

**SELECT COMMITTEE ON THE
RESERVES (RESERVE 43131) BILL 2003**

**TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
ON WEDNESDAY, 23 JUNE 2004**

Members

**Hon Peter Foss (Chairman)
Hon Robin Chapple
Hon Jon Ford
Hon Louise Pratt
Hon Derrick Tomlinson**

Committee met at 7.30 pm

McINTYRE, MR GREGORY MALCOLM GRANT
Legal Practitioner, John Toohey Chambers,
Level 3, Council House, 27-29 St Georges Terrace,
Perth, examined:

The CHAIRMAN: Welcome. You have signed a document entitled "Information for Witnesses". Have you read and understood that document?

Mr McIntyre: I have had a close look at it. It looked the same as the one I read at a previous occasion.

The CHAIRMAN: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document to which you refer during the course of this hearing. For the record, please speak into the microphones - they do not amplify. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that evidence be taken in closed session. If the committee grants your request, any public and media in attendance - of which there are a large number! - will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. Premature publication or disclosure of the transcript of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

We would like you to be here to get a bit of a handle on the nature of the allegations against this legislation. We have some affidavits filed in the proceedings that are interesting because they appear a little different from the evidence we have already received.

Mr McIntyre: Those filed by -

The CHAIRMAN: By the Government. Unfortunately, from your point of view, you cannot use the proceedings of the Parliament to impeach what has been said in the affidavit because our sittings are absolutely privileged and cannot be impeached in any court of law. However, there are some interesting differences in evidence. We can look at them. If it happens to be of interest to you to make the comparison between what has been said to us and what is said in the affidavits, and if you wish to draw to our attention any inconsistencies, we could comment on them, even if you cannot.

Mr McIntyre: I have not studied the transcripts. I have had a look at them from time to time. I have not done any direct comparisons between what has been said there and in the affidavits. The approach in the legal proceedings is to suggest that most of the material -

The CHAIRMAN: Is irrelevant.

Mr McIntyre: Among other things, it is irrelevant. It is mostly inadmissible for a variety of different reasons. Parliamentary privilege prevents us from relying on it for the truth of it. Annexed to their affidavits are various things, such as the Gordon inquiry report. We are having a little hearing about that in a fortnight or so.

The CHAIRMAN: Mr Bropho sent a letter from Dwyer Durack that seemed to indicate that they were arguing that certain parts of the claim were invalid and certain preliminary steps had not been taken. That is not really relevant to us.

Mr McIntyre: Yes. We are counterclaiming. We sought to strike out portions of their affidavit material and their defence that seeks to rely on things like steps taken to relocate people. We say that the thing that has gone wrong here is that you have taken away their property right, which is principally manifest in their right to management. They made one pleading point: they claim that we have not said that management is part of ownership. I have responded to that by saying that if you look at the statement of claims in its entirety, management is part of that.

The CHAIRMAN: The Act refers to that - not in that section, but in the next section.

Mr McIntyre: Is that the Land Administration Act?

The CHAIRMAN: The Act you are relying on.

Mr McIntyre: That is right. Section 3 talks about it. Clearly management is part of ownership. It is a pleading thing. We will respond, and I will amend if it is not clear enough on that point. They are also arguing that we seek to try to strike out claims under the Racial Discrimination Act, particularly sections 9 and 12. Section 12 deals with the right to accommodation. They say that under the Act we have to have made a complaint to the Human Rights and Equal Opportunity Commission, and that that is the only way to enforce sections 9 and 12 for acts which breach the legislation. Our response is that we are not actually seeking to enforce the breach of the human rights in that sense. We are saying there is an inconsistency -

The CHAIRMAN: There is a cause of action that arises from the breach. You are not trying to get an in rem type -

Mr McIntyre: We are attacking the legislation.

The CHAIRMAN: Yes.

Mr McIntyre: We attack it on the basis of section 10 and subsections (1), (2), and (3). We also say that there is quite extensive dicta in judgments of the High Court in Gerhardy and Brown and in Mabo number one that says that legislation can be inconsistent with section 9 of the Act if the legislation empowers people to engage in activity that for the duration is discriminatory. Therefore, we say that it is a section 109 direct inconsistency.

The CHAIRMAN: You are not seeking to enforce a right to confer by the Act. You are seeking to undermine an Act on the basis of section 109 inconsistency.

Mr McIntyre: That is right.

The CHAIRMAN: You do not have to enforce it; you just using it as an argument to show it is not a law at all.

Mr McIntyre: That is right. They recited to us the recent High Court decision of Nguyen.

The CHAIRMAN: That is the Vietnamese name.

Mr McIntyre: That is right. That party went ultimately to the High Court to say that this was a breach of our international human rights. The international human right is embodied in section 9 of the Racial Discrimination Act. We want a declaration that their activity is invalid. The High Court said that people cannot do that as they should go through the Human Rights and Equal Opportunity Commission.

The CHAIRMAN: That is a totally different course of action.

Mr McIntyre: Yes. I am confident, if the judge understands it.

The CHAIRMAN: You are saying that the validity or otherwise of an Act cannot depend on whether you have tried to force your right. It is either valid or not valid. All the impact of trying to force it might be to give a factual support for your legal argument - that is all.

Mr McIntyre: Yes.

The CHAIRMAN: You could work that out without having to try it out.

Mr McIntyre: Provided the judge understands all that argument, I think the cause of action will survive. If not, it is one of several.

The CHAIRMAN: I think your argument sounds pretty much -

Mr McIntyre: In any event, my instructor very cleverly lodged an application with the Human Rights and Equal Opportunity Commission on the last available day. There is a six-month time limit. She e-mailed me on Monday to say that on Sunday she electronically sent it, and we have that back.

[7.40 pm]

The CHAIRMAN: You know that if at any stage you do not want what you say to be made public - in other words if you feel you would rather discuss this in private - we can move into private session; otherwise what you say will go on the Internet.

Mr McIntyre: Yes. I think the crown State Solicitor knows all of these things.

The CHAIRMAN: I understand what you are aiming at. However, bear in mind that if at any stage you would rather tell us something that you think would make it easier for us to understand, but you do not want to necessarily tell the other side, ask for it to be in camera. Do you have a copy of the Act with you?

Mr McIntyre: No, I have not actually.

The CHAIRMAN: I suppose you do not have the commonwealth Act with you either.

Mr McIntyre: Is that the Racial Discrimination Act?

The CHAIRMAN: Yes.

Mr McIntyre: No, I do not.

The CHAIRMAN: We do not have the commonwealth Act with us either. Are you fairly familiar with it without having the exact words in front of you?

Mr McIntyre: Yes.

The CHAIRMAN: Perhaps we could go through the reasons you say that this Act, as enacted, is invalid. It is section 109, I take it.

Mr McIntyre: Yes, essentially. What we say is that -

The CHAIRMAN: You are not arguing that this is an Act in respect of Aboriginals and, therefore, totally outside -

Mr McIntyre: No. We are saying that it directly affects the property rights of a group of Aboriginal people and it is directed at that. That is its operative effect, or its substantive effect, because it is entirely specific to this particular -

The CHAIRMAN: There is no argument that this is an Act relating to Aboriginals in an area that has been occupied by the Commonwealth.

Mr McIntyre: Do you mean occupied in a statutory sense?

The CHAIRMAN: Yes.

Mr McIntyre: No. What we -

The CHAIRMAN: Are you just arguing a section 109 inconsistency on the grounds of racial discrimination?

Mr McIntyre: Yes. What we are saying is that the obvious import of this piece of legislation was to operate on the Aboriginal inhabitants of the particular reserve that it affects. It is an entirely specific piece of legislation in much the same way as the Queensland Coast Islands Declaratory Act

sought to take away the property rights of all people north of a certain parallel and had the substantive effect of taking away the rights of Murray Islanders. They were specific rights. What we say here is -

The CHAIRMAN: Is it not fairly close in parallel to that?

Mr McIntyre: Yes. It is a specific piece of legislation with a specific -

The CHAIRMAN: Even more specific than that one.

Mr McIntyre: That is right. It starts with the first operative provision, section 4, which says that the management order is revoked. So there was in existence a management order -

The CHAIRMAN: Now there is not.

Mr McIntyre: - which provided certain property rights. Part of the argument -

The CHAIRMAN: That actually fits in with the case of the Western Australian indigenous land use.

Mr McIntyre: What do you mean by that?

The CHAIRMAN: That particular one revoked the rights and substituted a new right, but it did not provide compensation immediately.

Mr McIntyre: Yes, that was Western Australia and the Commonwealth.

The CHAIRMAN: Yes.

Mr McIntyre: Yes, that is right.

The CHAIRMAN: That fits in almost exactly with that particular one.

Mr McIntyre: Yes. What you are saying is that under section 10(3), management cannot be taken without consent from a racial group that has rights of ownership. That is what section 10(3) says. This legislation does almost precisely that.

The CHAIRMAN: It has been said it was done because the Government did not want those people taking any legal action and so forth.

Mr McIntyre: That is right, and it could have been done under the Land Administration Act.

The CHAIRMAN: For breach?

Mr McIntyre: No, it could have been done if it had been in the public interest.

The CHAIRMAN: Yes, public interest, I am sorry.

Mr McIntyre: That would have been the appropriate way to do it. If what has been said in Parliament and elsewhere has any substance, the Government would have said that it was in the public interest and that it wanted to take the property from these people because of all the negative things that were happening in the community. For some reason it must have been advised that was too risky or it might not make out a case or -

The CHAIRMAN: I will put this to you, and you might make a note of it as well, that it was concerned that interlocutory injunctions might have been sought and the case delayed for a considerable period before it came to judgment. It occurred to me, and you might like to comment on it, that in such circumstances the court might not have given interlocutory relief. We cannot predict it.

Mr McIntyre: No.

The CHAIRMAN: It was by no means guaranteed, in putting an argument that the safety of women and children was at risk, that a court would give some form of interim relief. It may have allowed it to be done by some form of subsequent damages.

Mr McIntyre: Yes. I would have thought there would have been a better chance of doing it in that way rather than this legislation and actually surviving an attack. There was, of course, an advantage in doing it in the way it was done, and we have to catch up and may never catch up. However, I would have thought, in terms of legal merit, that both scenarios would probably have had an equal chance of being defeated one way or the other.

The CHAIRMAN: Could you put any estimate on the chance of getting some form of interlocutory injunction?

Mr McIntyre: If it had been done on the basis of public interest, I think we would have had great difficulty. In such an application, the responsible minister would declare that it was in the public interest, and that is generally regarded as a non-justiciable decision. I have run a number of these sorts of cases under section 18 of the Aboriginal Heritage Act. After the recommendation of the Aboriginal Cultural Material Committee, the responsible minister makes a decision that it is in the public interest to consent to the destruction of a site. Effectively, the minister's decision as to what is the public interest is regarded as a matter purely within the role of the Executive and not a matter with which the courts will interfere. You would be able to challenge it on the basis of whether it is unreasonable -

The CHAIRMAN: No proper consideration.

Mr McIntyre: No reasonable person could reach that decision or it was an improper purpose and those sorts of things. You could have a go at that and probably -

The CHAIRMAN: Unless you could show that the person who makes that decision is the minister.

Mr McIntyre: That is right. I imagine if the Government had gone down that route, I would have probably got some instructions to challenge it on that basis, but there would have been some difficulty in establishing that no reasonable person could have reached that decision or that there was an improper purpose. The Government would, no doubt, have said that the purpose was to protect women and children.

The CHAIRMAN: You probably would not have got an interlocutory injunction on the basis of improper purpose. You would have to establish that improper purpose or at least have to raise something to show it.

Mr McIntyre: We would have to show that there was a serious question to be tried and that the minister had taken on an improper purpose. The minister, of course, would say that he had a perfectly proper purpose. I think we would have had quite a difficulty getting to the serious question to be tried, let alone the balance of convenience issue.

The CHAIRMAN: That was certainly the view I put. I did not think it was necessary. There was a fairly remote possibility that from a political point of view - God forbid, you do not have to nod at this - judges occasionally take political matters into consideration and it would probably have been at some risk.

[7.50 pm]

Mr McIntyre: Well, they would describe it as the public interest -

The CHAIRMAN: Yes, that is right.

Mr McIntyre: Certainly in an interlocutory injunction application there are quite significant discretionary matters to be taken into account. There is what they call the balance of convenience. Frequently, you get them balancing the economic interests of a property developer against the sacred site interests of indigenous people. There is quite a lot of room for judges to apply their own views of the world.

The CHAIRMAN: That is one of the reasons I moved an amendment. All it did was stop the interlocutory relief. It addressed what I saw as being the Government's concern, but it was not

giving away all that much because I did not think that interlocutory relief would be granted. I think it was still capable of being upset under this Act, but it was less offensive in terms of what it did to the individual.

Mr McIntyre: In terms of civil liberties, it is quite a drastic piece of legislation when you take away the right of individuals to go to the courts to challenge -

The CHAIRMAN: I suppose I should carry on. We have had 4(1), you say. What is the next one?

Mr McIntyre: Five completed the picture, if you like. It took away the rights from the Swan Valley Nyungah Community Aboriginal Corporation, and then placed it in the control of the Aboriginal Affairs Planning Authority. That is the transfer of management.

The CHAIRMAN: The deeming provisions do not save that, do they? You cannot deem yourself out of a breach.

Mr McIntyre: No, where do you see that?

The CHAIRMAN: It has the effect as if it were done under section 46(1). You might have been able to do it under section 46(1) but the fact that you say it has effect as if it were done under section 46(1) does not mean it is.

Mr McIntyre: No. I think that is a machinery provision, which really just brings into play any useful parts of that legislation for the administration of the reserve as a vested reserve. That is what the balance of section 5 does. Section 6 is just procedural of course. Section 7 is one of the significant features. Having placed the management of the property in the hands of the Aboriginal Affairs Planning Authority Act, it then effectively creates some machinery provisions for the planning authority through the agency of administrator to, in effect, exercise ownership rights; that is, keeping people out of the property and so forth.

The CHAIRMAN: How do you attempt to define what the rights of the people who were living there were, other than the right to acquire possession if you are in possession of a -

Mr McIntyre: We have particularised what the property rights are.

The CHAIRMAN: There is the Swan Valley Nyungah Community, and then there are the residents. Section 59 of the Criminal Code says a person who is peaceably in possession of property cannot be forcibly removed; it is an offence even if somebody else has prior right to possession, for instance. If you have given possession of something to some people and you go in and say that you are tossing them out, that can be in itself an offence of unlawful authority.

Mr McIntyre: I think we have pleaded just general common law trespass in addition to the various statutory Racial Discrimination Act provisions. We have started off by saying the ownership right includes the right to occupy, the right to manage, and manage in various ways -

The CHAIRMAN: That is for the Swan Valley Nyungah Community Aboriginal Corporation is it not - not the individual?

Mr McIntyre: The ownership that we have to rely on is the ownership of the Aboriginal inhabitants because the Swan Valley Nyungah Community Aboriginal Corporation does not have a race; it is a corporation. In order to -

The CHAIRMAN: Is that a problem?

Mr McIntyre: It is an argument, but our argument is that the Swan Valley Nyungah Community Aboriginal Corporation holds the property in trust for the benefit of the Aboriginal inhabitants. That, I would have thought -

The CHAIRMAN: From time to time.

Mr McIntyre: Well, whoever the Aboriginal inhabitants may happen to be on a day-to-day basis, I suppose. It is the Aboriginal inhabitants who must have the ownership right, for the purpose of section 10(3), for them to claim racial discrimination. It is only an individual person of a particular race who can be racially discriminated against. It is the management by the corporation of its ownership right that has been effectively taken away by the legislation. That is the kernel of it. Of course, in that instance we rely on the High Court in *Western Australia and Ward*, which said that the vesting of a reserve in trustees gives a full legal right - a full beneficial right - to the beneficiaries of the trust. It will be nice to turn that around on them. That is where the property is at. As I say, we have particularised it by talking about the way in which they have managed the houses and the bush and we say that it is uniquely the Swan Valley Nyungah Community Aboriginal Corporation that is able to manage this reserve for the full benefit of Aboriginal people because it understands the spiritual significance of the place. It knows about protecting the ancestors who have been buried there and whose spirits are there and so on. We have particularised various of those things in the definition of what we say is the -

The CHAIRMAN: Another interesting thing that has happened is that the Government permitted significant capital investment in the land, which it now has. It has all the houses, the wind farm and the various other things that have become fixed to the land. One of the interesting questions was that ATSIIC was rather keen to preserve its investment - if I can put it that way. However, once it becomes a fixture, it is part of the land and goes to the benefit of the Crown. The Crown knew that that was happening. ATSIIC, of course, was a corporation or commission with a view to possibly benefiting Aboriginals - not benefiting Aboriginal corporations so much but benefiting Aboriginals - by channelling money through Aboriginal corporations. It thought it was benefiting the Aboriginals at that site by investing in that site. That site has now been taken away from those people, as has the benefit of not just the land but the later assets attached to that land, with the knowledge and consent of the State of Western Australia. I do not know if you can get any extra property right as a result of that - I do not think you can get a resulting trust - but there is a similar sort of concept. If you allow somebody to make capital improvements to a site on normal land, not crown land, a resulting trust would probably come over that.

Mr McIntyre: Yes. ATSIIC of course is with the State Government on this, at least its administration is as you probably no doubt know -

Hon ROBIN CHAPPLE: For at least the next two weeks anyway.

Mr McIntyre: When it ceases to exist. I was given to understand that it was looking for every possible avenue to recover -

The CHAIRMAN: Its investment.

Mr McIntyre: Yes, from the Swan Valley Nyungah Community, not necessarily from the State. Of course, I expect its position now would be to say that it is still a reserve for the use and benefit of the Aboriginal inhabitants, so it is just a question of who it is, who decides who the Aboriginal inhabitants will be and how they will benefit. Now it is the State Government, presuming that it is acting validly under this piece of state legislation, rather than the Swan Valley Nyungah Community Aboriginal Corporation. I think ATSIIC has at least a neutral view on what has happened to its investment, and certainly are not threatening actions for unjust enrichment. It was wanting to threaten the Swan Valley Nyungah Community Aboriginal Corporation and anybody else -

The CHAIRMAN: Are you saying that the right that the current people had to use that land for their benefit has been removed? Obviously, one of the tests of that is what would happen if we had not removed it; they would still be there and exercising that right.

Mr McIntyre: They are currently asserting their property right by running a case in the Federal Court of Australia.

The CHAIRMAN: Who are the plaintiffs in that case?

Mr McIntyre: It is a representative action, so Bella Bropho is the one who has been named on behalf of the Aboriginal inhabitants of the reserve and the corporation.

The CHAIRMAN: One of the things that interests me is and is arguable - obviously you have argued it - is that were it not for section 7, even though the management might have invested in somebody else, there may be some queries as to the capacity to remove people from the site.

[8.00 pm]

Mr McIntyre: Yes, although if the Aboriginal Affairs Planning Authority had been validly given that management role, it would probably be a natural consequence of that role that it would be able to -

The CHAIRMAN: Not if there is a trust to manage it for the benefit of those people. It is hard to see how it could suddenly start saying that people from Fitzroy Crossing are to be allowed in there, instead of Nyoongahs.

Mr McIntyre: Yes, that is probably right. As you say, to an extent it does not follow that section 7(3) gives any greater power to an administrator to remove people, although it specifies what the powers are. You could argue that he ought not be exercising those powers in a way that removes the Aboriginal inhabitants for whose benefit he is holding the reserve.

The CHAIRMAN: I think they put section 7 in because there were serious doubts about whether they could remove people.

Mr McIntyre: Yes; I imagine they did.

The CHAIRMAN: Because, you see, once you have somebody on land, and the land is vested for the benefit of certain people, the management is almost, to some extent, irrelevant. They make the decision about who comes on, but they must act properly in deciding who gets chucked off. It might not be an anti-discrimination right, but it might just be a right that cannot be exercised against those people in a completely whimsical or arbitrary manners.

Mr McIntyre: That is right. It may be a straight property right, as you say, and it could be a trespass to remove them.

The CHAIRMAN: Which then makes section 7 an extra argument. It is a further method of extinguishing such property rights that the people themselves had, as opposed to the rights of the Swan Valley Nyungah Community.

Mr McIntyre: Yes. Of course, we then go on further into the legislation. Section 8 is a denial of rights that are specific to these people.

The CHAIRMAN: It is only section 7(3)(a) and (b).

Mr McIntyre: Section 7(3)(c) is incidental to paragraphs (a) and (b), which gives him the power to -

The CHAIRMAN: No, but it is section 7, it is not the earlier sections.

Hon ROBIN CHAPPLE: Are you going on to section 8?

The CHAIRMAN: Yes, section 8, in relation to section 7.

Mr McIntyre: I see - yes.

The CHAIRMAN: It is discriminating against those rights, if they exist, to stay on the land until such time as somebody has some basis for removing them from the land. There must be some right under section 7 that is being impinged for section 8 to have any relevance, must there not?

Mr McIntyre: Yes - that is right.

The CHAIRMAN: Otherwise, it is up in the air and not that clear.

Mr McIntyre: They all collapse down onto one another, effectively. We say that we had the property rights that were taken away by section 4 -

The CHAIRMAN: Section 7, I think, takes away more rights. It is the effective extinguishment of the rights that went as a result of having the management. The management now enabled them to have a mechanism to confer individual rights of occupation. Changing the manager may just have been like changing a trustee. Section 7 says that, now that you are the trustee, you can get rid of everybody.

Mr McIntyre: Yes - that is right.

The CHAIRMAN: That is when it starts to come down to individuals.

Mr McIntyre: Yes. And then, of course you have -

The CHAIRMAN: No reasons?

Mr McIntyre: That is right. Essentially, we are still relying on the Racial Discrimination Act, in saying that, in addition to property rights, the international covenant gives you rights to be dealt with fairly by a tribunal, so that the taking away of the prerogative writ rights discriminates against us because we are not entitled to access to tribunals and natural justice.

The CHAIRMAN: It would only knock down that section, would it not, to the extent that it does not hit section 4?

Mr McIntyre: Is that right? Natural justice -

The CHAIRMAN: Section 11 goes back to section 7 and section 10 goes back to section 7 and section 9 goes back to section 7 and section 8 goes back to section 7.

Mr McIntyre: That is right.

The CHAIRMAN: Those would only knock down section 7.

Mr McIntyre: That is right. We need to knock down section 4 as well. All of that is pleaded out and we are having a go at all of that.

The CHAIRMAN: It strikes me that in some ways that, if you can establish a right of residence or expectation of residence, because of the fact that the trustee is under your control - if there is any argument there is a trust that arises out of section 4 - merely changing the trustee may not have changed the trust. There may have been a right of action that the individuals had - even if you put the Aboriginal Affairs Planning Authority - to say "they may change the trustee, but you must carry on as before unless you have some legitimate reason for terminating our residence here."

Mr McIntyre: Yes.

The CHAIRMAN: Section 7 is what enables them to do that.

Mr McIntyre: Yes, that is right.

The CHAIRMAN: If section 7 enables them to vary the terms of the trust, then sections 8 to 12 all show how discriminatory that right to terminate is.

Mr McIntyre: Without those provisions, they would be going back to the Aboriginal Affairs Planning Authority Act, which says that you start with the proposition that it is an Aboriginal reserve, and any Aboriginal in the State is entitled to come and inhabit it.

The CHAIRMAN: Is it that broad? I did not realise that. So, any Aboriginal is allowed to live there?

Mr McIntyre: That is what the Act says, although I think part of our case is that it is vested for the benefit of the Aboriginal inhabitants. The Aboriginal Affairs Planning Authority Act talks about reserves being created for the benefit of Aboriginal people of the State, but the actual declaration of this reserve is not for all Aboriginals in the State. It is for the Aboriginal inhabitants.

The CHAIRMAN: So the people who inhabit it are the ones affected. Unless that is changed, then strictly speaking it could still only be used by those people.

Mr McIntyre: Yes, you would think so.

The CHAIRMAN: That is interesting, and it probably means those in contemplation at the time the reserve was created. In the other words, you cannot just change the inhabitants from Nyoongahs to a different group.

Mr McIntyre: That is an interesting question. I think you made the point earlier on about the inhabitants from time to time. Mostly, I would think that that phrase allows for some fluctuation of the membership, obviously, over time or over generations.

The CHAIRMAN: But of the kind and nature at the time the reserve was created.

Mr McIntyre: I think you would certainly have an argument to that effect.

The CHAIRMAN: Is it still a C-class reserve?

Mr McIntyre: It has not been changed. If it was a C-class reserve, it still is.

The CHAIRMAN: Does that have any impact?

Mr McIntyre: I have not really addressed that.

The CHAIRMAN: That makes it more tenuous.

Mr McIntyre: The difference would be that it did not have to go before both Houses of Parliament.

The CHAIRMAN: If it was an A-class reserve, it would, yes.

Mr McIntyre: A C-class reserve does not have to go before the Parliament to be de-gazetted.

The CHAIRMAN: It is entirely an executive decision.

Mr McIntyre: It might be another strategy you are looking at.

The CHAIRMAN: It might be a very dangerous strategy, especially if they said it would remain for the benefit of Aboriginal people. The expiry does not help very much, does it? It was added by the lower House. They put in an expiry date for the second anniversary of the date on which the Act comes into operation. What do you do about an expired Act, by the way? That might actually make life difficult for you, if you have not got the case over. I suppose you would not just strike the legislation, you would strike down the effect of the legislation. That legislation would vanish of its own accord, would it not?

Mr McIntyre: It is interesting. I had not actually thought of that before. I suppose it cannot affect the validity of any acts.

The CHAIRMAN: I do not suppose it makes any difference to the validity of any acts, because all acts taken in the meantime are based on an Act that you say is invalid.

Mr McIntyre: I was just wondering whether the revocation of the management order by the force of the Act might expire.

[8.10 pm]

The CHAIRMAN: It does not normally happen when you revoke an Act, but that is interesting.

Mr McIntyre: It is not revoking, it is expiring. The management order has effect by force of the Act.

The CHAIRMAN: But it has been revoked.

Mr McIntyre: You would think that it is; yes.

The CHAIRMAN: The revocation will not expire. The new management order might expire, but the old one is gone; it will not be revived.

Mr McIntyre: Yes.

The CHAIRMAN: Section 4(1) will have effect. I think you will find that section 7 will go.

Mr McIntyre: Yes. That may be interesting. We are probably not all that far from that event occurring.

The CHAIRMAN: No. Okay, that is very interesting. What relief are you seeking?

Mr McIntyre: We are seeking declaratory relief, of course; the declaration that the legislation is invalid. From memory, also, delivery up of the reserve; well, orders that would result in them being removed from management of the reserve and it being re-vested in the Swan Valley Nyungah Community. We are seeking damages and all sorts of things. I do not know whether there is still a lot of enthusiasm for it, but it has cost the Swan Valley Nyungah Community quite a lot of money, of course, to pick up sticks and shift.

The CHAIRMAN: Yes. They do not have what they had, either.

Mr McIntyre: No. They bought all sorts of caravans and various things. I am not quite sure where everybody is now.

The CHAIRMAN: Everywhere.

Mr McIntyre: I think some of them are at Saunders Street and all sorts of places.

The CHAIRMAN: And moving.

Mr McIntyre: Yes. We still would have to put together the damages case for that. I do not know whether we will ever get to that.

The CHAIRMAN: It almost seems like the sort of thing that should be assessed after you have decided. The first part should be the preliminary issue and the latter part should be -

Mr McIntyre: That is right. We will deal with the overall, more general parts of that cause of action. It has already been suggested that it will not finish with a single judge of the Federal Court.

The CHAIRMAN: Yes. It is almost the sort of case that could be dealt with on a demurrer.

Mr McIntyre: In a sense that is what we are doing in a fortnight's time. We are really testing some of our more difficult issues, particularly some of the evidence that they are trying to rely on. We are trying to knock all of that out so that we do not have to respond to it.

The CHAIRMAN: As you put it to us, it really does not matter what are the merits behind the Act if it is discriminatory.

Mr McIntyre: That is right.

The CHAIRMAN: It is totally irrelevant.

Mr McIntyre: The way I put it is that, let me assume that there are problems with domestic violence and child molestation within that community. You do not solve that by hitting the whole community. It is the same as saying there is a high incidence of domestic violence in the suburb of Dalkeith; therefore, we will close down the suburb of Dalkeith and move out all the residents.

The CHAIRMAN: You have domestic violence in one house. Therefore, we pass an Act to say that that house is taken off the people who live in that house. They are all thrown out on the street and the problem is solved.

Mr McIntyre: It is a classic piece of discrimination; choosing a class that is a much broader class that is affected by the mischief we are seeking to eliminate.

The CHAIRMAN: Even then I still cannot see that you can pass an Act that picks out people on the basis of their race. The only factual issue was that it was on the basis of their race, but even that is not really it, because it is a group of a particular race.

Mr McIntyre: It is the Aboriginal inhabitants.

The CHAIRMAN: Nobody is suggesting that domestic violence or paedophilia or anything of that nature is confined to the Swan Valley Nyungah camp. I do not think there is any suggestion in any of the affidavits that it is the only place in Western Australia where this might be an issue. I mean, this goes even further. You could pass an Act that was general in terms and which in effect ended up discriminating against a particular section of the community, simply because it was always going to be picked up on the basis of the way it had been written. This goes further than that. It picks one group of people and says, "We are going to do it to you for a problem that is, for all intents and purposes, right throughout the community." There is no suggestion of following the same method with respect to any other group in Western Australia.

Mr McIntyre: If they had created a general piece of machinery legislation that said that in pockets of the State where we find that there is a high incidence of child molestation we will put in a management regime, and then implemented it at the Swan Valley Nyungah Community and at Cullacabardee and Fitzroy Crossing and various other places, they might have some slight justification.

The CHAIRMAN: Even that would be a problem because it would be used only against Aboriginals.

Mr McIntyre: Yes.

The CHAIRMAN: That would be a factual point of view. That would be a factual argument.

Hon JON FORD: You could say "any community".

The CHAIRMAN: Yes. That would be racial discrimination in the way it was being applied. This goes further. This is, by definition, an Act that discriminates against Aboriginal people, because it is framed only in terms of use against one particular Aboriginal community. You suggest that the Act might have stood up, but the enforcement might not have stood up if it were only used against Aboriginal people.

Mr McIntyre: That is right. There might be section 9 acts of racial discrimination.

The CHAIRMAN: That is right. This one does not even pretend to be that, and ends up with racially discriminatory enforcement. It is in itself, by its terms, discriminatory, because it applies to only one group of Aboriginal people.

Mr McIntyre: I am in no doubt that it will be put to us that there is nothing in the form of the Act that applies only to Aboriginal people, because it applies only to a reserve.

The CHAIRMAN: Where there are Aboriginal people and by definition only Aboriginal people are allowed to benefit from it.

Mr McIntyre: I wonder whether the word "Aboriginal" is used. I suppose it is. The Aboriginal Affairs Planning Authority is.

The CHAIRMAN: Do we have a copy of the vesting order?

Hon ROBIN CHAPPLE: And for the official use of Aboriginal people, or Aboriginal inhabitants.

The CHAIRMAN: Yes.

Mr McIntyre: The word "Aboriginal" is actually used only in the definition of the Aboriginal Affairs Planning Authority.

The CHAIRMAN: Yes, but this Act is definite. The reserve is a reserve for Aboriginal people.

Hon ROBIN CHAPPLE: For the use and benefit of Aboriginal people.

The CHAIRMAN: Yes. The Act states -

“the reserve” means class C reserve no. 43131 . . . that is reserved under the LAA section 41 for the use and benefit of Aboriginal inhabitants.

There you are. By definition it is a reserve that can benefit only Aboriginal inhabitants. It seems to me that facts do not come into it.

Mr McIntyre: As to whether it is invalid or not?

The CHAIRMAN: Yes. I would have thought that facts are irrelevant. Discrimination does not depend on having a good reason.

Mr McIntyre: No. That is right.

The CHAIRMAN: I would have thought all of this evidence was totally and utterly irrelevant.

Mr McIntyre: Yes, that is part of what we will be putting to Justice Nicholson in a couple of weeks' time. Otherwise, we have a huge mountain of material to respond to. There are all sorts of -

The CHAIRMAN: I know, you could go on forever.

Mr McIntyre: Yes. I do not know if you have looked at some of the same affidavits that I have looked at.

The CHAIRMAN: I think you have a bit of an idea of what we have been doing.

Mr McIntyre: In some of the affidavits they have told us about various meetings of public servants - they seem to move from one public service measure to another - and of different gatherings of people who make all sorts of unbased allegations about things they have heard people have done, and views they have formed about Mr Bropho and various others.

The CHAIRMAN: I think we have noticed that.

Mr McIntyre: It is extraordinary. I have been quite surprised that the Crown Solicitor's Office has served that up as evidence of anything.

The CHAIRMAN: If you have come across any evidence, we would be happy to hear about it.

Mr McIntyre: There is not much that I have identified as admissible evidence.

The CHAIRMAN: Is there any evidence, let alone admissible evidence, of activities?

Mr McIntyre: No. That is the thing. It all seems to be based on a chimera.

[8.20 pm]

The CHAIRMAN: You stopped at Cook. How long do you think Nicholson might take to make a decision?

Mr McIntyre: We are just dealing with preliminary stuff at this time.

The CHAIRMAN: Are there still a number of issues?

Mr McIntyre: There will still be a substantial number of issues. We are trying to wipe out the affidavit material and they are trying to wipe out a couple of our causes of action out of about five. That will not take him very long.

The CHAIRMAN: It would seem to me that you have taken up all the affidavit material.

Mr McIntyre: My instructing solicitor has been very diligent about this. We have gone through it paragraph by paragraph. However, when you look at what is left, I am a public servant. I have had meetings with them. They got a bit soft and said we will admit that person X said Y to person Z. However, there is no evidence about the truth of what was said, so it is not relevant.

The CHAIRMAN: It is not for me to comment, but it seems to me that facts are not relevant to a case framed, as I understand it; that the evidence of justification is not relevant evidence.

Mr McIntyre: Yes. They have based it on the argument that - it is a tricky argument. They say that if the response is objectively reasonable, it is not discriminatory.

The CHAIRMAN: Is there a case for that?

Mr McIntyre: No, not really.

The CHAIRMAN: That is something that might be decided by Nicholson.

Mr McIntyre: Yes.

The CHAIRMAN: On the argument as you framed it to me, if I were Nicholson, I would ask why there was any evidence.

Mr McIntyre: You are right. You look at the legislation and you have your answer, I would have thought.

The CHAIRMAN: The only evidence you might need is whether it is discriminatory. You might have to put up some evidence to show that it is Aboriginal people and -

Mr McIntyre: I might just look at the definition of "reserve" and say it is a reserve for the benefit of Aboriginal inhabitants.

The CHAIRMAN: The only argument you have is the question of the trust for the benefit of the people and whether the expectation is in itself a property right.

Mr McIntyre: What expectation?

The CHAIRMAN: Of the right to continue to reside there. There is a specific question that the Government has raised that the Land Administration Act says that by vesting a reserve in somebody does not create any property rights for the person in whom it is vested. There is a specific provision to that effect.

Mr McIntyre: That is right. I will not argue that.

The CHAIRMAN: I did not think you would.

Mr McIntyre: No beneficial property rights.

The CHAIRMAN: You do not start to own the land. You have rights, which are in the nature of occupation and so forth, but you do not own any part of the land.

Mr McIntyre: The person in whom it is vested is a trustee for the beneficial purpose of which the reserve is vested. We say that we are the beneficiaries. It is not the Swan Valley Nyungah Community Aboriginal Corporation that has a property right other than as a manager.

The CHAIRMAN: Which is in itself a property but not a real property right.

Mr McIntyre: Yes.

The CHAIRMAN: All I have said is that you do not end up with a real interest in the land. I do not think it has ever been argued that you would end up with the real interest in the land.

Does anyone else have any questions?

Hon ROBIN CHAPPLE: Not really. I suppose I am still interested in the issue of ownership of the fixtures and fittings or the chattels on the land and where you might see that.

Mr McIntyre: As far as -

Hon ROBIN CHAPPLE: Maybe even in light of the demise of the Aboriginal and Torres Strait Islander Commission.

Mr McIntyre: I do not think that the demise of ATSIC makes a difference. ATSIC lost its claim on it once the grant was properly acquitted. When ATSIC gave a grant of money, the conditions attached to the grant were that it be spent in accordance with the purposes of the grant. Once the places were built and the grants were acquitted, it seemed to me that ATSIC lost any right. Up until then under the statute they had some rights to revoke the grant and recover the property. I was asked to look at this by the Swan Valley Nyungah Community and that was the view that I came to. Once they had acquitted the grants and built the properties, ATSIC no longer had any statutory power to recover the property and lost any property it had. It was really a contractual tentacle, which was a part of the condition of the grant, which may have allowed them, by way of their contractual relationship with the grantees, to recover the result of their investment.

The CHAIRMAN: They recovered the money. Was there a limited right of severance?

Mr McIntyre: It is a special condition of the grant that says if you have not spent the grant in accordance with the conditions of the grant, then the grant or any property may be recovered.

The CHAIRMAN: The property has been fixed. Where would you get the right to sever it?

Mr McIntyre: It does not even get to that point because they spent the money in accordance with the purpose of the grant so there was -

The CHAIRMAN: Let us assume they spent the money but they had not done what they were going to do but there were a couple of bits and pieces lying around that had been attached to the land.

Mr McIntyre: If they had not complied with the terms and conditions of the grant, it would be arguable that ATSIC would be able to recover the grant or presumably whatever that grant had been converted into.

The CHAIRMAN: Unless it had been fixed.

Mr McIntyre: There would then be that issue. It seems to me that they would notionally have a contractual right as against the Swan Valley Nyungah Community.

The CHAIRMAN: I do not have any doubt about the contractual right or whether they have any right to go in and say that is ours and we will have it. If it had not been fixed - if it was lying on the ground ready to be stuck up, yes.

Mr McIntyre: That is right. Once it had become a fixture, there was no chance. Most of the moneys that they gave either became fixtures or were administrative expenses that were expended.

The CHAIRMAN: If they had not acquitted the grant, there would be a personal right to sue for the money but there would be little chance of getting it.

Mr McIntyre: That is probably right. That would be the result.

The CHAIRMAN: Once it is acquitted, there is not even a personal right to serve the money.

Mr McIntyre: That is right. That is my understanding.

Hon ROBIN CHAPPLE: So that property now -

The CHAIRMAN: Is state property.

Mr McIntyre: It runs with the land. It is all fixtures other than the school building. That belongs to whoever properly owns it depending on the view you take about the validity of the reserves Bill.

Hon ROBIN CHAPPLE: What about the issue of compensation?

Mr McIntyre: The compensation will apply to the consequential losses from the seizure of the land. There is an argument that if they had validly revoked the vesting under the Land Administration Act, there is a statutory provision that allows compensation for improvements. That

is a second reed litigation and may be run if we lose the current one. It is sort of acknowledged that there may be some obligation there. That is hanging -

The CHAIRMAN: That would belong to the manager, not to the individuals.

Mr McIntyre: Yes.

The CHAIRMAN: The compensation you are looking for is for the individuals.

Mr McIntyre: The compensation associated with this cause of action would be the compensation for the loss occasioned with having been removed from the land and having to buy a caravan or to set up somewhere else and just the general loss and damages associated with being forcibly removed.

The CHAIRMAN: Thanks very much indeed. Because we have not actually been transcribing your transcript - it has been recorded - it will be slower getting into the system. Do we know how long it will be? It will not be ready until the middle of next week.

Mr McIntyre: I am not in any hurry.

The CHAIRMAN: Okay. Can I just tell you that what I would like you to do with the transcript is correct it and send it back to us? There are two ways in which you can deal with the transcript. If you think we have incorrectly reported you, would you put in one letter what you think has been incorrectly transcribed. If on the other hand having looked at it again you feel that you have not expressed yourself appropriately, in other words, the wording may create an impression other than that which you intended to create, could you put that in a separate letter? You can do both. The corrections that are truly corrections will be made to the transcript and it will be published in the corrected form; the ones where you want to change what you said or that you want to amplify it, will be attached to it.

Mr McIntyre: Okay.

The CHAIRMAN: Thank you very much.

Committee adjourned at 8.32 pm