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REPORT

OF THE

SELECT COMMITTEE ON NATIVE TITLE RIGHTS IN WESTERN AUSTRALIA

Presented by the Hon Tom Stephens MLC (Chairman)

Report 3

APRIL
1998

Members of the Committee

Hon Tom Stephens MLC (Chairman)
Hon Barry House MLC (Deputy Chairman)
Hon Murray Criddle MLC
Hon Murray Nixon MLC
Hon Giz Watson MLC

Staff of the Committee

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ISBN
0-7309-8882-1

TERMS OF REFERENCE

The Committee [is] to inquire into and report on —

(a) the Federal Government's proposed 10 Point Plan on native title rights and interests, and its impact and effect on land management in Western Australia;

(b) the efficacy of current processes by which conflicts or disputes over access or use of land are resolved or determined;

(c) alternative and improved methods by which these conflicts or disputes can be resolved, with particular reference to the relevance of the regional and local agreement model as a method for the resolution of conflict; and

(d) the role that the Western Australian Government should play in resolution of conflict between parties over disputes in relation to access or use of land.

BACKGROUND

The Establishment of the Select Committee on Native Title Rights in Western Australia

On 17 September 1997, the Select Committee on Native Title Rights was established. The motivation for its establishment came from the Federal Government's proposed amendments, known as the 10-Point Plan, to the Commonwealth *Native Title Act 1993*. Included in those amendments were proposals to transfer to State Governments greater operational responsibility for native title-related matters.

The amendments came at a time when there was widespread concern among most affected stakeholders - Aborigines, government, miners and pastoralists - that the *Native Title Act* was not producing outcomes and was not providing a workable system of processing native title claims and land tenement applications. In addition, the High Court's *Wik* decision had resulted in confusion among all parties as to the impact of native title on land management and whether the *Act* had intended that the protections afforded to native title, including the right to negotiate, extended to native title on a pastoral lease.

Most had assumed at the time of the passage of the *Act* that native title could exist only on Crown land, even though the *Wik* case had been launched prior to the *Act*'s passage, and that native title rights were likely to be rights approaching full ownership. However, the High Court in finding that a pastoral lease did not extinguish native title rights raised the prospect that native title could co-exist with private property rights and could be less than full ownership. The Act therefore needed to be amended to provide mechanisms to clarify and, if necessary, accommodate co-existing rights.

Under the proposed amendments to the Act, the Federal Government argued that this accommodation could be achieved by affording native title parties with a right of consultation equivalent to that of a pastoral lease holder, and taking away the right to negotiate. Other amendments include increasing the Threshold Test for acceptance of native title claims and accessing the right to negotiate, extinguishing native title on a number of scheduled land titles and taking away the right to negotiate in a range of circumstances. While many of these proposed amendments have been furiously opposed by Aboriginal groups, one area of agreement among all parties has been the need to have a strong alternative means of resolving native title disputes through regional and project-specific agreements. Such agreements would provide a long-term accommodation of native title rights within the existing land management system.

THE ROLE OF THE COMMITTEE

It is with the prospect of needing to introduce complementary State legislation to assume greater responsibility of native title management that the Committee was established. When that proposed legislation is introduced to the Western Australian Parliament all members will need to be sufficiently aware of the wide range of issues involved with native title to be able to scrutinise that legislation. There is a balance that will need to be struck among all interests; one that will provide miners and pastoralists with the certainty of title they need, but one which respects the traditional land interests of Aboriginal people. The Western Australian Government has attempted to find that accommodation once before in the form of the *Land (Titles and Traditional Usage) Act 1993*, which was struck down by the High Court because it was inconsistent with Commonwealth legislation. The subsequent turmoil and uncertainty created by the invalidation of hundreds of titles granted by the State demonstrates the fine-balancing act which the State Parliament will have to perform in making legislation to complement any

amendment to the *Act*. Aboriginal groups have already indicated in the media and in hearings of this Committee that they will resort to common law injunctions as a means of asserting their native title rights and holding up projects which do not respect those rights. The Committee considers that litigation is an undesirable outcome and consequently is examining alternative solutions. The Committee is of the view that regional and land-use agreements may present such an alternative. The question that the Committee must address is: Under what conditions might regional and land-use agreements provide a viable solution?

PROPOSED DESTINATION

Canada's history of recognition of indigenous land ownership and agreement-making between Governments and Canada's indigenous peoples began very soon after colonisation of North America.

However, it was not until 1973 that common law native title rights were established in Canada. Six of the seven judges of the Supreme Court of Canada in *Calder v Attorney-General of British Columbia* recognised the legal right of Indians to "occupy and possess certain lands, the ultimate title to which is in the Crown". This was a right which was not dependent on any treaty and arose from their historic use and occupation of the land. In so finding the Court followed the Supreme Court of the United States which had similarly decided some 150 years previously.

A great deal of uncertainty arose out of the decision. The construction of the massive James Bay hydro-electric power project was halted by injunction, along with a number of other major projects, pending the outcome of resolution of indigenous title claims. Faced with the prospect of projects being held up for years on end in costly court proceedings the Canadian Government chose to enter regional-based agreements to achieve a comprehensive, final and certain outcome on a regional basis in respect of indigenous title. Unlike Australia, it chose not to pursue a legislative solution.

Since 1975, Canada has developed the Comprehensive Claims Process as a means of facilitating these agreements. Parties to the negotiation are normally the claimant group, the Federal Government and the Provincial Government. While it is not essential that the Provincial Government be involved in the negotiations, their involvement is encouraged, as it is the Provincial Government which provides title to land and has land administration responsibility. However, Provincial Governments have not always chosen to be involved, as was the case with British Columbia prior to 1991. The Government of British Columbia maintained that aboriginal title had been extinguished throughout the Province. However, in 1991, faced with mounting court challenges and uncertainty in the resource sector, the BC Government also decided to pursue regional agreements with claimant groups.

It is this process that the Committee wishes to examine as a possible model to facilitate agreements in Western Australia.

PROPOSED ITINERARY

FRIDAY 22 MAY 1998

Depart Perth for Canada

MONDAY 25 MAY 1998 to FRIDAY 5 JUNE 1998

Proposed meetings with:

BRITISH COLUMBIA

Vancouver

(1) **Professor Doug Sanders, Faculty of Law, University of British Columbia, Vancouver.**

Professor Sanders has acted for numerous aboriginal groups in agreement negotiations and litigation and is a highly respected academic authority on this matter.

(2) **Emeritus Professor Andrew Thompson, Faculty of Law, University of British Columbia, Vancouver.**

Professor Thompson is the former chair of the Alberta Oil & Gas Board and the Natural Resources and Energy Resources Board, notable third party interests in the agreement process. Now involved with First Nations Law Group.

(3) **Mr Paul Tenant, Department of Political Science, University of British Columbia, Vancouver BC.**

(4) **Ms Doreen Mullins, Director, Federal Treaty Negotiation Office.**

(5) **Hon Justice Macfarlane, B.C Court of Appeal, Vancouver.**

A resources lawyer, Justice Macfarlane has worked for Mobil Oil and for the Inuit First Nation; was also Dean of the Calgary Law School.

(6) **Tom Molloy, Federal Treaty Negotiation Office, Vancouver.**

Mr Molloy acts for the Canadian Federal Government in negotiations with aboriginal groups.

(7) **Mr Alex Robertson QC, Chief Commissioner, BC Treaty Commission.**

The Commission supervises the agreement process in BC and assists parties in that process.

(8) **Hon Justice Constance Hunt, Alberta Court of Appeal, Calgary, Alberta.**

(9) **Hon Justice Lambert, B.C Court of Appeal, Vancouver.**

Both judges are experienced resource lawyers and have had extensive experience in the negotiation of agreements and, during their time on the judiciary, hearing aboriginal title cases.

(10) **Mr Marvin Storrow and Mr Jim Aldridge.**

Lawyers for aboriginal Clients, Vancouver.

(11) **Mr Keith Lowes, Chris Harvey.**

Lawyers for business interests, Vancouver, BC.

(12) **Mr Ed Johns & Mr Robert Louie, First Nations Summit (Aboriginal Peoples), Vancouver, BC.**

First Nations are the umbrella representative organisations for aboriginal people.

(13) **Ms Susan Anderson Behn**

Ms Behn has a full time involvement in third party interests (BC Federation of Labour), Vancouver, BC.

(14) **Cominco Metals Limited**

Victoria

(15) **Mr Ian Waddell, MLA, Chair of Committee on Nisga'a Agreement, Legislature of British Columbia, Victoria.**

The Nisga'a Agreement is the first major comprehensive regional agreement made by the BC government.

(16) **Ministry of Aboriginal Affairs, Victoria, BC**

(17) **Ms Linda Vandenberg, Advisor to aboriginal groups, Victoria BC.**

(18) **Select Standing Committee on Aboriginal Affairs, Victoria, BC.**

(19) **Mr Joe Arvay - Government lawyer, Victoria, BC.**

(20) **Hamar Foster, Faculty of Law, University of Victoria.**

(21) **Mr Jack Ebbels, Deputy Minister, Ministry of Aboriginal Affairs.**

(22) **Russell Irvine, Adjunct Professor, University of Victoria.**

Involved in local government and land management issues.

NORTHWEST TERRITORIES

YellowKnife

(23) **Mr Bill & Roy Erasmus, Dene Nation, Yellowknife.**

Both people have a long-time involvement in the regional agreement process. Mr Roy Erasmus is the leader of the Dene First Nation

(24) **Government of NWT Officials - Constitutional Development and Aboriginal Rights Branch; Claims Negotiation.**

Has been involved agreement negotiations in the region for Territory Administration.

(25) **Federal Intergovernmental & Aboriginal Affairs**

Has been involved in agreement negotiations in the region for Canadian Federal Government

(26) **Northwest Territories Chamber of Mines**

ALBERTA (if possible)

Calgary

(27) **Dr Roger Gibbins, University of Calgary, Alberta.**

FRIDAY 5 JUNE 1998

Depart Vancouver

SATURDAY 6 JUNE 1998

Return to Perth

MEMBERSHIP

The Committee will be assisted by one Advisory/Research Officer and one Committee Clerk.

The trip is endorsed by all members of the Committee.

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TRIP COSTINGS

Perth-Vancouver return ($4444.00 x 7))	$31,108.00
Vancouver - Yellowknife return ($2110 x 7)	$14,770.00
Vancouver - Victoria return ($324 x 7)	$ 2,268.00
Meals, Accommodation, etc ($360 x 7 x 14 days)	$35,280.00
Total Cost	$83, 426.00 (approx)

Hon Tom Stephens MLC
Chairman

April 1998