Committee resolved to contact representatives of Government involved in formulating the bills, legal practitioners with expertise in the areas of law covered by the bills and representative bodies considered to be those significantly affected by the bills. Each of the parties were invited to attend before the Committee and provide comments on each of the bills. In addition, the Committee sought the views of each party regarding the recent decision of Justice Lee in the Federal Court decision *Ben Ward & Ors v State of Western Australia & Ors*, colloquially known as the "Miriuwung Gajerrong Peoples Case", which was handed down on 24 November 1998.

Due to the time constraint given in reporting to the House, the Committee is conscious of the fact that it has not had an opportunity to hear from all of those parties directly affected by the passage of the bills.

On 2 December 1998 the Committee heard evidence from the following:

- Mr John Clarke, Consultant to the Native Title Unit, Ministry of the Premier and Cabinet;
- Ms Vera Novak, Assistant Director General, Ministry of the Premier and Cabinet;
- Mr Jeffrey O'Halloran, Senior Assistant Crown Solicitor, Crown Solicitor's Office; and
- Ms Kathleen Glancy, Assistant Crown Solicitor, Land Claims Unit, Crown Solicitor's Office.

On 4 December 1998 the Committee heard evidence from the following:

- Mr Patrick Dodson, Member, Western Australian Native Title Working Group (evidence via video link from Broome);
- Mr Ian Satchwell, Chief Executive Officer, Chamber of Minerals and Energy;
- Ms Tanya Heaslip, Executive Officer - Aboriginal Affairs, Chamber of Minerals and Energy;
- Mr Peter Clough, Executive Officer, Chamber of Minerals and Energy;
- Mr Geoffrey Gishubl, Legal Adviser to the Chamber of Minerals and Energy, Partner, Jackson McDonald;
- Mr Guy Leyland, Executive Officer, Western Australian Fishing Industry Council;
- Mr Peter van Hattem, Partner, Freehill Hollingdale & Page, Legal Adviser to the Western Australian Fishing Industry Council;
- Miss Bronwyn Harries, Managing Director, Cape Seafarms Pty Ltd, Director, Aquaculture Council of Western Australia;
- Mr Niegel Grazia, Director (Western Australia), Australian Petroleum Production and Exploration Associated Limited;

- Mr Christopher Stevenson, Partner, Mallesons Stephen Jaques, Member of the Law Society of Western Australia Native Title Procedures Committee, Member of the Australian Mining and Petroleum Law Association;
- Mr George Savell, Chief Executive, Association of Mining and Exploration Companies;
- Ms Tamara Stevens, Assistant Director, Association of Mining and Exploration Companies;
- Mr David Harley, Vice President, Association of Mining and Exploration Companies;
- Mr Tom Birch, Chairman, Kimberley Land Council;
- Mr John Hoare, Executive Director, Noongar Land Council;
- Mr Preston Neil Thomas, ATSIC Commissioner, South East Zone;
- Mr Michael O'Donnell, Western Australian Native Title Working Group;
- Mr Glenn Shaw, Aboriginal Legal Service of Western Australia (Inc.);
- Mr Gregory McIntyre, Legal Coordinator, Western Australian Native Title Working Group;
- Ms Carolyn Tan, Partner, Dwyer Durack, Acting Chair, Anglican Social Responsibilities Commission, Member of the Law Society of Western Australia Native Title Procedures Committee;
- Mr Barry Court, President, Pastoralists and Graziers Association of Western Australia;
- Mr John Clapin, Chairman, Native Title Committee, Pastoralists and Graziers Association of Western Australia;
- Mr Geoffrey Gishubl, Partner, Jackson McDonald, Legal Adviser to Pastoralists and Graziers Association of Western Australia;
- Mr Dan MacKinnon, Vice-Chairman, Native Title Committee, Pastoralists and Graziers Association of Western Australia;
- Dr Henry Esbenshade, Director, Land Use and Native Title, Pastoralists and Graziers Association of Western Australia;
- Mr Graham Castledine, Solicitor, Minter Ellison;

- Mr Kevin McMenemy, General President, Western Australian Farmers Federation;
- Ms Rochelle Reynolds, Legal Officer, Western Australian Farmers Federation;
- Ms Anne Sheehan, Barrister, Wickham Chambers;
- Mr Michael Barker, Queens Counsel, Independent Bar;
- Professor Richard Bartlett, Professor of Law, University of Western Australia; and
- Ms Catherine Hobbs, Consultant, Catherine Hobbs Contract Management.

On 7 December 1998 the Committee heard evidence from the following:

- Ms Christabel Chamarette, Committee member, Australians for Native Title and Reconciliation, former Senator for Western Australia;
- Mrs Joan Lever, Committee member, Australians for Native Title and Reconciliation;
- Ms Nina Boydell, Secretary of Australians for Native Title and Reconciliation;
- Mr Christopher Williams; and
- Mr Morton Hansen, Deputy Chairperson, Perth Metropolitan Noongar Commission of Elders.

All witnesses were heard in public and copies of all transcripts of evidence will be accessible via the Parliament of Western Australia internet site: www.parliament.wa.gov

3. Relevant history

Native title has only relatively recently been recognised as existing at all in Australia. Prior to the decision of the High Court in *Mabo v Queensland (No. 2)* in 1992 Australia was regarded as having been *terra nullius* when first European settlement occurred.

In *Mabo v Queensland (No. 2)* the High Court held that the common law in Australia recognises that native title to land held by indigenous people survived the acquisition of sovereignty by the Crown over its Australian colonies. Explicit in the court's

recognition of common law native title was the rejection of the legal fiction of *terra nullius*, that before white settlement Australia was land that belonged to no-one.

It is important to acknowledge that in doing so, the High Court was not inventing these rights but recognising that they had existed in Australia prior to European settlement, and that in some places they still existed.

As part of his rationale for acknowledging the existence of native title, Justice Brennan stated that:

> The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterising the indigenous inhabitants of the Australian colonies as people too low in the scale of social organisations to be acknowledged as possessing rights and interests in land.[1]

These rights have come to be known as native title and they reflect the entitlement of Australia's indigenous inhabitants to their traditional lands in accordance with their laws and customs. The nature of the native title interests therefore depended on the traditional laws and customs of the Aboriginal groups. These interests in land may range from rights of access to land to rights of exclusive possession. Native title, what it is, its impact and its future is summed up by Justice Robert French, President of the National Native Title Tribunal:

> Native title is a property right recognised at common law. It is here to stay. As the Tribunal's audit of agreement shows, there are many people who recognise this fact and are attempting to negotiate properly with indigenous Australians. Native title, rather than being perceived as a threat, should be looked upon as an opportunity to address the fundamental relationship between indigenous and non-indigenous Australian as that is the only path to the certainty and mutual recognition of rights that all parties seek.[2]

Native title was found capable of extinguishment in certain circumstances such as by legislation, inconsistent Crown grant, reservation and use by the Crown for an inconsistent purpose or failure to maintain traditional laws and customs in relation to the land. It was held that Parliament or the Executive can only extinguish native title where it has demonstrated a clear and plain intention to do so.

In *Mabo v Queensland (No. 1)* the High Court had held that a State legislative attempt to extinguish any native title which indigenous persons may have held in the Murray Islands, but not other property rights held by non-indigenous people, was a breach of the *Racial Discrimination Act 1975* (Cwth).

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1 Mabo and Others V. Queensland (No. 2) (1992) 175 CLR 1, 58

2 National Native Title Tribunal media release dated 11 September 1998

A possible consequence of the decision in *Mabo (No. 2)* was doubt about the legal validity of freehold and other land grants made by State Governments under State legislation since 1975. The grants may have completely or partially extinguished native title rights, without affording native title holders procedural and compensation rights in contravention of the protections guaranteed by the *Racial Discrimination Act 1975*.

The Commonwealth Government's response to *Mabo (No 2)* was to enact the *Native Title Act 1993* (Cwth), which, among other things, allowed States to legislate to validate the doubtful land grants. Validation might in some cases have led to extinguishment of native title, either completely or to the extent of the inconsistency of the native title rights with the statutory title validated. The Act provided for payment of compensation for any such extinguishment. The Act permitted the validation of all grants made prior to the *Native Title Act*'s commencement date, being 1 January 1994.

In drafting the *Native Title Act*, the Commonwealth Government agreed to a process with indigenous people by which they would trade off what had occurred in the past for a say as to what happened in the future. Indigenous people made concessions in terms of their substantive rights in return for procedural rights which were contained in the *Native Title Act*. The Act gave certainty to all holders of post-European settlement titles by validating all titles, including those issued after 1975 that were clearly inconsistent with the *Racial Discrimination Act 1975*. The procedural rights included the statutory procedures for the extinguishment of native title, simplified mechanisms for providing native title as well as a "right to negotiate" process.

The Government of Western Australia challenged the validity of the *Native Title Act* and, alternatively, its application in that State. At the same time, the Wororra, Yawuru and Matu Peoples challenged the validity of the *Land (Titles and Traditional Usage) Act 1993* (WA). The *Land (Titles and Traditional Usage) Act 1993* purported to extinguish any surviving native title in Western Australia and replace it with more limited statutory rights to traditional usage of land.

On 16 March 1995 the High Court handed down its decision in *Western Australia v Commonwealth*. With the exception of one section, which the court held could be severed from the rest of the Act without affecting the validity of the remaining provisions, the High Court unanimously found the *Native Title Act 1993* to be a valid exercise of the Commonwealth's race power. The High Court held that the *Land (Titles and Traditional Usage) Act 1993* was inconsistent with the *Racial Discrimination Act 1975* and the *Native Title Act 1993* and thus inoperative by virtue of section 109 of the Constitution.

Between 1 January 1994 and 16 March 1995 the Western Australian Government granted interests pursuant to the *Land (Titles and Traditional Usage) Act 1993*. In

this period 4,934 mining and 4,494 land interests, including creation and amendment of reserves and disposal, dedication and resumption of roads, were finalised.[3]

The *Native Title Act* did not deal with the relationship of a validly granted pastoral lease and native title. The assumption of the Commonwealth and State governments was that a pastoral lease granted exclusive possession to the lessee and hence was inconsistent with continuing native title rights over the same land. The Commonwealth Government's view on the matter sufficiently appears from the then Prime Minister's Second Reading Speech when introducing the *Native Title Bill 1993*. He said:

> "The government's view [is that] ... under the common law, past valid freehold and leasehold grants extinguish native title. There is therefore no obstacle or hindrance to the renewal of pastoral leases in the future ..."

From 16 March 1995, the Western Australian Government substantially complied with the *Native Title Act 1993*[4] and generally elected to follow the "right to negotiate" procedures under the Act where interests or tenements granted were over pastoral leases notwithstanding the belief, articulated above, that leasehold grants extinguish native title.

On 23 December 1996 the High Court handed down its decision in *Wik Peoples v Queensland* finding that at least some Queensland pastoral leases were of such a nature that they would not necessarily have extinguished native title when granted. Native title, if it survived, would co-exist with the pastoral lessee's rights, although giving way to them to the extent that there was any conflict between the two.

The four judges who comprised the majority examined the Land Acts and the pastoral leases issued under the Acts in the context of the history of land law and settlement in Australia. They also stressed, following *Mabo (No. 1)* and *Mabo (No. 2)*, that general words in a statute should not be presumed to extinguish native title without clear and plain intention.

As a result, they concluded that undue emphasis should not be placed on notions of leasehold known to the English common law (such as an automatic right of exclusive possession). Rather, pastoral leases should be seen as creatures of statutes designed for uniquely Australian conditions - taking into account factors such as the often vast tracts of land available for individual pastoral operations, official knowledge that much of this land was occupied by Indigenous people, the degree to which third parties were given rights to enter upon the same land and the Crown's unwillingness to grant freehold over such large areas.

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3 Information provided by Mr John Clarke, Native Title Unit in the Department of Premier and Cabinet

4 There are 7 projects involving 211 titles issued after 16 March 1995 where the provisions of the *Native Title Act* were not complied with.

These considerations combined with close statutory interpretation led the majority to conclude that the lease in question did not confer exclusive possession on the lessees. Therefore, there was no necessary extinguishment of native title.

The majority left open the question of whether native title might revive after an inconsistent title to land issued under statute has expired stating:

> "To say that the pastoral leases in question did not confer rights of exclusive possession on the grantees is in no way destructive of the title of those grantees. It is to recognise that the rights and obligations of each grantee depend upon the terms of the grant of the pastoral lease and upon the statute which authorised it."[5]

The judges in the minority also treated the case as primarily one of statutory construction and focussed on the wording of the Land Acts and the leases granted under them in terms of the English common law definition of a leasehold interest concluding that, as Parliament had used the terminology of leasehold interests in the creation of the statutory interest, the pastoral leases included a right of exclusive possession which was inconsistent with the continued existence of native title rights.

The *Wik* decision produced considerable controversy and debate raising two key issues; the coexistence of native title existing on pastoral leases and the consequence of States granting renewals of pastoral leases, and other interests in relation to pastoral land, without regard to the procedures which the *Native Title Act 1993* applied to dealings involving land subject to native title.

The second issue referred to above relates to the validity of some post-1993 titles issued by governments. Unless covered by the "past acts" regime contained within the *Native Title Act*, or other limited exceptions, government grants and actions after 1 January 1994 which affect native title are "future acts." The *Native Title Act* sets out procedures which must be followed in relation to "future acts" which may invoke the "right to negotiate" regimes contained in the *Native Title Act*, for example in relation to mining tenements.

The Commonwealth Government's response to *Wik* was the Ten Point Plan which was subsequently reproduced in the Explanatory Memorandum to the *Native Title Amendment Bill 1997*. The Ten Point Plan provides the framework for the Commonwealth Government's legislative response to *Wik*. After a difficult passage through the Commonwealth Parliament the *Native Title Amendment Act 1997*, the statutory expression of the Ten Point Plan, was passed by the Senate on 8 July 1998 and its provisions came into operation on 30 September 1998. Included within these were changes to the threshold test by which native title interests could be registered. The pre-existing lower threshold test was generally recognised as causing delays in the federal native title process.

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5 *Wik Peoples v Queensland* (1996) 141 ALR 129 at 190

The *Native Title Amendment Act 1998* provides for validation of "intermediate period acts" by the Commonwealth which took place between 1 January 1994 and 23 December 1996, the period between the coming into operation of the *Native Title Act 1993* and the *Wik* decision, when it was considered that the grant of pastoral leases extinguished native title.

The Commonwealth Attorney-General, in his Second Reading Speech on 4 September 1997 when introducing the bill, said:

> "As I have said, the effect of the grant of a pastoral lease on native title was not specifically resolved by the High Court in *Mabo* nor by the *Native Title Act*. The previous government assumed that pastoral leases had extinguished native title. As a result of the *Wik* decision, we now know that pastoral leases do not necessarily have that effect. However, the government does not accept that grants by governments, and actions by others, in particular pastoral lessees, should be left invalid because of a legitimate and reasonable assumption, subsequently found to be wrong.
>
> The appropriate remedy for those actions should be compensation for any native title affected.
>
> Thus the bill provides for the validation of so-called "intermediate period acts" over freehold and pastoral lease land and public works, which occurred between 1 January 1994, the date of commencement of the *Native Title Act*, and 23 December 1996, the date of the *Wik* decision, which might otherwise have been invalid as a consequence of the existence of native title."

Division 2A of the *Native Title Act* as amended permits, but does not require, the States to legislate to validate "intermediate period acts" performed by them under the State legislation, on the same terms as the Commonwealth Act permits validation of Commonwealth "intermediate period acts."

The *Native Title Amendment Act 1997* also provides for "confirmation" that various types of grants and other activities of the Commonwealth in relation to land extinguish native title, either completely or partially.

In the words of the Commonwealth Attorney-General taken from his Second Reading Speech on 4 September 1997 on introducing the bill:

> "This government's policy is to bring a much greater level of certainty to bear in relation to native title issues, in particular in relation to the circumstances where it can be reasonably said that native title does not exist. To do so we have chosen to confirm explicitly in the *Native Title Act* the extinguishment of native title by certain grants or activities by governments.

> It needs to be clearly understood that the government does not seek to extinguish native title in this process. We do not seek to go beyond what can be inferred from the decisions of the High Court as to what acts have already extinguished native title.
>
> As I have already made plain, the government respects, and will continue to respect, the *Mabo* and *Wik* decisions and the native title rights of indigenous Australians. But it is in the interests of all Australians to be clear and certain about where extinguishment has already occurred. The resolution of native title issues will be made even more difficult by unrealistic expectations on the part of claimants or by unnecessary uncertainty for others with interests in land.
>
> Accordingly, the bill provides that certain "previous exclusive possession acts" have extinguished native title. They include the grant of a freehold estate, leases for residential, commercial or community purposes and interests included in a schedule to the act. The bill provides that states and territories are able to confirm that such grants extinguish native title.
>
> The bill is intended to introduce further certainty by confirming the effect of the grant of pastoral leases on native title. Consistent with the High Court's view, states and territories are able to confirm that the grant of such leases is confirmed to extinguish native title to the extent that the native title rights are inconsistent with those of the pastoralist.
>
> The bill provides that such extinguishment is permanent. The government recognises that the permanency issue was left unresolved by some members of the High Court in the *Wik* decision. However, it is a central element of the government's approach to amending the act to put an end to such uncertainty.
>
> To the extent that the provisions confirm the common law there will be no effect on native title rights. But if there is any actual extinguishment by the provisions, the legislation will provide for compensation on just terms."

Division 2B of the *Native Title Act* as amended allows the States and Territories to legislate to declare the extinguishment of native title in respect of their dealings under State legislation. Section 23A(4) of Division 2B of the *Native Title Act* reads:

> "This Division also allows States and Territories to legislate, in respect of certain acts attributable to them, to extinguish native title in the same way as is done under this Division for Commonwealth acts."

4. Opposition to the Bills

Before turning to an examination of the details of each Bill, the Committee wishes to place on record the comments of those witnesses who expressed grave concerns at the prospect of permanent extinguishment of native title by the passage of these Bills, particularly in light of the *Miriuwung Gajerrong* decision of Justice Lee which countenanced the revival of native title interests in certain circumstances.

Evidence given to the Committee by Mr Patrick Dodson, member of the Western Australian Native Title Working Group via video conference facilities:

> " I thank the committee for applying this technology to enable someone like me who lives in the north of the State to appear before it. It is a form of advancement that perhaps in future we should take more opportunity to use. I also appreciate that this committee has a very short life and therefore there will be many indigenous people as well as other Western Australians who may not have the opportunity to put their views to it. My comments come from the position I hold on the Western Australian native title working group. The primary position of that group is one of Opposition to the three Bills; that is, the Validations Amendment Bill. The Native Title (State Provisions) Bill and the Acts Amendment (Land Administration Mining and Petroleum) Bill. These Bills are opposed because they extinguish native title. They seriously erode and diminish native title holders' rights in an unjust and discriminatory manner. We therefore call upon the committee to recommend that these Bills be put aside and negotiations take place between the Government an the indigenous people of Western Australia. Just and certain outcomes can never be achieved in this debate while the most important players, the indigenous Western Australians, are left to the side and have their ancient rights seriously diminished and, in some cases, extinguished.
>
> The Government should adopt the approach recommended in the report of the Select Committee on Native Title of the Legislative Council which recommended that the State should be guided by the Canadian Comprehensive Agreements model that the State provide administrative and mediation support for agreement negotiations.
>
> The *Miriuwung-Gajerrong* case shows how strong native title is in Western Australia. There are many other groups in this State, and certainly in the Kimberley, that will be successful in their native title claim. Already it seems to me a centre pillar of the 10-point plan under which the legislation has fallen; that is, the confirmation of extinguishment. The court tells us that part 2B of the validations Bill is actual and deliberately extinguishment. We were told, and I think most of Australia understood and were told by the Government and many other people, that the schedule is really about confirming already extinguished native title. We have here a deliberate approach that is, discriminatory and that is aimed at deliberately and actually extinguishing native title. To press ahead with that activity to me

is unconscionable and in those circumstances will only lead to further court challenges to that Bill if it becomes an Act.

If the Government negotiates in good faith on the basis of recognising native title rights we can achieve good outcomes. If the Government continues to seek to extinguish native title there will only be further uncertainty and injustice.

The State should contemplate seriously the damage and harm it will cause to indigenous people through what I consider is a shortsighted approach to extinguishing native title. The extinguishment concept and the message it delivers is very clear to indigenous people. It seems that government is saying to the indigenous people through this notion of extinguishment, that indigenous people have never had any connection to the country over which that extinguishment is to apply. Although I understand that has a legal interpretation, I am asking you to contemplate this in a broader context in the history of our relationships in this country. The Government is attempting to restate in another way the odious connotations that were part of that offensive concept of terra nullius that so readily affected the relationships between indigenous and non-indigenous people in the past 100 years.

We must look at a different paradigm - one based on some form of recognition, whether that be symbolic of the ownership, presence, occupation and relationship of indigenous people to the land and some way that ownership could be recognised and revesting of lands could take place, as we do in many other areas of Australia and where there is some way in which the indigenous people's sense of ownership and belonging is not put asunder by the concept of extinguishment."

The Chairman of the Kimberley Land Council, Mr Birch gave the following evidence:

"Aboriginal people in the Kimberley do not want to go to court. We want to talk and negotiate agreements. More and more industry also wants to do this. However, agreement can only be successful through goodwill on the part of all people involved. Governments cannot legislate for coexistence, but they can provide a legal framework which encourages stakeholders to talk in a spirit of goodwill to reach agreement. The State Government's native title Bills undermine the goodwill which exists in places like the Kimberley. These Bills extinguish our native title rights in many places, and cut back our ability to negotiate with people who want to use our lands. The Bills will take away our right to negotiate on pastoral leases. This is wrong. My traditional country is on an Aboriginal reserve, and we call that land Balanggarra. We have been able to negotiate a very good agreement with a mining company because of the right to negotiate. Not very far

away, Aboriginal people whose land is on a pastoral lease will not have this right. It is just an accident that these boundaries are there. This is traditional country for Aboriginal people. We do not divide our country between Aboriginal reserves, pastoral leases, national parks and so on. We have native title, and we should have the right to negotiate. The Government treats our property rights with contempt, while at the same time it validates other people's titles issued illegally. The consequence of this legislation is that it will force us to go to court to keep from us the right to be robbed. We will have no other choice. If the Government want certainty - that is what Aboriginal people want as well - it should withdraw the Bills and set up a legal framework which encourages agreement."

Mr Morton Hansen, Deputy Chairperson, Perth Metropolitan Noongar Commission of Elders gave the following evidence:

"I thank the committee for allowing us to put something forward. I have not done this before. The following is a statement from the commission of Aboriginal elders -

OPPOSITION TO THE TITLES VALIDATION BILL, THE NATIVE TITLE (STATE PROVISIONS) BILL AND THE ACTS AMENDMENT (LAND ADMINISTRATION, MINING AND PETROLEUM) BILL.

We, the Perth Metropolitan Noongar Commission of Elders would like to voice our strongest protest to NO consultation with us on the Titles Validation Bill by the WA State Government.

We would also like to remind the State Government that, amongst other regional Commission of Elders in this state, the Perth Metropolitan Noongar Commission was initiated and established by the Court Government as the official forum for consultation on issues affecting Aboriginal people.

We unanimously resolved:

1. to support Greens' motion to establish a select Committee to examine the Titles Validation Bill, the Native Title (State Provisions) Bill and the Acts Amendment (Land Administration, Mining and Petroleum) Bill;

2. to support the Greens' motion of seeking an extension of back date of the Report of Select Committee on the Titles Validation Bill;

3. to support the Greens' motion of seeking the select Committee to take evidence in a public hearing on Friday 4th December 1998 and;

4. to oppose the passage of the Titles and Validation Bill, the Native Title (State Provisions) Bill and the Acts Amendment (Land Administration, Mining and Petroleum) Bill.

It is signed by the chairperson, Norm Harris, on behalf of Perth Metropolitan Noongar Commission of Elders. We believe that passing the Bill will take away our given rights to negotiation, especially our Noongar rights. We ask that our right to negotiate on lands pertaining to our Noongar people be reserved. As the statement says, in the past the Perth Metropolitan Commission of Elders has not had any negotiations about our titles and rights."

The Committee received a written submission from the Western Australian Aboriginal Native Title Working Group which stated in part:

"The issue of native title has been submerged in an emotional debate because of the ideological position of the State Government which refuses to recognise the property rights of indigenous Western Australians.

The resolution of native title should not be seen as a divisive and difficult question. [Parliament] must appreciate what the notion of extinguishment means to Aboriginal people. It means the Parliament of WA, at the stroke of a pen, takes away our rights to country and our culture that we have had since time immemorial. The notion of extinguishment is an assault against us as a distinct people of this State. Extinguishment should only occur with the consent of the native title holders.

The native title rights found in the *Miriuwung Gajerrong* judgement emphasise the importance of negotiated agreements which we believe are the only way to provide certainty for all parties involved."

5. Consideration of the Bills

5.1 *Titles Validation Amendment Bill 1998*

According to the Second Reading Speech:

"The purpose of this Bill is to validate certain titles to land and waters in Western Australia which were granted in what is now termed "the intermediate period" and to confirm the effect on native title of previous land grants and public works.

The intermediate period operated from 1 January 1994 to 23 December 1996 when the High Court handed down the *Wik* decision. During that time, many State Governments granted titles over pastoral leasehold land

without complying with the requirements of the *Native Title Act* because it was believed that pastoral leases extinguished native title.

When the *Wik* decision was handed down it became apparent that pastoral leases did not necessarily extinguish native title.

This meant that some of the grants issued during "the intermediate period" could potentially be invalid if they affected native title. The Federal Parliament has now passed legislation which allows for the validation of all the grants done during that period which were affected by freehold, current or historical leasehold (not including mining leases) or public works.

The amendments to the *Native Title Act* provide that the validation of these intermediate period acts is done by States in the same way that the *Native Title Act* of 1993 allowed for the validation of past acts done prior to the implementation of that Act. The Parliament passed the *Titles Validation Act* in 1995 in response to the *Native Title Act 1993*. We now seek to amend the State Act to incorporate the Federal changes.

Although it is not apparent that any of the titles issued in Western Australia are invalid, we seek to provide maximum certainty, as was done previously, to those people to whom titles were granted, by passing this legislation."[6]

The Explanatory Notes which accompanied the introduction of the bill provide further details as to the purpose of the Bill, in particular the explanation of Parts 2A and 2B of the Bill:

"**Part 2A - Validation of intermediate period acts**

New Part 2A is required as a result of the decision of the High Court in *Wik v Queensland* 1996, 141 ALR, 129 which created uncertainty about the validity of some government acts, public works and grants of land and mining titles that occurred between 1 January 1994, when the *Native Title Act 1993* came into operation, and 23 December 1996, when the *Wik* decision was handed down.

This uncertainty arose because of the widely held belief that native title had been extinguished on land in relation to which pastoral leases had been granted. As a result, many State Governments had proceeded to issue titles on land that was the subject of current or historical pastoral leases on the basis that native title had been extinguished.

The *Wik* decision contradicted the commonly held view that pastoral leases extinguish native title. The decision found that native title could co-exist

6 Hon Norman Moore MLC, Leader of the House, *Hansard*, 17 November 1998

with pastoral interests. This meant that the future act provisions of the *Native Title Act* should apply to all future acts where there was current or historical pastoral leases.

The result is that if acts have been done in relation to pastoral leasehold land without complying with the *Native Title Act* requirements and affected native title, they could be invalid.

Although it is not apparent that any titles issued by the Crown in Western Australia are invalid because of any native title which may exist, it is considered necessary to validate titles granted in the intermediate period. The Commonwealth Government recognised the need to provide certainty in the amendments to the *Native Title Act* and have put in place provisions which confirm the validity of titles issued by the Commonwealth and allow States to do the same.

Section 22A - 22EA of the amended *Native Title Act* validate any actions of the Commonwealth in the "intermediate period" where the act was on land which was freehold, leasehold (other than a mining lease) or a public work. There is an entitlement to compensation and a requirement for the Crown to notify native title parties about validated mining titles issued in the intermediate period.

Section 22F - 22H of the amended *Native Title Act* allow the States to validate grants on the same basis as the Commonwealth. The State's validating provisions must reflect sections 22B and 22C of the amended *Native Title Act* and provide for compensation to be payable in accordance with section 22F.

The new Part 2A has been introduced to effect the validation of any intermediate period acts attributable to the State. The Bill amends the *Titles Validation Act 1995* which was passed to validate acts done prior to introduction of the *Native Title Act* which may have been invalid because of native title."[7]

"**Part 2B - Confirmation of past extinguishment of native title by certain valid or validated acts**

The original *Native Title Act* left the issue of extinguishment of native title to be decided at common law. This resulted in significant uncertainty for both native title claimants and those with non-native title interests in land.

The amended *Native Title Act* dealt with this uncertainty by providing for the confirmation of extinguishment by certain acts. The effect is that

[7] *Titles Validation Amendment Bill 1998*, Explanatory Notes

exclusive tenures, such as freehold and residential leases, extinguish native title. Non-exclusive agricultural and pastoral leases extinguish native title to the extent of any inconsistency.

Previous exclusive possession acts (being those acts which are considered to permit exclusive possession of the area to the person who has an interest in the area arising from the act) have the effect of extinguishing any native title. The extinguishing is taken to have happened when the grant or vesting occurred.

A copy of the Scheduled interests provided for by the *Native Title Act* is attached in Appendix Two."[8]

"**Part 2C - Validation of future acts by agreement**

New Part 2C allows parties to an Indigenous Land Use Agreement (ILUA) to reach an agreement about the validation of a future act that may have already been done invalidly.

This new clause allows future acts to be validated by Indigenous Land Use Agreements if the conditions in s. 24EBA of the amended *Native Title Act* are satisfied.

The conditions to be satisfied under the *Native Title Act* are that the parties must agree to the validation of the future acts (which may be subject to conditions), the Government responsible for the doing of the act must be a party to the agreement and any person liable to pay compensation must be a party to the agreement.

The clause may apply to acts done prior to the commencement of the amended *Native Title Act* or to acts which occur at any time in the future."[9]

There is a need for certainty for people to whom titles have been issued. However, there has not been evidence presented to the Committee to confirm the statement in the Second Reading Speech that this Bill "... is essential to provide certainty to the thousands of individuals and developers who were granted titles in that period."[10] Mr John Clarke, the consultant to the Native Title Unit in the Ministry of Premier and Cabinet, in response to Select Committee questions as to the urgency of *TVAB* said:

"I think there is some sort of misunderstanding. The titles validation legislation is important... but I think the Government's overall statements

8 *Titles Validation Amendment Bill 1998*, Explanatory Notes

9 *Titles Validation Amendment Bill 1998*, Explanatory Notes

10 Hon Norman Moore - Hansard 17 November 1998 - p3484

> about the urgency of the legislation actually relate to the State Provisions Bill because of the very long lead time that is involved in gaining Commonwealth approval for that and so the longer it is delayed the longer it takes before the Commission can be up and running and dealing with it. So validation is extremely important because of the possibility of litigation occurring on some of those titles but it is really the other one that had the real time limit"[11]

Figures provided by the Government indicate that approximately 10,000 interests were granted by the Office of Traditional Land Use while it was in existence. Mr John Clarke gave the following evidence to the Committee in relation to these interests:

> "The probability is that somewhere in there there might be an invalid title but there is no suggestion that there is 10,000 invalid titles. The great bulk of them because they involve freehold land are perfectly valid but the validation legislation is umbrella legislation to cover the effect without having to identify or find what is invalid."

Mr John Clarke tabled for the Committee the complete list of all interests granted. The Committee has been unable to determine precisely how many of the interests granted did not involve freehold land and accordingly, might affect native title rights. To the extent that interests were granted which did affect native title rights, these grants were not made in accordance with the *Native Title Act*. The Committee is unable to determine from the evidence presented to it whether any of the 10,000 interests granted did affect native title . Mr Clarkes evidence is that there are in all probability invalid titles within the 10,000 interests granted. It is then a separate issue to consider whether the interests invalidly granted affect native title as this would require an assessment of the nature of the interest granted.

However, the Committee notes that as a matter of statutory drafting, validating legislation such as the *Titles Validation Amendment Bill 1998* must:

- identify the nature and extent of the actions and omissions which have produced the illegality that is to be cured;
- identify the extent of the illegality caused by those actions and omissions; and
- identify what acts and omissions have taken place after and in consequence of the invalidity.

To the extent that witnesses in evidence to the Committee have been unable to address this concern, it is a reasonable conclusion that, in the absence of advice to

[11] Hansard (uncorrected) John Clarke Evidence - Select Committee - 2 December 1998 - p.18

the contrary, some native title interests may have been affected by the grant of the 10,000 interests granted.

The *TVAB* does not only validate acts carried out in the intermediate period, it sets out to confirm the extinguishment of native title by past acts where this has already taken place at common law. The extinguishment of native title through the adoption of the Scheduled Interests, which are set out as a Schedule to the Federal *Native Title Act*, takes the Bill from being a validation Bill to also being an extinguishment Bill. Such extinguishment, as evidenced by the decision of Lee J in the *Miriuwung-Gajerrong* decision[12], goes beyond the common law. Effectively, this judgement confirms that *Titles Validation Act 1995* extinguished native title in circumstances where the common law did not. This suggests that a cautious approach be taken as to the effect of the *Titles Validation Amendment Bill 1998*.

The legislation specifically provides that compensation will be payable where Native Title is found to exist, and is extinguished.

The potential liability for compensation imposed on the State in accordance with these provisions cannot be quantified. There is no Australian judicial precedent to establish how to calculate the value of Native Title.

Compensation payable by the Federal Government must be paid "on just terms". As complementary legislation the State legislation provides for compensation to be paid in identical terms in the *Native Title Act*.

If the extent of extinguishment under the Titles Validation Amendment Bill 1998 is more comprehensive than the understanding at the time the Bill was introduced, and Native Title is extinguished where the common law would find that it still exists, then the State is potentially exposed to a liability on that land.

The committee finds that the State is exposed to a compensation liability that cannot be quantified.

5.1.1 Evidence from witnesses

The Committee heard the following evidence:

Mr Savell, Chief Executive of the Association of Mining and Exploration Companies gave the following evidence**:**

> "We have noted the debate that has taken place in Parliament. When referring to the Titles Validation Amendment Bill, we must look at that in

[12] *Ben Ward & Ors v State of Western Australia & Ors* [1998] 1478 FCA (24 November 1998)

the context of what we said earlier. We are looking for the Government to validate titles which we accepted in good faith and which we believe they offered in good faith. If a technical flaw is brought on by court judgments or federal Acts, that they must be addressed. It is a question now of: Is it in good faith or is it not? Do we accept a title anywhere or do we not? If we do accept titles and we cannot do the job, that will drive us further offshore because we can obtain titles, certainty and contracts from other governments. Many countries which Australia would say are underdeveloped and unsophisticated, have one thing going for them; they are doing it in good faith. We accepted those titles in good faith and we expect them to be honoured.

The industry is required to operate under a large number of statutes - some federal some state. We cannot proceed unless we take each of those statutes on face value. Whether it is the Land (Titles and Traditional Usage) Act or the federal Racial Discrimination Act in the period in which that Act operated, we were forced to operate under that Act and we did. Otherwise we could not have processed the titles. Unless our advisers are giving us faulty advice, that Act was valid until it was struck down. Why would we say that the titles were no good? If a Federal Court says, "We will strike that down because we don't like the colour of the paper", we as an industry will be left hanging. That is the problem with native title. Courts are making judgments on a range of things which cut across the statutes which are passed by elected Parliaments, whether they be state or federal. We are getting into a situation in Australia, quite frankly, where no-one will be able to operate because we will not be able to trust the Government or the court. Where does that leave us - an application to the religious deities?

AMEC supports the validation of titles issued and accepted in good faith between 1 January 1994 and 23 December 1996 should any of those titles carry any technical flaw in terms of validity of issue. Validity of title is the very foundation of the industry's ability to deal with the land specified in that title. Indeed, any suggestion of invalidity or native title risk is now enough in many cases for a financial house to terminate discussions with a developer until the issue is resolved. The mining industry must have certainty of title to operate effectively and efficiently, as must other industries."

Mr John Clapin, Chairman of the Native Title Committee, Pastoralists and Graziers Association of Western Australia gave the following evidence:

"Our members seek security of tenure. That is the concern which they have always had, whether it is the pastoral members or those in the farming areas who perhaps hold perpetual war service-type leases or conditional purchase leases. In many instances, they have been moving towards the view held by Mr Justice French that we should be looking at indigenous land use

agreements. However, the continuing concerns that develop from decisions such as those in the Kimberley make the pastoralists very wary about approaching these agreements. I imagine it also would make the native title claimants concerned about them. I know we are talking specifically about the state Bills, but I mentioned that as an overview.

There is great concern in the agricultural areas that there might be some delay in validating the perpetual lease holdings that people have held for at least 30 years under the War Service Land Settlement Scheme Act which came into force after the Second World War. They had the opportunity to freehold if they were sufficiently well off. Many chose, quite rightly, to develop their farms instead of going to considerable expense to freehold that land. Those who did not follow the opportunity to freehold the land, as it stands, have been left high and dry. Conditional purchase lessees are responsible for a large percentage of the grain crop that is being harvested at the moment, particularly land in the southern area which stretches from the great southern railway line to Esperance. Many of those properties are still under conditional purchase and have not been converted to freehold. That is of grave concern to our farming members. The Pastoralists and Graziers Association considers that the federal legislation was a compromise on a compromise. The members of the association have been prepared to accept that in view of national unity and moving beyond it. We have already been battling with native title for five years and the association's view was to accept the federal legislation and the amendments to the Wik legislation. The association feels that the validation of the titles and the passing of state legislation which complies with the federal legislation, but is not in any form a watering down of that legislation, is essential for its members to be able to progress to the next stage which could be the use of indigenous land use agreements or some form of area agreement. We cannot advise our members to proceed to that until there is some finality about the bargaining positions of the claimants and the leaseholders. On technical matters with regard to the amendments, with your permission we might defer to Geoff Gishubl."

Mr Gishubl, legal adviser to Pastoralists and Graziers Association of Western Australia gave the following evidence:

"As Mr Clapin has rightly said, the primary concern of the pastoral industry is certainty and security in terms of its tenures. The Native Title Amendment Act facilitated the improvement or confirmation of not only the validity of any tenures that may have been in doubt when granted before the Wik decision but after the enactment of the Native Title Act, but also the confirmation of extinguishment by certain exclusive tenures. Those two matters are of most concern arising from the proposed opposition amendments.

> In relation to the confirmation of validity, it is essential from the perspective of pastoral and farming interests that all agricultural titles that may have been in doubt - I do not have any information indicating to what extent there are any such titles other than that there may be - be confirmed as valid. Pastoral and farming interests are not in a position, as are some other interest groups, to undertake extensive negotiations to deal with fundamental issues such as validity. It is necessary to move to confirm that security and certainty of tenure, and for that reason the Titles Validation Amendment Bill is supported by pastoral interests in its present form.
>
> The pastoral industry also supports the confirmation of the extinguishing effects of past exclusive possession acts as they are defined in the Native Title Act as now amended. The Opposition's proposed amendments would narrow to four the class of titles in respect of which extinguishment is confirmed. They would exclude conditional purchase leases that did not include a covenant to reside on the conditional purchase lease and other exclusive agricultural tenures. It is the view of the pastoral industry that that distinction is artificial and unfair. The classes of tenure are essentially treated in the same way and they should be treated in the same way by the Titles Validation Amendment Bill. They are the main issues arising from the state Titles Validation Amendment Bill."

In a written submission following their appearance and in response to the Committee's request, the Pastoralists and Graziers Association provided information as to what tenures the PGA submits should be confirmed by section 12I of the *Titles Validation Amendment Bill 1998*:

> "The PGA supports the Government's proposed section 12I in its present form ("the Government's section 12I"). The PGA considers that the Government's section 12I is consistent with the spirit of the *Native Title Act 1993* (as amended) and is necessary to provide certainty for the Western Australian community as a whole.
>
> The PGA is particularly concerned to ensure that exclusive tenures held by its members are confirmed as having extinguished any native title. Without that confirmation there will remain doubts about, among other things, members' ability to further develop and finance their operations. Certainty and security of tenure is of paramount importance to the PGA's members; particularly in light of the difficult economic circumstances that have and continue to face the industry.
>
> The PGA therefore submits that as a minimum, all *exclusive agricultural leases* and *exclusive pastoral leases* (within the meaning given to those expressions by sections 247A and 248A respectively of the *Native Title Act*) should be confirmed as having wholly and permanently extinguished any native title."

Mr Kevin McMenemy, General President of the Western Australian Farmers Federation gave the following evidence:

> "The matter is of concern and we decided it might be better to speak to the committee. We were asked to make comment on the three Bills before the upper House and the Federal Court judgment. I propose, with your agreement, to deal with them in order. Essentially, the Titles Validation Amendment Bill, in our understanding from the information provided to us by the clerk of this committee, faces a proposed amendment to remove a provision on page 8, on lines 15 to 20, and to substitute other words. Our interpretation of that is that, if agreed to by the upper House, and subsequently by the Government, it will tend to focus on just perpetual leases and those provided for in the War Service Land Settlement Scheme Act. I am mindful of the comments made earlier by representatives of the Pastoralists and Graziers Association that residence is an issue, as distinct from the nature of the tenure. It was always our understanding that when the amendments to the Native Title Act went through in the middle of this year, that the type tenure - in other words, exclusive possession - was to be the determining factor, rather than whether someone lived on that land. We endorse the comments of the pastoralists and graziers in that area.
>
> Although our concerns regarding agriculture are addressed in the original Bill and its amendments, our concern stems more from the fact that if these types of leases are to be segmented into some type of perpetual leases and conditional purchase leases which have exclusive tenure provisions attached to them extinguish native title, while other leases which also have exclusive tenure attached to them do not, we will create a subset of differing rights attached to those leases. Our concern extends further in that it is entirely possible that at some time in the future a challenge in the Federal or High Court could be launched into the inconsistency between those types of leases. If the High Court were to rule in favour of such applicants, it would call into question the situation with perpetual leases and conditional purchase leases. It is not a situation we would countenance.
>
> Mr Smith asked the pastoralists and graziers representatives about the effect on the values of those two types of leases. We have first-hand experience in which a member of our organisation had finance from a bank refused. This goes back two and a half or three years. The bank conveyed verbally that nothing was wrong with his liquidity situation, but he was refused because a perpetual lease was involved and it was not sure of the security the bank could hold over that lease given the circumstances existing under the Native Title Act at the time. He was able to obtain finance elsewhere. It is a first-hand instance of finance being refused.
>
> We are aware that since the original Native Title Act was enacted the area of purple or perpetual leases - CP blocks - was a vulnerable area to native

> title. We were cautious about making public comment as we did not want to destabilise the market in that area. Those blocks and titles are traded as though they were freehold as they can be converted to freehold. That is our concern if the amendment were to pass and be accepted by the Government."

Mr Grazia, Director of the Australian Petroleum Production and Exploration Associated, commenting on a possible amendment to the Bill gave the following evidence:

> "I have not had much time to go into the detail of them, but it appears that the amendments will effectively place in question the extinguishment of native title with regard to special leases. Significant petroleum facilities, including the North West Shelf project, have been and are likely to be sited on special leases. Therefore, at risk is the security of these titles. It is of great surprise to the petroleum industry that the amendments appear to have the effect of extinguishing native title on agricultural land but fail to grant similar security to special leases such as those issued in conjunction with state agreement Acts. If this observation were correct, security of tenure for current and future projects would be put at risk in the event that at some time in the future the special lease should lapse, be subject to replacement with an alternative title, or be renewed. The amendments are unclear and uncertain as to the procedural rights of legitimate non-native title interests in relation to these future processes. The concern is that a facility such as the North West Shelf project would have a temporary security of tenure."

5.1.2 Extinguishment of native title

Concern was expressed by some witnesses that the Bill provided for permanent extinguishment of native title.

In a written submission received from the Western Australian Aboriginal Native Title Working Group they state:

> "We wish to emphasise that there is no necessity to legislate for the "confirmation" of extinguishment of native title. If native title has been extinguished at common law, such as is the case for freehold title (see Larrakia People's Case), then there is no requirement for legislation to confirm that.
>
> So called "confirmation" to remove uncertainty is nothing more than the racially discriminatory removal of the rights of Aboriginal people both now and in respect of future generations."

A copy of legal advice prepared by Ms Anne Sheehan and Professor Richard Bartlett states:

"The Titles Validation Amendment Bill represents a fundamental change to the common law position, and on any view will amount to substantial extinguishment.

The Validation Bill and the Ten Point Plan (*Native Title Amendment Act*) is founded on fundamentally false premises as to the nature of common law extinguishment. The Validation Bill seeks to declare extinguishment where none would arise at common law.

The principle false premises are:

- The notion that exclusive possession is the criteria of extinguishment - rejected in *Wik* and by Lee J.
- Leases extinguish rather than suspend.
- Leases will generally be entirely inconsistent with native title.
- Vesting of reserves extinguishes native title.

At common law:

- Leases will generally suspend rather than extinguish and only to the degree of inconsistency; a matter of great consequence in the context of historic tenure.
- Reserves - vesting does not extinguish native title.

In the result the Validation Bill will extinguish native title over vast areas where none will arise at common law leading to significant compensation implications. The result is evident upon examination of the definition of "previous exclusive possession act" in the NTA (s.23B(2) adopted in Clause 12H of the Bill)."

On behalf of the Anglican Social Responsibility Commission, Ms Carolyn Tan gave the following evidence:

"In summary, the Anglican Social Responsibilities Commission opposes the Titles Validation Amendment Bill on two major grounds: First, it opposes extinguishment of any common law native title rights except by the agreement of the native title claimants. It has always been a matter of concern that the list of extinguishing acts in the legislation includes many interests that would not otherwise necessarily extinguish native title at common law. The concern is that Parliament, in passing such legislation, would be carrying out acts of dispossession today. This interpretation has been confirmed by the recent Miriuwung-Gajerrong decision, which I

believe is totally consistent with the Wik decision in the High Court and predictable. Secondly, the commission opposes in principle the validation of intermediate period acts, again except by agreement or a determination of the arbitral body - whether that be the tribunal or the commission - especially in relation to the effect that that has on extinguishment. If validation has to occur then those titles are protected and there is no reason to have extinguishment as well."

5.1.3 Incorporation of Scheduled interests under section 249C of the *Native Title Act* within *Titles Validation Amendment Bill 1998*

Evidence given to the Committee suggests that not all of the categories of grants and other activities, listed in the Schedule to the Commonwealth legislation extinguish native title, actually have that effect at common law under the legal principles discernable in the *Mabo (No. 2)* and *Wik* decisions. This view is now much more strongly held by some legal commentators following the *Miriuwung-Gajerrong* decision.

Professor Richard Bartlett in a written submission to the Committee said the following:

"**Scheduled interests**

- Lee J's judgement suggests that *none* of these leases *necessarily* extinguishes native title upon grant at common law.

- A major misconception in the *Native Title Act* and the *Titles Validation Amendment Bill 1998*"

The Western Australian Aboriginal Native Title Working Group in its written submission to the Committee commented:

"Justice Lee acted in accordance with the dictum of Justice Toohey in *Wik* that:

> "The language of the statute authorising the grant and the terms of the grant are all important."

Justice Lee was obliged to answer in the Miriuwung-Gajerrong case the question which Justice Toohey raised in *Wik* but was not obliged to answer:

> "Whether native title rights are truly extinguished or whether they are simply unenforceable while exclusive possession vests in the holder of the pastoral lease."

Justice Lee's judgement is consistent with the views expressed by Justice Kirby in *Wik* that:

- the position of particular leaseholds in relation to native title must be elucidated in particular cases as they come up; and

- where the interest granted to a particular lessee is a limited one and could be "exercised and enjoyed to the full extent without necessarily extinguishing native title then it will co-exist with native title."

The *Titles Validation Amendment Bill 1998* adopts the "Scheduled interests" contained in the *Native Title Act*.

The Committee sought to explore the methodology undertaken in compiling the "Scheduled interests".

Division 2B of the *Native Title Act* as amended provides that native title is entirely extinguished by what are defined as "previous exclusive possession acts", while it is extinguished by "previous non-exclusive possession acts" to the extent of the inconsistency. The Explanatory Memorandum which accompanied the introduction of Division 2B stated it this way:

> "This Division confirms the effect on native title of various types of Commonwealth acts done on or before 23 December 1996 and seeks to reflect the Government's understanding of the common law of native title after the *Wik* decision. It also permits the States and Territories to confirm the effect of acts they have done on or before 23 December 1996."[13]

A "previous exclusive possession act" is defined in the *Native Title Act* to include the grant or vesting of a "Scheduled interest" as that term is defined under section 249C. This section defines a "Scheduled interest" to include:

> "Anything set out in Schedule 1, other than a mining lease or anything whose grant or vesting is covered by subsection 23B(9), (9A), (9B), (9C) or (10) (which provides that certain acts are not previous exclusive possession acts)"[14]

Part 2B of the *Titles Validation Amendment Bill 1998* mirrors Division 2B of the *Native Title Act* as is provided for under section 23A(4):

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13 *Native Title Amendment Bill*, Explanatory Memorandum

14 Section 249C(1)(a) of the *Native Title Act*

> "This Division also allows States and Territories to legislate, in respect of certain acts attributable to them, to extinguish native title in the same way as is done under this Division for Commonwealth acts."[15]

Accordingly, the "Scheduled interests" set out in Schedule 1 of the *Native Title Act* are incorporated into the *Titles Validation and Amendment Bill 1998*.

Mr John Clarke, Consultant to the Native Title Unit, Department of Premier and Cabinet was examined as to the methodology which led to the compilation of the Scheduled interests for Western Australia:

> "Hon GIZ WATSON: Yes. I was just wondering what the legal situation was in that scenario. Has there been any assessment of native title on each of the leases that are listed - or the types - in the schedule? You have talked about compensation and talked about where they are, but what native title assessment has been made?
>
> Mr CLARKE: The process which led to the scheduling of those interests in the Native Title Act was one that involved first of all the State Government going through and making an assessment of the types of tenures that the State had granted, where there was evidence of exclusive possession. There were a number of indicators of that. The State put together a list of those types of tenures and provided examples of the instrument - the lease document or whatever it might be - and extracts of the legislation under which the tenure was granted. That was provided to commonwealth officials who were part of the Attorney General's department. They then made their own assessment of the "exclusivity" provided by the particular grant. That led to exchanges between those commonwealth officials and ourselves. In some cases there were requests for additional information, examples of the particular tenures - the largest, the smallest, the total area involved etc. In the end, it was essentially a decision by the Commonwealth Government that there was sufficient evidence of exclusivity for them to be placed on the schedule.
>
> Hon GIZ WATSON: Just a bit of supplementary to the question about the Commonwealth advice. Just who were you dealing with in the Attorney General's department on that matter.
>
> Mr CLARK: A gentleman called Mr Tanner was the prime contact in relation to the scheduling of interests but there was actually a team of people working in the Commonwealth.
>
> Hon HELEN HODGSON: Can I just go back a step to something you said earlier about when we talked about the scheduling and the way in which

[15] Section 23A(4) of the *Native Title Act*

> that was assessed that the scheduling and the way that was assessed and the said that the State Government applied a number of markers to determine whether or not you felt that exclusive possession had been granted then the Commonwealth reassessed that, can you tell us what those markers that you looked at were?
>
> Mr CLARKE: It was essentially to look at the nature of the granting and to see whether it gave the grantee the ability to exclude all others from the land or to use the land in a way that was totally inconsistent with any ongoing native title rights.
>
> Hon HELEN HODGSON: To do that you actually dragged out samples of all of these sorts of leases and you assessed it against - each of the clauses of those leases - against . . .
>
> Mr CLARKE: As I said earlier the primary test was on the statute that enabled the grant to take place and in some cases the statute was sufficient. In other cases where the statute was ambiguous the form of the lease document was the primary source of that information."[16]

The Committee further investigated the process by which the Schedule of interests was compiled. The Committee sought to take evidence from Mr Tanna and Mr Jeffery both of the Australian Government Solicitor's Office. A reply was received to the Committee's request in the following terms:

> "I confirm that I am instructed that, as there is a long standing Commonwealth practice of not agreeing that Commonwealth Officers give evidence to State Parliamentary Committees, it has been decided that neither Mr Jeffery nor Mr Tanna should appear. As discussed, material concerning Schedule 1 of the *Native Title Act 1993* has been provided in the Explanatory Memorandum, and to the hearings of the Commonwealth Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Fund on the Native Title Bill."

The Commonwealth Joint Parliamentary Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund examined Mr Tanner, Mr Orr, Mr Clarke and others about the process by which the Schedule of interests was developed at a hearing in Canberra on 30 September 1997. This hearing explores in some detail the process by which the "Scheduled interests" were determined. The relevant extracts from this hearing are set out at Appendix "A". Because of the important consequences which can flow from the inclusion of a tenure or interest on this schedule - the permanent extinguishment of native title rights - the evidence of the hearing is set out at some length.

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16 *Hansard*, Transcript of Evidence, 2 December 1998

5.1.4 The effect of the *Miriuwung Gajerrong* decision on the Scheduled interests

Mr John Clarke, Consultant to the Native Title Unit, Department of Premier and Cabinet was examined as to the effect of the *Miriuwung Gajerrong* decision on the determination of Scheduled interests:

> "Hon GIZ WATSON: And secondly, has the assessment of this exclusivity been amended in light of the recent federal court decision?
>
> Mr CLARKE: No. Clearly there is some inconsistency between the nature of exclusivity as understood by both the Commonwealth and the Western Australia Government and the recent decision and that inconsistency will remain until such time as there is either repeals or there is further litigation to settle the issue beyond doubt.
>
> Hon MARK NEVILL: What is that inconsistency?
>
> Mr CLARKE: In very general terms Justice Lee's decision limited exclusivity to three whole titles and to certain public works basically and in his judgment he essentially finds that native title can exist with all leasehold titles now that is inconsistent with a number of High Court findings both in Mabo and in subsequent cases so . . .
>
> The CHAIRMAN: All leasehold titles?
>
> Mr CLARKE: All leasehold titles, yes.
>
> Hon M.D. NIXON: Perpetual lease.
>
> Mr CLARKE: There is a difference between the way he treated some of the reserves and pure leasehold titles but essentially he has left the possibility - well not the possibility - he has said that native title is not extinguished by a leasehold grant. Now this is somewhat different from the understanding of the law prior to this decision.
>
> Hon HELEN HODGSON: If I could just come in there. I do not claim to have read the whole of the case in the last few days but I have looked at parts of it and it is my understanding that he actually looked at it and looked at perpetual leases and some of those lease types and there were some indicators that were referred to as possibly indicating its exclusivity so are you not over generalising a bit by saying that it is inconsistent with Wik because he said that on all leasehold land there is no exclusivity. I mean some of the indicators that I recall seeing there were things like residential - the requirement to build a residence and to live there for a certain period of time and there are some markers like that in there and I would have thought

that that is inconsistent with what you just said about him saying that you cannot have exclusivity over any leasehold property.

Mr CLARKE: The - what I was saying was that in principle Justice Lee is arguing that a lease is insufficient to extinguish native title. I agree he then goes on to look at the effect of things that might happen on that lease so to use his example in the case of a pastoral lease which the High Court has already settled does not extinguish native title Justice Lee found that the footprint of the homestead did extinguish and a dam constructed on the property did. Now that is legally a different concept than what the general understanding was of the High Court's position coming out of Mabo and as again articulated in Wik and more recently in Fejo.

Hon GREG SMITH: Right, well two questions I will ask them both and you can please answer them. Has the Miriuwung-Gajerrong decision changed the Bill that we have got before Parliament now as far as their ability to be enacted and legislated and the other question is - given that Lee's decision seems to be in conflict with other State Acts that we have got for example I have got the Titles Validation Act here and there is a confirmation of ownership and for natural resources etc and also public access to waterways, banks, beds, foreshores and all those sorts of things - which will now take precedence? Will we have to change our State Acts to comply with that decision or will Lee's decision have to be amended to accommodate the State Acts?

Mr CLARKE: It is a fairly difficult area. What we are really dealing with here are two streams if you like there are in place laws of the Commonwealth in the form of the Native Title Act which set down a arrangements as to how native title is to be dealt with. That in turn gives rise to complementary State legislation such as the Titles Validation provisions. That legislation was prepared on the basis that it was interpreting what people thought was broadly the common law but as I think you all know Parliament's are capable of over-riding the common law and of making laws of general application and so what we have is a Commonwealth law and we have now had a federal court decision that, on the face of it, appears in so places to be inconsistent with that statute law. Now the situation remains that in those cases the statute law essentially takes precedence in that it is a law of the Parliament. I think where people have to be cautious is that Justice Lee's judgment is quite complex, it is very large as you know and I do not think it is reasonable or fair to take passages out of the judgment and use them out of the overall context of the judgment we need to look pretty carefully at it but I think it is inevitable that this judgment or subsequent judgments will be the subject of appeals and their compatibility with the written law will be tested. Now to the other part of your question - we do not believe that there is any reason to delay or

to re-consider the State legislation which is essentially legislation that has been enacted to comply with the federal native title legislation."

5.1.5 Compensation payable under the *Titles Validation Amendment Bill 1998*

Mr John Clarke, Consultant to the Native Title Unit, Department of Premier and Cabinet was examined as to the effect of the *Miriuwung Gajerrong* decision on the quantum of compensation which may be payable under the *Titles Validation Amendment Bill 1998* where native title is found to be extinguished:

"Hon MARK NEVILL: The follow-up question to that is: If Justice Lee is correct and we extinguish some of those titles now, there is a liability for compensation, if he is correct. If he is not correct, on appeal to the High Court or whatever, it does not matter. But has there been any quantification of that compensation cost and would the Federal Government pick up any of that cost?

Mr CLARKE: There are some complex compensation issues that arise as a consequence of Justice Lee's decision, particularly if his view of what we called partial extinguishment operates. Again there was a generally-held view, particularly as a result of the Wik decision, about the notion of partial extinguishment. If Justice Lee's view of partial extinguishment is correct and that is that native title is only inconvenienced by the existence of a pastoral lease and resumes its full potential when the pastoral lease goes, then you are right in the sense that that then poses questions about the effect of some of the things that are being done, particularly under the confirmation provisions. But you do need to keep in mind that if Justice Lee's version of how it operates is correct, that compensation liability is still going to be there when it comes time to renew or extend the term of the lease. So what you are really faced with is compensation now, if you like, that then enables the lease to continue into the future or perhaps repeated compensation in the future each time the lease is extended or renewed or replaced.

In terms of a commonwealth contribution, the agreement between the State and the Commonwealth is yet to be finalised. There are officials working on this, but what the State does have is a written undertaking from the Prime Minister that future compensation for that type of event, whether it is paid as a result of the confirmation exercise or it is paid at the time of a lease being renewed or extended, is covered by the 75/25 deal.

Hon MARK NEVILL: If you go ahead with the titles validation in its present form generally, this problem of compensation would come up if Justice Lee was correct. Would it be better to settle that issue up front by getting the courts to actually make some pronouncement on that or would

you be just deferring the problem by excluding those forms of lease to avoid engaging that decision and putting it off to another day? Is that not the choice we have got?

Mr CLARKE: There is not a lot of difference in how it is approached. The advantage of proceeding with the validation and the confirmation provisions now is that the matter is settled and if it is shown that Justice Lee's approach is correct and everyone else is not, then there will be additional compensation liability. As I said earlier, that liability would be there in any case so putting it off and waiting for the courts to finally resolve the matter does not remove the liability question.

Hon MARK NEVILL: And who would actually decide the amount of the compensation?

Mr CLARKE: The process is pretty complex. The scheme that the Native Title Act puts in place is essentially one where the Native Title Act provides for compensation and it provides a mechanism now under the amended Act for the federal court to make determinations about the amount of compensation. But those provisions are safety net provisions that come into operation if a State does not have adequate legislation to provide for that compensation. So it is not a simple answer. You have to look at the particular legislative regime in the State. If I could give an example - in this State our Land Administration Act provides for native title compensation. Native title holders have exactly the same rights to compensation as any other holder of interest in land.

Hon MARK NEVILL: That would be the Supreme Court acting as a compensation court.

Mr CLARKE: And that would end up as the Supreme Court sitting as a compensation court if it was not settled by negotiation.

Hon GREG SMITH: Going back to the compensation issue, as far as the validation of titles goes, is there a chance that if we do not validate some of these titles that are believed to have been exclusive tenure - and they now have a cloud over them because of the Lee case and those sorts of things - we could see a diminished value and a reduction in the ability to mortgage some of those exclusive leases, which could affect the price of them. Is there any compensation available for diminished value to leaseholders of those leases?

Mr CLARKE: If the validation provisions were not passed and some of Justice Lee's findings become established as part of the law, then the State would be faced with the prospect of having invalidly granted a title. The consequences of that are quite serious in that the person who received that

title could then sue the State essentially for giving them an invalid title and if they have built a house on it and invested money in it and so on well then clearly there is a liability against the State for the damages that they might have suffered in that sort of activity. So the consequences without validation is that the title was invalid and in a worst case scenario a court might find that it effectively was never granted and the consequences flowed. It is also possible that the court might find that balance of convenience is on that it is better to allow the title to stand and to award compensation to the native title party who may have suffered loss or damage and what the Validation Bill does is prevent that kind of litigation occurring by validating and providing for compensation for any loss or impairment of native title but without it Yes there are quite serious implications and it would lead to quite expensive and complex litigation.

Hon GIZ WATSON: My second question was in relation to the assertion that the titles of validation needs to be passed immediately as soon as possible, on what basis is that assertion made? Why does it have to be done before Christmas?

Mr CLARKE: I think there is some sort of misunderstanding. The titles validation legislation is important because of the fact that we have just been talking about that potentially there are titles out there that are invalid and that the holders of those titles could find themselves involved in litigation if the legislation is not passed. So it is important from that point of view to essentially put that issue to rest. The other element that is important in the legislation are the confirmation provisions because until the State puts in place those provisions the registration test in Western Australia will remain open if you like because until such time as those confirmation provisions are there when the registration test is administered there would be no exclusive tenures that would need to be excluded from claims so that the sort of problems that have been experienced in the South-West with the petrol and conditional purchases leaseholders being pulled into the claim process would continue so it is important from that point of view but I think the Government's overall statements about the urgency of the legislation actually relate to the State Provisions Bill because of the very long lead time that is involved in gaining Commonwealth approval for that and so the longer it is delayed the longer it takes before the Commission can be up and running and dealing with it so validation is extremely important because of the possibility of litigation occurring on some of those titles but it is really the other one that had the real time limit.

Hon GIZ WATSON: Can I just double check. I heard two sort of qualifying words and one was potential invalid Acts and possible invalid Acts so you are not saying there are definite invalid Acts which will be problematic but there is this potential or this uncertainty. Is that the sort of uncertainty that is justified?

> Mr CLARKE: That is a difficult one that is one of the very first sort of question. The problem is we do not know. There is all the land things that happen right over ten thousand of them. The probability is that somewhere in there there might be an invalid title but there is no suggestion that there is 10,000 invalid titles. The great bulk of them because they involve freehold land are perfectly valid but the validation legislation is umbrella legislation to cover the effect without having to identify or find what is invalid. Now it might be by way of example I can give is the so-called Innis Block you are probably aware of in Kununurra that was granted in that intermediate period and again if Justice Lee's decision holds then that is, or was, an invalid grant."

The evidence of Mr Clarke in respect of the quantum of compensation liability appears inconsistent with other evidence heard by the Committee. Mr Clarke's statement that:

> "But you do need to keep in mind that if Justice Lee's version of how it operates is correct, that compensation liability is still going to be there when it comes time to renew or extend the term of the lease. So what you are really faced with is compensation now, if you like, that then enables the lease to continue into the future or perhaps repeated compensation in the future each time the lease is extended or renewed or replaced."

is at odds with the submissions made by Professor Bartlett and Ms Anne Sheehan and evidence given by Mr Michael Barker QC that leases will generally *suspend* rather than extinguish native title rights and *only* to the degree of inconsistency. The renewal or extension of the term of a lease will affect native title rights but will not necessarily extinguish those rights whereas the effect of the *Titles Validation Amendment Bill 1998* is to provide for the permanent extinguishment of native title rights. Compensation for the latter must necessarily be higher than for the former.

Mr Clarke continued with his evidence by saying:

> "So the consequences without validation is that the title was invalid and in a worst case scenario a court might find that it effectively was never granted and the consequences flowed. It is also possible that the court might find that balance of convenience is on that it is better to allow the title to stand and to award compensation to the native title party who may have suffered loss or damage and what the Validation Bill does is prevent that kind of litigation occurring by validating and providing for compensation for any loss or impairment of native title but without it Yes there are quite serious implications and it would lead to quite expensive and complex litigation."

A written submission from the Western Australian Aboriginal Native Title Working Group objected to this process on the basis that:

"• It extinguishes native title on the lease areas mentioned [in the Scheduled interests] without knowing whether the common law would do likewise. This is fraught with danger and can never be a certain outcome.

• It allows for permanent extinguishment to take effect from the time of the grant. Therefore, if for example, the lessee does not reside on the lease or otherwise does not comply with the lease conditions, native title is still extinguished. This is clearly inconsistent with the legal test outlined by Justice Lee in the Miriuwung-Gajerrong case.

• So called "confirmation" to remove uncertainty is nothing more than the racially discriminatory removal of the rights of Aboriginal people both now and in respect of future generations."

5.1.6 Potential inconsistency between Federal and State laws

The *Titles Validation Amendment Bill 1998* provides for Western Australia to declare the extinguishment of native title in respect of its dealings under State legislation with respect to the matters set out in the *Native Title Act* which includes all the "Scheduled interests."

The Western Australian Aboriginal Native Title Working Group commented upon a proposed amendment to the *Titles Validation Amendment Bill 1998* which would delete reference to the "Scheduled interests" and re-insert a small proportion of them being:

"• a conditional purchase lease in Agricultural Areas in the South West Division under clauses 46 and 47 of the *Land Regulations 1897* which includes a condition that the lessee reside on the area of the lease;

• a conditional purchase lease in an Agricultural Area under Part V of the *Land Act 1898* which includes a condition that the lessee reside on the area of the lease;

• a conditional purchase lease of cultivatable land under Part V, Division (1) of the *Land Act 1933* in respect of which habitual residence by the lessee is a statutory condition in accordance with the provisions of the Division; or

• a perpetual lease under the *War Service Land Settlement Scheme Act 1954*."

The Committee heard evidence from Mr van Hattem that an attempt to provide for different consequences for "previous exclusive possession acts" to those provided for under the Commonwealth *Native Title Act* may be unconstitutional:

> "Just as the state provisions Bill comes about because specific provisions are already in the Native Title Act which contemplate and, in a sense, authorise the making of that legislation, so too the Titles Validation Act, the amendments to that Act and the Titles Validation Amendment Bill arise because of specific provisions in the Native Title Act which contemplate and authorise that sort of legislation. The confirmation of extinguishment provisions arise under part 2 division 2B of the Native title Act which commences at section 23A. Members of the committee will find that on page 20 of the reprint. The scheme of that division is to identify certain things as previous exclusive possession acts. There are also things identified as previous non-exclusive possession acts, but they are not relevant to this discussion. The approach in relation to previous exclusive possession acts is that if they are attributable to the Commonwealth by virtue of the Native Title Act, and nothing more, they are deemed to have extinguished native title. What that seems to be intended to do is to introduce certainty where presently the only rules relating to this topic are common law rules developed by judges on a case by case basis. There is considerable uncertainty as to the precise scope and extent of those rules; for example, there have been decisions like that in the Mabo No 2 case, where comments were made about the effect of grants of freehold and leasehold titles, the effect of public works and of land being reserved, all of which were from a legal point of view not central to the decision in that case, so are not binding but rather an expression of opinion of the court.
>
> This expression of opinion had been relied upon and it was widely considered that a freehold grant or the grant of a lease would extinguish native title. We have since seen that not all freehold grants do extinguish native title. The common law has developed and said that there are different types of freehold grants; some extinguish and some do not. We have also seen, principally through the Wik decision, the common law recognising that there are different types of lease; some extinguish and some do not. From the original statement of principle in the Mabo No 2 case, the common law has developed exceptions and qualifications. There is a considerable amount of uncertainty as to what it is. The confirmation of extinguishment provisions seem to be intended to identify particular types of tenures or past acts which comply with common law principles as they were understood at that point in their development and to say that these are deemed to have extinguished native title.
>
> The Native Title Act does not do that in relation to State grants. It does not deem them to have extinguished native title. It says that the category of grants which can have this effect are the previous exclusive possessive acts,

and they are defined in a particular way. If they are attributable to the Commonwealth, they extinguish native title and there are certain consequences in terms of procedural rights and compensation rights which are expressly provided for. The Act then goes on to say in relation to titles granted by states and territories that if the law is to the same effect as these provisions, it has effect. The Titles Validation Amendment Bill has apparently been drafted with the intention of giving effect to that.

Part 2 of the Bill starting with proposed section 12H does precisely that; it picks up the Commonwealth definition of this notion of previous exclusive possession acts and it provides for consequences in identical terms to those in the Native Title Act; in other words, the state Bill in the form it was introduced is drafted in a way that is consistent with, in a constitutional sense, the Native Title Act. The proposed amendments seek to take the notion of a previous exclusive possession act and divide it into three categories and prescribe different consequences in relation to those categories, so that we end up with legislation providing for the effect of previous exclusive possession acts attributable to the State in a way which differs from the effect of those acts which are attributable to the Commonwealth. For precisely the same reasons I have mentioned in relation to the future act provisions, we end up with inconsistency within the meaning of section 109 of the Constitution. The result, in my opinion, is to the extent the State provisions provide for consequences other than those provided in the Native Title Act, those provisions will be of no effect. They are inoperative as long as the inconsistency continues. That is my legal view of the effect all of this."

The relevant provision of the *Native Title Act* is Division 2B. This Division relevantly provides:

"**Division 2 - Confirmation of past extinguishment of native title by certain valid or validated acts**

23A Overview of the Division

(1) In summary, this Division provides that certain acts attributable to the Commonwealth that were done on or before 23 December 1996 will have completely or partially extinguished native title.

(2) If the acts were ***previous exclusive possession acts*** (involving the grant or vesting of things such as freehold estates or leases that conferred exclusive possession, or the construction or establishment of public works), the acts will have completely extinguished native title.

(3) If the acts were ***previous non-exclusive possession acts*** (involving grants of non-exclusive agricultural leases or non-exclusive pastoral leases), they will have extinguished native title to the extent of any inconsistency.

(4) The Division also allows States and Territories to legislate, in respect of certain acts attributable to them, to extinguish native title in the same way as is done under this Division for Commonwealth acts.

23B Previous exclusive possession act

(1) This section defines ***previous exclusive possession act***.

Grant of freehold estates or certain leases etc. on or before 23.12.1996

(2) An act is a ***previous exclusive possession act*** if:

(a) it is valid (including because of Division 2 or 2A or Part 2); and

(b) it took place on or before 23 December 1996; and

(c) it consists of the grant or vesting of any of the following:

(i) a Scheduled interest (see section 249C);
(ii) a freehold estate;
(iii) a commercial lease that is neither an agricultural lease nor a pastoral lease;
(iv) an exclusive agriculture lease (see section 247A) or an exclusive pastoral lease (see section 248A);
(v) a residential lease;
(vi) a community purpose lease (see section 249A);
(vii) what is taken by subsection 245(3) (which deals with the dissection of mining leases into certain other leases) to be a separate lease in respect of land or waters mentioned in paragraph (a) of that subsection, assuming that the reference in subsection 245(2) to “1 January 1994" were instead a reference to “24 December 1996";
(viii) any lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters.

Vesting of certain land or waters to be covered by paragraph (2)(c)

(3) If:

(a) by or under legislation of a State or a Territory, particular land or waters are vested in any person; and

(b) a right of exclusive possession of the land or waters is expressly or impliedly conferred on the person by or under the legislation;

the vesting is taken for the purposes of paragraph (2)(c) to be the vesting of a freehold estate over the land or waters.

23C Confirmation of extinguishment of native title by previous exclusive possession acts of the Commonwealth

Acts other than public works

(1) If an act is a previous exclusive possession act under subsection 23B(2) (including because of subsection 23B(3)) and is attributable to the Commonwealth:

(a) the act extinguishes any native title in relation to the land or waters covered by the freehold estate, Scheduled interest or lease concerned; and

(b) the extinguishment is taken to have happened when the act was done.

23D Preservation of beneficial reservations and conditions

If:

(a) a previous exclusive possession act attributable to the Commonwealth contains a reservation or condition for the benefit of Aboriginal peoples or Torres Strait Islanders; or

(b) the doing of a previous exclusive possession act attributable to the Commonwealth would affect rights or interests (other than native title rights or interests) of Aboriginal peoples or Torres Strait Islanders (whether arising under legislation, at common law or in equity and whether or not rights of usage);

nothing in section 23C affects that reservation or condition or those rights or interests.

23DA Confirmation of validity of use of certain land held by the Crown etc.

To avoid doubt, if the act is a previous exclusive possession act because of paragraph 23B(9C)(b) (which deals with grants to the Crown etc.), the use of the land or waters concerned as mentioned in that paragraph is valid.

23E Confirmation of extinguishment of native title by previous exclusive possession acts of State or Territory

If a law of a State or Territory contains a provision to the same effect as section 23D or 23DA, the law of the State or Territory may make provision to the same effect as section 23C in respect of all or any previous exclusive possession acts attributable to the State or Territory."

Accordingly, section 23E of the *Native Title Act* enables, but does not require, a State or Territory to legislate that previous exclusive possession acts attributable to it extinguish native title provided such legislation contains provisions to the same effect as section 23C.

Part 2B of the *Titles Validation Amendment Bill 1998* provides confirmation of past extinguishment of native title by certain valid or validated acts. Clause 12I (1) of the *Titles Validation Amendment Bill 1998* provides for the State to declare that previous exclusive possession acts attributable to it extinguish native title. It is drafted in terms which directly mirror those provided for in the *Native Title Act*.

It is contended by Mr van Hattem that for a State to legislate in respect of previous exclusive possession acts attributable to it in a way inconsistent with the express requirements of section 23C of the *Native Title Act* would be unconstitutional as the *Native Title Act* only permits States and Territories to extinguish native title in the same way as is done under the Commonwealth act. It is contended by Mr van Hattem that failure to legislate in the manner prescribed by the *Native Title Act* will result in an inconsistency within the meaning of section 109 of the Constitution with the result that, to the extent the State provisions provide for consequences other than those provided in the *Native Title Act*, those provisions will be of no effect.

The Committee notes that this raises complex legal issues and has heard evidence from Mr Greg McIntyre in addition to Mr van Hattam as to the operation of S.109 of the Constitution in relation to the Native Title Act recorded below in the context of a similar point being raised in regard to the inter-tidal zone. Mr McIntyre's legal opinion differs from Mr van Hattam's on this point of law.

The Committee has reviewed the equivalent pieces in legislation in various other States of Australia. Section 20(1) of the *Native Title (Queensland) State Provisions Act 1998* mirrors the *Native Title Act* provisions in every respect. Section 20(1) of the *Native Title (New South Wales) Act 1994* is also drafted in identical terms and precisely mirrors the equivalent provisions of the *Native Title Act*. Section 13H of

the Victorian *Land Titles Validation (Amendment) Act 1998* is also drafted in identical terms. Section 3A of the Northern Territory *Validation Native Title Act* is also drafted in identical terms to the Commonwealth *Native Title Act* and specifically states at section 3A(2) that:

> "In the event of an inconsistency between section 23B of the Commonwealth Act and Schedule 1 to this Act or between schedule 1 to the Commonwealth Act and Schedule 2 to this Act, section 23B or Schedule 1 of the Commonwealth Act (as the case may be) prevails."

The objects of the *Native Title Act* are contained in section 3 in the following terms:

> "**3 Objects**
>
> *Main objects*
>
> The main objects of this Act are:
>
> (a) to provide for the recognition and protection of native title; and
> (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
> (c) to establish a mechanism for determining claims to native title; and
> (d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title."

The Committee notes that Queensland, New South Wales, Victoria and the Northern Territory have all legislated in identical terms to that provided for under the *Native Title Act.* These jurisdictions have legislated before having the advantage of the opportunity to study the reasons for decision in the *Miriuwung-Gajerrong* case which examine the legal consequences for native title of a broad range of leasehold and other tenures.

5.2 *Native Title (State Provisions) Bill 1998*

According to the Second Reading Speech the purpose of this bill is as follows:

> "The [*Native Title Amendment Act 1998*] was proclaimed on 30 September and it now provides a basis for the State Parliament to put in place a comprehensive native title regime that will be administered by a State Native Title Commission. The Commission will have responsibility for the administration of native title claims within Western Australia as well as the important task of registering Indigenous Land Use Agreements.

> The Commission will also have administrative and determinative powers to deal with objections by native title parties to future land, mining and petroleum grants by the State Government.
>
> The Western Australia *Native Title (State Provisions) Bill* has been drafted in accordance with the relevant provisions of the amended *Native Title Act*. Parts of the Bill will require a determination by the Commonwealth Minister before the Bill can be functional, and the Minister's determination will also have to be laid before both Houses of the Commonwealth Parliament.
>
> The Bill aims to establish a State Native Title Commission which would be an equivalent body under section 207B of the *Native Title Act.* The Commission may also take on the role of recognised body in relation to future acts. In practice, the Commission will take over the role of the National Native Title Tribunal in Western Australia. The Commission will function as an impartial facilitator in registering native title claims and helping claims to be resolved by negotiation. The Commission will also play a role in resolving future acts.
>
> The Bill will enable the State Government to replace the right to negotiate on pastoral leases and certain reserves with a prescribed regime of consultation. The right to negotiate will remain on vacant Crown land and Aboriginal reserves and there is a new process for consultation for infrastructure titles and developments within towns and cities."[17]

Witnesses who gave evidence to the Committee raised the following issues in relation to the bill:

5.2.1 Proposal to extend the area covered to include the intertidal zone

Mr Patrick Dodson, member of the Western Australian Native Title Working Group said in evidence:

> "Intertidal zone is a classic area in relation to indigenous people who live in the north of this State, and no doubt in other places along the coastline. If the ALP amendments are not adopted there will be no right to negotiate in relation to the impacts and matters at that level. I belong to the sea and the coastline. That tells me I cannot have a say about how reefs, shell life, mangroves and tidal creeps are impacted on. I must sit by and watch things take place and ostensibly be happy about it. I will feel pretty angry about that."

[17] Hon Norman Moore MLC, Leader of the House, *Hansard*, 1 December1998

Mr Guy Leyland, Executive Officer of the Western Australian Fishing Industry Council gave the following evidence to the Committee:

> "My introductory comments will be brief. The purpose of appearing before you this morning is specifically in relation to some proposed amendments to clauses 3.5 and 4.4 of the Native Title (State Provisions) Bill. We will cover some policy matters from a legal perspective and touch on the impact of the Miriuwung-Gajerrong decision in respect of native title, fishing rights and so on. The Western Australian Fishing Industry Council is the peak fishing industry body in Western Australia. That includes pearling, aquaculture, retailing, marketing and processing. Our membership extends from the Northern Territory border to Esperance. We produce about $1b annually, and 95 per cent of the industry's production is exported - prawns, scallops, pearls, abalone and so on. We employ about 12 000 people in mostly regional centres. We operate in a multi-user environment, and for the most part as an industry we do not seek the exclusion of other groups in relation to the use of the marine environment. Our aim is to seek co-existence and the mutual recognition of rights in marine areas and marine resources...
>
> In respect of the proposed Australian Labor Party amendments to clauses 3.5 and 4.4 there are some legal arguments which the committee would benefit from hearing, and I invite Peter Van Hattem to present them.."

Mr van Hattem, legal adviser to the Western Australian Fishing Industry Council, gave the following evidence:

> "I have no introductory statement to make. Essentially, I am a legal practitioner. I do not represent any industry or viewpoint in particular; I am here today to accompany people from the WA Fishing Industry Council, and the comments that I make are made in that context, simply to present a particular view on certain legalities of some proposed amendments to the legislation. The legislation in question is principally about the Native Title (State Provisions) Bill. I am here today to talk about the proposal to extend the area covered to include the intertidal zone. I understand the committee may also be interested in the legal implications of proposed amendments to the Titles Validation Amendment Bill, specifically the amendments in relation to the confirmation of extinguishment provisions. Essentially the view that I have reached of those matters is that the proposed amendments would be unconstitutional in the sense that if the Bill were enacted in the form contemplated by the amendments, it would bring into existence an Act of the Western Australian Parliament which would be, to a certain extent, inconsistent with legislation of the Commonwealth Parliament.
>
> The effect of the commonwealth Constitution is that when there is inconsistency between commonwealth law and state law, to the extent of

the inconsistency, the commonwealth law prevails and the state law - the language is in the Constitution - is invalid and has been held to be inoperative to the extent and for the duration of the inconsistency. It may be better to deal with this by way of responses to questions from the committee, but the essence of my view on this comes about because provisions are contained in the Native Title Act, the commonwealth legislation, which deal with various aspects of native title. In one view it might be seen to cover the field of legislative regulation of native title and matters affecting native title. There are two relevant respects in which the commonwealth statute specifically leaves room for state and territory legislation to operate. One of those respects is the alternative provisions under sections 43 and 43A and another respect is the confirmation of extinguishment provision. There are, of course, other areas in which state laws are specifically contemplated as having an operation and the present Titles Validation Act is an example of a state law having been enacted pursuant to contemplation in the commonwealth Act.

In relation to the Native Title (State Provisions) Bill and the proposal to extend the area covered by parts 3 and 4 to include the intertidal zone, the inconsistency comes about because parts 3 and 4 are the pieces of legislation specifically contemplated, in a sense authorised, by sections 43A and 43 respectively of the commonwealth Act. To understand what is being authorised, it is necessary to understand the scheme of the commonwealth Act, how it relates, and how one gets to those sections in the first place. I am sure that members of the committee are familiar with the general scheme of the Act and, subject to any questions, I do not propose to go into that in any detail. Suffice to say, that the present regime, the amended regime under the commonwealth legislation, is that, generally speaking, everything that happens after 30 September this year is regarded as a future act without any further classification as permissible or impermissible; it is simply a future act. The approach of the statute is that every future act, which by definition affects native title, is invalid to the extent that it affects native title unless it is covered by one of these future act provisions. There are a series of subdivisions in division 3 of part 2 of the Act which contain the various exceptions or coverages which make these future acts valid. It is only if the act does not fall within any of those provisions that it is invalid to the extent it affects native title.

The subdivisions cover a range of matters and the important thing is that they are addressed in the order in which they appear in the statute. If a future act is covered by subdivision G, for example, one goes no further. One does not ask, "Is it also covered by subdivision M?" It is not a relevant question because being covered by subdivision G, the Act states the other subdivisions do not apply to it and its treatment of the procedural requirements, the compensation entitlements and the consequences of the

act in terms of extinguishment or non-extinguishment, are dealt with by that subdivision.

Sections 43 and 43A are part of subdivision P. The only acts which can be future acts covered by sections 43 and 43A are those acts covered by subdivision P, and so there are a number of exclusions. A number of acts are not dealt with under sections 43 and 43A, and they are not the subject of alternative state procedures because they do not find their way into subdivision P in the first place. Necessarily excluded are all of those acts which come under preceding subdivisions; it starts with subdivision B - certain types of indigenous land use agreements - and it proceeds through the equivalent of the old non-claimant clearance procedures. There are renewals, acts on reserves, facilities for the public and so on. When one gets to certain types of renewals of mining interests under subdivision I, or certain compulsory acquisitions or grants of mining interests under subdivision M - freehold equivalent - it is only if the act falls into those categories that it becomes the subject of subdivision P. However, even then there are express exclusions from subdivision P. The future act may have found its way through subdivisions I or M into subdivision P, and there is no other way to get there. A future act cannot be the subject of subdivision P unless it is covered by one of those two previous subdivisions I or M.

Having got to subdivision P, there are then a number of exclusions and exceptions. The relevant one is the exception found in section 26(3). For those with access to the Attorney General's reprint of the Act, it will be found on page 88 of that reprint. Subsection 3 states that subdivision P only applies to the act to the extent that the act relates to a place that is on the landward side of the mean high watermark of the sea. That means, on my understanding, that an act is not covered by subdivision P if it is on the seaward side of the high watermark. The significance of that is in sections 43 and 43A because these are the provisions which expressly contemplate that if there are alternative state provisions in relation to the acts covered by subdivision P, those state provisions will have effect in lieu of the commonwealth provisions in subdivision P. There are requirements of recognition by the commonwealth minister, and there is a process associated with that. Again, I do not think that is immediately relevant to the point under consideration, but my understanding of those provisions is that a state law which contains alternative provisions to these in subdivision P - that is, provisions which satisfy certain criteria in relation to the future acts covered by subdivision P - is expressly given effect. If you did not have section 43, the effect of the commonwealth Constitution would be that any state law trying to enter into this field of regulation would be inconsistent with it and invalid to that extent. Section 43 is, on one view, an exception to that constitutional principle. It is stating a state law which has particular characteristics is not inconsistent with this commonwealth law, and so there is room under the Constitution for it to operate. Section

43A is exactly the same. The relevant point is that sections 43 and 43A are both part of subdivision P. They are both addressing acts which are covered by subdivision P, and the effect of section 26(3) is to exclude from subdivision P all the future acts which would otherwise have been caught by that subdivision but which relate to an area on the seaward side of the high watermark.

The proposed amendment to the Native Title (State Provisions) Bill will change the area of coverage of the alternative provisions. Part 3 contains the alternative provisions permitted by section 43A of the Native Title Act, and part 4 contains the alternative provisions permitted by section 43. At the moment it has been, apparently on its face, carefully drafted to reflect the constitutional requirement. It clearly is drafted in recognition of section 26(3) by excluding from the state alternative provisions, acts relating to areas which are excluded from the commonwealth provisions to which these are an alternative. That is all I want to say, subject to questions, in relation to the amendment to the Native Title (State Provisions) Bill.

There is clearly an intention to cover the field. I agree with that explanation that section 109 contemplates the two different tests; cover-the-field or direct inconsistency. It may be that, closely analysed, the situation would be one of direct inconsistency, because the state Act in effect would provide for a procedure to be applied to acts relating to the intertidal zone, whereas the Native Title Act prescribes the procedure to be covered by acts in that area. That would be a clear example of direct inconsistency. Inconsistency with what, will depend on the act; whether the state Act is inconsistent with subdivision G, subdivision K or some other subdivision will depend on what is the act. There is scope for direct inconsistency. Even if that were not case, when one looks at the objects of the Native Title Act set out in section 3, one of which is -

> (b) to establish ways in which future dealings affecting native title may proceed and to set standard for those dealings;

it is clearly identifying the field of coverage of the commonwealth Native Title Act. That would give rise to indirect inconsistency apart from the question of direct inconsistency."

Mr Leyland and Mr van Hattem were questioned by the Committee on the evidence they had given:

"Hon M.D. NIXON: As I understand, it previous court rulings have said that the sea is free from native title claims. Presumably it is so that to a large extent the fishing industry can manage without being unduly concerned once it goes out to sea.

Mr van HATTEM: In terms of whether native title exists as to the sea and seabed, a Federal Court decision has said that it does. It is the Croker Island decision. The nature and extent of the rights determined to exist there are quite different from those in the Miriuwung-Gajerrong case. In terms of the existence of the native title question, it can exist anywhere. In terms of the consequences, the Native Title Act draws a very clear distinction between land and waters on one hand, and on the other between what happens onshore or within the limits of States and what happens offshore, beyond the limits of States and Territories. In a sense the fishing industry, to the extent that it operates on water, whether it is onshore or offshore, is affected less than the mining industry, for example.

Hon MARK NEVILL: Can you explain to the committee the effect of the Government's Bill and the various amendments on the finding of Justice Lee in respect of the intertidal zone from the Northern Territory border right around the coast to just north of Wyndham. Because of the rise and fall of the tides there, a very large area of land is involved. What is the effect of the Government 's Bill on native title in that area which Justice Lee has found to exist, and what is the effect of the various amendments, if you have seen them, on native title?

Mr van HATTEM: Do you mean both Bills?

Hon MARK NEVILL: Either.

Mr van HATTEM: I am not aware that the Titles Validation Amendment Bill would have any effect, because I am not aware there have been any exclusive possession acts in the intertidal zone. I stand to be corrected on that. The previous exclusive possession acts are freehold grants, various leases and all the scheduled interests mentioned earlier in the question. To the extent that a previous exclusive possession act had occurred in that intertidal zone, it would be deemed to have extinguished native title under the Titles Validation Act, if amended by the amendment Bill. If the proposed amendments to that Bill are made, the matter would be left to be dealt with by the common law; in other words, the Parliament would not be prescribing the effect of the various grants, rather it would be left for the courts on a case-by-case basis to determine whether a particular type of lease had any effect on native title, and whether it was an enduring effect - that is, extinguishment - or a temporary effect; that is, non-extinguishment. Whether the Titles Validation Amendment Bill goes through amended or unamended would not make a difference to the intertidal zone. In relation to the Native Title (State Provisions) Bill, a distinction will arise if the intertidal zone is the subject of a pastoral lease. I am not aware of that being the case.

Hon MARK NEVILL: I understand it is not.

Mr van HATTEM: If it is not the case, it does not come under section 43A of the NTA, but comes under section 43. If the state provisions Bill becomes an Act, any future act covered by subdivision P of the Native Title Act will attract the commonwealth right to negotiate instead of going through the process contemplated by part 4 of the state Bill. No future act relating to the intertidal zone will be covered by subdivision P of the commonwealth Act, so part 4 of the state legislation will have no application. Whether the state provisions Bill is passed in its present form or amended will make no difference to the intertidal zone because, as explained earlier, the proposed amendments will not be operative. To the extent that it is sought to bring acts which are excluded from the right to negotiate under the commonwealth Act under the state alternative provisions, the state legislation will simply be inoperative.

Hon MARK NEVILL: If someone wants to do something in the intertidal zone in the area, what applies - the right to negotiate or the right to consult?

Mr van HATTEM: The commonwealth Native Title Act will apply. Whatever the State does will not operate.

Hon MARK NEVILL: :How does it apply at the moment?

Mr van HATTEM: It depends on the act. It is useful to think of a series of cascading screens of increasingly coarser mesh. As the acts are poured onto the first screen, which is subdivision B, some will pass through and others will be rejected and pass to the next screen. One moves progressively from screen to screen depending on the act and, in some cases, the nature of the land to be affected by the act. Subdivision G deals with certain things relating to primary industry. If someone had a freehold farm or lease, say, in the present context, an aquaculture lease, above the high water mark, and one wanted to put a pipeline through to take water from the ocean, and it runs across the intertidal zone, it would probably be covered by subdivision G. Therefore, procedural rights and compensation entitlements and so forth are covered by subdivision G. Going to subdivision P and considering whether the right to negotiate exists, or an alternative right to consult, would be no good as one simply will not reach that point.

Hon GIZ WATSON: I address my question to Mr Leyland as the Western Australian Fishing Industry Council representative. Does WAFIC recognise the importance of the immediate environment in the intertidal zone, particularly in the Pilbara and Kimberley, to Aboriginal people in terms of their sustenance? Does WAFIC recognise that if the right to negotiate is removed, that removes any legally binding obligation to negotiate with Aboriginal people on the resource extraction from the area? That will be replaced with a requirement to consult, as far as I understand. Given the existing management under the Fish Resources Management Act

and the establishment of management plans - no obligation exists for the involvement of Aboriginal people, and I realise that allowance is usually made for them to participate, although no legal requirement applies - surely, this is a huge removal of Aboriginal people's opportunity to have a legal role in managing resources on which they depend.

Mr LEYLAND: Yes. From an industry perspective, our view is very much that Aboriginal people, like us, are legitimate users of the marine environment and have an interest in the matter, particularly in the northern region. They must be involved in the management arrangements for the resource in an area.

Hon GIZ WATSON: There is no legal requirement for that to occur.

Mr LEYLAND: In some respects there are, depending on the circumstances. The Recreational Fishing Advisory Council has a place for Aboriginal people to advise the minister on recreational fishing in the north. As a matter of practice and policy, WAFIC's view is that it needs to be involved and have discussions with Aboriginal people about mutual use of marine areas and management arrangements. Hence our participation in the Kimberley regional discussion over two years. We made a significant commitment, and want to continue that process.

Hon GIZ WATSON: That does not go as far as a legal right.

Mr LEYLAND: I would like Mr van Hattem to comment on that aspect.

Mr van HATTEM: It depends on what you specifically refer to. Is it the intertidal zone only?

Hon GIZ WATSON: The near-shore and coastal areas.

Mr van HATTEM: The scheme of the Native Title Act is to focus on particular acts; that is, things which have a legal consequence. Typically, grants of leases and freeholds, and lease renewals, are subject to a strict procedure. Members will be familiar with that process. Let us consider an example which may impact on an area; namely, the establishment of a shore-based facility.

Hon GIZ WATSON: I would argue that any activity in the marine environment has an impact. Fishing offshore has an impact on the near shore as species move in and out. It impacts on the environment. There is the vexed question of management of marine environments, which is different from management on land; that is, there is no separation, as everything is interrelated. If you provide a licence to fishermen offshore, it impacts upon Aboriginal communities who may fish off a jetty.

Mr van HATTEM: To the extent that native title is affected by that matter, it is beyond state regulation. The effects on native title, whether acts can be done and compensation is payable, and so on, are comprehensively covered by the NTA. Subdivision H deals with the management of resources, and living aquatic resources. It may be that if a proposal were implemented which would have a significant effect on the environment in the way to which you refer, the state Environmental Protection Act would play a role.

Hon GIZ WATSON: It does not affect Aboriginal people's right to the resources at all.

Mr van HATTEM: It purely relates to an assessment of proposals which will impact possibly on the environment, and the decision-making authority granting a licence or permit under state law - not native title law, but general law. If the act were deemed to have an impact on the environment, it would be subject to that Act and its various consultative processes and the levels of consultation involved, depending on the nature of the act in question. It is not something specifically for Aboriginal people and native title holders to the exclusion of others. It is available to members of the public generally affected by a proposal.

Hon GIZ WATSON: I understand that state jurisdiction applies to state waters. Therefore, I do not understand why the state cannot make laws which affect that area.

Mr van HATTEM: It comes back to the inconsistency: If the Commonwealth has passed a law dealing with a topic, the state cannot pass a law dealing with the same topic. The only exception is where the commonwealth law authorises that to happen.

Mr LEYLAND: The industry supports statutory rights to marine resources for communities in the north.

Hon GIZ WATSON: For whom?

Mr LEYLAND: For indigenous use of the resources. We would have a difficulty if the right impinged in any way on our enjoyment of our full statutory rights. If adjustment were needed, clearly compensation requirements would need to be addressed, if necessary. In our view, the involvement of Aboriginal people in commercial activity is a very desirable development.

Hon HELEN HODGSON: My recollection is that representatives of WAFIC gave evidence before the recent Select Committee on Native Title Rights. Have you read the relevant chapter in the report?

Mr LEYLAND: I have not - but I will.

Hon HELEN HODGSON: It is my recollection - I do not have the evidence before me - that the industry council does not have a problem with the idea of resource sharing. The comment made was to the effect that you are used to sharing with different operations, licensees et cetera. Would you have a problem sharing resources in the intertidal zone? Is that different?

Mr LEYLAND: Not in the least. We do not have a problem with that proposition.

Hon HELEN HODGSON: However, you indicated that some difficulty may arise by virtue of the right to negotiate being extended into the intertidal zone.

Mr LEYLAND: We do not want to overstate the case. In discussion this morning, we recognised it was a tenuous argument put up regarding the right to negotiate in the intertidal area. We recognised that it will impact on the new industry of aquaculture. For the most part, it would require land leases as well, and would be drawn into the process any way in a de facto manner. If they required pipelines and so on, it would be drawn into the right to negotiate in the land lease. If specific activity requires leases in the intertidal zone, it has potential to have a detrimental impact inhibiting the grant of the lease. However, we do not want to overstate our position.

Hon GREG SMITH: Will Aboriginal people be excluded from any significant areas of the intertidal zone now or in the future if the Bills are passed?

Mr LEYLAND: No.

Hon GREG SMITH: So, whether the Bill is passed is irrelevant as far as their access to the intertidal zone is concerned.

Mr LEYLAND: That is my understanding..”

Mr Grazia from the Australian Petroleum Production and Exploration Association Limited gave the following evidence to the Committee:

“I now move on to address the specific issues that the industry wishes to raise on the Native Title (State Provisions) Bill. At the end of the day, it is APPEA's view that it is imperative that the Western Australian legislation establish alternative state processes that are consistent with the commonwealth legislation, so that the Commonwealth can reasonably consider it for accreditation. APPEA understands that the amendments to clauses 3.5 and 4.4 of the Bill, proposed by the Australian Labor Party in

the Legislative Assembly, are inconsistent with the commonwealth Native Title Act. These amendments attempt to extend coverage of parts 3 and 4 of the Bill to the intertidal zone, which is inconsistent with section 26(3) of the commonwealth Act. This inconsistency is likely to prevent the commonwealth minister from making the necessary determinations to give effect to the proposed Western Australian regime.

It is APPEA's understanding that the high-water mark was selected as the offshore/onshore dividing line having regard for the impossibility of actually delineating the previously identified dividing line, which was the jurisdictional limits of the State. This is described as the mean low-water mark at 1 January 1901, a benchmark that has never been measured in much of Australia and no longer resembles the current low-water mark in many places. The low-water mark itself is subject to change over time. I understand that the water level is 15 centimetres higher now than it was in 1901. Members of the committee would be aware of some parts of the State, particularly in the north west, where there is historical evidence of changes in the high/low water mark. Measurement difficulties have led the Commonwealth, in the interest of workability, to institute the practical simplicity of an onshore regime above the high-water mark and an offshore regime over which the right to negotiate does not apply. Importantly, it has also accepted the need to provide certain procedural rights within the intertidal zone.

APPEA encourages the select committee to consider the procedural rights that already exist for indigenous interests in the intertidal zone. These rights are outlined in correspondence between APPEA and the Leader of the Opposition and arise as a result of last-minute government amendments to the commonwealth Act. They effectively convey the rights to be notified, to object and to be heard. In cases where the objection is pursued, provisions exist for the imposition of conditions on the proposed activity. These rights are not necessarily available to ordinary title holders, but comprise an efficient process because of their similarity with those that apply to alternative provision areas through the provisions of section 43A of the commonwealth Act.

The intertidal zone is of critical interest to APPEA's members. I would like to enlarge on why we think this similarity is important. Circumstances arise where petroleum tenements and activities extend over the intertidal zone. Furthermore, native title rights on vast stretches of the Pilbara coastline potentially coexist, in the main, with pastoral leases and petroleum tenements; that is, the coastline has many examples of what might be described as alternative provision areas.

Notwithstanding the ultra vires argument that is mentioned in point 2.2 of our statement, the ALP appears set to create a procedural complexity to the

native title process by introducing a potentially different regime to the intertidal zone. That is a relatively narrow area attracting the full right to negotiate, despite the absence of such a right on the much larger landward and seaward margins. Such an approach is neither equitable nor efficient. It subordinates coexisting rights which, according to the Crocker decision, prevail over native title rights to the extent of any inconsistency.

To assist members, it might be useful if I offer some explanation. If we think of the Pilbara coastline by way of example, we have a situation where, in the main, there is a pastoral lease, and that pastoral lease normally ends at the high-water mark. We then have the offshore requirements from the high-water mark and beyond. The concern for APPEA is that the intertidal zone, on a very expansive piece of the State's coast of critical interest to the industry, could, as a result of these amendments, have attached to it right-to-negotiate provisions which do not exist above the high-water mark and currently do not exist below the high-water mark.

Hon GREG SMITH: As I understand it, much of the exploration and extraction of your industry is conducted offshore, and the processing side is conducted onshore. How vital is the ability to cross the intertidal zone with a pipeline, for example, to the operations of a petroleum company?

Mr GRAZIA: If you had the opportunity of examining a petroleum tenement map of Western Australia, you might be surprised at the extent to which petroleum tenements exist onshore. A number of operators, typically Australian juniors, are almost totally dedicated to exploration activities in the onshore area. A number of production facilities and tenements are entirely landlocked. I can understand the tendency to assume that the interest is largely offshore, but it is an anomaly, and I suspect to some extent one that we bring upon ourselves somewhat with regard to the way in which we promote community awareness of our industry. There are significant onshore interests. The intertidal zone is important from a number of perspectives, particularly with regard to the initial grant of tenements; and in Western Australia there are numerous examples of them straddling onshore and offshore areas and encompassing the intertidal zone. Issues also exist with regard to conducting operations associated with exploration activities across the intertidal zone, and the capacity of the industry to continue to develop facilities to handle product. I am talking here about supply bases, for example, as exist at King Bay on the Burrup Peninsula. We are also dealing with the construction of ports and jetties. Issues also exist with regard to pipelines, not just the pipeline itself, for which I understand particular provisions apply, but to the circumstances in which there might be a requirement to, for example, assemble a pipeline onshore and then drag it out over the intertidal zone into offshore areas, an occurrence which has become more frequent in recent times with the installation of gas gathering infrastructure off the North West Shelf. The

intertidal zone is at certain points in time of great significance to the industry with regard to some of these activities that are of a temporary nature, and it is fundamental in terms of the capacity to have supply operations to the field, and to install pipeline-related facilities."

Mr Gregory McIntyre, Legal Coordinator for the Western Australia Native Title Working Group gave the following evidence:

"The committee has heard some submissions from the petroleum and fishing industries about the intertidal zone. I disagree with the legal opinion of Mr van Hattem. The committee should receive a written submission by Monday which will set out my argument in a concise form, but I will raise some of the issues so you can ask questions.

We believe that the amendment proposed by the Labor Party in the Lower House, which the committee can now consider, would result in the intertidal area - the area between the high and low-water marks and what is included in the definition of on-shore waters - being included in both the consultation and the right-to-negotiate procedures. For example, it would apply to the consultation procedure where there might be a marine reserve. If we applied the same definition of the application of alternative procedures that is in the Native Title Act, taking out the exclusion of intertidal zones, it would apply in those sorts of areas. It would most usually apply in the right to negotiate over vacant crown land, and most intertidal zones are vacant crown land. A good example is the area at the top of the Miriuwung-Gajerrong claim. The right to negotiate would most likely apply. Mr Dodson told the committee about the significance of that. It is not difficult to understand why Aboriginal people are interested in having that included.

Some concern has been expressed in correspondence I have seen from the petroleum industry about the setting of the low-water mark as the area to be included in both those procedures. It says it is difficult to do so and it prefers the high-water mark. By opting for the low-water mark rather than the high-water mark the Government would be countermanding two historical facts. The high-water mark has been understood to be the common law definition of the State and the boundaries of the State. A witness this morning said it has been so since 1901. It was confirmed as the area to which the common law extends in the Seas and Submerged Lands Act. It is the definition which the Native Title Act has chosen for distinguishment between on-shore and off-shore. The definition has historical significance. It is an internationally recognised limit of the on-shore area of an international State. From there we measure the international waters. The Government would be creating a new concept by measuring from the low-water mark rather than from the high-water mark. In a submission from the petroleum industry - the committee may have it

but we can make it available - it is suggested that subdivision M of the Native Title Act might apply to that area. In my written submission I have detailed why that is not so. Essentially, I suggest that subdivision M and its various subsections are meant to apply to internal waters where an adjoining owner may have some riparian rights. It talks about the native title holders having the same rights as an ordinary title holder if their title adjoins or surrounds the waters. It does not provide any rights to the water itself, only to the land adjoining or surrounding it. My legal opinion is that that part does not cover the intertidal zone. The suggestion of the petroleum industry that a procedural right applies to the intertidal zone by application of subdivision M of the Native Title Act is not the case. Therefore, there is a good argument for including it in a special way within the provisions.

Mr van Hattem made it clear that in his view the addition of the intertidal zone to either the consultation procedures or the right to negotiate would be unconstitutional because it would be inconsistent with the Native Title Act. The Native Title Act seeks to cover the field and he felt such inclusion would be inconsistent because of seeking to cover the same field or would simply be directly inconsistent. In my legal opinion neither of those reasons is correct. It does not mean that a right which is accorded or an addition which is made which differs from the federal legislation is inconsistent. Difference is not the same as inconsistency as a matter of constitutional law. I suggest that where the relationship between the Native Title Act and state legislation operates is this: The State in the ordinary sense has the right to make plenary laws for the peace, order and good governance of the State. The State can and should be able to do anything necessary to govern the State. The State is limited only by what the Commonwealth legislation prevents it from doing effectively. The State might want the cloak of the Native Title Act to enact provisions such as the validation provisions because if it did not have the cloak of constitutional federal legislation, it would be in danger of breaching the Racial Discrimination Act. If the State gave lesser rights than the right to negotiate which exists under the Native Title Act and sought to have that federal right replaced, it would probably be unconstitutional because it would be inconsistent removal of something given by federal legislation. To give more is merely to exercise a State's right to add to the peace, order and good governance of the State, which is not prevented by any commonwealth legislation."

In addition, Mr McIntyre provided a written submission through the Western Australian Aboriginal Native Title Working Party:

"<u>The inter-tidal zone and the right to negotiate</u>

As the Select Committee will appreciate from the oral submissions made to it by indigenous people, they regard their coastal interests as being every bit as significant as the land above the high water mark. The inter-tidal

zone should be included in Right to Negotiate and Consultation Procedures. The *Native Title Act* section 26(3) excludes the intertidal zone from the right to negotiate.

The ALP has moved amendments in the Legislative Assembly which provide Indigenous people with limited rights of negotiation and consultation over the inter-tidal zone. These amendments to clauses 3.5(2) and 4.4(2) of the Native Title State Provisions Bill do not create a regime for the inter-tidal zone which is separate from the "onshore" area.

The ALP amendment seeks to incorporate the inter-tidal zone into the consultation procedure and right to negotiate procedures which will apply onshore (negating the exclusion of the inter-tidal zone from the Commonwealth Right to Negotiate: *Native Title Act* section 26(3)).

The low water mark

The low water mark is the line which defines the "limits of a State" with sufficient accuracy for it to be recognised in Australian and international law and at common law as the defining line of the jurisdiction of a State in the Commonwealth of Australia: See Seas and Submerged Lands Act Case (1975) 135 CLR 33.

The low water mark, thus defines the distinction between an "offshore place" and an "onshore place" under the *Native Title Act* (see section 253); and is, therefore a more appropriate criterion for defining the application of Consultation and Negotiation rights.

Constitutional Validity

The amendments which the ALP moved in the Legislative Assembly to clauses 3.5 and 4.4 of the Native Title State Provisions Bill which apply the Consultation and Negotiation Procedures to the inter-tidal zone:

(a) do not require the approval of the Commonwealth Minister pursuant to section 43 and section 43A of the Commonwealth Native Title Act 1993;

(b) do not deny rights to native title holders, but positively add to them;

(c) in adding an area to those to which the Right to Negotiate applies under the Commonwealth *Native Title Act*, do not breach and are not inconsistent with the Racial Discrimination Act 1975 (Cth); and

(d) are not inconsistent with the Commonwealth Native Title Act 1993, thus

(e) could not be said to be invalid or inoperative because of the operation of s. 109 of the Constitution.

The State Parliament has constitutional power to make laws it deems necessary for the peace, order and good government of the State. There is nothing in the operation of the Commonwealth law which prevents it exercising that power to give statutory rights to native title holders in relation to the inter-tidal zone.

It may be appropriate, to avoid confusion with those provisions which are to be approved by the Commonwealth Minister, to place the rights in relation to the inter-tidal zone into a separate part of the Native Title State Provisions Bill and have the provisions of Part 3 and 4 apply as appropriate.

Alternatively, the view might be taken that s.25(5) authorises States and Territories to "make their own laws as alternatives to subdivision P of the *Native Title Act*, without limiting what may be contained within such laws, provided the Commonwealth Minister is satisfied as to compliance with the minimum standards set out in sections 43 and 43A.

Inconsistency between Commonwealth and State laws may arise where -

(1) the two laws make contradictory provisions upon the same topic, making it impossible to comply simultaneously with the duties or obligations imposed by both laws: RJ Licensing Court of Brisbane; Exp. Daniell (1926) 28 CLR 23

(2) one law takes away or modifies a right, immunity or privilege conferred by the other law: Clyde Engineering Co Ltd v Cowburn (1926) 37 CLR 466

(3) a State law makes provision in respect of an activity or matter which the Commonwealth intends to cover completely by its laws: O'Sullivan v Noarlinga Meat Ltd (1954) 92 CLR 565.

It is not rendered impossible for any party to comply with the State law by the Commonwealth law merely because the State law provides for Consultation and Negotiation rights to apply to the inter-tidal zone, where the Commonwealth has provided that the Right to Negotiate under subdivision P of the NTA does not apply to the inter-tidal zone.

Neither law takes away or modifies the rights or privileges which are extended to native title parties of each law. If the State law applies, the native title party has such rights or privileges as are accorded by that law and if the Commonwealth law applies the native title parties have such rights as are accorded by that law.

Other potential parties to consultations or negotiation may be obliged to consult or negotiate under State law, in relation to the inter-tidal zone, whereas they would not have that obligation under the Commonwealth law. However, the fact that the Commonwealth law has chosen to so limit the extension of the rights of native title parties does not constitute the Commonwealth law (as) a law which confers an immunity upon non-native title parties; although as a practical consequence of what the law omits, non-native title parties will not have obligations in relation to the inter-tidal zone.

It is clear from the NTA s.25(5) that the Commonwealth does not intend its law to be the only law with respect to the procedures relating to the future acts affecting native title referred to in s.25(1). I.e. -

* permissible leases etc renewals under s.24IC

* certain conferrals of mining rights

* certain compulsory acquisitions of native title

Section 25(2) of the NTA specifically provides that "the States and Territories may make their own laws as alternatives to this Subdivision. The Commonwealth Minister must be satisfied as to certain matters before such laws can take effect."

There is nothing about the inclusion of the application of Part 3 and 4 of the NTSPB to the inter-tidal zone which would cause the Commonwealth Minister to fail to be satisfied about the matters specified in s. 43(2)(a) to (k) or s. 43A(4)(a) to (h), (6) and (7).

A Commonwealth law may be both compatible with an aided by similar State legislation: Victoria v Commonwealth (1937) 58 CLR 618, Dixon J (Rich J concurring) at 630, Starke J at 628; Flaherty v Girgis (1987) 162 CLR 574, Mason ACJ, Wilson and Dawson JJ at 595, McWaters v Day (1988) 168 CLR 289, 299.

Further, a Commonwealth law may indicate that it does not intend to cover a field, in which case scope remains for the operation of State law: RvCredit Tribunal, Ex p. General Motors Acceptance Corporation,

> Australia (1977) 137 CLR 545, Barwick CJ 552, Mason J at 563 (Barwick CJ, Gibbs, Stephen and Jacob JJ concurring).
>
> In the present instance the enactment by the State of alternative provisions to the Subdivision P provisions of the Commonwealth NTA, which include extending rights to the inter-tidal zone, is not incompatible with Commonwealth legislation. The Commonwealth has expressed an intention in NTA s.25(5) to leave scope for the operation of such a State law.
>
> There is nothing which excludes the inter-tidal zone from the definition of an "alternative provision area" in NTA s. 43A(2). Indeed, section 43A(8) allows for the possibility that the State might make different provisions for some kind of land or waters than for others. It follows that there could be a regime specifically addressed to the inter-tidal zone if the State Parliament so chose."

The evidence of Mr van Hattem and Mr McIntyre on the issue of the inter-tidal zone are in conflict. On 10 December 1998 the Chairman tabled a legal opinion given by Mr PW Johnston, legal counsel retained by the Labor Opposition , which addresses the inter-tidal zone issue. As the advice was not sought by the Committee and due to the lateness of its tabling, the Committee has not considered this advice in its deliberations.

5.2.2 Right to negotiate/consult

The amended Native Title Act came into force from 30 September 1998. There were major changes incorporated in the procedures of the National Native Title Tribunal, including in respect of the registration test. It will take the National Native Title Tribunal some time to examine current Native Title claims and apply the new registration test.

> "Ms HEASLIP: The registration test was welcomed; all parties supported that. However, the tribunal will be the first to tell you that it will probably take two or more years and enormous resources to begin processing and clearing the number of claims in the system through the registration test; that, in itself, will be timely and costly. We do not expect any short term relief.The tribunal has been very up-front about that."

Many of the issues in respect of workability are based on practical difficulties that arose in respect of the "Right to Negotiate". The intention of the new registration test is to ensure that only Native Title holders, as opposed to claimants, benefit under the remaining Right to Negotiate. It is yet to be demonstrated whether this will in fact significantly reduce the number of multiple and overlapping claims.

Ms Tan, from the Anglican Social Responsibilities Commission made the following comments:

> "The SRC also sees no need to establish a new state tribunal when we already have a national tribunal with staff and facilities based in Perth. The general feeling is that it is premature to legislate in relation to the so-called workability issues until the federal amendments have taken their course. Many of the complaints about delay and workability relate to the lack of a threshold test and the fact that native title processes were tacked on the end of other processes, such as mining approvals or environmental processes. It looked as though the last thing tacked on was holding up everything. If amendments could be made in terms of parallel processes in that regard, it would save a lot of time.
>
> With the federal amendments and the existence of the registration test, many of the problems of workability might be worked through without the need to proceed with the Native Title (State Provisions) Bill. It would be far better to see how it works in practice and to identify areas where there might be real needs and problems as to workability and then legislate on those rather than to rush into a piece of legislation without knowing what are the problems and whether we are addressing the real issues, if any exist.
>
> If the federal legislation, with its amendments, works in practice, there will be no need to extend extinguishments and to remove the right to negotiate. The commission believes that the rights under common law and the original Native Title Act should not be reduced without knowing there is at least a very obvious need for that. Otherwise why are we going through the process of removing rights from indigenous people?"

The Committee heard evidence from witnesses on the right to negotiate versus consult as follows:

Mr Patrick Dodson from the Western Australian Aboriginal Native Title Working Group gave the following evidence:

> "The Native Title (State Provisions) Bill virtually takes away the right to negotiate over large areas of the state pastoral leases, towns, cities and reserves. That right is replaced by a lesser consultation procedure. There is no protection over the intertitle zone for native title people. I highlight that which was highlighted in the select committee report regarding the Broome situation where the right to negotiate has existed. It has assisted the Aboriginal people and lessened the reliance on the Heritage of Western Australia Act and obviously avoided many disputes which were part and parcel of the landscape here prior to that right to negotiate being available to the indigenous people.
>
> It has involved the indigenous people in the town planning scheme. It has led to an interim agreement with the shire which enables the orderly development of the urban regions, the protection of culturally sensitive

areas as well as the provision of infrastructure needs of the other citizens of this State and this town. Agreements obviously have been made in this town as a consequence of that right to negotiate being available and one of those has been an agreement with the [?] Shopping in which a proportion of land was surrendered to the developer. There has also been an agreement in relation to the agriculture development which is at the foreshore. The right to negotiate and the goodwill of the Government in relation to that has enabled us to proceed. By way of agreement rather than relying on the strictures of the law.

There is high potential for a framework agreement to be entered into with the State at some stage. Those matters, that agreement, that potentiality would not be exist if it were not for the capacity of the indigenous people to have a right to negotiate in relation to land that they consider to be their native title domain.

We urge the committee to support the reinclusion of the right to negotiate. We are not opposed to pastoralists diversifying, but not at the expense of our rights to protect our native title. Our position in relation to these 3 Bills is obviously where we see ourselves coming from a disadvantaged viewpoint as a consequence of the amendment made to the Native Title Act this year. We obviously understand that the Labor Party in this State has said it supports the Bills and that it supports the establishment of state regime. In that political context we have tried to convince the Labor Party to address our concerns in an effort to try to claw back some of the interests and rights we believe have been taken away from us. Their amendments fall far short of this. Nonetheless, they provide some important improvements to the Government's Bill to make it more balanced, particularly in relation to the provisions that deal with consulting in good faith and in relation to the intertitle zone and the parliamentary disallowance ministerial overrider of the State Native Title Commission's decision. These are important improvements that should be included as they lesson the substantial downgrading of our rights and the government Bills.

If the Government negotiates in good faith on the basis of recognising native title rights we can achieve good outcomes. If the Government continues to seek to extinguish native title there will only be further uncertainty and injustice."

Question asked of Mr Dodson by Committee member:

Hon GREG SMITH: The state provisions Bill has the two sections, the right to negotiate and the right to consult. The right to negotiate is seen by many who have tried to work with it as almost a legislated right to extort whereas hopefully the right to consult will create a more harmonious working relationship between claimants or native title holders and people

who want to develop mines or the airport at Broome for example. People are now using a consultation process more than a negotiation process. Is that right?

Mr DODSON: I do not know. I would not have thought so in Broome. We should not get confused between the amicable way we enter into negotiations as opposed to consultations. Not every negotiation must be hostile. They can be done in an amicable manner where quid pro quo situations arise and compromises can be readily entered into. Much of it depends on how the scene is set. Obviously if there is belligerence at the start of negotiations there will be a belligerent response. The question of whether the right to negotiate is used as a tool for extortion is a grandiose comment. I do not believe any commercial developer would be subject to any form of extortion over the way in which they enter into negotiations. If they were, they should not be in the business. Very hard negotiations take place in a commercial environment and bargains are driven hard by either side. Ultimately, the commercial decision must be made and if in the judgment of a developer the enterprise or activities they wish to undertake are still able to stand up on the basis of the economics of it they will enter into the agreement. If they are not that will become clear in the process of those negotiations and they will walk away from that.

Ms Heaslip of the Chamber of Minerals and Energy gave the following evidence:

"The position of the Chamber of Minerals and Energy of Western Australia has been that the right-to-negotiate procedures are the crux of the problem and what we call the unworkability of the system. That is why, even though the Government's Bill is a compromise, we support consultation provisions instead of the right to negotiate. Even though the right-to-negotiate provisions have been modified federally, they will not take away the existing problems. In our paper we alluded to a number of problems and why the right-to-negotiate procedures do not work, and in previous papers to members of the committee and to the Australian Labor Party.

Nothing has gone through because, even though the new procedures are in place, the tribunal must first deal with its backlog of 5 000 claims. Anyone issuing a fresh section 29 notice, which is the way a mining title is sought through the Native Title Act processes, will have to join the queue as No 5 001.

Any new procedures to help start the streamlining of the process will be of benefit. The tribunal is working as hard as it can. All parties want to move along this backlog. The sooner we can put in place a streamlined process, the easier it will be for parties to focus on reaching decisions and getting results.

> The main issue for the industry with the existing system is the right to negotiate. That is where the problem is for industry. That is why we believe that the consultation provisions will make it a far more streamlined process."

Mr Gishubl, Legal Adviser to the Chamber of Minerals and Energy gave the following evidence:

> "It is hoped that the so-called Wik amendments, when taken as a whole, will produce a system that is substantially more workable and expeditious than the old right-to-negotiate system. However, considerable doubts and concerns remain about the scope for lengthy delays and continuing litigation arising from the modified right-to-negotiate system. The State Government's proposed alternative system appears, on the face of the matter, to be considerably more streamlined, transparent and workable and, if implemented, there is a reasonable chance that it will assist in moving through the backlog more quickly than the implementation of the Wik legislation."

Questions were asked of the witnesses by the Committee:

> Hon GREG SMITH: The right to negotiate as it has been - I am not sure how the right to negotiate will work in the new set-up which amounts to a right to veto - has been described by some people as almost a legislative right to extort. Has it been used in that way?
>
> Mr SATCHWELL: One of my mining industry colleagues used the term "a right to ransom" in the media recently. It has resulted in stalled discussions and it is not benefiting anyone in most cases.
>
> Hon M.D. NIXON: Presumably the right to negotiate is to claim compensation for damage which might be done to the property of traditional native title owners. Is there a different rate of discharge for a mining company with the capacity to pay it compared with a pastoralist who might do a similar amount of damage to the environment? Are there two prices?
>
> Ms HEASLIP: There is a perception that that is the case. The question of compensation is important to us because compensation for impairment of or damage to native title rights and interests is appropriate. Compensation sought in the past has not always been for a particular impairment, it has been for a range of matters including payments that are often tantamount to royalties.
>
> The CHAIRMAN: There is an absence of clear and detailed content to the consultation processes in the current Native Title (State Provisions) Bill before the Parliament unamended. Does the chamber have any fear that that

unamended Bill will not survive injunctions and court challenge until it receives content by judicial decision?

Ms HEASLIP: Judicial decisions on any new legislation will be the norm. We have worked with judicial challenges to the existing legislation and no doubt there will be ongoing challenges. However, we also believe that part 3 is very prescriptive. It contains prescriptive guidelines about the processes to be followed. We should move forward.

Mr GISHUBL: The content of the requirement to consult in the unamended Bill has not been the subject of any judicial consideration because the legislation does not yet exist. However, there has been much judicial consideration of the content of the ordinary and natural meaning of the word "consult". Consequently, it is at least hoped that the existence of that judicial authority and extensive debate at a Commonwealth level will minimise the risk for further litigation, although it cannot be ruled out. The content of the proposed Opposition amendment does not have that benefit either. The proposed amendment to the content of the consultation would arguably effectively elevate the consultation requirement to something akin to a right to negotiate in another guise. The wording proposed is far from clear and apt to protract litigation.

The CHAIRMAN: I understand that a Bill would not normally be subject to judicial consideration but that this Bill has already been the subject of submission and some consideration of the submissions dismissed by Justice Lee before he brought down his finding.

Mr GISHUBL: I will clarify my remarks. I did not mean to suggest that the Bill would be the subject of judicial consideration before it is enacted. I am merely opining on the possible outcome of either version of the Bill, as presently considered, being enacted.

Mr SATCHWELL: The new registration test should work a lot better than the old one but, as the chamber has said repeatedly, in the end what we need to do once we are through the legislative maze, is test how the new Act, including the new registration test, works on the ground. That will be the real test.

The CHAIRMAN: Was the chamber supportive of lifting the threshold test in the amendments to the Native Title Act contained in the 10-point plan as part of an important strategy for finding relief to the difficulties experienced under the original Act?

Ms HEASLIP: Yes. As a result of previous Federal Court decisions there was no registration test prior to this new test. The chamber was supportive, as were all interested parties.

The CHAIRMAN: Does the chamber see the amendments as having an important and significant impact on the current situation?

Ms HEASLIP: We hope that as part of a package the new registration test will help and, in particular, help deal with the issue of anybody being able to lodge a claim irrespective of the merits or otherwise of the claim and the issue of overlapping, multiple, frivolous and vexatious claims. That is only part of the package. The second part deals with the right to negotiate provisions. We see that being balanced out by bringing in consultation provisions which, when used in conjunction with the registration test, should move things forward.

Hon GIZ WATSON: Does the chamber have a position on what it sees consultation as entailing? What consultation would relate to is obviously up for definition both in practical operation and what rights it would confer. Does the chamber have an opinion on consultation?

Ms HEASLIP: I will answer that question briefly and then ask my colleague to elaborate. As to our general understanding of the word "consultation" compared with the court definitions of "negotiations," consultation invariably means the right to be advised, in this instance, of a mining tenement grant and the right for the native title claimant to object and to have the objection heard and for discussions to take place. The difference between that and "negotiation", as we see it, is that negotiation requires an outcome - an agreement - to be reached. Consultation would mean that if agreement were not reached there would be no bar, in effect, to the tribunal or commission helping to break the deadlock. At this time under the right to negotiate, when negotiations break down and we do not reach agreement, there has been successful legal argument that because agreement has not been reached the tribunal cannot exercise its jurisdiction to break the deadlock. There are also questions of compensations that flow.

Hon GIZ WATSON: Is one of the salient differences that "negotiation" implies discussion between equal parties and that "consultation" implies the giving of information and an exchange of information rather than an active process of working out a solution?

Ms HEASLIP: Both involve an active process. The mining industry is committed to that, but there is no obligation ultimately to have reached an agreement in order to be able to move forward.

Mr GISHUBL: The core content of negotiation is a bona fide attempt to reach agreement about certain matters, whereas consultation involves open discourse and disclosure of information and taking into account the information provided by the other side. It does not necessarily mandate an

attempt to reach an agreement, but it involves listening and taking into account the concerns and wishes of the other side.

Hon GIZ WATSON: Does it involve a requirement for good faith?

Mr GISHUBL: Certainly, if bad faith were exhibited in consultation, there would be a reasonable argument that there has not been proper or true consultation. Good faith, in the sense that it has been interpreted or construed in the context of the Native Title Act, is a different matter. It should not involve exactly the same considerations and issues as have been determined to be involved in negotiation in good faith, but I would have thought that full and frank disclosure and consultation, would preclude bad faith.

The CHAIRMAN: Thank you, Mr Gishubl. Have you had the opportunity to read Chief Justice Lamer's Delgamuukw judgment?

Mr GISHUBL: I have, but I must confess that I have not read it for about eight months, so I am not in a position to express a detailed view on its content.

The CHAIRMAN: Several of his sentences dealt with the concept of consultation having the prospect of being something that varied, depending upon the right that was being argued over, from something that he called mere consultation all the way through on a continuum to something that might, if the right were significant enough, require more than full, frank and open disclosure but rather the consent of the parties. Do you see some prospect that in view of Justice Lee's reliance upon the Delgamuukw judgment that that might be the eventual fleshing out of what consultation will mean in the native title process in Western Australia?

Mr GISHUBL: I feel that it is likely that that proposition will be put by someone at some point. All that I can say is that that is not necessarily consistent with the way in which "consultation" has been interpreted by the courts in Australia to date.

Hon BARRY HOUSE: It should be pointed out that that is a Canadian judgment, not an Australian judgment.

The CHAIRMAN: Upon which Justice Lee has now based his determination.

Mr GISHUBL: He has quoted certain passages from that judgment.

The CHAIRMAN: Yes.

Mr GISHUBL: He has not adopted wholly all the comments in the judgment, so it would not be right to say that Justice Lee has implicitly adopted the comments of the Canadian decision in the context of the meaning of consultation.

Mr Niegel Grazia representing the Australian Petroleum Production and Exploration Association gave the following evidence:

"APPEA is also concerned that the Opposition is seeking to amend provisions relating to consultation; that is, it proposes to introduce a concept of consultation in good faith with a view to reaching agreement, and the inclusion of compensation as a matter of consultation. The ALP amendments would effectively remove this distinction made between areas to which the right to negotiate applies and alternative provision areas. That is the distinction which is made under section 43A and section 43 of the commonwealth Act.

APPEA requests that the select committee gives this matter further consideration, recognising that the commonwealth Act specifically differentiates between the right to negotiate and the right to be consulted. This distinction is important in that it acknowledges alternative provision areas in which native title interests are limited to a right of coexistence with other interests. APPEA is concerned that the ALP amendments to clause 3.25 of the State Government's Bill effectively introduce a right to negotiate to such alternative provision areas. This would unjustly subordinate legitimate non-native title interests and bind them to a process in which good faith has been interpreted to swing on actually securing an agreement. Clearly, this goes beyond the obligation to consult and provides the native title interests with a deadlock mechanism that would impinge upon the legal rights of other parties.

APPEA is further concerned that the ALP amendments to clause 3.25 introduce compensation as a matter over which agreement must be reached. Even the right-to-negotiate provisions of the commonwealth Act do not prescribe compensation as a matter over which agreement is to be reached. In such areas, consultation should focus on how the effects on coexisting native title rights might be minimised, rather than on reaching agreement or agreeing to compensation for any effects. Under this approach the parties remain free to consider compensation as a remedy, but should not be obliged to do so. If the committee chooses, I am happy to pause there and deal with any questions, to the extent that I am able to, perhaps with Mr Stevenson's assistance."

The Committee asked questions of the witnesses:

"Hon GIZ WATSON: Mr Grazia, what I am hearing you say is that APPEA's position is that it is not willing to be bound by a good faith requirement or a commitment to an actual outcome when it comes to negotiating with Aboriginal parties. Surely that does not leave much for Aboriginal parties in this process.

Mr GRAZIA: In practice, APPEA'S membership would of course be prepared to commit to a common understanding of consultations in good faith. The concern about the good faith provision relates to legal argument and legal interpretation, which we understand has been presented, which allows a native title party to argue that good faith has not been provided on the basis that agreement has not been reached. In practice, companies have no interest in sitting down and talking to indigenous people unless they are there with a common understanding of good faith. The concern relates to the legal interpretation that has been applied to the terminology.

Hon GIZ WATSON: What has been the history and experience with petroleum interests negotiating with Aboriginal people on practical outcomes that have delivered anything to any Aboriginal interests in the matter of petroleum? Have any outcomes actually delivered anything to Aboriginal people?

Mr GRAZIA: Certainly. The initial focus in discussions relates in the first instance to site avoidance, which the industry has both the technical means and the will to address in a practical manner. On the site avoidance front, the industry is equipped and able and does deal with that matter quite seriously, and that is obviously in the interests of native title parties. If your reference is to commercial gain or to the improvement of the opportunities and lifestyles of Aboriginal people, there are examples of agreements into which the petroleum industry has entered. I am aware of one example in Queensland, which has gone as far as agreeing to a sharing of profits, so to speak - almost a royalty arrangement. That is certainly not the preferred industry position, but I am aware that that has occurred. With regard to a more local example, WAPET had longstanding relationships until recently with the Thalanyji group in Onslow involving waste management and the utilisation of steel products, and involving matters that have been accumulated on Barrow Island and that need to be dealt with for environmental reasons. A contract was issued in that instance to a local Aboriginal group and was in place for several years. However, that has since changed as a result of WAPET scaling down significantly its operations out of Onslow. I am also aware of a couple of anecdotal incidents. The reality of the petroleum industry is that much of our activity takes place offshore and well away from communities. We have very few onshore facilities in comparison with the mining industry and other sectors, agricultural or otherwise, and that does limit in practical terms what may be done with Aboriginal groups.

> Hon GIZ WATSON: In practice, you agree that negotiation in good faith is the way to go, but you are not willing to be bound by a legal requirement to do that?
>
> Mr GRAZIA: That is correct."

Evidence given by Mr George Savell, Chief Executive, Association of Mining and Exploration Companies:

> "AMEC supports the removal of the "right to negotiate" on pastoral leases and replacement with a right to consult. Legitimate claimants will not be prejudiced in any way and will still be eligible for compensation for effect of development on their native title when conferred. The "right to negotiate" was largely the cause of the multiple claim phenomena which occurred under the Native Title Act 1993 in its unamended form. When linked with another major problem - the fact that "claimants" as opposed to "recipients of formal determinations" were accorded this right - compensation issues - that is, money - began to drive the process. When it is accepted that many of the "claimants" - some of whom have already been "compensated" by developers - will never be "recipients of formal determinations", the absurdity of this whole right is starkly revealed.
>
> AMEC draws the committee's attention to the fact that native title is being "normalised" and is virtually being placed on the same basis as a pastoral lease. In short, pastoralists and native title recipients will have the same procedural rights. This certainly does not amount to discrimination as some have claimed. As a result, compensation payments to native title recipients will be calculated as a question of fact and not with respect to effect on that right, on a contrived, artificial and commercially unrealistic basis."

The Committee asked questions of the witnesses:

> Hon BARRY HOUSE: Mr Savell, I know you did not address them specifically, but is it correct to say that you have reservations about those amendments that were circulated to you, which have been proposed by the Labor Party, for two reasons: Firstly, if they are passed and incorporated into legislation, they will be inconsistent with commonwealth legislation, and secondly, they will not enhance, in fact, they will detract from the legislation as it has currently entered the Legislative Council?
>
> Mr SAVELL: It is a difficult question to answer. When we first reviewed the amendments that the Labor Opposition put up, we thought some amendments were entirely reasonable - those which were associated with matters such as the commission, appeals, and things of that nature. We opposed some amendments, particularly those that sought to put the right to negotiate back over pastoral leases. We informed the Labor Opposition

that we would oppose those absolutely and completely because, while the federal legislation devolves the power to the State to decide a number of matters, it was clear that unless that right to negotiate was taken off a pastoral lease country - about 70 per cent of Western Australia's production comes from pastoral leases; exploration is often on pastoral leases - we would perpetuate the problem. We would have preferred the Bill to go through largely the way it was. We had no objection to amendments that added to, but did not detract from, the process. We did not want any roadblocks put back in place which had been taken out at great cost at the federal level.

Ms STEVENS: Another basis for our opposition to the ALP's amendment was that it had always been our belief that native title claimants on pastoral leases should be afforded the same procedural rights as pastoralists - they coexist in the same tenure. Therefore, why should one group be afforded a more robust right than a group existing in the same area? That has been the fundamental basis for our argument.

The CHAIRMAN: Ms Stevens, are you suggesting that a court would find that the rights of a pastoralist would be in the same content to those rights that Justice Lee found in his judgment?

Mr SAVELL: No. We are not doing that.

The CHAIRMAN: Why do you think that a native title holder's rights should be the same as those of someone holding a grazing licence to graze cattle over the top of land? When Mr Savell was last here, a lot of import was given to the need for content within the native title. Justice Lee has given some content to that. We have a rough idea of the content for the holder of a grazing licence. Why would you be surprised if there was then a different right with reference to mining when the rights are so clearly of a different content?

Mr SAVELL: I do not know whether they are. A pastoral lease is considered to be crown land under the Mining Act provisions. It does not carry the same rights as those of a fee simple landholder in the south west or any other part of the State. We are trying to compare apples with oranges. On one side the court is saying that native title can coexist with pastoral leases. Pastoral leases carry conditional arrangements to allow the pastoralists to conduct a pastoral business. I could equally take the view that we are seeing a contradiction; that form and content are being given to native title under Justice Lee's judgment, which is probably inconsistent with an ephemeral title over a piece of land which perhaps already contains umpteen mining leases and a pastoral lease. We make that point because exploration licences and prospecting licences are in our view ephemeral titles. They are thrown over a table like a tablecloth. Mining leases are

> something different because they give us the right to develop mines and do many things which are similar to a fee simple title for a period of time."

Mr Hoare, Executive Director of the Noongar Land Council gave the following evidence:

> "By losing the right to negotiate, what do we have? The legislation would be totally empty. With the right to negotiate we are able to sit with non-indigenous groups and they are able to sit with us and negotiate. It brings us together on a negotiating basis, so that we can develop agreements and agree on issues of work, employment and training, and with our outback community harmony, move closer together. If companies do not have to sit and negotiate with us, the Noongar people will probably need to look at the Indigenous Land Corporation. It has a certain amount of funds but it is also a national organisation. It must focus Australia-wide. Our funding could be very minimal to purchase lands. With such a large community group - which represents a population the size of a town like Geraldton or Bunbury - something like 26 000 people in the south west alone are looking for employment and training to get ahead. The lack of the right to negotiate does not give us an opportunity for a place at the table to meet and talk properly on an equal basis. It also does not give the non-indigenous people the same. I notice that now people are aware that the Noongar Land Council is up and running and available, we have numerous inquiries daily from mining companies which want to talk and become involved with these agreements. Unlike a lot of non-indigenous people, Noongar people are happy to live in the country and to be out in the bush. Mining takes place in the bush. This is a great opportunity to have the right to negotiate in those outback regions and the opportunity for developing a community out in the bush, putting employment out there and developing infrastructure and towns out there."

Mr Patrick Dodson, Member of the Western Australian Native Title Working Group gave the following evidence:

> "I know there are many margins for situations in Western Australia - all sorts of people without cash trying to make cash and those with much cash who want to make more. However, we should not be casting aspersions upon indigenous people for their capacities to negotiate at arm's length commercial arrangements that give them the best deal possible. That is what free enterprise is about. If we do not accept that we must change the rules for everyone else. I do not think the right to negotiate enables indigenous people to extract that high a benefit that it will put it in the category to which you alluded. I do not see the evidence or where there has been exorbitant extortion, claims made or benefits reaped through the use of that right to negotiate. I might be ignorant of that. If there are I would like to know about it."

Mr Gregory McIntyre, Legal Coordinator for the Western Australian Native Title Working Group gave the following evidence:

> "I move on to the consultation procedures. I will address essentially the amendment which has been moved by the Australian Labor Party in the lower House. It adds words to the concept of consultation under the Native Title (State Provisions) Bill, and it adds words which would suggest that the consultation is, firstly, in good faith; secondly, towards agreement; and, thirdly, has, as one of its possible outcomes, compensation.
>
> It was put to the committee rather forcefully, but in my suggestion wrongly, by a number of the witnesses who have appeared before the committee earlier in the day that, firstly, there is something wrong with it, including good faith. I thought Mr Gishubl eventually said, "Well, we wouldn't be allowed to negotiate in bad faith." The addition of good faith merely cements what should be a reasonably understood part of the process of consultation. How can one in conscience walk away from this place saying, "We have refused to add the concept of good faith to the consultation procedures"? Secondly, on the question of whether or not it should be towards agreement, it was suggested by some representative of the mining industry that that then obliges them to reach agreement, and unless they can reach an agreement, they are stuck in a deadlock.
>
> It does not do either of those things, neither did it under the right to negotiate in the federal arena. The idea that consultation might be towards agreement does not oblige anybody to reach agreement. Nobody can be forced to reach an agreement, and the legislation does not do that, neither could it, and the words do not suggest that. If in fact the parties proceed by way of consultation in good faith towards an agreement, and they do not reach one within the minimum time limit under the legislation, then of course there is a deadlock procedure, which is the arbitration process which has existed under the federal Native Title Act and exists in the form in which the state legislation is drafted. Therefore, no serious problem exists. There are some problems in the resources which allow those processes to run their appropriate course, and to do so within the time limits. In my experience in the goldfields, although there are six-month time limits, the State, in complying with its obligation to negotiate in good faith, has found that it is unable to do so on some occasions within 12 months or 18 months or so. That is not because it is not possible to do that; it is really a question of resources, it is a question of people getting used to the process, and it is a question of getting the machinery rolling in an appropriate fashion, rather than any of that being impossible.
>
> On the question of compensation, I cannot understand why anybody can submit that one will get away with presenting to the commonwealth minister a piece of legislation under the consultation procedure which does

not include a provision which suggests that compensation is one of the possible outcomes, because that is precisely what is required by the federal legislation. It is one of the things which the minister must find is one of the possible outcomes of the process in order for him to approve it. It defies belief.

Hon MARK NEVILL: Has anyone suggested that that was not going to be part of it?

Mr McINTYRE: It is not in the current state Bill. There is no mention of compensation in the part 3 section of the current state Bill relating to consultation. The ALP amendment adds it. The federal legislation, in my opinion, requires it to be added. The mining industry seemed to abhor the idea that that might be one of the outcomes. However, it seems to me that the legislation will not get through the commonwealth process unless it is there, and I cannot understand why it has been allowed to get this far. I know there has been some discussion with the Attorney General's department about this. Perhaps it is suggested that it is assumed that it will be in there. However, it seems to me that to spell it out gives one more chance of getting approval through the commonwealth processes.

The only other thing about that consultation procedure is that I have pointed out in the written submission that what the legislation, as drafted by the State Government, presently says is that the purpose of the consultation is to resolve disputes or to reach agreement on unresolved disputes. It uses that kind of language. If that does not suggest agreement, what does it suggest?"

Ms Catherine Hobbs gave the following evidence to the Committee:

"People have also said that there is no right of veto for native title parties. That is not true. In every commercial, practical, real sense there is an absolute right of veto. If that were not so, then mining companies would not have ungranted leases. It is not as though we are not trying to use the negotiation process; we are. A negotiation process involves, for example, if I wanted to lease an office, I would discuss leasing that office with the relevant party and if we could not reach agreeable commercial terms, I would lease a different one. We do not have that right or ability in the mining industry. The assets lie in the ground. Everywhere we want to explore or mine, there is a native title claim. Despite our best efforts and our good faith in negotiating, we often cannot achieve agreement.

Someone referred to the right to negotiate as a right to extort and asked whether it had been seen to be used as such. I certainly have seen it used that way...".

5.2.3 Federal State complementary legislation under the *Native Title Act*

Questions asked of Mr Peter van Hattem by the Committee:

> "Hon GREG SMITH: Mr van Hattem, obviously you have studied the state legislation and carefully compared it with the Native Title Act. In its current form, does it comply with everything in the Native Title Act so it is complementary to it?
>
> Mr van HATTEM: When you say in its current form, I understand it was amended in the Assembly.
>
> Hon GREG SMITH: From what you have seen.
>
> Mr van HATTEM: I have seen both. My view is that the Bills, in the form they went to the Council, complied with the Native Title Act; that is, if enacted, they would not be to any extent inconsistent with the Native Title Act.
>
> The CHAIRMAN: Does the comment apply also to the form in which they went into the Assembly?
>
> Mr van HATTEM: Yes, I think so."

Evidence was taken from Mr Patrick Dodson of the Western Australian Native Title Group:

> "Hon M.D. NIXON: You will agree that the state legislation is complementary legislation to the federal legislation. Have you any concerns that in any way it is contrary to the federal legislation?
>
> Mr DODSON: No, I do not think it is contrary. It probably adopts the bottom line that the federal legislation sets out. There are probably options the State could exercise its mind on to improve the Bills as they are drafted. It may be contrary in terms of the schedule because the philosophy and views it puts is clearly an understanding that that schedule is about confirming already extinguished native title. In light of the fact that the Justice Lee decision has highlighted that is not the case, it might well find itself in conflict.
>
> The CHAIRMAN: My colleague Hon Murray Nixon asked you whether your advice was that the current state legislation was contrary to the federal Native Title Act as amended. Is it your advice that the Bills as unamended represent the bottom line that would represent the minimum basic prerequisite for complying with the amended Native Title Act? Or is your view that amendment, in particular those Labor amendments of which you

are aware, would constitute the necessary precondition before these Bills were in a form that represented the bottom line?

Mr DODSON: In answer to the first part it is my understanding that this is a minimalist position the State adopted in relation to the opportunities provided by the Native Title Amendment Act and that, as you know, schemes were adopted in New South Wales, for instance, where the right to negotiate was retained so there is a different arena proposed here. In answer to the second part of question, it is obviously a clawing back process. If some of those amendments were adopted it would assist to bring about balance. However, it does not go anywhere near restoring the position that was there in 1993 when the Native Title Act was first passed. There are obviously fundamental differences. You are talking about a state regime as opposed to a commonwealth tribunal. If the state regime under the commission is not objective, transparent and without a level of integrity there is little cause for optimism among indigenous people about receiving justice through that amendment. The obvious limitations on the rights to negotiate over the extent of the areas of land, particularly the pastoral upgrade areas, will be a tremendous blow to indigenous people. We must wait for the outcomes of the committee's deliberations, or for commonwealth recommendation for allowance or disallowance, and the processes of Parliament before these Bills are finally put into whatever shape they will transpire into law.

Hon HELEN HODGSON: Do you think any amount of amendment to the validation Bill will make it acceptable? Do we need to have a state provisions Bill at all or would the Native Title Act as amended this year be sufficient to give protection to Aboriginal people?

Mr DODSON: The position of the working group on the three Bills is that we oppose them. Certainly we see no justification for the validation Bill it. Why should we now reward the State for violating the rights of indigenous people when the law was quite clear as to the procedures that they were required to follow in relation to the issuing of leases and licences. It seems to me that has been done on one occasion - in 1993 - when validations were forced upon indigenous people. Now we are getting a second occasion clearly in defiance of existing law that the State is to be rewarded and the fact it is indemnified in some situations I understand by developers in relation to the compensation claims that arise, so I see no reason for the State to indemnify those people who were issued those leases and licences. Their anxieties were put to rest and the native title holders are not in any way the people responsible for the irresponsibility and dereliction of the State in relation to that matter.

Secondly the schedule in relation to leases that were deemed will now be active in the extinguishment of native title interests. Again, I have heard

over the past years and during the debates over native title the sense of outrage by the pastoral and mining areas as a result of the Wik judgment. We as indigenous people, as were the rest of the Australian public, were told that this schedule was about confirmation of already existing extinguishment when in fact the judge, in the Mirriuwong-Gajerrong case, highlighted that that was not the case. This ratification of the schedule will lead to active and deliberate extinguishment of native title. That will pose tremendous problems for the State as well as for the indigenous people. We will find ourselves caught up in litigation. I see no justification for that Bill being proceeded with. I can understand the concerns some people have. I understand the Labor Party has put forward some amendments. With good sense and cooperation we could see how coexistence and cooperation between indigenous and non-indigenous people should work.

In answer to the question of whether there is a state regime or commonwealth regime, this State has an appalling record. Some of the politicians should read in Hansard their speeches made in past years. It has an appalling record in relation to indigenous people in this State. The ability to trust a state instrument versus a Commonwealth instrument is something indigenous people will be reticent to do. They will not find themselves having confidence in a state regime if it is not transparent, objective, independent and subject to some parliamentary supervision or override because, unfortunately, business is done in this State in a different manner than we might like. I am afraid that under those circumstances I prefer the commonwealth position being retained as a body that is independent at the federal court level. We are now in the Federal Court anyway because everything we do under the amendment Act requires it to go into the Federal Court. We are in that situation.

I can appreciate the desire of the State and whatever party is running it for the State as an institution to have management and control over the land tenure system. That is probably the right thing. However, it cannot be done at the expense of indigenous people's rights and interests. It is the capacity for legislators as well as the public like me and others to work out how best we can now deal with native title as part of the legal landscape in which we find ourselves, rather than seeing native title as something that must be annihilated, extinguished or obliterated off the face of the earth. It will not go away; it is part of our common law and we will find ourselves at risk in terms of challenge and confusion.

There must be improvements to the state scheme and some of the matters we have indicated should take place. If we cannot have a just scheme at state level we should not have it."

Mr Michael O'Donnell, a lawyer with the Western Australian Native Title Group gave evidence to the Committee:

"A lot is being made about whether the state Bills, and especially the Australian Labor Party amendments which support the indigenous position, are inconsistent with the federal Act. It is important to put before the committee that the 1998 federal Native Title Act, or the amended Native Title Act, in effect enables a State or a Territory to do a number of different things. If the State or Territory chooses to do these things, it then sets minimum standards as to how they can be done. For example, in relation to the intertidal zone, the Act does not stop the State using its normal powers to legislate for a procedural regime or a right to negotiate to apply. It sets minimum standards. One must be careful as to how these things are drafted. However, there is no doubt in our view - and Mr McIntyre will go into more detail about that about how these things can be done. Specifically, it enables the state Parliament to extinguish or not extinguish native title in those provisions in part 2 in the Titles Validation Amendment Bill. It does not say that the State must do it but if the State does it, it does it in accordance with the mechanism provided there. It does not say firstly that it has to extinguish native title; nor does it say that it must in the total mass of the Act. The Parliament can proceed to do nothing in that respect, it can proceed to do part of what is listed in the schedule, or it can proceed to do everything that is listed. Similarly in relation to the validation of intermediate acts, there is no obligation upon the State to do that. The State can do it if it wishes by agreement, for example. It does not have to pass legislation that takes away Aboriginal property rights up front and leave them to the mercies of the courts and in opposition by the very people whose titles are secured by the State. Those people will be able to fight Aboriginal people in the courts for compensation. Something was made of this point the other night in the state submissions to the committee, particularly in relation to a small handful of titles. By saying "a small handful", I do not mean to demean the significance of it to particular people involved. However, a small handful of titles have been found invalid in relation to the Miriuwung-Gajerrong claim. The State told the committee what an awful situation that was and that if there is no validation, the State will be liable to those people. That is all very true but it needs to be clearly understood that the State, not the native title holders, put those people in that position by not complying with the federal Native Title Act. If the validation goes ahead as conceived in the Bill, Aboriginal people will find themselves in an identical position to that of the non-indigenous people because of the State's action. The inconsistency does not apply only to extinguishment and validation. It is to understand that the federal Parliament has given this Parliament discretion when it comes to which provisions, if any, it wants to implement. For example, Mr Dodson said this morning that the New South Wales Parliament has left in place the right to negotiate over pastoral leases. There has been a modified form of that outcome in the Queensland Parliament. Regardless of whether the State Parliament passes laws, it can maintain the right to negotiate. That is at the discretion of this Parliament. The federal law says that if you want to

displace it, you can do so under terms and conditions, but the discretion lies entirely with the Parliament. A state tribunal - or what is called the Native Title Commission in the Bills - is similar; it is for the State to decide whether to have such a tribunal.

Part 2 of the Titles Validation Amendment Bill derives from point 2 of the Howard Government's 10-point plan. The public position of the Federal Government, and I understand that of the State Government, has always been that when those provisions were implemented at the federal level thereby enabling them to be implemented at the choice of the State, the confirmation of pre-existing extinguishment was enacted and allowed for. The position was that the courts and the common law would have found that native title had been extinguished. Endless submissions were made by indigenous groups at the federal level stating that that was not the case and that it is the courts' place in our society to determine people's rights and that it is not the task of Parliament. In any event, if Parliament decided to do it anyway - and I am sure it did with the best of intentions - it could not get it right because it was looking at titles extending back to 1829 and statutes which no longer exist. It was trying to ascertain circumstances which are now more than 100 years old. Due to the mammoth nature of the task, the officials involved in compiling that list were not able to look at each and every lease and the conditions in them to try to satisfy the legal test propounded in the Wik decision. It was too large a task. All they could do was to examine the statutes and the form leases; they were not able to examine each of the lease conditions. Unfortunately for the titleholders, that lesson has been realised. Three months after the Native Title Amendment Act 1998 took effect, a court has found that a number of leases listed in the schedule, the so-called "confirmation of extinguishing title", do not extinguish native title.

Mr Dodson discussed the Ballengarra people and the co-existing native title determination which was found to exist on Lacrosse Island and the effect of the threshold. The registration test is the gateway to people obtaining the right to negotiate or, if the right to negotiate does not exist any more, the alternative consultation procedures. It does not deal with claims per se and the finalisation of native title claims; it deals with the statutory rights which arise under the Native Title Act. The new test sets an onerous burden on Aboriginal people. It establishes a prima facie test which they must pass, along with a number of other elements in the test.

On Wednesday evening the State openly admitted that the validation provisions are discriminatory. Mr Clarke put it to the committee that, in effect, there was an exemption from the application of the Racial Discrimination Act in the validation provisions. Despite my clients finding that offensive, that has been the situation since 1993. However, it is important to understand that the application of the Racial Discrimination

Act, albeit in the limited form of section 7 of the Native Title Act, applies to the confirmation of extinguishment provisions in part 2. The only provisions which are excluded from its limited application are the validation provisions and not the extinguishment provisions."

5.2.4 Indigenous Land Use Agreements

The Committee questioned Mr Dodson:

"Hon BARRY HOUSE: Those of us who were on the previous select committee into native title - and I am pleased to see a copy of the report on the desk next to you in Broome - forecast that the future relied on goodwill existing between different parties in negotiations. I understand you have been party to some negotiations on goodwill. What is your idea of the progress of those negotiations and what are your hopes for the future with those?

Mr DODSON: Certainly the presence of goodwill will lead to good agreements which will reflect mutual respect for the interests and rights of the parties involved. Under the Shire of Broome interim agreement the minutes of shire meetings are made available to the working group which examines them prior to their going to the shire. If matters are being proposed for shire consideration they bring those matters to the attention of the subcommittee of the shire which works through any of the difficulties or concerns to resolved them before they become contentious. In that environment of cooperation and goodwill we have not seen the use of the cultural heritage Act or animosity that often characterised a town like Broome in the past. That has been brought about by both the indigenous people and the shire.

The encouragement of the State in relation to the coastal zone areas of Broome is another important development in which goodwill is being applied to examine how best indigenous people, the shire, CALM and other agencies can work together to protect the immediate area around the Cable Beach region of Broome so that it is preserved for posterity not only for exclusive use but the topography and beauty of that region which is a great asset for the tourist industry in this part of the world is ensured. Those things come about because there is goodwill on all sides.

With all due respect to members of the Government the State seems to me to have played two games. On the one hand it is seeking to establish agreements with indigenous people as it has done with the Spinifex arrangements and the Ballingarri arrangements. On the other hand we have almost a Jekyll-and-Hyde situation in which the notion of native title almost becomes anathema. I can understand the reasons, which seem to be the centrality of the State's capacity to regulate and administer land. It seems to

me that native title is a reality of our legal system and that we indigenous people and the State must reach an agreed position on how this should work without the violation of the indigenous people's rights. As I think the original select committee report indicates, it should seriously consider agreeing these issues and the way in which we proceed as opposed to trying to find legislative solutions that are an attempt to deny and rescind rights of the indigenous people. That will always lead to conflict and heart-break because it is not done on the basis of goodwill. In saying that, I am not meaning to cast aspersions on the Premier or anyone else in the State. There is intention to good things, but there seems to be a blind spot about the rights of indigenous people. We must sit down and constructively work through the arguments. I suggest that the recent Mirriuwong-Gajerrong decision is a good example of where we need to restart our approach to how native title should be rescinded. That requires goodwill not just political expediency. That is where the lack of goodwill will lead to further litigation, division and discord.

5.3 *Acts Amendment (Land Administration, Mining and Petroleum) Bill 1998*

According to the Second Reading Speech the purpose of this bill is as follows:

> "With the proclamation of the amendments to the Commonwealth *Native Title Act* on 30 September 1998, Western Australia is now able to establish its own regime to deal with native title issues. The establishment of this regime is the subject of the *Native Title (State Provisions) Bill*. To facilitate the proposals within that Bill, consequential amendments are required for the *Land Administration, Mining, Petroleum* and *Petroleum (Submerged Lands) Acts*."[18]

The Committee heard no evidence in relation to this Bill.

6. The impact of the *Miriuwung-Gajerrong* decision

On 24 November 1998 while the Bills were being debated in Parliament the Miriuwung-Gajerrong decision was handed down. The Committee sought the views of witnesses appearing before it as to the effect of the decision and its impact (if any) on the Bills before the Committee for consideration:

> "Hon BARRY HOUSE: In this continually moving feast that is native title, the Miriuwung-Gajerrong decision appears to have opened up the issue of crown ownership of minerals. It also appears that that will be completely resolved only after the court appeals. Does the Chamber of Minerals and Energy of Western Australia have a view on that or does it have any concerns about possible outcomes of that?

[18] Hon Norman Moore MLC, Leader of the House, *Hansard*, 1 December1998

Mr SATCHWELL: The Chamber of Minerals and Energy of Western Australia has a strong view that it should endeavour to maintain the longstanding principle of crown ownership of minerals on behalf of the people of Western Australia. The Miriuwung-Gajerrong decision, on the face of it, seeks to change that principle. That will need further legal clarification because the judgment is not entirely clear. It appears to change that principle and we believe that the principle should stand and the Crown should own the minerals on behalf of the people of Western Australia.

Ms HEASLIP: A further issue is that the decision appears to elevate the rights of native title claimants and holders to a greater level than those of other non-native title holders of interests in the same areas of land.

Mr GISHUBL: That is a reasonable comment.

Hon MARK NEVILL: How confident are you of the workability of the new threshold under Wik. Do you think it will work as intended? Under Justice Lee's judgment and the determination on Lowcross Island, it appears that the threshold has been significantly lowered. What are your views on that threshold test as it now stands and the impact of Justice Lee's judgment?

Ms HEASLIP: The case certainly suggests that a lower standard of proof is now required for native title than we thought would be the case. We are concerned that it may undermine any benefits which might flow from the new registration test which provides for a higher test.

Mr GISHUBL: Justice Lee's decision also opens up very important issues concerning the content of native title. To date the Australian judicial consideration of the content of native title tends to suggest that native title is comprised of a bundle of rights which are derived or dependent on the traditional system of laws exercised and reserved by Aboriginal people. On the face of it, Justice Lee's decision appears to elevate the content of native title to full beneficial ownership. That is a matter with wide-ranging ramifications for current land-users. The matter was not resolved by Miriuwung-Gajerrong by any stretch of the imagination and it has simply resulted in further uncertainty about the true position.

The CHAIRMAN: In your comments earlier you indicated that native title prior to Justice Lee's decision was seen to be just "a bundle of rights". Justice Lee said it is not a mere bundle and relied on the Delgamuukw judgment of Chief Justice Lamer. Does that seem to be a reasonable authority to rely on in dismissing the concept that native title is not a mere bundle of rights?

Mr GISHUBL: It is one decision of a single Federal Court judge. It could be argued that other decisions in Australia like the Croker Island case, Fejo and also possibly Wik and Mabo stand for a contrary proposition. The position is simply not clear at the moment. Justice Lee has a fairly clear view but it is not yet clear whether the High Court will share that view

Hon GREG SMITH: Has the Miriuwung-Gajerrong decision changed anything regarding the state Bills' conforming to the NTA? Is it irrelevant?

Mr van HATTEM: The Federal Court decision cannot alter the Native Title Act. The issue is whether the state legislation is consistent with the Native Title Act. Nothing the Federal Court does can change that. It is either consistent or not consistent.

The CHAIRMAN: I understand that you were also involved in the submissions to Justice Lee on behalf of Argyle Diamonds and Normandy in reference to the Miriuwung-Gajerrong case that has just been determined.

Mr van HATTEM: Yes.

The CHAIRMAN: Do you have any commentary that you would like to give to the committee now, on the decision of Mr Justice Lee insofar as he referred to resources and any impact on those issues that were of interest to you in that case?

Mr van HATTEM: I can certainly comment on that. I made no preparation to comment on that today; however, some issues arose out of the determination which in a sense raised more questions than they resolved. In the determination of rights in paragraph 3, the total determination is in broad generic terms and the qualification on those rights in part 5 is in broad generic terms. The detail of how it is worked out is not covered. That is not necessarily a criticism of the decision because it may not be the role of the court, in making a native title determination, to descend to that level of detail as to who has specific rights in specific circumstances. However, it does raise the issue, in relation to the resources, of the extent to which the rights of the native title holders vis a vis resources are qualified or impaired, or indeed extinguished, by acts of the Crown, whether through legislation or the grant of titles permits and so forth. For example, the rights said to be included in the total bundle of rights were rights to use and enjoy resources, the right to use and control enjoyment of other resources, the right to trade in resources and the right to receive any portion of resources. Resources is capable of meaning anything from gold, diamonds, and petroleum at one level, through to fish, grass, sand and rock. Perhaps air is pushing it too far, but water would be in there. It raises the issue that if people are fishing in Lake Argyle and they catch fish, do the native title holders have the right to receive a portion of that fish taken?

How would that be sorted out? Is the right exercisable in kind or payment and so forth. With fishing in Lake Argyle, for instance, a couple of kids pulling out barramundi? That is perhaps an extreme example.

Hon GREG SMITH: Given the determination, if it was followed to the letter, could native title holders require those children to give some remuneration for access to fish for those fish?

Mr van HATTEM: I do not know the answer to that. The reason I do not know is that there is not sufficient detail and certainty in the determination. You are suggesting one way that it could be resolved. It might not go down that path, but it might. If there is a criticism, not so much of Justice Lee on making the determination, but of the value of the determination of rights, because it is so general and generic in those terms, it does not resolve a lot of certainty. It principally resolves the question of whether native title exists or not. Therefore, are Governments and the proponents of projects and so forth dealing with claimants or recognised holders of native title? It resolved that issue but it does not take it much further than that.

Hon HELEN HODGSON: Mr Stevenson, have you had an opportunity to look at the Miriuwung-Gajerrong decision when it discusses different types of leases and whether exclusive possession has been conferred?

Mr STEVENSON: I have read the decision in general terms. I have not studied it at great depth, but I do have an understanding of the decision.

Hon HELEN HODGSON: In the analysis of the perpetual leases and the types of leases that were discussed, some comments were made about some indicators as to what would or would not confer exclusive possession. Would the nature of activity on most of these special leases be such that the common law would have conferred exclusive possession?

Mr STEVENSON: In my opinion, that would be the cas. But the point is that the purpose of the amendments to the Native Title Act, which the Titles Validation Amendment Bill proposes to put in place, is to remove the need for lawyers and courts in each and every instance to ask the question, along the lines that Justice Lee has outlined in his reasons for his decision, of whether native title has been extinguished in that particular case. The great concern we have is that the certainty that the industry is looking for as a result of our interest being referred to in the schedule of interests to the Native Title Act will not be there; and that is what Mr Grazia is referring to. We want to be able to move forward from this point, knowing that in respect of those places that we occupy under special leases pursuant to various state agreements, that there is no longer an issue with regard to native title. However, having said that, we recognise immediately that if native title were proved at some stage in the future to exist with regard to

those areas, then those native title holders would be entitled to compensation, which is obviously a fair and reasonable outcome. What the industry hopes will be achieved as a result of the state legislation is to remove the need in each and every case to look at and go to the particular terms and conditions of the interest, whether it be a lease or some other type of interest in the land, and to then weigh those rights against the native title rights and interests. Following on from that is the further concern that if the position is not made absolutely clear at this point in time, then in the future, when those other interests come to be renewed or replaced, the whole issue of whether a right to negotiate process will be applicable will arise again, and that will create further uncertainty and, in our view, unnecessary costs for the industry in carrying on with its business.

Mr GRAZIA: APPEA is not in a position to provide expansive comments on the case for two reasons; that is, it was a very recent decision and also I understand it is subject to an appeal. Recognising the committee's request to provide some comment in this area, I will say that our expectation is that existing petroleum tenement holders would continue to exercise their rights and that the grant of future tenements would be subject to the appropriate notification, negotiation and consultation provisions. A lot of interest in the industry has focused on the statements with respect to the ownership of resources and sharing in the benefits of their production. I guess it is a potential area of uncertainty. However, petroleum and mineral resources have long been recognised in statute as the property of the Crown. Mr Stevenson may like to amplify the issue that perhaps statute adequately deals with the ownership issue.

Mr STEVENSON: I do not wish to go into that issue today but I will make one observation on what Justice Lee said in his reasons for his decision in this case. His contention was that so far as common law is concerned, there is no such concept as partial extinguishment of native title. Of course, he is referring to common law, and that may or may not ultimately be held to be the case on appeal. I think the committee and the Parliament are concerned with putting some certainty and workability into the position by statute. Our submission is that because at common law there may be no such thing as partial extinguishment, that is no reason why Parliament, in the interests of society as a whole, should not - as the Native Title Act already does - use the concept of partial extinguishment to provide certainty and workability for everyone concerned.

Hon BARRY HOUSE: Section 4.3 covers the potentiality of the question of crown ownership of subsurface mineral resources. Does your organisation have a definite point of view? I think you have virtually said what it is.

Mr STEVENSON: Our view is that the minerals have already been appropriated by state legislation and cannot be the subject of native title.

Hon GREG SMITH: Has anything changed since the Miriuwung-Gajerrong decision which would affect the Bills currently before the Parliament?

Mr STEVENSON The only thing is the issue I have raised; that is, the question of common law and partial extinguishment. That is not something we need to revert to consider.

Hon MARK NEVILL: I think the 1936 Petroleum Act reserved all petroleum resources to the Crown. That can only be undone by statute. Is that correct?

Mr STEVENSON: That would be my view.

Hon MARK NEVILL: In what other way could it be undone?

Mr STEVENSON: I do not think there is any other way. I agree with you. One of the tests which Justice Lee uses to determine whether native title has been extinguished is whether Parliament expresses a clear and plain intention in its legislation that it should be the case. The problem obviously is that in 1936 the concept of native title did not exist, so it is a fairly woolly test, which can be used and applied how we wish at a later time. The answer to your question is that in my opinion it cannot be done in any other way.

AMEC cannot stress strongly enough how important the passage of these Bills through the Parliament is to Western Australia's and thus Australia's mining industry. In terms of the amendments which have been proposed by the Opposition, AMEC notes that Government has adopted some of the measures suggested and accepts those changes. However, it stresses the need for the Legislative Council to take on board the points AMEC has proposed and to consider carefully whether amendment may cause the legislation to become unacceptable to the Government, the mining industry or other groups, as this will not be in the interests of Western Australia or Australia generally.

The treatment of the first two Bills - the Titles Validation Amendment Bill 1998 and the Native Title (State Provisions) Bill 1998 - when taken together with the recent Miriuwung-Gajerrong judgment by Justice Lee is likely to create a fundamental change in industry investment policies, as the implications particularly of the Miriuwung-Gajerrong case are factored into the exploration program decisions and mining development proposals decisions considered by companies in both Western Australia and Australia.

The Miriuwung-Gajerrong decision attacks a number of fundamental premises on which mineral exploration and mining development has been based in Western Australia for the past 100 years. Justice Lee's decision said that the Miriuwung-Gajerrong people had the right to control the access of others of the determination area - which is otherwise defined in his judgment; the right to use and enjoy resources of the determination area; the right to control the use and enjoyment of other resources of the determination area; the right to trade in resources of the determination area; and the right to receive a portion of any resources taken by others from the determination area.

The right to control access to the determination area is unspecified. Much of the area will contain pastoral land and crown land and access to those two categories by the mining industry has been relatively unfettered by government to this point. The industry now does not know what will be its rights. Land access will very likely be affected or there will be a perception that it has been affected and the investment will disappear anyway. The right to use and enjoy resources of the determination area creates another unspecified situation as resources can mean foodstuffs, materials, minerals, timber, fish and so on. The right to control the use and enjoyment of others of resources of the determination area runs on from the previous point but establishes a second tier of control other than government. Who and on what terms can now do what and to whom do we talk? The right to trade in resources raises the question of whether minerals are a tradable item. How does a mining company now proceed? The right to receive a portion of any resources taken by others suggests a related right; that is, a right to a royalty. Is the mining company being forced to share its investment and operation with others who have not contributed to the development costs so that individuals benefit rather than the community? It has already been suggested that Justice Lee has created a situation in which the Crown's ownership of minerals is now in doubt. This, in itself, is a direct challenge to the powers of elected governments since 1904; all of which have taken, on behalf of the community, ownership of Western Australia's mineral resources except in particular instances such as pre-federation land titles where minerals belong to the owner and in the Hampton area agreements.

The Lee judgment has firstly, attacked community ownership of minerals and, secondly, challenged the rights of governments to deal with unalienated land and offers native title holders - that is, persons determined to hold native title by court process - rights superior to other holders of land titles in Western Australia. What do we do now? Do we completely realign our land title system and decide whether all other land holders have different rights? How do we approach it? The upshot of those points is that the industry now faces great uncertainty and, as the mining industry deals in risk capital, the industry will reassess whether it should continue to invest in a State and a nation where considerable sovereign risk now exists as a

result of a court judgment. The Association of Mining and Exploration Companies believes that the certainty and safety of investments in mineral projects has been considerably diminished by the Lee judgment and that it is not in the national interest. Although the judgment may be appealed, that will take considerable time during which capital will bleed out of Australia to overseas destinations. Once that occurs, the reversal of that process will be lengthy and may not be adequately addressed. Thus Australia and the community will miss out on considerable benefits during the period for which the process continues.

It is clear that the Miriuwung-Gajerrong decision, whether it is eventually judged to be correct, totally wrong or a permutation of that combination, has injected considerable uncertainty into the native title process and debate. In AMEC's view, the Western Australia Parliament should act positively to put in place a system which will allow the development of Western Australia's resources to proceed in an orderly and reasonable fashion; a system which does not elevate one group of citizens above others - a consistent criticism of native title - and which will interface the determination of native title with existing systems of commerce and government administration of land titles and rights.

Hon GIZ WATSON: I would have thought that that would leave the option to negotiate. In terms of the Miriuwung-Gajerrong, you asked, "With whom do we negotiate?" I thought that the judgment made that very clear - you negotiate with the Miriuwung-Gajerrong people.

Mr SAVELL: I do not think that it follows quite as clearly as you would imagine. There is no problem with the industry negotiating with groups of people - we do that every day - but I have read in the newspaper that the State might appeal the judgment. If that is so, we will be stuck waiting for how ever long it takes to determine who has what rights and what will happen next. It is over crown land and pastoral leases. There are statutes and we have titles either validated now or applied for. We are not about to go racing out and say that we have no rights under the state statutes, the Mining Act and any other Act until the matter is addressed. Our advice to date is generally that in fact it is a rather wobbly judgment and that there are grounds for appeal - there are grounds for many other legal moves, including the States and Territories, and we see that the Northern Territory will appeal the decision - to change what has happened. You can see the uncertainty factor to which I referred earlier. Not only is it who you talk to, it is who has the prior rights, what Governments are going to do and what the courts will do in future. It is becoming a totally impossible commercial situation, and the easiest way out of a totally impossible commercial situation is to take your money and put it somewhere else.

Ms STEVENS: In terms of Miriuwung-Gajerrong, one of the key issues for the mining industry is the use of the word "resources" and the fact that the judgment obviously does not define it in a substantive way. Although we know essentially to whom we should talk in terms of negotiating compensation agreements, we are a little lost because we are not sure what is meant by the term "resources". Are we talking about things like kangaroo and yams or minerals? When it comes to negotiations, where do we begin and what do we include in the agreements? It is simply because we do not have a clear definition of what those native title rights and interests are.

Hon GIZ WATSON: Could that not be sorted out by negotiation?

Mr SAVELL: I doubt that. After all, on one side we have the judgment of the court which cuts across some of the imperatives which Governments hold as their own, such as the ownership of minerals, for argument's sake. We could get ourselves into a nice old mess in relation to any mining titles we hold if we started negotiating royalties and payments with a body like that. What will the States say to us? "We will take your mining title back because you are not doing the right thing; you are in breach of the legislation." There is an appeal process going on. You can imagine the situation we are in; it is just not as easy as it appears on the surface.

Hon HELEN HODGSON: Hon Murray Nixon asked whether you thought that there were any implications of the Miriuwung-Gajerrong decision in respect of the legislation and you said that you did not think that there were any. Do any compensation matters flow from the Miriuwung-Gajerrong decision?

Mr SAVELL: As we discussed a moment ago with Hon Giz Watson, there could be, but when we deal with other landholders or holders of rights, compensation questions are normally based on fact. We know when we talk to a farmer who has a fee simple farm that we need to gain his permission to enter. We need an arrangement whereby we will pay him compensation if we damage his land. That is all set in the statutes at present. As I have said before to parliamentary committees and I say it again, native title is basically like a puff of smoke. The Lee judgment is aimed at putting some substance into what we are talking about on native title, although it does not appear as though it will finish exactly where Justice Lee left it from the point of view of the chances of appeal and so on.

If we affect someone's native title rights, we will pay compensation. I do not know how we proceed when a court has made a judgment which is not in the legislation and we have a piece of federal legislation to be backed by pieces of various state legislation. What do we do? Do we believe Lee, who is about to be challenged, or do we believe the statute which binds us if we wish to proceed to explore for and develop minerals? The answer is

that we must abide by the statutes. If the statutes are changed as a result of the Lee judgment, fine, we will abide by that statute, but at the moment we are caught between the two. That is our difficulty. We are not too sure how to proceed, to be honest.

The CHAIRMAN: I want to direct you more closely to Hon Helen Hodgson's question.

Mr SAVELL: Did I misunderstand it?

The CHAIRMAN: No, but the question drew attention to the impact of the potential effect of Justice Lee's decision upon compensation issues affecting the mining industry.

Mr SAVELL: I am sorry, I misunderstood your question; I can answer that.

Hon HELEN HODGSON: As I understand it, there is a question about some types of leases that were in question in the Miriuwung-Gajerrong decision. Although they were scheduled matters, Justice Lee has found that native title has not been extinguished on those leases, and that could raise the question of compensation.

Mr SAVELL: Yes, you are right. Thank you, Mr Chairman, for redirecting us. The Miriuwung-Gajerrong case generally, if it remains in place and gains credence, will substantially increase compensation. It would also more or less accord a royalty right to the holders of native title in the area, so it is a whole new ball game. It is a situation in which most compensation is determined not by a statute or by a direction, but by the actual facts of the case on the ground. That is how we deal with farmers, pastoralists and others. If the figures come out wrong, again that will go directly back to a straight commercial position. If it is eventually decided that yes, we have a reasonable deposit and the compensation is $10m, it will not be worth developing, and we will walk away from it. Compensation means nothing then. We have a backlash in compensation which at this stage is not well measured. A judgment like that could render a lot of mineral deposits uneconomic in the eyes of the holders because if we have to pay out more than the deposit will stand, obviously there is no point in developing the deposit, so it will have an impact on the development of resources.

Ms STEVENS: Are you driving at the fact that if it goes ahead there will be a compensation bill that must be paid in respect of certain tenures?

Mr Glen Shaw, Director of the Land Heritage Unit at the Aboriginal Legal Service also gave evidence to the Select Committee:

Mr SHAW: I will not be terribly long in my presentation as I will be before the committee later this afternoon with the Aboriginal Legal Service. I am here to provide support to the Western Australian Native Title Working Group in its clearly demonstrated opposition to the Government's position on title validation, and the alternative procedure proposed in the original legislation regarding the removal of the right to negotiate. We have seen over the last week or so a clear and concise decision from the Federal Court which outlines the position with native title and common law. Before the Parliament of Western Australia is legislation which is in complete opposition to the legal principles espoused in that decision. Effectively, the Federal Court made a determination on native title, and within one month the Parliament of Western Australia went through the process to legislatively extinguish those rights. That is completely unfair and unjust. It goes against the moral fibre of what Parliament is supposed to do; that is, represent all Western Australians.

We have seen the Government espouse the view that, from its perspective, it believes that pastoral leases have always extinguished native title. That has never been proven in common law. The Federal Court decision re-affirmed that position. We have a Government which is going through the process, if possible, of putting through legislation which will remove the right to negotiate from the vast majority of native title holders; and provide them with an alternative procedure right to be consulted. We need at some stage to consider the meaning of "consultation".

The State Government should also look at potential litigation relating to the legislation as it would affect native title holders in this State. If I may be somewhat forward, the State should look at its win-lose record in the court in relation to its management of native title. It needs to question whether it is acting in the best interests of all Western Australians. When it comes to the crunch, one must take mining industry comments regarding pastoral leases and native title with a grain of salt. A large number of pastoral leases are owned by the mining industry. Therefore, it is in its interests to have native title extinguished in those areas. We must also take with a grain of salt the current scheme and what is going on in relation to the Lee judgments, in relation to potential ownership of minerals and what that means. The judgment also said that the States still have the ability to process and distribute exploration and mining leases and tenements. Therefore, it does not change the regime as it currently stands. All it does is put before the mining industry a clear opportunity for them to negotiate quite substantive high quality agreements with native title holders. The problem that has been created is the Government has abrogated its responsibility to pay compensation to the mining industry where the mining industry is in fact being hurt. If the mining industry was not in a position where it had to pay the compensation that would otherwise be paid by the State and could use those monetary resources to assist in a possible

financial settlement in those agreements, the mining industry would find the Lee judgment much easier to live with.

This legislation will go down the path of destroying the pre-existing rights of native title holders. Native title is a form of title that pre-exists colonisation in this country and has been recognised as such by common law. People must understand that. They must also understand that the recent judgment has applied legal principles to what are common law rights of native title holders and not to try to match it against a westernised tenure based system and extinguishment happening on the westernised tenure based system. We need to go back to the drawing board. The Government and the opposition parties now need to look at proposals for getting into indigenous land use agreements or regional agreements to solve the issues. Legislation will not work.

Mr McIntyre then gave the following evidence:

Mr McINTYRE: Thank you, Mr Chairman. It is used eight times altogether in the course of the decision, but never in anything other than those sentences. There is no explanation of what Justice Lee had in mind when he spoke of it. One can only therefore draw some inferences. It has obviously thrown a wave of concern through the minds of many people. Of course, when one has a State which has a resources minister, when that word is used it rings that kind of connotation. It may be that there is something in it, in the sense that His Honour Justice Lee certainly followed the general thrust of the decision of the Supreme Court of Canada in Delgamuukw, which, incidentally, places the common law of Canada and the common law of Australia essentially in similar buckets. I have said on a number of occasions previously that Canadian and Australian authorities on this topic of indigenous title have been leap-frogging each other for the past decade or so. There was the Delgamuukw No 1 decision, then the Mabo decision, then the Court of Appeal of British Columbia on Delgamuukw, then the Native Title Act case, then Wik, then the Supreme Court of Canada in Delgamuukw, and now Justice Lee's decision. They have all borrowed from one another, spoken of each other's judgments, adopted one another's analyses, commented on them, and essentially my suggestion is that the common law is developing in much the same way in Canada as it is in Australia.

Hon BARRY HOUSE: It does not necessarily make it right though, does it?

Mr McINTYRE: The common law, of course, is an international concept as inherited from the British. Therefore, the High Court, as committee members would be aware from reading Mabo and other decisions, looks to other common law countries to see what the common law is for Australia.

Hon Barry House is right that it develops in slightly different ways in the different parts of the British Commonwealth and former British Commonwealth. I am just using this to try to extrapolate what His Honour might have been thinking when he talked about the word "resources". Therefore, if one assumes that he is picking up Delgamuukw, they did talk in that case about native title, including the whole of the land, all of the resources related to it, and the capacity to commercially exploit them. That is one possibility.

What the applicants in the Miriuwung-Gajerrong case applied for, and particularised their claim as, was in relation to these sorts of resources: They talked about the right to hunt, to fish, to gather bush food and plants used for medicine, and to dig for ochre. It is possible that that was what His Honour had in mind when he used the word "resources". Therefore, people should not read too much into the use of that one word. It is really a matter for development in future cases as to what it means. What is clear in His Honour's judgment is that the mining tenements which were granted within the area of the claim are all valid; all of the rights which were granted in relation to them are valid; they coexist with the native title interests, but they are able to be exercised.

I looked to find what His Honour said about how the interests co-exist with one another. The best statement I found was at page 257, going over to page 258, where he said -

> Native title as an interest in land, vests in the community, and in the third applicants, a right to possess, occupy, use and enjoy that part of the determination area in respect of which native title exists, in accordance with traditional laws, customs or practices acknowledged and observed by them, as far as is practicable, but subject to the extent that the Crown, by legislation and by acts vesting concurrent rights in third parties in land or water of the determination area, has provided for the regulation, control, curtailment, restriction, suspension or postponement of the exercise of the rights vested in the community, or third applicants, as incidents of native title.

The CHAIRMAN: For the purpose of the record, that is the section which precedes the determination. For those who are operating on the Internet copy of the judgment, it is the penultimate paragraph of the summary.

Mr McINTYRE: That is the closest we get to some explanation of what His Honour was talking about that I have been able to locate. Therefore, what he is saying is that, yes, there is a native title, and he goes on in his determination to say that that involves an interest in the resources and control of the resources, but it is subject to what the Crown does by way of

legislation and Acts vesting other interests. He declares that all of the mining interests and the leases and various other forms of tenure are all valid and co-exist and operate concurrently. Therefore, miners do not need to concern themselves that they will not be able to obtain their tenements on the basis of this judgment. All it suggests is that when the Native Title Act was enacted in 1993 and gave a right to negotiate prior to the grant of mining tenements, on the apparent assumption that native title would be affected by the grant of mining tenements, it got it right - nothing more, nothing less.

The final topic is the question of leases and extinguishment. It was said by witnesses for the Crown when they appeared before the committee that the effect of the judgment by Justice Lee was that all leases co-existed with native title, as I understood what they were saying. That is not an accurate assessment of what the decision says. His Honour Justice Lee did approach the matter very carefully. He applied the clear and plain intention to extinguish native title test. He looked, for instance, at conditional purchases leases, and he said that they would not, by themselves, extinguish native title. However, if there was a development upon them which made the use of the land wholly incompatible with the continuation of native title, then a lease of that kind would extinguish native title.

He looked at the vast range of special leases which were part of the claim area. He said that if it was found that the purpose of the special lease contemplated a permanent improvement of the land amounting to an exercise of adverse dominion, native title would be extinguished. Therefore, in relation to special purpose leases, he said that if those conditions were attached to the particular special purpose lease, there would be special purpose leases which would extinguish native title. He looked at each one separately, and I think in all cases in this instance he found that there was not such a condition which would necessarily extinguish all forms of native title and create an absolute adverse dominion. He looked particularly at the fact that most of those special purpose leases were for short duration and for limited purposes, with the obvious intention that they would return to become crown land. I have looked back through his judgment to see what is the rational basis for that, and it is clear from the judgment that he has relied heavily on the majority judgments in Wik and has quoted them, referred to them, and set out the tests as they set them out; and that he has followed the similar tests by Justice Lambert in Delgamuukw in Canada. The United States authorities adopt similar kinds of tests. He has also analysed what Justice Brennan said in Mabo No 2. Therefore, the suggestion that he has gone out on a limb and created some new area of the law or some new interpretation of the law is not borne out by a careful reading of his judgment.

Hon GREG SMITH: Given that the land fund was put aside for people who had lost the ability to claim native title because it had been extinguished or they had been removed from their lands, and given that you have now said that the Lee decision has increased the area that is capable of being claimed for native title, is that likely to have reduced the number of people who have access to the land fund?

Mr O'DONNELL: I do not think I or anybody else has said that the Lee decision has increased the area which is claimable. All that Lee has done is to give us a determination as to what native title is there and how it coexists with existing rights. What will increase the call on the land fund is the legislation the Parliament is about to pass, which would extinguish all native title and make less land claimable. A certain amount of land in the Noongar country is claimable and benefits are able to be spread around among developers and resource companies. If you extinguish the rights on further tracts of land in the Noongar country, you will initially expose the State as the primary body to pay compensation and to pick up that bill. That is an argument against extinguishment in those sorts of areas and putting a further burden on what is already a rather inadequate indigenous land fund.

Mr SHAW: As a layman, I understood the Mabo decision to say that native title exists over all of Australia except where it is proved that it has been extinguished. The Lee decision does not expand the boundaries of the country. All it does is to reduce the actions by which government can extinguish native title. I agree that it does not effectively increase the claimable area but reduces the level of extinguishment.

Dr ESBENSHADE: I would like to add to what has been said in relation to one of the outcomes of Justice Lee's decision, particularly the impact on the COAG water law reform agenda. Each State has been trying to revise its laws to come into a new era of water law. The decision clouds the extent to which that would be even possible with the uncertainty about title over water. Further, I have a considerable file in the office which records calls, comments and writings by members who have had great worry and trouble with the National Native Title Tribunal in the mere processing of form 6 - an elemental exercise to advertise in the countryside that people are in a native title claim area. Who are the claimants? Are you in the claim? My job in the association has been a straightforward administrative one to assist our members to file form 6, to understand the extent of a claim and to be sure that they have completed the right paperwork. It has been a long and difficult exercise for people in the country. I simply wish that the State forms a tribunal of some type that is more sympathetic with and perhaps more knowledgeable of the local situation.

Hon BARRY HOUSE: I am interested to hear Dr Esbenshade expand on his first comments about the impact of the Lee judgment on the COAG water reforms.

Dr ESBENSHADE: Certainly, the power of the State to grant water licences seems to me to be a question of the extent to which those would be valid. I am unclear, not having been fully briefed yet, on the impact of Justice Lee's decision. First reading suggests that people could be in a position where their land title under COAG water law reform would no longer directly equate with their water rights, so the State's role is extremely important.

Hon HELEN HODGSON: I happened to hear a radio interview with Mr Court last week. It was the day after the Miriuwung-Gajerrong decision, and he indicated that he would be in touch with the Government about appealing. Have you been in any correspondence with the Government?

Mr COURT: No, not personally; I followed it in the Press. I must correct myself; I spoke to the Premier, which I do fairly regularly, and told him of our feelings about the situation. He indicated that there probably would be an appeal from the State Government, but that was before it went to Cabinet. I think that the decision will come out of Cabinet on Monday.

Hon HELEN HODGSON: So there is no correspondence that you might be able to make available to the committee?

Mr COURT: No.

Mr CLAPIN: As chairman of the committee, I have had no direct contact. We have made our views known to the Government. A letter in today's edition of *The West Australian* sets out our views and urges that there be clarity. The Government owes it to the people of Western Australia to proceed to a higher court - I hope that it is the High Court - so at least the rights issue can be clarified. It might not come forward with a decision that we would like, but I hope that it will move to the next step of clarification because, unfortunately, as it stands at the moment each court decision, instead of clarifying native title issues, compounds the problems.

Mr COURT: I was at a National Farmers Federation meeting in Canberra at the time of the decision . The matter is of great concern not only to Western Australia but also to Queensland, the Northern Territory, South Australia and New South Wales. It was jointly decided that the National Farmers Federation should make representations to the Government. Representations will have been made to the Federal Government also.

Mr CASTLEDINE: I am here, as I understand, simply as a solicitor who has acted for local government in various native title claims. I hasten to add that I am not here to represent the views of local government on native title. I am clearly not authorised to do that. The position with local government and the legal issues that impact upon it relate primarily to vested reserves. Local governments have many public reserves vested in them which means it is in their care, control and management. The effect of the Miriuwung-Gajerrong decision is that neither the creation of a reserve or its vesting in a local government body can extinguish native title. The result is that native title may continue to coexist on reserves which are vested in local government bodies. I think the court's decision amounts to this. While native title may continue to exist, the use of reserves in certain circumstances might have the effect of extinguishing native title. The issue from the local government's point of view is being able to determine from the reserves that are vested in it which ones might have extinguished native title and which might not; that is a legal issue and it is difficult for non-legally qualified persons to make that judgment. To that extent there is a degree of uncertainty within local government whether native title might exist on various reserves, but certain principles can be applied and one can form a view, but there is no certainty in that sense. The position has been significantly affected by the amendments to the commonwealth Native Title Act, which essentially make it a permissible future act to do anything on a reserve which is within the terms of the reservation. Many of the uncertainties which local government previously experienced have already been overcome by the commonwealth Act. Nothing that is proposed in the state Bills will affect that.

As far as vested reserves are concerned, the commonwealth Act simply states that if the vesting expressly or impliedly authorised exclusive possession, it is a previous exclusive possession act. However, it is clear from Justice Lee's decision that the vesting of reserves in this State does not have that effect. Again, the Bills will not impact on local government as far as confirming the extinguishment of native title. Each case must be considered on its merits and the common law test applied.

The remaining difficulty for local governments is the use of the reserves which will affect native title. Some local governments may be concerned about compensation issues as a result. If, for example, a local government were proposing to issue a lease or authorise some development on a reserve on which native title may still exist, there may be a legal issue about how that is affecting any surviving native title and what the compensation issues may be. My understanding of the new Act is that the State will be responsible for any compensation payable as a result. Nevertheless, I think that is an area that local governments will need advice on and might find difficult.

The other aspect of the Bills before this Parliament, which may have an effect on local government, concerns community purpose leases. They are defined in the Native Title Act as being previous exclusive possession acts. Many of the leases issued by local government over its reserves will come within the definition of community purpose leases. The Titles Validation Amendment Bill proposes that they be confirmed as having extinguished native title. However, I am also aware that the amendment proposed by the Opposition will largely leave that issue up to the common law, so it will again be the question from case to case whether a community purpose lease has extinguished native title.

I understand that any lease granted by a local government over a public purpose reserve would fall within the definition of a community purpose lease, and it is the pre-Wik community purpose leases which would be confirmed to extinguish native title if the Bill went through in the form it has been drafted.

The other issues for local government from my experience regarding coexistence generally as a result of Justice Lee's decision is that it can be said that native title rights may be held concurrently over reserves, concurrently with the rights of the public and the rights of certain third parties who have interests over that land. Naturally there may be a potential for conflict between the exercise of native title rights and non-native title rights. In my experience, local government would be expected to deal with that if the land is in their care, control and management and people will go to the local government when issues of conflict arise. That might arise for example in the case of camping on a reserve which may be regulated or prohibited under a by-law, but which may be said to be exercised in a certain case under a native title right. The area of concurrency or coexistence between native title and non-native title is an area which will be an issue for local governments to deal with because they are dealing with these issues on the ground as it were.

That is the position as far as I can see it in a nutshell. It may be that a body such as the Western Australian Municipal Association, which I have been in touch with, would want to make a submission to this body or make its views known. As I said earlier, I am not in a position to purport to represent local government as such, but they are the legal issues which I am aware are of concern to local government.

Hon MARK NEVILL: Under Justice Lee's decision, native title is granted and certain rights are attached to that, some of which are similar to freehold in that control can be exercised regarding who comes onto the land or the access sort of questions, plus the resource questions which are undetermined. If native title holders own that land, would it be subject to being ratable by local government?

Mr CASTLEDINE: There is no clear answer to that. It has been raised before, but it may be that in due course some amendments to the Local Government Act would be required to make it clear whether native title interests are ratable. I am not in a position to express a view on that.

Hon GIZ WATSON: You mentioned there might be some concern or confusion with local council about compensation. I thought the matter of compensation was clearly set out and that it was a commonwealth-state obligation. I do not understand that a local council would have any obligation in the matter of compensation.

Mr CASTLEDINE: I do not believe it will. I believe that the Act provides for the State to be responsible for compensation. The only confusion is that in the case of reserves it is the actual use of the reserve which affects native title rather than the vesting of it. If the use of the reserves is something which results from the activity of the local government or the person to whom they are issuing a licence or lease - it is an area which is not absolutely clear - it seems to me that the intention of the Act is that the State would be responsible for any compensation in those circumstances.

Mr McMENEMY: Moving on to the judgment of Justice Lee, as indicated in comments heard today, it has cast into the equation further uncertainty and doubt as far as our organisation and membership is concerned. It does not define resources. I heard reference to water resources by Dr Esbenshade of the Pastoralists and Graziers Association. We have not seen it in the context of the COAG agreements. We have concerns about water being regarded as a resource - which of course it is - and what rights that decision may bestow to native title holders relating to water. Of course, the same thing can be said about minerals. We do not know where that issue may lead. If the judgment grants some form of interest in minerals, water and possibly produce on the land, it is unclear how it will be exercised and to what extent those rights could be carried. As such, it seems to give rights, particularly in the area of minerals, over and above those conferred to pastoralists. However, earlier decisions of the High Court declared that rights inconsistent with pastoral leases were subservient to those leases, or words to that effect. We are left in a curious situation in which pastoral leases are dominant over a native title right, yet native title carries greater rights - for example, mineral rights - than pastoral leases. It seems a contradictory situation.

It is yet unknown whether that judgment will be one decision or extend to others. Certainly, it has the capacity to create a precedent. It has probably been said before, but it creates more questions than it ever answered. Ultimately, it may be that the Full Bench of the High Court or Federal Court must address those matters. I will leave it there and take questions.

Professor BARTLETT: Being an academic, I have a pile of documents to distribute. One is the outlined submission with attachments which I will endeavour to speak to. As the submission indicates on the front, my purpose in these notes is to indicate firstly the high authority and universal principles of the common law which underlie the Miriuwung and Gajerrong decision which, it is suggested, is merely another statement of the common law. Secondly, the nature of native title is reflected in those universal principles of the common law. Thirdly, I address the subject of extinguishment and expropriation and indicate what I suggest the common law is and the false premises the validation Bill proceeds on and I make a few comments on the draft amendment by the chairman. Fourthly, I address the question of intermediate period acts; and fifthly I return to the old subject of regional agreements. I will endeavour to be brief as it is all recorded in this submission in any event.

On the subject of high authority and universal principles, it is my suggestion that the High Court decision in Mabo and the decision of the Federal Court in Miriuwung and Gajerrong was inevitable. It was dictated by the respect demanded of property rights and, accordingly, there was little recourse for either of those courts but to find in that regard. In particular, the notion gives full respect to property right. In that regard, two of the attachments are referred to there. One is written by me which addresses that question. The other is by a colleague at the law school who has just written a paper that is about to be published, I note, in the *Australia Mining and Petroleum Law Journal* which sets out the nature of the Miriuwung and Gajerrong decision.

The second subject I wish to turn to is the nature of native title. Again, it is suggested that the universal principles dictate, as found by the High Court in the Mabo decision, that native title constitutes a right to use and enjoy the land. That, as in other jurisdictions, has been held to include resources. It should also be noted, however, that the decision of the Federal Court, as would seem consistent with the common law, dictates that that right to native title is concurrent with all existing interests and is subject to concurrent legislation and regulation and other grants under that legislation. Therefore, it is very much a declaration of rights subject to the existing interests and laws in that regard.

Ms SHEEHAN: My task was to look very specifically at the decision and in relation to what the effect of the decision would be if the validation Bill were passed. I have been instructed by the Aboriginal Legal Service that they are happy for me to provide to the committee a copy of an advice prepared by myself and Professor Bartlett. I should say before I hand this up that it was done in a rush and it was not done for the purpose of the committee; it was done for the purposes of informing our clients with respect to what had been found in the decision etc. On that basis I would

ask the committee to forgive any minor typographical errors that may occur in the document.

The first three pages of the document refer to matters that have already been addressed by Professor Bartlett in what he said in his submission to you this afternoon. The actual effect of the Bill starts at the bottom of page 3. To walk you through it, what I have done is to go to the tenures that are affected that were not extinguished at common law and that would be extinguished under the Bill, just to illustrate what is the practical effect on the ground. As the committee would be well aware, there are not that many areas of Western Australia where the tenure history is known. It is one of the difficulties in looking at this legislation that in most cases the tenure history is unknown. This is an area in which the tenure history is known because it has been to the Federal Court and all the tenure history had to be obtained for that purpose. Paragraphs 8 through to 13 all relate to intermediate period acts. There were not, in fact, a lot of those in this claim. There were two freehold entitlements that were granted during the intermediate period that did not comply with the provisions of the Act and therefore were found not to have an effect upon native title. I have given details of those at paragraphs 9 and 10; public works that were not authorised, in that appropriate authorisations were not conducted before those works were done during the intermediate period; and a number of very small leases to Lake Argyle. I mean small in terms of the area that were covered.

In relation to extinguishment of acts prior to the Wik decision, there was an interesting variety of tenures in this case. Certainly not all tenures that find their way into the schedule are tenures that will come up in the future. However, there was a reasonable variety of historical tenures that the court had to look at. There was, for example, a permit to occupy crown land prior to the issue of the crown grant. If you go through the case, what the judge has done is looked at the legal processes involved, looked at the land involved and on the particular facts has made findings. These are not, at large, legal fictions or theories. These are on the ground facts, looking at what has occurred.

Perhaps I should have said this at the outset; however, I assume the committee is aware that the area of land under claim, the Miriuwung and Gajerrong No 1 claim, was vacant crown land, reserves and national parks. At the time the claim was made, there was not, for example, any pastoral lease holdings over this area or any permits to occupy land. These were all historical tenures. Therefore, it involved the court in going back, checking what the processes were involved in that time, seeing what the effect was of the legal instrument and then applying the legal principles to the factual circumstance as you go through each lease and other form of tenure.

In the Argyle and Normandy mining leases a reason relied upon is that part of the area was protected under the Aboriginal Heritage Act. His Honour said that the two could co-exist but it is repugnant to say that a mining lease which will not protect that site because it is protected under the Aboriginal Heritage Act cannot of and by itself extinguish. These leases would form part of the schedule because they come under the Diamond (Argyle Diamond Mines Joint Venture) Agreement Act. Even these leases are not the diamond mine itself. They are a long way from the mine but they were granted and form part of that Act. That matter is picked up quickly and specifically in the schedule. Leases for tourist and travel shop facilities are also picked up and dealt with in the schedule along with canning and preserving works and special leases for market garden purposes. The court looked at the history, what was involved and what had occurred and applied the common law principles to determine if that amounted to extinguishment and found that it did not. A lease for a government residence is the title of a lease but when you look at the facts, you find it is a temporary camp for officers going out for the infamous pest problem was also rejected as a being a form of extinguishment itself. A number of other commercial leases were picked up and considered to be of a temporary nature when examined in detail.

I heard Mr Castledine's comments about community purpose leases. The community purpose leases included a variety of organisations such as a water ski club and the Ord River Yacht Club. The court looked specifically at what the lease involved and the lease required public access in those cases. What happens on the ground is that the area was used by all members of the public including the Miriuwung-Gajerrong people, part of the court hearing took place there and a ceremony was conducted. That did not interfere with the rights of the sailing club which used it on Sunday mornings. The land is generally used by the community in that way. The details of what is inside the lease show that it is a long way from exclusive possession, yet because it fits into the definition of exclusive possession lease under the Native Title Act, it is one of the leases which is caught up and extinguished pursuant to the Act which would extinguish at common law. That gives the committee a basic outline of some of the leases.

I draw the committee's attention to the grazing only leases which are dealt with in paragraphs 31 and 32 of the submission. They involve huge areas of land. These are not pastoral leases; they are leases for the specific purpose of grazing. One cannot build a residence or make improvements beyond $1 000 without the approval of the minister under these leases. It is land reserved purely for the purpose of grazing cattle apart from the use the public and the Miriuwung-Gajerrong people make of it. Under a combination of the Bill and the Native Title Act, these would be commercial leases and would extinguish at common law. They do not according to this decision. The other matters have been covered. The issue

of reserves has been covered by Professor Bartlett and I will just add the public works question. The court was very clear that, in its view, the public work involved the land on which the public work was created. In its interpretation of what the amendments to the Native Title Act mean, the Crown Solicitors Office has argued that the adjacent land incidental covers all of the land which is at any time resumed for the original process. That is a massive area of vacant crown land. I do not necessarily agree that it is a legal argument which will have legs at the end of the day, but it is the sort of argument which is being put up to establish extinguishment in these circumstances.

Mr BARKER: Professor Bartlett has discussed some of the higher issues of theory and law which suggest the 10-point plan and the consequential validation Bill are based on false premises. Ms Sheehan has provided the flavour on the ground of the effects of the validation Bill in the Miriuwung-Gajerrong case if enacted given the determination of their native title rights. If a decision like this had been available when the 10 point plan was being debated, it would have been easier for many people, including legislators, to understand what would be involved in a real case before extinguishment became a possibility. I emphasise in that context that the decision is workable for the Miriuwung and Gajerrong people. As of yesterday and the day before, I met with a number of people in Kununurra and I will table an article from *The Kimberley Echo* dealing with some of these matters headed as of today "Your Home is Safe". There is evidence in some public reports of confusion about what the judge determined in the Miriuwung-Gajerrong decision. At pages 257 and 258 the judge noted -

> Native title as an interest in land, vests in the community, and in the third applicants, a right to possess, occupy, use and enjoy that part of the determination area in respect of which native title exists, in accordance with traditional law, customs or practices acknowledged and observed by them, as far as is practicable, but subject to the extent that the Crown, by legislation and by acts vesting concurrent rights in third parties in land or water of the determination area, has provided for the regulation, control, curtailment, restriction, suspension or postponement of the exercise of the rights vested in the community, or third applicants, as incidents of native title.

It is important to note in my submission that the native title rights so declared are specifically subject to those matters. His Honour went on to note -

> How concurrent rights are to be exercised in a practical way in respect of the determination area must be resolved by negotiation between the parties concerned.

Earlier in the decision at page 38 the court stated in reference to the Native Title Act -

> The Act is concerned with the facilitation or curial proceedings in which it is determined whether native title exists and, as Fejo makes clear -

Fejo was the decision of the High Court for the Larakia people in which the court held that a freehold grant extinguishes native title.

> - neither ascertainment of the enforceability of, nor the enforcement or protection of, native title rights is within the jurisdiction of this Court.

A point made in Fejo is quoted in this proposition at page 37. In the words of the High Court -

> If actual or claimed native title rights are sought to be enforced or protected by court order, the party seeking that protection must take proceedings in a court of competent jurisdiction.

In my submission it is clear that the Federal Court in the Miriuwung-Gajerrong decision has recognised concurrent party rights including the Crown and other parties to whom the Crown has granted interests such as the shire and other state resource management authorities. These concurrent party rights exist alongside the native title rights as declared. It is also clear from what the court has stated that the native title rights to possess, occupy, use and enjoy the determination area are subject to legislation and investing those rights in third parties and thereby regulating the exercise of the native title rights. There is a real danger in this decision that, as happened following the High Court decision in Wik, some people will assert that the native title rights declared somehow provide Aboriginal people holding those rights with some right of veto over other uses. That is not the case here and one would be wrong to understand it that way. The judge expressly stated that the native title rights are subject to all of those other matters. There is no reason in these circumstances, as has been the fact since Europeans first ventured onto the tradition land of the Miriuwung and Gajerrong, why the rights and interests of the Miriuwung and Gajerrong under their traditional laws and customs cannot be enjoyed alongside the enjoyment of rights which have been granted to other parties and the regulation which exists under state law.

Mr Castledine's client in the Miriuwung-Gajerrong case was the Shire of East Kimberley-Wyndham. It was concerned about the management of the foreshore reserves, showgrounds and other places vested in the shire. If one thinks about this in a practical way, what the court has said is that the

Miriuwung-Gajerrong have native title in the vested reserves, save the ones on which there has been held to be extinguishment, but that it is subject to the shire's vested interest. The shire has a vested interest in the management of those reserves for the benefit of the public generally but there is no reason, and this is where the judge presses the point of negotiation, why those parties cannot get together to talk about a number of things including how that might best be managed, having regard to the Aboriginal interests in that foreshore reserve. To the extent that Mr Castledine suggested the decision meant that in the exercise of the shire's management powers there might be an extinguishment of native title, with respect I do not think that is the best way to put it. The judge has made it clear that the shire's management might amount to curtailment or in some cases suspension of the native title rights but it has not fundamentally extinguished the right. It is a question of what can be done under the native title right having regard to the shire's control and management powers. A lot can be achieved if people sit down and talk. Mr Castledine gave the example that if there was a provision in the by-laws of the shire prohibiting camping, it probably would be a good law. However, there would be no reason why some rule or relaxation could not be created during negotiations between the parties in an appropriate case to recognise the ability of the Aboriginal people to enjoy their native title rights. The same might be said about other land falling into the reserve categories - for example, national parks and reserves managed by Department of Conservation and Land Management. In those circumstances, there is no reason that the native title holders and the Department of Conservation and Land Management might not agree on an appropriate management plan in respect of the national park and other reserve areas so that native title rights and interests in that area are fully respected. It is simple to imagine a circumstance in which committees established by CALM for management involve Aboriginal people, that sites of importance within a national park, if they exist, are properly regarded in the drawing up of management plans, and, indeed, having regard to the rights of use and enjoyment that Aboriginal people have in that area, why some programs involving the training and employment of Aboriginal rangers, for example - something about which Miriuwung and Gajerrong people speak - might not be achieved through negotiation. It is not as if all parties which may be affected by this type of decision, which found that native title rights coexist with other rights granted under law, consider that there will be confusion, or that the situation that follows will be intractable or impossible.

I note in the edition of *The Kimberley Echo* of 3 December 1998, to which I have already made reference and tabled, that following the front page, in which the article is headed "Your home is safe", and following at page 2, on which there is a photograph of Mr Ward, his wife and two of his children, and Mr Ward is quoted at length, including saying that they had proved their right under white man's law, there is an article tucked away at

page 6 under the heading "Public updated on Ord 2 proceedings". It quotes Mr Hopkins, the project manager of the joint venture partners, Wesfarmers and the Murrabini Corporation - which sounds remarkably like an Aboriginal corporation but is not - as saying that in terms of land acquisition issues, they told the meetings that they did not expect last week's Federal Court decision to affect the project in a significant way. That was because they had always intended to pursue a land use agreement with the Aboriginal traditional owners, and negotiation of such an agreement would proceed.

In these circumstances the attitude of the Miriuwung and Gajerrong people, recently stated to me over the last couple of days, is this: They ask why the State Government, government agencies and local government, cannot sit down with them and negotiate an agreement designed to plan regional land uses in the East Kimberley, and thereby respect the rights and interests of all people, including the Miriuwung and the Gajerrong. It is in those circumstances that this group puts the submission to the committee that the common law approach to the determination of native title issues has much to commend it, particularly when one has regard to the historic use of Aboriginal people, such as the Miriuwung and the Gajerrong, who have effectively been coexisting with the people in their region since the 1880s when Europeans first arrived there.

The CHAIRMAN: I will start with some particulars. There is no concept at common law of partial extinguishment. Is that a new concept that is being introduced by Justice Lee's decision?

Mr BARKER: We are in the position that we do not want to debate some of those matters, if I can put it that way. We are here to assist as much as we can. However, we are also aware that the State Government is pondering some appeal to this decision. It is clear from the way that Justice Lee has dealt with the matter in the passage that I quoted at page 258, and elsewhere in the document, that he has taken the clear view that either native title has been extinguished or it has not, and one really does not have some halfway house. What one has in relation to the exercise of concurrent rights and interests in, or in relation to, land is the potential for inconsistency, and that inconsistency and the enjoyment of rights go to the enforceability of the native title rights, not to their existence. Therefore, it may be said that depending on the circumstances, depending on the place at which the native title rights are to be enjoyed, the nature of rights that might be vested in the shire or vested in CALM or otherwise vested in a mining tenement holder, what is actually available for excise by the Aboriginal native title holders is very limited. That would be because it has been curtailed or it has been suspended by virtue of the detailed nature of the right or interest that has been created under state law.

One can look at it one way or the other, but it is a satisfying proposition that the court has put forward; that is, that it is in the exercise of the native title rights versus other interests that one resolves the problem through an understanding that it is an enforceability issue, not an extinguishment issue. We certainly believe that is entirely consistent with traditional understandings.

The CHAIRMAN: I am mindful that you do not want to enter into a debate. However, in Justice Lee's judgment, are there any arguments that he has accepted in favour of the applicants, despite the applicants' failure to advance them?

Mr BARKER: If I were pressed on such an issue in court and I responded, I would soon be described as engaging in something highly argumentative. I am aware of some leaked document in which some such statements were allegedly made on behalf of the Crown Solicitor's Office in this State. I think it is more appropriate for us not to comment on those matters, with respect.

The CHAIRMAN: I would like some help on one issue which relates to the threshold issues. The finding in favour of the Miriuwung people in the south-east corner seems to have been, at least in the view of some people, a problem. Again I am referring to the document that came from the Crown Solicitor's Office. However, I am trying to understand what is being argued here. There is a finding in favour of the Miriuwung people in the south-east corner that is considered to be still in dispute, subject to the appeal. What is the south-east corner to which they could possibly be referring? Is it more likely to be the south west that they are referring to?

Mr BARKER: I think it probably is the south west. As you may know, Mr Chairman, when one is in that part of the world and one talks about top and bottom, they are in precisely the opposite directions from what one might think.

The CHAIRMAN: Is it possible that they are referring to the Miriuwung-Gidja lands at the southern end of Glen Hill in the south west?

Mr BARKER: Yes, I would have thought so. There was a question of evidence before the court, when evidence was taken in the court, near the junction of the Ord and Bow Rivers, as to whose traditional land was to be found as one went further east as well as west. There was a question, as the evidence shows and the judgment shows, of overlapping interests in part of the claim in the vicinity of Glen Hill station, as it is known - Mandungala is its traditional name - and there were some parties for whom the Kimberley Land Council appeared, and who had not made a formal application to the court, in respect of whom the judge noted that they may

well have interests. However, he did not make any determination because there was not another application pending. I think he makes a reference in the judgment to the possibility of a common law action for native title; that is, an action distinct from the Native Title Act being taken in respect of their interests. In relation to some evidence given, there was a question of other traditional interests going further east. However, His Honour was satisfied on the evidence that the land claimed was traditional Miriuwung country, and he determined accordingly.

The CHAIRMAN: Do those areas involved in the issue of site protection significance fall within the Glen Hill-Mundingulla pastoral lease?

Mr BARKER: No. Those areas are outside the Glen Hill pastoral area. If the committee turns to page 261 of the decision, the first schedule is close to the very back of the decision, and that contains the map of the determination area. At the bottom of that map, in about the middle of the page, the word "Lissadell" appears. Generally speaking, it is in the vicinity of that part of the determination area that the area referred to is to be found.

The CHAIRMAN: I refer to Professor Bartlett's suggestion that that area of Justice Lee's decision where he sets up the criteria provides the screening out of native title survival. Justice Lee says that there must be actual use made of the land by the holder of a tenure which is permanently inconsistent with continued existence of Aboriginal title. I think Professor Bartlett is suggesting that that criterion is a new criterion, although Justice Lee locks that in to the majority decision in Fejo.

Professor BARTLETT: The reference I am making is to the part of the judgment in which he is referring to the judgments of Justices Gummow and Gaudron in the Wik decision. That is at page 40 in connection with the reference to Western Australia and the Commonwealth, and then Delgamuukw, and on page 41 the reference to the judgments of Justices Gaudron and Gummow in the High Court of Australia. I was suggesting that Justices Gummow and Gaudron had suggested the possibility of extinguishment by development of a pastoral lease, as distinct from the actual grant of the pastoral lease. It appears that Justice Lee has implemented that suggestion by Justices Gummow and Gaudron and tied it in with other authority at the same time. Therefore, the result is that in fact there are three possible times at which extinguishment might occur; that is, upon the passage of legislation - the Land Act; upon the passage of a tenement under the legislation, such as the grant of a pastoral lease; and acting under the pastoral lease itself by development of the pastoral lease.

The CHAIRMAN: With the passage of the three Bills that are now before the Parliament, effectively that would amount to a number of the

Miriuwung-Gajerrong native title rights in reference to the determination area now being extinguished by legislation.

Mr BARKER: Yes, by force of the Bill if it were to become an Act.

The CHAIRMAN: By force of the Bill if it were to become an Act, unamended. What would be the next step that, as a legislator, one should anticipate would be the consequence of that in terms of litigation from the Miriuwung-Gajerrong people?

Mr BARKER: Our clients have asked me that question directly, and we have indicated that their only real course, accepting that the Parliament has the full power to make such a law, is to claim compensation in respect of the confiscation of their native title rights. As I have understood what they have said to me, that is not something that they relish, because they value their native title rights and do not measure them in terms of money. However, that would be the only legal entitlement they would have under the Act; where compensation is payable, they would be obliged to claim it.

The CHAIRMAN: It is almost as though the validation and extinguishment Bill opens up the prospect of a cash envelope as the only question with which the Miriuwung-Gajerrong people have been left.

Mr BARKER: I am sure our clients would not adopt the language of a cash envelope. They would consider that they have to be properly compensated for what had been taken from them, and that would be all that they could do. There has been no investigation as to quantum or the like. It has not been an issue for the applicants in this action.

The CHAIRMAN: Is there a rough assessment of the size of the determination area that would be extinguished by virtue of the passage of this legislation?

Ms SHEEHAN: I can make a guess, understanding that there will be arguments with regard to, for example, the extent of public works. If you were to take the arguments of the Crown Solicitor's Office at their height, you would talk about 80 per cent of the land, and you could then operate downwards from that in terms of percentage, their argument being that the land that was resumed for the Ord stage 1 would come into the definition of public works. That is the force of the argument. There are other massive areas of land that are subject to, for example, grazing and mining leases.

Mr BARKER: If you referred to the determination map in the first schedule at page 261 of the decision, the one area in respect of which there probably would not be any obvious effect would be the shaded area at the top, which

is one might say colloquially the mudflats, in respect of which there will not have been historic tenures.

Ms SHEEHAN: With regard to the mudflats area, there is some argument with regard to where the leases actually went. In some cases we are talking about pieces of paper which are more than 100 years old, where the lease document was never produced. The Department of Land Administration gave evidence in this case and said that if there were a real issue with respect to where those leases went, it would have to go up there and do a survey, because although those areas have never in contemporary times, or say in this century, been used for the purpose of pastoral lease, there is an argument as to what the old maps meant, because there is not a lease document and you cannot identify it by that. The argument of the Crown is that when you read the amendments to the Native Title Act, they are not interested in problems - formal problems being the lease not having an operation at common law. They rely upon equity and upon the fact that it is called a lease as sufficient to extinguish, and thereby get over the difficulties that they would have in trying to prove some of these documents. There is a bit of jutting into the mudflats area, depending upon what view is taken of that, but my recollection of the evidence is that this survey would take years to complete to try to backtrack as to where those areas were.

Hon HELEN HODGSON: Would the mudflats come within the intertidal zone?

Mr BARKER: Yes, and there would be no right to negotiate in respect of an area about which there would be no doubt that there was native title. Save for that area and the qualifications about mapping that Ms Sheehan has put on it, you will appreciate that all of the terrestrial part of the claim will have been the subject of historic pastoral leases in respect of stations that you will have heard about, such as Argyle, Ivanhoe and Ascot stations, as well as possibly part of the Carlton and Nimbingie stations if it stretched into that shaded area at the top. Then you will find the other types of tenures that would be caught either in the schedule of interests or the broader definition of prior exclusive possession acts or prior non-exclusive possession acts scattered in various places through the land-based portion of the claim.

Hon BARRY HOUSE: I have a question for Professor Bartlett. I, along with a couple of other members here, was a member of the recent Select Committee on Native Title Rights in Western Australia that reported to the Legislative Council, and that is the report to which you refer in your submission. I am glad at least one person has read it! It appears to me that you may have used quite liberal licence in the statement that you have made in the submission. It appears to me that the basic contention in the report

is that regional agreements are far preferable to litigation, and it is largely silent on the issue of legislation. Would you like to comment on that? The other point is that you refer to regional agreements in the United States and Canada as being much more effective settlement processes. While we were in Canada, the Nisga'a treaty was signed. It was very contentious at the time, and I believe the jury is still out in many respects and it is very difficult to make a definitive statement, as you have done. Have there been further developments in Canada with regard to the ratification of the Nisga'a treaty, and about costs and other matters, and how you can justify saying that it is definitely a more effective process?

Professor BARTLETT: If I can address the question of a more effective process first, the process of regional agreements is not a product of the past few years in British Columbia. British Columbia is the exception. It is the one with the problem. The process began in the 1820s in the United States and has spread throughout the whole of the United States, and it then spread throughout the whole of Canada. The major recent examples would be Alaska and the eastern coastal settlements throughout New England, and also, of course, the whole of the western United States, which is still largely federal land, and accordingly public land. I suggest they have clearly established that regional agreements have been regarded by the United States, and subsequently Canada, as the preferable approach to adopt. I tendered to that previous committee a document prepared for the Australian Mining and Petroleum Lawyers Association, which set out the process of settlement in detail, and the history with regard to the United States and Canada. I suggest that that history, and its development of very effective resources, mining and forestry industries, demonstrates that it is a more effective way to proceed. I am not suggesting that it is perfect by any means. This is a difficult problem. I did not live in Saskatchewan and Alberta for 20 years without realising how difficult a problem this is. Those are both major mining and forestry jurisdictions, including oil and gas. It is a very difficult subject, and not everyone agrees on it, but I think they all agree that it does work, in so far as the mining industry and the forestry industry do produce the resources, and they have grown to a very substantial degree indeed and make a significant contribution to the gross domestic product of both those jurisdictions.

With regard to legislation, it seems to me that the regional agreement process to which I am referring is one in which legislation does not play a part, except as ratifying the regional agreement process, so it is antithetical to legislation. That is why I would say that regional agreements are a process that does not contemplate legislation as a way of unilaterally extinguishing native title, not that it has not happened on occasion in both Canada and the United States. There are exceptions where it has happened, but they were exceptions; they were not the general approach.

Hon BARRY HOUSE: Do you consider the Miriuwung-Gajerrong judgment a fair judgment on your clients' behalf? Are you surprised that perhaps it went further than you had anticipated?

Mr BARKER: It is implicit in the last part of your question that we think it went further than we anticipated. I would not accept that implicit statement. It is very difficult to respond to that matter. We are barristers who were instructed by the Aboriginal Legal Service to appear in that case. In meetings with our clients over the past couple of days, no surprise was expressed by them that they had won this determination. The Miriuwung-Gajerrong people know that they have native title to their traditional country. They simply considered the decision to be a just one, certainly, but one about which there could be no doubt. The legal questions of extinguishment no doubt baffle many people, but given that they have continued to have access, one way or the other, and have been able to protect their traditional lands for a long time, it tells them that there is no practical extinguishment and there is no reason that there should be legal extinguishment, particularly when they are prepared to sit down and talk with people. So yes, I suspect from what they have said to us that our clients believe that it is a fair decision and they did not expect it to be any other way.

Ms SHEEHAN: The submissions that went to the Federal Court on the matter are on the court record. I do not think you will find if you read those submissions any surprises in relation to the decision. There is nothing that I can see that is novel, certainly not in terms of the determination. The other issue that I want to comment on, talking about the discussions with our clients over the past two days, is the question of compensation that was raised. When I was attempting to explain to them what the Bill meant, and what effects it might have, they asked me to come here and say to you that they would like the members of Parliament to have a look at the land, as the judge did, so they can explain to you what it means but also so that you can see what you are proposing to take away, and there is a lot in the judgment that explains that to you. The way they view it is if you just went up there and had a look, they could explain it all to you. I pass on that invitation.

Hon BARRY HOUSE: Good idea! We have enough trouble getting approvals for travel!

Mr BARKER: The determination is in the terms that we recommended should be made. I return to the first comment that I made, and I am implore you as elected representatives, and the public generally, to have regard to what Justice Lee said in the penultimate paragraph of his judgment at page 258. He said that native title rights so expressed are subject to the legislation that exists and the rights that have been granted under it that provide for the regulation, control, curtailment, restriction, suspension or

postponement in exercising the rights vested in the communities that benefit from the order. That must be remembered when people endeavour to understand what is said here. It is wrong simply to focus on a certain paragraph of the determination without having regard to that not just significant but fundamental qualification of the judge's reason.

Hon MARK NEVILL: The elasticity of legal concepts from time to time bewilders me. I am quite bewildered at the way the extinguishment is now being dealt with on a lot of these different types of leases. If we go back to Mabo No 2 and the fish processing industries on the Island of Meer, there Justice Brennan and the majority said that lease extinguished native title. In his judgment he used the words "clear and plain intention". His view in that case seems to have been discounted in subsequent cases in which there seems to have been a non-extinguishment or perhaps revival of title in leases that affect the land less. How does that legal concept accommodate those sorts of ideas?

Professor BARTLETT: The difficulty with the whole area of leases is because there were so many inconsistencies in the judgment of Justice Brennan, I would suggest, in that the fundamental criterion he laid down was "clear and plain intention". That related fundamentally to giving full respect to property rights. He then made some off-the-cuff comments about leases and the sardine factory leases. With respect to the sardine factory leases his opinion was not the majority. As I read the Mabo decision, the court was split 3:3. Justice Dawson's judgment was so far removed from the rest that it is almost no help at all. Mabo left a great many practical applications unclear but it did set down fundamental principles, one of which is that one gives full respect to property rights. To some extent we are in the process of determining what that means. The decision of the federal court is entirely dictated by the majority in Wik. I suggest it would be difficult for any other conclusion to be arrived at with respect to leases.

Mr BARKER: One does need to have regard to the second schedule in the land that His Honour found was the subject of the extinguishment of native title. That included, as you can see, areas that were occupied by the riding club, the agricultural society, the pistol club, the pumping station, the diversion dam, a couple of repeater station sites that Telstra operates, land on which there will be a fuel generator, a reserve site for a power station and another area where hydroelectric power station facilities were being installed. They are all consistent with the examples you gave of a use which does not allow native title survival, and thus His Honour plainly found extinguishment in those cases.

Hon MARK NEVILL: In relation to the indigenous land agreements, how do you identify who is to benefit among the Aboriginal people; who is to

be included and who is to be excluded? Obviously everyone will not be clearly identified with a group. Does that mean that people are in or out?

Mr BARKER: Is that in relation to a particular proposal which might be the subject of an agreement?

Hon MARK NEVILL: Yes, an indigenous agreement, say, in the Kununurra region.

Mr BARKER: As you will see from the judgment, His Honour found that native title vests in the Miriuwung-Gajerrong people and in respect of Lacrosse Island it is shared between them and another group. It is always a question for the indigenous people to decide according to their own traditional laws and customs. It is difficult to explain, but His Honour's judgment repays close reading in the first part in which he deals with the existence of native title. The anthropology in this area clearly shows a complex relationship between people. There is no single rule as to who owns land which can be equated, for example, with Torrens title. The common law position as stated in Mabo is that those rights and interests in relation to land that are recognised under traditional law and custom make native title. A variety of people through different mechanisms in traditional societies, and certainly amongst these people's traditional society, exculpate the rights and interests. In any case, if people are negotiating such an agreement, as they have done in the past when dealing with mining companies and the like, amongst themselves they identify who are the right people. They appoint the negotiators, come to an agreement and make under their own law - now recognised by our common law - the decision of who is in or out, if you wish to put it in those terms. Sometimes the ramifications of a particular proposal may be so great that it reverberates throughout the whole area and the people will make decisions. Again, it is very difficult to be precise because we are dealing with a traditional set of rights and interests and not with rights that are so delineated that one can simply put them on a register, mark them off and apportion benefits accordingly.

Hon MARK NEVILL: I ask that question because inherently it can be very divisive. To take the Balgo area south of Halls Creeks, the Billiluna claim covers the Balgo area, yet all of the Balgo people are excluded from the Billiluna claim, despite the fact that they are conceived there and born there and they have their law in that area. I cannot see how these indigenous land agreements will overcome those sorts of problems if there are to be exclusions of people within them.

Mr BARKER: The first thing that happens after a native title determination is made is that the holder of it must nominate a prescribed body corporate to manage the native title. That organisation then has functions under 57

of the Native Title Act, which include dealing and negotiating with persons and bodies on the outside, be they Governments, departments, or mining companies and the like. Through that process the agent of the native title holders will bring that sort of agreement forward. With respect, the particular issue you have raised is one that goes beyond our ability to comment. After 200 years of European settlement of the continent, there are undoubtedly some difficulties between Aboriginal people who have been displaced from one area to another about who are to be recognised as the native title holders. The expectations that have been created by the Native Title Act have no doubt contributed to those difficulties, but who are the right people for particular places is to be resolved with the assistance of Aboriginal organisations, representative bodies and the like and on expert advice, and finally by the people themselves. There can be a difficulty with people who are acknowledged to have lately settled into a place.

Hon MARK NEVILL: You say that a lot of the native title rights are subject to statutory procedures and controls and that Aboriginals can claim native title over national parks. Would they be subject to normal statutory controls of taking fauna in national parks, and even rare and endangered fauna, or would native title overtake that?

Mr BARKER: May I answer that question in stages because the issue is a live one throughout Australia. There is a case involving the Queensland fauna conservation Act, which I think is now to go before the High Court on various issues. Before the Full Court of this State has recently been argued the question of the effect of the Fish Resources Management Act of this State on native title and the extent to which regulation has removed the practical exercise of any right that subsists. However, in broad terms the High Court recognised in Mabo No 2 that in national parks and similar areas, native title rights would not necessarily be expected to be extinguished, because plainly a process of management of those lands is consistent with the continued exercise of native title. Therefore, although it did not have to decide a national park case, the High Court implied that a national park regime does not extinguish native title. That was based on strong Canadian precedents with a similar effect; indeed, it is based on strong Australian precedent with the so-called vesting of water in government. The High Court held long before Mabo No 2 was brought down that a common law riparian right was not necessarily removed by a provision of a Statute which purported to vest property in water in the Crown or some government agency and that there is no necessary inconsistency between the two but rather one looks at the management of the water right and the power to manage the water right that is given the Crown, and in the event that the management of that right conflicts with the riparian right, the statutory right would prevail. With respect, I think that same theory underlies this decision.

Ms SHEEHAN: May I add to that? There is also a practical implication. You will see that the area includes Gibb River National Park in the Northern Territory. Firstly, the Northern Territory Government was at great pains throughout this case to say that it did not dispute that the Miriuwung-Gajerrong people were the right people for the country. It did not put that in issue. Secondly, it was at pains throughout to point to the fact that in its management plans, Keep River National Park involved consultation and it involved the traditional owners. On a day-to-day level, that is how to sort out of some of those difficulties in a very practical sense.

Mr BARKER: His Honour plainly had that in mind when he said that there must be negotiation between the persons holding the current rights and interests.

Professor BARTLETT: The only matter that has been left out is section 211 of the Native Title Act which preserves the right of native title holders to pursue their personal, domestic or non-commercial communal needs. That section would seem to prevail in that circumstance, subject to the application of general laws otherwise.

Hon GREG SMITH: It has been very interesting listening to you. I refer to the determination relating to the right to control the access of others to the determination area. Can you expand on that in terms of how much right it gives them to control other people's access. As you have been telling us, the way it reads and what it means are two different things with all the overriding issues. How much control do the native title holders have over the access of others if they so desire?

Mr BARKER: It is important to read all of what is said with the qualifications. I suggest to people that they not read the determination by separate paragraphs but look at the summary provisions starting at the bottom of page 257, the top of page 258 and the penultimate paragraph. His Honour has formally set out the determination and what he said in a clearer manner. In relation to the orders he then made, if one looks at the determination, he then seeks to structure it. We submitted that it was appropriate to structure it so that it was understood what it meant in practical terms to possess, occupy, use and enjoy the traditional lands. In the determination at page 259, the first right identified is the right to possess, occupy, use and enjoy the determination area. In a sense, His Honour attempts to give that context. Everything that follows is included in the notion of possessing, occupying, using and enjoying the determination area.

I have sometimes sought to explain the position to people in this way: One can imagine foundation day of the colony of Western Australia in 1829 and assume that the Supreme Court had been set up near where Mrs Dance cut

down the tree. A message was sent to the Miriuwung-Gajerrong people that this was all happening and that they should be careful because the Europeans were coming that way. However, the Miriuwung-Gajerrong people had a possible native title right claim. They would then have hotfooted it to the Supreme Court and applied for the determination of native title and the court would have said that it was completely theirs; there was no-one there and the traditional law would have been recognised by the British law and the native right would have been unlimited. They had the right to possess, occupy, use and enjoy the determination area. That necessarily carries with it an entitlement if someone steps inside that area to tell them that they must talk to the Miriuwung-Gajerrong people first. In a real sense that is the nature of the declaration of possession, occupation, use and enjoyment. Those words are also used in the Mabo determination of the High Court.

Since those days many laws have been made. As we see here, many of them severely control, restrict, curtail, suspend and so on the native title rights that would have been so full in 1829. His Honour said in this decision that that is the case. So, one starts from the conceptual position that if there has not been extinguishment of native title, because there is no clear intent in the legislation as analysed, it is there as it was back then, as long as the people can prove that they have maintained their traditional connection, as he found they had. Given that, what laws are there? His Honour said that that must be worked out as we go along. Some people want to point in the national park area to management powers which authorities in the Northern Territory and Western Australia have and which enable them to permit people to enter a national park, or existing rights that people have to access mining tenements or to exercise their water rights. All of those rights exists in the laws which generally apply and which are there for implementation.

It comes back to the understanding that whatever is left following this large degree of regulation the traditional owners can still do under their traditional native title powers. It is not appropriate to try to write some book about what that amounts to. As His Honour noted in the passage to which I referred earlier, those issues are questions of enforcement, which are not for the Federal Court in proceedings like this to deal with; they are issues that may arise in the future, and that is the time to hotfoot it to the Supreme Court to determine the extent of the regulation and whether the native title right to control in this case has been curtailed by existing rights or legislation. That is the way it is intended to work, because we have two parallel sets of laws: Traditional laws and European laws operating together.

Hon GREG SMITH: I am sure that has answered the question. When I go to Kununurra people will ask me how these things will affect them.

Mr BARKER: The Miriuwung-Gajerrong people have indicated, as Mr Ward said in the article, that they are pleased for people to approach them and talk to them. They want to act on the judge's recommendation to negotiate.

Hon GREG SMITH: I am looking for a verification. Let us say, for example, that this determination includes the right to trade in the resources in the determination area, yet the Titles Validation Bill 1995 verified that the Crown had exclusive control of the minerals. Does that mean that the state Act nullifies that determination?

Mr BARKER: Without entering into a detailed analysis of what the state Act does, whatever the proper effect of that state law it will qualify the capacity to enjoy that native title right. I am not seeking to avoid the answer; that is the proper answer. One must analyse each law and circumstance to determine whether there is a right to trade in a particular resource, whether it has been qualified and so on. The simple examples are those set out here. If existing mining tenement holders have a right to do something, that concurrent right stands on its own.

Hon GREG SMITH: How would you recommend going about the negotiation process with the Miriuwung-Gajerrong people? Would it be on an ongoing basis as each act is done in the area, or do we negotiate an agreement that would hand the management of the area back to the East Kimberley shire in exchange for something else? Will it be a corporate body that will be consulted in conjunction with all other bodies that have to be consulted?

Mr BARKER: That is a very sensible proposal that was always in the Native Title Act. Once we have native title, particularly in this case and many others in the Northern Territory over the past 20 years, we have the agency and people come to that organisation. As far as trying to progress negotiations is concerned, it is like all negotiations: One must sit down and work out what people want and how one can harmonise their interests. As I suggested earlier, one can start to break them down into certain groups that can talk on their own without being involved in a large set of negotiations. Most shires in Western Australia that are seemingly affected by native title decisions have expressed the desire to work with Aboriginal people to work things out. There is no question that the shire's management powers and vested rights exist. It is a question of what Aboriginal interests might be, whether they have any special interests, might the shire in recognition of the traditional ownership that has now been determined by the court engage in some practical response to that by asking whether it can train and hire Aboriginal rangers or the like. I can cite similar examples in relation to national parks. There could be discrete management discussions in those areas. I am aware of a situation in the Pilbara in which the local

Aboriginal people would like to see proper management plans put in place in respect of the national park. They would like to see that improved and the provision of some proper living sites in that area. That is the sort of negotiation that can produce outcomes that are in everyone's interests.

Ms SHEEHAN: Wearing my former hat as a solicitor involved in this, I point out that in negotiations anything and everything is possible depending on what the parties agree. However, there is a real resource issue. It is unbelievably difficult to do the work involved in getting up a case that is contested as this case has been and at the same time conduct negotiations. One of the lessons to be learnt from this is that if the effort is put into negotiations we can save much time and money. It is very difficult to do both at the same time; in fact, I would say that it is impossible.

Mr BARKER: If the committee were able to adopt and make recommendations along these lines, it should recommend that if there are to be negotiations, the resource capacities of the parties must be equal. A party such as the native title holders must be able to deal with powerful parties such as the State. They need the right backup and the State must invest money in order to take the right type of advice and to be able to engage in meaningful negotiations. I am reminded of some of the consumer protection provisions enacted in the United States and Canada, in particular in the Nader years when consumer advocates were set up to represent the public interest. That is very hard to do if people are unfunded. However, if the State provides the funds to resource those people to represent their interests to Government, we are more likely to get practical and effective outcomes. If we tell people that they should negotiate but not fund them to do it properly it is unlikely that the outcome will be achieved.

Hon MARK NEVILL: Do you think that is a good agreement?

Mr BARKER: I do not have a comment on that.

The CHAIRMAN: I am sorry but that has not been the case. The Miriuwung-Gajerrong case is case number one. Have your clients put in another claim?

Ms SHEEHAN: Four years ago the case was divided when they made the decision because there was uncertainty about what it meant as far as land tenure was concerned. The first case claimed all public lands. The second two cases claimed pastoral leases because it was thought that that dealt with a different legal issue. Both Miriuwung-Gajerrong number two, which is pastoral leases on the Western Australian side of the claim, and Miriuwung-Gajerrong number three, which is pastoral leases on the Northern Territory side of the claim, are in the mediation stage. Neither of them has been referred to the Federal Court. I referred to the Miriuwung-Gajerrong

number two negotiations with respect to the Ord stage 2 development. Practical difficulties arose when attempting to conduct those negotiations at the same time as raising a case of this magnitude for hearing. However, they were not the only difficulties.

The CHAIRMAN: Are there any residual areas of land over which the Miriuwung-Gajerrong people will lodge claims following the resolution of those issues?

Mr BARKER: Apart from claims two and three, which remain outstanding, not as we understand it.

Ms SHEEHAN: They have decided to claim the area of their traditional lands at present and that is all they have decided to claim.

Mr BARKER: The evidence indicates that the traditional lands are more extensive than the areas that have been claimed. My response was meant to indicate that presently no other claims are before the court.

The CHAIRMAN: Is that the boundary issues?

Mr BARKER: Yes, that is right.

The CHAIRMAN: Is there any final advice on the issue of the legislation before us that flows from any matter that has not been mentioned to this point?

Mr BARKER: No, I do not think so. The points that Professor Bartlett made are points to be considered and the practical effect on the determined rights and interests of the Miriuwung-Gajerrong people as explained by Ms Sheehan. We confirm our submission that if the Bill became law, it would have a significant and deleterious effect on the existence of those rights and interests held by the Miriuwung-Gajerrong people.

Ms SHEEHAN: If you had another three hours I could tell you what is wrong with the Native Title (State Provisions) Bill. However, I suspect everyone else has told you about the difficulties in that regard.

Hon GREG SMITH: Did the Mirriuwong-Gajerrong decision almost go further than you expected it to go in the rights it gave to the native title holders in that claim? What forms of tenure do you believe are acceptable to extinguish native title? How will we deal with situations like those in the goldfields in which claimants have the right to negotiate, but problems have arisen with people who believe they are the legitimate native title holders making claims over the top of other claims. Will lifting the threshold test solve that problem?

Mr DODSON: Are you asking me as an indigenous person whether I was surprised by the extent of the finding? No. I believe native title covers a range of areas that we are yet to discover in this country. We have tended to think of it narrowly in terms of land tenure. In future years, we will find it will have some other meanings which will be brought about by litigation or negotiations. I am not surprised by the judgment; I am delighted by it. I see it not as a win to the exclusion of other people's interests and rights for the people in the Kununurra region, but as a great opportunity to restart the basis on which we negotiate and find a more comprehensive way of dealing with the land interests of indigenous people as well as others in the State, so that not only development and industry can proceed and securities be provided but also the rights of indigenous people can be secured, enjoyed and asserted so that they can participate in the economic benefits that might flow from that region.

Regarding whether the form of tenure might be acceptable, obviously no form will be acceptable for extinguishment. I understand the limitations that have arisen in terms what the judge ruled. I take the view that we all belong to Australia. Indigenous and non-indigenous people are Australians. The indigenous people are the prior owners and occupiers of this country and their interests and rights have been overlaid by the rights brought in with the British and the systems established subsequently. I hope one day we in this nation will find a way of recognising the indigenous people's prior ownership and occupation either symbolically or in real terms, as the courts have done in recognising those rights, and find ways to allow the notion of coexistence and concurrency to exist rather than snaffled out or made subordinate.

There is already a clearly established position in common law which I thought would create no fear for non-indigenous people or holders of titles predominate over the indigenous people's interests and the subordinate position native title holders will come to the table on in relation to those matters. The only way I can see it bringing about more equity and justice is to find ways by which the native title interests could find expression more clearly in that concurrency and coexistence arrangements. The threshold test will provide a tremendous advance on the position you described about competing claims and the conflicts that might arise with indigenous people themselves over who are the right people for the country and who should develop as we are dealing with it etc. A heavy onus is placed on indigenous people in relation to that test and that will hopefully clarify many of the competing interests.

We could probably have taken a bit more of a lesson from the Northern Territory Land Rights Act procedures in terms of an inquiry position. However, I understand we are operating from two different legal premises. An inquiry will often assist. Again here in Broome for instance we are

seeking the cooperation of the state and the federal ministers for a section 137 inquiry to take place to try to resolve some of those conflicting an competing interests that arise among indigenous people. That is the way that will be useful in the future. I understand that section has not been triggered under the Native Title Act anywhere in Australia; it will be the first time. The outcomes from that I think should assist in clarifying who the groups are and what rights pertain to those groups.

I am mindful of the judgment of the Mirriuwong-Gajerrong situation that rights are held in common by all the groups. These are new concepts for the western mind and the western legal interpretation. We must find out how to deal with the indigenous people's understanding of their own rights, that have been clarified under the law in recent days after 200 years of denial. It is not an easy matter to resolve the constructively the turmoil that sometimes arises. However, with cooperation and a framework to assist and provide the resources to do that, we would be able to resolve some of these matters more amicably.

Hon MARK NEVILL: Under the Lee judgment, do you see native title as a stronger form of title than freehold, given the rights he is suggesting to resources, to control entry and to exclude? Is Justice Lee really suggesting a form of Aboriginal sovereignty in his judgment?

Mr DODSON: Far be it for me to say a judge of the Australian courts was suggesting sovereignty. The courts were not even considering that question in the Mabo judgment or other judgments in the High Court. I am not meaning to be flippant. The question of sovereignty is a red herring in relation to this matter. The courts are not in a position to consider that. Although whether the industry people draw from it in terms of their conflicts of sovereignty is another matter. Sovereignty is a question of how the rights, interests and functions of indigenous people and their self-determination within the framework of the constitutional and political framework of Australia. How is that to be expressed. The notion of sovereignty per se does not worry me because I do not see it as putting asunder the political or constitutional structures. I am sure that is not what the judge attempted or suggested in his judgment.

The issue of rights is an area to which we in Australia are gradually becoming more and more exposed and familiar with and to some extent we are frightened by some of it because it is new in the sense of our coming to terms with indigenous people having rights found in our courts that now say they may well run to the matters you suggested or the matters the judge found about a right to share in the resources and the right to exclude people. Those rights are not totally alien to what we do now in many other places. We have all sorts of regulations and exclusions that impact on our rights as citizens of Australia. We cannot just walk into Mr Court's or

anyone else's home for that matter without an invitation. We should respect those rights. I am not suggesting we should be allowed to walk onto their properties without some notification or request.

Resources is again a matter that is unclear. I am not a lawyer and the lawyers you will talk to today from the working group may want to answer this question. It seems to me that the right to share in the resources has been fundamental to the thinking of indigenous people's rights or the expression of their rights to land. The Woodwood inquiry in the Northern Territory underpinned the setting up of the 1976 Land Rights Act. You will find that Mr Woodwood made it clear that to give indigenous people rights to land without the ability to control or enjoy the wealth that was generated from that land would be a meaningless form of land rights. Therefore the notion of indigenous people having a share in the resources that are derived from the land or any other matters is not a new concept. It has been around for 20 or so years.

It does not phase me that these rights that the judge says are part of native title were recognised. It is a question of how we now manage that situation and what are the best ways to ensure the balance between the indigenous people's interests and rights here and those that the States must try to regulate.

Hon MARK NEVILL: The threshold test under the Wik amendments was seen to raise the bar in terms of claims. Justice Lee's decision seems to place that bar where it was before in terms of the threshold test he applied in Mirriuwong-Gajerrong particularly to, say, Lacrosse Island.

Mr DODSON: It is not the advice we are getting out of the tribunal at the moment in terms of the registration that must be undertaken by claims already submitted. The test is quite rigid. In the light of the history of those people and the way in which they have been dispersed, subjected to expansion of pastoralism and massacres in that region, destabilisation of their society, wave on wave of encroachment on their cultural and social life and in the early years into Halls Creek, the pastoralists in the early 1960s, the developments of the dam, the beginnings of the agricultural industry in that region and the ongoing social impacts and displacements the reasoning about how they have sustained their connection to their country is just and proper. We must take into account the physical connection. The factors that mitigate the physical connection were well thought through.

The registration test will be subject to that kind of thinking. There is no doubt that the thinking of the judge's decision will give rise to people's arguing for the broader social and cultural circumstances that are already permissible under that amending Bill. Deliberate acts or effects of government policies that led to people being disconnected from their

country must be taken into consideration. I do not see much change there. The stringency of the test is still there.

The CHAIRMAN: Following the Mirriuwong-Gajerrong decision there was speculation from some quarters that this decision would lead to the installation of toll gates in the Kimberley. Is there some canvassing of that among indigenous people as being a real response to that decision in the north east Kimberley?

Mr DODSON: The only toll gate I know of is the one that the customs authority has erected at the border between the Northern Territory and Western Australia to protect the agricultural industry in the Kimberley from fruit fly and various other infestations. That is thankfully in existence because those industries require that protection. Any suggestion that a toll gate or barrier will be or has been erected is absolutely laughable. It is the same ridiculous logic that we have seen underpin the way in which the arguments have been run in the Northern Territory for years in relation to Uluru when it was handed back to the indigenous owners of that part of the world. All sorts of calamities were about to befall the economic and political regime of the Northern Territory. We even had people on TV saying children would not be allowed to climb the rock. It did not transpire. Katherine Gorge is an example in the Northern Territory. Statements were made that people would not be allowed to go up the gorge in boats and enjoy the scenic beauty. We now have the Jawoyn people running the enterprise encouraging tourists to go there. It is a furphy designed to muckrake. It leads to social discord, is totally irresponsible and should be spurned as such.

7. Legislative approach

As has been demonstrated by the native title cases that have already been before the courts, common law claims are not the ideal way by which native title should be determined. They can take many years to resolve, are very complicated and are extremely expensive for all parties involved.

Adopting a legislative approach is also subject to problems, however, if the legislation is not fair and reasonable. The ideal way in which native title and competing claims can be resolved is by negotiation and agreement, either within or outside a legislative framework.

The basic principles for any Western Australian legislation should include:

- it should be fair, reasonable and workable;
- any body established to manage native title should be credible, independent and appropriately resourced; and

- procedures should include due process and take proper account of competing interests.

A further consideration to which regard should be had is that the *Native Title (State Provisions) Bill 1998* must receive the approval of both the Commonwealth Minister in the form of a determination that the Bill complies with the *NTA*; such a determination is subject to disallowance by either House of the Federal Parliament.

It is unlikely that the Commonwealth Minister will approve this Bill if it does not meet the minimum standard requirements of the *NTA*. Senate disallowance of the Commonwealth Minister's determination if in all parties are not treated equitably, if the administrative process by which objections can be made is insufficient, and the independent body set up by the Bill is not credible and independent.

Conclusions and recommendations

1. That the evidence included in the Committee's report be considered during the debate of these Bills in the House.

Hon Tom Stephens MLC
Chairman

APPENDIX "A"

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

Reference: Native Title Amendment Bill 1997

CANBERRA

Tuesday, 30 September 1997

EXTRACT FROM OFFICIAL HANSARD RECORD

"**Mr Orr** - The basic policy of the government was to confirm extinguishment. But based on the common law principles which the High Court has espoused, firstly in the *Mabo No. 2* decision and then in the *Wik* decision, the government is of the view that on the basis of those decisions, if exclusive possession has been granted to a person, then that has extinguished native title in relation to that land.

Senator BOLKUS - Just on that, the High Court mentioned that there should be special references to the actual leases involved. You did not mention that. Is that not one of the considerations?

Mr Orr - We will come to that when we talk about how the schedule was developed.

Senator BOLKUS - But it is not one of the considerations listed by the government, by the sound of it.

Mr Orr - No, that is right. We have not looked at particular leases simply because the government's policy is that, on the basis of the legislation on which the lease has been granted, if it is clear that the lease provided exclusive possession the lease was to go on the schedule. If there is any doubt about that, then it is not to go on the schedule. But this process has not gone to looking at individual leases which, of course, the court did in the *Wik* case.

Senator BOLKUS - That is despite the fact that the High Court said that that is what you should do.

Mr Orr - The High Court said that if you were to complete the full task, that is right, that is what you should do. It could well be that there are some particular leases of types not on the schedule which will still provide exclusive possession and, perhaps, in due course that will be done. So we have only gone part of the way.

Senator BOLKUS - Sorry to digress at this stage, but it seems to be an important issue. Could there also be the reverse? Could there be scheduled interests which do not extinguish native title under common law included on the schedule?

Mr Orr - As you will hear when we give the evidence as to how it has been developed, we have been aware of that possibility and we have taken steps to put the schedule together on the basis of what is the legislative intent as set out in the legislation and other objective factors which we have garnered in the process.

Mr Orr - It was originally intended in the government's thinking that in the bill there would just be some generic descriptions of leases which provide exclusive possession, and there would not be any specific listing. But in discussion with the states and territories they indicated that this approach would leave considerable uncertainty with regard to the land management system of Australia and that it would be a much preferable course to proceed towards a listing of specific types of leases in the bill to enable there to be certainty with regard to those types of leases.

Mr Orr - The test which we have applied is that leases have been put on the schedule if there is reasonable certainty that exclusive possession was provided by the leases and that they have therefore extinguished native title. Where there has been significant doubt that exclusive possession was provided and therefore significant doubt that extinguishment has taken place, the leases have not been put on the schedule.

Senator BOLKUS - You said "by the leases". You did not mean that, did you?

Mr Orr - By the types of leases.

Senator BOLKUS - I think we need to distinguish that.

Mr Orr - That is true. There are no specific leases on the schedule. The schedule does not get to the detail of saying that a lease granted on day X to Y people extinguishes native title. The schedule simply includes types of leases.

Mr Orr - The government's policy is that this is meant to be implementing the common law and therefore it is really confirming what has already happened at common law. If, however, either the schedule or the general provisions go further than the common law, there is provision for native title holders to receive just terms compensation for any extinguishment of their rights.

Mr Tanna - The guiding principle that I followed in preparing this list was a legal determination of whether an interest confers a right of exclusive possession. This test I saw as reflecting the common law, namely, that the grant by the Crown of a right of exclusive possession over an area is wholly inconsistent with the continued existence of native title and thereby extinguishes that native title.

All the scheduled interests are leases, with three exceptions. No interests less than leases, such as permits or licences, are included in the schedule. Also, mining leases are specifically excluded. The scheduled leases are not examples of the generic past exclusive possession acts, such as commercial leases, residential leases or non-exclusive agricultural leases, though they may be specific types of those leases. The point of the schedule was not to specify specific examples of those more generic descriptions. The purpose was to specify those leases that conferred a right of exclusive possession.

The schedule contains both historic and current leases - historic, that is, in the context that they are no longer effective. In preparing the schedule I did not have regard to how the land or waters were actually being used. The important issue was the rights and obligations that were being given. In preparing the schedule I examined over 600 individual pieces of state and territory legislation, dating back in some cases to the beginning of last century. I did not make a determination based on the terms and conditions of the actual lease instruments.

The leases contained in the schedule are those which, without needing to have recourse to the terms of the instruments, it can be said with reasonable certainty conferred a right of exclusive possession. If there was significant doubt as to whether that was the case, then the lease was not included. In my mind, after having a look at the terms and conditions of extrinsic material, reasonable certainty was either that of course that lease should be on the schedule or that I had no significant doubt that that lease should be on the schedule.

The test of reasonable certainty was based on an examination of the legislation and relevant regulations - where that was indicated in the legislation - as a whole, not just the specific provisions under which the leases were granted, and in some cases certain extrinsic information about the actual leases. I suppose, then, it is not absolutely correct to say that it was just based on the terms and conditions of the legislation because I had regard to extrinsic material and that extrinsic material included the actual or average areas of land that were covered by particular types of leases, lease purposes, the location of the land, the type of land covered by leases and, in some cases, historical information. Leases were not scheduled if the legislation indicated that the lease covered previous or existing Aboriginal

reserved land or the legislation contained a reservation in favour of Aboriginals.

In preparing the schedule I requested the states and the Northern Territory to submit the legislative reference for the particular leases that they believed conferred a right of exclusive possession. After receiving their lists, I obtained the legislation, which in some cases was extremely difficult - as you can appreciate - where some of the legislation dated to the beginning of the last century. An examination was undertaken by myself in relation to the legislation as a whole to determine whether the lease conferred exclusive possession, not just the provisions under which the lease was granted, because in a number of cases there were other provisions that were not actually in the part or division that impacted on the decision as to whether those leases should be scheduled.

I also examined extrinsic material which I requested the states and the Northern Territory to provide in writing when the legislative provisions raised questions that could not be answered within the terms of the legislation. In preparing the schedule I had regard to a number of factors in determining whether the lease conferred a right of exclusive possession. No single factor was determinative. However, I must say that purpose was an important factor where the terms and conditions were not set out in the legislation.

The first point to make is that regard was had to a variety of factors; these were the factors which basically the High Court had regard to in *Wik*. However, as evidenced by the majority judgments in *Wik*, no particular factor was decisive or necessarily carried more weight in determining whether any particular lease conferred a right of exclusive possession, subject to the proviso that, where provisions were neutral, certainly purpose become important.

Senator BOLKUS - How many factors did you have altogether?

Mr Tanna - There were about 15 to 18.

Mr Tanna - The first factor was the terms and conditions. As an overall approach I considered the terms and conditions of the types of leases that I looked at in comparison to the terms and conditions of the *Wik* leases. Might I say that, because of the different land history and settlement in each state and territory, the schedule falls into two parts. One is types of tenures: you might have conditional leases, agricultural farms or conditional purchase leases. These are a type of tenure. On the other hand you have what is called purpose leases. These are leases where they are not particular types of tenures but there is a general provision in the statute which gives a right to grant a lease for particular purposes in the statute or other such

purposes as the governor or minister may determine. That is why, when you look at the schedule, you see this division between types of leases, types of tenure and purpose leases.

In relation to the rights of third parties, the conferral of rights on the Crown and third parties, and the nature of those rights, was relevant to determining whether a lease conferred a right of exclusive possession. Extensive rights to third parties indicated that exclusive possession was not necessarily intended.

The next point was the obligations conferred and the restrictions imposed on the lessee. Regard was had to the kinds of obligations, if any, that were imposed by the grantee under the lease. For example, a grant may have been made subject to conditions that the grantee erect boundary fences or carry out improvements. The more intensive these obligations, the more there was an indication that exclusive possession was intended. Restrictions on the grantee, in particular on any intensive activities, indicated that exclusive possession was not necessarily intended. The idea is that if the Crown imposed a number of intensive obligations on a person then the Crown was giving that person a greater degree of control of that land. That was an indication, in my mind, that exclusive possession was intended - remembering that this was only one of a number of factors looked at.

The next factor was a capacity to upgrade. That basically meant that in some cases the lessee had a legally enforceable right or, otherwise, a right to apply to convert to a freehold or a freeholding tenure. The right was seen as being a higher form of tenure and an indication that the Crown, by giving someone a right, particularly a legally enforceable right, to convert to a freehold, would not have intended other people to have rights which might impede its legal obligation to give freehold.
The next factor, which was one that was important particularly when the terms and conditions of the lease were not set out in the legislation, was purpose. A purpose which necessitated exclusive possession or required an intensive degree of use or extensive construction on the land suggested an exclusive possession right. On the other hand, a purpose that did not require an intensive use of land suggested that a right of exclusive possession was not intended. For instance, things like agricultural leases or leases for residential or industrial purposes indicated an intensity of use of the land or a construction on the land that could only be carried out with exclusive possession.

Senator BOLKUS - What do you include there in intensity of use? What does that mean?

Mr Tanna - For instance, with an agricultural lease, the tilling of the land - the types of activities contemplated by an agricultural lease - does not leave any room for the rights of others to be exercised. A shop, a restaurant, these types of purposes indicate a use that does not permit other rights to be exercised. In preparing the schedule I was very concerned to ensure that purposes were very precise - that the purposes were such that I could say, "Of course exclusive possession was intended."

Therefore, purposes such as "commercial" or "business" were not accepted, because a business purpose does not necessarily mean a purpose that gives exclusive possession. Things like agriculture, cultivation, industrial, shop, restaurant or sportsground were purposes that, to me, indicated an exclusive possession activity - an activity where you would exclude others from the land.

Senator BOLKUS - So if there was a shop on one portion of the land then you included the whole lease area?

Mr Tanna - The test in the schedule is whether the lease permits the land or waters to be used solely or primarily for the purpose. The test is not actually what is done on the land. The test is: what does the lease permit solely or primarily? If the lease permits solely or primarily an activity that necessitates exclusive possession or is such that the construction or intensive use is an exclusive possession activity, then that was put on the schedule. But it was important that the test be "solely or primarily" for that purpose. Whether it was actually used for that purpose was not seen as relevant, as is indicated from the High Court decision in *Wik* that the rights granted are the important thing, not what is done with the land. That was the rationale for that.

Senator BOLKUS - The actual lease was important in *Wik*, not the actual nature of the rights granted, in isolation.

Mr Tanna - In terms of the rights and obligations, the rights granted were important and not actually what was done on the ground. To use your example, Senator, if you are given a lease for a shop but you do not build the shop, then it is still a lease that confers a right of exclusive possession because you are given the right to use that solely or primarily for a shop. Whether you do so is not relevant to the issue of what rights have been given. That was the view I took here and that is why the test is solely or primarily, to make sure that if it is only an ancillary use then it will not be included.

The next factor that was important in some situations was the historical origins of the lease. Clearly in the *Wik* case historical origin was an important factor. So, in particular, a lease which developed from what was

otherwise analogous to the traditional pastoral lease which evolved in Australia from the middle of the 19th century has not been included.

Another factor that was important was the location of the land. It was important to consider whether the land was located within closely settled areas, such as towns, or in more remote areas.

The suitability of land for a particular purpose or activity, such as agriculture, was seen as a relevant factor because usually - and this is something I have found with all the states and territories - because of the rent it could obtain for the lease, the Crown would not be granting a lease for grazing purposes only over an area that was suitable for agricultural land because granting a lease for agriculture would get a higher rent, generally speaking.

The suitability of the land for a particular purpose was an indication of the purpose for which the lease was granted. In some states where the leases did not specify a purpose - there was no actual purpose - basically it was contemplated that the land could be used for any purpose but, because of the rent that was charged and the suitability of the land, it would certainly be contemplated that the area could at least be used for agriculture.

The next element was size. In the majority of judgments size was seen as the relevant factor in determining whether the lease conferred right of exclusive possession. In that regard, I was able to get actual sizes. Where a large number of leases were granted under a provision, I followed the approach of getting the size of the 20 or 50 largest and the 20 or 50 smallest to get a flavour of the areas involved.

Area is important because another thing common throughout the states and territories was that you would not usually be giving someone an agricultural lease for 100,000 hectares. If you were, you were giving them an agricultural and grazing lease. Generally speaking, the larger the land involved, the more likely that the lease would be for grazing or pastoral use. The smaller areas were the agricultural lands because of the intensity of use of those lands.

The final points are that in the terms of the leases the instruments were not looked at, but the extrinsic material was, as were the terms of the legislation and the relevant regulations. If I had significant doubt, the lease was not included. I emphasise that no particular factor was determinative, that this was a balancing of factors. And again remembering that the *Wik* decision was based on pastoral leases - there were no pastoral leases in the schedule - accordingly the principles had to be adapted to take into account that the leases that I was concerned with were not pastoral leases.

The schedule was prepared examining a spectrum of factors. Some factors that were relevant to some leases were not relevant to other leases. There were a number of factors I looked at but some factors were not relevant in some cases and other factors were.

In preparing the schedule I sought the assistance, as a consultant, of Associate Professor Peter Butt, a professor of law at the University of Sydney. Professor Butt is an expert on property law. When the lists were prepared of the leases that were proposed to be on the schedule, they were sent to each state and territory. I met individually with each state and territory to give them an opportunity to express their views and provide further information about the tenures I had not included on the schedule.

These discussions were at times robust and at times some of the tenures that I put in were the subject of correspondence and advices. Ongoing discussions were held with the states and the Northern Territory throughout this process. Might I say that this process took approximately four and a half to five months to complete.

Senator BOLKUS - Can I ask about historic leases? I presume that by historic you mean they have lapsed or the enabling legislation which provides them has lapsed. The concept embodied in the *Wik* decision has been described by the Attorney-General's legal practice briefing by saying, "the majority of judges concluded that none of the grants necessarily extinguished all the incidence of native title and that they allowed the possibility, if not the probability, that on the expiration of an interest, then native title could revive." That is a fair assessment of the High Court decision, isn't it?

Mr Orr - The position, as we understand it, is that some of the majority judges in the *Wik* decision left open the question as to whether extinguishment by the grant of inconsistent rights, with regard to a pastoral lease, was permanent extinguishment or just suppression for a period. When they were talking about that, they were talking about pastoral leases. I just remind the committee that there are no pastoral leases on the schedule, nor in the category of excluded grants.

Senator BOLKUS - But that part of the judges' reasoning was not limited solely to pastoral leases, was it?

Mr Orr - It was on the facts. That is what they were talking about. They said that there was not any complete inconsistency between the grant of a pastoral lease and native title rights so that native title could have survived the grant of a pastoral lease. Although a number of them said that there would be extinguishment to the extent of any inconsistency, a number of them did say that the question as to whether that was permanent

extinguishment or simply suppression was a question that they did not have to answer because the majority had already answered the question by saying that there was not any necessary complete extinguishment of native title.

To anticipate slightly, the High Court has therefore left that issue open, although it is clear, in our view, that the majority in *Wik* thought that extinguishment was permanent. It is clear from some of the statements in *Mabo No. 2* that the judges in that case thought that extinguishment was permanent. But because the issue has, to a limited extent, been left open by the High Court in *Wik*, the policy of the government is to confirm in this legislation that when we are talking about extinguishment it is permanent extinguishment.

Mr MELHAM - That is policy by the government.

Mr Orr - That is correct.

Mr MELHAM - That is not the common law. Isn't it fair to say that the issue of revival of native title is still not settled at common law?

Mr Orr - That seems to be the case under the *Mabo No. 2* decision and it seems to be the case under the minority in *Wik*. It is correct that some of the majority leave that question open because they do not have to resolve the question in *Wik*. So the question is in their minds left open. We could argue about what seems to be the better view but, as the government has said on a number of occasions including in the explanatory memorandum and in the second reading speech by the Attorney-General in introducing the bill, it is government policy to provide that extinguishment. It is permanent with regard to these. The government does not assert that this is an implementation of the *Wik* decision.

Mr MELHAM - That is right. So it goes beyond the *Wik* decision. The government policy in this area goes beyond what was decided in *Wik*. That is a fair comment, isn't it?

Mr Orr - It is not fair to say that it goes beyond the *Wik* decision. It resolves an issue which is left unresolved by some of the majority judges.

Mr MELHAM - The issue is open in *Wik*.

Mr Orr - By some of the majority in *Wik* the issue is open.

Senator BOLKUS - If you are permanently extinguishing on leases that have expired when there is a fair chance, you have to concede, that the High Court may in a subsequent case on an issue which you say has been left open but where I agree with your legal practice brief that it is suppressed

rather than extinguished, you cannot be certain that there is no extinguishment can you?

Mr Orr - The record needs to be clear: the practice brief is saying that the issue is left open and that is what I am saying.

Senator BOLKUS - But if it is left open how can you be certain?

Mr Orr - That is also the government's position, that is, that the *Wik* decision says that some of the majority judges leave open this issue but the government policy is, as I said and it clearly says in the second reading speech, to answer that question in the interests of certainty for the land management system.

Mr MELHAM - So there is a policy decision by the government that the act does affect the extinguishment of native title?

Mr Orr - No.

Mr MELHAM - Isn't that what you just said?

Senator BOLKUS - You cannot be certain that native title has been extinguished by common law but I am not certain that it has extinguished. The inclusion of, for instance, historic leases for a start means extinguishment when the interest has lapsed.

Mr Orr - I have said what the government's position is, as I understand it, and that is that some of the majority judges leave that open. It is unclear. The government's position is that that question should be answered by confirming that extinguishment is permanent in these cases.

Senator BOLKUS - Coexistence is the embodiment of *Wik.* When would you say that coexistence is not allowed for in a lease? Is it when there is exclusivity, or do you say that there are other degrees of provision through which native title has been extinguished? For instance, would you say that, if the lease provides primarily for a particular purpose, that extinguishes any native title interest that may be relevant to that particular lease area?

Mr Orr - That test which we understand from *Mabo No. 2* and *Wik,* which Mr Tanna outlined and which I outlined, was that where there has been a grant of exclusive possession the native title has been extinguished, so there is no ability for coexistence. That was a High Court-

Senator BOLKUS - "Primarily" does not mean exclusive possession, does it? If a lease provides primarily for someone to use it, the implication is that there can be someone who has an access right to that lease area.

Mr Orr - No, I do not think we would agree with that. The view we are taking is that, if a lease provides for exclusive possession, of itself the grant of that sort of right, on the tests in *Mabo No. 2* and *Wik*, will have extinguished native title. The question seems to be getting at: what actually happened on the ground subject to the lease? What activities did the lessee actually undertake? I think it is clear from *Mabo No. 2* and, in particular, from *Wik*, that that is not the proper inquiry. The proper inquiry, as Mr Tanna said, is the nature of the grant, the nature of the rights granted by the lease.

Senator BOLKUS - That is the point, then. In Mr Tanna's process we are not actually looking at the nature of the rights granted by individual leases. We are actually looking at the definition of the lease. Would it not have been better had we gone down the preferred Commonwealth route of defining what was in and what was out, rather than trying to include or exclude some hundreds of thousands of interests? Your point is that you look at what actually happens on the ground, but you are not doing it are you?

Mr Orr - No. Our submission is that it is not appropriate to look at what actually happens on the ground in the land subject to the lease. Our position is that you look at the rights granted to the lessee, and that is what we have done. It is correct that we have not looked at the particular lease instruments -

Senator BOLKUS - That is right.

Mr Orr - But we have looked at the legislation under which the lease is granted, we have looked at the purposes for which the lease is granted and we have looked at some other objective factors in relation to those leases.

Mr MELHAM - You have substituted yourself for the court, haven't you? Haven't you made a determination already? What you have done here is to dispense with, in all these cases, the need to go to the court.

Mr Orr - What we have is implement the government's policy.

Mr Orr - The policy is to assess particular types of leases across Australia and to determine whether exclusive possession has been granted by the grant of these leases and therefore extinguished native title.

The alternative approach is to leave the determination of all these matters to the court and in due course, over a long period of time, after a large number of cases, the law will become clear. Clearly the policy of the government is to provide a level of certainty with regard to these grants rather than to leave the matter to be determined by the courts.

Mr MELHAM - Mr Orr, down this route there is a risk that the inclusion of some of these categories in the schedule will extinguish native title, given the route that you have taken. Do you say that your safety net in terms of that is that the legislation provides for compensation in the event that extinguishment does take place by this schedule? Is that your safety net - that if you have got it wrong and wrongly included interests where native title has survived and they are extinguished, then you make up for it by paying compensation?

Mr Orr - The compensation provision is there, and I pointed that out to you earlier.

Mr MELHAM - I accept that.

Mr Orr - If the government's policy has fully been implemented, then the leases on the schedule will be leases which have already extinguished native title and compensation will not be payable. But as you say, it is possible that there are some leases on which it will be extinguished by the confirmation; compensation is thereby provided. The safety net from our point of view is the process which we have just spent some time outlining to you, of the efforts that have been put in to develop a schedule, in consultation with the states and territories, on the basis of the criteria which we have outlined."[19]

[19] Extract from *Official Hansard Report* of Evidence taken by the Joint Parliamentary Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund on Tuesday 30 September 1997.

APPENDIX "B"

SUMMARY OF VARIETY OF PROCEDURAL RIGHTS UNDER NTAA

RNTC = Registered Native Title Claimant
RB = Representative Aboriginal or Torres Strait Islander Body
RNTBC = Registered Native Title Body Corporate

No.	NTAA Section	Procedures
1	S22EA & s22H	Intermediate period acts - comprising rights to mine (or expansions or variations of the same) over areas subject to a lease or public works Notice within 6 months after NTAA commences
2	S23HA & 23JI	Previous non-exclusive possession acts after 23/12/96 Notice and opportunity to comment
3	S24BH	Body Corp Agreements – Notice
4	S24CH S24CI(I) S24CI(2)	Area Agreements: (1) Notice (2) Objection against registration on ground failure to comply with s.202(8)(a)&(b) (i.e. n.t. holder id & authorised agreement) (3) Negotiation to withdraw objections
5	S24DI & s24DJ	Alternative procedure Agreements: (1) Notice (2) Objection on ground not fair and reasonable (3) Negotiation of withdrawal of objection
6	S24MD	Procedures under Regulations for Registration of Agreements (Yet to be proclaimed)
7	S24GD(6)	Off-farm activities: (a) notice (in way determined by Cw. Minister) before act done (b) opportunity to comment
8	S24HA(7)	Water and airspace future acts: (a) notice (in way determined by Cw. Minister) before act done (b) opportunity to comment

9	S24ID(3)	Renewals & Extensions – if grant of freehold or right of exclusive possession: (a) notice (in way determined by Cw. Minister) before act done (b) opportunity to comment
10	S24ID(4) & s24MD (6B)	Renewals & Extensions of – - "permissible lease etc" (s24IC) - "non-exclusive agricultural lease" (s247B) - "non-exclusive pastoral lease (s248) and upgrade to perpetual lease or new activity (s24IC(4)(b) and (c) - notice to RB and RNTC (s24MD(7)) - objection within 2 months - consultation about: • ways of minimising acts impact on native title rights and interests • access to land or water, and • way in which things may be done - hearing by independent person - determination upholding objection or setting conditions - determination complied with unless after taking into account consultation with Minister for Indigenous Affairs, it is in the interests of the Cw/State/Territory not to comply
11	S24ID(4) & s24M(8) (d)	Renewals and Extensions (as in 10) if no RNTC - notice to RB - comment by RB – s24MD(8)
12	S24JB(6)	Public Works: (a) notice (in way determined by Cw. Minister) before act done (b) opportunity to comment
13	S24J(7)	Park Management Plans: (a) notice (in way determined by Cw. Minister) before act done (b) opportunity to comment
14	S24KA(7) (a)	Public Facilities over non-exclusive agricultural lease/non-exclusive pastoral lease - same procedural rights as if native title claimant held such a lease
15	S24KA(7) (b)	Public Facilities over other areas: same procedural rights as if native title claimant held ordinary title
16	S24MD (6A)	Compulsory Acquisition – procedural rights as if held ordinary title
17	24MD (6B)(a)	Compulsory Acquisition – to confer rights on third party if RNTC as for 10 above
18	S24MD (8)(d)	Compulsory Acquisition to confer rights on third party – if no RNTC – notice to RB and comment by RB

19	23MD (6B)(b)	Creating or variation of right to mine for an infrastructure facility – if no RNTC – as for 10 above
20	S24MD(8) (d)	Creation or variation of right to mine for an infrastructure facility – notice to RB and comment by RB
21	S24NA(8)	Off-shore places – if RNTC – same procedural rights as for any corresponding rights and interests
22	S24NA (9)(d)	Off-shore places – if no RNTC – opportunity for RB to comment
23	S26A (6)	Approved Exploration Acts – Approved determination following notice to RNTBC, RNTC and RB and consideration of their submissions and subject to following conditions applying to each act: (a) notice to RNTBC, RNTC and RB (b) right to be heard by independent person unless no other person would have such right (i) grantee obligation to consult (ii) consultation procedures about minimising impact of act on exercise of native title rights and interests
	S26A(7)	Consultation about: (a) protection and avoidance of areas of particular significance to holders of native title rights and interests in accordance with traditional law and customs (b) access by native title holders or grantees (c) way in which anything authorised by act and affects native title is to be done
24	S26B	Approved gold or tin mining acts – same procedural rights as for s26A, except that consultation must include consultation about the way in which any rehabilitation or other matters which relate to the doing of the act is to be done (without specific reference to the affect on native title).
25	S26C(5)	Excluded opal or gem mining: (a) notification of RNTBC, RTNC and RB and (b) invitation for/and consideration of submissions about: • request to exclude • identification and protection of area of particular significance to native title holders in accordance with their traditional laws and customs

26	S31 S29 S31(1)(a) S31(1)(b) S38-39 S42	Normal Negotiation Procedure: • Notice to RNTBC, RNTC, RB, Grantee Party • Opportunity to NTP to make submission • Negotiation in good faith • Arbitral body determination • Ministerial Overruling of Determination
27	S32	Expedited Procedure: – notice/objection/Arbitral body determination
28	S36A & s36B	Ministerial Determination: • Ministerial Determination that 238 determination unlikely to be made within reasonable time • Notice to arbitral body requiring summary of material presented to it: notice to negotiation parties • Taking into account submissions by negotiation parties submissions in response, report by arbitral body and consultations with Cw. Minister (s36A(1A))
29	S43	Alternative State Provisions: (a) notification of RNTBC, RB, RNTC and potential native title claimants (b) negotiations in good faith (c) mediation (d) right to object (e) power to become a native title party (s30) (f) arbitral body to determine objection (g) s39 criteria for arbitral determination (h) NNTT member of arbitral body (i) Decisions of State body may be overruled on grounds of State or national interest (j) Compensation provisions (k) Ministerial Determination in circumstances similar to those in s36A and subject to requirements similar to ss36B and 36C

30	S43A S43A(1) S43A(2) S43A(3) S43A(4)	Exception to Right to Negotiate: Subject to Ministerial determination Applies to "alternative provision area" (current and historical freehold, reserves and towns and cities) Minister to give notice before determination to RB Minister to invite and consider submissions from RB before determination Requirements for Ministerial determination approving Alternative Provisions: (a) Notice to RNTC, RNTBC, RB (b) Right to object (c) Consultation and mediation between objections and State about ways to minimise compulsory acquisitions impact on registered native title rights and interests (d) Consultation and mediation, between objector and person who requested or applied for act, about minimising impact on registered native title rights and interests (e) Independent person hearing objection (f) Judicial review of decision to do act (g) Compliance with independent determination of objection unless State Minister for Indigenous Affairs consulted and in State interest
31	S43A(4) (h)	Compulsory Acquisitions under s26(1)(c)(iii) for the purpose of: (a) conferring rights or interests on the Government party; or (b) providing an infrastructure facility Procedural rights not less favourable than for ordinary title.

APPENDIX "C"

SELECT COMMITTEE ON NATIVE TITLE

MINORITY REPORT OF THE HON MURRAY NIXON MLC HON BARRY HOUSE MLC & HON GREG SMITH MLC

In view of the evidence given and the submissions received, we are of the opinion that the Bills as presented to the Legislative Council comply with the requirements of the *Federal Native Title Act* and will remove the uncertainty that exists on numerous titles and set up a workable state regime under which to administer land in the State.

The T*itles Validation Amendment Bill 1998* does no more than validate those titles provided for in the *Native Title Act 1993* as amended. The confirmation provisions of the Bill ensure that exclusive tenures such as freehold and certain leasehold titles are excluded from the native title processes. The area of the State subject to the scheduled leasehold interests covered by these provisions is less than 0.6% of the State.

- The Bill, when passed, will ensure that farmers in the South West holding conditional purchase leases and war service perpetual leases will no longer have their farms subject to native title claims. The same will apply to residential and commercial leaseholders in many of the State's regional areas.

- Aboriginal people will continue to have access to pastoral leases and the inter-tidal zone.

The *Native Title (State Provisions) Bill 1998* in the form presented to the Legislative Council has been the subject of extensive consultation with interest groups and the Commonwealth Government to ensure it complies with the *Federal Native Title Act 1993* as amended. Evidence given suggested that some minor amendments may in fact make the legislation unconstitutional.

The right to negotiate on pastoral leases was identified by witnesses as one of the areas most responsible for the unworkability of the current future act process.

- The right to consult process in the *Native Title (State Provisions) Bill 1998* is provided for in Section 43A of the NTA. The intent of the Wik amendments to the NTA was that where Native Title co-existed, Native Title holders should have no greater procedural rights than those rights of other co-existing title holders.

- This is a compromise position from Prime Minister Paul Keating's original view as stated in the Second Reading Speech in 1993 that pastoral leases had extinguished Native Title.

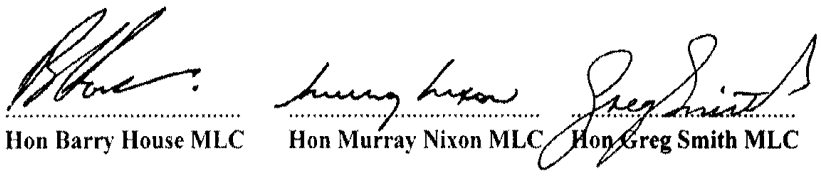
- This will assist in stemming the flow of Australian investment and exploration expertise from going overseas.

- It will allow the Government to release badly needed residential blocks in regional Western Australia without lengthy delays dealing with the unworkable future act process.

The *Acts Amendment (Land Administration, Mining And Petroleum) Bill 1998* contains consequential amendments that are required to give certainty.

Having heard evidence from a wide selection of persons and organisations, (listed in the report) the signatories to this minority report are of the view:-

The three Bills are complementary legislation as provided for in the *Federal Native Title Act 1993* as amended by the *Native Title Amendment Act 1998* and they are urgently needed to provide the State with a fair, equitable and workable native title system that can operate in harmony with the existing State's land and resource management legislation.



Hon Barry House MLC **Hon Murray Nixon MLC** **Hon Greg Smith MLC**

APPENDIX "D"

Attachment to the Report of the Select Committee on Native Title Legislation

The undersigned members wish to make the following comments in respect of the committee report.

Time Constraints placed on the Committee

Members of the committee have attached this separate report to identify the impact of the time constraints placed on the committee, and referred to in part 3 of the report.

When the establishment of the committee was proposed, the Hon Giz Watson expressed her wish that the committee be able to:

- consult with aboriginal communities directly affected by the legislation;
- scrutinise the provisions of the package of bills;
- examine the schedule of titles that will be validated by the *Titles Validation Amendment Bill*; and
- consider the implications of the compensation requirements.

The Hon Giz Watson clearly expressed her view that the committee needed adequate time to deliberate on these matters, and that the committee should not be required to report back to the Parliament before March 1999.

We acknowledge the commitment that all members of the committee, which has met almost daily in order to meet the report back date, have made to the inquiry. We would particularly acknowledge the dedication of the committee staff. However, it has not been possible to meet the stated intention of the mover of the motion within the time frame allowed.

The committee has met on 6 occasions over the 9 days since the committee was established. It has taken approximately 11 hours of evidence, but has deliberated for less than 8 hours, and was only able to consider the written draft report, which is over 130 pages long, on the day that it was due to be tabled. Some 90 pages of the draft report were sighted for the first time on the morning of the report back date.

The committee heard evidence on complex legal matters, but was unable to seek advice from Counsel because of the time constraints within which it was operating. Although opinion from Mr P W Johnston was tabled as a submission to the committee on 10 December, this legal opinion was sought by the Chairman in his capacity as a member of the committee, and not by the committee as a whole. Therefore it was considered inappropriate that this advice be considered by the committee. It is noted that in any event this advice is qualified in the covering letter, which indicates that he

> "has not been able to give exhaustive and definitive consideration to the very complex issues entailed in the submission."

Additionally the Federal Court decision in Ben Ward & Ors v the State of Western Australia

& Ors[1] was delivered after the *Titles Validation Amendment Bill 1998* was received in the Legislative Council. Although the committee heard evidence on the decision, and has reported on the potential impact, it has not had sufficient time to analyse the case in detail.

There was little, if any, evidence given on the *Native Title (State Provisions) Bill 1998* or the *Acts Amendment (Land Administration, Mining and Petroleum) Bill 1998* other than in the matter of the intertidal zone. These Bills contain a complex legislative mechanism that deserves detailed examination. In debate in the Legislative Assembly there were a large number of amendments moved by the Government and the Opposition, some of which were accepted. The impact of these amendments needs to be thoroughly scrutinised.

In particular we note the number of witnesses, with conflicting views on the issues before the committee, who commented on the inadequacy of the time frame in allowing them to present considered submissions to the committee, as illustrated in the following separate comments:

> "Mr CLARKE: The work is under way to produce maps of that nature. I must, however, point out that it is extremely difficult. What I was proposing to present was a state map that will show, if you like, the significant areas - that will be a large format map - where it is possible to plot the leasehold tenures - they are primarily the agricultural titles for conditional purchase leases and perpetual leases and some of the larger industrial leases in the north west. Most of the scheduled interests are very small in size and are two hectares or less in size and are therefore completely impossible to plot on anything like a State-wide scale. So we will have available some examples of those in typical regional centres to give the committee some idea of the distribution and the nature of those. However, it is not possible to produce every single scheduled interest on a map in the sort of time available.
>
> The CHAIRMAN: Will you be able, in the time available, to give us some estimate of the value of each of the areas of land and/or tenures affected by the tenures and the works referred to in questions 2, 3, 4 and so on?
>
> Mr CLARKE: No. It would not be possible to provide valuations on those."

> "Hon GIZ WATSON: The impact of these Bills is likely to be felt probably most strongly in the Kimberley and with Aboriginal people there. What level of understanding and consultation has there been with any of these people about the impact of these Bills? What do you anticipate will be the impact should they pass quickly?
>
> Mr DODSON: I can appreciate the brevity of time. You have a week or so to understand some of the concepts already put to you. The concepts I have raised are not well known or understood, even in the Kimberley among my relations and countrymen. I have seen no government effort to explain and interpret the nature of

[1] [1988] 1478 FCA 24 November 1998

these Bills. I have not seen a great deal of effort by anyone, except the Kimberley Land Council on occasions to explain how these Bills will affect the rights and interests of people under the Native Title Amendment Bill now. There has been very little understanding of the consequences these Bills will reap. The extinguishment provisions and the restrictions of the right to negotiate are not understood. As a result a high level of frustration and anger that will result once the realities of these matters are brought to bear."

"Mr SAVELL: I will make an opening statement. Thank you for this opportunity to provide AMEC's views on the Titles Validation Amendment Bill 1998, the Native Title (State Provisions) Bill 1998 and the Acts Amendment (Land Administration, Mining and Petroleum) Bill 1998.

In its communication dated 3 December 1998, the committee sought AMEC's views on the potential impact on members of the recent decision of Justice Lee of the Federal Court, in what is colloquially known as the "Miriuwung-Gajerrong Peoples case". As it was not possible at such short notice to obtain the services of our legal adviser on this matter - as he was otherwise engaged in court - the finer points of law related to the amendments may not be able to be dealt with in detail. We apologise for that fact should the situation arise."

"Mr COURT: We are in the middle of harvest and the cost of coming to Perth and the cost of this whole inquiry is of great concern to me and the members from the bush."

"Hon GIZ WATSON: At what point and how did the Commission of Elders find out that these Bills would be coming before Parliament? There was an earlier discussion about these proposed Bills. Did the commission know about that at that point?

Mr HANSEN: We found that out on Thursday and that is why we raced into Perth on Friday to see whether we could have a say. People have probably read something about it individually, but as a group of people, we were asked on Friday to speak to you about our feelings and express what we wanted to say on this subject."

Recommendation 1:

The undersigned members condemn this Government for failing to consult with aboriginal representatives in the drafting and establishment of this legislation, and recommend:

That the committee be reconstituted in order to allow:

- a detailed examination of the matters raised in the report to which this report is attached;
- full consultation with the aboriginal community affected by the legislation; and
- the committee to obtain Counsel's opinion on all the legal issues raised in this report.

and that the committee report back to the House no later than 11/3/1999.

The Extent of the Right to Consult

The right to negotiate is to be replaced with a right to consult in respect of certain forms of land tenure. The meaning of the right to consult is unclear, except that it is commonly understood to be different to the existing right to negotiate.

Several witnesses gave evidence to the committee on this point. Mr Dodson, is cited in the main report on this point (refer section entitled Right to negotiate/consult).

In response to questioning, Mr Dodson indicated that the right to negotiate involves the ability for parties to determine the framework of their negotiations; and that difficulties are often a result of the manner in which the negotiations are conducted.

Mr Shaw, however, seems less clear on the meaning of the right to consult, and suggested that it requires some statutory interpretation:

> "We have a Government which is going through the process, if possible, of putting through legislation which will remove the right to negotiate from the vast majority of native title holders; and provide them with an alternative procedure right to be consulted. We need at some stage to consider the meaning of "consultation". The *Webster's Dictionary* says that consultation means consent. Perhaps the Government should consider the wording of the legislation prior to putting it into the Houses."

Recommendation 2:
We recommend that in the event that the Right to Negotiate is replaced with a right to consult[2], the obligations imposed by the consultation process must be clearly established in the legislation.

[2] However also note recommendation 5 agreed to by Hon Helen Hodgson and Hon Giz Watson, but not supported by Hon Tom Stephens.

Validation

It is clear that the question of land title in Australia involves a reconciliation of competing interests. Native title can be extinguished by an act of sovereignty that confers exclusive possession on another person; but the questions of whether native title is extinguished or can co-exist with a form of land tenure - whether a category of tenure or a specific lease - can only be resolved by reference to the instrument conferring tenure. Native title may also be suppressed by a form of land title, reviving when the land usage or form of tenure expires.

Although there may be inconsistency between native title and other forms of land tenure, the Court has held that the rights granted under the act of sovereignty will prevail over native title to the extent of any inconsistency.[3]

The wholesale extinguishment of property rights is an action that any government must only take after consideration of the impact on the owners. Where that action is directly targeting a particular racial grouping, which is already suffering the impact of past and current government policy, then that action is contrary to the Racial Discrimination Act.

The *Titles Validation Bill 1998* validates titles that are within the intermediate period and that are deemed to be "past exclusive possession acts" as defined by the Federal *Native Title Act*. The decision on what acts were added to the schedule and deemed to be "exclusive possession acts" was made before the decision in Ben Ward & Ors v the State of Western Australia & Ors.

The intermediate period encompasses the period during which the Western Australian government did not comply with the provisions of the *Native Title Act 1993*.

We find that:

- the proposed legislation will not provide 'certainty' and risks opening up new areas of legal ambiguity;
- the stated intention of the Federal and State legislation is to confirm the common law position, holding that some forms of title extinguish native title;
- the *Titles Validation Amendment Bill 1998* may extinguish or eliminate native title on land over which native title currently exists
- the *Titles Validation Amendment Bill 1998* makes legal unlawful acts carried out under the State's failed *Land Titles and Traditional Land Usage Act (1994)*; and
- the legislation is inherently discriminatory and will bring Western Australia into international shame and disrepute

Hon Helen Hodgson MLC
10 December, 1998

Hon Giz Watson MLC

Hon Tom Stephens MLC

[3] Wik Peoples v Queensland (1996) 141 ALR 129

APPENDIX "E"

In addition, the undersigned members wish to make the following findings and recommendations:

We find that this legislation:

- will probably lead to further dispossession and fracturing of aboriginal culture and greatly diminish aboriginal peoples legitimate claims to land
- will severely strain any emerging goodwill developed with aboriginal people for the establishment of negotiated agreements

Recommendation 4:	That the *Titles Validation Bill 1998* be rejected;
Recommendation 5:	That the right to negotiate be maintained over all land tenures where native title exists;
Recommendation 6:	That there be a suitable trial period to assess the operation of the amended *Native Title Act* before considering any State legislative response.
Recommendation 7:	That the Government, in considering models for achieving certainty about rights in comprehensive land claim agreements adopt a set of principles upon which to base future dealings with Aboriginal people. These principles must balance the following objectives: • fairness, equity, mutual respect and recognition of rights • upholding the honour of the Crown. • certainty with respect to land and resource rights for Aboriginal people and other Australians • preservation and encouragement of economic development possibilities for all Australians • acceptability to Aboriginal people, governments and other parties potentially affected efficient and accelerated settlement of comprehensive claims, thereby lowering negotiation costs for Aboriginal people and government • consistency with the historic situation legally
Recommendation 8:	That the Government takes a leadership role in pursuing negotiated outcomes such as Indigenous Land Use Agreements and Regional Agreements (such as the Spinifex and Balangarra framework agreements).

Hon Helen Hodgson
10 December, 1998

Hon Giz Watson

APPENDIX "F"

Hon Tom Stephens, MLC - Dissenting Report

A number of sections of the draft report that I presented to the Select Committee for consideration have not been agreed to by a majority of the Select Committee.

As a result, I am utilising SO 364 to add a dissenting report.

In addition to my own dissenting report, I have signed off another dissenting report. I have been able to join with the Democrat and the Green Members of this Select Committee in finding some additional areas of common ground. However, I have not been prepared to agree to all aspects of their report and their recommendations. I do not accept that the legislation before the House should be rejected. I believe that the Bills should be amended to provide workable and fair native state based native title legislation. I support the proposals of the Labor Opposition to achieve that end and call on all Members of the House to seriously consider these proposed amendments for inclusion in the Bills. I believe that these Bills, when improved by the Labor amendments will provide that certainty and fairness that is so greatly needed in this area of native title.

The recent Report of the earlier Select Committee report contains the following sections, all of which were agreed to unanimously by the members of that Committee, four of whom were members of the current Select Committee.

It is illustrative to record some of these recommendations again here in this Report.

1. Introduction: 10 - p.3: The Committee has concluded that a workable system should provide the following:

   - respect for the property rights of all Australians;
   - respect for the cultural and religious beliefs and practices of all Australians;
   - a cost and time effective, efficient, equitable and just process for the determining and granting of interests in land and resources;
   - certainty, efficiency and equity for all parties in the administration of land tenure issues;
   - security for industry operating on lands on which native title may exist; and
   - the need to avoid costly, lengthy and disruptive litigation which is unpredictable in its outcomes.

   This is most likely to be achieved through a system of agreements, which parties have a mutual interest in maintaining.

2. Content of Native Title: .1 Committee Discussion [15.2 - p.28] "The preferable way of determining the content of native title in any given case is by agreement with native title holders and government to enable it to be accommodated within the existing property system of private property interests, and State and Commonwealth laws".

   .2 Conclusions and recommendations [3 - p. 29] "The State endeavour to reach negotiated agreements with claimants to define and provide certainty as to the content of native title rights and interests for all stakeholders".

Hon Tom Stephens, MLC - Dissenting Report

3. Extinguishment of Native Title:

.1 Committee Discussion [7 - p.39]

.1 "If it is the case that any of the scheduled interests included in the list of 'exclusive possession acts' are found at a future time not in fact to extinguish native title, then the State and Federal Governments will be liable for an as yet undetermined amount of compensation.

.2 "While the committee acknowledges the problems that exist in predicting where native title has been extinguished, it recommends extreme caution in the drafting of legislation "confirming" extinguishment of native title on "previous exclusive possession acts". This caution should arise from the strictness with which the High Court has interpreted extinguishment and to the possibility that an as yet undetermined amount of compensation may become payable to native title holders should it be found that native title had not, in fact, been extinguished by a specific grant of land. This caution should also be equally applied in the validation of 'intermediate period acts'.

.3 "In particular, it should not include stock routes and should determine on a case by case basis, whether native title has been extinguished on community purpose leases and public works. With the combined effect of Court decisions and Federal legislation, it is arguable that native title may co-exist with these non-indigenous tenures.

.2 Conclusions and Recommendations [p.40]

.5 "The Committee notes that proposals to 'confirm extinguishment' in relation to those interests included in the Schedule of 'Previous Exclusive Possession Acts' in the amended *Native Title Act 1975* could probably lead to lengthy and costly litigation."

.6 "The State provide prompt and equitable compensation for any native title interests that are impaired or extinguished."

4. National Native Title Tribunal

.1 Committee Discussion [10.2 - p.60] "If a State Commission is established by Parliament, it would be necessary ....if the Commission was to be an effective impartial mediator, that the Commission be at arms length from other Government agencies and had the confidence and respect of all parties concerned... It remains to be seen whether in fact "clear and distinct walls" can be built".

5. The Right to Negotiate

.1 Committee Discussion [10.3/4 - p.79] "The right to negotiate is an approximation of traditional customs and protocols, in particular, it approximates the traditional right of Aboriginal people to have a say in what occurs on their land.....There is a future likelihood of legal action by Aboriginal people, with the possibility of injunctions being sought, if they feel their right to negotiate has been eroded. This is likely to be an expensive and divisive process.

.2 Conclusions and recommendations

.13 [p.79] "The Committee notes that the improved acceptance and registration test - pre-requisites for access to any right to negotiate - will alleviate many of the problems associated with overlapping and unsustainable claims.

.14 [p.80] "The Committee notes the complications inherent in the establishment of differing rights in relation to different tenure types which has the potential for conflict and unfairness and this adds extra incentive for reaching agreements".

.15 [p.80] "The Committee recommends the creation of an alternative Future Act regime through regionally based agreements as the preferred first option".

6 Conclusion

.15 [p.252] "While the Federal amendments settle some areas of ambiguity, it has opened up new ones which are likely to be the subject of new litigation given the present absence of goodwill among stakeholders. These include the meanings of terms such as 'consultation' and the 'right to object' and whether these differ from right to negotiate. Court interpretation may, as has occurred in the past, change the intention and operation of the legislation. It could be the case that the impending judgment in the Miriuwung-Gajerrong litigation may change the ground rules considerably. The Committee report has also sought to detail matters in the legislation which could be challenged through the Courts: the schedule of extinguishing grants, requirements that claimants have a physical connection to land claimed, and the shortening of time lines in the right to negotiate procedure.

.16 [p252] "The Federal legislation and procedures still remain focussed on individual tenures by providing for reconciliation of native title and non-indigenous titles on a tenure-by-tenure basis. Therefore, it is likely that the period post-amendment of the *NTA* will be very similar to the period pre-amendment where the endeavours of all parties concerned are devoted solely to overturning, upholding or finding ways around legislation. This is a soul-destroying and divisive process which has developed a legal, political and social industry around it. It is expensive not only in financial terms but also in human terms. It fosters conflict and not healing, which is sorely needed in Australia today. Nor does it provide the appropriate forum to deal with political and social issues, such as the fostering of self-sufficiency and the resolution of funding issues.

.17 [p252] "This is not how it should be. Efforts need to be devoted to finding

mutually acceptable solutions and then working together to make those solutions work. The process of coming together to determine mutually agreed upon solutions can often be as important as the solution itself...one of the principal aims of the *NTA* was to facilitate mediation as an alternative to expensive litigation. It is these processes that assist the parties to identify common ground and to lay the foundation of a lasting relationship. The essence of this process is compromise and the identification of mutual interest. Native title needs to be looked at, more fundamentally, as an opportunity to address and reshape the relationship between indigenous and non-indigenous Australia.

.21 [p253] "The Committee recommends that the State continue to seek...consensual solutions with...Aboriginal groups"

.44 [p.259] "The report has recommended that a cautious approach be taken in "confirming" and extinguishment of native title on tenures, where it may be found at a later date that these tenures did not in fact extinguish native title. If this occurs, then the "confirmation" legislation will amount to a "buy-out" of native title rights and interests and expose the State and taxpayers to a compensation bill, which is yet to be quantified."

.48 [p.259-260] "Australia cannot afford to become mired in the politics of blame and guilt for what has occurred in the past. We must recognise that there have been past injustices from which we can learn, acknowledge and then move on to build a just and more united society which doesn't allow those problems to occur again. It must be a process of building goodwill, trust and mutual respect.

.49 [p.260] "Ultimately, this process will not occur through litigation or legislation or in any process which is adversarial and based upon division and acrimony. Goodwill cannot be legislated, mutual respect can not be judicially determined - goodwill and mutual respect cannot be imposed. It requires a commitment by all parties to producing outcomes with which all parties can live. Such a commitment is slowly beginning to emerge as people realise that no proposed solution will work unless all parties stand to gain from the solution, have a stake in it and have incentives to make it work".

Conclusions and recommendations

.45 [p260] "The Committee notes that much of the conflict and mistrust surrounding native title arises from a public misunderstanding and misconception of native title and the *Native Title Act 1993*. This in turn has prevented more negotiated settlements being reached"

.46 [p261] "The Committee recommends that the State seek to shape positive public attitudes to the resolution of native title agreements and enhance public understanding for native title"

.47 [p.261 "The State have regard to the six-stage Canadian comprehensive agreement model as a useful guide to

agreements, but recognise that the form, speed and contents of negotiations be by mutual agreement between relevant parties".

This backdrop of the Legislative Council's First Select Committee report needs to be again noted, paying particular attention to the fact that the earlier report and its findings, recommendations, discussion and conclusions were agreed upon unanimously by the multi-party membership of the committee, four of whom serve on the current select committee on Native Title. It appears to me to be a great shame that the unanimously agreed findings of the earlier Committee report have now been ignored in the face of pressure for the approval of the current State Government legislation, despite that legislation (as can be seen from the above) flies in the face of some of those recommendations.

Legislative approach

As has been demonstrated by the native title cases that have already been before the courts, common law claims are not the ideal way by which native title should be determined. They can take many years to resolve, are very complicated and are extremely expensive for all parties involved.

Adopting a legislative approach is also subject to problems, however, if the legislation is not fair and reasonable. The ideal way in which native title and competing claims can be resolved is by negotiation and agreement, either within or outside a legislative framework.

The Court Government's response to the *Mabo* decision was to enact the *Land (Titles and Traditional Usage) Act* in December 1993 which purported to replace native title existing in WA with "rights of traditional usage". Subsequently, on 24 December 1993, the Federal *Native Title Act* was passed. An essential feature of this legislation, and one that is currently lacking from the present State native title Bills, was a recognition that there must be a process in the legislation that is sufficiently attractive to native title claimants. If this does not exist, claimants may choose to use the common law. Such a choice will not lead easily to the benefit of any of the parties involved. The Mabo decision took 10 years to process, and it would not be in the interests of the State of Western Australia if claims within our State boundaries all went through a similar process.

In drafting the *NTA*, the Federal Government agreed a process with indigenous people by which they would trade off what had occurred in the past for a say as to what happened in the future. Indigenous people made concessions in terms of their substantive rights in return for procedural rights, which were contained in the original *NTA*. This Act gave certainty to all holders of post-European settlement titles by validating all titles, including those issued after 1975 that were clearly inconsistent with the *Racial Discrimination Act 1975*. The procedural rights included the statutory procedures for the extinguishment of native title, simplified mechanisms for providing native title as well as, very importantly, a right to negotiate process.

Figures released by the National Native Title Tribunal[1] show that more than 1,200 agreements have been struck between miners, pastoralists, different indigenous groups, industry bodies and governments. This indicates at least in part that where the parties are focussed on achieving a practical solution to a problem they can succeed without the interference of

[1] Media release dated 11 September 1998

government or the courts. Such agreements provide the greatest certainty of recognising and protecting the native title rights of indigenous people and protecting the validly granted rights and interests of other parties. Of particular significance when considering the proposed State legislation is that 91% of all agreements referred to above have been in WA.

The basic principles for any Western Australian legislation should include:

- it should be fair, reasonable and workable
- any body established to manage native title should be credible, independent and appropriately resourced
- procedures should include due process and take proper account of competing interests

A further consideration to which regard should be had is that the *Native Title (State Provisions) Bill 1998* must receive the approval of both the Commonwealth Minister in the form of a determination that the Bill complies with the *NTA*; such a determination is subject to disallowance by either House of the Federal Parliament.

It is unlikely that the Commonwealth Minister will approve this Bill if it does not meet the minimum standard requirements of the *NTA*. Senate disallowance of any State Bill is said to be likely if in all parties are not treated equitably, if the administrative process by which objections can be made is insufficient, and the independent body set up by the Bill is not credible and independent.

The Labor Opposition has expressed the view that the *SPB* is deficient in all these respects and requires amendments, so that the legislation will gain the approval of the Commonwealth Minister, and not be subject to disallowance by the Senate or rejection by the High Court. In this way the State Parliament can avoid slowing up the process, by putting in place a satisfactory State based regime that serves the interests of all stakeholders involved in the native title processes.

INTER-TIDAL ZONES AND RELATED ISSUES

I sought and obtained a legal opinion from Mr PW Johnston, Legal Counsel of Wickham Chambers and lecturer in Constitutional Law at the University of Western Australia. Mr Johnston had been engaged by the Labor Opposition during its consideration of these Bills to provide legal advice in regards to various amendments. Mr Johnston commented on the inter-tidal zone and related issues in the following terms. His advice should be available to the House in my view for considering the government's legislation and arguments in relation to opposition to Labor amendments.

Mr PW Johnston Counsel of Wickham Chambers and Constitutional Law lecturer at the University of Western Australia, has commented on the issue in the following terms:

> All that s26(3) is doing on its plain and natural reading is applying positively the benefits of the right to negotiate, among other things, in respect of acts to the extent they have effect on the landward side of the high water mark (HWM). It stops there. It does not in terms say they *do not apply* below the HWM. Consequently, there is no direct inconsistency in terms of a textual contradiction or exclusion of the State's capacity to apply similar provisions conferring similar (not the same) rights as those available under the NTA in the ITZ. That is, the State is not applying the actual provisions of Subdivision P there. It seeks to create a similar and parallel regime in

that zone. If however the word "only" in s26(3) is ambiguous, a beneficial interpretation should be given and the sub-section read down.

Further, in dealing with 'covering the field' inconsistency, two directly opposite intentions can be ascribed to Commonwealth laws. One is to exclude the operation of State laws entirely, even if they are compatible. The other is to leave room for State laws to *supplement* or *complement* a regime primarily laid down by the Commonwealth (*Ex parte McLean* (1930) 43 CLR 472). If the Commonwealth law contains no express statement of its intention, the matter is left to inference. A relevant case here is *Wenn v Attorney-General (Victoria)* (1948) 77 CLR 84. It addresses the issue of what inferences can be drawn, negatively, from an omission to apply a regime or benefit beyond a certain point? If the Commonwealth had meant to exclude the right to negotiate in the ITZ, rather than leave that area unaffected and therefore open to State complementation, it could have made it abundantly clear by stating "This part is not intended to apply below the HWM".

Although it is arguable that there may be some direct or indirect inconsistency between the State Bill if amended as proposed by the Opposition and the NTA, the contrary view is in my opinion the preferable view. The State Parliament should be reluctant to take a restrictive reading of its powers. Rather, it should rely on the presumption of Constitutional validity.

I had formed the above opinion before I became aware that an opinion had been expressed to the Select Committee that the proposed amendments are unconstitutional because the Commonwealth's NTA is intended to cover the field of matters with respect to matters affecting native title except to the extent provided, relevantly, by sections 43 and 43A of that Act. According to that view "alternative" State laws permitted consistently with those provisions are the full extent to which any State regime complementary to that of the Commonwealth may be made. The provisions of the various subdivisions in Division 3 of Part 2 of the NTA, so it is submitted, contain the full range of applications and exceptions in relation to future that may be validated. Only if an act falls within one of the relevant categories can it be the subject of subdivision P. Anything not covered by that regime is not capable of being validated by the combined effect of the Commonwealth NTA and "alternative" State laws. It is in that context that the argument for invalidity seeks to implicate the so-described "exclusive" effect of section 26(3) of the NTA.

So much may be conceded so far as the alternative State provisions authorised by sections 43 and 43A may operate within the spatial area marked out by s26(3). The view expressed is, with respect, consistent and logical. What it fails to address, however, is where the spatial or geographic limit of the applied alternative provisions is to be drawn. On my analysis set forth above, section 26(3) only purports to set the physical limit to the operation and application of Subdivision P above the HWM. The argument fails to take into account that the proposed amendments are not intended to apply the actual provisions of Subdivision P to the ITZ. Rather, they are intended to apply a parallel and equivalent set of State provisions (not "alternatives") in an area that the NTA has left open to State regulation of native title aspects below the HWM.

Hon Tom Stephens, MLC - Dissenting Report

Mr Peter van Hattem

Mr Van Hattem came before the Committee to help WAFIC present their submission in relation to the Bills before the Committee. Mr van Hattem argued the case that amendments to the legislation as before the House would render the legislation unconstitutional and liable to be disallowed by the Federal Minister. Mr van Hattem told the Committee in response to questions from the Chair that he was involved in the draughting of draught instructions that related to the Native Title legislation before the Committee.

Recommendations:

1. **That the *Titles Validation Amendment Bill* be amended to restrict native title extinguishment in a way that avoids unnecessary extinguishment. That the *Native Title State Provisions Bill* be amended to more accurately reflect the requirements that the State Native Title Commission be an equivalent body to the National Native Title Tribunal. That consideration be given to protecting the rights of native title claimants and holders in the inter-tidal zone in this Bill by accepting the proposed Labor amendments.**

2. **That the Government and the Parliament accept responsibility to balance this legislation so as not to disadvantage any one section of our community.**

3. **That the Government and the Parliament recognise that the preferable way for native title issues to be resolved is by way of a state government lead, pro-active approach aimed at the parties entering into broad-ranging agreements, as recommended by the previous Select Committee on Native Title.**

4. **That the House in its debate of this legislation note its exceptional complexity, with its relationship to Commonwealth legislation raising complex constitutional issues;**

5. **That the House note that the procedures which this state legislation will institute, in combination with the NTA 1993 (Cwth), as evidence by the Schedule of Procedures at Annexure 2, will provide all stakeholders in the process with considerable difficulties in working with the legislation.**

6. **That the Government and the Parliament recognise that any validation of titles which will be effected by the passage of the Titles Validation Amendment Bill must only be carried out with a great deal of care and precision, so as not to unnecessarily extinguish native title, and thereby, unnecessarily -**

    (a) **deny a particular racial group of their property rights; or**

    (b) **incur an unnecessarily large compensation liability for taxpayers.**

.....

Tom Stephens MLC
Dissenting Report

10 December 1998