



REPORT
OF THE
SELECT COMMITTEE ON NATIVE TITLE RIGHTS
IN WESTERN AUSTRALIA

Presented by the Hon Tom Stephens MLC (Chairman)

Report

SELECT COMMITTEE ON NATIVE TITLE RIGHTS IN WESTERN AUSTRALIA

Date first appointed:

17 September 1997

Terms of Reference:

- (1) A Select Committee of five members is hereby appointed. Three members of the committee shall be appointed from among those members supporting the Government.
- (2) The mover be the Chairperson of the Committee.
- (3) The Committee be appointed 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.
- (4) The Committee have the power to send for persons, papers and records and to move from place to place.
- (5) The Committee report to the House not later than November 27, 1997, and if the House do then stand adjourned the Committee do deliver its report to the President who shall cause the same to be printed by authority of this order.
- (6) Subject to the right of the Committee to hear evidence in private session where the nature of the evidence or the identity of the witness renders it desirable, the proceedings of the Committee during the hearing of evidence are open to accredited news media representatives and the public. (Added 23 October 1997)

Members at the time of this inquiry:

Hon Tom Stephens MLC (Chairman)

Hon Murray Criddle MLC¹

Hon Barry House MLC

Hon Murray Nixon MLC

Hon Giz Watson MLC

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Mr Marcus Priest, Advisory/Research Officer

Mr David Lloyd, Committee Clerk (November 1997 - February 1998)

Mr Jason Agar, Committee Clerk (September 1997 - August 1998)

Ms Kelly Campbell, Committee Clerk (from October 1998)

The Committee expresses its gratitude to all staff involved in the production of the report, with particular reference to the staff of Hansard.

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Table of Contents

GLOSSARY	i
CHRONOLOGY	ii
INTRODUCTION	1
CHAPTER 1 - HISTORY OF NATIVE TITLE	7
1 A brief history of native title in Australia.	7
2 The <i>Mabo</i> decision	11
3 The <i>Wik</i> decision	13
CHAPTER 2 - CONTENT OF NATIVE TITLE	15
1 Introduction	15
2 Docking of two systems of law	15
3 At its fullest native title is equivalent to fee simple	15
4 Native title is a communal right	16
5 Native title is not the same as land rights	17
6 The Aboriginal relationship to land	17
7 Native title is not the same as Aboriginal sovereignty	18
8 “Native title is an amorphous mass”	19
9 Native title as a bundle of rights	20
10 The Federal Government approach	20
11 Submissions against codification	21
12 The Canadian approach	23
13 Frozen rights?	24
14 Does common law native title include mineral rights?	26
15 Committee discussion	28
Conclusions and recommendations	29
CHAPTER 3 - EXTINGUISHMENT OF NATIVE TITLE	31
1 Introduction	31
2 What the High Court said	31
3 Validation of ‘intermediate period acts’ in Western Australia	32
4 Suppression or extinguishment?	34
5 Confirmation of past extinguishment of native title by ‘previous exclusive possession acts’	35
6 Compensation for extinguishment	37
7 Committee discussion	39
Conclusions and recommendations	40
CHAPTER 4 - PHYSICAL CONNECTION AND NATIVE TITLE	41
1 Introduction	41
2 Physical connection is required	42
3 Physical connection is not required	43
4 What level of physical connection is required?	44
5 Committee discussion	45
Conclusions and recommendations	45

CHAPTER 5 - THE NATIONAL NATIVE TITLE TRIBUNAL	47
1 Introduction	47
2 The NNTT is not a court	47
3 Recognition of native title	48
4 The Future Act Regime	49
5 Complaints about the Tribunal	50
6 Tribunal's resources	52
7 Tribunal's workload	53
8 Allegations of bias	53
9 The proposal to establish a State Native Title Commission	54
10 Committee discussion	60
Conclusions and recommendations	62
 CHAPTER 6 - THE RIGHT TO NEGOTIATE	 63
Chapter overview	63
1 Introduction	64
2 Mining and the right to negotiate	64
3 What the unamended <i>Native Title Act</i> said	64
4 Federal Government amendments	65
5 Stakeholders positions on the right to negotiate	66
6 How does the right to negotiate compare with other property rights?	70
7 How the right to negotiate compares with an injunction	72
8 The expedited procedure	74
9 Right to negotiate on pastoral leases	76
10 Committee discussion	79
11 Conclusions and recommendations	79
 CHAPTER 7 - ACCEPTANCE AND REGISTRATION	 81
1 Introduction	81
2 Court interpretation of the acceptance and registration tests	82
3 Amendments to the acceptance and registration test	83
4 Overlapping claims	86
5 The creation of "Native Title Working Groups"	94
6 Committee discussion	95
Conclusions and recommendations	98
 CHAPTER 8 - MINING AND NATIVE TITLE	 99
1 Statistical analysis	99
2 Delays in processing of applications	100
3 New mines being delayed by native title?	103
4 Trend to overseas and brownfield exploration	109
5 Amendments to the <i>NTA</i>	111
6 Compensation for mining	115
7 Economic benefits of Aboriginal involvement in mining	118
8 Committee discussion	121
Conclusions and recommendations	124
 CHAPTER 9 - PASTORAL LEASES & NATIVE TITLE	 127
Chapter overview	127

1	Background	128
2	Pastoral leases and native title	130
3	The amendments	134
4	Committee discussion	142
	Conclusions and recommendations	144
CHAPTER 10 - ROLE OF THE STATE IN NATIVE TITLE MATTERS		145
	Chapter overview	145
1	Background	145
2	What the <i>NTA</i> said	146
3	What is good faith negotiation?	147
4	What the amended <i>NTA</i> says	148
5	What Aboriginal people say	148
6	What other witnesses say	149
7	What the Department of Premier and Cabinet say	151
8	What the Department of Minerals and Energy say	152
9	What the Aboriginal Affairs Department (ADD) said	154
10	Should the State be involved in negotiations?	155
11	Committee discussion	156
	Conclusions and recommendations	157
CHAPTER 11 - THE SUNSET CLAUSE		159
8	Committee discussion	160
CHAPTER 12 - TOWNS AND CITIES		161
1	Introduction	161
2	Kalgoorlie-Boulder	161
3	Leonora and Laverton	162
4	Broome	163
5	What the amendments to the <i>NTA</i> say	164
6	Committee discussion	165
	Conclusions and recommendations	165
CHAPTER 13 - WATER AND NATIVE TITLE		167
1	Introduction	167
2	The <i>Croker Island</i> decision	167
3	The recognition of aboriginal right to fish in Canada	168
4	Limitations upon the common law right to fish in Australia	169
5	What the <i>Native Title Act</i> says	169
6	<i>Fish Resources Management Act (WA) 1994</i>	170
7	Amendments to the <i>NTA</i>	171
8	Commercial fishing native title rights?	171
9	What Aboriginal people say	171
10	What commercial fishing interests say	172
11	Committee discussion	173
	Conclusions and recommendations	174
CHAPTER 14 - AGREEMENTS		175
1	Introduction	175
2	Regional agreements	175

3	Project/local agreements	176
4	Why enter agreements?	177
5	The old <i>Native Title Act</i> and agreements	179
6	The amended <i>Native Title Act</i> and agreements	180
7	What the State Government and Mining Representatives said about regional agreements under the amended <i>NTA</i>	181
8	What Aboriginal Representatives said about regional agreements under the amended <i>NTA</i>	183
9	Is there a role for an independent broker in the agreement process?	185
10	Small local agreements or larger regional agreements?	187
11	Issues arising from ILUAs so far	190
12	Committee discussion	193
	Conclusions and recommendations	196
CHAPTER 15 - ABORIGINAL TITLE IN CANADA		199
1	Background	199
2	Introduction	200
3	A brief history	202
4	Reasons for pursuing agreements	212
5	The claims process	221
6	Issues arising out of Canadian Experience	224
7	Committee discussion	245
	Conclusions and recommendations	247
CHAPTER 16 - CONCLUSION		249
	Conclusions and recommendations	260
APPENDIX 1: Bibliography		265
APPENDIX 2: Materials collected by Committee in Canada		269
APPENDIX 3: Committee meetings		273
APPENDIX 4: Canada - Itinerary		275
APPENDIX 5: Criteria to indicate an ongoing traditional connection with land		279
APPENDIX 6: The <i>Delgamuukw</i> decision		281
APPENDIX 7: Flow Chart of Right to Negotiate Procedure		285
APPENDIX 8: A brief history of Aboriginal Affairs in Western Australia		287
APPENDIX 9: Data from the National Native Title Tribunal		299
APPENDIX 10: List of persons who made submissions to the Committee		309
APPENDIX 11: List of persons spoken to by the Committee in Western Australia ...		313
APPENDIX 12: List of persons spoken to by the Committee in Canada		319
APPENDIX 13: Data from the NNTT regarding agreements reached		325
APPENDIX 14: The Howard Government's Ten Point Plan		327
APPENDIX 15: Draft Pastoral Lease Grant Agreement		329
APPENDIX 16: Letter from Hon Murray Criddle MLC, dated 3 November 1998 ...		361

GLOSSARY

AAD -	Aboriginal Affairs Department (WA)
AIP -	Agreement-in-Principle
AMEC -	Australian Mining and Exploration Council
ALRA -	<i>Aboriginal Land Rights Act (Northern Territory) 1976</i>
ALRC -	Australian Law Reform Commission
ALT -	Western Australian Aboriginal Lands Trust
APAs -	Alternative Provision Areas
ATSIC -	Aboriginal and Torres Strait Islander Commission
BC -	British Columbia, Canada
BCTC -	British Columbia Treaty Commission
BCCTF -	British Columbia Claims Task Force
Bonner Report -	Report of the Review of the Aboriginal Lands Trust (1996)
CCS -	Comprehensive Claims Settlements
CDEP -	Community Development Employment Projects (An Aboriginal “Work for the Dole” scheme)
Cwth -	Commonwealth Government of Australia
DAA -	Department of Aboriginal Affairs (BC)
DOLA -	Department of Land Administration (WA)
DOME -	Department of Minerals and Energy (WA)
GLC -	Goldfields Land Council
IBA -	Interim Benefit Agreement
ILUA -	Indigenous Land Use Agreement
KLC -	Kimberley Land Council
LAA -	<i>Land Administration Act (WA) 1997</i>
NEQA -	North-East Quebec Comprehensive Agreement
NFF -	National Farmers Federation
NIWG -	National Indigenous Working Group
NTA -	<i>Native Title Act 1993</i>
NNTT -	National Native Title Tribunal
NTAB -	<i>Native Title Amendment Bill 1998</i>
NTRB -	Native Title Representative Body

NWT -	North West Territories
Ten Point Plan -	Document released by the Federal Government in May 1997 outlining the principles informing proposed amendments to the <i>Native Title Act 1993</i> .
TNAC -	Treaty Negotiation Advisory Committee
WAFIC -	Western Australian Fishing Industry Council
WAFF -	Western Australian Farmers Federation
WMC -	Western Mining Corporation

CHRONOLOGY

31 October 1975	Racial Discrimination Act came into operation.
8 December 1988	Decision by the High Court in <i>Mabo v Queensland (No 1)</i> .
3 June 1992	Decision by the High Court in <i>Mabo v Queensland (No 2)</i> .
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 1996	Decision by the High Court in <i>Western Australia v Commonwealth</i> .
23 December 1996	Decision by the High Court in <i>The Wik Peoples v The State of Queensland</i> .
8 May 1997	Federal Government's 10 Point Plan released.
8 July 1998	Amendments to the <i>NTA</i> pass the Senate.
27 July 1998	Royal assent to the amendments to the <i>NTA</i> .
30 September 1998	Amendments to the <i>NTA</i> came into operation.

INTRODUCTION

- 1 The Select Committee on Native Title was established pursuant to a motion carried in the Legislative Council of the State Parliament of Western Australia on 16 September 1997. Notice of this motion was first given by the Leader of the Opposition in the Upper House (Hon Tom Stephens) at the Opening of the first session of the thirty fifth Parliament on 26 March 1997. When introducing this motion to the House Mr Stephens outlined the following reasons for the establishment of the committee:
 - native title was relevant to the future of all West Australians, and the resolution of that issue was of enormous importance;
 - the Federal Native Title Act was defective and was not working to meet the needs of any section of the Australian community - Aboriginal or non-Aboriginal;
 - state legislation pursuant to anticipated amendments to the Native Title Act would be necessary and all members of Parliament needed to be well prepared and equipped to properly consider that legislation; and
 - significant developments were occurring throughout the State in relation to native title which could be drawn on in the process of drafting legislation.
- 2 This motion was debated in the House on 11 September 1997. The Leader of the Government in the Legislative Council (Hon Norman Moore) indicated to the House that the motion to establish the Select Committee had the support of the Government for the following reasons:
 - it was necessary to examine the issues of conflicts and disputes that may arise over the implementation of Federal amendments to the Native Title Act in this State; and
 - the Select Committee may be able to assist in suggesting solutions to problems being experienced in the State in relation to native title
- 3 Other Members, who spoke in reference to the motion to establish the select committee, agreed.
- 4 The Select Committee first met on 17 September 1997. Advertisements calling for submissions were placed in *The West Australian* on 23 September 1997. Fifty one written submissions were received (cf schedule one for list of submissions). The Select Committee met on twenty eight occasions (cf schedule two which details the select committee meeting schedule). Evidence was taken in open session on one occasion (cf schedule three for list of public hearings).

- 5 The First Session of the thirty fifth Parliament was prorogued on 7 August 1998 and as a result the Select Committee lapsed.
- 6 The Second session of Parliament opened on 11 August 1998 and on 13 August 1998 the Leader of the Government moved to re-establish the Select Committee with the same terms of reference and membership.
- 7 On 8 April 1998 the Committee sought House approval for a visit to Canada. The Chairman argued that there were many similarities between this State and the Province of British Columbia and that much could be learnt from the Canadian experience with aboriginal title:

“The Aboriginal people talk about the experience of British Columbia, where they say, there has been a great breakthrough in the resolution of native title issues facing that province...The Supreme Court of Canada, when Trudeau was Prime Minister, brought down a native title judgment similar to the Mabo judgment, and it had the effect of imposing a recognition of the native title regime across the provinces which are part of that federal system.

It is interesting that it was the Premier, W.A.C. Bennett, a conservative Premier of British Columbia, who bitterly fought the judgment of the Supreme Court and said it would be disastrous for his resource-rich State. He questioned how the High Court, which was based on the east coast, would know how to resolve these questions. Nearly 30 years later his son became Premier of British Columbia, the son at first also espoused the same rhetoric as his father in vilifying the High Court on the east coast. As the litigation proceeded he gave up in desperation and said that British Columbia could not continue forever with cases in the courts. For nearly 20 years his Government had been fighting native title issues and he said some arrangements must be made that would work for all British Columbians. The result was that arrangements are now being struck which are to the benefit of that resource-rich province.”²

The trip had the “vigourous support” of the Leader of the House, Hon Norman Moore MLC³.

- 8 From 10 - 26 July 1998, the Committee visited Canada to speak to stakeholders and interested parties in British Columbia, the North-West Territories and Alberta⁴. At the

² Hansard, Legislative Council, 26 March 1997, 907-908. The Committee notes that this snapshot of British Columbia’s recent political history is corrected by the following details: Premier WAC Bennett was in office from 1 August 1952 to 15 September 1972; his son Premier William Richard Bennett was Premier from 22 December 1975 to 6 August 1986; both Premiers led Social Credit Governments.

³ Hansard, Legislative Council, 30 April 1998, 2221.

⁴ An itinerary from the visit is included in Appendix 4 of the report. A list of materials collected during the visit is included in Appendix 2. A list of persons met during the visit are included in Appendix 12.

- time of its visit, the Committee observed that Canada was also experiencing significant development in relation to aboriginal (native) title. As a result, the Committee had a unique and privileged opportunity to observe events, such as the signing of the first modern day treaty in British Columbia (the Nisga'a agreement). The Committee also spoke to parties at the coalface, such as federal and territorial negotiators involved with the creation of the new province of Nunavut in the east of the North-West Territories pursuant to the Nunavut Comprehensive Agreement with the Inuit people of that region. The Committee came away from this visit with a much deeper understanding of the international context of aboriginal title and the political and legal issues involved with negotiating agreements.
- 9 The Committee also travelled to the Kimberley, from 16-21 February 1998, and Kalgoorlie, from 21-22 May 1998, to see first hand the impact of native title and how stakeholders were adjusting. While it was clear from both visits that there were problems occurring in the administration of native title, such as the overlapping of multiple claims in the Goldfields, it was also clear that stakeholders were taking the first tentative steps to resolving differences and breaching divides, such as the Rubibi Interim Agreement between the Rubibi Working Group and the Broome Shire Council.
- 10 As a result of these visits and hearings in Perth, the Committee concluded that, whatever solutions are proposed, a workable land administration system in relation to native title is only going to be achieved through the good faith and the support of all stakeholders. 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.
- 11 One of the problems the Select Committee had with its terms of reference was that the issues with which it was concerned were at the same time also being dealt with by both national and state governments and parliaments. This was not only true of the Committee's efforts to grapple with domestic native title issues in Australia, but was also true of the work the Committee did while in Canada. As a result, even as the Committee worked, the Australian situation, in particular, was constantly changing. As the Committee took evidence on Native Title procedures that were seen to be

failing, proposals for amendment were being floated, drafted and re-drafted, introduced, debated and then - with further amendment - carried into law. The end result is that it was difficult for the Committee to comment on the legislation that was before the federal parliament, for as work was prepared for consideration as a possible draft report, it was already out of date as amendments were proposed and subsequently enacted on 3 July 1998.

As a result, the Committee never found the opportunity to usefully comment on the changing face of the Ten Point Plan; for no sooner was it first presented than it became clear that it would either be subject to a double dissolution election or further amendment in order to guarantee parliamentary passage.

- 12 It has been similarly difficult to get a “final take” on the WA State Government’s legislative response to the Federal Government’s amendments. This response has been emerging simultaneously with the work of the Committee. It was only as the Select Committee started deliberations on the final report that a draft exposure document from the State Government had emerged which indicated the shape of the legislation that was being considered for presentation to the State parliament. Even then, further changes have since been made to the proposed legislation contained in the draft exposure document. The final version of the proposed legislation was introduced into the Legislative Assembly by the Premier on 15 October 1998. At this stage it is too early to know what will be the final shape of the legislation when it emerges from the Parliament. Further, the legislation establishing the State Native Title Commission, once passed by the WA Parliament, will require a determination by the Commonwealth Minister, and the Minister’s determination will also have to be laid before both Houses of the Commonwealth Parliament, which may disallow the determination⁵.

As a result, this Committee has adopted the approach of simply receiving the draft exposure document and using it as the backdrop against which our report is now presented. Nevertheless, the likely content of the proposed legislation and the procedures to be established by proposed State legislation are known, as they are broadly dictated by Federal enabling legislation. Therefore, the Committee is able to comment on the principles, issues and direction which will underpin the proposed state legislation. There are a number of underlying issues which arise in the context of the operation of the unamended *Native Title Act 1993 (NTA)*, the amended *NTA*, and the proposed State Government legislation. These include:

- the content of native title;
- the extinguishment of native title;
- what is necessary to establish native title;
- the format of any body established to mediate and arbitrate on native title matters;
- overlapping claims;

⁵

Ss 43A(1)(b) & 214 of the *Native Title Act* and s46A of the *Acts Interpretation Act 1901*.

- the right to negotiate;
- pastoral leases;
- mining;
- towns and cities;
- water;
- the role of the State; and
- agreements.

These matters form the basis of the report's chapters. Consequently, the Committee hopes and intends that this report will be a useful document for the Parliament, the Government and the public.

13 Broadly speaking, in deliberating on its Terms of References, the Committee's response has been:

- to detail the law in respect of native title in Western Australia as it presently stands;
- to detail the past operation of laws in relation to native title in Western Australia;
- to examine whether changes to the Native Title Act, if implemented in Western Australia, will create a more workable environment in relation to native title in this State; and
- to examine whether there are non-legislative alternatives for dealing with native title.

CHAPTER 1

HISTORY OF NATIVE TITLE

1 A brief history of native title in Australia

- 1.1 In 1988 the High Court held, in *Mabo No 1*⁶, that a Queensland Act which purported to divest certain Torres Strait Islanders of their traditional lands was invalid as it was inconsistent⁷ with s. 10 of the *Racial Discrimination Act 1975 (RDA)*. The *RDA* prohibits discrimination based on race in relation to holding property. The High Court accordingly held that an Act which singled out the legal rights of Murray Islanders while leaving the legal rights of others in the Murray Islands intact was inconsistent with this prohibition.
- 1.2 In 1992 in *Mabo No 2*⁸, the High Court held that the common law of Australia recognised the traditional property law rights of Indigenous Australians and that the Meriam people, the people of Murray Island, had the use, occupation, possession and enjoyment of Murray Island as against the whole world. The report will focus on this decision in section 2 of this Chapter.
- 1.3 In December 1993, the Western Australian Government enacted the *Land (Titles and Traditional Usage) Act 1993* which purported to replace any remaining native title in Western Australia with “rights of traditional usage”.⁹ Rights of traditional usage were expressly made subject to all other interests in land and were to be extinguishable by legislative or executive act.
- 1.4 Three weeks later, on Christmas eve in 1993, the Commonwealth Government’s *NTA* received Royal Assent. The *NTA* validated past grants of title which were inconsistent with native title and established the National Native Title Tribunal (NNTT) to mediate and make consent determinations of native title claims, to manage a regime dealing with Future Acts affecting native title, and to determine compensation for loss or impairment of native title.

⁶ *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

⁷ Section 109 of the Constitution provides that State legislation which is inconsistent with Commonwealth legislation is invalid to the extent of the inconsistency.

⁸ *Mabo v Queensland (No 2)* (1992) 107 ALR 1.

⁹ Cf Appendix 8 - *A Brief History of Aboriginal Affairs in Western Australia* - supplied by the Aboriginal Affairs Department.

- 1.5 The WA Government challenged the constitutional validity of the *NTA* and claimed that native title had been extinguished in WA, either upon settlement or by the *Land (Titles and Traditional Usage) Act 1993*. A number of groups of Aboriginal peoples challenged the validity of the *Land (Titles and Traditional Usage) Act 1993*. On 16 March 1996, in *Western Australia v Commonwealth*¹⁰ (the *Wororra Case*), the High Court held that the *WA Act* was inconsistent with the *RDA* and therefore was invalid. The *NTA* was held to be within the legislative competence of the Commonwealth Parliament under s. 51(xxvi) of the Constitution (the races power) and was not itself racially discriminatory or inconsistent with the *RDA*.
- 1.6 On 23 December 1996, the High Court delivered its decision in *The Wik Peoples v The State of Queensland*¹¹. A majority of the members of the Court (Toohey, Gaudron, Gummow and Kirby JJ) held that the grant of certain pastoral leases under certain Queensland Acts did not confer exclusive possession on the grantees and therefore did not necessarily extinguish native title rights and interests that may be held in respect of those areas. It ruled that native title rights could survive and co-exist with pastoral leases where there was no inconsistency between those rights. Where there was an inconsistency between those rights then pastoral rights would prevail and native title would yield to the rights of the pastoralists. The report will focus on this decision in section 3 of this Chapter.
- 1.7 The Federal Government released what was termed “The Ten Point Plan” on 8 May 1997¹². Pursuant to amendments flagged in the Ten Point Plan and following negotiations with independent Senator Brian Harradine, a revised set of amendments to the *NTA* finally passed through both houses of the Federal Parliament on 8 July 1998 which sought to:
- permit States and Territories to legislate to extinguish, or confirm extinguishment of, native title on land subject to certain exclusive tenures (including, for example, freehold residential, commercial land and agricultural land where it can be demonstrated that there was an intention to grant exclusive possession) if that is what the common law otherwise provides;
 - permit States to validate certain acts and grants between 1 January 1994 and 23 December 1996;
 - allow pastoral lease rights to prevail over native title rights which are inconsistent with the grant of a pastoral lease and should these rights be found by courts to extinguish native title rights then this extinguishment will be confirmed;

¹⁰ *Western Australia v Commonwealth* (1995) 128 ALR 1.

¹¹ *The Wik Peoples v The State of Queensland* (1996) 141 ALR 129.

¹² The Howard Government’s Ten Point Plan as originally proposed is outlined in Appendix 14 to this report.

- permit States to establish approved alternative regimes with certain minimum standards to the right to negotiate in relation to mining, or other third party activities on non-exclusive tenures, such as pastoral leases. Under the regime native title holders will have an opportunity to be consulted about ways of minimising the impact of the mining lease or acquisition on their title and to have their objections about the impact of native title heard by an independent person or body. The alternative regime must be approved by the Federal Minister and the Senate and the right to negotiate regime will remain until an approved regime is established;
- shorten the right to negotiate period to 4 months;
- create a higher registration test for native title claims and provide for the lodgement of claims in the Federal Court instead of the NNTT. This test will include a requirement that at least one member of the claimant group have a traditional physical connection to the area claimed. Where a claimant group is denied registration then they may apply to the Federal Court and seek to satisfy the Court that the claimants can establish their native title and can demonstrate that the parents of at least one member of the claimant group had physical access during their lifetime which would have continued but for being locked out or removed by action of government;
- eliminate the right to negotiate and procedural rights over water resources;
- enable pastoral lessees to carry out activities within the definition of “primary production” in the *Income Tax Assessment Act 1936* notwithstanding they are not authorised by the express terms of the pastoral lease and provided they are authorised by the State without the necessity to upgrade or compensate native title holders;
- permit pastoral lease holders to carry out off-lease activities incidental to activities on the lease area without incurring the right to negotiate providing they are authorised by the State;
- permit pastoral lease holders to upgrade their lease without incurring the right to negotiate if the off-lease activity is not inconsistent with the exercise of the native title rights and interests;
- apply normal laws for compulsory acquisition of land subject to native title which is required for urban and municipal services, therefore exempting these acts from the right to negotiate, and providing procedural rights equivalent to that of the dominant interest holder;
- restrict the right to negotiate to a once-only right which can be utilised at either the exploration or mining stage but not at both;

- permit towns and cities and private infrastructure projects to be exempted from the right to negotiate and apply the alternative regime established by the State;
- encourage negotiated voluntary and binding regional agreements.;
- permit a Minister to exclude certain minimal impact acts, such as certain exploration, fossicking and prospecting activities, from the right to negotiate;
- permit the processing of a project with only one right to negotiate on all proposed grants of land which form part of that project; and
- exclude the renewal of mining leases from the right to negotiate providing the lease is not for a longer period and does not confer rights which were previously not conferred.

1.8 These amendments received royal assent on 27 July 1998. As a result, some of these amendments had immediate effect upon proclamation on 30 September 1998:

- changes to the registration test; and
- changes to the Future Act regime to exempt certain acts from the right to negotiate - mining title renewals, infrastructure, off shore and intertidal, facilities for services to the public, reservations and leases, management of water and air space, primary production and off farm activities, and indigenous land use agreements.

1.9 The WA Government is now in a position to:

- seek an exemption from the Commonwealth for certain exploration and mining acts;
- legislate to validate past acts;
- establish a “recognised State body” to provide a regime alternative to the right to negotiate procedure; and
- legislate to confirm matters such as Crown ownership of natural resources and Crown rights to control the use and flow of waters.

1.10 It would also be in the discretion of the State to:

- **upgrade pastoral leases;**
- **authorise diversification on pastoral leases; and**

- **authorise off-lease pastoral activity.**

2 The *Mabo* decision

2.1 Although the case was centred upon the traditional land-holding customs of the inhabitants of the Murray Islands in the Torres Strait, the six majority judges considered that their decision may be applicable on the mainland and that native title was held by Aboriginal and Torres Strait Islander people who had maintained a connection with the land and waters, according to their traditional law or customs.

*“The term “native title” conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.”*¹³

*“Before proceeding further, one more point should be noted. While this case concerns the Meriam people, the legal issues fall to be determined according to fundamental principles of common law and colonial constitutional law applicable throughout Australia. The Meriam people are in culturally significant ways different from the Aboriginal peoples of Australia, who in turn differ from each other. But, as will be seen, no basic distinction need be made, for the purposes of determining what interests exist in ancestral lands of indigenous peoples of Australia, between the Meriam people and those who occupied and occupy the Australian mainland.”*¹⁴

2.2 A general summary of the propositions stated in the case is as follows:

- **the common law recognises the concept of native title;**
- **the source of native title is the traditional connection to, or occupation, of the land;**
- **the nature and content of native title is determined by the character of the traditional connection or occupation; and**
- **native title can be extinguished by the valid exercise of governmental powers provided a clear and plain intention to do so is clearly evident.**

2.3 Further, by reference to this case, native title has been ascribed the following common characteristics:

- **it is invariably possessed by the community and hence is communal in nature;**

¹³ Per Brennan J at 41.

¹⁴ Per Toohey J at 140.

- **it is inalienable other than by surrender to the Crown or pursuant to traditional laws and customs; and**
- **it is a legal right that can be protected by legal action.**

2.4 In order to establish native title, a claimant group must show:

- **they have maintained their traditional connection with the land; and**
- **their title has not been extinguished by the Crown.**

2.5 Explicit in the Court's recognition of common law native title was the rejection of the legal fiction that Australia was land that belonged to no-one (*terra nullius*) at the time of British settlement and that indigenous property law rights were extinguished on the British acquisition of sovereignty. Rather, native title continued to exist where it had not been extinguished by an act of sovereign power inconsistent with it and remained a burden upon the Crown's title.

"It was only by fastening on the notion that a settled colony was terra nullius that it was possible to predicate of the Crown the acquisition of ownership of land in a colony already occupied by indigenous inhabitants. It was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other. If that hypothesis be rejected, the notion that sovereignty carried ownership in its wake must be rejected too. Though the rejection of the notion of terra nullius clears away the fictional impediment to the recognition of indigenous rights and interests in colonial land, it would be impossible for the common law to recognize such rights and interests if the basic doctrines of the common law are inconsistent with their recognition.

These fictions denied the possibility of a native title recognized by our laws. But once it is acknowledged that an inhabited territory which became a settled colony was no more a legal desert than it was "desert uninhabited" in fact, it is necessary to ascertain by evidence the nature and incidents of native title."¹⁵

In coming to this conclusion Justice Brennan stated that while this decision overturned past authority, to do otherwise would be to perpetuate a view of the common law which was unjust, did not respect all Australians as equal before the law, and was out of step with international human rights norms¹⁶.

2.6 The concept that indigenous property rights pre-exist and survive the establishment of sovereignty in colonised lands has existed in other British common law countries

¹⁵ Per Brennan J at 31 & 41.

¹⁶ Ibid, 41.

for up to 200 years. It has been argued that the High Court's decision was an exercise in judicial activism in overturning past authority and *creating* new racially-based property rights. However, to the extent that the High Court made new law, they did so in express reliance upon decisions in these other countries and in terms of a *recognition* of pre-existing native title rights by Australian common law, which had until that point been ignored. That is, it was a common law property right, like freehold or leasehold, although of a unique kind.

3 The *Wik* decision

- 3.1 In *Wik*, the High Court found that, unlike other leasehold interests, pastoral leases were a statutory form of leasehold granting only certain property rights over land to graze cattle, while reserving other rights to the State. The majority of the Court cited historical evidence that the pastoral lease was developed by the British Imperial Government in response to the rapid spread of squatters over much of Australian crown land.

“The need for statutory regulation was brought about by movements in New South Wales in the late 1820s to occupy large areas of land to depasture stock. The “squatters” moved on to land to which they had no title. The land was unsurveyed, their activities uncontrolled. And of course they had no security. The colonial authorities met the movement of squatters with a system of occupation licences.”¹⁷

- 3.2 The Court accepted historical evidence that the Imperial Government was particularly concerned to protect Aboriginal peoples from this spread and, to ensure that they were not excluded from land, sought to do so through the creation of reservations for Aboriginal people on the pastoral leases. This concern was also reflected in North America in the *Royal Proclamation Act of 1763*. (This will be dealt with in more detail in Chapter 15).
- 3.3 The *Wik* minority (Brennan CJ, Dawson and McHugh JJ) were of the view that pastoral leases created a right analogous to that of a lease at common law. This was because Parliament had used the terminology of leasehold interests in the creation of this statutory interest. Therefore, pastoral leases included a right of exclusive possession which was inconsistent with the continued existence of native title.
- 3.4 While the Australian High Court has provided confirmation that Aboriginal title to land may still survive, their decisions have been more in the abstract. The Court has very much left the nature, scope and extent of the title and rights and how they relate to non-indigenous titles largely undefined. Therefore, the next chapters of this report deal more extensively with commonly raised questions arising out of the High Court's decisions:

17

Per Toohey J, *Wik v Qld*, Op Cit, 171.

- **What is the content of native title?**
- **How is native title extinguished?**
- **What sort of connection do Aboriginal people need to have maintained?**

CHAPTER 2

CONTENT OF NATIVE TITLE

1 Introduction

- 1.1 Unlike other common law property rights “native title” has its **origin** and is given its **content** by the communal rights and interests possessed by Aboriginal and Torres Strait Islander people under their traditional laws and customs. It is not a new right but rather a traditional right which has been recognised by the common law and is enforceable by the common law. Native title is neither an institution of common law nor a form of common law tenure but rather is recognised by the common law¹⁸.

2 Docking of two systems of law

- 2.1 In his evidence to the Committee, NNTT President Justice Robert French characterised the recognition of native title by the common law as a “docking of two systems of law” and put the relationship between the two thus:

*“The recognition of native title is one system of law speaking to another. The recognition is limited and qualified by the fact that native title is recognised subject to all our laws and the private rights that are created pursuant to those laws.”*¹⁹

It is this unique relationship of intersection between Australian common law and traditional Aboriginal law which causes conceptual difficulties in relation to native title. The most common question asked before the Committee was “What is native title?” and there were regular representations made for Government to legislatively define the content of native title. The Federal Government has baulked at this because of the legal and constitutional difficulties arising from an exercise of defining a common law right.

3 At its fullest native title is equivalent to fee simple

- 3.1 The High Court in *Mabo No 2* held that, at its fullest, native title was analogous to a fee simple estate in land. However, it was a *sui generis* right, a right like no other, which was, unlike other common law interests in property, not dependent upon Crown grant and the content of which was determined on a case by case basis in accordance

¹⁸ *Mabo No2*, Op Cit, per Brennan, 59-61.

¹⁹ Justice French, Transcript of Evidence, 9/4/98, 4.

with traditional rights and customs. The content of native title was not frozen in time at the point of settlement but was capable of undergoing change provided that the general nature of the connection to the land remains. However, even among the majority members of the Court, there were differences among the members about what exactly native title was. Justices Deane and Gaudron referred to native title as a personal, usufructuary right to use and occupy the land, arising out of communal traditions and customs²⁰, while Toohey J posited that title arose merely from prior occupation and rejected any analysis of the right as “personal” or “proprietary”²¹.

4 Native title is a communal right

- 4.1 Native title is a communal right. That is, it is a right held by a community of Aboriginal people rather than any one individual in that community. This conclusion is based upon anthropological evidence that suggests that there was no concept of individual land ownership in traditional Aboriginal society but rather that land was only communally held by clan and tribal groups. In the context of the Murray Islands, Moynihan J commented:

*“Communal life based upon group membership seems to have been the predominant feature of life. Many of the activities of daily life were social activities which took place in the context of group activities of a ceremonial or ritualistic nature. Behaviour was regulated in the interest of the community by social pressures”.*²²

- 4.2 On the basis of these findings, the High Court concluded that the Meriam people as *a community* held a proprietary interest in the Murray Islands. The rights or interests of individuals of that community were “carved out” or “dependent upon” the communal native title²³.

*“A sub-group or individual asserting a native title dependent on a communal native title has a sufficient interest to sue, to enforce or protect the communal title. A communal native title enures [takes effect] for the benefit of the community as a whole and for the sub-groups and individuals within it who have particular rights and interests in the community’s lands.”*²⁴

20 Ibid, per Deane & Gaudron JJ, 83.

21 Ibid, per Toohey J, 152.

22 Ibid, 9.

23 Ibid, 44.

24 Ibid.

- 4.3 Before amendments to the *NTA* there was no requirement in the Act that native title claims be made only on a communal basis. This has led to problems in relation to overlapping claims being made by individuals. This matter will be dealt with in more detail in the chapter dealing with acceptance and registration.

5 Native title is not the same as land rights

- 5.1 Native title is not the same as land rights, although both seek to recognise Aboriginal peoples' traditional connection to land. While native title is a common law recognition of this connection, land rights is a statutory construct. Said Mr Michael Rynne, a private practitioner:

“There is a fundamental difference between native title and land rights. Land rights is a statutory construct to give people rights to access land. Native title is not a statutory construct. It is a relationship. It exists. Regardless of whether native title is recognised, native title has always existed and will always exist. It is simply a fact that Aborigines live in Australia under the very existence of laws and customs, and whether we recognise it or not, those laws and customs will always prevail.”²⁵

Mr Rynne went onto make the more contentious point that so long as an Aborigine lived in Australia, there would be a form of native title somewhere; thereby suggesting that while the common law may no longer recognise native title because it has been determined that extinguishment has occurred, the traditional laws and customs which found that right will always exist.

6 The Aboriginal relationship to land

- 6.1 The Aboriginal Land Inquiry Report by Paul Seaman QC (The Seaman Inquiry) reported that the Aboriginal relationship to land was:

“To protect and maintain the country and its sites. Men and women of the group are responsible for preserving the land in its present state, for gaining and passing on religious knowledge of its creation and for passing on religious knowledge of its creation, and for performing land-sustaining ritual. Interference with the land and its important spiritual places has consequences not only for the land itself, but for those who are charged with the responsibility for its maintenance. In addition, to the rights and responsibilities of the group, particular individuals may also have relationships of a special kind to the land or some of it. Generally speaking the circumstances of conception or birth at a given location carries with it a

²⁵ Mr Michael Rynne, Transcript of Evidence, 30/4/98, 4.

special relationship with that place, and traditional rights and duties towards its control and protection.”²⁶

7 Native title is not the same as Aboriginal sovereignty

7.1 Aboriginal native title is not the same as sovereignty. Nor is the sovereignty of the Crown a justiciable issue. Mason CJ in *Coe v Commonwealth*²⁷ ruled that native title was a common law interest which was subject to the paramount sovereignty of the Crown:

*“Mabo (No.2) is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are "a domestic dependent nation" entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognized by the laws of the Commonwealth, the State of New South Wales and the common law. Mabo (No.2) denied that the Crown's acquisition of sovereignty over Australia can be challenged in the municipal courts of this country ((18) (1992) 175 CLR, at pp.15, 31-32, 69, 78-79, 122, 179-180.). Mabo (No.2) recognized that land in the Murray Islands was held by means of native title **under the paramount sovereignty of the Crown**”²⁸ [emphasis added].*

7.2 In Canada, aboriginal groups have also made claims for some form of sovereignty. In the recent *Delgamuukw v The Queen in the Right of British Columbia*²⁹ case, the applicants made claims for “jurisdiction” and “self-government”. These claims were dismissed at first instance as the trial judge interpreted them as claims for sovereignty. On appeal, this claim was also rejected and labelled by Wallace J “*incompatible with every principle of parliamentary sovereignty*”. On appeal in the Supreme Court of Canada this issue was not directly touched upon save to overturn the trial judge’s decision and direct that a new trial be held. Previously, the Supreme Court in *R v Pamajewon*³⁰ held that rights of self-government, if they existed, could not be framed in excessively general terms.

²⁶ The Aboriginal Land Inquiry, 1984, 12.

²⁷ *Isabel Coe on Behalf of the Wiradjuri Tribe V. The Commonwealth of Australia and State of New South Wales* (1993) 118 ALR 193.

²⁸ Ibid.

²⁹ *Delgamuukw v The Queen in the Right of British Columbia* (1997) 79 DLR (4th) 185. A summary of this case is contained in Appendix 6.

³⁰ *R v Pamajewon* [1996] 2 SCR 821.

Nevertheless, the Canadian Federal Government has recognised that aboriginal people have an “inherent right of self-government” in relation to matters that are “*internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.*”³¹ However, the Government has made clear that this inherent right “*does not include sovereignty in the international law sense, and will not result in sovereign independent nation states*”³² and will be subject to the Canadian Charter of Rights and Freedoms and certain provincial and Federal laws.

*“Implementation of self-government should enhance the participation of aboriginal peoples in the Canadian federation, and ensure that aboriginal peoples and their governments do not exist in isolation, separate and apart from the rest of Canadian society.”*³³

8 “Native title is an amorphous mass”

8.1 The general statements of the Court as to the content of native title have subsequently presented problems to parties wishing to ascertain what interests native title holders have in a piece of land and how these rights will relate to other rights in the land. Association of Mining and Exploration Companies (AMEC) Assistant Director, Ms Tamara Stevens, referred to native title as an “amorphous mass” which did not interface with the existing titles system. This was seen as a fundamental flaw of the NTA:

“The Native Title Act purports to manage a matter that has never been defined, so it is a nonsense. If the Government does not define in legislation what it is talking about, how is anybody else supposed to know what it is talking about.

*Native title must be tied down and fenced in as particular rights...”*³⁴

8.2 AMEC Executive Director, Mr George Savell, suggested that such confusion about the content of native title has allowed unfounded native title claims to be made.

“Do we take it as a caveat? Do we take it as an easement? Do we take it as a new level of titles? It is a contrived title. It is either rights in land, which no-one wants to admit, or it is a proper title of some sort which is yet to be

³¹ Federal Government of Canada, “Aboriginal Self-Government”, Federal Policy Guide, 1995, 3.

³² Ibid.

³³ Ibid.

³⁴ Mr George Savell, AMEC, Transcript of Evidence, 6/11/98, 6-7.

defined...Because of a lack of will by parliaments, a definition of native title does not exist. That process has allowed anybody to decide what they think native title is."³⁵

- 8.3 The ambiguity of native title was of great concern to members of this Committee and during evidence a definition of native title was sought from witnesses. However, many witnesses avoided stating any specific definitions. Mr Franklin Gaffney submitted that the reason for this reluctance was:

*"There is no precise definition for it and there never will be a conclusive definition for it because it is impossible to have a conclusive definition for something that cannot be defined in traditional common law concepts."*³⁶

9 Native title as a bundle of rights

- 9.1 Some have argued that native title is a bundle of discrete rights to engage in activities which are divisible, capable of independent assertion and codifiable. This interpretation is based upon statements by Justice Toohey in *Mabo* which referred to "title" as an "abstract bundle of rights" associated with the relationship of possession³⁷. The Western Australian Government has lobbied the Federal Government to include amendments to the *NTA* to codify native title. The Federal Government rejected this proposal³⁸.

10 The Federal Government approach

- 10.1 Mr John Clarke said the Federal Government had preferred a model which simply specified what native title was not and then put in place layers of procedure for dealing with the interaction between native title and other interests. The amendments to the *NTA* also require claimants to specifically establish each of the native title rights and interests claimed before the claim will be registered by the NNTT. The Western Australian Farmers Federation (WAFF) have lobbied against this approach. WAFF stated that pastoralists could not act with certainty if they did not know what the powers or limitations of native title were.

³⁵ Ibid, 8.

³⁶ Mr Franklin Gaffney, Transcript of Evidence, 31/10/97, 37.

³⁷ *Mabo*, Op Cit, 495.

³⁸ Mr John Clarke, Transcript of Evidence, 31/10/97, 8.

“The amendments refer to acts which are inconsistent with native title. How can these be defined when native title is undefined?”³⁹

11 Submissions against codification

- 11.1 Justice French warned the Committee against an approach which sought to impose a universal definition on native title or a requirement for identification of native title rights which assumed a “shopping list” of rights and interests. On a case by case basis, native title could be as little as a right to walk across some land, hunting and gathering rights in another or in another instance the right of recognition and rights to consultation over future use of the land, he said. To seek to impose a universal definition would fail to take account of these variations, he said.

“Native title derives its content from law and custom, so it may vary from one case to another. If you codified it, you might be putting a square on a circle; in other words, you might be cutting off some bits of native title. You would then run into the difficulty that it might be argued that you had effectively extinguished what was not within the codification, and there could then be arguments about compensation and validity.”⁴⁰

- 11.2 He stated that to define native title by the rights it gave rise to or to try to codify it was inconsistent with the approach taken in general property law in its approach to rights and interests in land.

“People sometimes ask - I think this committee has asked it: "What is the definition of native title?" From an Aboriginal perspective, they say, "This is my country". There may be people who have particular responsibilities and rights within that broad framework, but the broad statement "This is my country" often encapsulates the sense of belonging or responsibility, or mix of those things which traditional Aboriginal people feel. We can get very broadly expressed statements of native title...

Very often, that ownership is expressed in particular ways. People talk about hunting, gathering, doing law business and passing on culture to children and so forth. One of the criticisms made at the tendency to try to list native title rights in the early stages was this: the Aboriginal people have a broadly defined concept of ownership. The fact that they express it or use it in particular ways does not limit the concept of ownership from their point of view. For example, we might be freeholders and own a block of land somewhere in a town. We do not define our rights by the use we make of it.

³⁹ WAFF Written Submission, 2.

⁴⁰ Justice Robert French, Transcript of Evidence, 9/4/98, 15.

People make different uses of freehold blocks. Someone might have a shop if zoning allows it or a house or they might keep it vacant for some reason.

The use we make of the land is not necessarily the definition of the right we have. We all know that freehold is a very expansive right under our law. Similarly, one could say the use people make of land is one thing under native title; the scope of the rights they see themselves as having is another. That does not mean that every native title holder has exclusive possession as against the whole world. Even in Aboriginal law there is scope for overlap and shared areas, especially in arid lands where resources are scarce.

However, something else sits on top of this that comes out of the business of our law recognising and interacting with Aboriginal law. At the point of conjunction, the High Court said that the Crown had sovereignty. The Commonwealth Parliament and the State Parliament can make laws and have made laws which can displace or impair native title. Therefore, where native title exists or can be recognised by our law, our law will say "it is recognised but subject to the laws of the Commonwealth and the laws of the State and all the private rights, freehold, leasehold, statutory reserves and so forth that have been created under those laws".⁴¹

- 11.3 The Western Australian Native Title Working Group said that native title was an expression of Aboriginal peoples' connection to land and this could not be codified:

"I regard it as being the inherent birthright of indigenous people. It is the right that indigenous people have always had to have interests in and ownership of country...It is basically saying we had rights; you came; and you cannot merely by coming take away those rights. Acts have taken place across this country that have extinguished native title; and we accept that those acts have happened but where those acts have not happened, native title must be seen to still exist."⁴²

- 11.4 Similarly, Mr Michael Rynne told the Committee that native title rights were rights held by Aboriginal people because they were Aboriginal:

"Native title is a legal description of the lifestyle of Aboriginal people that makes them Aboriginal people. It is their customs and traditions; it is how their identity is formed...Native title is what makes someone an Aborigine. It is what makes a Wongi in the Goldfields a Wongi. It is what makes a Mardu

⁴¹ Justice French, *Ibid*, 3.

⁴² Mr Glen Shaw, Transcript of Evidence, 6/11/97, 54.

a Mardu. It is what makes a Noongar a Noongar...It is who these people are, how they see themselves, the way they form their identities."⁴³

12 The Canadian approach

- 12.1 In Canada, a similar generalised view of native title has been taken. In the Canadian case of *Calder v Attorney-General of British Columbia*⁴⁴, Justice Judson defined indigenous title in the following terms:

*"What they are asserting...[is the] right to continue to live on their lands as their forefathers had lived and this right is not lawfully extinguished."*⁴⁵

- 12.2 The Canadian Supreme Court has also expressly rejected the approach of defining title to land by a bundle of mutually-exclusive rights. The Court has distinguished between aboriginal rights to engage in certain activities, which were aspects of aboriginal practices and customs and which could be exercised independently of title, and aboriginal *title* to the exclusive use and occupation of land. Unlike as is suggested by *Mabo No 2*⁴⁶, the Canadian Court said in *Delgamuukw*⁴⁷, that title to land was not restricted to those uses which were elements of custom and tradition of the land-holding group. Title arose from First Nation Peoples' prior occupation of Canada and was limited only by its inalienability and that it not be used in a way which is irreconcilable with the nature of the attachment to land. However, it was not until *Delgamuukw* that the Court expressly focussed on title; prior to that it had focussed on the concept of aboriginal rights, in particular the right to fish and hunt. Said Chief Justice Lamer:

"The aboriginal rights...fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the "occupation and use of the land" where the activity is taking place is not "sufficient to support a claim of title to the land. Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity..."

43 Mr Michael Rynne, Transcript of Evidence, 30/4/98, 5.

44 *Calder v Attorney General of British Columbia* (1973) 34 DLR (3rd) 145.

45 *Ibid*, 156.

46 *Op Cit*.

47 *Op Cit*.

...At the other end of the spectrum, there is aboriginal title itself. As Adams makes clear, aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to land itself. Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognised and affirmed by s. 35(1), including site-specific rights to engage in particular activities. As I explained in Adams, this may occur in the case of nomadic peoples who varied “the location of their settlements with the season and changing circumstances”. The fact that aboriginal peoples were non-sedentary, however, does not alter the fact that nomadic peoples survived through reliance on the land prior to contact with Europeans and further, that many of the practices, customs and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures.”⁴⁸

- 12.3 While there are some cultural and legal differences between Canada and Australia, Australian parliaments would be unwise to ignore Canadian jurisprudence and this broad interpretation of aboriginal rights and title. In this area, Australian and Canadian Courts have achieved something of a cross-pollination of ideas with each regularly referring to the other in the course of judgments. Further, while a key difference is the constitutionalisation of aboriginal rights in the Canadian constitution, this provision does not create or alter the nature of the rights, which are a common law creature, as they are in Australia.

13 Frozen rights?

- 13.1 Professor Richard Bartlett, Professor of Law at the University of Western Australia, pointed out to the Committee that Australia also differed from Canada in that while many in the Australian High Court had sought to ground native title in traditional laws and customs of Aboriginal people, while the Canadian Supreme Court had found that prior occupation was the basis of aboriginal title - (“*Under common law, the act of occupation or possession is sufficient to ground aboriginal title to prove that the land was a distinctive or integral part of aboriginal society before the arrival of Europeans*”, - Lamer CJ in *Delgamuukw*⁴⁹). In Canada, the relevance of traditional laws and customs are relevant to determining the content of a right not to the proof of existence of the right; that is, if the source of a group’s claim is occupation, then the common law consequences of occupation and possession should determine the content of the right. However, the tendency to be preoccupied with traditional laws and customs in Australia had given rise to a misleading impression that native title

48 Op Cit.

49 Ibid.

was only about pre-colonisation practices, said Professor Bartlett. For example, there is a view that native title only includes ceremonial and hunting and gathering rights and this was all it included prior to occupation. Said Mr George Savell of AMEC:

*“It [native title] was a right of the original inhabitants to continue to live their lives the way they lived life before the British turned up. If you do that, you must look at what the Aboriginal population gave themselves as rights in the first place. They had a right to pass over the land. They had a right to hold ceremonies. They had a right to take from the land sustenance and materials for their shelter and clothing. Those rights were loosely arranged on a tribal basis, if one can take notice of what anthropologists have now drawn up. Native title, if it exists, must contain those elements - or some of those elements.”*⁵⁰

13.2 Professor Bartlett disagreed with this view of native title. Rather, he suggested that prior occupation of land and equality before the law were the bases of native title.

“Native title tends to be associated with traditional relationships to the land and perhaps the maintenance of those traditional relationships. However, in my experience and in any realistic view of the world, a bridge is needed to contemporary ways of existence and contemporary development. The native title legislation does not effectively provide that bridge, which can be provided by other approaches.

*Equality before law is unquestionably the fundamental basis, but then Chief Justice Brennan talks about the traditional connection to the land and the traditional laws and customs, obviously very much driven by the Northern Territory approach to Aboriginal land. That is very unfortunate. The result is we do not know exactly if it will be, what has been called the “frozen rights” approach which is the ability to forage, hunt and fish and use it for ceremonial purposes but with modern methods, or whether it will be exclusive use and enjoyment.”*⁵¹

This preoccupation with traditional laws and customs, Professor Bartlett said, was brought about by the undue and unnecessary proliferation of anthropologists.

“A dilemma with Australia is that I cannot believe the number of anthropologists who make their living here. It appals me. They do not necessarily do anything very productive to focus on what Aboriginal people want to secure by way of living in the modern world. They tend to focus on traditional ways of being, which is fine if that is what Aboriginal people want.

50 Mr George Savell, Transcript of Evidence, 6/11/97, 5.

51 Professor Richard Bartlett, Transcript of Evidence, 21/5/98, 5 & 13.

However, an amazing focus is placed on it by the non-Aboriginal community. I find it astonishing. It was new to me when I came to Australia. I acted a lot for Aboriginal groups and also resource companies in Canada, but I was not dealing with anthropologists very often; they were quite rare in my experience.”⁵²

- 13.3 Professor Bartlett’s view is reinforced by Justice Toohey in *Mabo No 2*, who referred to Professor Bartlett in the course of judgment. Justice Toohey found that it was presence amounting to occupancy which was the foundation of title rather than merely traditions and customs.

“It is the fact of the presence of indigenous inhabitants on acquired land which precludes proprietary title in the Crown and which excites the need for protection of rights. Presence would be insufficient to establish title if it was coincidental only or truly random, having no connection with or meaning in relation to a society’s economic, cultural or religious life.”⁵³

Justice Toohey further warned of the need to separate any inquiry into the existence of native title, a threshold question, and the content or substance of the native title, which was irrelevant in determining whether native title existed.

14 Does common law native title include mineral rights?

- 14.1 Another area of uncertainty in relation to the content of native title is whether native title includes surface and subsurface mineral rights. Some people see an inconsistency between native title claims which include claims to such rights and the likelihood that Aboriginal groups conducted very little mining activity prior to non-indigenous settlement of Australia.
- 14.2 In relation to other titles s. 8A of *WA Mining Act* provides that, in most cases, the property in all minerals is vested in the Crown, as are royalties in relation to land not alienated in fee simple before 1 January 1899. Land in fee simple granted before that time includes rights to minerals on that land - about 1% of all WA land holdings (14.28% of all freehold land; the total freehold estate is 7% of the State). Royalties on all minerals which are sold or used for commercial or industrial purposes are payable to the Crown.
- 14.3 This section, along with provisions in the *NTA* which prevent the NNTT making an arbitral determination of compensation according to royalty payments by a miner, have led many to say that native title does not include mineral rights. Mining interests

⁵² Ibid, 6.

⁵³ *Mabo No 2*, Op Cit, 486.

expressed themselves in the strongest possible terms in support of Federal Government amendments to allow States to confirm this position.

“Crown ownership of minerals is of fundamental importance to Australia’s economic growth and the distribution of wealth amongst the community. Western Australia, as with other States (with the possible exception of NSW), vests ownership of its minerals in the Crown. However, native title determination applications commonly include claims relating to ownership, use, enjoyment and management of natural resources including mineral resources. As a result claimants are seeking to make minerals a part of negotiations in the right to negotiate process. The Western Australian Chamber notes that this is philosophically inconsistent with s. 38 of Native Title Act which prohibits the NNTT making a determination that includes profit sharing conditions in relation to the grantee parties activities. More importantly, it is inconsistent with the sovereign right of the Crown to administer and control its natural resources.”⁵⁴

14.4 Said AMEC:

“Crown ownership of minerals is therefore a nonsense where a minor part of the community can frustrate the many in obtaining the benefit from the communal resource, to satisfy their own minority interests.”⁵⁵

14.5 In passing, it is worth noting that the United States Supreme Court has long recognised that native title includes minerals and forestry and the only limitation that has been recognised is the right to sell. The Canadian Supreme Court has also recently found that indigenous native title may include mineral rights⁵⁶, although any such right is subject to an inherent limit that it cannot be used in a manner which is irreconcilable with the nature of the attachment to land. Said Mr George Savell of AMEC:

“It is fine for someone to make a native title claim based on a need to conduct ceremonies, to take sustenance and to take materials. However, if they wish to go further than that - for example, on the question of ochre- nothing will stop them, in most cases, from taking out a mining tenement or acting under other legislation to give them a better title than native title.”⁵⁷

⁵⁴ Chamber of Minerals and Energy, Written Submission, 21.

⁵⁵ AMEC, Written Submission, 22.

⁵⁶ *Delgamuukw*, Op Cit.

⁵⁷ Mr George Savell, Transcript of Evidence, Op Cit, 6.

- 14.6 On the basis of this decision and the Western Australian *Mining Act*, which allows for private mineral rights, Professor Bartlett was of the opinion that there are strong grounds for arguing that there has not been a clear and plain intention to extinguish native title rights to minerals.

*“One might well conclude that most petroleum legislation and many pieces of mining legislation in Australia have extinguished native title rights to minerals, although not all rights. It is my argument that in fact the Mining Act of WA has not done that. That is because private rights to own minerals were not taken away. If that had been done it would have made a major difference. Fifteen per cent of freehold land includes mineral rights in Western Australia.”*⁵⁸

15 Committee discussion

- 15.1 If it is accepted that native title is more than just a bundle of definable rights it requires an examination of non-indigenous title to ascertain what the inter-relationship is between the two. In particular, it is necessary to determine what the non-indigenous title holder is entitled to do in any given instance. Given that native title will be exercised subject to any valid State and Commonwealth laws and validly granted private interests, where the two conflict or produce incompatible outcomes then the rights of the native title holder must give way to the rights of holder of a non-indigenous title.
- 15.2 However, this approach is still likely to result in much confusion and uncertainty given the current vagueness about what interests extinguish or suppress native title. 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. The Committee recommends against any moves to codify native title rights. It is likely that any attempt will be challenged in Court and prolong current uncertainty. The only alternative to either legislative codification or agreements is judicial decision. Along with being a time-consuming and expensive process, it is unlikely that a decision recognising rights will establish a framework of laws and private interests within which these rights can be exercised and will require further negotiation between parties to do so. Such a framework needs to be achieved on the basis of agreement between the parties.
- 15.3 Such an agreement has already been achieved in the Cape York Aboriginal community of Hopevale where the Queensland Government negotiated with the community to recognise their title. The Government agreed to recognise native title subject to valid State and Commonwealth laws, the rights and functions of the local Council, a number of mining leases and agreements between Telstra and the regional

⁵⁸ Professor Richard Bartlett, Transcript of Evidence, Op Cit, 13.

electricity corporation. The agreement took approximately 12 months to negotiate. Native title was agreed to include:

- maintaining and using native title land;
- conservation of natural resources;
- use of the natural resources of the land for social, cultural, economic religious, spiritual, customary and traditional purposes;
- determining access rights in relation to entry of the land; and
- exercising and carrying out economic life.

15.4 Resolution of co-existence issues may also be assisted by native title *applicants* being required at an early stage to identify the nature and source of their claim and therefore, what their claimed native title includes. So far, most native title applicants have phrased their claims merely in terms of “exclusive use and possession”. While a number of witnesses, including Tribunal President Justice Robert French, sought to assure the Committee that this phrase was a legal expression of native title claimants traditional connection to the land rather than a claim for factual exclusive use and occupations, the effect of these words has been to cause considerable anguish and distress amongst non-indigenous property holders. Said Mr Michael Rynne:

“Imagine sitting in your room having breakfast, and you open your mail and someone has written to you and said: “Excuse us, but we want to exclusively occupy your pastoral lease.”⁵⁹

15.5 The Tribunal has sought to assist claimants to define and narrow these claims. However, the Committee sees merit in requiring claimants to define at an early stage the activities they seek to do pursuant to their native title. The added benefit is that some parties may well be more predisposed to negotiate if they are not under the misapprehension that they could lose their land.

Conclusions and recommendations

1. The Committee recognises the importance of land in Aboriginal culture and traditions and suggests that without such recognition, the issues of social alienation and self-sufficiency cannot be addressed.

2. That the State not seek to codify native title rights and interests.

3. 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.

59

Mr Michael Rynne, Transcript of Evidence, 30/4/98, 5.

CHAPTER 3

EXTINGUISHMENT OF NATIVE TITLE

1 Introduction

- 1.1 Along with uncertainty about the content of native title, another key concern of many stakeholders is being able to determine where in Australia native title may still exist. Figures have been quoted recently suggesting that up to 78% of the Australian land mass being claimable as a result of the High Court's ruling in *Wik*⁶⁰.

2 What the High Court said

- 2.1 While native title is not dependent upon Crown grant for its recognition, the High Court in *Mabo No 2* held that it was capable of being extinguished by the Crown without compensation. The Court held extinguishment could occur through an exercise of the sovereign power which displayed a clear and plain intention to extinguish native title. In addition, native title had to be recognised subject to all valid grants of interest in land. The majority of the High Court found that native title would also be extinguished where the traditional title holders have lost their connection with the land. However, after 1975, extinguishment of native title by inconsistent grant of land was subject to s. 10 of Federal *Racial Discrimination Act 1975*. As a result the Federal Government moved to validate grants of land by enacting the *NTA*.
- 2.2 Following the recent decision by the High Court in *Fejo v Northern Territory*⁶¹, it is now clear that the private grant of freehold extinguishes native title permanently.
- 2.3 The High Court in *Wik* was asked to rule on whether the grant of a pastoral lease was inconsistent with the continued existence of native title and had thereby extinguished native title. The decisions of the majority judges were based upon a strict view of the circumstances in which native title could be extinguished. This required a clear and plain parliamentary intention to do so.

“There is a strong presumption that a statute is not intended to extinguish native title. The intention to extinguish native title must be clear and plain, either by express provision of the statute or by necessary implication. General

⁶⁰ “Lighting the Wik”, *The Australian*, 22/11/97, 23 quoting the Prime Minister Mr John Howard.

⁶¹ *Fejo v Northern Territory*, High Court of Australia, (1998) HCA 58.

provisions of an Act are construed as extinguishing native title if they are not susceptible to some other construction.”⁶²

- 2.4 In determining inconsistency, it was necessary to compare the legal nature and incidents of rights granted by the Crown with the native title rights. If the two sets of rights were unable, or could not possibly, co-exist then extinguishment was affected. If the two could co-exist, no question of implicit extinguishment arose⁶³. Native title rights which are not extinguished will survive alongside the grantee’s rights. Justices Toohey and Gummow determined that the test was not one of “exclusive possession” but rather whether the rights arising from a grant of land, otherwise thought to be exclusive occupation of land, were necessarily inconsistent with native title rights. It was not determined by examining the actual conduct of the pastoralist on the lease.
- 2.5 Although the High Court’s ruling was specific to a pastoral lease in Cape York, it is very likely that native title exists on pastoral leases in Western Australia. On the construction of rights granted by the *Land Act 1993 (WA)* to pastoral lease holders, it is unlikely that pastoral leases extinguish native title in WA. Even before the *Wik* decision, it was argued that s. 106 of the *Land Act* - declaring that Aboriginal people may at all times enter upon any unenclosed and unimproved parts of the land the subject of a pastoral lease - could well prevent any conclusion that there was a legislative intention to extinguish native title on pastoral leases⁶⁴.

3 Validation of ‘intermediate period acts’ in Western Australia

- 3.1 Following the decision in *WA v The Commonwealth*⁶⁵, uncertainty as to the existence of native title on pastoral leases in Western Australia saw most mining tenement applications over pastoral leases in the State being put through the Future Act regime. (Under the unamended *NTA* all Future Acts which could effect or impair native title must either comply with the freehold test or in relation to certain acts attract the right to negotiate if there is an objection. See Chapter 5 for a fuller explanation).
- 3.2 The WA Government’s policy was noted by the NNTT in *Western Australia v Thomas*:

“The [WA] government party has decided to follow the [right to negotiate] procedures of the Act in order to ensure that grants of its mining tenements are valid. As a matter of policy it has decided to do so in all cases where it

⁶² *Wik*, Op Cit, 224, per Kirby J.

⁶³ *Ibid*, 246-247, per Gummow J.

⁶⁴ P Van Hattem “The Extinguishment of Native Title”, in R Bartlett (ed) “Resource Development and Aboriginal Land Rights in Western Australia”, 1992.

⁶⁵ Op Cit.

*considers that native title might exist, including where the proposed tenement is over pastoral lease land...The [WA] government has done this despite being of the view that pastoral leases...extinguished native title. Other State governments in Australia have taken a different position...It is not for the Tribunal to comment on the correctness or otherwise of those different approaches. If the High Court finds that pastoral leases do extinguish native title, then the Western Australian Government will have put itself and the Tribunal to considerable administrative inconvenience and cost to no effect. On the other hand if the High Court finds that pastoral leases do not extinguish native title, the Western Australian government's practice will have been well founded."*⁶⁶

- 3.3 Given the result of the *Wik* decision, this course has proved to be a prudent one given that in all other States many grants of title over pastoral leases could be invalid. Amendments to the *NTA* enable States to validate grants of tenure made between 1 January 1994 and 23 December 1996 in relation to land where native title existed ("intermediate period acts"). As discussed, the pressure for these amendments came about because State Governments did not follow the Future Act procedure of the *NTA* in relation to grants of interest over non-exclusive possession tenures (for example, pastoral leases), where it was considered that native title had been completely extinguished. Following *Wik*, it became evident that this may not be the case. Without further action, these grants could be invalid.
- 3.4 As discussed above, in Western Australia, these amendments are of particular relevance to interests granted pursuant to the *Land (Traditional Usages and Titles) Act 1993* between 1 January 1994 and 16 March 1995 (as previously noted, the State Government conformed with the requirements of the Future Act Regime in relation to grants over pastoral leases after that date). In this period 4934 mining and 4494 land interests, including creation and amendment of reserves and disposal, dedication and resumption of roads, were finalised⁶⁷. The State Government contends it is not possible to differentiate between valid and invalid grants during this period because the Courts would have to determine if native title rights and interests existed and if they were affected by the grant. The Committee notes that the main effect of the proposed legislation will be to validate grants of interest granted pursuant to an Act declared by the High Court to be inoperative because it contravened the *Racial Discrimination Act 1975*.
- 3.5 Despite its substantial compliance with the *NTA* regime after 16 March 1995, the State Government also proposes to validate all intermediate period acts between 1 January 1994 and 23 December 1996, in case there are other grants which would be invalid because of non-compliance with the *NTA*. There are seven projects, involving

⁶⁶ *Western Australia v Thomas*, NNTT W96/3 and WF 96/12, 17 July 1996, 49.

⁶⁷ Information provided by the Native Title Unit in the Department of Premier and Cabinet.

211 titles, after 16 March 1995 where the *NTA* was not complied with⁶⁸. The Government is unable to say whether native title exists (and will therefore be extinguished) in these areas and hence whether the tenures are invalid.

- 3.6 Mr Greg McIntyre, a Perth Barrister, highlighted to the Committee that States which had ignored the requirements of the *NTA* were being placed in the same situation as Western Australia, which had substantially complied with the Act after 16 March 1995.

*“The Western Australian Government’s position is a good illustration of why it was an unfair process. After the native title case, it at least was prepared to accept the regime and engage in the Future Acts process. It has done so reasonably diligently since 1995. We say that is an illustration of how all other States could have done that. They chose not to and continued to issue mining and various other leases. When the High Court made the decision they were hoping it would not make, they complained that they must have the leases validated. Native title parties say that that is an unfair and inappropriate way to deal with the matter; if they made a mistake they should negotiate an arrangement rather than say that they will wipe out all rights in any event because they did not want Aboriginal people to have them.”*⁶⁹

4 Suppression or extinguishment?

- 4.1 An area of uncertainty arising out of the *Wik* decision is whether native title rights inconsistent with pastoral lease rights (and rights pursuant to other non-exclusive titles) are permanently extinguished or merely “suppressed” or “given-way” during the currency of the lease. The judges in *Wik* referred to the issue of native title “yielding” to pastoral lease rights. And, immediately following the decision of *Wik*, the Federal Attorney-General issued advice to the effect that pastoral leases did not extinguish inconsistent native title rights:

*“...In such circumstances, the native title rights must yield...in the sense of give way to the exercise of the grantee’s rights. However, it may not be appropriate to speak in terms of the extinguishment or impairment of native title rights in such cases. As the High Court appears to contemplate concurrent and potentially overlapping rights in relation to an area of land, the issue at this level may be simply one of **priority** between such rights as opposed to their extinguishment or impairment. Any native title rights which survive the grant of the lease must **give way** to the extent that they are inconsistent with the exercise of the grantee’s rights, but not so as to affect the existence of native title rights for all time (ie their extinguishment). It may mean no more than native title rights being **unenforceable** while inconsistent*

⁶⁸ Ibid.

⁶⁹ Mr Greg McIntyre, Transcript of Evidence, 5/8/98, 27

*rights are being excised, with the possibility that they can once again be enforced if the inconsistency is removed.*⁷⁰

4.2 This advice was seized on by opponents of proposed amendments to the *NTA* which would have seen inconsistent native title rights permanently extinguished on pastoral leases. As a result, these amendments were dropped in relation to pastoral leases. The amended *NTA* now provides that native title rights and interests inconsistent with pastoral lease rights will be suspended and activities giving effect to pastoral lease rights that are not inconsistent with native title rights and interests will *prevail* over, but not extinguish, those native title rights and interests. However, if it is found by the Courts that pastoral rights do *in fact* extinguish inconsistent native title rights then that extinguishment will be confirmed.

5 Confirmation of past extinguishment of native title by ‘previous exclusive possession acts’

5.1 In an attempt to provide some certainty in relation to grants of land which have extinguished native title, the *Native Title Amendment Act 1998 (NTAA)* itemises “previous exclusive possession acts” which the *NTAA* says have permanently extinguished native title at common law. However, the inclusion of these interests in *NTAA* will not itself confirm the extinguishment of native title, as the Commonwealth does not have the power to make such laws. Rather, it will enable the Western Australian Parliament to pass legislation confirming such extinguishment pursuant to its power to make laws in respect of land administration. Itemised tenures include:

- a perpetual lease. These tenures were granted to returned servicemen after World War II;
- residential leases;
- commercial leases;
- exclusive agricultural or pastoral leases;
- freehold;
- leases under s. 41a of the *Land Act 1898* for the purposes of “artificial limb factory...bowling green...dairying...golf links...market garden...pig and poultry farm...tropical agriculture; vegetable growing”;
- a lease under s. 152 of the *Land Act 1989* for the purposes of “artificial lake...fish canning and horse paddock...cultivation of tobacco...gardening...growing cotton...yard for horses”;
- public works;
- community purpose leases;
- certain leases granted pursuant to nominated State/Development Agreements;
- conditional purchase leases; and
- a lease under s. 116 of the *Land Act 1933* for the purposes of “agriculture...crocodile farm...cropping and grazing...hydroponic vegetable

70

Attorney-General’s Department, “Legal Implications of the High Court Decision in *The Wik Peoples v Queensland*: Current Advice”, 23/1/97, 7-8

garden...land base associated with pearl oyster hatchery...land -based pearl farming...land-based aquaculture...land-based for fishing industry...non-irrigated agriculture...parking and storage...stockpiling of river sand...tourist railway”.

Due to uncertainty about Crown to Crown grants of land all such grants will be confirmed to extinguish native title only if that is what the common law provides. Nevertheless, these grants are all valid. The State Government estimated that the scheduled interests constituted less than 0.6% of the State.

- 5.2 It is argued that without such a list, resolution of what constitutes extinguishment would be a lengthy and expensive process if conducted on a grant-by-grant, state-by-state basis. This would give rise to massive uncertainty in land administration in the interim. Federal Attorney-General Hon Darryl Williams stated in the course of the Second Reading Speech of the *Native Title Amendment Bill 1997 (NTAB)*:

*“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 possession acts” have extinguished native title.”*⁷¹

- 5.3 The Chamber of Minerals and Energy also highlighted statements by the former Prime Minister Paul Keating that the Indigenous Land Corporation was established to assist those Aboriginal people whose native title had been extinguished⁷². They argued that it would be unfair to penalise people who had acted on the basis of these statements.

- 5.4 In their submission to the Committee, the Ministry of Premier and Cabinet argued that the schedule minimised the possibility of arguments over extinguishment and any consequent uncertainty. In the last three years, this uncertainty had resulted in valid titles, not previously thought claimable, being claimed. These had included grants such as freehold, exclusive leases and public works. As a consequence, there was a great deal of concern and uncertainty for landowners about their ability to develop or sell their properties and also in regard to land values.

*“The current Act outlines the effect on Native Title of those land titles which were invalidly granted and have been validated but remains silent on the effect of the same types of grants which have always been valid. This creates considerable uncertainty about which titles are validated and those which are invalid, making valid titles susceptible to claims creating confusion in regard of the Future Act provisions.”*⁷³

⁷¹ Native Title Amendment Bill 1997, Second Reading Speech, 8.

⁷² Chamber of Minerals and Energy, *Written Submission*, 18.

⁷³ Department of Premier and Cabinet, *Written Submission*, 4-5.

- 5.5 It is worth noting that even if native title is found to exist on land where it was previously considered to be extinguished that native title would not displace validly granted interests in the land and would be subject to those interests. The uncertainty then, is not about whether native title can displace other property rights but how they inter-relate.
- 5.6 Opponents of this amendment argue that the list goes further than confirming extinguishment but also extends to extinguish native title on those titles and seize on a statement by Deputy Prime Minister Hon Tim Fischer that the amended *NTA* provides for “*bucketloads of extinguishment*”. The Aboriginal Legal Service of Western Australia submitted to the Committee that on some types of land included in the list native title could still exist. These included community purpose leases granted to an Aboriginal group or community, government to government grants of freehold title, some public works, and stock routes.

“The Schedule attempts to determine by legislation the common law position in respect of extinguishment of native title by various forms of tenure. This is an inappropriate interference in the common law.”⁷⁴

- 5.7 Mr Greg McIntyre said he could not identify a lease in Western Australia, other than non-exclusive pastoral leases, which would not extinguish native title under the schedule⁷⁵.
- 5.8 Father Frank Brennan and the Australian Law Reform Commission (ALRC) also voiced their concern to the National Joint Committee on Native Title that the confirmation, in so far as it went further than the common law, overrode the Future Act regime of the *NTA*, was racially-discriminatory and rolled back the *Racial Discrimination Act 1975*. In particular, Father Brennan was of the opinion that if native title could exist on a pastoral lease it was even more likely to remain on stock routes.

6 Compensation for extinguishment

- 6.1 Compensation for extinguishment or impairment of native title is to be determined by the Federal Court, although an application for compensation may be the subject of mediation. The State Government was unable to say how long it would take for an application for compensation to be determined. Aboriginal representatives were concerned that establishing an entitlement to compensation would be a lengthy process, which could be more costly than the compensation eventually awarded.

⁷⁴ ATSIK *Wik* Taskforce, “Native Title Amendment Bill: Issues for Indigenous Peoples”, October 1997, 17.

⁷⁵ Mr Greg McIntyre, Transcript of Evidence, 6/8/98, 27.

- 6.2 While the Commonwealth has committed itself to picking up 75% of compensation, the State will still be liable for 25% of compensation. Mr John Clarke conceded in his evidence to the Committee that the State Government would have to exercise extreme caution in compulsorily acquiring or extinguishing native title so as not to expose the State to potentially large compensation claims⁷⁶.
- 6.3 Part of the Federal Government's amendments include provision to limit compensation for native title to the value of the equivalent freehold land. However, the Australian Law Reform Commission (ALRC) raised the prospect that the guarantee in the Commonwealth Constitution that all property be acquired on just terms may override this amendment. The ALRC highlighted the decision by the NNTT in *Waljen*⁷⁷ that rejected submissions from the WA Government that the maximum amount that could be payable was capped at the freehold value of the land. Rather, the NNTT held, any calculation had to take into account the spiritual and cultural aspects of native title and could be likened more to an award of damages in personal injuries litigation⁷⁸.

*"In our opinion, the plain meaning of the words of s.123 of the Mining Act, whether read in the context of that Act or within the context of the Native Title Act, leads to the conclusion that native title holders are to be put in a position of substantive equality with the owners of land when their entitlement to compensation is being assessed. It follows that, if owners of ordinary title are entitled to compensation for 'all loss and damage' suffered or likely to be suffered by them resulting or arising from the actual mining, then native title holders are entitled to no less, even if the nature of their loss or damage is different from that of a non-Aboriginal land owner. An analogy can be drawn with personal injuries litigation where superior courts have held that Aboriginal people can be compensated for such things as an inability to complete initiation rights, *Dixon v Davies* (1982) 17 NTR 31 at 34-35. inability to gain and enjoy full tribal rights, *Dixon v Davies* at 34, *Napaluma v Baker* (1982) 29 SASR 192 at 194. loss of ceremonial function, *Napaluma v Baker* at 194, *Weston v Woodroffe* (1985) 36 NTR 34 at 45. inability to partake in matters of spiritual and tribal significance *Napaluma v Baker* at 194, *Dixon v Davies* at 35. and loss of social standing in the tribal or clan group. *Dixon v Davies* at 34."*

"Although this is a relatively novel aspect of the emerging law of native title, it will have to be addressed by tribunals and courts when ruling on applications for compensation under the relevant sections of the Act (including ss.61 and 161, 74 and 51). Decisions on those applications will

⁷⁶ John Clarke, Transcript of Evidence, 31/10/97, 13.

⁷⁷ *State of Western Australia v Roberta Vera Thomas & Ors ('Waljen') and Aurora Gold (WA) Ltd (NNTT, 17/7/96, WF 96/3).*

⁷⁸ ALRC Written Submission, October, 11-12.

constitute a growing body of law and practice which will develop just as the law has done in relation to such things as damages for pain and suffering in personal injuries litigation. The few reported decisions on awards of damages for personal injuries where particular Aboriginal cultural factors were involved show something of the reasoning to be applied.”⁷⁹

- 6.4 The ALRC expressed concerns that should it subsequently be found that a grant of land did not extinguish native title then this would give rise to a significant claim of compensation against the State under the Commonwealth Constitution. It stated that the Commonwealth had seriously underestimated the cost of compensation. In the case of Crescent Head in New South Wales, the Government had paid 150% of the value of freehold land to compulsorily acquire native title rights.

“The permanent extinguishment of inconsistent native title rights, rather than their suppression during the life of the lease, may be influential in determining the quantum of compensation; lessees benefiting significantly at taxpayers expense instead of benefiting Consolidated Revenue by paying for their improved tenure.

The Commission considers that the compensation implications of the Bill are potentially so substantial that the Government ought to think very carefully before making such a large scale commitment of taxpayers funds to the extinguishment of the property and cultural rights of indigenous Australians.”⁸⁰

7 Committee discussion

- 7.1 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.
- 7.2 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. his caution should also be equally applied in the validation of ‘intermediate period acts’.

⁷⁹ Waljen, Op Cit.

⁸⁰ ALRC, Written Submission, 12-13.

- 7.3 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.
- 7.4 It should also be noted that, under the old and amended *NTA*, where there is particular concern about the existence of native title on their land, there is provision to enable private land-holders to make what is known as non-claimant applications to determine the status of native title on land. If there is no objection to the application then, under the amended *NTA*, native title will be taken to have been extinguished on that piece of land. Should native title subsequently be found to have existed, then the Government's compensation burden will be limited to the specific area of land.

Conclusions and recommendations

4. The State re-assure all landholders that all validly granted interests will not be impaired by native title.

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.

Chapter 4

PHYSICAL CONNECTION AND NATIVE TITLE

1 Introduction

- 1.1 The Court in *Mabo No 2* ruled that claimants must demonstrate a continuing, substantial connection to the land they are claiming. However, there was some confusion about whether proof of common law native title requires a claimant to show that they have a continuing physical connection to the claimed land or requires only that claimants show a continuing spiritual connection to the land. The Committee heard numerous complaints about native title claims being made by people who did not live in the areas they were claiming. In Kalgoorlie, the Committee heard that claims in the Goldfields area had been made by individuals who had allegedly lived their whole life in Perth.
- 1.2 Before entering into negotiations with claimants for the recognition of native title the State government has required that the claimants demonstrate some ongoing “traditional” connection with the land claimed⁸¹. Two of the criteria include requirements of ongoing physical contact (Criterion 4 includes a requirement that there be “Evidence of continuing contact with traditional land [sovereignty], including contemporary contact”; and Criterion 8 includes that the “Claimants are living on the land”). Criteria also include that claimed native title involve “use and occupancy”.
- 1.3 Amendments to the *NTA* require one person of the claimant group to have or have had a “traditional physical connection” with the land claimed before they can be registered and access the right to negotiate under the *NTA*. Where this cannot be shown then a claimant group may apply to the Federal Court and be registered if they can convince the Court that *prima facie* the claimants can establish their native title and can demonstrate that the parents of at least one member of the claim group can establish they had physical access during their lifetime that would have continued but for being locked out or removed by action of government. However, even if they cannot pass a physical connection test under the amended *NTA*, the claim may still proceed through the Federal Court - the registration test is only a “gateway” to the right to negotiate.
- 1.4 It may be the case that native title can be established if, in the future, a Court finds that a physical connection is not necessary.

⁸¹ A list of these criteria can be found at Appendix 5.

- 1.5 These amendments will particularly affect those groups of Aboriginal people who have been forcibly removed from their traditional lands. It also may affect Aboriginal people who have been excluded, “locked out”, from pastoral leases, contrary to s. 106 of the *Land Act 1933*. For instance, in the Kimberley, the Committee took evidence in which the situation of the Wangkatjungka community was outlined. This community, located in the middle of a pastoral lease, is said to have been effectively locked out of “their country” for long periods of time by the owner of that pastoral lease; this was also interchangeably described as the community being “locked-in” to their small land excision⁸².
- 1.6 Indigenous representatives maintain that under their traditional laws and customs, which determine the content of their native title, physical occupation of the land is not required and a mere spiritual connection is all that is required. They further objected to the package of amendments on the grounds that they would give only a limited period within which to gain an exemption order from the Federal Court and that the amendments effectively required Aboriginal people who had been forced off their land to prove the actions of the people who had forced them off their land.

2 Physical connection is required

- 2.1 Mr George Savell of AMEC said a physical connection was a requirement of a valid claim for native title. He said the issue of a non-physical spiritual connection was a “red herring”, as this was a matter properly for the *Aboriginal Heritage Act (WA) 1972*.

“I do not think the Aboriginal claim for spiritual association is all that much different from a lot of other long standing landholders...I have a long association with the pastoral community. Many pastoralists have a strong association with the land, but their pastoral lease does not recognise that. That is a red herring. I am not denying that Aboriginal people may have a spiritual association with the land. However, that association is served if they have access to the land, and that is what is proposed in the amendments. That is backed up by the Aboriginal Heritage Act which allows them special arrangements for sites of significance to them.”⁸³

- 2.2 In *Coe v The Commonwealth*⁸⁴, Mason CJ supported the view that physical occupation is required. He stated:

82 In particular, the Committee heard from the Marraworraworra Resource Agency in Fitzroy Crossing in relation to this matter.

83 Mr George Savell, Transcript of Evidence, Op Cit, 7.

84 *Coe v Commonwealth* (1993) 118 ALR 193.

*“[If a plaintiff asserts native title to land] the plaintiff must establish the conditions according to which native title subsists. Those conditions include (a) that the title has not been extinguished by inconsistent Crown grant and (b) that it has not been extinguished by the Aboriginal occupiers ceasing to have a requisite physical connection with the land”.*⁸⁵

3 Physical connection is not required

- 3.1 In other cases, judges have stated that native title, having its foundation in the traditional laws and customs of a group, requires no more than that those traditional laws and customs be maintained. Justice Brennan in *Mabo No 2* noted in the course of his judgment that:

*“Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group whereby their traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence”*⁸⁶

- 3.2 These statements would appear to suggest that physical connection is not required; rather continued observation of customs based on traditions is required. Similarly, in *Ejai v Commonwealth*⁸⁷, Owen J noted:

*“To establish native title at common law, the claimant must show that its traditional connection with the land has been substantially maintained over the period. This does not mean a strict continuity of actual use and possession. A degree of change, evolution and flexibility in the traditional laws and customs may not be fatal to the claim. The claimant must continue to have a special relationship with the land but it may contemplate modern modes of existence, usages, exploitation of resources and the like.”*⁸⁸

- 3.3 As a result of the uncertainty, claims have been accepted by the NNTT where there is no evidence of continuing physical occupation of the land. In his evidence to the Committee, NNTT President Justice French refused to be drawn on whether, in law, physical occupation was required:

“The Mabo decision referred to physical connection. Of course, that case was dealing with an island community, and there was no doubt that the people

⁸⁵ *Coe v Commonwealth* (1993) 118 ALR 193, 206.

⁸⁶ *Mabo*, Op Cit, 59-60.

⁸⁷ *Ejai v Commonwealth*, Supreme Court of Western Australia, No 1744 of 1993.

⁸⁸ *Ibid.*

were living there and that the community in question had a physical connection. Therefore, the question of physical connection in the Mabo case was not really debated; it was not a live issue. That left open the question: Must there be a physical connection in order to make out native title at common law? Indigenous interests will say that the essence of the connection is spiritual and cultural, and if they have been removed from the land for some reason but have maintained their cultural connection with it, their stories about it and so forth, their native title remains. No court has answered as yet."⁸⁹

4 What level of physical connection is required?

4.1 Even if physical connection is in fact required by the common law, the question still remains what degree of physical connection is required - physical occupation, proximity to the area, traversing the area or just occasional visits to the area? For example, native title could be preserved by occasional visits to a traditional area by otherwise urbanised claimants, as is asserted by claims over area in and around Perth, or title could be preserved by annual walkabouts through traditional lands by Aboriginal persons who were engaged for the remaining ten or eleven months of the year on cattle stations. It is entirely possible that intellectual cultural or spiritual association with land could suffice to preserve some native title rights and interests for substantial periods of non-contact. However, it is not clear what period of "non-use" of land may elapse before it may be said that the tide of history has washed away any real prospect of traditional law or custom leaving intact entitlement to land.

4.2 Again Australian courts may choose to turn to Canadian decisions which have found that "*one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed*"⁹⁰. Said Lamer CJ in *Delgamuukw*⁹¹:

*"Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or exploiting its resources."*⁹²

The Court also ruled in *Delgamuukw* that it was not necessary that a claimant group be able to demonstrate an "unbroken chain of continuity".

⁸⁹ Justice French, Transcript of Evidence, Op Cit, 19.

⁹⁰ B Slattery, "Understanding Aboriginal Rights", 1998, 75.

⁹¹ Op Cit.

⁹² *Delgamuukw*, Op Cit.

“The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognise aboriginal title. To impose the requirement of continuity too strictly would risk...perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonisers who failed to respect “aboriginal rights to land.”⁹³

5 Committee Discussion

- 5.1 The Committee notes that no Court has determined whether a physical connection is a pre-requisite for a successful native title claim or what level of connection is required. If Parliament legislates to demand that a physical connection be shown before registering a claim there is a likelihood of challenge in the Court. In relation to the negotiation of claims, the Government’s approach should be determined in accordance with the extent of the interests claimed and the factual support for the interests claimed. For example, a person seeking ceremonial rights in relation to land may be able to show a continuing ceremonial attachment to that land or customary knowledge of the songs or stories that relate to that land.

Conclusions and recommendations

7. Claimants not be required to demonstrate occupancy or physical connection to land claimed before commencing negotiations for a recognition of native title providing they can otherwise show continuing traditional affiliation to that land.

93

Ibid.

CHAPTER 5

THE NATIONAL NATIVE TITLE TRIBUNAL

1 Introduction

1.1 The *NTA* provides for the **recognition** and **protection** of native title to the extent recognised by the common law of Australia. The *NTA* does not create native title rights nor as the body the Act establishes, does the NNTT have the power to determine whether native title exists or not. Given the many uncertainties about the status of native title, as highlighted in the preceding sections, the Act sets up a process to allow Aboriginal and Torres Strait Islander people to come forward to have their common law native title rights recognised as an alternative to lengthy and expensive litigation. In summary, the Act:

- provides for the validation of past acts invalidated after 1975 due to the operation of the *RDA*;
- establishes ways in which future dealings (“Future Acts”) affecting native title may proceed and native title may be protected - the Future Act regime; and
- establishes a mechanism for determining claims to native title and compensation for acts of extinguishment or impairment of native title rights.

1.2 To assist in the recognition and protection of native title, the NNTT was created by the *NTA* and is empowered to:

- assist native title applicants, and others whose legal rights and interests may be affected by the recognition of native title, to reach agreements about how all parties’ rights may co-exist; and
- make administrative arbitral decisions about whether a proposed Future Act may proceed if there is no agreement between interested parties. Such a decision does not determine whether native title exists in the area in question, but only whether a particular act may proceed.

1.3 In short the NNTT has two distinct areas of operation

- **mediation of native title claims; and**
- **the Future Act regime**

2 The NNTT is not a court

2.1 NNTT President Justice Robert French went to great lengths to point out to the Committee that the NNTT was fundamentally a mediation body, not a court. The

NNTT's core task is to assist in the clarification of the relationship of coexistence between Australian common law native title and all other property interests.

“The core of much of our mediation issues are about the relationship between native title as it is recognised by the common law and other laws - the Commonwealth, State laws and all the private rights given under them that sit on top of the native title.”⁹⁴

2.2 The need for such a mediation body arose from the unpalatability of the alternative: expensive and time-consuming litigation to prove native title on a case by case basis. In the interim of such determinations, it was believed that there was a danger of injunctions being sought to prevent development and mining proceeding, as had occurred in Canada.

“Given the requirements for the proof of native title at common law and the many unanswered questions about its loss or extinguishment, litigation on native title questions was always going to be time consuming and expensive. A process was needed to facilitate recognition of native title by agreement where that is possible. In the meantime, dealings with land were going on apace and there was a need to protect native title rights pending their recognition at common law and when recognised.”⁹⁵

3 Recognition of native title

3.1 As a result of the *NTA*, native title rights may now be recognised in two ways:

3.1.1 *Original Jurisdiction of the High Court*

Under the common law any Aboriginal or Torres Strait Islander can seek a determination and recognition of their native title rights in the High Court. This occurred in the case of the Murray Islands in *Mabo*.

3.1.2 *Determination of native title under the unamended NTA 1993*

Under the unamended *NTA*, a claimant group could lodge an application with the Tribunal, which would be accepted by the Tribunal unless it was of the opinion that:

- **it was frivolous or vexatious; or**
- **that prima facie the claim could not be made out.**

⁹⁴ Justice French, Transcript of Evidence, Op Cit, 3.

⁹⁵ Justice French, “Wik and Beyond - An Overview of the Proposed Amendments to the *Native Title Act 1993*”, 1997, 8.

This report will deal in more detail with how this test has been applied in more detail in Chapter 7.

Upon acceptance of the claim, the Tribunal will attempt to mediate an agreement between the claimant group and parties whose rights are affected by the application. If an agreement is reached the matter is then referred to the Federal Court and a consent determination of native title is made if it is appropriate to do so. This has occurred twice since the passage of the *NTA*: at Crescent Head on the Central Coast of New South Wales and at the Aboriginal community of Hopevale in Far North Queensland.

If agreement is unable to be reached, the Tribunal must refer the application to the Federal Court to decide.

3.2 The effect of the Brandy decision on determinations of native title

3.2.1 The Act originally intended that the Tribunal would have power to inquire into and make determinations of applications which were unopposed or which would lead to an agreement for a determination. However, as a result of the High Court decision in *Brandy v Human Rights and Equal Opportunity Commission*⁹⁶ (*Brandy*), this process has been changed so that all such proposed determinations are referred to the Federal Court, which can inquire into the matter and, if satisfied as to the terms of the agreement, make an Order in those terms.

3.2.2 As a result of the *Brandy*, Tribunal President Justice French recommended amendments to the *NTA* to provide that all applications be commenced in the Federal Court. Applications could be referred to the Tribunal for mediation if determined that mediation was necessary and there was a likelihood of reaching an agreement. Matters could be referred back from mediation to the Court on the application of any party. Decisions about the viability of applications could be made in the context of a Federal Court strike out motion and the standing of persons to be parties would also be a matter for determination by the Court. Justice French's proposals were contained in amendments to the *NTA* and are now part of the Federal legislation. The need for this change was reinforced by the “*..tension between the Tribunal's role as a neutral mediator and its role as a decision maker in relation to the acceptance of applications and of the standing of persons or organisations to be parties to an application*”⁹⁷.

4 The Future Act regime

4.1 The unamended *NTA* provided protection for native title from impairment or extinguishment in a number of ways:

⁹⁶ *Brandy v Human Rights and Equal Opportunity Commission* (1994) 183 CLR 245.

⁹⁷ Justice French “Central Concepts of Native Title”, Papers from An Overview of Native Title, Law Society of Western Australia, 1997.

- 4.1.1 permitting Future Acts which affect native title as long as they were capable of being done in relation to freehold land (otherwise known as the “freehold test”).

Where such an act is proposed to be done on-shore, native title holders attract whatever procedural rights are available to ordinary title holders under the relevant legislation that enables the act to be done. The purpose of this protection is to provide native title holders with the same protection from overriding Crown Grants that is conferred upon freehold title.

Other Future Acts are “impermissible Future Acts” and are invalid. However, Future Acts offshore are all permissible Future Acts; and

- 4.1.2 providing a right to negotiate in relation to certain permissible acts:
- compulsory acquisition of land by the Crown for the purpose of transfer to a third party; and
 - creation, renewal or extension of a right to mine.

- 4.2 Amendments to the *NTA* have changed the structure of the Future Act Regime. Subdivisions B to L of Division 3 of the amended *NTA* deal with categories of Future Acts which are valid even if they do not pass the Freehold Test (Subdivision M of the amended *NTA*). The range of Future Acts attracting the right to negotiate (Subdivision P of Division 3 of the amended *NTA*), has also been narrowed. These changes will be dealt with in more detail in Chapters 6, 8 & 9.

5 Complaints about the Tribunal

- 5.1 The target of much resentment relating to native title has tended to be focussed on the NNTT. This resentment relates to lengthy delays and an absence of firm procedures and time lines. In addition, the fact that only two determinations of native title have come out of the NNTT in five years is produced as further evidence of its failure to resolve native title claims. Ms Jan MacPherson of Western Mining Company (WMC) told the Committee:

*“The Native Title Tribunal has been ineffective, both in mediating settlements and providing directions or sound decisions in relation to objections for the expedited procedures. They have not been timely, nor have they been successful in determining the outcome of matters referred to them under the right to negotiate process.”*⁹⁸

98

Ms Jan MacPherson, WMC, Transcript of Evidence, 31/10/97, 29.

- 5.2 In many cases it is likely that the NNTT is the most visible target for discontent which arises more broadly from the failure of the processes which the *NTA* establishes rather than from the Tribunal itself. It also needs to be pointed out that, given that the *NTA* seeks to establish alternative procedures to litigation based upon mediation and negotiation, the parties themselves must take a share of responsibility for the effective operation of the processes. No amount of coercion can succeed in achieving successful agreement between parties if there is no willingness of parties to reach agreement and ensure workability of that agreement. In such cases the only viable option is for parties to have matters decided in Court.
- 5.3 However, according to some witnesses, the NNTT has been reluctant to provide direction in native title mediation and enforce mediation timetables. As a result claims in mediation have, in the view of these witnesses, drifted aimlessly. WMC representative Ms Jan MacPherson said in many cases an initial meeting between the parties had not occurred for many months after claims had been registered and then not again for up to eight months. During the hiatus period, she said, parties tended to lose interest or the mediation would lose track. In relation to Future Act applications, the State was also tending to stretch out the initial registration period from four to six months and the negotiation period from six to eight months.

“I think I am aware of one instance where it was over 18 months from the time the claim was registered, so you have this hiatus there where things are just simply not happening and then whilst the Act seems to only require the one plenary and if a mediated settlement cannot be reached then or does not look likely then it gets referred to the Federal Court. The National Native Title Tribunal are not making references in the vast majority of application hearings. They are not making references to the Federal Court and the follow up mediations are taking place many, many months down the track.”⁹⁹

- 5.4 While conceding that in hindsight there were some circumstances where it could have referred matters onto the Federal Court more quickly than it had done, the NNTT in its *1998 Interim Report* said there were other matters where the WA Government had sought to refer matters to the Federal Court which have subsequently been positively progressed. It also warned against an analysis of its performance based solely on the number of determinations of native title it had facilitated. Mediation, the report said, was by its nature very slow and painstaking and this often attracted comment that the process was not achieving results as quickly as some might have expected. This criticism also failed to take into consideration that the NNTT, as only a mediation service, could not impose agreement on parties or make determinations, and also that a large number of non-native title resolutions such as mediated agreements in relation to Future Acts, which do not involve formal determinations of native title, had been achieved.

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Ibid, 32.

“To assess the effectiveness of the Tribunal is not a simple task. The Tribunal has previously commented on the difficulty of assessing its effectiveness in its primary function of mediation, when progress remains largely in the hands of the negotiating parties. To assess the effectiveness of the Tribunal solely upon the number of determinations of native title made in the past four years, is to seriously understate the complexity of its task, to dismiss its tangible achievements and to devalue the contribution and commitment of thousands of Australian individuals, companies and communities who have participated, and continue to participate, in the negotiated settlement of native title and other intersecting, coexisting and conflicting rights and interests.”¹⁰⁰

5.5 On the other hand, the NNTT has been the subject of criticism for holding too many meetings. Said Social Justice Commissioner Michael Dodson:

“Many representatives of claimants have complained that the Tribunal organises too many meetings...perhaps the Tribunal is responding to the demands of non-indigenous parties in setting meeting schedules.”¹⁰¹

6 Tribunal’s resources

6.1 In response to questions by the Committee, the NNTT Registrar Christopher Doepel provided the following information about the Tribunal’s resources:

- its budget for the 1997-98 years was \$23.8 million, with an allocation of \$7.9 million to address increased workload and new work arising from amendments to the *NTA*; and
- it has 231 staff nationwide, with 169 being located at the main office in Perth and two in Kalgoorlie.

6.2 When asked whether further resources and staff would progress Future Act applications and claims at a faster rate, Mr Doepel responded that although it would enable the Tribunal to give more attention to some applications, mediation generally progressed only as fast as the parties desired or were able to cope. The overall rate of progress of native title matters also turned to a significant degree on “...*the levels of resources committed to the process by key participants, including state and territory governments, local government, indigenous representative bodies and industry groups*”¹⁰².

¹⁰⁰ NNTT, Interim Report, September 1998, 4.

¹⁰¹ M Dodson, Power and Cultural Differences in Native Title Mediation, ALB, Vol 3, 84, 1996.

¹⁰² Mr Christopher Doepel, Transcript of Evidence, 9/4/98, 26.

7 Tribunal's workload

- 7.1 The NNTT's workload has also been increased by the Federal Court decision of *Western Mining Corporation v Lane*¹⁰³ which held that it was mandatory for the Tribunal to notify a claim to all persons holding proprietary interests in any of the areas covered by the application where the interest is registered in a Register of Interests in relation to land or waters maintained by the Commonwealth, a State or Territory. In some areas under claim there may be hundreds or even thousands of tenement or leaseholders who can reasonably be expected to be adequately notified of a claim.
- 7.2 The Tribunal has begun prioritising claims and devoting more resources to those claims with a chance of success. Tribunal Registrar Christopher Doepel told the Committee:

*"There is no point in our pushing something along if a State Government or a representative body is either not inclined or not in a position to match that, or vice versa. Therefore, there is a gradual shaking out going on at the moment."*¹⁰⁴

8 Allegations of bias

- 8.1 Justice French conceded there was also a tension between the role of the Tribunal as an impartial mediator in native title claims and its role as an administrative body in making decisions whether or not to accept a claim¹⁰⁵. The NNTT also had helped claimants in resolving overlapping claims. Said Mr Donald McGauchie, former National Farmers Federation President:

*"The Tribunal should be abolished, it has been appallingly biased against pastoral leaseholders as it was established to support claimants."*¹⁰⁶

- 8.2 Other causes for allegations of bias may include the Tribunal's work with Aboriginal groups in seeking to resolve overlapping claims and the dual role of the Tribunal in mediating claims and as an arbitral body with the power to authorise Future Acts. Justice French acknowledged the call for a more proactive role by the Tribunal in progressing claims but expressed a note of caution:

¹⁰³ *Western Mining Corporation v Lane*, Federal Court WAG86/96, 19/3/97.

¹⁰⁴ *Ibid.*

¹⁰⁵ Justice French, "Implementing the *Native Title Act* - First Steps, Small Steps", 1994, 76.

¹⁰⁶ *The Countryman*, 18/9/97.

“Experience with mediation to date and feedback from a process evaluation which was commissioned by the Tribunal, indicates support for a directed and proactive approach on its part. There are risks if that approach is pushed too far. The Tribunal may appear to be favouring a particular approach to or resolution of the native title issue. Parties hostile to or suspicious of the process are all too ready to construe such activity on the part of the Tribunal as indicative of a bias in one direction or another. This requires reasonably fine judgement by Members and Case Managers. It must be accepted that there is an irreducible risk that some parties will perceive the Tribunal as biased one way or the other in mediation, whatever its approach.”¹⁰⁷

- 8.3 In a bid to address some of these issues, amendments to the *NTA* adopted recommendations by Justice French that the NNTT be able, during the course of mediation, to refer questions of law or fact to the Federal Court to determine without a full scale trial. This was not possible under the unamended *NTA* until mediation has finished or become impossible. Justice French said this procedure could be used to break the deadlock in mediations where a particular issue was causing a log jam.

9 The proposal to establish a State Native Title Commission

- 9.1 Prior to amendment, under s. 251 of the *NTA*¹⁰⁸ it was possible for a State Native Title Tribunal, which mirrors the NNTT, to be established to take over the functions of the NNTT. Only in South Australia was a State-based arbitral body established to deal with Future Act matters; it was established as part of the SA Environment, Resources and Development Court.
- 9.2 The Western Australian Government is now proposing to establish a State Native Title Commission, along the lines of the Environmental Protection Authority¹⁰⁹. It is proposed that the Commission will administer State procedures alternate to the right to negotiate regime established pursuant to s. 43A of the amended *NTA*. S. 43 of the amended *NTA* allows, similarly subject to a determination of the Federal Minister, for State legislation to replace the Federal right to negotiate provisions of the *NTA* with State right to negotiate provisions.
- 9.3 Pursuant to s. 207A of the amended *NTA* the State Commission will be able to become a recognised State body, following a determination by the Commonwealth Minister. This will enable the Commission to receive (in addition to the Federal Court) applications for determination of native title and also compensation. The functions and powers of the NNTT and the Native Title Registrar, such as the

¹⁰⁷ Justice French, “An Overview of Native Title”, The Law Society of Western Australia, 1997, 17.

¹⁰⁸ This section has been replaced by s. 207A in the amended *NTA*.

¹⁰⁹ Mr John Clarke, Transcript of Evidence, 23/10/98, 14.

- operation of the Registration Test, can be assumed pursuant to a determination made under s. 207B of the *NTA*. This will enable the new Commission to review existing native title claims and deregister claims which do not meet the new registration test.
- 9.4 As noted in the last paragraph, if a State Commission is established, there will be two forums for applications for a determination of native title: either in the Federal Court or in a State equivalent body (such as the proposed WA Native Title Commission). Where native title claims are initially lodged in the Federal Court and referred to the State body for mediation, the progress of mediation will be subject to the oversight of and direction from the Federal Court. In these cases, only the Federal Court will be able to make a determination of native title.
- 9.5 The State Government also proposes that a function of the Commission will be the compilation of a database of information in relation to native title rights and interest - its existence, holders, claimants, and extinguishment. In performing this function the Commission may request any person to provide the Commission with information which is relevant to the compilation and maintenance of this database. This database will be open to members of the public.
- 9.6 Pursuant to ss. 43, 43A, 207A & 207B of the amended *NTA*, the Commission will have to meet certain minimum criteria. The legislation establishing the State Native Title Commission, once passed by the WA Parliament, will then require a determination by the Commonwealth Minister that it complies with these criteria, and the Minister's determination will have to be laid before both Houses of the Commonwealth Parliament, both of which may disallow the determination¹¹⁰. The Commission will be responsible for dealing with the alternative regime to the Federal right to negotiate regime on pastoral leases and towns and cities, the consultation regime for infrastructure grants (which the State gained responsibility for immediately upon amendments to the *NTA* becoming operational on 30 September 1998), compulsory acquisition, and mediation of native title claims.
- 9.7 Mr John Clarke told the Committee that, in relation to the alternative consultation regime for non-exclusive tenure, the Commission would have regard to similar considerations, as the NNTT had under the *NTA*. Mr Clarke admitted that the approval process referred to in 9.6 could be a time-consuming process. Until the State establishes a State body, the NNTT and the Federal right to negotiate procedure will remain in operation in Western Australia in relation to pastoral and other nominated grants of land.
- 9.8 As part of the original *NTA* package in 1993, the then-Federal Government promised to pay 50% of the costs of establishment and operation of State Native Title Tribunals. This will continue to be the case for any State body established under the amended

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Ss 43A(1)(b) & 214 of the *Native Title Act* and s. 46A of the *Acts Interpretation Act 1901*.

NTA, although the details remain subject to negotiations between the State and Federal Governments.

- 9.9 It is estimated that this new State Commission will have up to 40 staff, including one full-time Commissioner and three part-time Commissioners. As of mid-August of 1998, the NNTT estimated that it had nearly 100 staff dedicated almost exclusively to dealing with Western Australian matters, and a further allocation of approximately 60 staff whose work included matters involving WA or support for staff dedicated to WA matters. This means that the State Commission as proposed will be around 75% smaller than the WA component of the NNTT. Mr Clarke said it was hoped that a number of these State Commissioners would be regionally-based. Mr Clarke was unable to say what the cost would be of establishing and operating the new Commission.
- 9.10 Mr Clarke said the creation of the State Commission would facilitate the integration of the administration of native title into the State land administration system and shorten delays in the granting of titles and he promised significant efficiency gains.

“I was around when environmental issues started to emerge as something of significance. We went through a similar process. Now we have environmental processes integrated into other approval processes and the objective would be to achieve a similar outcome with native title.”¹¹¹

- 9.11 Applications to the Commission will run at the same time as the warden is dealing with the *Mining Act 1978* issues or DOLA is dealing with the various administrative land processing. At the moment applications do not commence until these other matters have been completed and this has caused unnecessary delays.
- 9.12 Another benefit of a State Commission would be to remove the inconsistency of the State being both a facilitator of negotiations between native title and grantee parties, and the developer, Mr Clarke said.

“Now the difficulty is that government has often a dual role - and I have tried to highlight that in the submission - in the area of land titles; the government is actually the proponent because it is DOLA that develops the land in regional towns and puts it on the market. There are cases where private sector developers do it but, by and large, it is the government that is proposing the action and will be involved. The government, if you like, there is the developer whereas in the mining area the government is the facilitator because you have got a mining company and you have got a native title party. So there are two roles; sometimes the government is there as a fully fledged developer, in other cases it is simply trying to bring the parties together. The proposal in relation to the state Native Title Commission is aimed at removing

¹¹¹ Mr John Clarke, Transcript of Evidence, 24/10/98, 15.

that blurring of role, so that the commission will be there purely as a facilitator. It will not have the developer role. It will be possible then, where DOLA has a proposal, the DOLA people will be there as the developer; the commission will provide the role of umpire/facilitator and the native title party will be on the other side. So there will be a clearer role for government in that guise to try and facilitate the sort of resolution by way of agreement.”¹¹²

9.13 The State Government proposes that, like the Environmental Protection Authority, the staff and Executive Director of the Commission will be officers of the Public Service in the department principally assisting the Minister in the administration of the Commission.

9.14 Mr Clarke insisted that while the Commission would be a part of the State bureaucracy it would nevertheless be an independent body.

“The commission will be established as an independent body. It will not act as an advocate for government, and it will not represent government in any claims process. It will be an independent mediator. Government will be required to have its own organisational structures to enable it to enter into negotiations with native title claimants, either as a State in dealing with a claim, or as a Government as a proponent that wished to develop land, or whatever. Clear and distinct walls will be built between the tribunal, the commission and those other actions of government.”¹¹³

9.15 The Committee is of the view that it is likely that there will be a considerable challenge maintaining a balance between the integration of the State Native Title Commission into a State bureaucracy and its need to remain independent. Already Aboriginal representatives have expressed suspicion of a state-based body. Father Frank Brennan told the Federal Parliamentary Joint Committee on Native and the Aboriginal and Torres Strait Islander Land Fund that part of the agreement between the Federal Government and Aboriginal representatives at the time of the negotiation of the NTA was a guaranteed access to a national tribunal, supervised by a Federal Judge, in order to ensure that there was transparent and clear dealing in relation to determination of the existence of native title¹¹⁴.

9.16 Justice French also seemed to have this problem in mind when he told the Committee that the prospective body would need to be careful to ensure that it was seen as an impartial independent mediator.

112 Ibid.

113 Mr John Clarke, Transcript of Evidence, 24/10/97, 16.

114 Father Frank Brennan, Hansard, Federal Parliamentary Joint Committee on Native and the Aboriginal and Torres Strait Islander Land Fund, 26/9/97, NT 403.

“If that commission is to be a body which mediates in the mainstream native title process, it will of course be very important that it is seen to be independent, because it will be standing as a mediator between the State and applicants. One of the advantages of the national tribunal is that it is a commonwealth body so it does not belong to any particular State Government; and when we mediate the State is a party, the applicant is a party, and we are in the middle. Therefore, it will be very important for the trust of indigenous people if a state body is created which displaces the national body out of mainstream mediation - I am not talking about the Future Act process, but about mainstream mediation - that it should be a body which has appointments to it and a structure which enables it to win the trust of all the stakeholders.”¹¹⁵

9.17 Justice French was also quoted in *The West Australian* on 3 July 1998 as saying:

“The State Tribunal will have to face the challenge, of course, of establishing trust in dealing between the State, which is its creator, and native title applicants who are negotiating with the State.”

The NNTT has also drawn attention to the degree of expertise it has developed:

“The Tribunal has developed a high degree of technical expertise in managing a large number of Future Act applications in a legislative framework which is complex and subject to a degree of legal uncertainty. It has adapted readily to significant changes in its operating environment as a result of determinations by Tribunal members and Federal Court rulings, and the varying approaches of State and Territory governments to Future Act matters.”¹¹⁶

9.18 Aboriginal representatives also alleged it would be short-sighted to replace an organisation which had spent five years developing a body of experience and knowledge in working with stakeholders and legislation. Said Mr Glen Shaw representing the Western Australian Working Group on Native Title:

“Any current uncertainties or unworkability of the present Commonwealth processes will not be automatically avoided by the introduction of a State regime. All that will occur is that yet another new statutory set of provisions will be introduced, with all the same problems of coming to an understanding of the new provisions and testing their meaning; a process which has been progressing for five years under the Commonwealth Native Title Act. For

115 Justice French, Transcript of Evidence, Op Cit, 24.

116 NNTT Interim Report, September 1998, 32.

*instance, "negotiation" is replaced with "consultation" under the alternative provisions. The stakeholders, the administrators and the Courts will all have to come to an understanding of the difference between those two concepts."*¹¹⁷

The Committee notes at this point that the definition of consultation is not clear and a matter of ongoing debate, as is illustrated in the above quote. While the definitions of "negotiation", "consultation" and "right to object" are unclear and the difference between the three is similarly unclear, it is likely that this will be the matter of ongoing litigation as guidance from the court will often be sought. (In Canada, the Supreme Court in *Delgamuukw* held that the content of obligation to consult with Aboriginal title holders was determined by the nature and scope of the act proposed. However, the obligation to consult arose from the fiduciary obligation owed by the Crown to Aboriginal title holders rather than from statute). This matter is also dealt with in Chapter 6, section 9.6.3.

Mr Shaw claimed that there was an onus on the State to demonstrate to taxpayers the advantages which would accrue to them from the State assuming the responsibility and cost of instituting State processes in relation to native title. He said the NNTT guaranteed a uniformity of practice across State and Territory borders and was funded by the Federal government, so avoiding the necessity of the State having to find those funds.

- 9.19 Similarly, barrister Mr Greg McIntyre, who appeared with Mr Shaw, said it was important that the State did not overreact to what was in essence a transitional situation.

*"We need to be careful that we do not overreact to a transitional situation where people are becoming used to one another - and with the different parameters put in place by the High Court and the Native Title Act - and create even more problems. It is clear from listening to Mr Clarke that the introduction of a new state regime will not necessarily solve the problem of sorting out how to administer the process; it will just establish another set of administrative processes. The best and the worst I heard him suggest was that letters will not have to be written between the organisations, it will all be done by way of computer connection. That might be good for efficiency but it is something to be watchful of in terms of independence. I could not detect any major improvement on the current process. One might blame the Native Title Tribunal for not achieving some of these results, however it requires cooperation by all the involved parties. It needs time and it has not been an easy process. I do not think the transition will be made any easier by replacing the current processes with a new 40 person, \$6 million state organisation."*¹¹⁸

117 NNTT, Interim Report, September 1998, 32.

118 Mr Greg McIntyre, Transcript of Evidence, 5/8/98, 26.

Mr McIntyre also rejected an analysis of the performance of the NNTT based upon the number of determinations of native title, claiming that outcomes could not be measured at this early time.

“It is right that no determinations have been made on native title; however, the reality is that a raft of cases has been moving slowly towards that result. For a variety of reasons, a lot of work is involved in reaching that stage. The mediation process has been achieving outcomes, but these are not public outcomes - each step is a little outcome. Eventually, it will get there. The state process will not achieve those outcomes any quicker or in a more simple way. It will be just as complicated, take just as long and involve the same log jam moving down the stream which will eventually burst out. As we are five years down the track, it will not take another five years to achieve outcomes once the state regime is in place.”¹¹⁹

10 Committee discussion

- 10.1 There is a real need to co-ordinate native title matters with other land and environmental clearance procedures which must occur before a grant of land can occur. According to Dr Ian Manning from the National Institute of Economic and Industry Research, the establishment of state procedures to mirror the NNTT procedures in SA has reduced delays¹²⁰. SA has established its Environment, Resources and Development Court as an arbitral body to deal with Future Act matters. This was achieved under the provisions of the unamended *NTA*.
- 10.2 If a State Commission is established by Parliament, it would be necessary to ensure no duplication of services between the new body and the NNTT. In addition, it would be necessary that, 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. One possibility is through the appointment of a serving or retired judge as Chief Commissioner. It remains to be seen whether in fact “clear and distinct walls” can be built.
- 10.3 Problems may also occur where claims straddle State and Territory borders, where the native title regimes differ between the States and/or Territory. It is imperative therefore that the WA State regime be consistent with the South Australian and Northern Territory regimes.
- 10.4 What are the policy options facing the State? The question for the State is how best to handle:
- a) Future Acts;

119 Ibid.

120 Dr Ian Manning, Written Submission, 11.

- b) the Registration Test;
 - c) mediation; and
 - d) other issues - eg inquiry research; interagency relations.
- 11.5 Little can be learnt from the SA experience in relation to state-based non-arbitral functions, as the South Australia body handles only the Future Act regime.
- 11.6 Adopting arbitral functions as part of the State's land administration *may* be good practice and good policy, but arbitration should be seen as a distinct and separate final option of the native title process after all other avenues have been explored.
- 11.7 There is an argument that the State would be best served by leaving the new, amended *NTA* and *NNTT* to continue to operate before taking over its functions too quickly. There are questions of cost and expertise with processes which need to be considered in any decision of when to take over those processes.
- 11.9 An incentive for the State in assuming control of native title administration will be the ability of the relevant State minister to intervene to overrule a Commission decision or cut short mediation and arbitration, in certain circumstances. Under the unamended *NTA*, intervention could only occur after arbitration had been completed and only by the Federal Minister for Aboriginal Affairs. Under the amended *NTA* the State may assume this power.
- 11.10 The native title process and the role and function of the *NNTT* has suffered from the lack of a broad, factual, public education campaign at State and Federal level.
- 11.11 Mediation is often about effecting a major shift in attitude and developing trust and mutual respect so that a consensus agreement can be reached. It means that myths, prejudices and misunderstandings must be overcome first. Fear campaigns of many years mean that views are polarised and prejudices are entrenched, and this is the baggage brought to mediation.
- 11.12 The Committee can note that there have been no determinations of native title in WA, despite WA being a big State with traditional owners still living on their traditional lands and displaying all of the characteristics of what one would expect of native title holders. This compares starkly with, for instance, Queensland (Hopevale and Western Yalanji) and NSW (Dunghutti/Crescent Head).
- 11.13 Progress on agreements are contingent on the goodwill of parties, including the State. The State's precondition for entering into mediation has meant that it is only engaged in one formal mediation of native title. In the Spinifex agreement the State studiously avoided recognising native title in any way but (in a breakthrough in itself) at least recognised "traditional ownership" in the media announcement of this framework agreement. (This agreement will be dealt with in more detail in Chapter 14).

Conclusions and recommendations

8. The Committee notes public dissatisfaction with the NNTT which centre on its inability to date to achieve determinations of native title.

9. The Committee notes that criticism of the NNTT in part stems from the incorrect belief that the Tribunal can make determinations of native title and that other criticisms centre on the NNTT's inexperience in handling new and novel concepts and procedures.

10. The Committee notes that problems in any new system often lie in the parties themselves and the newness of the procedures.

11. If the State moves to replace the National Native Title Tribunal with a State Commission:

a) every effort be made to prevent duplication;

b) the expertise and experience built up within the NNTT be retained; and

c) the Federal Government should be approached to contribute to the cost of running the State Commission.

12. The State better co-ordinate other land-clearance procedures with the Future Act procedure so that they run in parallel by initiating Future Act clearance procedures at the same time as other procedures.

CHAPTER 6

THE RIGHT TO NEGOTIATE

CHAPTER OVERVIEW

The right to negotiate procedure under s. 29 of the unamended *NTA* provided for a six month period for mining leases and four months for exploration licences in which native title holders and claimants can negotiate with Government and grantee parties on the granting of certain interests in land.

Mining representatives made the following submissions in relation to the right to negotiate:

- it enabled claimants to demand a portion of their profits;
- it extended delays in the grant of titles;
- it was the greatest single disincentive to mineral exploration and mining development in Australia - as a result, many miners were now directing their exploration focus offshore;
- it had become a *de facto* 'right of veto' over exploration and mining development; and
- every claimant was able to exercise a right to negotiate and able to extract compensation payments without a proper testing of their claim.

Aboriginal people and other opponents of the amendments to the right to negotiate submitted:

- the right to negotiate was an essential element of common law native title and an erosion of that right would render native title essentially meaningless and "effectively extinguish" native title;
- there was no evidence of a decrease in exploration or a shift of exploration offshore;
- it was the State Government's lack of commitment to the native title process and desire to undermine the process which was the cause of delays in grants of title;
- the section in the *WA Mining Act 1978* which required exploration lease holders to convert them into mining leases at the end of a five-year period distorted the actual number of mining projects which were being held up;
- the right to negotiate was a trade-off for the validation of titles between 1975 and 1993; and
- any erosion of that right would be contrary to the *RDA*.

1 Introduction

- 1.1 The right to negotiate procedure provides for a six-month period for mining leases and four months for exploration licences in which native title holders and claimants can negotiate with Government and grantee parties on the granting of certain interests in land. If there is no agreement in this six-month period, then the Native Title Tribunal can be asked to make an arbitral decision on whether the grant should proceed and on what terms. (A flow chart of the right to negotiate procedure - produced by the National Native Title Tribunal - can be found at Appendix 7.) Without doubt the right to negotiate was the most contentious issue aired before the Committee and industry identified it as the key cause of hold-ups in the grant of interests in land.

2 Mining and the right to negotiate

- 2.1 The impact of the right to negotiate has been felt primarily by the mining industry. It is arguable that the right to negotiate was designed to give Aboriginal people a stake in the mining industry given that two of the three instances in which the right to negotiate arises are in relation to mining - creation or variation of right to mine and extension of right to mine. It is for this reason that this report will deal with the impact of native title on mining in a separate chapter, Chapter 8, from a more general discussion of the right to negotiate.

3 What the unamended *Native Title Act* said

- 3.1 If a Government believes that it is seeking to do an act of the kind specified in s. 26 of the unamended *NTA*, it would advertise its intention of the proposed Future Act and give two months for native title holders and claimants to lodge an objection with the NNTT. Entry of a claim in the Register of Native Title Claims was a pre-condition to the right to negotiate.
- 3.2 Once an objection to that proposed Future Act had been lodged and it had been accepted by the NNTT, the Government, native title parties and any nominated grantee parties had six months (or 4 months in the case of an exploration licence) to negotiate an outcome. If at the end of this period the matter had not been resolved, then any parties could ask the NNTT to determine whether the proposed Future Act could proceed. The arbitral determination of the Tribunal could be overridden by the Commonwealth Minister, or the State Minister if this power had been delegated, within 2 months of the Tribunal decision.
- 3.3 During the initial 6-month negotiation period, the Government was required to negotiate in good faith and give all parties an opportunity to make submissions to it. If it did not negotiate in good faith then the Tribunal did not have the power to arbitrate in the matter. The content of the good faith requirement varies according to the circumstances of the case. The Tribunal has indicated in a number of its decisions criteria for determining the standard of good faith in negotiations. This matter will be dealt with in more detail in Chapter 10.

4 Federal Government amendments

- 4.1 The recently amended *NTA* will enable the State to establish a State regime alternate to the Federal right to negotiate procedure on non-exclusive land tenures, principally pastoral leases. The regime may provide for a right of a lesser nature than the right to negotiate but which must meet minimum standards provided in s. 43A of the *NTA*. Under the regime, following notification of the proposed Future Act, native title holders and registered claimants may object to a proposed Future Act. If, following consultation - a period of four months or less - between the proponent of the Future Act and the Aboriginal party, there is no agreement or withdrawal of the objection, an independent arbiter can be appointed of its own motion or on the application of a consultation party¹²¹. Any decision by an arbiter can be overruled by the relevant State minister on the grounds that it is in the interests of the State to do so. Recommendations of the arbiter and determinations of the Minister are subject to judicial review by the Supreme Court. The procedure will apply on areas of land covered by existing and past non-exclusive tenures, national parks, public reserves and in relation to land within town and city boundaries in relation to Future Acts which are not compulsory acquisition, public works or a mining infrastructure project.
- 4.2 The *NTA* amendments also enable a State to establish a State right to negotiate regime on areas not covered by the s. 43A regime.
- 4.3 Many of the amendments are of a permissive nature only and, should the State wish, the State may retain the Federal right to negotiate procedure. Further, the operation of any State alternative regime and the State right to negotiate regime is subject to a determination of the Federal Minister and is then subject to disallowance by either house of Federal Parliament. Until those procedures occur the existing right to negotiate regime will remain.
- 4.4 In relation to the following Future Acts, the right to negotiate does not apply:
- approved exploration acts (subject to approval by the Commonwealth);
 - approved gold or tin mining acts;
 - approved opal or gem mining acts;
 - acts in relation to primary production on pastoral leases;
 - low-impact Future Acts;
 - renewals, regrants or extensions of valid mining leases or pursuant to valid pre-existing rights of renewal;
 - certain third-party rights on non-exclusive leases;
 - compulsory acquisition for the purpose of conferral of rights upon third parties;

121

Unlike the right to negotiate procedure it is not a precondition of arbitration that the parties have negotiated in good faith.

- the creation or variation of a right to mine for the sole purpose of construction of an infrastructure facility; and
- acts not inconsistent with a valid reservation.

Other amendments include:

- altering the time limits by extending the notice period and shortening the minimum period for negotiation and recommended period for arbitration;
- empowering the State or Commonwealth Minister to intervene in the right to negotiate process before arbitration is concluded if the arbiter is tardy in making a decision;
- providing a once-only right to negotiate in relation to mining projects; and
- excluding facilities for services to the public, whether provided by the public or private sector, from the right to negotiate and providing native title holders with a right equivalent to the dominant tenure holder (“Infrastructure Acts”).

5 Stakeholders positions on the right to negotiate

5.1 What the Keating government said

5.1.1 In the Second Reading speech of the *NTA*, the then Prime Minister Paul Keating stated that the right to negotiate derived from the “*right to be asked about actions affecting their land*” because of “*their deeply felt attachment to the land*”¹²². While Aboriginal groups had originally sought a right of veto, as is the case in the *Northern Territory Land Rights Act 1975*, Mr Keating stated that the right to negotiate was a “*compromise*” between the desire of native title holders to maintain control over their land and the interests of miners.

5.1.2 What the High Court said

5.1.2.1 The High Court in *Waanyi* confirmed the above statements and further observed that the right to negotiate served to protect native title until it could be determined. In this way, it acted like a common law interim injunction, which preserved the *status quo* pending a court determination.

“It is erroneous to regard the registered native title claimant’s right to negotiate as a windfall accretion to the bundle of those rights for which the claimant seeks recognition by the application. If the claim is well-founded, the claimant would be entitled to protection of the claimed native title against those powers and interests which are claimed or sought by persons with whom negotiations might take place under the Act. Equally, it is erroneous to regard the acceptance of an application for determination of native title as a stripping away of a power otherwise possessed by the Government to confer mining rights....If the claim of native title is well founded, the power was not available

122

Hansard, House of Representatives, 16/11/93, 2880.

to be exercised to defeat without compensation the claimant's native title. The Act simply preserves the status quo pending determination of an accepted application claiming native title in land subject to the procedures referred to."¹²³

5.1.2.2 The High Court further observed that the right to negotiate also served to promote and enable parties to establish amicable relationships between future neighbouring occupiers.

*"If it be practicable to resolve an application for determination of native title by negotiation and agreement rather than by judicial determination of complex issues, the Court and the likely parties to the litigation are saved a great deal in time and resources."*¹²⁴

5.1.3 What Aboriginal people say

5.1.3.1 Many Aboriginal people argued that the right to be consulted before others came onto their land was an essential part of traditional Aboriginal laws and customs.

*"The right to negotiate is not an addition to the common law rights recognised in Mabo. When it exists, it is a common law right exercised in accordance with the traditional laws and customs observed by the indigenous native title holders. In my experience it is always a requirement under traditional laws and customs for any outsider to negotiate entry and activity on Aboriginal country with the traditional owners."*¹²⁵

5.1.3.2 The Aboriginal Legal Service of Western Australia submitted that Aboriginal aspirations were to be recognised as equal at the negotiating table when land issues were being considered:

"Aboriginal aspirations in land is to have their interests recognised, to turn back the tide of dispossession, to be included as a recognised and equal party at the negotiating table when issues of land use are being considered and to have issues of land use dealt with in a way which takes into account Aboriginal rights and interests in land and not in a way which marginalises them from the process and leaves them as a party that is not asked for its opinion and has no ability to negotiate an outcome that they are happy with...It goes further than simply a right to consultation. It involves the right to sit at the negotiating table and have a say in how decisions about land use

123 Waanyi, Op Cit, 352.

124 Ibid.

125 Flood, S, "Native Title: The Right to Negotiate - Common Law Right or Right Conferred by Statute", Implementing the Native Title Act, 1996, 84.

proceed as opposed to a position that seeks to be obstructive and as an opponent to land use or land development.” (Emphasis added)¹²⁶

5.1.3.3 The Minority report of the Parliamentary Joint Committee on Native Title and The Aboriginal and Torres Strait Islander Land Fund remarked that underpinning the right to negotiate was the consideration that recognition of native title was meaningless without some mechanism to protect it against arbitrary impairment or destruction¹²⁷.

5.1.3.4 Human Rights and Equal Opportunity Social Justice Commissioner Mr Michael Dodson said the right to negotiate placed native title “*in a position of formal equality with other titles and commented that the right to negotiate was intended to provide native title with a meaningful level of protection in situations where it was particularly vulnerable to being overridden*”¹²⁸.

5.1.3.5 Justice Woodward in the 1974 report of the Aboriginal Land Rights Commission, wrote:

*“I believe that to deny Aborigines the right to prevent mining on their land is to deny the reality of their land rights.”*¹²⁹

5.1.4 What industry says

5.1.4.1 It is clear from witnesses who made submissions to this Committee that the experience of the right of aboriginal people to negotiate has been uneven; claims are made that some “amicable relationships” have been established; however, in many more cases it would appear that the right to negotiate is identified as the cause of new bitterness and resentment amongst miners. Industry expresses a general view that the scope of the right to negotiate had been unjustifiably broadened, allowed to be improperly used and has created a long delay in the grant of interests in land. In particular, industry identifies the effect of Court decisions as having allowed all but a few claims to be accepted and to have enabled claimants to extract money from mining companies before the validity of their claim has been tested. (This will be dealt with in more detail in Chapter 7.) Overlapping and competing claims had made dealing with native title claimants even harder. Said mining industry representatives:

*“The Mining Industry should not be seen as the ‘cherry’ of which the Aboriginal people have the right to bite.”*¹³⁰

126 Mr Gregory Benn, Aboriginal Legal Service of WA, Transcript of Evidence, 31/10/97, 50.

127 Tenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, October 1997, 109.

128 Mr Michael Dodson, Written Submission, 21.

129 Aboriginal Land Rights Commission, Second Report, 1974, 103-104.

130 Amalgamated Prospectors and Leaseholders Association of WA Inc, Written Submission, 2.

“It [the NTA] mixed up social justice issues with land administration, which is always a volatile mixture. The section of the Act on the right to negotiate - I will not attempt to quote the sections of the Act in question - is purely an attempt to transfer on specious grounds money from one place to another in the community. Under normal law, if we affect someone’s title, we pay the duly assessed damage we have caused. We do that with every landholder.”¹³¹

5.1.4.2 Mr Patrick Spinner from WMC Ltd expressed concern about the level of caution being displayed by the State in terms of the obligation of good faith negotiations and the Tribunal’s ability to cope with an increased number of referrals for mediation by the State.

“Since the good faith decision was handed down in the Federal Court and the tribunal, the Government is taking the cautious route and they are going and referring everything to mediation assistance, so they are asking the tribunal to come in and help the parties mediate before it goes to a formal determination, if you like. So they are following the good faith negotiation aspect as far as they possibly can. What we have found is that when things are then referred off to the tribunal they are not in a position to mediate. They do not have the staff available and the number of matters that are going to them have just been accruing.”¹³²

5.1.4.3 In response to these sort of criticisms, the NNTT commented that in some cases parties to the mediation were not prepared to mediate, either for personal reasons or because of lack of resources.

“There is no point in our pushing something along if a State Government or a representative body is either not inclined or not in a position to match that, or vice versa. Therefore, there is a gradual shaking out going on at the moment.”¹³³

5.1.5 What WA and Federal governments said

5.1.5.1 Mr John Clarke from the Department of Premier and Cabinet told the Committee that so valuable was the right to negotiate, some claimants were making native title claims just to access the right to negotiate. Following the exercise of this right, claimants were then reluctant to further their native title claim for determination as there was no

131 Mr George Savell, Transcript of Evidence, Op Cit, 5

132 Mr Patrick Spinner, WMC, Transcript of Evidence, 31/10/97, 32.

133 Ibid.

commercial value in such a determination¹³⁴. This has, in Mr Clarke's view, created blockages and delays in the system¹³⁵.

5.1.5.2 The Federal Government argues that the right to negotiate is a special right afforded by statute to native title holders which is over and above what other property holders enjoy. Therefore, it is not racially discriminatory to remove that right in some circumstances. This view was shared by members of the mining industry. It was stated repeatedly to the Committee that the right to negotiate was a racially-specific right and was the source of great ill-will.

*"It is not a property right, although people have tried to build it up to that. It can be given by Parliaments and it can be removed by Parliaments."*¹³⁶

*"The right to negotiate has given native title claimants a far superior right than is enjoyed by comparable non-Aboriginal land holders. There is no equivalent right afforded to comparable non-Aboriginal land holders. Such a result is not only inequitable, it also creates 2 systems of different but parallel rights that must be dealt with by resource developers at great expense."*¹³⁷

6 How does the right to negotiate compare with other property rights?

6.1 Under s. 29(2) of the *WA Mining Act 1978*, most privately owned land in Western Australia is protected from mining development, in the sense that mining cannot occur without the consent of the owner:

"Except with the consent in writing of the owner and the occupier of the private land concerned, a mining tenement shall not be granted in respect of private land -

(a) which is in bona fide and regular use as a yard, stockyard, garden, orchard, vineyard, plant nursery or plantation or is land under cultivation;

(b) which is the site of a cemetery or burial ground;

(c) which is the site of a dam, bore, well or spring;

(d) on which there is erected a substantial improvement;

(e) which is situated within 100 metres of any private land referred to in paragraph (a), (b), (c) or (d); or

(f) which is a separate parcel of land and has an area of 2 000 square metres or less."

134 Department of Premier and Cabinet, Written Submission, 16.

135 Op Cit.

136 Mr George Savell, Transcript of Evidence, Op Cit, 3.

137 The Chamber of Minerals and Energy, Op Cit, 9.

6.2 Paul Seaman QC commented in the course of his 1984 report that “*a person will often try to bargain for a price for his consent to mine which reflects to some extent the value of the minerals*”¹³⁸. This comment is also applicable to the rights of holders of freehold title which contain private mineral rights.

6.3 Private land is not deemed to include a pastoral lease, a lease or concession otherwise granted by or on behalf of the Crown for grazing purposes only, for timber purposes or a lease of Crown land for the use and benefit of the Aboriginal inhabitants. These interests are deemed to be “Crown Land”. In respect of a pastoral lease, the lease holder has the right to be consulted prior to grant of a mining tenement and compensated for any loss arising. In addition, mining, prospecting, fossicking or exploring shall not take place on any Crown land that is -

“(a) for the time being under crop, or which is situated within 100 metres thereof;

(b) used as or situated within 100 metres of a yard, stockyard, garden, cultivated field, orchard, vineyard, plantation, airstrip or airfield;

(c) situated within 100 metres of any land that is in actual occupation and on which a house or other substantial building is erected;

(d) the site of or situated within 100 metres of any cemetery or burial ground;

(e) land the subject of a pastoral lease within the meaning of the Land Administration Act 1997 which is the site of, or is situated within 400 metres of the outer edge of, any water works, race, dam, well or bore, not being an excavation previously made and used for mining purposes by a person other than a lessee of that pastoral lease, without the written consent of the occupier, unless the warden in relation to any land other than land referred to in paragraph (c) by order otherwise directs.”¹³⁹

6.4 In respect of land held by the WA Aboriginal Lands Trust (ALT), the miner must gain the consent of the Minister before entering onto the land, such consent being given in consultation with the local Aboriginal community. According to the Aboriginal Affairs Department (AAD) there has been no instance where the Minister for Aboriginal Affairs has authorised access to reserve contrary to the recommendations by a community.¹⁴⁰ Royalties coming from mining on such land is kept in the Mining Rents and Royalties Trust Account of which ALT is the trustee. The current balance of the trust is \$906,955.09. Disbursements from this account were frozen in December 1995 as a result of concerns that there was no legislative authorisation for the ALT to either hold or disburse the funds¹⁴¹. This situation calls for attention.

138 Seaman Inquiry, Op Cit, 63.

139 S. 19, *Mining Act (WA)*.

140 Letter from Mr John Unkovich, Principal Legal Officer of Aboriginal Affairs Department, 18/6/98.

141 Information provided by Mr John Unkovich.

- 6.5 There is also provision under s. 32 of the *Aboriginal Affairs Protection Authority Act 1972* entitled “Customary tenure” to declare that Aboriginal people of an area have “exclusive use and benefit of any area”. No proclamation has ever been issued under this section and its purpose remains somewhat curiously unclear, as its terms and heading suggest that it was an early legislative recognition of native title¹⁴².
- 6.6 Under the Northern Territory *Aboriginal Land Rights Act 1976*, Aboriginal people have a right of veto over mining on their land. However, minerals on Aboriginal land remain the property of the Crown. In addition, there is a “once-only consent” at the exploration stage. These provisions are based on the conclusion of the Royal Commission conducted by Justice Woodward that Aboriginal people should be accorded special protection against unwanted mining on their land because of their special relationship with the land¹⁴³.

7 How the right to negotiate compares with an injunction

- 7.1 In Canada, First Nation groups have no equivalent of the right to negotiate attached to their native title rights. Instead, they have sought to rely on common law court injunctions to prevent development to which they object. Injunctions have been granted in a number of notable cases including to prevent the construction of the massive Quebec James Bay hydro-electricity project in 1974 and more recently in British Columbia to halt activities of the province’s forestry industry. In Australia there have been media reports of aboriginal representatives threatening to use injunctions to prevent mining and development, if the right to negotiate is amended¹⁴⁴. (It is noteworthy that the most recent decision of the Canadian Supreme Court in *Delgamuukw* held that Canadian aboriginal people needed to be consulted where their title was being infringed, which in most cases, “will be significantly deeper than mere consultation” and some cases may require consent. This duty arose from the fiduciary duty of the Crown to Aboriginal people, which arguably may not exist in Australia).
- 7.2 Such injunctions are available in Australia for Aboriginal people. In the *Mabo* case, Brennan J acknowledged that native title, being a property right, could be protected by way of common law injunction¹⁴⁵.
- 7.3 Professor Richard Bartlett suggested to the Committee that in 1993 it would have been possible to leave Aboriginal people to rely on their common law rights to protect their native title rather than passing the *NTA* and creating the right to negotiate.
- 7.4 A court will grant an injunction where:

142 Ibid.

143 Aboriginal Land Rights Commission, Second Report, 1974.

144 "Pact will bring legal nightmare, says critics", *The West Australian*, 22/7/98.

145 Ibid, 44.

- there is a serious question to be tried;
- damages would not be an adequate remedy and the party against whom the restraint is sought would be able to pay them; and
- the balance of convenience lies in favour of granting the injunction; this involves an assessment of the apparent strength or weakness of the applicant's case.

7.5 In relation to native title, the Court will pay particular attention to the spiritual attachment to the land of native title claimants where disruption of that attachment may result in irreparable damage to the claimant's social and cultural beliefs. In *Bodney v The Western Australian Museum*¹⁴⁶, Franklyn J ruled that monetary damages could not alleviate any wrong to the plaintiffs that may be established as there could be “no greater threat to any of us than a threat to one's family and social structure” and therefore granted an injunction.

7.6 The availability of injunctions to native title claimants in Australia is unclear. Unlike Canada, the Federal Parliament has created a framework of legislative rules and procedures pursuant to which extinguishment and impairment of native title is to be considered. Australian courts have been willing to grant injunctions where it appears that these rules and procedures have not been adhered to, for example where the State grants an interest in land without first giving notification of its intention to do so pursuant to the *NTA*. However, provided these rules and procedures are adhered to, some have suggested that it would be unlikely that a claimant would be successful in obtaining an injunction (for example, where a claimant seeks to prevent a Future Act occurring but have been unsuccessful in satisfying the right to negotiate registration test or else the specific future is not one which attracts a right to negotiate). However, the High Court in the recent case of *Fejo*¹⁴⁷ appeared to suggest that this will not always be the case and an injunction would be available in other situations, depending on the facts and circumstances of the case:

“That is not to say that an injunction could be granted to a registered native title claimant only if it can be shown that the right to negotiate or other procedures required by the Act were at issue. Whether an injunction should be granted will depend upon the facts and circumstances of each particular case and much may turn upon the nature of the conduct threatened. If the conduct amounts to an impermissible Future Act it will be invalid. But the fact that the conduct is invalid and would not affect the native title that is claimed would very likely not be a sufficient answer to a claim for injunction to

146 *Bodney v The Western Australian Museum*, SC of WA, No 7959; 23 November 1989.

147 *Fejo v The Northern Territory of Australia*, High Court of Australia, 10 September 1998. In this case, the High Court was asked to rule on whether a grant of fee simple extinguishes native title or whether native title can revive when land is once again held by the Crown.

restrain conduct that would, for example, work irreparable damage to the rights and interests claimed.”¹⁴⁸

Kirby J argued that it may be possible for a court to grant an injunction to protect a claimant’s position in mediation, which was a valuable statutory right.

“Arguments of convenience might sometimes support the provision of an injunction to protect a native title claimant on the basis that it had invoked valuable statutory rights, and otherwise to hold all parties affected in the status quo ante pending elucidation of their respective rights and obligations. Where the conduct of another would seriously diminish the utility of statutory rights, render the provision of such rights difficult to prove or enforce, introduce complex third party claims which could bedevil the holders of such rights or plunge them into a mire or complex and distracting litigation, equity might well intervene to afford relief. In a proper case, it would not be deflected by the theoretical argument that the Act ultimately protected native title rights and interests once they were finally established.”¹⁴⁹

Following this decision, a native title holder or claimant may seek to argue that as the right to negotiate, or procedural right of a lesser nature, did not prevent irreparable harm occurring to their native title that an injunction should be granted.

8 The expedited procedure

- 8.1 Under the unamended *NTA*, a Government could exempt a Future Act from the right to negotiate if the Government believed that it did not directly interfere with the community life of the native title holders in relation to the land or water concerned, did not interfere with areas or sites of particular significance and did not involve major disturbance to the land or waters concerned. If native title parties objected to the expedited procedure then the NNTT must hold an inquiry to determine whether the expedited procedure can occur.
- 8.2 The potential scope of the expedited procedure has been narrowed by the Courts. As a result of the decision of the Federal Court in *Ward v Western Australia*¹⁵⁰, community life is now deemed to include spiritual aspects of community life as well as physical aspects of life. Therefore, a Future Act will not be able to be expedited even if it is not likely to physically interfere with the community.
- 8.3 This decision has been bitterly attacked by prospectors and miners, who supported Federal Government attempts to limit the scope of objections to the expedited

¹⁴⁸ *Op Cit*, per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, 10.

¹⁴⁹ *Ibid*, 19.

¹⁵⁰ *Ward v Western Australia* (1996) 136 ALR 557.

procedure to a direct interference with the carrying on of community or social activities.

“Why are Native Title claimants entitled to compensation from prospectors when the prospectors activities have such a minimal impact on the land?”¹⁵¹

- 8.4 Increasing numbers of traditionally low-impact tenements, such as prospecting and some exploration licences, are being caught up in the native title process¹⁵². WMC representative, Ms Jan MacPherson, said this increase had been fuelled by this decision.

“A current trend that is emerging in the Goldfields...relates to the lodgement of objections to the expedited process for exploration licences. The practice is that objectors lodge an objection, usually based on heritage grounds, and then contact the company and agree to withdraw the objection if the company enters into an agreement to make annual payments to them, to undertake repetitive heritage surveys and to agree not to oppose their native title claim.”¹⁵³

- 8.5 To illustrate their claims, the Amalgamated Prospectors and Leaseholders Association drew the Committee’s attention to Mr Jack Ottway, an 81-year-old prospector, as a case in point.

“This guy is digging with a pick and shovel in an area already worked. The total size of the Maduwonga claim is 2.1m hectares. Jack’s area is nine hectares representing 0.00042 per cent of the total land claim...The area disturbed is 0.01 hectares or 10 square metres. I compared that to the size of the Subiaco Oval and it represents less than a blade of grass...Jack has no mining machinery; it is small scale stuff, yet we are on to our sixth draft agreement. The agreement started at 88 pages and includes a heritage survey paid for by Jack.”¹⁵⁴

- 8.6 The Chamber of Minerals and Energy said the amendments would achieve no more than was originally intended by the Act. AMEC Executive Director Mr George Savell said matters of spiritual disruption were matters best dealt with by the *Aboriginal Heritage Protection Act 1972*.

- 8.7 However, Aboriginal groups say that court interpretation of the Act is in accordance with the basis of native title - attachment to country based on spiritual considerations -

151 Amalgamated Prospectors and Leaseholders Association of WA, Written Submission, 2.

152 See Appendix 9 - objections to expedited procedure (data provided by National Native Title Tribunal).

153 Ms Jan MacPherson, Op Cit, 25.

154 Mr Scott Wilson, APLA, Oral Submission, Kalgoorlie, 22/5/98.

and with the original intention of the Act. Therefore, they opposed the Federal Government proposals to limit the scope of objections to the expedited procedure.

“These changes detract from the Act’s capacity to make provision for the specific cultural concerns of indigenous people...To deny a fundamental concern for Aboriginal people from consideration in this respect represents a significant attack upon their rights as given effect by the Act.”¹⁵⁵

- 8.8 Whether the amendments to the *NTA* will achieve the exclusion of spiritual considerations from the expedited process is unclear. S. 237 of the amended *NTA* provides that an act attracting the expedited procedure if “the act is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders of native title”. Originally, the section read “the act does not directly interfere with the community life”. Aside from maybe changing the probability test, the amendment does not address the issue of whether community life includes consideration of spiritual matters, which the Federal Court has previously ruled that it does. However, given the potential for exclusion of a range of mining and exploration activities by the Commonwealth Minister from the right to negotiate process, it is likely that acts which would have been put through the expedited procedure will now not be subject to the right to negotiate.

9 Right to negotiate on pastoral leases

- 9.1 The right to negotiate on pastoral leases in relation to mining is perhaps the most contentious issue of all amendments to the *NTA*. A view has been widely expressed that it is unfair for Aboriginal people to have a right in relation to third parties which the pastoral lessee does not have. Said National Farmers Federation President Mr Donald McGauchie:

“If the right to negotiate applied to pastoral leases, it would lead to the ludicrous and unfair situation, where leaseholders who had paid full price for their farms would have a significantly lesser right than native title claimants over development on their own properties.”¹⁵⁶

- 9.2 This view is also supported by the mining industry. Their view is driven not only by an ideological perspective but also from a financial perspective. AMEC claimed that about 70 per cent of Western Australia’s income comes from mining operations on pastoral leases and about 70% of all Future Act applications related to mining work on pastoral leases.¹⁵⁷

155 Aboriginal Legal Service of Western Australia, Written Submission, 7.

156 NFF Press Release NR 20/98, 6/4/98.

157 AMEC, Written Submission, October 1997, 18.

- 9.3 The amendments have been strenuously opposed by Aboriginal representatives and advocates. Father Frank Brennan asked

*“Why should the right to negotiate be taken away simply because they suffered the misfortune of a pastoral lease having been granted over their land?”*¹⁵⁸

Father Brennan argued that the right to negotiate was the only “protective husk” which the legal system could wrap around the Aboriginal relationship to land permitting some decent measure of self-determination.

- 9.4 Similarly, the Kimberley Land Council stated that native title could not be compared with a pastoral lease, which involved a specific licence to run sheep or cattle. Rather, it was the essence of the title that determined what sort of protection it received. As native title was uniquely vulnerable to extinguishment, it required the protection of a measure like the right to negotiate, especially in the Kimberley where much of the area was covered by pastoral lease.

*“The proposed amendments to the right to negotiate will have a harmful effect on the ability of Kimberley Aboriginal people to enjoy their native title rights...and sets up a scenario of drawn out litigation as Aboriginal people resort to common law remedies to defend their rights.”*¹⁵⁹

- 9.5 This point was reinforced by Professor Richard Bartlett who stated that implicit in the rejection by the High Court of WA’s *Land (Traditional Usage and Titles) Act 1995* was the rejection of the view that a pastoral lease was equivalent to native title. Rather, the *NTA* equated the status of native title with that of freehold. Accordingly, it required certain procedural rights to be accorded to native title as per the demands of equality before the law.

*“The protections against mineral or petroleum development on most tracts of private land are so substantial that a right to negotiate is a crude depiction of that veto power.”*¹⁶⁰

Further, pastoral leases were a limited form of tenure, Professor Bartlett stated

“Leases have always been a junior form of tenure, inferior to freehold. They have always been subject to substantial reservations and conditions including a right of resumption without compensation. They are deemed “Crown land”, not ‘private land’, for the purposes of the Mining Act 1978 (WA) and the Petroleum Act 1967 (WA). The pastoralist has almost no rights to resist other development of the land. The leases are subordinate interests and always have

158 Father Frank Brennan, “The Case for Non-Extinguishment, Non-Discrimination and Negotiation”, 1997, 14.

159 KLC, Written Submission, 13.

160 Richard Bartlett, Transcript of Evidence, 21/5/98, 13-14.

been. Native title rights are determined by the nature of the traditional connection to the land. But they are not circumscribed and limited by the multitude of conditions which are inherent in and have always been attached to pastoral leases. Native title holders, to the extent of their rights, are entitled to their full unconditional enjoyment.”¹⁶¹

9.6 The State’s proposal in relation to pastoral leases

9.6.1 The WA Government has proposed to create a regime alternate to the right to negotiate on pastoral leases and present and past non-exclusive tenures under s. 43A of the *NTA* (referred to in the amended Act as Alternative Provision Areas (“APAs”). This procedure will be administered by the new State Commission. This procedure is dealt with in more detail in para. 4.1 of this Chapter.

9.6.2 Mr John Clarke said that the new State procedure for APAs would be very close to the Federal right to negotiate, so as not to cause confusion between the two regimes and a consistency between other State regimes.

“The state legislation proposes a process which is very close to the commonwealth’s right to negotiate. We have not produced a radically innovative scheme - it follows the Commonwealth one closely.”¹⁶²

9.6.3 Aboriginal representatives suggested to the Committee that if the aim of the State was merely to set up a regime which was little more than a duplication of the existing system, this was an expensive and wasteful exercise in creating an additional layer of bureaucracy. In addition, they suggested that the shift from the right to negotiate regime to one of consultation would not necessarily make native title any more workable or certain. Rather, they sounded an ominous warning by intimating it invited further litigation to seek court ruling on what the term “consultation” meant. Said Mr Greg McIntyre:

“I had a quick look at some dictionary definitions to which I refer in the background paper. It may well be that the boundaries of what consultation means to most people will be shifted when put into the legal arena. I often think of consultation in the light of Governments organising a meeting and telling us what they want to do, giving an hour for questions and then doing what they wanted in the first place. The fact that the word consultation is in the legislation means it will have to be given a more dictionary oriented definition, which means decision making between equals, to paraphrase the Shorter Oxford Dictionary. We will find we have not created an easier process

¹⁶¹ Richard Bartlett, “A Return to Dispossession and Discrimination: The Ten Point Plan”, 27 UWALR, 44, 58.

¹⁶² Mr John Clarke, Transcript of Evidence, 5/8/98, 9.

for government or industry; we have created a different one which will need to be addressed.”¹⁶³

10 Committee discussion

- 10.1 There has been widespread support for state government’s re-establishing direct control over land management issues. The WA Government has strongly argued for the establishment of an alternative regime to the Federal right to negotiate process. The amended Federal Legislation now presents the prospect, subject to the passage of State legislation, of many different procedures governing Future Acts to replace what was just two. WA has the opportunity of replacing the NNTT, which has had five years experience in establishing and running the native title procedures. In its place a new body will have the challenge and opportunity of establishing and running new procedures for administration of an array of native title processes.
- 10.2 In relation to the exemption of approved exploration acts under s. 26A of the amended *NTA* from the right to negotiate, it is notable that a variety of witnesses, including Mr John Clarke, recognised that licence to perform such acts will be of limited appeal to miners given that such exemption only applies to acts that “are unlikely to have a significant impact on the particular land or water concerned”. In Mr Clarke’s opinion, this means that exploration in this category cannot involve any earthmoving equipment. As most exploration includes some form of earth moving equipment, miners will still be seeking to rely on the expedited procedure.
- 10.3 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. While it is strongly valued as such by Aboriginal people, on the downside it has created division and distress within Aboriginal communities as well as the wider community. However, the community is no stranger to disputes about items of economic value.
- 10.4 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.

Conclusions and recommendations

13. The Committee notes that the improved acceptance and registration test - prerequisites for access to any right to negotiate - will alleviate many of the problems associated with overlapping and unsustainable claims.

163

Mr Greg McIntyre, Transcript of Evidence, 5/8/98, 27.

14. 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. The Committee recommends the creation of an alternative Future Act regime through regionally based agreements as the preferred first option.

16. The frozen funds held in the Mining Rents and Royalties Trust Account be given immediate attention.

CHAPTER 7

ACCEPTANCE AND REGISTRATION

1 Introduction

- 1.1 The registration process of the *NTA* is the first step in the process of seeking recognition of native title and provides the “gateway” to the right to negotiate. Once a native title claimant is entered upon the native title register, their claim may attract the right to negotiate over any proposed Future Act within their claim area. Registration was intended to be preceded by an active screening process. Unfortunately, due to a number of factors, which include the failure of the *NTA* to ensure communal claims and Court interpretation of the acceptance and registration tests, this has not proven to be the case. Wrote Justice French in November 1997:

“The original vision of the Native Title Act was to be underpinned by, among other things, substantial preparation for the lodgement of each application, a screening process applied by the Tribunal, a conference to see whether agreement could be reached about the application, determinations of unopposed or agreed applications by the Tribunal and referral of contested applications to the Federal Court. The scheme of the Act was also consistent with the proposition that registration of a claim and the right to negotiate and arbitrate mining grants and acquisitions was tied to the acceptance of applications. As for intra-indigenous conflict, that was a matter to be resolved by Representative Bodies of Aboriginal people designated as such by the Minister.

Amendments to the Bill in the Senate and later decisions of the High Court and Federal Court have led to different outcomes. The lodgement of applications gives rise immediately to the right to be placed on the Register of Native Title Claims and to invoke the compulsory negotiation and arbitration provisions of the Act in relation to the grant of mining tenements and certain compulsory acquisitions. This right may be acquired and exercised by individuals without community consent or involvement. There is very little scope for substantive assessment of applications in deciding whether to accept them. The Tribunal’s power to make effective determinations in respect of unopposed or agreed applications has been seriously questioned.”¹⁶⁴

164

Justice French, “Wik and Beyond - An Overview of the Proposed Amendments to the *Native Title Act 1993*”, November 1997, 22.

The failure of the acceptance and registration test has had a number of results:

- overlapping claims; and
- claims which are unlikely to ultimately be successful, in the meantime attracting the right to negotiate.

2 Court interpretation of the acceptance and registration tests

2.1 Court interpretation of the acceptance and registration tests have heavily limited the NNTT's ability to filter claims. The High Court in *North Galanjanja Aboriginal Corporation v Queensland* ("*Waanyi*")¹⁶⁵ ruled that the NNTT's power to reject claims was limited only to claims where there was no arguable question raised by the application, notwithstanding the Tribunal is of the view that the application will fail. In determining whether there was an arguable case, the Court held that the NNTT was only entitled to examine the application on its face and not entitled to seek to look behind the application by having regard to material other than that which accompanied the application. (Until this decision, the NNTT had accepted submissions from State Governments and miners as to why the application should not be accepted.)

2.2 Decisions by the High Court and Federal Court have also meant that registration is now effected immediately upon lodgement of an application and prior to consideration of whether the application should be accepted. Justice French told the Committee that the original intention of the *NTA* was that acceptance of a claim would precede registration and the rights flowing from the registration. However, decisions in *Northern Territory v Lane*¹⁶⁶ and *Kanak v National Native Title Tribunal*¹⁶⁷ seem to have undermined that original intention and it is now possible for a person to have a right to negotiate and obtain benefits even though their claim for native title may ultimately be unsuccessful. This has meant that all claims, regardless of their prospects of ultimate success, initially attracted the right to negotiate until such time as they undergo the acceptance test - a fact acknowledged by the High Court in *Waanyi*. This aspect of the *NTA* was heavily criticised by mining interests in evidence to this Committee. Justice McHugh J noted these concerns in *Waanyi* and commented that the right to negotiate was indeed a valuable right:

"No doubt some miners, pastoralists and other persons believe that the procedures of the Act are unfair, that they create uncertainty and delay that can force interested parties to buy off unmeritorious claims, and that they prevent or impede the exploitation of important national resources. But such beliefs are beside the point. Parliament has laid down the law. It has attached valuable rights to an accepted claim, rights that are exercisable by a claimant before the validity of the claim is judicially determined. The Act has given

¹⁶⁵ *North Galanjanja v Queensland* (1996) 70 ALJR 344.

¹⁶⁶ *Northern Territory v Lane* (1995) 59 FCR 332.

¹⁶⁷ *Kanak v National Native Title Tribunal* (1995) 132 ALR 329.

*claims of native title an economic as well as a spiritual and physical dimension.*¹⁶⁸

2.3 However, as the majority in *Waanyi* pointed out, it was also possible that a claimant could obtain compensation before determination, which turned out to be favourable to them.

2.4 Justice French noted that the combined effect of these decisions and the absence of any requirement for applicants to submit comprehensive tenure material with their application has been to render the acceptance and registration steps relatively insignificant as screening processes for applications.¹⁶⁹ Appendix 9 contains graphs provided by the NNTT which show that while the dramatic increase in claims lodged over the past 5 years, the number of claims being rejected has remained fairly constant.

2.5 The following figures, provided by the NNTT are the total number of native title claims lodged with the NNTT on a nation-wide basis as of 31 August 1998¹⁷⁰:

	NSW /ACT	Vic.	NT	Tas	SA	WA	Qld
Native title claims currently before Tribunal	110	38	33	0	28	290	209
Claims referred to Federal Court	4	1	5	0	2	28	5
Claims rejected by Tribunal	7	2	0	3	0	4	2
Claims withdrawn by applicants	6	2	0	0	0	44	18
Determinations of native title	1	0	0	0	0	0	2*
Total number of claims lodged with tribunal since 1/1/94	128	43	38	3	30	366	235

* There are 2 Queensland Determinations including Meriam QCX94/1(Mabo) which was resolved outside the *Native Title Act* under the Common law process.

3 Amendments to the acceptance and registration test

3.1 As discussed earlier in the report, amendments to the *NTA*, recommended by Tribunal President Justice French, provide that all applications are now to be commenced in the Federal Court and then referred to the Tribunal for administration of the registration

¹⁶⁸ Ibid, 369.

¹⁶⁹ Justice French, "Wik and Beyond - An Overview of the Proposed Amendments to the *NTA* 1993", November 1997, 12.

¹⁷⁰ Since these figures were compiled there has been a jump in the number of native title applications. In September there was an increase of 35 native title applications around Australia, 21 of which were in Western Australia. Tribunal Registrar Chris Doepel said the movement was to be expected as indigenous people prepared for significant changes to the *NTA* on 30 September 1998 (NNTT Media Release - 8 October 1998). However, claims made before this date did not gain any additional advantages to claims lodged after this date.

test have been adopted. Claims which do not satisfy the registration test will not attract the right to negotiate. However, unregistered claims may continue, unless the subject of a successful strike-out action. The Federal Court will also be able to make a decision about whether it is appropriate that the claim be mediated. In a press release dated 19 August 1998, Justice French noted that there was a misconception that amendments to the registration test meant that claims that were not registered could not continue. However, he said, the contrary was true and he called for stakeholders to continue to work to find resolutions to claims, even if they were unregistered.

“The registration test is primarily a gateway to the right to negotiate. But it is important for other native title stakeholder groups - including miners, pastoralists, and other state and local governments - to appreciate that native title applications which do not satisfy the registration test will lose the right to negotiate and other procedural rights, could remain on foot as a claim.

Indigenous people with an unregistered claim can continue to work towards a formal determination of native title. This means that there should be no slackening of effort in constructive negotiations between interest groups to achieve mutually beneficial native title agreements.”¹⁷¹

- 3.2 In addition, amendments to the NTA recommended by Justice French that claimants show they have the authority of the group they are claiming for as part of the threshold test have been adopted. This amendment had support of all stakeholders.

“It is obviously contrary to the philosophy underlying native title and the objectives of the Act that indigenous people should be expending time and resources in litigating against each other.”

“I believe it is necessary to ensure that applicants address the need to build consensus within their own communities before proceeding with the lodgment of claims, and particularly before acquiring the right to negotiate. I think the group authority test will require that to be addressed in a more urgent way than perhaps it is at the present. At the present time we are telling people that if they are speaking with many voices, overlapping claims, and different elements of families, no State Government will be able to negotiate with them. The deals they will be able to negotiate with miners will be basically beads and trinkets deals, because they have to divide themselves in a sense between a whole range of different applicants. This is a communal title and the benefits should be collective and communal, while recognising and protecting the interests that individuals may have.”¹⁷²

- 3.3 Additional responsibilities have been given to Native Title Representative Bodies (NTRBs) to facilitate claims, resolve intra-indigenous disputes and certify agreements

171 National Native Title Press Release, PR98/42, 19/8/98.

172 Justice Robert French, Transcript of Evidence, 16.

- and applications for determination. In addition, no native title claims can be made or determined on an area of land where there has been a previous determination of native title. However, the amendments do not go so far as to demand that all claimants go through NTRBs, as has been suggested by the National Indigenous Working Groups. Rather, where the Registrar is satisfied that the claimants have the authority of the group for which they are claiming, he or she may accept the claim.
- 3.4 The onus for registration has been moved to claimants who must show that they have a *prima facie* case. (Previously, the Registrar had to be satisfied that claimants did not have a *prima facie* case). In considering the application the Registrar may take into account information provided by the applicants, any tenure searches conducted by the Registrar and any information provided by the State or Commonwealth government (which had been previously prevented by the High Court’s decision in *Waanyi*).
- 3.5 The new registration test includes requirements that:
- the application not overlap with a claim that has been previously registered where there are common claimants between the two claims;
 - the application is certified by the relevant representative body or is authorised by the native title claim group and the grounds of this authorisation (“the group authority test”);
 - there is a factual basis for the asserted native title rights and interests;
 - that the rights and interests claimed can *prima facie* be established;
 - the application not claim ownership of minerals, petroleum or gas;
 - the application not claim exclusive rights in relation to an offshore area;
 - the application not cover an area subject to a previous native title determination, a previous exclusive possession act or a previous non-exclusive possession act where the application claims exclusive possession;
 - the native title rights and interests claimed and boundaries of claimed area are readily identified; and
 - the native title claim group has or had a traditional physical connection with some part of the area claimed.
- 3.6 The new registration test is being applied retrospectively to all claims made after 27 June 1996, when the proposed amendments were first announced. The Native Title Tribunal is now readministering the registration test to all claims made on or after this date. It must do so as soon as is reasonably practicable. In addition, where a new s. 29 notice is issued in relation to a claim, regardless of when lodged, the new registration test must be reapplied to the claim within four months of the notice being given¹⁷³. The State has indicated that, when established, the proposed State Commission will take over re-examining claims. However, it is unclear exactly whether this Commission will be established in time to take over what is likely to be an enormous administrative task.

173

This has occurred in the cases of 31 WA native title claims. The new registration test will be applied to the claims as a result of the State Government’s decision to grant 25 mining tenements, mainly in the Goldfields and Mid-West, in the areas covered by the claims.

- 3.7 The new registration test has been opposed by Aboriginal representatives on the grounds that it sets the bar too high and imposes onerous obligations which cannot be complied with within the shortened registration timetables established by the amended *NTA*¹⁷⁴.

4 Overlapping claims

- 4.1 Overlapping claims provided the most visible evidence of the failure of the registration test. The rest of this Chapter will deal with this matter.
- 4.2 The failure of the *NTA* to prevent overlapping claims led to what can only be referred to as a tangled spaghetti of interlocking and overlapping claims made by members of the same community and often by members of the same family. It was this aspect of the *NTA* which attracted most bitterness and hostility from witnesses, not just among non-Aboriginal people but also Aboriginal people.
- 4.3 Miners complained to the Committee that there was no certainty that one could make a deal with a group claiming to be the traditional occupants of an area, without another emerging at a later date to lodge a new claim and so send the miners back to the negotiating table. Similarly, lengthy negotiations with numerous claimants could produce naught where all but one claimant reached an agreement.
- 4.4 By way of example, the Committee heard from the General Manager of Anaconda Nickel, Mr Malcolm James, about the difficulties his company had in establishing their \$1 billion mining project in the North-Eastern Goldfields. Anaconda's Murrin Murrin mine is now a model for Aboriginal-mining company co-operation. It has a target of 20% Aboriginal employment in the mine, has created a Murrin Murrin foundation (now managed by the North-East Independent Body - the creation of this body will be dealt with in more detail in section 9.3 of this Chapter) to receive annual payments from the mine, established a joint venture between Henry Walker and Aboriginal groups and given preferential status for Aboriginal sub-contractors. Despite these achievements, Mr James now argues that the project succeeded in spite of native title rather than because of native title. An 18-month negotiation with 18 claimant groups was derailed at the point of agreement, when a new claim emerged. In total, 25 claims were made over their operations before an agreement was reached. Said Mr James:

"The Native Title Act has made this a commercial Act which allows Aborigines to be compensated for things in which they would never previously have been involved. There is no history in our area of Aboriginals running their own mines, and therefore no justification for being held almost to ransom over a \$1b mining project involving revenues in excess of \$600m per annum for the next 30 years. We find it almost intolerable that that project is

174

ATSIC, "Native Title Amendment Bill 1997", Issues for Indigenous Peoples, October 1997, 31.

*in jeopardy because of one native title claimant group after we had already dealt with 18 other claimants representing the majority of the Aboriginal community from that region. We do not blame the Aborigines for it; it is an Act of Parliament under which they are working.*¹⁷⁵

- 4.5 The consensus among Aboriginal people was that native title while it had delivered some benefits and opportunities it had also been the cause of great divisiveness and conflict within Aboriginal communities. Said one Kalgoorlie witness: *“It came in and destroyed our people; our people have turned against each other.”*¹⁷⁶

4.6 Cause of overlapping claims

4.6.1 Individual gain

- 4.6.1.1 There is no doubt that the prospect of obtaining large payments from mining companies and government has motivated many competing native title claims. This has been conceded on all sides. In February 1998, one claimant boasted to the *Sunday Times* that he was using native title to make “a quid” from mining companies.

*“I don’t want one 4WD, I want a fleet of the bastards for all of us. But I am not a rip off merchant. I am an opportunist...The white man’s legal system made the rules and I am just working within them. I believe every other Aborigine has the right to do the same.”*¹⁷⁷

The Committee also heard allegations of individuals improperly using money paid by mining companies to claimant groups for their and their family’s individual benefit. These included one case in which an individual had used money to pay for him and his family to travel to Disneyland. This improper use by individuals of money meant for the communal benefit of a group of claimants, has in many cases provoked other members of the claimant group to lodge new claims.

- 4.6.1.2 In Kalgoorlie, some mining representatives acknowledged that given such an opportunity, they too would take advantage of it.

*“The Act [NTA] breeds fraudulence. They admit it to me. If I were them, I would do the same. The window of opportunity is there.”*¹⁷⁸

- 4.6.1.3 Nevertheless, there are a number of other important factors, along with the failure of the registration test, that have caused the proliferation of claims. These include:

175 Mr Malcolm James, Transcript of Evidence, Op Cit, 2.

176 Mr Cyril Barnes, Oral Submission, Kalgoorlie, 22/5/98.

177 "Aborigine cashes in on title", *Sunday Times*, 22 February 1998.

178 Mr Robert Money, Oral Submission, Kalgoorlie, 22/5/98.

- mining companies seeking quick fixes and making large payments to individuals;
- failure of some NTRBs to properly represent their clientele;
- historical relocation and removal of Aboriginal people from their country; and
- growth of the independent “native title lawyer” phenomenon.

4.6.1.4 Having said that, one can add that Aboriginal people and their advocates and supporters can easily identify widespread social and economic needs that are not adequately met by community, industry, governments or parliaments. It should come as no surprise that they then turn to the use of the *NTA* and of lawyers and of the Courts to help tackle economic and social needs through whatever processes are available to them in this arena. Sometimes, regrettably too frequently, there has been an injudicious use of these processes by Aboriginal people and their advocates which does not appear to have any evident connection with communal rights. Some of the consequent arrangements that have been struck appear to have little connection with addressing communal needs such as health, education, employment, training and housing.

4.6.2 Historical relocation and removal of Aboriginal people

4.6.2.1 The relocation of groups from their traditional lands and the removal of some Aboriginal children from their parents have undoubtedly created problems in people being able to identify their traditional lands. In the case of Aboriginal reserves and former mission settlements, conflicts between historical residents and traditional inhabitants of the land have also been common.

“It is a product of factors which include historical relocation of people, contests over whether the interests of specific sub-groups of native title holders are being recognised, contention over objectives and, in some cases, personality differences.”¹⁷⁹

4.6.2.2 It is no coincidence that in the regions in which relocations have occurred most heavily, there are the most overlapping and conflicting claims - the Goldfields and the South-West. In the Goldfields, the Committee heard that problems had arisen because structures of leadership had broken down due to the large movement of people. In regions where this did not occur so much, such as the Kimberley, there appears to be a cohesiveness in the Aboriginal community and a relatively well defined leadership, for instance in the Kimberley Land Council.

4.6.2.3 Former Goldfields Land Council solicitor Michael Rynne said it was unrealistic to expect Aboriginal people to resolve these differences quickly.

179

Justice French, “The National Native Title Tribunal and the *Native Title Act*: Agendas for Change”, 29.

“We have this society which is widely acknowledged as the most disadvantaged sector of the community. In Western Australia for 150 years members of this group have been exposed to non-indigenous systems and that has created some havoc for them. There is no doubt about that. One only has to look at the statistics. It is unrealistic for somebody to walk in to all these people and say, “You have all got to get together and agree amongst yourselves and deliver up this communal native title and you have two years to do it.” I have seen the anguish on the faces of these people as they genuinely attempt to work through these issues, and it hurts. It hurts any family. Members of my family can be prone to argue over who gets the lawnmower that is working! It hurts all family members who go through this process of resolving what their problems are with each other. They sit down and work through them.”¹⁸⁰

4.6.3 Mining companies seeking quick fixes and making large payments to individuals

4.6.3.1 In many ways, some mining companies have been agents of their own problems. The Committee regularly heard accounts of miners seeking to fast-track the native title process by making payments to individuals either to obtain consent or to not oppose their proposed project. No doubt this was in part due to a system which they saw as unworkable and likely to cause unreasonable delays. However, while the practice may have succeeded in the short term, in the sense that the tenement was granted within a short-time frame, in the long term it has ultimately made it harder for them to get tenements granted.

4.6.3.2 The Aboriginal Legal Service told the Committee:

“There has to be recognition that to proceed in the culturally appropriate way takes time. A lot of problems in relation to overlapping claims I think have arisen from the belief of the mining industry that things need to be dealt with yesterday, that development needs to be - that mining work needs to push ahead as a matter of urgency no matter what the cost and that sort of attitude has resulted to a large degree in Aboriginal groups saying this is not good enough, filing claims and in some cases filing overlapping claims.”¹⁸¹

4.6.3.3 The practice has also created unrealistic expectations among Aboriginal people about what can be obtained from mining companies. With each new deal a new benchmark has been set for future deals. A “Catch-22” situation has come to exist in which miners now find themselves in a position of being unable to get access to land without making a substantial payment which will, almost inevitably, make it harder for themselves in the long run.

180 Mr Michael Rynne, Transcript of Evidence, 30/4/98, 7.

181 Aboriginal Legal Service of WA, Transcript of Evidence, 31/10/98, 43.

“Commerce has come along and set a price on a native title claim, saying, “I need access to this country; I am caught by this process, I have to get on with it. How much do you want for me to get on to your country?” A price is set; it becomes common knowledge, so somebody else files a claim. That is just human nature. If people put a price on a native title claim, they encourage the claims themselves.”¹⁸²

4.6.3.4 This has also made it difficult for smaller miners to compete with the larger mining operations which are able to make substantial payments to claimants. Said one witness in Kalgoorlie:

“They consider I’m fair game...That I’m Gutnick or Anaconda. But it’s very hard for the junior explorer to match a Gutnick or Anaconda.”¹⁸³

4.6.3.5 Of particular concern is evidence given to the Committee by the Western Australian Aboriginal Working Group on Native Title that one particular mining company had sought to encourage a particular native title claim in conflict with another claim to fast-track the process. While the motivation for such action may be understandable - frustration at delays caused by native title - the mode of operation is not. If true, such actions are likely to be counter-productive and foster ill-will if the claim is not broadly representative of the Aboriginal group in the region.

“When mining companies and other interests go out and encourage claims which they feel may expedite their processes, it invariably reverses their expectations and complicates the whole process.”¹⁸⁴

“Invariably there are parties - in particular, those from the mining and other industry groups - who argue that they cannot identify the position of the rightful traditional owners, yet they still fail to approach the native title representative bodies in the area.

The mining companies and other interest groups go out head hunting individuals whom they see as being the people to negotiate with. By doing that, without the assistance and advice of representative bodies on the ground that know all of the groups in the area etc, the individuals leave themselves wide open to entering into an agreement. The rightful owners come along later. The simple solution is for the mining and industry groups to approach representative bodies in each region. That is why the representative bodies were put in place. Some people who might be on little wildcat missions on the side will negotiate Aboriginal land title claims, but that is nothing to do with

182 Mr Michael Rynne, Transcript of Evidence, Op Cit, 11.

183 Mr Robert Money, Oral Submission, Kalgoorlie, 22/5/98.

184 Mr Wayne Warner, WA Working Group of Native Title, Transcript of Evidence, 6/11/98, 52.

the Act. These people are reluctant or are failing to work within the provisions in the Act. While that is occurring, there will be problems."¹⁸⁵

4.6.4 The growth of the native title "legal industry"

4.6.4.1 Where laws are uncertain and the subject of deep divisions in the community it is perhaps inevitable that there will be some in the legal profession that seek to exploit that uncertainty and division for their own professional purposes. This appears to have been the case with native title. While agreement amongst all stakeholders was rare, there was a widespread agreement that the major beneficiaries of native title and surrounding uncertainty have been lawyers. To some extent, allowances must be made for the resentment that comes from realising that a person is profiting from others conflict and emotional distress. This resentment is also common in family law-related matters. The Committee also notes that in some cases, especially in the Goldfields, progress of native title negotiations has been hindered by the fact the fact that a number of native title claimants do not have recourse to professional and expert legal advice. There have been cases in which access to such legal advice has expedited the progress of negotiations. Nevertheless, the Committee heard claims that some lawyers have sought to inflate expectations of Aboriginal people and exacerbate existing internal divisions.

*"Approximately \$3m to \$4m is owed to white law firms...Many are firms that have basically pushed and pushed, splitting family groups, finding clients. It became a system of "rent a black". If they could find one, they got them to lodge a claim."*¹⁸⁶

4.6.4.2 Miners had common stories of being presented with lengthy legal documents making extravagant and unrealistic demands. However, Mr Michael Rynne made the point that many of the tactics that Aboriginal people were now using were common commercial negotiation tools.

"In any commercial negotiation delay and frustration are legitimate tactics. It is a standard practice that companies or anybody can use. One uses whatever tools are available. However, one can go beyond the point where it is acceptable. We all assume that everybody knows the unwritten rules of what is and what is not acceptable in business...Everybody knows there is a line beyond which you do not go. I have never been involved in any negotiations that have gone beyond the line, although some parties have been criticised for taking matters to extremes. That can be either side around the negotiating table. In the negotiation process one party could use time to delay matters, whereas another party says "Do this within such and such a time or we'll just

185 Ibid., 44.

186 Mr Darryl Pearce, Oral Submission, Kalgoorlie, 23/5/98.

bash it through to the tribunal and have this thing over and done with". The tools exist for parties involved in the negotiation to use against each other."¹⁸⁷

4.6.4.3 It is inevitable that, where Aboriginal people who do not see their rights in reference to land adequately protected by parliaments or governments, there will be those who turn to lawyers and the courts for redress. In the face of a failure on the part of the parliament to strike the right balance there will be those in the Aboriginal community who will accept the dictum that it is "not the right time to give up their lawyers".

4.6.5 Deficiencies with NTRBs

4.6.5.1 Aboriginal groups argued strongly that NTRBs be given greater responsibility and resources to resolve overlapping claims. Responsibility would include acting as an initial filter for claims before lodgement with the NNTT, mediating in the case of boundary disputes and certifying regional agreements. Properly resourced professional NTRBs would protect the rights of native title holders while guaranteeing smooth processing of Future Acts, they argued¹⁸⁸.

*"Native Title Representative Bodies play a crucial role in negotiating successful agreements and managing claims. They are also responsible for mediating indigenous disputes within and between groups - a function that is strengthened in the Native Title Amendment Bill 1997. NTRBs are devising a number of strategies to suit local needs and to deal with problems such as overlapping claims."*¹⁸⁹

4.6.5.2 Justice French agreed with this assessment stating that efficient and well-resourced representative bodies were fundamental to the proper workings of the process.

*"Resolution or management of these conflicts requires considerable time and patience. It is primarily the responsibility of the Representative Body for the area and the indigenous people themselves. Sometimes the Representative Body is part of the conflict."*¹⁹⁰

4.6.5.3 However, while it was clear that some NTRBs were efficient and well-organised, others were in a state of collapse or are still on a very steep learning curve. Justice French said that sometimes NTRBs, being the primary source of funding for native title claims in their respective areas, set policies or priorities for the way in which native title applications would be supported which were in conflict with the interests of particular groups. Sometimes difficulties also arose between indigenous groups and

187 Mr Michael Rynne, Transcript of Evidence, Op Cit, 9.

188 Native Title Amendment Bill 1997, Issues for Indigenous Peoples, ATSIC Wik Team, October 1997, 35.

189 Western Australian Aboriginal Working Group on Native Title, Written Submission, 10.

190 Justice Robert French, "The National Native Title Tribunal: *Native Title Act*, Agendas for Change", 29.

NTRBs because of a perceived conflict of interest between persons on the NTRBs and those seeking to lodge applications without its sanction.

4.6.5.4 In the last two years, the Western Pilbara Representative Body has been wound up and replaced and the Perth Noongar Land Council has experienced turmoil. In the Kimberley, the Committee heard complaints from Mr Billie King at the Kupungari Community on Mt Barnett Station in relation to the KLC and from industry and others in the wider community expressing concern that the KLC was not always acting in accord with the wishes of the local Aboriginal community. Part of the problem stemmed from the absence of any guidelines or criteria for the operation of NTRBs, said Mr Michael Rynne.

“The only matter that has made this a difficult process for them is that their role has never been defined. The Act provides a general definition of what representative body will do, but that has never been defined, so they are struggling to find a direction in the role they play. For example, the Goldfields Land Council plays a mediation role to resolve overlaps. Other land councils do not have substantial numbers of overlaps and they are looking for a role to play within the various politics.”¹⁹¹

4.6.5.5 In addition, some Aboriginal groups have a fundamental opposition, rooted in traditions and customs, to other people speaking for their land. Said Ms Jan MacPherson of WMC:

“Many times our experience is that the indigenous groups express a view that they do not want to be represented by native title representative bodies, nor do they want to be part of an overall regional agreement in many instances. Where they believe they have a strong territorial and traditional connection to the land under claim they often prefer to either appoint their own professional representative and believing they do have a strong claim, not to combine with the other groups which they are, we understand, feeling pressured to do in order to get funding to continue with their applications for native title determination. It is our belief that the current pressure by the native title representative bodies and by the National Native Title Tribunal for groups to combine is in some instances contributing to, rather than resolving, intergroup conflicts and it is certainly making it difficult for mining industry representatives to be assured that any agreement that we enter into is going to be binding and sustainable. That is not to say and we do not say that there are not instances where groups are keen to combine and if that is the case and if that is their wish then we too are keen to enter into negotiations for agreements with them.”¹⁹²

191 Mr Michael Rynne, Op Cit, 8.

192 Ms Jan MacPherson, WMC, Transcript of Evidence, Op Cit, 30.

4.6.5.6 In Kalgoorlie, the Goldfields Land Council (GLC) conceded that part of the blame for numerous overlapping claims had to lie with the GLC and its failure to properly represent all claimants. The Goldfields Mediation Service told the Committee that discontent with the standard of representation had led some groups and individuals to lodge new claims to enable them to gain the right to negotiate and a place at the negotiating table. They said making a claim was like putting up a notice board that the claimant is an Aboriginal person with a right to be heard. Such was the case for the group of women who made an enormous claim over the Goldfields and Nullarbor region. (This claim has since been withdrawn.) Spokesman for the group, Mr Brian Wyatt, said that just as it was easy to make a claim, so was it easy to leave someone out of the claim. He told the Committee that differences between the GLC and the claimants over the GLC's focus on mining and development had led to the claim being made, despite the fact that all claimants had been included in other claims¹⁹³.

5 The creation of "Native Title Working Groups"

5.1 One way in which claimants and NTRBs have sought to resolve overlapping claims has been the creation of Working Groups to provide a single voice for disparate claimants. In Broome and in the Goldfields, these working groups have had a measure of success. They have, in the most part, managed to bring claimants together, to act as agent in negotiations with other parties and provide Governments, miners and developers with a point of first contact for negotiations with claimants. In Broome, the Rubibi¹⁹⁴ Working Group has negotiated agreements with the Paspaley Pearls Shopping Centre, the State Government in relation to an aquaculture farm and the Broome Local Council in relation to town planning and coastal protection schemes. Said Rubibi:

*"Rubibi came together initially because there were problems with relationships between the various groups in Broome but in particular there was a problem with the non-Aboriginal community - developers, the State and the Shire. Every time the Shire wanted to do something it would ask an Aboriginal group whether it was okay and whether they were the right group to talk to. The Aboriginal group would say yes. The building or whatever would go ahead and another Aboriginal group would storm the Shire and say permission was not given. Rubibi was formed to help alleviate those problems and so that there was one voice in Broome speaking for all Aboriginal people."*¹⁹⁵

5.2 The working groups have been constructed on a native title claimant basis with an emphasis on family group representation and are often driven by the leaders of the

¹⁹³ Mr Brian Wyatt, Oral Submission, Kalgoorlie, 23/5/98.

¹⁹⁴ "Rubibi" is a place name in the Broome area; it is the name that has been chosen for the federation of all the traditional owners of this area, the three largest groups being the Yawru, Djungan and Gooloorabooloo.

¹⁹⁵ Mr David Lavery, Rubibi Working Group, Oral Submission, Broome, 16/2/98.

- community. These leaders are then directly accountable to their family membership. All decisions are made by consensus.
- 5.3 Despite making great steps forward in respect of resolving competing claims there have been ongoing difficulties in maintaining the marriage between groups, especially between historical and traditional occupants and traditional and non-traditionally oriented groups. The NNTT has identified resolution of intra-indigenous issues as its most important task in the short-term. To this end, it is heavily involved in mediating conflicting claims through supporting the establishment of indigenous working groups. In the Goldfields, it has also established the Goldfields Mediation Service to assist it in this task. As a result of this initiative, along with the support of the GLC, four working groups have been established - Central, Southern, North-Eastern and North-West - with a view to incorporating all claims. Most progress has been made in the North-East where overlapping claims have been reduced by approximately 75%. This working group is on the verge of finalising a regional framework agreement with a consortium of mining companies, which will standardise exploration and mining terms and conditions.

6 Committee discussion

- 6.1 The combined effect of Federal and High Court interpretation of the *NTA* has been to change the intention of the Act considerably. There is no doubt in the Committee's mind, having heard the evidence of all parties, indigenous and non-indigenous, that the absence of any effective threshold test has been a cause of great distress, division and damage in the indigenous and non-indigenous community. Regardless of other amendments proposed in the Ten Point Plan, the Committee is firmly of the view that putting in place a meaningful and effective threshold test at the front-end of the process is of first-order importance in resolving many of the problems currently being experienced with native title. It is likely that this was the original intention of the Act.
- 6.2 There is also no doubt that part of that threshold test must be to require proof of communality of claimants. Without such proof, there can be no way of preventing splinter and overlapping claims, which in the opinion of the Committee is the major problem now hampering the native title process. If these amendments were made it is likely that many of the present problems would resolve themselves.
- 6.3 It also seems to be the case that there is a substantial overlap between native title and cultural heritage issues. That is, the *NTA* is being used in relation to protection of cultural heritage. Therefore, if improvements were made to the relevant cultural heritage legislation to provide adequate protection to sites of cultural heritage, for example at the exploration or prospecting stage, then the use of the right to negotiate or alternative State procedures may not be necessary. It is not necessarily the case that the Aboriginal group identify the relevant sites but rather that they indicate zones within which sites may be found. It is worth noting that the 1984 Seaman Inquiry recommended that the functions of the Environmental Protection Authority (EPA)

could be amended to include a consideration by the EPA of the social impact on the various groups of Aboriginal people affected by a development.

*“It should take into consideration the geography and population distribution of the area and the traditional and other associations with land of the Aboriginal people of that area. The Authority should be obliged to identify the Aboriginal organisations and groups which are affected and the degree to which they are relatively affected. It should recommend methods of reducing the social impact and in particular for the provision of land or the distribution of funds to reduce the effects of the development on Aboriginal people. I recommend the rehabilitation should be a specific matter to be dealt with in any impact assessment study.”*¹⁹⁶

- 6.4 In a bid to force claimants to consolidate their claims the State Government has now adopted a policy of refusing to negotiate with individual claimants until such time as they consolidate their claims. Professor Bartlett told the Committee that such an approach had met with some success in Canada. The Committee was able to see the way such an approach could be implemented and the problems that have occurred during its briefings and discussions in British Columbia. (This will be dealt with in more detail in Chapter 15.) The Committee agrees that this approach should be continued in light of its successes and in spite of its failures, as the Committee can see little other option.
- 6.5 In relation to the suggestion by the National Indigenous Working Group that NTRBs have exclusive coverage, the Committee believes it is clear that some claimants can adequately represent themselves and either have, or will quickly develop experience in dealing with mining companies. Given problems with some NTRBs in Western Australia the Committee is concerned that exclusive coverage may cause more problems than it solves. There is no doubt that there needs to be an effective gatekeeper for claims; one that is able to represent and articulate the concerns of their members. In this respect, the Committee notes the comments of Mr Malcolm James:

“The representative bodies need to act as the gatekeeper, but if the representative bodies are structured properly you are still dealing essentially with the people and let me give you some examples. The North East Independent Body which we believe hopefully will become a body corporate will be a recognised aboriginal corporation and will represent the region. They will have representatives from each of the claimant groups sitting on their committee and on their executive. That is who you will deal with face up. So you are dealing with the claimants and whilst you may not be dealing with a specific claimant that has a claim out here you will be dealing with one member of that family or people that they have agreed will represent them but they still are the aboriginal people. You are not sitting there dealing with a white-collar lawyer in Perth who cannot articulate what their concerns are;

196

Seaman, Op Cit, 72.

that is a big issue, particularly to us. White-collar lawyers can only really articulate the legal and the financial aspects of concerns. They cannot sit there and tell us about the spiritual impact about the sacred sites; you need to do that face to face, and having had experience in other countries - Africa, Asia and that - I think the only way you can deal in an emotive situation like this is face to face."¹⁹⁷

- 6.6 One possible option is to have smaller representative bodies. This was a recommendation of the *Review of the Aboriginal Land Rights (Northern Territory) Act 1975*¹⁹⁸. The review found that the system of land councils in the NT needed to be replaced with smaller, regional land councils which more accurately reflected Aboriginal tradition. It found that the two larger land councils were perceived to be bureaucratic, remote, tardy and uninterested in local Aboriginal problems and disconnected from Aboriginal tradition while the two smaller land councils had been more successful in merging identification of traditional Aboriginal ownership within their representative structures.

In fact, there is already a trend to the creation of smaller representative organisations through the establishment of native title working groups supported by the NTRB in the region. These working groups have had a measure of success in uniting disparate intra-indigenous interests.

- 6.7 However, in the creation of smaller bodies, it is necessary to balance this with the importance of having parity of bargaining power and the need to utilise limited funds effectively. It is absurd to expect that every Aboriginal person or family should receive assistance to lodge their own mini-native title claim. In addition, there is very little incentive in the western adversarial legal system to seek compromise and consolidation of claims where a direct result of that consolidation may be that one legal firm rather than twelve is needed. Without a focal point for developers, governments and miners, problems in identifying traditional occupants of an area and uncertainty will continue and there will be no guarantee that new claimants will not emerge after agreement has been reached. At the same time, there needs to be a cooling off period after any agreement is reached in case the agreement was made as a result of ill-informed considerations or undue influence; protocols of prudent commercial arrangements should apply.
- 6.8 The Committee also recognises that there should be sufficient resources, which are properly applied, devoted to NTRBs to enable them to resolving overlapping claims.
- 6.9 One should not expect that any given proposal will be able to gain the unanimous support of the Aboriginal people in an area. In all areas of society, it is often not possible to secure an agreement on a unanimous basis in a large group of people. But

¹⁹⁷ Mr Malcolm James, Transcript of Evidence, 11/6/98, 10.

¹⁹⁸ Review of the Aboriginal Land Rights (Northern Territory) Act, 1998.

it is necessary to ensure that once an agreement has been reached or decision made by a group regarded as representative of the constituents, that that decision or agreement cannot be then compromised by dissenters. Therefore, it is critical that there be a system to ensure that NTRBs have a continuing mandate from their constituency and that there be appropriate mechanisms for review of their decisions. It is also imperative that the group authority test be embedded in the *NTA* and where a group choose not to be represented by the relevant NTRB that this group be genuinely representative of the group of people they claim to represent.

- 6.10 While there is a need for Aboriginal people to take a more united approach to native title matters, there is also an equal need for non-Aboriginal groups to take a more united approach to native title negotiations through some form of peak industry body. In the North-East Goldfields, miners are currently realising that they can only hope to achieve uniform terms and conditions if they act together.

Conclusions and recommendations

17. The Committee supports an increased threshold test.

18. In particular the Committee supports the requirement that claimants be able to demonstrate that their claim is made on behalf of a defined community.

19. The Committee recommends that the State Government conduct an open review into the operation of the *WA Aboriginal Heritage Act 1972*.

20. The Committee encourages the State to conduct negotiations through the representative bodies.

CHAPTER 8

MINING AND NATIVE TITLE

1 Statistical analysis

1.1 The following is a breakdown of the tenement applications at 22 May 1998 and was provided by the Department of Minerals and Energy:

Tenement type	Referrals made	Cleared	Objections to expedited procedure	Subject to negotiation
Exploration licences	5312	3933 (73.3%)	956 (17.8%)	476 (8.9%)
General purpose leases	134	3 (3.4%)	0	84 (96.6%)
Miscellaneous leases	223	143 (70.8%)	34 (16.8%)	25 (12.4%)
Prospecting leases	3795	3107 (82.4%)	502 (13.3%)	162 (4.3%)
Retention leases	8	6	0	0
Mining leases	2265	349 (16.9%)	0	1713 (83.1%)

1.2 In relation to Future Acts, the following figures were provided by the NNTT and represent all Future Act applications from May 1995, when the State first began adhering to the Future Act Regime, to 22 May 1998:

- 13,270 Future Act notices have been advertised. Of these 13,093 relate to applications for mineral tenements and 177 relate to proposals for the compulsory acquisition of interests in land.
- Of the mineral tenement notices, 81.67% (10,694) asserted that the expedited procedure applied. Of these, 81.87% (8,057) (or approximately 61% of all tenement applications) were cleared for grant without attracting any objection.
- 2581 mining leases (approximately 19.5% of all tenements) were submitted to the right to negotiate procedure. Of these 2,318 (approximately 90%)

remained subject to negotiation. The remaining 10% were cleared for grant following an agreement between the parties. As at 30 April 1998 183 mining leases, 4 exploration leases, 14 miscellaneous licences, 5 general purpose leases and 7 land proposals have been granted following the right to negotiate procedure.

1.3 Since those figures were provided, the number of s. 29 notices in Western Australia declined after the passage of the amendments of the *NTA* in July from around 350 a month to nil in September 1998. Since 30 September 1998, the commencement date of a number of amendments to the *NTA*, there have been 64 s. 29 notices issued. In the month of September, the NNTT also received 2000 applications in Western Australia from indigenous parties asking the NNTT to decide whether a proposed Future Act should proceed. Since 1995 and up until September 1998, there had been, in total, 194 such applications made, most of which were made by Government or grantee parties¹⁹⁹. It is likely that these occurrences reflect the passage of amendments to *NTA* in July 1998 and the commencement in operation on 30 September 1998 of the changes to the Future Act Process.

1.4 In relation to the expedited procedure, the NNTT presented data to the Committee for the period from 23 December 1996 to 29 June 1998 that:

- the number of objections lodged to tenements asserting the expedited procedure had increased from 17% to close to 65%. The percentage of objections relating to exploration licences asserting the expedited procedure had increased from 16% to 69%, the percentage of objections relating to prospecting licences has increased from 17% to around 40%;
- the number of exploration licences cleared for grant without objection fell from 84% to 31%; and
- the number of prospecting licences cleared for grant without objection fell from 83% to 60%.

2 Delays in processing of applications

2.1 The Department of Minerals and Energy (DOME) told the Committee that they estimated Future Act procedures had added around three months to the time taken to grant prospecting licences through the expedited procedures and upward of six months for those licence applications where objection had been lodged to the expedited procedure.

199

Information provided by the NNTT.

2.2 As of 31 August 1998 there was a backlog of 3500 applications awaiting submission to the Future Act process²⁰⁰. (The Department of Minerals and Energy estimates that they receive around 5,000 mineral and 70 petroleum title applications annually.) Of these 54% are mining leases, 46% are exploration titles and 20% are general purpose and miscellaneous leases. The Committee notes that, while no breakdown was available of how many proposed projects the backlogged applications related to, DOME has a policy of giving priority to applications where the applicant urgently requires the tenure.

2.3 The Minister for Minerals and Energy, Hon Norman Moore MLC, told Parliament on 1 April 1998 that these delays were due to the unworkable procedures of the *NTA* and not a lack of staff²⁰¹. However, it was conceded by Mr John Clarke from the Department of Premier and Cabinet that not all of the backlog of titles were pending because of native title.

*“At any one time, if we did not have native title to contend with the department would have had something like 2500 to 3000 titles, coming through the processes.”*²⁰²

2.4 In a report by Coopers & Lybrand Partner, Mr Wayne Lonergan, reported that the right to negotiate was also a “right to cause delays” and found that these delays, an increase of the risk factor and compensation for native title had caused a loss in mining revenue of \$30 billion dollars²⁰³.

*“The increased perception of risk, and the fact that the level of risk is actually increased, has an adverse impact not only on equity investors, but also on financiers. The inevitable result being that the cost of both equity finance and debt finance will each rise with higher returns being demanded to offset the increased risk.”*²⁰⁴

2.5 However, Ms Patricia Lane, who was at that time NNTT Registrar, questioned whether the backlog was due to the *NTA*. She stated time frames for the issuing of mineral tenements and exploration licences under the *NTA* were often misrepresented and misunderstood. Even before the implementation of the *NTA*, the backlog of grants there were regularly around 2000. The only delay in the issuing of the bulk of licences was instead the two-month notification period under s. 29 of the *NTA*. She stated:

200 Information provided by Mr John Clarke by letter dated 15/9/98.

201 Hansard, Legislative Council, 1/4/98, 1275.

202 Mr John Clarke, Transcript of Evidence, 23/10/97, 17.

203 “Native Title: The Financial Time Bomb”, Australian Journal of Mining, July 1997, 35.

204 Ibid, 38.

*“The DOME does acknowledge a backlog in its processing of tenements, but this must be seen as contributed to by the normal operations of grant of title (it used to be about 2000 titles pending during the DOME’s three to four month processing period) and by the DOME’s response to the introduction of the NTA.”*²⁰⁵

A time lag between the end of the State regime under the *Land (Traditional Titles and Usages) Act 1993* and the introduction of new procedures in line with the Commonwealth NTA contributed to the backlog of tenements, she said.

*“Over time there will be a decrease in unnecessary delay.”*²⁰⁶

- 2.6 This point was picked up by the ALS, who alleged that many of the backlog of claims related to the WA Government’s refusal to initially follow the procedures in the NTA and its failure to satisfy the good faith requirement of the NTA.

*“There was a significant period of time during which the State Government was not following the processes within the future use regime under the Native Title Act and a certain amount of backlog relates to that period of time when it could well have commenced following that regime immediately upon the passing of the Native Title Act. If it had not chosen to attempt to follow another path in its Land Titles and Traditional Usage Act. I guess the other significant factor is as I mentioned in opening, the State Government’s refusal and reluctance to sit down and negotiate in good faith with native title holding parties.”*²⁰⁷

- 2.7 The Tribunal’s view was also endorsed by Mr Michael Rynne who argued that as the Tribunal and stakeholders gained more experience with each other and of the process, time delays would shorten. However, there had been inevitable teething difficulties in reconciling a land administration system which had operated for over 200 years on the legal fiction of *terra nullius* with native title.

“Once somebody objects to an exploration or prospecting licence, the reason for the delay is because of the novelty of the issue. Tenement officers, company representatives or whatever, must report to various levels and go through it saying, “This is what we are now facing; this is what the Native Title Act says; this is what the law says”. They must explain this convoluted process to people who know nothing about it. Similarly, some of the claimants who object are not fully conversant with what actually happens when they do so. The moment an objection is lodged for one of these low impact acts, such as exploration or prospecting, everybody goes through an education process.”

205 National Native Title Tribunal Media Release PR96/7, 8/3/97.

206 Ibid.

207 Mr Gregory Benn, ALS, Transcript of Evidence, Op Cit, 43.

It is my experience that once education levels increased in companies and for claimants that were continually going through this process, we were very quickly getting satisfactory arrangements, in some cases up to 80 or 90 a month. Once again, it depends on the intellectual property of the parties involved. If the parties understand the issues, it is my experience that they agree between themselves on site clearances or some methodology for ensuring that cultural information was protected, and they would move on very quickly. If one of the parties did not have an understanding of the issues, the matter is protracted.”²⁰⁸

- 2.8 The Western Australian Aboriginal Native Title Working Group on Native Title said opponents of the NTA had never given the Act time to work.

“I find it difficult to accept that opponents of the Native Title Act have attacked it ever since its introduction, its infancy stage. I understand that same process occurred with other major pieces of legislation to do with Aboriginal affairs, such as the Aboriginal and Torres Strait Islander Act. We are still in the bedding down period. We still have to let this legislation set in. It would be different if the onus was not entirely on the Aboriginal people to prove they have native title rights. If the pastoralists had to prove their prior connection to the land when they came to take up a lease, the shoe would be on the other foot. Time is of the essence because of the onus of proof. It takes time.”²⁰⁹

3 New mines being delayed by native title?

3.1 The Aboriginal perspective

- 3.1.1 Under the *Western Australian Mining Act 1978*, prospecting and exploration lease holders are required to convert their leases into a mining lease after five years even though there is no intention at the time to mine on the lease or definite ore body and the leaseholder only intends to continue exploration or prospecting on the lease. It was argued by the Western Australian Aboriginal Working Group on Native Title that this requirement distorted the actual number of mining projects being delayed and the number of mining lease applications was not an accurate reflection of the true number of actual mining projects being held-up.

“Many of the applications are administrative necessities rather than an expression of a serious intent to mine, because once the term of an exploration lease expires, the only way a company can maintain control of its interest is to acquire a mining lease. The present system is obliged to treat all applications as though production is genuinely contemplated, thus

208 Mr Michael Rynne, Transcript of Evidence, Op Cit, 7.

209 Mr Wayne Warner, WA Aboriginal Working Group on Native Title, Transcript of Evidence, Op Cit, 50.

commanding considerable resources which could be spent dealing with those that are serious about production.”²¹⁰

- 3.1.2 Mr Greg McIntyre said this anomaly in the legislation made it near impossible to assess the appropriate level of compensation for impairment of native title of a mining lease when the miner had no idea of the type of activity in which they would seek to be engaging.

“Mining leases are really about production mining. However, the vast majority of miners will not go into production at all on a lot of their mining leases and if they do, it will be many years hence. I have had the experience in the Native Title Tribunal and the two arbitrations which have been decided, of miners telling us that they do not know what they will do when they get the licence other than continue the exploration they have done for the last five to 10 years. They could not tell the tribunal what they will find or what sort of production activity they will be engaged in. The tribunal members asked “How are we to work out the effects on the native title parties and set appropriate conditions?” At this stage, the granting of the mining leases to comply with the provisions of the Native Title Act is something of a catch-22 situation. We are making the point that perhaps it is not only a case of the Native Title Act being unworkable, but that the Mining Act in its interaction with the Native Title Act is unworkable in a sense because it is not designed to properly cater for the distinction between exploration and productive mining.”²¹¹

- 3.1.3 Aboriginal representatives also sought to highlight figures from the Australian Bureau of Statistics regarding the upward trend of exploration expenditure since June 1997 - in the June 1997 quarter the estimate was 20.7 % higher than for the June 1996 quarter and Western Australia experienced the largest increase, up \$11.9 million to \$188.2 million.
- 3.1.4 Their view was supported by Dr Ian Manning of National Institute of Economic and Industry Research. Dr Manning claimed that there was little evidence that any mine has been delayed in Western Australia because of native title. While some mining projects had been delayed, it was not as serious as many had claimed. The delays arose as much from depressed world mineral prices and the speculative nature of projects as from the unworkability of native title. Where there was real urgency in a mineral development, a native title agreement would be reached, he said. Dr Manning stated:

“The mining industry has made pointed reference to the number of mineral tenement applications under negotiation in Western Australia. It has, however, made little attempt to assess the significance of these applications, for example, the extent to which significant deposits or prospective areas are

210 Mr Darryl Kickett, WA Aboriginal Working Group on Native Title, Transcript of Evidence, Op Cit, 43.

211 Mr Greg McIntyre, Transcript of Evidence, Op Cit, 25.

affected. Judging by announced agreements negotiation effort has concentrated on those applications where there is immediate prospect of significant production. No estimates are available of the production potential and prospectivity of land for which applications are still under negotiation. However, given the nature of the industry, some delayed applications are likely to be applications where there is no immediate prospect of mining production or exploration activity. Administrative delays are of no economic significance where there is no immediate intention to mine or to explore: indeed, in these circumstances it makes economic sense for a mining company to place a low priority on negotiations. With present mineral price prospects, the number of instances where there is a commercial incentive to slow negotiations is likely to be increasing."²¹²

- 3.1.5 The failure of the *WA Mining Act 1978* to reflect the reality of mining and exploration has also been identified in a series of decisions by the NNTT and the Federal Court in *Re Koara People No 1*²¹³, *Ted Coomanoo Evans v Western Australia*²¹⁴ & *Re Koara No 2*²¹⁵. These cases attempted to grapple with an assessment of compensation for the grant of a 21-year mining lease where the miner had no immediate intention of mining on the lease. In *Koara No 1*, the NNTT spelt out the problems arising from provisions of the *WA Mining Act*.

"A number of consequences flow from the nature of Western Australian mining leases. First in this case from the time when the normal negotiating procedures commenced the parties were left to negotiate without any real opportunity to consider the most important effects of the proposed grants, namely the impact of actual mining operations. Secondly when an application is made for a determination in relation to the proposed act there are obvious difficulties for the Tribunal in applying the criteria in s 39 to an actual mining operation which may never occur and about which little or nothing is presently known. Thirdly the grantee parties are unable to give any worthwhile evidence about the nature and extent of the mining operations which might eventually be conducted with the result that the native title party cannot respond with any specific evidence about the effects of actual mining operations, or the interests, proposals, opinions or wishes of the Koara people in relation to the management, use or control of the land concerned. Fourthly the Government party has difficulty in assessing its future liability for compensation in the event that it decides to grant the lease should the Tribunal's determination be that the act may be done. Fifthly it is difficult for the Tribunal to give full consideration to the native title party's right to be

212 Dr Ian Manning, "Native Title, Mining and Mineral Exploration: a postscript", June 1998, 12.

213 *Re Koara People No 1* (1996) 132 FLR 73.

214 *Ted Coomanoo Evans v Western Australia* (1997) 77 FCR 193.

215 *Re Koara No 2* (NNTT, 19 June 1998).

asked about actions affecting his land and to achieve respect for his connection to the land by providing appropriate protection. The result is that the Tribunal is placed in the position of weighing the criteria set out in s39 at the least logical stage of the process of exploration and mining.”²¹⁶

In the subsequent decision of *Koara No 2*, the NNTT went further in its criticisms of the WA *Mining Act 1978* provisions. It suggested that the provisions of the WA *Mining Act* undermined the intention of the right to negotiate and was a serious impediment to properly giving effect to Parliament’s intention.

“One of the major concerns of the native title party was to be informed of what would happen on their land so that they could deal with it in accordance with their traditional procedures and give consideration to whether to agree to the proposal in the full knowledge of what is involved at the productive mining stage. In the Second Reading Speech on the Native Title Bill 1993 (Hansard, House of Representatives, 16 November 1993 at 2880) the Prime Minister said in relation to the right to negotiate that ‘this emphasis on Aboriginal people having a right to be asked about actions affecting their land accords with their deeply felt attachment to land’. The evidence in this case demonstrates the importance that the native title party attaches to knowing what is going to happen on their land. It is arguable that this beneficial intention is thwarted in the circumstances of these mining leases, as the grantee parties cannot say what actions they intend to carry out on the lease areas, and that the Tribunal, given the limitations on its powers, should determine that the acts may not be done. It is the Tribunal’s view that the current situation is a serious impediment to it properly giving effect to Parliament’s intention.”²¹⁷

3.2 Submission by Justice French

- 3.2.1 As has already been identified in this report, there is sometimes also a fundamental difference between the mining and Aboriginal perceptions of time frames. Often, an Aboriginal group is reluctant to be rushed into making decisions. Justice French said he had not seen any evidence of the right to negotiate being used as a *de facto* right of veto but rather of this difference aspirations and time frames.

“We do not seem to have too many cases of people actually saying “I don’t want mining to occur”, or “I don’t want exploration to occur”. It is really about the terms and conditions on which it will occur. There is no veto available under legislation because ultimately it is subject to arbitration, and even that is subject to a ministerial override at the end of the day. Even if the tribunal said no, a Minister can say yes. The problems are that in some cases there are differences between the aspirations of the Aboriginal claimants and

²¹⁶ *Koara No 1*, Op Cit, 86.

²¹⁷ *Koara No 2*, Op Cit, 24.

what the mining company is prepared to wear or what it regards as economical or commercially reasonable. This can sometimes lead to lengthy negotiations, and the difficulty can be fuelled by the fact that the mining company has a particular time frame within which it needs to get something done. The applicants do not necessarily share that same sense of urgency to see their country mined or explored, except on conditions that they may see as acceptable. I do not see any evidence of the process being used to deliberately frustrate mining.”²¹⁸

3.3 The mining industry position

- 3.3.1 The mining industry sought to highlight the speculative nature of the industry and that miners were not willing to invest time and money to negotiate over native title to gain access to land for exploration when there was no guarantee of return. They sought to impress upon the Committee that temporary land access was essential to renew Western Australia’s mineral and energy resource base. Said Mr Patrick Spinner of WMC:

“If you expend your funds in your exploration licences you have no secure income coming via a mining lease, the company is very reticent to invest large amounts of money and make discoveries that it may never be able to develop.”²¹⁹

- 3.3.2 In the Kimberley, a representative of Western Metals put the problem thus:

“What will hit us in the back of the head is not being allowed to make holes in the ground. The clock is ticking. We are very fortunate because we have some resources in the ground to see us through. Two or three years down the track it could be different.”²²⁰

- 3.3.3 However, due to substantial lead times between discovering new deposits and exploitation, the impact of native title may not show up in 5-10 years time, maybe even longer. Said the Mineral Councils of Australia:

“There is significant investment in mining underway in Australia. This reflects discoveries over the past decade, technological change and the fulfilment of years of planning (eg proving up resources, conducting feasibility studies, negotiating supply contracts and substantial loans which may be more than 30 years).

218 Justice French, Transcript of Evidence, Op Cit, 23.

219 Mr Patrick Spinner, Transcript of Evidence, Op Cit, 26.

220 Mr Richard Jordinson, Western Metals, Cadgebut, 19/2/98.

*An exploration program is not expected to bear fruit for at least five years; to discover a world class deposit in three is unusual; the cost is at least \$50 million.*²²¹

3.4 Position of the State

- 3.4.1 The claims of the mining industry have been reinforced by the Premier Hon Richard Court MLA on 18 June 1998. Mr Court referred to the June report of *Access Economic Investment Monitor* which reported that, while WA led the country in levels of industrial investment, \$9.8 million or 24% of the national amount, and this level had increased 14% over the previous year, \$14 billion worth of national projects were currently facing delay because of native title.

*“We are living very much on borrowed time with these delays that are occurring with these projects because when exploration is flat, two to three, or four years out you start getting the ramifications of those delays.”*²²²

- 3.4.2 Examination of the Access report shows that it states only that the projects are *subject* to native title rather than *delayed* by native title. It makes the point quite clearly even if the Aboriginal claims were removed, some of the projects might not proceed immediately because of commercial reasons. The key factor was the Asian crisis rather than native title.

*“While some projects have clearly been delayed by Native Title claims (Century being an obvious example) a number of projects can proceed having negotiated a settlement...The existence of native title claims do not therefore necessarily mean that investment does not proceed.”*²²³

*“The key for resource investment next year will be how many of these projects are deferred as a result of the Asian meltdown...the ABS survey still suggests strong growth in Western Australia and the bulk of resources projects are in the West. So resource investment elsewhere could decline as existing projects under construction are completed, while mining investment in the West continues to rise.”*²²⁴

- 3.4.3 The figure given by Access was further questioned by Dr Ian Manning, who said the major project included in their figure, Perseus gas field on the NW Shelf, worth \$6

221 Minerals Council of Australia, “The Impact of The Native Title Act on Mineral Exploration”, 1998.

222 “Wik Row costs \$14b: Premier”, *The West Australian*, 19/6/98.

223 Delta Electricity & Access Economics, *Investment Monitor* No 33, March 1998, 14.

224 *Ibid*, 10.

billion, was being held up because of the time taken to prove the resource and arrange finance for development, not because of native title²²⁵.

3.5 Specific examples of delay

3.5.1 AMEC made available to the Committee a document entitled "Briefing Note on *The Native Title Act 1993: A Crippling Burden on Industry - March 1998*". Within this document are details of eleven industry "case studies" which AMEC says were held up or placed on hold as a result of native title because companies have not been able to conclude access agreements with claimant groups.

4 Trend to overseas and brownfield exploration

4.1 AMEC and the Chamber of Minerals and Energy also sought to rely on two key indicators to demonstrate that exploration and mining were being affected by native title:

- the trend to overseas exploration; and
- the trend to brownfields exploration over greenfields exploration; that is, for miners to explore existing mineral tenements ("brownfields") rather than new areas ("greenfields").

4.2 The trend to overseas and brownfield exploration

4.2.1 A survey by the Minerals Council of Australia (MCA) of the major Australian mining companies (representing some 45% of Australian exploration expenditure and 80% of overseas exploration expenditure by Australian companies) showed their overseas exploration grew twice as fast (on an annual growth rate basis) as their Australian exploration expenditure over the three years to 1996/97. Over this period their overseas exploration grew by 60% to \$381.5 million compared with exploration expenditure in Australia which grew by 25% to \$506.2 million. In addition, these companies spent 43% of their exploration expenditure overseas compared with 37% in 1993/94. The MCA predicted that Australian expenditure would further drop because of the dominance of gold exploration, which was expected to fall with the decrease in gold prices, which had accounted for 75% of exploration growth over the previous three year period.

4.2.2 AMEC argued that the increased willingness of Australian companies to move overseas was due to difficulties in accessing new land and increased exploration costs due to native title.

"People do not understand that the mining industry is mobile. The crust of the globe is pretty much the same anywhere. We do not have to stay in Australia and develop. We can go anywhere else in the world and develop. The

225

Dr Ian Manning, Written Submission, 1.

Australian mining industry is probably the best mining industry the world has ever seen. It can go anywhere and develop anything, and it is doing it right now. This is the difficulty. The big effect overseas is that we can take Australia's technology overseas and train the nationals. We take our own support with us to do the computer work, the chemical analyses and the whole bit. The product of those other mines is in competition with Australia's sales into the world market. In most cases we can produce the minerals we produce in Australia more cheaply in other countries than we can produce them here. The more constraints government places on this industry in Australia, the quicker it pushes it somewhere else."²²⁶

- 4.2.3 AMEC also cited a survey by Australian accounting firm Coopers & Lybrand that the proportion of exploration overseas increased to 41% in 1995/96 and 43% in 1996/97 and over a ten year period to 1996/97, the average annual rate of growth and exploration by these companies in Australia has been 8.6% and overseas 17.7%. By way of example they referred to the 1996 Annual Report of WMC noted at page 34 as follows:

"Today we have programs in Central Asia and in Eastern and Western Africa, where we previously had none. We have also expanded our exploration activities in South America. In 1995-1996, 30% of grassroots exploration was in Australia, compared to 54% for the previous year. Land access problems related to Native Title issues may further reduce 1996-97 expenditures in Australia."

The 1996/97 Annual Report of WMC did not note whether this prediction had proven to be correct. However, in its March quarter 1998 *Shareholders' Review*, the company announced a cut in expenditure of 20% in a number of overseas exploration projects.

- 4.2.4 A research paper, commissioned by ATSIC and authored by Dr Ian Manning from the National Institute of Economic Research, questioned the assumption of mining representatives that the increase in overseas exploration and exploration of brownfields was due to native title. He argued that as a result of the high level of mineral exploration and use of modern technology, a high proportion of Australia's land surface had been explored pushing new exploration overseas or onto existing mineral fields. Further, as a result of an increasing number of middle-aged mines, there were sound commercial reasons to extend the life of these mines.

"The switch to overseas exploration by Australian miners overstates the extent to which exploration has moved out of Australia. Much of the movement of Australians overseas has been replaced by movements of overseas explorers into Australia. However, recent changes in world politics have resulted in previous very high Australian share in world minerals exploration moving back towards a more sustainable level. This trend would have occurred

226

Mr George Savell, Transcript of Evidence, Op Cit, 9.

without Mabo, and even AMEC admits that factors other than native title have had considerable influence on recent industry investment decisions.”²²⁷

Dr Manning further cited a mineral exploration boom since 1993 to support his case.

“The post-Mabo boom in mineral exploration is an embarrassment for those who claim that native title has depressed exploration.”²²⁸

Figures from DOME show that in the period from 1992 to 1997, the number of applications for mining leases increased almost threefold from 759 to 1,653, tenements increased from 4,082 to 5,172 and total revenue from mining leases increased from \$8,092,894 to \$28,344,810²²⁹.

And while there was no way of determining whether this boom would have been bigger without native title, Dr Manning said, there was clearly little point in the industry increasing the level of expenditure beyond the capacity to explore as set by the availability of equipment and skilled personnel. He also questioned reports that \$30 billion had been lost in mining revenue because of native title and that Australian mining executives now ranked Australia high amongst the high-risk exploration countries, above many third-world Asian and South American countries. Dr Manning said the reports were methodologically flawed and failed to take into account other important factors.

In order to shorten delays in the granting of titles, Dr Manning proposed:

- increasing the average area and length of exploration licences;
- that the right to negotiate run concurrently with negotiations with state authorities and private land owners and other clearance matters (the right to negotiate currently runs after these matters have been completed);
- development of standardised terms and conditions by the Land Councils and the mining industry; and
- provision of research and negotiation skills, through the Land Councils.

5 Amendments to the NTA

5.1 In light of mining industry concerns about the right to negotiate, the Federal Government made the following changes to the right to negotiate:

227 Ian Manning, “Native Title and Mineral Exploration”, National Institute of Economic and Industry Research, 1997, 20.

228 Ibid, 15.

229 Hansard, Legislative Council, 1/7/98, 5076.

- allowing the State to exempt a range of Future Acts from native title procedures:
 - acts in respect of water,
 - approved exploration acts - these may include drilling,
 - approved gold or tin mining acts,
 - approved opal or gem mining acts,
 - renewals, regrants or extensions of valid mining leases,
 - low-impact Future Acts;
- removing the right to negotiate from infrastructure projects for the provision of services to the public, regardless of whether this is done by a public or private sector interests, with a right equivalent to that of the dominant tenure holder;
- altering the time limits by extending the notice period and shortening the minimum period for negotiation and recommended period for arbitration;
- empowering the State or Commonwealth Minister to intervene in the right to negotiate process before arbitration is concluded if the arbiter is tardy in making a decision;
- providing a once-only right to negotiate in relation to mining projects; and
- creating a category of Future Act known as a “project act” which will allow miners to process a package of mineral tenure applications at one time.

5.2 Miners and the State and Federal governments argue that the intent of the amendments is to differentiate between the impact of various grants of mining interests on native title rights.

5.3 Aboriginal opposition to the amendments

5.3.1 The proposed amendments have all been opposed by Aboriginal representatives. In particular, they oppose:

5.3.1.1 **Shortening of negotiation times** on the grounds that is unrealistic to expect that claims can be properly prepared to meet the new registration requirements and for negotiations to be finalised within the shortened time frame.

5.3.1.2 **Exclusion of right to negotiate from mining lease renewals or extensions** on the grounds that over time the nature and type of mining activity may change.

“This completely ignores the realities of the development of mines. For example, at the end of a mining lease lasting 20 years, mine management and technology would necessitate a new round of negotiations when native title

*matters are at issue. This right to renegotiate is one that freeholders currently enjoy.*²³⁰

5.3.1.3 **Once only right to negotiate** on the grounds that it is impossible to negotiate on terms of mining when it is not clear what the type and nature of the mine will be prior to the completion of exploration.

*“Given that about only one in a thousand exploration leases becomes a productive mine, this system implicitly acknowledges that the two activities are quite distinct and have their own procedural requirements...If native title holders decide to negotiate at the exploration stage, as many will do because of the necessities of heritage protection, they will be denied the right to negotiate about a subsequent mine that may have a dramatic impact on the land.”*²³¹

5.3.1.4 **Exclusion of right to negotiate from certain classes of exploration, prospecting and fossicking and mining activities** on the grounds that it limits Aboriginal peoples’ ability to protect culturally-significant sites. They argue that the present *Aboriginal Heritage Act 1972* is not an effective nor workable means of doing so. The Western Australian Aboriginal Native Title Working Group argued that the right to negotiate was the “single most effective means to protect Aboriginal culture and tradition”.

*“The Aboriginal Heritage Act does not do the job that it is supposed to do of protecting Aboriginal sites. Now, if it did then Aboriginal people who perhaps do not have native title rights but do have interests in protecting sites would not attempt to use other legislation to assert their rights or interests and you know I think that is a situation that needs to be grappled with by this Government in looking at - if the Government expects Aboriginal people to use the Native Title Act as they should do, and that is in relation to the protection of native title rights and interests, then there should be other mechanisms for groups that do not have native title rights for asserting and having their interests in land addressed as well.”*²³²

5.3.1.5 **Creation of one right to negotiate in respect of all tenements in a single project** on the grounds that it is not possible to negotiate properly on multiple tenements within the shortened time frame.

“Native title holders may find themselves in a situation where they are effectively left with one month negotiation period in relation to a major project

230 Mr Darryl Kickett, Transcript of Evidence, Op Cit, 41.

231 Ibid.

232 Mr Gregory Benn, Transcript of Evidence, Op Cit, 47.

the effects of which may have profound consequence for a community for decades.”²³³

5.3.1.6 **Replacement of the right to negotiate** on “non-exclusive” leasehold interests with a right equivalent to the leaseholder.

5.3.1.7 **Removal of the right to negotiate in relation to the acquisition of native title for third parties for infrastructure purposes:**

“Native title rights can be compulsorily acquired by governments in order to enable private companies to construct infrastructure purely for their own use. The bias of these provisions could not be more blatant. They run counter to the commonly-accepted principle that compulsory acquisition of property by the State should be for a public purpose.”²³⁴

5.3.2 In general, Aboriginal representatives have argued that amendments to the right to negotiate procedure will discourage claimants to register their claims under the *NTA* and encourage common law claims and injunctions. This, they claim, is a recipe for further uncertainty. Father Frank Brennan argued before the Joint Parliamentary Committee on Native Title that the right to negotiate provided a lure for common law native title holders to enter into a registration system for the determination of claims²³⁵. Take away that “carrot” and native title holders would assert their rights at their convenience. Further, without any register of claims, miners would have no way of knowing the nature of and extent of native title interests claimed around the nation and there would be a “*return to the common law wilderness of uncertainty*”²³⁶.

5.4 State Government response

5.4.1 In relation to the last amendment, Mr John Clarke said this amendment was important to enable projects such as An Feng Kingstream, in the mid-West, to go ahead which required the construction of significant infrastructure support. With private sector being increasingly relied on for infrastructure projects this amendment was said to be crucial.

“Major infrastructure such as power lines, pipelines, are long and linear by nature and because of that typically intersect with very large numbers of claims. Under the present process any one of those claimants can hold the entire project to ransom. The changes will not extinguish native title; native title holders will still have full procedural rights and they will still have full

233 ALS(WA), Written Submission, 5.

234 Mr Michael Dodson, Written submission, 23

235 Hansard, Legislative Council, 26/9/97, 411 - 412.

236 Ibid.

*rights to fair and equitable compensation. What they will not have is the ability to deliberately delay and frustrate important infrastructure projects.”*²³⁷

- 5.4.2 In relation to approved exploration acts, the State Government argued that there were appropriate safeguards built into the legislation. In particular, in relation to approved exploration acts under s. 26A of the amended *NTA*, that the Federal Minister must have consulted with appropriate Native Representative Body and registered native title claimants, that the Minister be satisfied that the act or acts are unlikely to have a significant impact on the particular area concerned, that there be a right to be heard by an independent body in relation to the doing of an act, that the person doing the act “consult appropriately” with the relevant NTRB or registered claimant, that there be appropriate heritage protection and that once a determination has been made the exclusion will not continue. Mr John Clarke raised the possibility that any determination by the Minister under this section could be challenged under the *Administrative Decisions Judicial Review Act 1977*. In addition, while the State would be seeking an exclusion under this section, few miners would be seeking to do an act pursuant to this section, given the limitations that would be placed on the act, which included an exemption on earth-moving equipment. Mr Clarke referred to the title as a “Clayton’s title” which would not be attractive to miners.

6 Compensation for mining

6.1 What the *NTA* says

- 6.1.1 In relation to compensation, the *NTA* provides that the NNTT acting as an arbitral body must not impose conditions upon a grantee to make payments to native title holders worked out by reference to the amount of profits made, or any income derived, or any things produced by any grantee as a result of doing anything in relation to the land or waters concerned after the act is done (s.38(2) of the *NTA*). Compensation is to be calculated according to what a freeholder with an entitlement to compensation would have received for the loss, diminution or impairment of their rights.
- 6.1.2 There is no similar prohibition on royalty-type payments in the context of an agreement made between the parties before arbitration. The *NTA* provides that an agreement may include a condition that has the effect that native title parties are to be entitled to:

*“payments worked out by reference to:
 (a) the amount of profits made; or
 (b) any income derived; or
 (c) any things produced.”*²³⁸

²³⁷ Mr John Clarke, Transcript of Evidence, 23/10/97, 6.

²³⁸ *Native Title Act*, s. 33.

6.1.3 Some have commented that this section, along with the prospect of a decision by the Minister to override an arbitrated decision, “*provides an incentive for native title holders or claimants to come to an agreement*”²³⁹. Therefore, the ALS was of the opinion that a proposal to amend the NTA to allow the Minister to intervene in negotiations before arbitration would undermine the incentive to reach an agreement between the parties²⁴⁰.

6.1.4 These provisions have not been amended and are still in effect.

6.2 What miners say

6.2.1 A major concern of mining companies is the extent to which the right to negotiate has been used by native title claimants to obtain financial payments from miners. Independently of their concern that the claimant may not in fact be the actual native title holder, they argued that shifting the burden of compensation for impairment or extinguishment of native title from the State to the grantee miner increased the miner’s sovereign risk and was a disincentive to mining.

*“At the moment the mining industry are really bearing the costs involved of both the outcomes of the right to negotiate process and also in the process itself a large amount of the costs are actually being borne by the mining industry. We pay royalties to Government and we think that it would not be unfair to ask Government to consider that we are already paying them a royalty which is benefiting the whole of the community and that they could contribute more to both the costs of the outcomes and the provision of services and to the costs of the actual processes.”*²⁴¹

6.2.2 This concern was expressed most strongly in Kalgoorlie where the Committee heard complaints that the State Government had created an additional tax on mining. The common feeling was that native title was all Australians’ responsibility, not just miners, as all Australians enjoyed the benefits of the mining industry.

*“At the moment, the legislation effectively shifts the onus for economic support of these people and recognition of their land rights, which have yet to be proved, onto the mining or resource sector or the pastoral industry. Who is responsible for compensation? I believe it is all Australians; native title affects all of us. However, if there is a mechanism whereby we contribute more because we use the ground, so be it. At the moment it is open - whatever we arrange is the deal.”*²⁴²

239 J Altman, “Native Title Act 1993: Implementation Issues for Resource Developers”, Centre for Aboriginal Economic Policy Research, Discussion Paper No 88/1995, 3.

240 ALS (WA), Written Submission, 7.

241 Ms Jan MacPherson, Transcript of Evidence, Op Cit, 31.

242 Mr Lloyd Jones, Croesus Mines, Oral Submission, Kalgoorlie, 22/5/98.

Despite these concerns, the State Government is proposing to amend the *Mining Act 1978* to make a mining tenement holder legally liable for payment of compensation to native holders for impairment or extinguishment of native title. This amendment formalises previous State Government policy.

- 6.2.3 There was additional resentment that in many cases compensation was not being sought for impairment to native title but on the basis of profits made. *“Richness of ore shouldn’t determine the disturbance to the ground or impairment of native title”* said one witness in Kalgoorlie²⁴³. Former Northern Land Council Executive Director, Mr Darryl Pearce, said Aboriginal people were seeking compensation for *disturbance to their way of life*²⁴⁴. This argument is perhaps somewhat beside the point because, although the compensation is for disturbance, the measure of this disturbance is invariably a share of profits.

6.3 What the State says

- 6.3.1 Miners’ concerns were supported by the State Government. Mr John Clarke said mining companies were groping in the dark in trying to determine what was appropriate to pay in compensation to native title holders.

*“There is no market established. People are unsure of what native title is worth. Individual companies are making assessments in their own economic terms, and they do not want anyone else to know what it is.”*²⁴⁵

6.4 What Aboriginal people say

- 6.4.1 All Aboriginal groups went to lengths to stress that they were not opposed to mining but rather sought to be consulted and proactively involved in any mining. This fact was confirmed by the GLC and the North-East Independent Body who stated that most Aboriginal people in the region were quite prepared to exempt exploration from the right to negotiate providing adequate heritage clearance was done and compensation was determined once a decision was made to proceed with mining.

- 6.4.2 Said North-East Independent Body Chief Executive Officer, Mr Adrian Meredith:

“We want to encourage the exploration companies to get out there and find the mines. We want to give them incentives. We do not want to hold it up or go to court with section 150 mediations, referral to the tribunal and so on. We already have an agreement in place as part of a formula that the mining company forum has developed with us over the past 12 months. We are

243 Mr Scott Wilson, Oral Submission, Kalgoorlie, 22/5/98.

244 Mr Darryl Pearce, Oral Submission, Kalgoorlie, 23/5/98.

245 Mr John Clarke, Transcript of Evidence, Op Cit, 23/10/97, 11.

working together to finalise this agreement. It also entails what you have referred to. We have said all along that we are not against mining in any shape or form. We want to participate in the mining industry and we want to give certainty to mining exploration and prospectors in the north eastern goldfields.”²⁴⁶

7 Economic benefits of Aboriginal involvement in mining

- 7.1 Anthropologist, Dr David Trigger, confirmed to the Committee that indeed Aboriginal peoples perception of the economic value of a big mine affects their sense of the benefits which should flow to them. Dr Trigger was a consultant anthropologist in the negotiations surrounding Century Zinc in North-West Queensland.

“They [the Aboriginal people in the region] would sit back and say if the project will produce a certain amount of wealth we are owed a certain proportion of it. If it produces a lower amount, it would be different. On the other hand, valuing land is a highly symbolic and culturally important matter.”²⁴⁷

- 7.2 This is not to say that Aboriginal people are concerned about native title merely in so far as it will return material benefits from mines. A number of the witnesses who spoke to the Committee, expressed quite passionately their commitment to protecting their traditional country for themselves and their children. They also sought participation and mining in their region so long as it did not destroy their environment. Mr Robert Watson, from Mt Anderson, said to the Committee in relation to the proposed damming of the Fitzroy River:

“People need to generate an income to sustain themselves and live on the country. The Aboriginal people have great ideas about how development might happen. There is always a clear understanding that you cannot damage a massive amount of country, as is being proposed, just to make money. We have to be able to look at other forms of development which are environmentally friendly and which can sustain people’s lives by producing food or making an income, which the Government can always tax. There are other ways to use the water that exists now that can create massive industry and have massive effects for people by providing food or income. The great thing is that we are not damaging the country. We need to weigh up whether massive development like this is viable in the long term - in 30 or 40 years and so on.”²⁴⁸

- 7.3 Similarly, the National Indigenous Working Group stated:

²⁴⁶ Mr Adrian Meredith, Oral Submission, Kalgoorlie, 23/5/98.

²⁴⁷ Dr David Trigger, Transcript of Evidence, 27/11/97, 8.

²⁴⁸ Mr Anthony Watson, Oral Submission, Mt Anderson, 18/2/98.

*“The right to negotiate principles in the Act have provided many Aboriginal people with a real right for the first time to directly control the protection of their culture, to be involved in economic activity through agreements which deliver employment and wealth generation opportunities and allowing them to control negative social impacts related to these developments. The Act has therefore provided an incentive for indigenous people to constructively engage in economic development proposals.”*²⁴⁹

- 7.4 There are strong arguments for providing Aboriginal people with an interest in the profits of mining, such is the case on some Indian lands in Canada. Professor Bartlett argued that without such an interest there would be little incentive for Aboriginal people to support a mine which interfered with their land and way of life. Professor Bartlett concluded that this commonality of interest between miners and indigenous groups in Canada had been a strong reason for the success of mining on Indian lands. The Committee heard of a number of examples of successful mining on aboriginal land during its stay in Canada. These will be dealt with in more detail in sections 3.1 and 3.3.5 of Chapter 15.
- 7.5 Professor Bartlett’s suggestion has in the past been supported by former Chair of the WA Chamber of Mines and Energy Aboriginal Affairs Committee, Mr Warren Atkinson, and the Industry Commission Report on Mining and Minerals Processing in Australia. The Industry Commission report was highly critical of the Northern Territory regime which reserved mineral rights to the Crown but provided Aboriginal people with a right of veto over mining. These arrangements resulted in a lack of benefit from mineral development to affected Aboriginal groups. The Commission saw granting traditional owners *de jure* rights to any minerals found on their land as a possible solution to a great many of the problems then experienced as a direct result of ill-defined property rights.²⁵⁰
- 7.6 Additional benefits flow from Aboriginal participation in mining in remote areas including training, infrastructure and job creation as well as increased local income to regions which traditionally have not had such opportunities before and have become dependent upon heavy government support. Therefore, any instrument which achieves economic self-sufficiency has an economic, as well as a moral imperative. Dr Ian Manning in his report *Native Title, Mining and Mineral Exploration* wrote that research indicated that the Right to Negotiate underlay significant new opportunities in remote area economic development.

“There is a very limited range of economic opportunity in remote areas and government programs have had little success in generating self-sustaining

249 National Indigenous Working Group, "Co-existence - negotiation and certainty", 1997, 12.

250 Industry Commission, "Mining and Mineral Processing in Australia", 1991, Vol 1, 24.

Aboriginal employment. Mining industry is well-placed to contribute to the development of an economic base for Aboriginal communities.

“Mining companies stand to gain guaranteed legal access to the resource, an improvement in the social environment in which they operate, and an opportunity to develop a local labour force and perhaps eventually to reduce their reliance on very high cost labour recruited in the cities.

Governments are found to potentially gain a reduction in indigenous dependence on social security and welfare payments, a reduction in the demand for government-financed development projects in remote areas and an improvement in the social environment in remote areas, with the potential to reduce the costs of social problems.”²⁵¹

- 7.7 Many mining companies have recognised the importance of a reciprocal working relationship with Aboriginal communities and have official good neighbour policies with communities surrounding the mining operation and the need for economic benefits from the mine to flow through to surrounding communities. This is the case, for example, at the Kimberley Argyle Diamond mine and at Western Metals’ Cadgebut mine. The reasons for the agreements are complex²⁵² but intense political and public pressure in the late 1970s and early 1980s would at least have to be included in this list as a contributory factor. However, one industry source refers to the reasons for such agreements in the following terms:

“These relationships have arisen from increased awareness by the industry of the needs of Aboriginal people, improved communication and consultation between companies and their local communities and a genuine desire by both parties to enhance benefits from mineral development.”²⁵³

- 7.8 However, even with these projects in the Kimberley there has not been a material increase in the standard of living of Aboriginal people in the region. A report by Greg Crough and Christine Christopherson noted that, even when the Argyle Diamond mine was considered, the majority of benefits from the project flowed to interests outside the Kimberley region. Noted the report:

“ATSIC program spending alone is more than \$62 million a year in the region, and social security payments to Aboriginal people could be as much as \$30 million annually. There are few other economic activities that can bring in to the region this amount of income.”²⁵⁴

251 Dr Ian Manning, Op Cit, 6.

252 See *Aborigines and Diamond Mining - The Politics of resource Development in the East Kimberley Western Australia* (editors R.A. Dixon and M.C. Dillon).

253 "Let's Make Native Title Work", Issue paper no 1, WA Chamber of Minerals and Energy, March 1998.

254 G Crough & C Christophersen, "Aboriginal people in the economy of the Kimberley region", 1993, 61.

- 7.9 This failure has also recently been noticed by the Review of the Aboriginal Land Rights (Northern Territory) Act 1976²⁵⁵. The Review noted that while the ALRA had resulted in many positive results for Aboriginal people in the NT- returning much of their traditional land to them, helping them to enrich their culture and rebuild their confidence as a people - monies received under the ALRA have not been strategically applied to social and economic advancement of Aboriginal people of the NT as a whole. And, although some portion of payments have socially and economically benefitted Aboriginal people in the NT, monies had largely been dissipated in Land Council administrative costs and cash payments to individual Aborigines in particular areas of the Territory. However, on balance, the report leans towards the view that the benefits of the Act have outweighed its costs.

8 Committee discussion

- 8.1 There are lengthy delays in the processing of some tenement applications and although the majority of exploration leases are granted with a relatively short delay, this is not the case with mining leases. While the actual number of productive mines being delayed is not reflected by the numbers of delayed mining leases, there is still a major cause for concern. The Committee is strongly of the view that the *Mining Act 1978* needs to be amended to change the requirement that exploration lease and prospecting licence holders only be required to upgrade to a mining lease when there is a definite intention to mine on the lease. The Committee notes that before this is done consideration will need to be given to 1) implications for local council's revenue base 2) orderly development of mineral wealth of state.
- 8.2 Should the *Mining Act 1978* not be amended then all renewals of those licences will be exempt from the right to negotiate providing there is no change in the nature or impact of the activity carried out on the lease area (The Committee notes that the *Mining Act 1978* has already been amended to extend the term and renewal period of miscellaneous licences from 5 years to 21 years. This amendment removed the possibility that the right to negotiate could be triggered every five years when a miscellaneous licence had to be renewed.).
- 8.3 To some extent the large number of tenements pending and the small number cleared are a function of the minimum two month notification period for all tenements and the newness of the process. It should be noted that the majority of tenement applications (61%) were cleared without objection. The Committee also notes the number of agreements reached to withdraw objections to the expedited procedure increased from 22% to 40% from June 1997 to March 1998. The Committee suggests that this may be due to Representative Bodies becoming more proficient and experienced in dealing with the Future Act process and being able to devote more time and resources to exploration and prospecting licences.

255

J Reeves QC, "Building on Land Rights for the Next Generation", 1998.

8.4 Nevertheless, it is of particular concern that:

- the small number of mining leases that have been cleared - 16.9%;
- between 1993/94 and 1996/97 the number of mining leases granted in WA has fallen by 80% (from 805 to 159). Over the same time mining lease applications have increased by 58% (1995/96 - 947, 1996/97 - 1653)²⁵⁶; and
- the decreasing numbers of exploration licences that are being cleared without objection.

8.5 The Committee does not accept that the causes of the delay are wholly due to native title or wholly due to other commercial and economic factors. It is most likely that it is a combination of all factors, rather than one single factor. Similarly, whether the high rate of exploration growth in the last few years would have been higher if not for native title or whether the effects of native title on mining will be felt some years down the track, the Committee is unable to say. It is undoubtedly the case that where there is real economic incentive to commence a mine, such was the case in relation to Murrin Murrin and Century Zinc in Queensland, then a deal will be struck. If it was not profitable in the long term to make such a deal, then a commercially-prudent company with an obligation to its shareholders would not make such a deal. In addition, it is fair that all persons, indigenous and non-indigenous living in a region adversely affected by a mine be justly compensated for any loss resulting from the mine, to equally share in any benefits of the mine and have an opportunity to have an input into how the mine is operated. This is currently the case in relation to many private landholders in Western Australia, who have the opportunity to provide their consent in relation to mining on their land on agreed terms under s. 29(2) of the *Mining Act 1978*.

8.6 However, that claimants are able or justified to share in the benefits of mining in the way that they do, without necessarily having a valid claim, is another matter completely. This is a matter which needs to be addressed through a higher threshold test. Another possibility is to require all payments of financial compensation in relation to native title be paid by miners into an appropriate trust, until such time as the native title claim is determined. This system would be similar to payments made into court pending final judgement in general litigation matters. This was often suggested to the Committee as the fairest way for the whole community to benefit.

8.7 The Committee notes the traditional practice of gift exchange in the law, practice and custom of many aboriginal people; gift exchange is regularly connected in a traditional setting to issues of sharing, access, damage and punishment; it is against this traditional backdrop that some contemporary aboriginal response to native title issues is more easily understood.

8.8 Another cause of the delays is undoubtedly the piecemeal approach of the Future Act process. That is, it is directed to each individual grant of land. This is an extremely

256

Hansard, Legislative Council, 1/7/98, 5076.

- resource intensive and time consuming process. There is a real need for a system which deals with land tenure issues on a more comprehensive and regional level. This matter will be dealt with in more detail in the section dealing with regional agreements.
- 8.9 Negotiations on native title also need to be run concurrently with other land clearance and approval matters. That the Future Act Regime runs subsequently to these other matters is plainly inefficient.
- 8.10 There also should be no problem with a once-only right to negotiate. Should this right be exercised only at the mining stage then there would need to be an effective heritage protection and clearance regime to operate at the exploration stage. We note that the *Aboriginal Heritage Act 1972* is currently under review. Consideration of this issue should occur in this process. This should address concerns of Aboriginal people relating to the disturbance of culturally significant sites by exploration. This is presently the case in the NT where a once-only consent was introduced into the *Land Rights Act* in 1987. In the NT miners had concerns “they were spending vast sums of money on exploration with the consent of the traditional owners, only to be excluded once the minerals they discovered, and with little hope of having this refusal overturned by proclamation”²⁵⁷. While it is acknowledged that such a regime will disadvantage traditional owners who fail to realise how disruptive mining will be, there is a need to balance the needs of the mining industry with the needs of traditional owners.
- 8.11 The Committee endorses the views of the Report of the Review of the *Aboriginal Land Rights Act 1976* on the need for mining companies to appreciate the unique cultural and social environment in dealing with Aboriginal people.

*“Mining companies dealing with Aboriginal people have to appreciate that they are operating in a unique cultural and social environment. For example, many Aboriginal people remain suspicious of mining companies, the Aboriginal decision making process is usually communally oriented and many of the Aboriginal participants in the process will not be able to read or write and will be living in a state of poverty. This is the sort of environment that could give rise to allegations of unconscionable conduct if the mining company is not careful in its dealings.”*²⁵⁸

- 8.12 It was clear to the Committee that in some cases there has either been an inability or unwillingness to break traditional patterns of dependence by taking these opportunities. AMEC claimed there was a clear preference for cash payments to Aborigines in the Kimberley rather than employment opportunities. The Committee has not had the opportunity to investigate the substance of this claim. Indeed the claim

²⁵⁷ McRae, H, Nettheim, G, and Beacroft L, “Aboriginal Legal Issues”, 1997, 190.

²⁵⁸ Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976, “Building on Land Rights for the Next Generation”, 1998, 5.

is at odds with the tenor of other comments that have come out of the region, particularly those from the representative body. If there is indeed some trend within the Kimberley region that leans towards cash payments, then this benefit needs to provide for a long term community benefit. This requires commitment from miners as well as Aboriginal representatives. Other submissions commented that Aboriginal people had not taken advantage of these opportunities with more than one witness remarking on a “window of opportunity which had been left wide open” with no one willing to go through. In addition, many mining companies commented that in some cases they had found it difficult reconciling cultural obligations, practices and expectations of indigenous people with the requirements of full-time permanent employment. However, it is unrealistic to expect entrenched disadvantage to be corrected quickly and it requires a commitment from all parties to do so. The Committee is firmly of the opinion that this commitment can be fostered. It is critical not only for Aboriginal people but also the regions in which they live, in which they often form the majority of the permanent population, that this commitment be embedded and followed through on. The impact of a sustainable economic base in these regions will benefit all in those regions. Said Commissioner Patrick Dodson in the Royal Commission into Aboriginal Deaths in Custody:

“Aboriginal participation in regional economies is fundamental to achieving locally sustainable economies in rural and remote Australia, is not an optional extra to be considered as a welfare issue once regional plans are in place. Aboriginal people are an integral component of regional economies.”²⁵⁹

This may require that Aboriginal people have some stake or sense of ownership in the process.

Conclusions and recommendations

21. The State Government conduct a public review of the *WA Mining Act 1978* with a view to extending the terms of the exploration and prospecting licences, requiring an upgrade to a mining lease only where there is a definite intention to mine.

22. The Committee endorses the exemption from the right to negotiate of renewals of mining and miscellaneous leases where there is no change in the nature and scope of those leases.

23. That a register of all native title agreements be established and kept by the NNTT or equivalent State body. Consideration of access to the register will need to be assessed with regard to matters of commercial confidentiality and privacy.

259

Royal Commission into Aboriginal Deaths in Custody, Vol 2, 1991, 525.

24. All payments in relation to native title be paid to a trust fund, held and managed by and on behalf of the relevant Aboriginal claimant group.

25. Mining operations and industry projects be encouraged through a package of incentives to provide training, education and employment opportunities to Aboriginal people, including encouragement for the option of joint ventures with Aboriginal communities.

CHAPTER 9

PASTORAL LEASES AND NATIVE TITLE

CHAPTER OVERVIEW

A pastoral lease is granted for “pastoral purposes”. This has been deemed to include the feeding of cattle or other livestock upon land but it may also be broader and encompass activities pursued in the raising of livestock.

Under the *NTA*, there is no right to negotiate in relation to the renewal of a pastoral lease. Further, the *Wik* decision also confirmed a pastoralist’s rights under pastoral lease and that inconsistent native title rights yield to pastoral rights. However, as a result of *Wik* there is uncertainty in relation to activities by the pastoralist that are not strictly within the terms of the lease.

The WA Government says there was a widespread belief at the time of the drafting of the *NTA* in 1993 among pastoralists that pastoral leases extinguished native title. The State Government has a policy of giving increased security of tenure to pastoral lessees and has enacted the *Land Administration Act 1997* to permit the authorisation of “primary production” activities on pastoral leases.

Pastoral Representatives say there is a pressing need of pastoralists to diversify to remain competitive. They have vigorously sought the extinguishment of native title on pastoral leases, particularly in the eastern States. As they say legal co-existence is impractical, they fear the prospect of free and unfettered access across leased areas and foresee potential for conflict between traditional usage of the land and primary production

Aboriginal representatives say the amendments provide a windfall by giving lease holders better title than they enjoyed before *Wik*. They reject the claim that there was an agreement in 1993 that native title would be extinguished on pastoral leases. They argue that the amendments deny Aboriginal equality before the law because the amendments made native title subordinate to pastoral leases and are therefore racially discriminatory. Therefore, the amendments would almost certainly yield more, not less, litigation and compound uncertainty and lack of confidence in Australian real property law

Environmentalists say amendments will allow potentially environmentally-damaging activities on pastoral leases, some of which contained much of Australia’s most fragile land.

1 Background

- 1.1 In 1996-1997, pastoral lease land comprises 37% of the State; some 563 pastoral leases covering 95,132,593 square kilometres of which 12 are wholly or partly foreign owned and 41 were owned by mining companies (calculate). There are approximately 510 stations. In 1996/97 the State received \$477,000 in rental income and the average rent was \$965.24 per annum²⁶⁰.
- 1.2 In 1990-1991, total lease rentals in Western Australia from the 582 pastoral leases, which covered 38% of the State, were \$490,000. In that year, 1991, the Select Committee into Land Conservation, found that pastoral lease rentals did not cover the Western Australian Government's costs of administering the management of pastoral leases, and represented only 2% of the estimated annual expenditure by the pastoral enterprises²⁶¹.
- 1.3 The following provides a breakdown of the largest pastoral landholders in Australia²⁶²:

Private

- Hugh McLachlan 4.7 million ha, 29 properties in WA and SA
- McDonald Family 3.1 million ha, properties across Australia
- Brian Oxenford 2.3 million ha, 9 properties WA and NT
- Ashley Daley 1.2 million ha, 3 properties in Qld
- Peter Managazzo 1 million ha, 3 properties in Qld
- AJ and PA McBride 1 million ha, 9 properties in SA
- Charles Lund .9 million ha, 4 properties in NT and Qld
- EG Green and Sons .8 million ha, 6 properties in the Kimberley
- Sir James McCusker .8 million ha, 7 properties in WA
- Frank McAlary .8 million ha, 5 properties in NSW and WA

Corporate

- Aboriginal Land Trusts 20 million ha, 101 properties across Australia
- S Kidman and Co 11.7 million ha, 17 properties in Qld, SA, WA, & NSW
- Stanbroke Pastoral Company (Owned by AMP) 10.1 million ha, 27 properties in Qld and NT
- Austag (owned by Elders) 6.4 million ha, 16 properties in Qld and NT
- North Australian Pastoral Company 6 million ha, 14 properties in Qld and NT
- Heytesbury Pastoral Company

²⁶⁰ Hansard, 17/6/98, 56-57, and 24/6/97, 4577

²⁶¹ Legislative Assembly Select Committee into Land Conservation, 1991, 98-100

²⁶² Australian Farm Journal, Vol 6, No 9, November 1996

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|---|---|
| | 5.6 million ha, 19 properties in WA, Qld and NT |
| • Consolidated Pastoral Company | 4.5 million ha, 14 properties across northern Australia |
| • Queensland and Northern Territory Pastoral Board (owned by Bankers Trust) | 2.7 million ha, 12 properties across Australia |
| • Tipperary (Indonesia) | 1.9 million ha, 8 properties in NT |
| • Colinta Holdings | 1.2 million ha, 7 properties in NT and Qld |
| • National Mutual | .8 million ha |
| • BHP Minerals | .7 million ha |
| • Sultan of Brunei | .6 million ha |
| • News Limited | .15 million ha |
- 1.4 In Western Australia, pastoral lease is granted for “pastoral purposes”. This has been deemed to include the feeding of cattle or other livestock upon land but it may also be broader and encompass activities pursued in the occupation of cattle and other livestock farming²⁶³. The rights of a pastoral lessee are further confined by s. 105 of the *Land Administration Act 1997 (LAA)* so as to “give no right to the soil, except as may be required for domestic purposes, for the construction of airstrips, roads, buildings, fences, or other improvements on the land so occupied”.
- 1.5 Further, all pastoral leases are granted, held and continue to be held on the condition that certain improvements (fencing, water points etc) are affected by the lessee in accordance with an approved development plan and that certain levels of stocking are maintained. Lessees have no right to sell or use timber other than for specified requirements and permission is required for clearing. There is access across pastoral leases by public/gazetted roads. Aboriginal people may enter upon any unenclosed or unimproved parts of a pastoral lease to seek sustenance in their traditional manner (there is an exclusion area around dwelling areas) by virtue of s.106 of the *LAA*. (This provision of the *LAA* differentiates pastoral leases in WA from pastoral leases in most other States.) Land may be resumed by the State for any public purpose or for otherwise facilitating the improvement and settlement of the State, without compensation other than for loss of improvements.
- 1.6 The *LAA* further reserves to the Minister:
- rights to create roads, take material for public purposes and raise stock;
 - the right to take away from the land any material required for public purposes;
 - to permit any person the right of passage; and
 - approve, on the recommendation of the Board, upon such terms and conditions as he considered appropriate, the sowing and cultivation by a lessee of non-indigenous pasture species for the purpose of enhancing the stock carrying capability of the lease or for such other purposes as the Minister approved.

263

Wik, Op Cit, 245

- 1.7 A permit is required by the pastoral lessee if he or she wishes to cultivate non-indigenous vegetation, interfere with indigenous vegetation or conduct an activity which was not permitted by the pastoral lease. Further, a pastoral lease is deemed to be Crown land under the *Mining Act 1978* and thereby pastoral lessees are denied the ability that many private landholders had under s. 29 of the same Act to prevent mining on their land.
- 1.8 In light of the limited grant of rights, pastoral lessees have felt insecure on their leases and have pressured Government to upgrade their leases. In Queensland, the insecurity of title has driven pastoral lessees to enter into the Cape York Land Use Agreement with Aboriginal people in the region. In return for assured access to pastoral leases Aboriginal people have promised to join with pastoralists in approaching the Queensland Government to upgrade the leases. From the mid-1980s, the Western Australian Government has also made a commitment to upgrading pastoral leases to perpetual leases. This was largely in response to the frequently expressed need for the use of pastoral leases as collateral. However, following *Wik*, this upgrade cannot occur without compulsory acquisition of native title rights.

2 Pastoral leases and native title

2.1 An historical perspective

- 2.1.1 It is undoubtedly the case that on many pastoral properties there has historically been a *de facto* co-existence of Aboriginal people and the non-Aboriginal property owner. Evidence to this effect was presented to the High Court in *Wik* and the continuing heavy involvement of Aboriginal people in the cattle and pastoral industry is evidence of their large role in the industry. Across northern Australia, Aboriginal people were heavily relied upon as part of pastoral operations for their knowledge of the land and conditions. While in some areas there were serious and violent clashes between the two groups, in other areas Aboriginal communities grew up around a station homestead and drew some of their self-identity from that pastoral lease.
- 2.1.2 At Mount Elizabeth Station the Lacey family had first-hand experience of this peaceful co-existence.

“Even when Dad was here, people used to come and go. When he first came here I remember old people coming out of the bush with spears, hardly speaking a word of English. They would settle on the station. They would not do much work because it was all cattle work, but the girls helped in the garden and we grew all our own vegetables. The old fellas would chop wood and so on around the station for a feed. After a couple of weeks they would be off; they would just disappear. They would be gone for months and the next thing they were at a neighbouring station and doing the same thing there.”²⁶⁴

264

Mr Peter Lacey, Oral submission, Mt Elizabeth Station, 20/2/98

- While in the Kimberley, the Committee saw first hand the large numbers of Aboriginal people involved in the pastoral industry, not only working on non-Aboriginal stations but also in running their own. In total, there are some 26 Aboriginal-held or run properties in the Kimberley region. According to 1993 figures, “the pastoral industry is the most significant level at which the Aboriginal people of the Kimberley participate in the wider economy of the region”²⁶⁵. Many of the Aboriginal owned pastoral leases are on land which is not regarded as good pastoral land. Crough and Christopherson reported that many were in a poor state of repair when purchased, included large areas of very low viability land²⁶⁶ and were kept going by ATSIC financial support and CDEP payments.
- 2.1.3 With the introduction of minimum wages for Aboriginal station workers in the late 1960s, many Aboriginal people were no longer employed nor left with any opportunity to continue working on the stations and drifted into the nearby towns and other population centres.
- 2.1.4 In the mid-1980s, the WA Government started excising living areas from pastoral leases to enable Aboriginal groups to move back onto the pastoral leases pursuant to a recommendation of the Seaman Inquiry 1984²⁶⁷. A moratorium was placed on this practice in 1993. While a small number of grants have been made to groups which have previously squatted in areas and have developed some infrastructure to service the area, there has been no recommencement of the policy despite a recommendation from an inter-departmental review from the Department of Aboriginal Affairs (AAD) and the 1996 Review of the Aboriginal lands Trust to do so.
- 2.2 What *Wik* and the *NTA* says**
- 2.2.1 Despite *de-facto* co-existence in many places, it does not necessarily follow from the *Wik* majority decision that native title exists on all pastoral leases in Australia. It does not even necessarily follow that native title exists on the leases under examination in *Wik*, as the Court was not asked to rule on those questions of fact. However, given the factual co-existence and maintenance of connection with the land, Father Frank Brennan was of the opinion that in many cases Aboriginal people would be able to prove continuing native title rights.
- 2.2.2 Under the *NTA* pastoralists have a guaranteed right of renewal without the need to refer to native title holders. Further, the *Wik* decision also confirmed a pastoralist’s rights under pastoral lease. Therefore, pastoralists who do not exceed the rights granted by their leases and who do not seek additional rights are unaffected by native title - the *NTA* allows automatic renewal of pastoral leases, under the same terms and

265 P Green and S Hawke, Report of the First Conference of Kimberley Aboriginal Pastoralists, 1993, 15

266 G Crough and C Christopherson, “Aboriginal People in the Economy of the Kimberley Region”, 1993, 65

267 The Aboriginal Land Inquiry, 1984.

conditions which now exist, with no right of native title claimants to negotiate on the renewal. Any native title rights must yield to the rights of the pastoralist.

- 2.2.3 Where there is uncertainty in relation to activities by the pastoralist that are not strictly within the terms of the lease. While it was certainly the case, historically speaking, that pastoral leases were different from other leases, time has for many blurred those origins. Many pastoralists have come to view their lease as equivalent to freehold. As a result, pastoralists have conducted activities which are not within the terms of their leases or sometimes not on the leased land.

“Pastoral management does not consist of merely depasturing stock and building yards. Till now, the farmer, in the absence of regulation, could reasonably assume that new techniques to improve yield and add value to the land could be employed to develop the farm business. To develop their land, farmers looked to the State as their landlord, which applied its regulation essentially through the process of the planning and development regime; what rights the farmer did not have in respect of the land would be controlled and regulated by the State.

Clearing and burning, excavation for water storage and damming of water courses have long been part of pastoral management. Sowing of pasture, ripping for growth promotion and water retention, the control of vermin and natural fauna have been employed as means to improve yields on leases. More recent advances in managing pasture are more 'agricultural' than 'pastoral' - all these things have impacted and continue to impact on the enjoyment of many native title rights.

Exposure to the fluctuations of international markets have added pressure on farmers to ensure their business remain competitive. Recommended rangeland strategies urge farmers to diversify their use of the land away from sole reliance on grazing, to ensure their businesses' cashflows sustain them in lean years. Few, if any, of the activities undertaken under a pastoral lease or like tenure are expressly permitted in the grant or the statute. The farmers' use of methods to improve land outside traditional or core activities could now become 'Future Acts' within the meaning of the Native Title Act.”²⁶⁸

- 2.2.4 Pastoralists now face the possibility of a direct right of action for compensation by a native title holder where they have exceeded their rights under the lease. Solicitor, Mr Mark Love, who represented the pastoralists in *Wik*, has argued that as the statutes granting pastoral leases are largely silent on what rights are granted, a native title claimant has a direct interest in establishing that the grantee has very narrow 'authorised' rights.

268

M Love, “*Lighting the Wik of Change*”, AITSIS Issues Paper no 14, 8

2.3 What Pastoralists say

- 2.3.1 There was a widespread belief at the time of the drafting of the *NTA* among pastoralists that pastoral leases extinguished native title.

*“Farmers occupying pastoral holdings believed they held rights to fully manage the land. It was thought that the statutes under which their rights were conferred (sic) all the normal rights and interests of the common law rights which the statutory grants imitated. They were the land’s custodian, charged with the responsibility of productively using the land to its best advantage. They were subject only to the restrictions spelt out in the ‘lease’, the relevant land Act and the general law.”*²⁶⁹

Some argued that this belief was reinforced by the preamble of the *NTA* which stated: *“The High Court has held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests such as the grant of freehold or leasehold interests.”* The term leasehold was interpreted to include pastoral leasehold. This was certainly the view of the minority in the *Wik* case - that a pastoral lease was like other forms of common law leasehold title which granted exclusive possession. Chief Justice Brennan commented in the course of his judgment:

*“By adopting the terminology of leasehold interests, the parliament must be taken to have intended that the interests of a lessee, transferee, mortgagee or sublessee are those of a lessee, transferee, mortgagee or sublessee at common law, modified by the relevant provisions of the Act.”*²⁷⁰

- 2.3.2 It was the use of the common law terminology of leases which also undoubtedly created a firm impression in the minds of pastoralists that their lease was a lease of exclusive possession and while the *NTA* did not expressly state this view, it was drafted in contemplation that they may do so. This belief was reflected in the Second Reading Speech of the Bill by then Prime Minister, Paul Keating. Federal Attorney-General, Darryl Williams, stated in the Second Reading Speech of the *Native Title Amendment Bill 1996* that many assumed in 1993 that native title could only exist on Crown land, and that native title rights were likely to be rights approaching full ownership. That native title could co-exist with private interests in land, as was decided in *Wik*, was not contemplated, he said. Therefore, the protection of native title afforded by the *NTA* on the basis of this assumption, the right to negotiate, now extends to circumstances which were not contemplated.

269 M Love, Op Cit, 3.

270 American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd (1981) 147 CLR 677 at 686 cited at *Wik Peoples v Qld* (1996) 141 CLR 129, 145.

3 The amendments

3.1 In relation to native title on pastoral leases, the amended *NTA* includes provisions to:

- enable native title to be compulsorily acquired on pastoral leases to enable the upgrade of pastoral leases to a perpetual or freehold lease without incurring a right to negotiate but rather allowing objection by a native title holder pursuant to the alternative State regime;
- replace the right to negotiate in relation to proposed mining on pastoral leases with alternative state procedures;
- enable pastoral lease rights to prevail over native title on pastoral leases to the extent that they are inconsistent and should the Courts determine that the pastoral lease rights extinguish inconsistent native title rights then this extinguishment may be confirmed; and
- enable States to authorise all ‘primary production’ activities (within the definition provided by the *Income Tax Assessment Act 1936*) provided the dominant purpose of the use of the land remains for primary production and could have been authorised on a lease on 31 March 1998 - there would be no right to negotiate in relation to these activities - this protection would extend to activities conducted ‘off-lease’ which are incidental to the primary production activities on the lease provided they are not inconsistent with the exercise of native title rights and interests; these Acts are subject to the non-extinguishment principle and require the notification of any NTRBs and registered native title claimants or holders by the person proposing to do the act.

3.2 What the WA State Government says

3.2.1 The Western Australian Government included provisions in the *LAA* which effectively anticipated the amendments. The *LAA* came into operation on 30 March 1998, which is valid pursuant to s. 24GC of the amended *NTA*. The provisions are as follows:

- Ss. 161 and 165 of *LAA* allow the Minister to authorise acquisition of private interests in land for re-grant to private interests “*for the purpose of enabling the development of the land in a way that, in the opinion of the Minister, confers an economic or social benefit on the State or the relevant region or locality*”.
- Ss. 120 - 122 of *LAA* in relation to the issue of permits to pastoral leaseholders in relation to authorising “non-pastoral activity” (for example, horticulture and aquaculture) and “pastoral-based tourist activities” on pastoral leases.

3.2.2 Mr John Clarke said that the State would be reluctant to issue permits to allow broad acre or large scale non-pastoral activities on pastoral leases and would instead be

requiring a change of tenure for more intensive activities on pastoral leases²⁷¹. Tenure would most likely be changed to a perpetual lease, with the same conditions as the pastoral lease. This policy would be in line with the Government's previously-stated policy of giving increased security of tenure to pastoral lessees. Another reason for the State's reluctance to change the tenure of pastoral leases would be the compensation implications of such changes.

- 3.2.3 On 17 June 1998, the Minister for Finance, Hon Max Evans MLC, representing the Minister for Lands, told the Parliament that in the previous five years all applications for variation were approved and the majority were for low-key tourist activity²⁷². In 1997, the State approved 12 applications for variation of pastoral leases. Five of these were for low key tourist activity and seven were for domestic goat grazing enterprise. This number was double the average number of applications per year in the preceding four years.

3.3 What pastoralists say

- 3.3.1 Pastoralists spoken to by the Committee expressed a pressing need to diversify to remain competitive. In the Kimberley, the Committee heard that pastoralists were looking to diversify their activities into tourism and related ventures to survive. They claimed they could not do so without first negotiating with native title claimants. By way of background, the Kimberley Pastoral Industry Inquiry in 1985 found while only one of the 17 leases in the north Kimberley region were non-viable, 24 of the 86 in the west and east Kimberley were non-viable²⁷³. By 1990, the Select Committee on Land Conservation estimated that 48% of the Kimberley leases were not producing sufficient cash flow to maintain an owner-operator pastoral enterprise²⁷⁴. As a result of the *Wik* decision, the WAFF said future diversifications would be extremely difficult:

*“Farmers around Australia are already diversifying into more profitable enterprises to take advantage of the growth of the processing sector, but on pastoral leases, those farmers with big plans will be forced into extensive negotiation, arbitration and litigation. Many of them will simply not bother, and Australia’s economy will be poorer.”*²⁷⁵

- 3.3.2 Therefore, pastoral representatives vigorously sought the extinguishment of native title on pastoral leases stating:

271 Mr John Clarke, Transcript of Evidence, 23/10/98, 9

272 Hansard, Legislative Council, 17/6/98, 58

273 Kimberley Pastoral Industry Inquiry, 1985, Department of Regional Development and the North West, 69-111

274 Ibid, 81

275 Mr Donald McGauchie, National Farmers Federation statement to the media following passage of the Native Title Amendment Bill in the House of Representatives, 5 December 1997

“Only exclusive possession of pastoral leases will free farmers from the risk of challenge by native title holders to pastoral activities. This was the accepted understanding of the law prior to December 1996 in relation to pastoral leases. It was the basis of the agreement in 1993 negotiated between indigenous people, the Keating Government and the NFF...Any uncertainty has the potential to result in matters having to be resolved by the Courts.”²⁷⁶

- 3.3.3 Nevertheless, the NFF have endorsed the amendments to the NTA but sought further amendments including a further tightening of the threshold test to restrict claims to those based upon “continuing and current traditional physical connection”. They have also expressed concern at resolving access arrangements between native title claimants and pastoral lessees.

“Uncertainty won’t be eliminated for many years because of the time it will take to decide statutory access arrangements, current and new claims and common law claims - this will hamper the evolution of agriculture.

“Bearing in mind that many people who have claims on their land have just been through a severe drought (or are still in one) and have battled with low prices for their cattle and their wool.

“To be faced with potential long legal battles on top of the problems of staying viable is almost too much for many of them.”²⁷⁷

- 3.3.4 Kimberley Pastoralists and Graziers spokesperson, Mrs Ruth Webb-Smith, said while pastoralists were happy to allow access to their pastoral lease, provided the Aboriginal group complied with certain conditions, legal co-existence was impractical:

“We have brought these places and worked hard. There must be one person running a business...The worry is the uncertainty of trying to run a business from day to day. We cannot have people running over the place. I am trying to run a business. It is not as though they leave the gates open deliberately. We might have spent \$10,000 out of our own pocket - not from grants or CDEP (Community Development Employment Projects) - and all of a sudden the whole lot is lost because the gates have been left open...All these places are finely tuned and all of a sudden we have everyone running all over the place.”²⁷⁸

- 3.3.5 Mrs Webb-Smith expressed a concern commonly expressed by WA pastoralists that gates would be left open by visiting Aboriginal groups, cattle would be taken and

²⁷⁶ Western Australian Farmers Federation, Written Submission, 1

²⁷⁷ Donald McGauchie, opening comments to the Federal Joint Parliamentary Committee on Native Title, 26 September 1997

²⁷⁸ Ms Ruth Webb-Smith, Oral Submission, Beefwood Station, 18/2/98

convoys of vehicles would be driven across properties. They feared the prospect of free and unfettered access across leased area and foresaw potential for conflict between traditional usage of the land and primary production.

- 3.3.6 WAFF also expressed concerns about gates, fires, guns, locks, horse paddocks and breeder herds which are all very real and practical concerns:

“There needs to be a duty of care owed by those who have statutory access and a way to enforce this standard of care. Activities which may be conducted on the lease should be limited to traditional activities and not broadened to include new activities. At the moment it is not specified how traditional activities may be conducted and may include hunting using firearms, vehicles etc.”²⁷⁹

- 3.3.7 These problems were not only confined to non-Aboriginal pastoral holders. The Committee heard from Mr Stuart Gunning of the Kimberley Aboriginal Pastoral Association (KAPA) that similar issues arose where Aboriginal owned and managed pastoral enterprises co-existed with sizeable Aboriginal communities on the leased area²⁸⁰, where those communities had different land-use priorities to the pastoral enterprise. KAPA said it was working to develop protocols for co-existence in these cases. The Committee hopes that these protocols would be a useful model for other pastoral leases.

- 3.3.8 The Committee also notes the recent agreement struck in Cape York between a pastoralist and Aboriginal community.

3.4 What Aboriginal representatives say

- 3.4.1 The amendment proposals have been opposed by Aboriginal representatives on environmental and legal grounds. They also argue that, as many of Australia’s pastoral leases are now held by overseas interests and large, wealthy land-holding corporations, the amendments provide a windfall, not for battling pastoralists, but wealthy businessmen by giving them better and more full title than they enjoyed before *Wik*.

- 3.4.2 Mr Greg McIntyre said there was a misconception that Aboriginal people would oppose diversification or off-lease activity by pastoralists. This was not the case. However, blanket extinguishment or overriding native title rights was not the way to allow this to occur. Rather, diversification or off-lease activity should occur through agreements with local Aboriginal groups, as had occurred in the Cape York Land Use Agreement.

²⁷⁹ Western Australian Farmers Federation, Written Submission

²⁸⁰ Mr Stuart Gunning, Oral Submission, Broome, 21/10/98

“The Cape York Land Use Agreement was a good example, where indigenous people were supportive of their neighbours in the bush - if that is a politically correct term - where they could talk these things through. As one Cape York pastoralist said, poverty is a common ground on which they can sit down and talk to one another. It was not necessary to determine those things by legislation. However, it could well have been necessary if the right to negotiate, for instance, applied to new enterprises on farming properties or new activities. Those things could have been easily agreed without the necessity for blanket legislation.”²⁸¹

- 3.4.3 Aboriginal representatives rejected the claim that there was an agreement in 1993 that native title would be extinguished on pastoral leases. They point out that the *Wik* case was launched before the legislation was passed. Father Frank Brennan, who was involved in the negotiations in 1993, stated:

“Pastoralists were guaranteed that they would be able to renew their leases on identical terms and conditions without ever having to negotiate with native title holders. Most players in 1993 believed that the High Court would have ruled 4-3 that native title was extinguished on pastoral leases but government accepted that Aborigines were entitled to their day in court. Should they lose, Aborigines would still have the power to reinstate native title on a pastoral lease which they purchased (s.47). In principle, it would have been wrong for Parliament to extinguish any common law rights which may have been found to exist.”²⁸²

- 3.4.4 Professor Richard Bartlett stated that the amendments denied Aboriginal equality before the law because the amendments made native title subordinate to pastoral leases. Examination of the substance of the *Native Title Amendment Bill 1996* revealed that it was a substantial, complex and specific “disapplication” of the protection of the *RDA*, he said.

“The Howard Government’s “Ten Point Plan” is not unlike the invalidated Land (Titles and Traditional Usage) Act 1993 of Western Australia. It subordinates native title to all other interests, in particular those of the mining and pastoral industries, and strips native title of substantial protection. Native title is accorded essentially an inferior status, entailing a denial of equality before the law. However the Native Title Act started out, if the proposed amended Act will merely validate the dispossession of the past, validate the dispossession in the future, and offer minimal rights to compensation and burdensome procedures to Aboriginal people...It will provide title and resource security to everybody except native title holders.”²⁸³

281 Mr Greg McIntye, Transcript of Evidence, 5/8/98, 27

282 Father Frank Brennan, Op Cit, 4

283 Professor Richard Bartlett, Transcript of Evidence, Op Cit, 64

- 3.4.5 Professor Bartlett's views were supported by the Australian Law Reform Commission (ALRC) and barrister Greg McIntyre. Mr McIntyre provided the Committee with legal advice previously prepared for another party indicating that the provisions in the *Land Acquisition and Public Works Act 1902 (WA)* and the *Land Administration Act 1997 (WA)* were racially discriminatory because they were intended only to be used to expropriate native title.

*"In my view a Court could properly find that the purpose of the Acts Amendment Repeal (Native Title) Act 1995 (as transferred to the Land Administration Act), being to allow for the acquisition of native title in order to grant to others, a purpose not having been previously contemplated in relation to any other persons, is a racially discriminatory purpose."*²⁸⁴

- 3.4.6 The ALRC said the amendments would almost certainly yield more, not less, litigation and compound uncertainty and lack of confidence in Australian real property law. They recommended the principle of co-existence of non-exclusive leasehold and native title interests be legislatively upheld. Where there was a belief by a leaseholder that their interests were uncertain then it was incumbent on the leaseholder to seek a declaration from the Court to clarify co-existing rights.

*"Once the parameters of each interest and the means of determining conflicts are clear, there is no bar to the continued concurrent enjoyment of the rights of each party."*²⁸⁵

There was precedent for co-existing rights in the English property system, in which the co-existence of rights was a fundamental tenet, the ALRC said.

*"The doctrine of estates and tenures 'provide the conceptual basis for concurrent interests in land as well as pointing to a distinction between those interests which carry with them a right to possession of land for a defined duration and those which bestow some proprietary right but do not carry with them a right to possession."*²⁸⁶

- 3.4.7 Father Frank Brennan wrote in his submission that in order to prove that the compulsory provisions were non-discriminatory "A few Hills Hoists would have to go under"²⁸⁷.

"I have no problem with pastoralists having certainty so that they can engage in state approved primary production activity and farmstay tourism; but in

284 Mr Greg McIntyre, July 1997

285 ALRC Written Submission, Written Submission, 15

286 Ibid.

287 Father Frank Brennan, Op Cit, 8

return they should have the decency to allow Aboriginal people who pass an appropriate threshold test to come to hunt, fish, camp and have ceremony. And they should be prepared to sit down and talk with those Aboriginal people, if they do be permanent settlers in that area, to talk about excision of a living area which do not interfere with the pastoral operation, where there is a guarantee that they keep, say, one kilometre away from the homesteads and improvements and things of that sort."²⁸⁸

- 3.4.8 Father Brennan's suggestion was echoed by Mr Danny Webb-Smith on Beefwood Station in the Kimberley, who had similar proposals to restart the living excision program. Said Mr Danny Webb-Smith:

*"As far as I am concerned, if an Aboriginal rings and says he wants to come on the land, he can go anywhere - as long as I know who it is and where he wants to go. Co-existence will work as long as we can identify the group or person, because they do not come in ones or twos - they come in 20s or 30s."*²⁸⁹

3.5 What some other sections of the community say

- 3.5.1 Tourism, regional development and environmental commentators express concern that the holders of a grazing licence over vast areas of land should not automatically be guaranteed the exclusive right to further develop the land holdings for all other economic purposes such as tourism facilities, road houses etc. Some of the natural attractions that are located on pastoral land are national treasures. It is not in the widest community interest to simply encourage the processes of law to be set in such a way as would allow the pastoral lessee to set out on a path of having the guaranteed right to develop such attractions. The pastoralist may be the person who would best develop the area for tourism purposes (for example, the features that have been developed at the El Questro pastoral lease are world class; no amount of advertising and intensive selection processes are likely to have attracted a better class of development and use of the natural features of this pastoral lease than has been achieved). However, can this always be guaranteed? Will pastoralists - who in many cases are already suffering from crippling debts and poor returns on their pastoral operation - be the best placed to develop and manage tourist infrastructure on these natural features and attractions. It may also not be ideal for a pastoralist to be pressed to spend so much time on other economic activities so as to have inadequate time to invest in the management and development of their pastoral lease and other pastoral activities. Road houses and tourism facilities and the like are important parts of the development of remote regions. To leave those developments exclusively in the hands of those who have a pastoral lease is not necessarily going to produce the best development opportunity for these sites.

288

Hansard, Federal Joint Committee on Native Title and Torres Strait Islander Land Fund, 26,9/97, NT418

289

Mr Danny Webb-Smith, Oral Submission, Beefwood Station, 16/2/98

- 3.5.2 The Committee heard from Mr Athol Farrant, a retired farmer, on this matter. Mr Farrant drew the Committee's attention to a 1979 report entitled "The Present and Future of the Pastoral Industry". The report detailed overstocking, degeneration and degradation of pastoral areas. He claimed the upgrading of pastoral leases and relaxation of restrictions on the leases would make these problems worse.

*"The report indicates the absolute need for us to consider the country rather than, as I understand it, accommodating the desire to make the leases perpetual."*²⁹⁰

- 3.5.3 Similarly, the Select Committee into Land Conservation 1991²⁹¹ found that in the Kimberley only 7.6% of the land was of high quality, while 57% was of either medium or low quality land, while a further 35% was "virtually useless or of very low potential".

*"Considerable capital is required to develop leases to the extent needed to provide improved control of cattle and adoption of improved animal husbandry techniques to increase per head of productivity. In addition, transport and processing costs are high, while the quality and hence the value of the cattle produced is low. A problem further tending to reduce the profit margins in the Kimberley pastoral enterprises is the high prices paid for leases which partly reflects the extent of corporate ownership of leases; the presence of speculators in the cattle industry and generally the unrealistic expectations of new pastoralists to develop Kimberley stations while underestimating the financial requirements to do so."*²⁹²

- 3.5.4 This point was expanded upon by the Australian Conservation Foundation, who claimed that the amendments would allow pastoralists to pursue any form of activity with little or no constraint. This would be environmentally-damaging on pastoral leases, some of which contained much of Australia's most environmentally-sensitive and diverse land. They claimed that the pastoral lease system was intended to be used by Governments as a means of controlling activity on the land and protecting the land.

"Leasehold tenure is a land management tool, a licence issued by governments to regulate various land uses, such as clearing. Through conditions attached to the lease, governments can have an important role in ensuring protection of the land and in managing the range of activities that pastoralists can engage in. Lease conditions allow governments to ensure that land is looked after on behalf of the whole community. Governments can adjust the stocking rates, set logging rates, require that land be rehabilitated, protect endangered species,

290 Mr Athol Farrant, Transcript of Evidence, 6/11/97, 26

291 Legislative Assembly Select Committee into Land Conservation, Discussion Paper No 3, 1991.

292 Op cit, 78

*reserve wildlife corridors, or replant trees along rivers. The Government's ability to do this will be severely limited if tenures are upgraded.”*²⁹³

3.5.5 In Broome, Allan Grosse from the Department of Conservation and Land Management expressed concern that the amendments would result in pastoral lease holders gaining a form of ownership of areas of natural heritage, which were located on the lease area. In addition, to being able to charge fees for entry to these areas, it could be the case that these leaseholders would be automatically considered to be the appropriate developers of land for other economic purposes: for example, tourism facilities such as road houses.

4 Committee discussion

4.1 Co-existence of real property interests is a fundamental tenet of the English property system. For example, on any given piece of land there may co-exist a freehold interest, a leasehold interest, a public or private easement, strata interests or an interest in the remainder. The reason that it is at first conceptually difficult to slot native title into this regime of co-existence is the relative vagueness of the content of native title. Once it is clear what the parameters of both interests are, then there should be no problem to their co-existence.

4.2 It is not uncommon for there to be a commonality of interest between pastoralists and Aborigines born out of a similar upbringing and shared experiences. In some cases, pastoralists share an affinity with the land which is very similar to that of Aboriginal people. However, there will be cases where the two do not “get on”. The recent history of dispute over native title has in many ways increased the potential and reality for tension. There needs to be an environment encouraged which is conducive to co-existence succeeding.

4.3 It needs also to be borne in mind that on all pastoral leases where native title still exists, native title yields to the legal rights of the pastoralist. It is only in relation to acts which do not strictly fall within the terms of the lease but are nevertheless an integral part of modern pastoral operations that there are potential problems. Under the *WA Land Administration Act 1997*, it is these activities which are to be regulated by the State through issuing of permits. However, in many cases these have not been sought or issued.

4.4 The *Wik* judgment has highlighted the tenuous nature of the pastoral lease and pastoral lessees have every reason to feel insecure, irrespective of native title, for economic as well as legal reasons. There is no doubt that many pastoral lessees will need to diversify to survive. We note the Indigenous Land Corporation was established to enable Aboriginal people to acquire land. However, the Committee is of the view that there is little point in acquiring properties where there is no on-going support for the

293

Australian Conservation Foundation, Written Submission, 2.

operation of the property. The Committee encourages the State to provide access to services provided by AgWest and Pastoral Lands Board.

- 4.5 Any diversification of activities or upgrade of tenure will have significant compensation implications if due regard is not given to native title. This needs to be foremost in the minds of Government when considering applications to permit diversification or upgrading.
- 4.6 The Committee recommends that in relation to applications for a land grant, upgrade, diversification, or renewal of lease the applicant reach agreement with potential native title holders in relation to access to the leased area for native title purposes. This could at least include provisions such as:
- notification of intention to access the area;
 - specification of the maximum numbers that can enter the lease at one time;
 - rules as to opening and closing of gates;
 - rules as to hunting and use of firearms on the lease;
 - rules as to disposal of waste;
 - remedies for breach;
 - recognition and respect of culturally-significant sites;
 - camping;
 - taking of plants;
 - lighting of fires on lease;
 - dogs and other animals brought onto the lease;
 - ceremonies on lease;
 - interference with the pastoralist's business; and
 - use of vehicles on the lease.
- 4.7 The Committee notes the recommendations of the 1996 Bonner Report that the State re-commence excising living areas from pastoral leases. It is understood that in some cases it will not be practical or economic to do so, given that such excisions may require provision of basic amenities. It is important that where an excision does occur that persons living on that excision be able to access areas of the pastoral lease, subject to agreement with the lessee.
- 4.8 In relation to the last two recommendations, the Committee notes the draft Pastoral Lease Grant Agreement recently released by the South Australian Government, a copy of which can be found in Appendix 15 to this report. The agreement aims to *"...establish a consensual regime whereby the State, the pastoralists, the Aboriginal communities and other persons can all use and enjoy the land harmoniously and consistently in exercise of their respective rights, powers or interests in or to the land"*. The draft agreement deals with the above matters. The draft also provides for:
- authorisation and ratification by State legislation;

- the release of the State and any pastoralist or any other person having an interest in land from any claim for compensation and damages arising from the granting pastoral lease and acts performed pursuant to the lease;
- suspension of common law native title rights and replaces them with rights under the agreement;
- a right of exclusive occupation for the pastoralist and allows them to exclude all people from an area around a house or other buildings on the lease;
- development on the lease in consultation with the relevant Aboriginal group
- protection for the conduct of the pastoralist's business;
- mining on the lease subject to consultation with the relevant Aboriginal group and payment of compensation (the terms of which are specified). This provision of the agreement mirrors the alternative right to negotiate regime on pastoral leases in the amended NTA; and
- applications for excisions of community living areas from the pastoral lease.

4.9 The benefit of such agreement would be to provide a framework, and therefore certainty, as to the exercise of Aboriginal common law and statutory rights in respect of pastoral leases. In particular, it would provide benefits for all parties by:

- **Western Australia** - releasing of the State from an as yet undetermined liability for compensation for extinguishment and impairment of native title;
- **pastoralists and Aboriginal groups**- providing specific enforceable guidelines for access to the lease with remedies for breach. It is clear that neither party is presently satisfied with the ambiguous nature of access provided by s.109 of the *LAA* as there are no guidelines for the exercise of that right. Further, pastoralists would gain the right of exclusive occupancy and Aboriginal people a protection of their rights of access.
- **miners** - providing certainty as to the procedures for mining on pastoral leases and compensation for such mining.

Conclusions and recommendations

26. The State develop model agreements for pastoral and other agricultural leases, as has been developed in South Australia, for use in relation to Aboriginal access proposals.

27. The State encourage pastoralists to enter agreements with local Aboriginal communities in relation to regulating access to leaseholder land under s. 106 of the *Land Administration Act 1997*, diversification of on-lease activities and upgrade of tenure.

CHAPTER 10

ROLE OF THE STATE IN NATIVE TITLE MATTERS

CHAPTER OVERVIEW

Under the Australian Constitution, the State has sole responsibility for land management and the issuing of titles. In addition, under the common law system of property, all land title derives from and is held directly or indirectly by the Crown. The one exception to this rule is native title, which is sourced upon the Aboriginal traditional occupation or connection of land, and is a burden on the Crown's title.

The *NTA* sought to recognise the importance of the State in Native Title matters by imposing upon the State an obligation of good faith in the right to negotiate process.

Aboriginal representatives alleged a lack of good faith on the part of the Western Australian State Government. They said that the State, for political purposes, initially tried to flood the system with Future Act applications to overload it and then sought to prolong delays in order to show the system was not working.

Other witnesses said they had detected a shift in the State's willingness to privately negotiate post-*Wik*. NNTT President Justice French spoke positively of the State's attitude and said they were prepared to look at native title outcomes, and also non-native title outcomes.

State representatives told the Committee that the unworkability of the *NTA* arose from ambit claims and the inability of the State to co-ordinate state land administration with Federal legislation. Another important factor in the failure of many negotiations has been the failure of parties, other than the State, to act in good faith. They said even with extra resources they doubted whether it would make a material difference to delays.

1 Background

- 1.1 The Western Australian Government has taken a leading role in national debate on native title, starting with its preferred solution in 1993 of the *Land (Traditional Titles and Usages) Act* through to its extensive lobbying of the Federal Government in relation to the Ten Point Plan. This activism stems from the large portion of the State subject to native title claims and the resulting impact on State affairs. Said Mr John Clarke, consultant to the Department of Premier and Cabinet:

“I think it is fair to say again, we had a fairly prominent role because we were the only State that had actually worked under the Native Title Act and therefore we were fully aware of the shortcomings of the present Act.”²⁹⁴

- 1.2 Under the Australian Constitution, the State has sole responsibility for land management and the issuing of titles. In addition, under the common law system of property, all land title derives from and is held directly or indirectly by the Crown. The one exception to this rule is native title, which is sourced upon the Aboriginal traditional occupation or connection of land, and is a burden on the Crown’s title.
- 1.3 While the Crown was at one time able to unilaterally extinguish native title without compensation, it is now restrained from doing so in certain circumstances by the *RDA*.

2 What the NTA said

- 2.1 The *NTA* originally sought to recognise the importance of the State’s lead role in resolving native title’s integration into land management by imposing on the State an obligation of good faith in the right to negotiate process. It was not enough for the State to sit back and allow the grantee party and the native title claimant to negotiate terms of grant; the State had to take a proactive and active role in negotiations. If this precondition has not been satisfied then the NNTT cannot be asked to make an arbitrated decision.
- 2.2 The reason for the obligation of good faith was spelled out by NNTT member Chris Sumner in his decision of *Re Koara People No 1*:

“The negotiation process is at the core of the Future Act regime. This is emphasised by the fact that the obligation to negotiate in good faith is imposed on the Government party. The Government party can ensure that the right which is given to Aboriginal people can be effectively utilised and not be a right which exists in name only. The imposition of the obligation on the Government party will help to ensure that the ‘right to be asked’ and the ‘special right to negotiate’ which is given to Aboriginal people by the Act is effective. A Government party is in a special position to have regard to the public interest in ensuring that the beneficial intentions of Parliament are realised.”²⁹⁵

- 2.3 Another reason for the primary obligation being imposed on the Government was highlighted by the Native Title Mediation Service in Kalgoorlie. They pointed out that in many cases parties took their lead from the State Government. If representatives of the State did not turn up, mediation parties often said they saw no reason why they should continue being involved.

²⁹⁴ Mr John Clarke, Transcript of Evidence, 31/11/97, 8.

²⁹⁵ *Re Koara People No 1* (1996) 132 FLR 73.

3 What is good faith negotiation?

3.1 The Tribunal has ruled that essential to the concept of good faith negotiation was a willingness to compromise, an open mind and “...a genuine desire to reach an agreement as opposed to simply adopting a rigid pre-determined position and not demonstrating any preparedness to shift”. The NNTT in *Re Koara People No I*²⁹⁶ and *WA v Thomas & Ors*²⁹⁷ indicated a list of factors which must be considered when determining whether this obligation has been met. These include:

- unreasonable delay in initiating communications;
- failure to contact one or more parties;
- shifting position just as agreement seems in sight;
- adopting a rigid non-negotiable position;
- stalling negotiations by unexplained delays;
- failure to make proposals in the first place;
- failure to make counter proposals;
- failure to do what a reasonable person would do in the circumstances;
- sending negotiators without authority to do more than argue or listen;
- failure to provide parties with information about the tenement and information from the Register of Aboriginal sites;
- failure to convene meetings between parties; and
- failure to seek referral to NNTT if negotiation breaks down.

3.2 As a result of the Tribunal’s decisions on good faith negotiations, which have resulted in around six tenure applications being remitted to negotiation, the Western Australian Government has developed its own protocol for negotiation with native title parties. While making a positive step towards procedural certainty for all, the Tribunal has expressed caution in regards to the development in that the protocol may result in a bureaucratisation of the negotiation process²⁹⁸. Following the decision 134 Future Act determination applications were withdrawn and resubmitted by the State.

3.3 While the obligation of good faith was imposed only upon the State, the Tribunal recognised that in many negotiations the actions of the native title party and other circumstances had an effect on the content of this obligation - if the native title party acts unreasonably then there could be a lesser standard on the Government. This was found to be the case in *WA v Strickland*²⁹⁹ in which the solicitors for the native title parties had demanded confidentiality in negotiations and then refused to negotiate

²⁹⁶ Ibid.

²⁹⁷ *WA v Thomas & Ors* (1996) 133 FLR 124.

²⁹⁸ Justice French, “Central Concepts of Native Title”, An Overview of Native Title, Law Society of Western Australia, September 1997.

²⁹⁹ *WA v Strickland* (NNTT, WF98/5, 11 August 1998).

when this demand was not acceded to. The Tribunal said the Government could not be found to have breached its obligation to negotiate in good faith when the native title party itself had refused to negotiate.

4 What the amended NTA says

- 4.1 Under the amended NTA all parties will be required to negotiate in good faith under s. 31(b). As before, the NNTT will be unable to arbitrate if this pre-condition is not met. However, under s. 31(2) if a negotiation party refuses to negotiate about a matter unrelated to the effect of the Act on the registered native rights and interests then this will not constitute a failure to negotiate in good faith. This was not the case previously where matters unrelated to the Act could be drawn into the negotiations. Further, the State Government proposes to remove the requirement of it being a negotiating party and the good faith obligation where it is not a grantee party.

5 What Aboriginal people say

- 5.1 It is an alleged lack of willingness to compromise and closed minded approach to native title issues by the Western Australian Government which a number of Aboriginal representatives and other witnesses pinpointed as the chief cause for delays and backlogs in the native title process. They allege that the State initially tried to flood the system with Future Act applications to overload it and then sought to prolong delays in order to show the system was not working. The Aboriginal Legal Service of WA stated that:

“A lot of the so-called inefficiencies and unworkability of the Act that have been argued as the basis for the need for amendments have been created by the State Government’s reluctance to participate in good faith in the right to negotiate process.”³⁰⁰

- 5.2 The ALS further alleged that a certain amount of backlog related to a period of time when it could have begun complying with the NTA immediately upon its enactment. In addition, the Department of Minerals and Energy was said to be chronically under-resourced and under-staffed. This view was supported by the Western Australian Aboriginal Working Group who gave the following history of the matter.

“In 1992, it was confronted with the legal fact of native title. The Government’s response was to resist the implications of Aboriginal common law rights in land and to adopt a policy of non-engagement with the processes of the Native Title Act 1993. Until its own Aboriginal Lands (Titles and Traditional Usages) Act was struck out by the High Court in March 1995, the State seemed more concerned with pre-empting the native title rights and interests of Aboriginal people rather than the requirements of good management. Since the High Court’s decision in the matter of its own

300

Mr Gregory Benn, ALS of WA, Transcript of Evidence, Op Cit, 43.

legislation, the State has invoked the Future Act processes of the Native Title Act with considerable energy. Unfortunately, it has not been so energetic in managing the consequences because the large number of outstanding Future Act applications that have been advertised since March 1995 are now represented as evidence of the unworkability of the Native Title Act. The resources that the State has provided to manage the workload have been grossly inadequate.”³⁰¹

6 What other witnesses say

- 6.1 The above view was not confined to Aboriginal representatives. In a submission to the Committee by the Shire of Roebourne similar opinion was expressed. Over the past two years, the Shire has been experiencing chronic land shortages, freehold values have risen by up to 400% and a number of overlapping native title claims have been placed over the town of Karratha and surrounding area. In a letter to the Committee dated 21 April 1998, Shire Chief Executive Officer Trevor Ruland said land shortages were perhaps being used by the State to further their political objectives in relation to native title. Said Mr Ruland:

“The Shire has experienced difficulty in receiving the necessary co-operation from both the State Government and the Land Council on reaching resolution, such that the land release matters may be resolved. The financial and political problems within the West Pilbara Land Council have presented difficulties, however the State Government’s position has been ineffectual. There can be little doubt that the State Government’s original stance on Native Title had a negative effect on relations.

At a meeting with the Premier in 1997, the problems facing the Shire were presented, with the response being that the matter would be resolved with the amendments to the Native Title Act by the Federal Government. When asked what contingencies were in place should the amendments not proceed, no decisive answer was offered. This indicated that the frequently cited problems facing the Shire were perhaps being used in the broader political objectives of the State Government.”

- 6.2 This complaint was also mirrored in Kalgoorlie, another hotspot in relation to land shortages, where community representative and former deputy mayor of Kalgoorlie Mr Douglas Daws alleged that the Department of Land Administration and the town of Kalgoorlie were being used as “pawns” by the State and Federal Governments.

“The overall feeling is that it is out of control and that the Federal and State Governments are either unable or unwilling to tackle the issues. There is a sense that some government departments are being used as pawns. I believe the

301

Western Australian Working Group on Native Title, Transcript of Evidence, Op Cit, 12.

Department of Land Administration has been used as a pawn in the game by the Government to hold up land development in Kalgoorlie. They have been hoist with their own petard because we now have a desperate land shortage. They are all too quick to blame the shortage on native title without trying to resolve the issue. It is now out of control.”³⁰²

- 6.3 However, this was not a consistent view among witnesses, with some detecting a shift in the State’s willingness to negotiate post-Wik and following a number of other losses in the Courts. There was evidence of the State Government privately seeking to progress mediations under certain conditions while at the same time publicly lobbying to change the NTA.

“They [the State] may not necessarily like the conditions that have been outlined; nonetheless, it is something very positive because pre-Wik the State would not mediate on claims. Post-Wik, it will. If this process is followed it can lead to a discussion about a mediated outcome on native title.”³⁰³

- 6.4 Justice French also spoke positively of the State’s attitude:

“They are prepared to look at native title outcomes, they are also prepared to look at non-native title outcomes and I think that is a very encouraging sign. I can give some recent examples of that. In the Rubibi cluster of claims in Broome, the State and the applicants requested that the mediation process be adjourned so they could directly negotiate on a sort of regional outcome for the area. That was a very positive sign. The Premier went there and was engaged in it. In the metropolitan area, which is unfortunately bedevilled by intra-indigenous issues, the State indicated quite clearly, and it was a matter of public record, that it was prepared to negotiate some non-native title outcomes, including consultation and protection of areas of interest and importance to Aboriginal people, provided that the Aboriginal groups were able to speak with one voice. There are other mediations where the State is talking seriously about native title outcomes or alternatives which are of great interest to the applicants. I cannot say that the State Government’s attitude in terms of the on-the-ground process is anything less than cooperative and positive. I think it shifted in a more positive direction after strategic positions were taken probably back in the days of their own state legislation.”³⁰⁴

- 6.5 Some of these outcomes, the Spinifex Agreement and the Balanggarra (see Chapter 14), have since become publicly known and applauded.

³⁰² Mr Douglas Daws, Oral Submission, Kalgoorlie, 22/5/98.

³⁰³ Mr Michael Rynne, Transcript of Evidence, Op Cit, 11.

³⁰⁴ Justice French, Transcript of Evidence, Op Cit, 24.

7 What the Department of Premier and Cabinet say

7.1 The State's dealings with native title are co-ordinated from the Department of Premier and Cabinet.

7.2 Mr John Clarke and Ms Vera Novak from the Department appeared three times before the Committee to give extensive evidence. They argued strongly for the Federal Government's then-proposed amendments to the *NTA*. They argued that the unworkability of the Act arose from ambit claims and the inability of the State to co-ordinate state land administration with Federal legislation.

*“At present the government must complete all other approval processes before it can trigger the native title process. This adds at least six months to approval times and in some cases even more...new changes...will enable, we believe, the state to essentially regain control of land and mining administration and also to fully integrate native title into the land and administration system.”*³⁰⁵

7.3 Another important factor in the failure of many negotiations has been the failure of parties, other than the State, to act in good faith.

*“Both the applicant and the native title party can treat the government with contempt and not suffer any adverse consequences. We repeatedly have cases of people simply refusing to attend mediation or negotiation meetings.”*³⁰⁶

7.4 The State has sought to put in place public guidelines to formalise its position on mediation and the right to negotiate procedure. These include:

- a draft negotiation protocol; and
- a set of criteria to indicate an ongoing traditional connection with land which must be satisfied before the State enters into negotiation for determination of native title. These include continuous traditional association with land claimed, existence and continuous exercise and observance of traditional laws and customs since immediately prior to sovereignty, an established cohesive social group with common identity and resolution of overlaps (where those overlaps were not traditionally-based).

7.5 As a result, the State is now in formal negotiations with two groups, the Spinifex People³⁰⁷ and the Balangarra³⁰⁸, with a view to reaching an agreement in relation to

³⁰⁵ Mr John Clarke, Transcript of Evidence, 23/10/97, 8.

³⁰⁶ Ibid.

³⁰⁷ The term “Spinifex” is used to describe the people of the Spinifex Desert within the Great Victoria Desert. “Spinifex” is the name of their claim. This group is from the Southern Pitjantjatjara land area. Their land area in WA abuts the South Australian border, some 50,000 sq kms of which is subject to the claim they have made. The group is made up of people spread over a vast living area, made up of many communities, with members of the group living in and

their “traditional ownership and use of” claimed lands - these cases are further dealt with in Chapter 14 - and is negotiating informally with three groups in relation to reaching some kind of Future Act regime, and has made offers to negotiate with a further 14 groups provided they can satisfy the criteria.

7.6 The Department of Minerals and Energy has also sought to give priority to mineral tenement application where the applicant has identified a pressing need for that application to be dealt with.

7.7 In relation to matters of staffing and expenditure, the following figures were provided:

According to figures presented to the Committee by the Department of Premier and Cabinet, it is estimated that \$9.525 million was spent by the State Government on native title related matters in the 1997/98 financial year, an increase of \$2.545 million on the previous year. The breakdown across Government Department is as follows:

Estimated WA Government expenditure on native title related matters in 1997/98

Department of Minerals and Energy	Ministry of the Premier & Cabinet	Department of Land Administration	Crown Solicitors Office	Other agencies	Total
\$2.835 million	\$0.65 million	\$1.74 million	\$3.59 million	\$0.71 million	\$9.525 million

It is expected that this will rise to \$12.125 million in 2000/2001, with a total of \$55.925 million spent over a six year period from 1995 to 2001, of which \$18.52 million will be spent in land claim litigation (approximately 1/3 of the total expenditure). In particular, the Government’s costs for the unsuccessful challenge to the *NTA* were \$1,734,451 and, so far, \$3,361,962 has been spent on the Miriuwong Gajerrong litigation (a contested native title claim in the North-East Kimberley, a judgment which is due in the near future).

Mr John Clarke was unable to tell the Committee what the projected cost of the establishment and operation of a new State Commission would be.

8 What the Department of Minerals and Energy say

8.1 As at 24 June 1998 there were 12 people employed by the Native Title Land Access Unit in the Department of Minerals and Energy (DOME). Five of these staff were case

around Tjun Tjun Tjara, Kalgoorlie, Laverton and many of the Central Desert population centres.

308

“Balangarra” is the name that has been given to the people that are party to the framework agreement that relates to the people and land of the North East Kimberley area, between Oombulgurri and Kalumburu.

managers. Over the past three years the budget of the Unit has risen from \$1 million in 1995/96 to \$1.96 million in 1997/1998³⁰⁹.

- 8.2 The Minister for Mines told the Parliament on 28 April 1998³¹⁰ that at that time 21 staff in DOME were involved in native title matters - 14 from the land access unit and corporate executive were dealing with Future Act negotiation matters, including policy formation, and seven from the minerals titles division were involved in processing titles, (about one person to every 286 applications) through the Future Act regime. He further stated that DOME had at that time 320 concurrent negotiations ongoing, to which 10 staff were allocated, approximately one per 32 negotiations. A further 40 full-time staff and 22 part-time staff across Government departments were involved in native title related matters.
- 8.3 Mr Phil Mirabella, a representative of DOME, rejected claims that the State was to blame for the delays. He was adamant that Western Australia of all State governments was the one Government that had been conducting the process in the correct way. Rather, it was current provisions of the *NTA* which were the sole cause of delays. Mr Roy Burton said since submissions have been subjected to the *NTA*, the processing and granting of mineral titles, in particular mining leases, had been grinding to a halt. He estimated that the *NTA* had added six months onto the waiting period for applications.
- 8.4 Mr Mirabella said even with extra resources he doubted whether it would make a material difference to delays.

*“I have been very disappointed with the knowledge of the parties involved. The mining industry started to learn very quickly. Quite a few claimants changed legal representation along the way because the representatives might have done something the claimants did not like. It made it very difficult for our department to start to negotiate and finalise deals. Everything was challenged and unrealistic demands were placed on us. Many companies found that very difficult to deal with and some decided to withdraw from the negotiating process or even withdraw the tenements altogether.”*³¹¹

- 8.5 However, DOME said it had sought to give priority to mineral tenement application where the application had identified a pressing need for that application to be processed.

309 Hansard, Legislative Council, 23/6/98, 4402.

310 Hansard, Legislative Council, 28/4/98, 73.

311 Mr Phil Mirabella, Transcript of Evidence, 5/11/97, 15.

9 What the Aboriginal Affairs Department (AAD) said

- 9.1 Responsibility for native title related matters have been handled principally by the Department of Premier and Cabinet, and by the Department of Minerals and Energy, in relation to *Mining Act 1978* applications, and the Department of Land Administration, in relation to *LAA* applications. This has meant that the Department with on-line responsibility for Aboriginal Affairs, the Aboriginal Affairs Department, has had very little involvement with native title matters.
- 9.2 Nevertheless, AAD retains responsibility for:
- the Aboriginal Lands Trust;
 - administration of *Aboriginal Heritage Act* and Register of Sites;
 - custody of the old Native Welfare Department records in relation to family genealogies; and
 - the Aboriginal Cultural Materials Committee.
- 9.3 Further, AAD has been provided with \$200,000 by the State Government to assist in the accessing of records held by the Department to members of the “Stolen Generation”. Further, AAD has also been provided with Commonwealth funding to establish “support agencies” for people who are seeking to find their families.
- 9.4 AAD is presently negotiating transfer of administration of the Aboriginal Lands Trust (ALT) to DOLA. Further, pursuant to the recommendations of the 1996 Review of the Aboriginal Lands Trust (“The Bonner Report”), AAD has been developing implementation plans for ownership of lands held by the ALT to be transferred to Aboriginal people.
- 9.5 The Bonner Report recommended that transfer of land from the ALT should occur by 2002. It found that the importance of this transfer stemmed from the ALT’s past inability to properly administer Aboriginal lands.

“...the lands managed by Aboriginal Lands Trust have been badly managed. As a foundation for building a better future for Aboriginal people, much of the ALT land is ‘damaged goods’.

With the greatest respect for past and present members of the Aboriginal Lands Trust, the ALT has essentially been an absentee landlord without the resources to address the needs of people resident on its land or to make representations on their behalf.”³¹²

The AAD now estimates that this transfer may not occur until 2004 or later. It is likely that the land will be transferred as either crown land in trust, as a perpetual lease or freehold depending on the current tenure of the land.

312

Report of the Review of the Aboriginal Lands Trust, 1996, 9 & 21.

- 9.6 At the time of giving evidence to the Committee, the ALT was in the process of taking nominations for a new chairman following the resignation of Mr Cedric Wyatt on 10 April of this year. Mr Wyatt was appointed as a member of the new board on 1 July 1997.
- 9.7 It appeared to the Committee that little had been done by the AAD to progress the transfer of ALT lands to Aboriginal ownership. In particular, witnesses from AAD admitted that they had not yet made any assessments of whether native title could exist on ALT lands and whether transfer would have a consequence on that title. This is a particularly important exercise given that there is a high probability that native title still exists on those lands.
- 9.8 Further, a witness from the AAD also admitted that there had not yet been any mediations between people likely to hold native title over ALT lands and other Aboriginal people who may live on the lands. This again is a matter of primary importance given the likelihood of conflict between the two groups in the event of transfer of ownership. In this respect the Committee notes the comments of the Bonner report which found that the ALT had a “...*duty to play a constructive role in resolving land disputes*”:

“The need to create balance between the rights of traditional owners of land and existing land users (and possibly others with a strong historically-derived attachment to a property), where they are not the same people, is central to this report.

Current experience where native title claims have been lodged over Aboriginal reserves has highlighted the complexity of determining entitlements over Aboriginal land and the need for every effort to be made to improve communication between different parties to any dispute.”³¹³

- 9.9 Demand for access of native title claimants to genealogical records and information on Heritage Sites will undoubtedly increase with the new requirements of the registration test, which include proof of physical connection to land claimed or proof of forced removal from land. Given the new stricter timetables for registration it will be necessary for the AAD to ensure that this information is readily available.

10 Should the State be involved in negotiations?

- 10.1 There was divided opinion among witnesses about the role that the State should take, even amongst those who alleged that the State had failed to be active enough in the native title process.

313

Report of the Review of the Aboriginal Lands Trust, 1996, 27.

- 10.2 On one hand there were those who were very much in favour of the State taking a very hands-off role and leaving Future Act matters to the claimants and the grantee parties. This was the case in the North-East Goldfields where the North-East Independent Body lobbied actively to be left to their own devices in reaching agreements with miners and for the Government to then support those agreements. This view was supported by the Western Australian Working Group on Native Title who stated:

*“Negotiations in which State Governments have not intervened tend on the whole to be shorter than those where there is intervention from the State. In Western Australia most cases being referred to the Federal Court quickly are those in which the State has intervened with the expedited procedure process on Future Acts; where the claimant wants the matter in the court and a determination made quickly.”*³¹⁴

Nevertheless, the WA Government needed to play a significant role in the resolution of the conflict between the parties and to set up a legal framework which allowed agreements to be binding, they said.

- 10.3 On the other hand, there was also a strong point of view that for native title disputes to be resolved, the State needed to take a lead role. WMC was firmly of the opinion that the State needed to become more involved.

*“My experience is based only on one native title study tour of North America. The difficulties they are facing are resolved in my opinion - and this is a personal opinion rather than a WMC opinion - largely because of a greater involvement by Government in the processes of resolution and of agreement and the responsibility for negotiation, compensation and this right to negotiate, is genuinely not just a problem of the mining industry. It is more a problem of all involved parties. So, you will get other industries involved, forestries and fisheries particularly in Canada, and you will also get a heavy involvement of Government who look to sharing royalties, rather than creating a further impost on their industries.”*³¹⁵

- 10.4 This matter will be dealt with in greater detail in Chapter 14 on Agreements.

11 Committee discussion

- 11.1 The amended Federal NTA and the State Government’s proposal to legislate for a State Native Title Commission is consistent with its constitutional responsibilities for land management. In view of those responsibilities, the Committee recommends that the State take a lead role in native title negotiations, unless otherwise requested by parties

³¹⁴ Mr Glenn Shaw, Transcript of Evidence, Op Cit, 50.

³¹⁵ Ms Jan MacPherson, Transcript of Evidence, Op Cit, 28.

to the negotiations, and also take a public leadership role in relation to the native title process.

- 11.2 The Committee recognises the importance of negotiation in good faith as essential for outcomes in native title claims and that all parties, including the State, commit themselves to negotiate outcomes in good faith.

Conclusions and recommendations

28. The State take a lead role in all native title negotiations, unless otherwise requested by parties to the negotiations, and commit itself to the native title process and producing positive outcomes for all stakeholders.

29. If the State proceeds to establish a State Native Title Commission, that government finance provide administrative and mediation support for parties involved in native title matters.

30. That all parties, including the State, be obliged to negotiate in good faith.

31. The State facilitate convenient and prompt access to its historical archives in relation to Aboriginal people and their histories held by bodies such as the State Library and the Aboriginal Affairs Department.

32. The Aboriginal Affairs Department be directed to speed up the transfer of lands held by the Aboriginal Lands Trust to Aboriginal ownership.

CHAPTER 11

THE SUNSET CLAUSE

- 1 The Federal Government originally proposed to place a six-year limit on all native title claims under the *NTA*. The limit was a bid to allay fears that native title claims will continue indefinitely. This limit would have prevented claimants from being able to access the right to negotiate procedure and the assistance of the NNTT after a six-year period. This amendment was removed during negotiations with Independent Senator Brian Harradine.
- 2 The effect of this amendment was widely misunderstood and there was a perception that it would have prevented all native title claims after this time. This was not the case. Rather, after this period had expired, claimants would only be able to make a common law native title claim or seek common law injunctions. Similarly, in relation to claims made before the sunset limit, where those claims were heard in the Federal Court, persons claiming native title rights but who have not at that time made a claim will also be able to be heard. However, in neither cases would the claimants have had the protections of title in the *NTA*, such as the right to negotiate, nor would that claim be processed by the NNTT.
- 3 The only way common law claims can be prevented after 6 years would be to effect an extinguishment of all native title rights. This would have significant compensation implications. The sunset clause has now been removed.
- 4 The National Farmers Federation had pressed strongly for the sunset clause:

“A six-year limit on claims under the Native Title Act will ensure greater certainty for pastoralists facing claims, because they need to know what the future holds for them, their families and their farm.”³¹⁶
- 5 Aboriginal representatives opposed the sunset clause. The ALS of WA said many claimants did not have resources to prepare claims within the time limit.

“There are many reasons why a group may or may not make a native title claim. Resources, of course is one factor but there are a number of groups out there that are not seeking to pursue native title claims and are standing back waiting for resolving issues of potential conflict with adjoining groups. So, there are a number of reasons why a group may not be in a position to file a

316

National Farmers Federation News Release, NR 20/98, 6 April 1998

claim prior to a sunset clause and a clause like that would simply be asking for - begging for a disastrous situation, I would have thought.”³¹⁷

6. Mr Michael Rynne told the Committee that under the present *NTA* there existed a mechanism to enable land-holders to determine whether native title existed on their land. This was the non-claimant application. If a non-claimant application is unopposed then the applicant is entitled to proceed with the proposed Future Act.
7. Mr Darryl Pearce said the State could also prevent further claims over a piece of land by recognising native title on the land and agreeing to a consent determination of native title. The effect of such a determination under the *NTA* would be to prevent further claims being made. Mr Pearce said this aspect of the *NTA* was a sunset clause by another name.

8. Committee discussion

- 8.1 It was originally thought that the Sunset Clause was essential to produce certainty. After further examination, it was suggested that the common law entitlement to native title could not be removed anyway, so the Sunset Clause would not be effective. After negotiation, the Federal Government and Senator Harradine removed this provision.

317

Mr Gregory Benn, ALS of WA, Transcript of Evidence, Op Cit, 46

CHAPTER 12

TOWNS AND CITIES

1 Introduction

1.1 The Committee received submissions from 8 local councils:

- Albany;
- West Arthur;
- Mingenew;
- Roebourne;
- Leonora;
- Laverton;
- Broome; and
- Kalgoorlie-Boulder.

1.2 There was a convergence in the concerns raised by the councils in relation to native title within town boundaries. These were:

- **overlapping native title claims;**
- **difficulties in changing the use of reserved land;**
- **the inability to release new blocks of land for industrial and residential development; and**
- **the impact this has had on council rates and land prices.**

2 Kalgoorlie-Boulder

2.1 The Committee heard impassioned evidence from witnesses that Kalgoorlie, was as a result of the native title processes, a “confused city”. With eight overlapping claims over the town site and land prices increasing by up to 300%, their concern was clear. Said Kalgoorlie-Boulder Mayor Ron Yurevich:

“The people in the community have chewed away all their fingernails.”³¹⁸

2.2 The Committee heard from some business and community representatives that uncertainty as to native title had stopped some companies from coming to Kalgoorlie. In one case, a proposed industrial area between Kalgoorlie and Coolgardie, the Mungari Industrial Park, which had attracted a great deal of commercial interest, was

318

The City of Kalgoorlie-Boulder, Written Submission, 1.

still unable to proceed after a decision by the NNTT to allow the development to proceed had been appealed to the Federal Court.

- 2.3 Due to land shortages the City had increased residential density on blocks of land and rezoned blocks of land for residential use, including land at the old airport and railway yards. Kalgoorlie-Boulder Mayor Ron Yuryevich told the Committee a release of 6000 blocks of land which had previously been a golf course had been delayed, as it was subject to a native title claim and the land was vested for the purpose of recreation³¹⁹. He estimated that the City needed approximately 350 new blocks of land a year and that within 12 months all available land for release would have dried up³²⁰.
- 2.4 Land shortages have resulted in blocks, which previously sold for around \$56,000, selling for as much \$162,000 and in one case a quarter acre block appreciated by \$40,000 in the space of eight months. Chamber of Commerce representative, Mr Barry Kingston said these price increase were making it increasingly difficult for first home buyers.
- 2.5 According to the Kalgoorlie-Boulder Land Release Task Force there is private land in the city unconstrained by zoning or potential native title claims which can be potentially compulsorily acquired for subdivision. However, witnesses from DOLA admitted this option had not yet been considered.
- 2.6 On the positive side, native title had resulted in new lines of communication being established between the Aboriginal and non-Aboriginal communities and although there had been incidents of racial abuse on both sides, these were of an isolated nature.

3 Leonora and Laverton

- 3.1 In nearby Laverton and Leonora, there were similar concerns about the lack of available land for release. However, their concerns focussed mainly on the loss of revenue from new mining and exploration leases. In Leonora, there were 10 native title claims over the townsite and 603 mining lease applications had been held up. Shire President Glen Baker said he estimated the shire had lost \$1 million in rates as a result. In Laverton, Shire President Murray Thomas estimated that \$779,544 in revenue had been uncollectable as a result of 561 mining tenement applications being delayed. In total there were 28 claims in his Shire and these had cost the Shire \$24,265 per year (3.5% of the Shire's rate income) in administration costs. Mr Thomas was of the opinion that mediation was not succeeding in his Shire.

³¹⁹ Mr Ron Yuryevich, Transcript of Evidence, 6/11/97, 31

³²⁰ Ibid., 1

4 Broome

4.1 The picture in relation to problems relating to native title in Broome was somewhat different. The establishment of the Rubibi Working Group to represent all native title claimants in town and of a joint committee between Rubibi and the Council has been on the whole a success in setting up a constructive dialogue between the two. The Committee is made up 50% of Rubibi representatives and 50% of Shire representatives. Decision making is by consensus. Since then the following has been achieved:

- a land-use study identifying the non-indigenous land use needs for Broome and also the needs of the Aboriginal population, has been conducted by Rubibi and the Shire and a new Town Plan has been drawn up on this basis; the Plan includes “bush corridors” to allow Aboriginal people to camp and hunt within the town boundaries; and
- it has been recommended by a Shire Council committee that all Vacant Crown Land and some coastal Reserves have been vested in Rubibi with a lease-back arrangement to the Shire, with decision making power over the land being delegated to a joint Rubibi-Shire committee.

4.2 The Committee heard from members of Rubibi and also representatives of the Broome Shire Council that the constructive relationship had succeeded in transforming race relations in the town.

“At the commencement of the Native Title process in Broome, four years ago, the relationship between the Broome Shire Council and the indigenous population of the Shire could only be described as dreadful. The local Aboriginal people felt disempowered and marginalised from the decision making processes of the Shire, and the Shire Councillors. In the wake of the controversy over the Broome Crocodile Farm people felt mistrustful of the local Aboriginal community...Over the past three years a new respect for Aboriginal culture has emerged within the broader community. Broome is primarily a tourist destination. Today, there is a growing awareness, within the non-indigenous population, of the potential for growth in the tourism industry based on Aboriginal culture and heritage. As a consequence, developers are now approaching Rubibi with a view to creating opportunities for mutual economic advancement.”³²¹

4.3 Despite the successes, there are still ongoing problems in Broome. These include the location of a new Broome airport, with Aboriginal representatives objecting to the preferred site on cultural heritage grounds, and the use of land on the Waterbank pastoral lease. Broome Shire Chief Executive Officer Greg Powell said recent negotiations with native title claimants had produced very few outcomes and both sides

321

Rubibi Working Group, Written Submission, 5-6

were becoming frustrated at the lack of progress. He said that while there had been outcomes over the last three years there had still been a great deal of uncertainty. This uncertainty had been of great concern to business, who had been reluctant to become involved in the native title process. Said Shire President Angus Murray:

“We will never reach agreement on everything and there will be contentious issues. The Native Title Act needs to establish a mechanism through which contentious issues can be resolved. The system should not drag out forever. It is not a matter of someone being right and someone being wrong. The siting of the airport could be one such issue for Broome. Someone, probably at state government level, will have to make a decision at the end of the day for compromise. Not everyone will be happy - the tourism people or the Aboriginal people.”³²²

5 What the amendments to the NTA say

5.1 The Federal Government has amended the NTA to:

- remove the right to negotiate in relation to compulsory acquisitions for private developments (there is presently no right to negotiate in relation to compulsory acquisition for governmental purposes) and infrastructure and providing native title holders with an alternative procedural right of notification, objection and hearing by an independent body or person created under s. 24MD of the amended Act;
- where a Future Act within town and city boundaries is not compulsory acquisition or an infrastructure-related Act, replace the right to negotiate with the alternative state regime under s. 43A of the amended NTA; and
- permit the use of reserved land for a purpose different from the purpose for that which it was originally reserved providing the Act's impact on native title would be no greater than would have been the case for an act done in accordance with the reservation. (This amendment would have particular relevance in relation to the proposed change to build on the Kalgoorlie Golf Course).

5.2 These amendments were supported by all councils that made submissions to the Committee. Broome Shire President Mr Angus Murray said while arrangements with the Rubibi Working Group would continue, the amendments were needed to provide certainty for future land use in Broome.

5.3 The amendments have been opposed by Aboriginal representatives, who say that they are a further narrowing of their native title rights and a denial of equality before the law. Said Father Frank Brennan:

322

Mr Angus Murray, Oral Submission, Broome, 16/2/1998

“Justice demands parity of rights for the city mob and the bush mob.”³²³

- 5.4 Representatives of the Rubibi working group said the amendments would return the situation in Broome for Aboriginal residents to the pre-Native Title period, that is, without the *NTA*. This was because Aboriginal people would not be in a position to bring the Council to the bargaining table:

“Although initially this [native title] was seen by the Shire of Broome and the State of Western Australia as something to be resisted, there can be no doubt that the Shire of Broome and the State have benefited from the improved relationship with the claimant groups. As indicated above, this improved relationship would not have occurred were it not for the application of the Future Act Regime to the townsite. The proposed amendment to exclude townsites and cities from the operation of that regime is totally opposed by Rubibi. If successfully passed this proposal would undermine their position and reinstate the troubled relationship of the past.”³²⁴

6 Committee discussion

- 6.1 The Committee notes the Broome Shire Council and the Rubibi Working Group have taken a significant initiative in the incorporation of Aboriginal interests and concerns into local planning schemes and in resolving disputes. We commend this approach at a wider local government level.
- 6.2 Although blame is allocated to different parties, the processes under the *NTA* combined with the various attitudes of parties in the process have led to severe land shortages in towns and cities in Western Australia such as Kalgoorlie, Broome and Karratha. In a State the size of Western Australia this is indefensible and the Committee supports ongoing negotiations between Aboriginal and non-Aboriginal groups to reach agreements on land issues within town boundaries.

Conclusions and recommendations

33. Local government incorporate Aboriginal interests and concerns into their planning schemes, having regard to the successful model set by the Broome Shire Council and Rubibi Working Group.

³²³ Father Frank Brennan, Occasional Paper Number 103, Uniya Social Justice Centre, September 1997, 15

³²⁴ Rubibi Working Group, Oral Submission, Broome, 16/2/1998

CHAPTER 13

WATER AND NATIVE TITLE

1 Introduction

- 1.1 Of the 289 claims in Western Australia, 43 of those claim areas include offshore areas, and a larger number still claim rights over on-shore water bodies. Central to these claims is an assertion by the claimants that water is integral to their culture and they have an ongoing connection with the water bodies as displayed by their ceremonies customs and traditions.
- 1.2 While there has been some form of private ownership in relation to onshore water bodies, in relation to the ocean this kind of claim presents conceptual difficulties as traditionally the ocean has not been the subject of private ownership rights. Said Justice Olney in the recent *Croker Island* decision:

*“Whereas the land is capable of being fenced off, of being cultivated and improved, and of being occupied and lived upon by people, our relationship with the sea is primarily limited to the taking of fish and other sea life from and the traversing of the sea. Our capacity to physically close off and to cultivate the seas has been confined to areas close to shore and only recently has modern technology enabled us to build large structures for the drilling of oil and other such purposes in deeper waters of the seas.”*³²⁵

2 The *Croker Island* decision

- 2.1 The decision by the Federal Court in the *Croker Island* case held that Australian common law did recognise some form of native title rights in relation to the sea. Justice Olney determined that the applicants held communal title in relation to the sea and sea-bed within the claimed area, including the inter-tidal zone. However, this title was of a non-exclusive nature and did not confer possession and occupation of the sea and sea bed or ownership of minerals or sea life. This was because these things were not in accordance with their traditional laws and customs in relation to the sea and sea bed. Rather their traditional laws and customs conferred only use and enjoyment of these areas and entitled them to have free access to the sea and sea bed for all or any of the following purposes:

- to travel through or within the claimed area;

325

Mary Yarmirr & Ors v Northern Territory of Australia & Ors [1997] 274 FCA (15 April 1997)

- to fish and hunt for the purpose of satisfying their *personal, domestic, or non-commercial communal needs* including for the purpose of observing traditional, cultural, ritual and spiritual laws and customs;
 - to visit and protect places which are of cultural and spiritual importance; and
 - to safeguard their cultural and spiritual knowledge.
- 2.2 Native title within the claimed area was found to be subject to all other valid rights and interests and, to the extent of inconsistency, had to yield to those rights, as was the case in *Wik* in relation to pastoral leases.
- 2.3 Justice Olney ruled out, in the case of *Croker Island*, the notion that native title entitled the claimants to exclusive use and occupation of the claimed sea.

“The claim that by their traditional laws and customs the applicants enjoy exclusive possession, occupation, use and enjoyment of the waters of the claimed area is not one that is supported by the evidence. At its highest the evidence suggests that as between themselves, the members of each clan recognise, and defer to, the claims of the other clan, to the extent that on occasions permission is sought before fishing, hunting or gathering on another clan’s sea country and by inference, although the evidence is not strong, other Aboriginal people from country outside the claimed area probably do likewise.

The very nature of the sea renders it inappropriate to attempt to strictly apply concepts such as possession and occupation which are readily capable of being understood in relation to land. There is a clear distinction between possession and occupation on the one hand and use and enjoyment on the other. The claimed right of senior clan members to grant permission is limited to allowing non-members to use and enjoy the country, not to possess or occupy it.”³²⁶

3 The recognition of aboriginal right to fish in Canada

- 3.1 The decision in the *Croker Island* case has produced a result akin to Canadian Courts, which, while not dealing with aboriginal title to the sea, have recognised a common law aboriginal right to fish for food, and for social and ceremonial purposes. However, under Canadian law this right can only be infringed provided there is a valid justification. In addition, these rights take precedence over non-aboriginal fishing rights except for conservation.

326

Ibid.

4 Limitations upon the common law right to fish in Australia

- 4.1 While there is now growing judicial support for the recognition of at least an Aboriginal common law right to fish, judges in the New South Wales Court of Appeal in the case of *Mason v Tritton* and the Western Australian Supreme Court in *Sutton v Derschaw*³²⁷ expressed cautionary notes when dealing with claims of an Aboriginal right to fish. Said Gleeson CJ in *Mason v Tritton*:

*“Fishing is an activity which is so natural...that some care needs to be exercised in passing from an observation that people have engaged in that activity to an assertion that they are members of a class who have exercised some form of right pursuant to a system of rules recognised by the common law.”*³²⁸

5 What the *Native Title Act* says

- 5.1 The term “off-shore place” is defined in s. 253 of *NTA* and means any land or waters to which the *NTA* extends other than those that are in an “onshore place”. An “onshore place” means any land or waters within the territorial limits of a State or Territory.
- 5.2 S. 223(1) defines “native title” or “native title rights or interests” to mean the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or *waters* (italics added). Subsection (2) states that “rights and interests” include hunting, gathering, or *fishing rights and interests*.
- 5.3 S. 225 (a) of the *NTA* states that a determination may be made in relation to a particular area of land or *waters* (italics added).
- 5.4 S. 253 of the *NTA* provides that “waters” include:

*“(a) sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters; or
(b) the bed, or subsoil under, or airspace over, any waters.”*

- 5.5 S. 211 of the *NTA* preserves from the operation of Commonwealth and State regulatory laws, native title rights and interests involving the carrying on of certain classes of activities, defined in s. 211(3) as ‘hunting’, ‘fishing’, ‘gathering’, or ‘a cultural or spiritual activity’. Where a law requires that a class of activity of the kind mentioned can only be carried on with a licence or permit, and the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders, native title holders are not required to obtain a licence or permit to carry on the activity. However, this waiver only applies where they perform the

³²⁷ *Sutton v Derschaw* (1995) 82 A Crim R 318.

³²⁸ *Mason v Tritton* (1994) 34 NSWLR 572, 574

activity in exercise or enjoyment of their native title rights and interests, and to satisfy domestic or non-commercial needs.

5.6 S. 212 provides that the State may confirm any *existing* (italics added):

*“(a) ownership of natural resources by the Crown;
(b) right of the Crown in that capacity to use, control and regulate the flow of water; and
(c) fishing access rights prevail over any other public or private fishing rights.”*

And may also confirm any *existing* public access to and enjoyment of:

*“(a) waterways;
(b) beds and banks or foreshores of waterways;
(c) coastal waters; or
(d) beaches.”*

However, this confirmation will not impair or extinguish native title.

5.7 In relation to Future Acts, the right to negotiate only applies to onshore places. In relation to off-shore areas, native title holders have the same procedural rights as any corresponding rights and interests in relation to the offshore place that are not native title rights and interests (s. 23(6)(b) of *NTA*). If, because of these procedural rights, an ordinary title holder is required to be notified in relation to a Future Act then the native title holder is entitled to be notified.

6 *Fish Resources Management Act (WA) 1994*

6.1 S. 211 of *NTA* is mirrored in the *WA Fish Resources Management Act 1994 (FRMA)*, s. 6 of which states:

“An Aboriginal person is not required to hold a recreational fishing licence to the extent that the person takes fish from any waters in accordance with continuing Aboriginal tradition if the fish are taken for the purposes of the person or her family and not for commercial purposes.”

6.2 Division 2 of Part 14 of the *FRMA* enables Aboriginal persons to object to the grant of aquaculture leases and exclusive licences, on the basis of traditional usage rights under the *Land (Titles and Traditional Usages Act) 1993 (LTTU)*. Given that the *LTTU* has been declared inoperative and repealed it will be necessary to amend the *FRMA* to substitute native title rights for traditional usage rights.

7 Amendments to the NTA

- 7.1 In relation to water, on-shore and off-shore, and “living aquatic resources”, all Future Acts, including legislation, leases and licences, are valid. However, native title holders are entitled to compensation for extinguishment or impairment of their rights and the non-extinguishment principle will apply. Further, a person proposing to do and act over water must notify the relevant NTRB registered native title holder or body and give them an opportunity to comment. In addition, the right to negotiate in relation to Future Acts in relation to aquaculture projects and the taking or catching of fish/shellfish under the extended definition of Primary Production are removed.
- 7.2 In relation to off-shore water bodies, Subdivision N of the *NTAB* provides that a Future Act is valid to the extent that it relates to an offshore place. Under the Bill native title holders have the same procedural rights as other holders of interests in offshore places where their native title is affected by any Future Acts that are valid. Therefore, if a government proposes to allow mining and restrict fishing in a particular area offshore, native title holders would have the same rights as the holder of the fishing licence.
- 7.3 The right to negotiate is removed from the intertidal zone. This could have a significant impact on pearling and aquaculture lease holders in terms of shore access. However, it will certainly have a tremendous impact on many Aboriginal people associated with coastal areas, where they spend most of their lives and much of their days in the intertidal coastal areas.

8 Commercial fishing native title rights?

- 8.1 It is unclear whether native title claimants can claim commercial fishing rights as part of their native title, as has occurred in Canada and New Zealand. S. 211 probably does not extinguish native title sea rights which are of a non-domestic or non-commercial nature but rather it protects certain native title rights from the operation of State and Commonwealth laws. Nor does the *Croker Island* case deal directly with this point. It has been argued that certain traditional hunting rights or practices, such as trading fish with other indigenous communities, could be characterised as a right which is commercial in nature, albeit one that has undergone change since colonisation³²⁹.

9 What Aboriginal people say

- 9.1 Aboriginal representatives have opposed the amendments stating that they effectively render native title without content in on-shore areas.

“Because of these provisions, native title holders will be marginalised from important decisions concerning the management and exploitation of resources vital to their lives, and their lives, and their property rights will be treated in

329

P Kilduff and N Lofgren, “Native title fishing rights in coastal waters and territorial seas”, 3 ALB 81, 16

a discriminatory manner. Important opportunities to participate positively in and benefit from their native title will be replaced by a right of compensation. The basis on which important moves to self-sufficiency and autonomy have been available to indigenous peoples in New Zealand (such as fisheries agreements) and other countries will be potentially denied to Australia's indigenous peoples."³³⁰

- 9.2 Professor Richard Bartlett said the *NTAB* would render native title water rights subordinate to private water rights.

10 What commercial fishing interests say

- 10.1 The WA Fishing Industry Council (WAFIC) said they were concerned by the trend towards claims for exclusive possession of fish and aquatic resources. However, in light of the decision in the *Croker Island* case, it is unlikely that these claims will be sustainable.

*"The vast majority of native title claims do not effectively accept the legitimacy of the continued existence of people holding fishing rights and pearling leases. They believe that the successful result of their claims will be that they have control over access to marine areas and the validity or effectiveness of our licences."*³³¹

- 10.2 The WAFIC was also critical of the fact that two regimes existed in relation to native title on-shore and off-shore. Therefore, they supported the amendments.
- 10.3 In general, the WAFIC was supportive of regional agreements across broad regions which provided for a regional biosystem approach. They also supported the inclusion of Aboriginal people into resource management regimes for offshore areas but opposed the granting of additional licences to Aboriginal people.

"People who are involved in accessing the resources are those that should be involved in the management of those resources...However, we are opposed to granting additional licences to Aboriginal people as this amounts to an expropriation of the rights of the current fishers of that stock. If Aborigines wish to get involved in commercial activities then they should do so under the current commercial system.

Rather than creating a quasi native title commercial right ...you are far better setting up structures for Aboriginals to participate in the formal side of the industry than creating basically second class rights for Aboriginal peoples ...[this] will neither give industry the assurance as to resource management

³³⁰ ATSIC, "Issues for Indigenous Peoples", Op Cit, 21

³³¹ WA Fishing Industry Council, Transcript of Evidence, 31/10/97, 54

*and will eventually not really give the Aboriginal groups what they want which is a secure future and income.*³³²

11 Committee discussion

- 11.1 The right of Aboriginal people to fish, hunt and gather food on the intertidal zone and coastal waters is a traditional right that in many places continues to be exercised to this day. The access to this food source has been and continues to be the mainstay of sustenance for many Aboriginal communities. In particular, this practice represents for many Aboriginal people their primary source of protein in their diet.
- 11.2 Similarly, rights to on-shore water bodies such as creeks, estuaries, water holes and wetlands and the food available therein are inseparable from Aboriginal self-sufficiency where these traditional links are maintained.
- 11.3 Aboriginal tradition does not make a distinction between land and sea with respect to recognition or traditional ownership of country.
- 11.4 Many marine organisms, in particular fish species, migrate between near shore and offshore habitats. Exploitation of certain species by recreational or commercial fishers in deeper waters affect the availability of fish to Aboriginal communities closer to shore and in tidal creeks, rivers and estuaries. This may well impact on the traditional right to fish and hunt for the purpose of satisfying their “...*personal, domestic, or non-commercial communal needs...*” as recognised in the *Croker Island* case.
- 11.5 Despite the provisions of the *FRMA* allowing for Aboriginal people to take “...*fish from any waters in accordance with continuing Aboriginal tradition...*” the Act gives no legal right to consultation or consideration on management of fisheries and allocation of the fisheries resource. Furthermore, existing management arrangements do not provide Aboriginal people with the rights or ability to exercise control over exploitation of fish and other marine organisms that they and other commercial or recreational fishers may be jointly utilising, or where the fishing activities of recreational or commercial fishers may be effecting non-target species or habitat. Arguably, Aboriginal people are left free of any statutory responsibility for the resource.
- 11.6 The amendments to the *NTA* will further reduce the rights of Aboriginal people by validating all Future Acts in relation to water, on-shore and off-shore, and “living aquatic resources”, including legislation, leases and licences. It will also remove their right to negotiate over aquaculture projects and commercial fishing licences.
- 11.7 Aboriginal communities need to have a legally recognised role in management of “living aquatic resources” and other activities in the coastal environment and responsibility for continued sustainability for those resources and the environment.

332

Ibid, 59-60

Many have a continuing connection and involvement in those areas and rely heavily on them for sustenance purposes. Presently, the practices and activities of Aboriginal people in these regions (for example, the hunting of endangered species) is not being properly considered or dealt with by management regimes.

Conclusions and recommendations

34. The State establish joint management regimes with Aboriginal people in the intertidal and offshore areas.

35. The State incorporate Aboriginal interests into the management of inland and offshore water bodies where there is a substantial Aboriginal interest.

CHAPTER 14

AGREEMENTS

1 Introduction

- 1.1 An increasing number of native title related agreements are being struck in Western Australia as parties begin to explore alternative ways to litigation of native-title related issues. Figures released by the NNTT in September 1998 showed that 1,200 agreements had been struck in Australia since the passage of the *NTA* in 1993, 91% of which were in Western Australia³³³.
- 1.2 There are different types of agreement. Regional agreements need to be distinguished from project agreements, which deal only with specific mining, exploration or industry projects and specific Future Acts in relation to those projects. There are also native title claim related agreements, such as the withdrawal of a native title claim and reduction of overlapping claims dealing with native title. While these agreements will certainly relate to a region they are of a more limited and local nature.

2 Regional agreements

- 2.1 A regional agreement is, in the context of native title and rights of Aboriginal people and in relation to land, an agreement between Aboriginal peoples and government and sometimes other interest groups in relation to a region. Wrote Peter Jull:

*“A regional agreement is a way to organise policies, politics, administration, and/or public services for or by an indigenous people in a defined territory of land”*³³⁴

The involvement of the State is the distinguishing feature of a regional agreement from a project agreement. The size of a regional agreement also tends to be on a larger scale than a project agreement.

- 2.2 The three principal elements of an agreement are:

- the parties;
- the region; and

³³³ National Native Title Tribunal, Press Release, PR98/49, 11/9/98. Table reproduced in Appendix 13.

³³⁴ P Jull, “Regional Agreements -What are they?”, A note for use by the Office of the Aboriginal Social Justice Commissioner, 1.

- what is agreed upon - the terms of the agreement.
- 2.3 The WA Government is now involved in negotiations with a number of groups in Western Australia with a view to reaching some form of regional agreement. Media attention has focused on the Spinifex Desert and the Balanggarra Framework Agreements.
- 2.4 The Spinifex Desert Framework Agreement provides for negotiation on a number of issues including the granting of freehold title to the “Spinifex people”, provision of State and Local Government services, and environment and conservation management plans. However, this framework agreement does not explicitly provide for the recognition of native title. Rather, the State acknowledges that the Spinifex People are the “traditional owners” of the region covered by the agreement and the parties agree that land covered by the agreement will be excluded from the operation of the Future Act regime of the *NTA* and that native title rights will be exercised pursuant to the agreement. A similar agreement has recently been achieved with the Balanggarra people in the North East Kimberley region, involving the Aboriginal peoples of the Kalumburu and Oombulgurri and related communities.
- 2.5 Agreement has also been reached between the Broome Shire Council and the local Rubibi people in respect of town-planning in the Broome Shire and joint management arrangements. This is not strictly a regional agreement.
- 2.6 While regional agreements may deal with other matters, the principal focus of such agreements is in relation to land: cultural site protection; environmental management; future development; mining; access to land; infrastructure; and clarification of interests in land. It has been recognition of common law native title to land which has been the primary cause for government consideration of such agreements.
- 2.7 Mr John Clarke told the Committee that much of the work being done in Western Australia by the State in relation to regional agreements was based upon the Canadian model of Comprehensive Regional Agreements. These Canadian agreements were the focus for the Committee when it travelled to Canada and Chapter 15 will detail Canada’s model for regional agreements.

3 Project/local agreements

- 3.1 In Western Australia, there has been substantial work done on these types of agreements - there have been 957 Future Act-related agreements (96% of the national total) and 174 related to native title determination applications (71% of the national total)³³⁵. In Western Australia, these agreements have included³³⁶:

³³⁵ Information provided by NNTT.

³³⁶ More details on specific agreements can be found “Wik, Mining and Aborigines” (1998) by Paul Kauffman.

- **Yandi Land Use agreement** - between Hamersley Iron and the Gumala Aboriginal Corporation in relation to the Yandicoogina iron ore mine in the Pilbara;
- **Agreement between the Miriuwong and Gajerrong people and AuDAX Resources NL** - gives the company access rights to explore and mine; this agreement covers heritage and site surveys, exploration and mining, environmental issues and rehabilitation of disturbed areas in the East Kimberley; the native title claimants will be able to participate in work and education opportunities and receive financial compensation for use of their traditional country.
- **Striker Resources agreement, Kimberley**- the agreement covers 6,500 square kilometres in the Kimberley and provides for compensation to the native title claimants at four stages of the development - at the exploration stage, a percentage of on-grounds costs will be paid; at the mine construction phase, 1.5 per cent of capital costs will be given to the Balangarra people; when the mine is operating, the Balangarra will get part of the quarterly sale proceeds; and annual land rents will be calculated on the area disturbed;
- **Murrin Murrin agreement** - a confidential agreement between Anaconda Nickel and Aboriginal people of the North-East Goldfields;
- **Tjupan Ngalia agreement, Goldfields** - native title claimants and three mining companies agreed that Future Act processes of the *NTA* will be bypassed and future grants of tenements to the companies will be fast-tracked. The claimants have agreed to assist the companies in all future grants provided the companies have regard to Aboriginal culture, employment, training and business enterprise opportunities.

4 Why enter agreements?

- 4.1 Advantages for entering agreements are both many and real. Uncertainty as to the extent and content of native title and its potential to disrupt, delay or prevent future development and mining has been the key in putting regional agreements on the agenda. Agreements may be able to provide a way of avoiding costly, protracted, divisive and uncertain litigation, while at the same time clarifying interests in relation to land and advancing the cause of all stakeholders.
- 4.2 An example of the costs associated with litigation is that set by the Miriuwong-Gajerrong claim. The case was referred to the Federal Court in February 1995 and hearings were completed in 1998. At the time of this report, a determination has still not been handed down. The Western Australian Government estimated that it had spent \$3.36 million on the case³³⁷ by 30 June 1998 and ATSIC estimated that it had allocated \$1.3 million. By way of comparison, the cost of the Cape York Land Use Agreement for the Cape York Land Council was around \$20,000 and the NSW Aboriginal Land Council received a grant of \$46,860 to manage the Crescent Head agreement³³⁸.

337 Hansard, Legislative Council, 30/6/98, Parliamentary Question, no 1772.

338 D Smith, Discussion Paper 163/98, Centre for Aboriginal Economic Policy Research.

- 4.3 All sides involved in the debate appear to have recognised the beneficial nature and desirability of such agreements. The National Indigenous Working Group said agreements provided a “...flexible, simple, efficient, and certain alternative to the costly, claim-based processes contained in the Native Title Act...”³³⁹. Similarly, WMC said voluntary regional agreements had a “high level of support” from them.

*“It is really a good alternative to the formal native title process and we do encourage those and we are actively entering into and participating in negotiations for voluntary agreements.”*³⁴⁰

- 4.4 Professor Bartlett said as regional agreements focussed on a much larger area than the grant-by-grant approach to native title of the NTA, they enabled parties to reach agreement on a much broader range of issues.

*“As a result of the focus on the piecemeal process, which is both costly in time and resources, it also means the ability to compromise the parties’ interests is extremely limited. If one focuses on a much larger area and many more transactions, a range of matters can be compromised at the same time. If you focus on one particular transaction, your ability to compromise is much reduced.”*³⁴¹

- 4.5 Regional agreements also provide a framework to situate and manage native title rights within the existing system of property rights and land administration. Justice French noted that even in the event that a court determined that native title existed in any given area, further work would still be required to incorporate those rights into the existing land management system.

*“Whether an agreed determination is reached or a determination is made by order of the Court after a contested hearing, negotiations between the native title holders, the relevant Government and private interest holders are likely to be necessary about the way in which native title is to be enjoyed consistently with the framework of laws and private rights within which it exists. Determinations will generally have to be supported by agreed rules for managing the relationship between native title, public laws and private rights. There is no present mechanism under the Act for enforcing such rules and giving them legal effect...For example if native title were found to exist on land covered by a pastoral lease it would be necessary to agree upon a code of conduct and rules for access to the land and enjoyment of native title rights and interests consistent with the rights of pastoralists.”*³⁴²

339 National Indigenous Working Group, “Co-Existence - Negotiation and Certainty”, 13.

340 Ms Jan McPherson, WMC, Transcript of Evidence, 31/10/98, 29.

341 Professor Richard Bartlett, Transcript of Evidence, 21/5/98, 2.

342 Justice French, “National Native Title Tribunal and the Native Title Act, Agendas for Change”, *Implementing the Native Title Act*, 1996, 34.

4.6 Similarly, Craig and Jull note:

*“Even where native title rights are recognised by courts...it may not be possible to make such rights mean anything in practice without expensive further court actions or without new laws and political and administrative structures. A regional agreement is a way to transform vague rights into a clear form of organisation and laws so that indigenous peoples have some real benefit from them. A person may have a right to food, but unless that person is able to hunt or otherwise obtain food, an abstract right will not save them from starvation.”*³⁴³

4.7 Most importantly, negotiated agreements may be able to provide an alternative to the costly and time-consuming approach of litigation which produces uncertainty and ill-will between parties.

“There are major disadvantages with the claim by claim approach. It is costly. Lawyers and anthropologists are needed to assemble detailed information about Aboriginal cultural and historical connection to land.

*It is also a long process and if there is a disagreement between Aboriginal people and others who have an interest in the land, [and] the matter can not be settled by the Tribunal then the native title claim is settled by the Federal Court.”*³⁴⁴

5 The old *Native Title Act* and agreements

5.1 Originally, s. 21 of the *NTA* was the only provision of the *NTA* to deal with agreements. The section provided that native title holders could, in agreement with the State or Commonwealth, surrender their native title rights or authorise a Future Act that could affect their native title. Consideration for doing so could include a grant of a freehold estate. Such an agreement was deemed to be a Future Act for the purposes of the *NTA*. Therefore, once an agreement had been reached there had to be a two month notification period during which objections could be made with the potential for a further six month right to negotiate procedure. This aspect of the process was one of the main reasons why the section has been unused, as there was a likelihood of further native title claims being made once an agreement was reached. Other deficiencies of the section included:

- the section dealt only with agreements between the State or Commonwealth and native title holders and did not relate to agreements between private interests and native title holders, such as the Cape York Land Use Agreement. While native title holders could make an agreement with the Government and

³⁴³ Op Cit, 4.

³⁴⁴ M Sibosado, “Native Title and Regional Agreements - Kimberley Region” in A Harris, *A Good Idea Waiting To Happen: Regional Agreement in Australia*, 1994, 37.

grantee party, pursuant to ss. 31(1)(b) and 34, these were in relation only to specific Future Acts applications;

- it was doubtful whether there could be a regional agreement where there had been no prior determination of native title, as s. 21 referred only to “native title holders”. Should such an agreement have been made without a prior determination of native title it could later transpire that the people signing the agreement were not in fact the native title holders; and
- the *NTA* made no mention of what effect these agreements were to have or how they were to be protected.

5.2 In respect to these issues, Mr John Clarke said in reference in the unamended *NTA*:

*“The present Act provides absolutely no protection for agreement, so if you have an agreement under the present Act you are still obliged to go through the full Future Act process including the right to negotiate and that is the primary reason that agreements have not been used because they simply provide no real protection at all and it is much simpler to go straight into the Future Act process where at least at the end of that process you get a valid title.”*³⁴⁵

6 The amended *Native Title Act* and agreements

6.1 There was strong in-principle support for the concept of negotiated agreements from the Federal Government.

*“Fair negotiated agreements are the best way of resolving native title issues and are clearly preferable to expensive and protracted litigation.”*³⁴⁶

6.2 As a result of the uncertainty of s. 21 agreements, the *NTA* now provides a more comprehensive framework for agreements between stakeholders. These agreements are called Indigenous Land Use Agreements (ILUA). To the extent that a Future Act is covered by an ILUA, it is a valid act and does not attract the right to negotiate or any other procedural right under State or Federal legislation. There are now three categories of ILUAs:

- **body corporate agreements** - these can only be made in relation to an area where there has been a determination of native title. All relevant native title corporate bodies holding native title must be parties. If native title is being surrendered, then the relevant government must be a party. These rights can cover Future Acts, native title applications to the Federal Court, the

³⁴⁵ Mr John Clarke, Transcript of Evidence, 31/10/97, 4-5.

³⁴⁶ Media Release, Special Minister of State, 11 August 1998.

relationship between native title and non-native title rights, how native title and non-native title rights are to be exercised or the extinguishment of native title.

- **area agreement** - can be made where there has or has not been a determination of native title. Native title claimants and any registered native title body corporate holding native title, must be parties. If there are no registered claimants or registered native title bodies corporate, then any NTRB for the area and any person who claims to hold native title in relation to the area must be a party. If the agreement provides for extinguishment of native title by surrender then the State must be party. These agreements can cover the same matters as a body corporate agreement but can also cover any matter concerning access rights for native title claimants. These agreements are to be certified by the relevant NTRB. If not, then the Registrar of the NNTT must be satisfied of certain conditions contained in s. 24CL of the amended *NTA*.
- **alternative procedure agreements** - these may establish an alternative Future Act regime or provide a framework for the making of other agreements about native title. They may not provide for the extinguishment of native title.

6.3 The above agreements may be made on a regional or site specific basis. Registered agreements have effect as if they were a contract among the parties to the agreement and all persons holding native title in the area, even if they are not parties to the agreement.

6.4 Where there is a body corporate agreement, no competing claims may be made after the agreement has been entered into, as they can only be made in relation to an area where there has been a native title determination. However, if there is a revised determination of native title and there is a newly determined native title holder which is not the same as previously determined holders, the ILUA must be removed from the Register of Indigenous Land Use Agreements.

6.5 In relation to the other types of agreements, if a determination of native title is made which is not in accordance with the agreement, then the agreement must be removed from the Register of Indigenous Land Use Agreements. However, any tenures granted pursuant to such an agreement will continue to be valid.

6.6 All agreements may be removed from the Register of Indigenous Land Use Agreements if a party was induced to enter an agreement by fraud, undue influence or duress.

7 **What the State Government and Mining Representatives said about regional agreements under the amended *NTA***

7.1 Both Mr Clarke and mining representatives expressed concern that the regional agreements would provide no long-term certainty where there were no determined

native title holders with whom an agreement can be made. If this was the case, there would always be a possibility that the agreements could be overturned by rogue claimants. Said Mr Clarke:

“If you are going to have agreements entered into before there is any determinations of native title they are always going to be at risk because you can never be certain if you are entering into the agreement with the right people...as soon as someone comes along and establishes that they in fact hold native title to that particular area of land and they were not a party to the original agreement, the agreement self destructs. Now, that means that these agreements get you over the initial grant of your title. If you have one of these agreements you get a valid title but they do not necessarily have any long term security because of the very high levels of uncertainty about who the holders of native title are and whether or not you have included them in the group.”³⁴⁷

- 7.2 Mining representatives spelt out similar fears to those of Mr Clarke. Mr George Savell from AMEC said while there was support from his members for regional agreements, they were not putting a great deal of faith in them³⁴⁸. Said Ms Tamara Stevens of AMEC:

“No guarantee can be given that additional claims will not be made to sabotage the broad community group’s attempts to ensure a fairer treatment of individuals in the claimant group with employment and training opportunities and economic empowerment.”³⁴⁹

- 7.3 Mr Clarke said, while the amendments provided a better legal basis for agreements the process of reaching agreements was a slow one and may not resolve the problems in the short term³⁵⁰.
- 7.4 Mr Clarke said the State Government was developing regional agreements which would be ratified by State Parliament³⁵¹. However, Mr Clarke said the State response to the amended *NTA* would not directly assist in or provide incentive for the formation of regional agreements.

347 Mr John Clarke, Transcript of Evidence, 31/10/97, 4.

348 Mr George Savell, Transcript of Evidence, Op Cit, 10.

349 Ibid.

350 Department of Premier and Cabinet, Written Submission, October 1997, 14.

351 Mr John Clarke, Transcript of Evidence, 6/8/98, 11.

8 What Aboriginal Representatives said about regional agreements under the amended NTA

- 8.1 The Aboriginal Legal Service of WA argued that the resolution of claims through regional agreements would not occur under the amendments as the amendments would destroy any of the goodwill that had existed for negotiating fair and just agreements.

“The native title process will not work effectively until there is broad based acceptance on the part of all interested parties of the significance of native title for indigenous Australians and Australian society as a whole.”³⁵²

- 8.2 The Western Australian Aboriginal Native Title Working Group argued that it was through the right to negotiate that regional agreements could be negotiated. Agreements provided a mechanism for involving Aboriginal people in regional land management issues and social and economic development in a region. It also provided an opportunity to deal with a range of matters outside of native title such as service and program delivery in areas including health, housing and education.

“The agreement approach to resolving some of the land management issues brought about by native title provides an opportunity for all stakeholders and the State to negotiate an enduring, workable and mutually beneficial set of arrangements for using the land...The approach recognises the economy, environment and history of each region and enables all parties to participate in the process that identifies and formalises a balance of interest. By striking the balance, all the stakeholders will commit themselves to realising the outcome of the agreement. Agreements can be situated in the legal framework that acknowledge co-existing rights and economic interests and provide fairness and certainty for all parties. For indigenous people a regional agreement addresses co-existence issues and involves them in the processes of land and resource management. It also outlines the process for resolving disputes about land use and other regional matters or particular developments that might be subject to an agreement.”³⁵³

- 8.3 The Western Australian Aboriginal Native Title Working Group also submitted that the essential elements of a regional group process were:

- **strong and resourced native title representative bodies:**

“Native title representative bodies play a crucial role in negotiating successful agreements and managing claims. Native title representative bodies have a number of strategies to suit local needs with problems such as overlapping claims...Representative bodies have a pivotal role in organising and managing

352 ALS of WA, Written Submission, October 1997, 7.

353 WA Native Title Working Group on Native Title, Transcript of Evidence, Op Cit, 44.

regional indigenous organisations in maintaining links with government and other stakeholders. It is essential that these bodies are resourced properly to carry out these and other functions."³⁵⁴

- **Commonwealth and State legislation to provide a framework for negotiation:**

*"Without a framework supported by legislative sanction, commitment to the process is muted."*³⁵⁵

- **a proactive stance by the State in relation to negotiation:**

*"One of the difficulties in the progress of agreements in WA was the earlier refusal of the State Government to acknowledge the existence of native title and its ambivalence about entering negotiations that might lead to agreements that resolve conflicts about land use. The responsibility of government for service delivery in regions guarantees their central role in any regional negotiations. Without a genuine commitment from governments to the process, the benefits will be slow to be realised."*³⁵⁶

8.4 A long-time advocate of regional agreements has been the KLC. It has established the Coalition of Kimberley Aboriginal Organisations in an attempt to develop a regional position on negotiations³⁵⁷. In their written submission to the Committee they argued that the State Government was in a position to provide national leadership on resolution of native title issues through the development of a state-based regime centred on regional agreement negotiations. They proposed that issues for negotiation be:

- *recognition and respect for native title;*
- *constitutional protection of native title;*
- *principles in regional framework agreements;*
- *identification of discrete regions;*
- *agreement on fast-tracking processes that provide certainty to industry and indigenous people in areas of intense development pressure;*
- *agreement on processes for compensation where native title has been extinguished or impaired;*
- *WA statutory title to provide for ownership and management of indigenous land;*

354 Ibid, 45.

355 Ibid.

356 Ibid.

357 M Sibosado & the Coalition of Kimberley Aboriginal Organisations, in A Harris (ed), *A Good Idea Waiting to Happen: Regional Agreements in Australia*, 1994, 39.

- *agreed processes for the transfer of Aboriginal Land Trust to Traditional Owners and Aboriginal people with historic association;*
- *formal recognition of regional Aboriginal Representative Bodies and land-owning Bodies Corporate; and*
- *government administrative arrangements which assist the negotiation process.*³⁵⁸

8.5 The KLC said the advantage of this approach would be to elevate “*issues of indigenous rights above party politics and sectoral interests and allows for arrangements to develop that suit peculiar circumstances of each particular state and regions within states*”.³⁵⁹

8.6 Mr Martin Sibosado has argued that the current administration of native title which is focussed very much on a grant-by-grant basis has also encouraged disagreements among Aboriginal people over who owns what land.

“It may...lead to arguments between Aboriginal people over who belongs to what land. We have seen evidence of this in the Kimberley and more recently in the Pilbara. The litigation/adversarial approach has been devised by non-Aboriginals and it is not the best way of promoting and increasing self-determination of Aboriginal people.

The approach gives enormous powers to lawyers who understand the mysteries of the court and law. Aboriginal people in this situation defer to white experts who are trained to understand the complexities of the Mabo High Court ruling and the Native Title Act.”³⁶⁰

A regional agreement process which encouraged Aboriginal people to build a regional mandate and consensus would go some way to alleviating these problems.

9 Is there a role for an independent broker in the agreement process?

9.1 Thus far, the NNTT has played an important role in assisting parties to come to agreements. In relation to the Spinifex Agreement, the NNTT was involved in the negotiation with Tribunal Member, Hon Fred Chaney, chairing more than 20 meetings between the parties. One of the Spinifex elders Robert Brooks was quoted in *The West Australian* the day after the signing of the agreement as saying that the NNTT was “*crucial to the agreement*”³⁶¹.

³⁵⁸ KLC, Op Cit, 24.

³⁵⁹ Ibid.

³⁶⁰ M Sibosado, Op Cit, 37.

³⁶¹ *The West Australian*, 3/7/98.

- 9.2 An argument put for the involvement of an independent broker in the negotiation process is to ensure equity and fairness in the mediation process and to ensure that there is not a significant power imbalance between the negotiating parties.

“Claimants lack the resources and assistance they need to negotiate as equals. By fine-tuning the mediation process the Tribunal may be able to improve the claimant’s experience of it, but such change will not affect the power imbalance that exists outside the mediation meetings. The Tribunal may not be in a position to redress historical or resource inequality but it must not conceal it. If, in any particular mediation, this inequality seems likely to lead to an unfair bargain then mediation is inappropriate and the Tribunal should acknowledge this...For mediation to work as a means to resolve native title claims, the context must promote equal bargaining power. The Commonwealth, the Tribunal and other stakeholders must work to create conditions necessary for long-term, comprehensive settlements.”³⁶²

- 9.3 However, as was outlined in Chapter 5, the NNTT has been the subject of criticism and to allegations of bias in its handling of mediations in seeking to ensure equity in the negotiation process. Said Mr Donald McGauchie, National Farmers Federation President:

“The Tribunal should be abolished, it has been appallingly biased against pastoral leaseholders as it was established to support claimants.”³⁶³

- 9.4 As will be discussed in the next chapter, the British Columbian Government has established the BC Treaty Commission (BCTC) as “gatekeeper” of the treaty process. The BCTC accepts indigenous parties into the treaty process, determines the readiness of parties to enter negotiation, encouraging timely negotiations by assisting the parties to establish a schedule and monitoring their progress in meeting deadlines and identifying the need for and providing dispute resolution services as requested by the parties. However, the BCTC is not directly involved with negotiations and bows out of the process after the finalisation of a Framework Agreement.

“The experience of negotiations in other provinces where only one - or at most two - claims have been negotiated at once, indicates that co-ordination is crucial to an efficient process. Where co-ordination is lacking resources have been wasted because the parties were not prepared to proceed...The impartiality and fairness of the process is also critical to its success. The process will be more credible if assisted by a tripartite body appointed by British Columbia, Canada and the First Nations.”³⁶⁴

362 Aboriginal and Torres Strait Islander Social Justice Commissioner, Annual Report, 1995.

363 The Countryman, 18/9/97.

364 The Report of the British Columbia Claims Task Force, 1991, 37.

As will be seen in Chapter 15, the BCTC has come under criticism for not vetting First Nation groups rigorously enough. The BCTC also complained of under-funding.

10 Small local agreements or larger regional agreements?

10.1 Many Australian commentators and Aboriginal representatives have indicated a preference for a “bottom-up” or “organic” model of regional agreements. That is, agreements which are built up incrementally from project or local area agreements as opposed to the Canadian “top-down” agreements which are driven more by Federal and Provincial Governments. So far Australian experience in negotiation of agreements has been centred more on local agreements as negotiations have tended to have been precipitated by mining or industry projects.

10.2 There are a number of arguments put by Australian commentators for a bottom-up approach not least the cost of large agreements and the time taken to negotiate them.

10.3 Justice French expanded on these points in his evidence to the Committee:

*“We wanted to suggest that there was room for this sort of agreement to be developed without necessarily going the whole way down the Canadian path of the very large scale regional agreements which have taken 17 years to negotiate. I see small agreements, based on applications or on local regions and particular issues, as the building blocks eventually for larger scale relationship. It is a bottom up process where people are learning about their rights and relationships and building relationships, rather than top down mega solutions to problems that might arise.”*³⁶⁵

10.4 It is also argued that the top-down approach would exclude any kind of substantial input from indigenous people at the start of the process and increase the likelihood of distrust of any agreement among indigenous communities.

*“Agreements must, in the first instance, be firmly grounded at the local or specific purpose level, rather than a broader policy level.”*³⁶⁶

*“Regional agreements will only develop in this way if Aboriginal people ‘on the ground’ believe that they re-elect and promote indigenous interests.”*³⁶⁷

10.5 Similarly, it is argued that, as there is no history of Australian governments displaying any willingness to negotiate agreements, it is yet to be seen whether any Australian

³⁶⁵ Justice French, Op Cit, 16.

³⁶⁶ M Edmunds, “Key Issues for the Development of Regional Agreements”, *Regional Agreements: Key Issues in Australia*, 1998, 7.

³⁶⁷ C O’Faircheallaigh, “Process, Politics and Regional Agreements”, AITSIS, 19.

governments will be successful in completing the negotiations to arrive at comprehensive regional agreements.

“In the contemporary Australian political context it is very difficult to see how the first ‘top down’ process is, in most circumstances, remotely feasible. Indeed in some cases it is proving impossible to even engage state governments in agreements in relation to specific resource projects whose establishment requires Aboriginal consent and which promise to generate significant benefits for state and national economies...Against this background it is extremely unlikely that governments will undertake the sort of long-term and very substantial commitment required to support a ‘top-down’ process, but without such support the model cannot work.”³⁶⁸

Having said this, the two framework agreements in Western Australia are positive first steps.

- 10.6 A number of commentators have questioned the ability of the Aboriginal people to unite for purposes of regional agreement negotiations. Patrick Sullivan has written in *Regional Agreements in Australia: An Overview Paper* while First Nation peoples in Canada had a history of united activism in relation to land rights that was not the case in Australia with Aboriginal peoples.

“The crisis of indigenous unity and authority is certainly an initial stumbling block. It is almost universally difficult to ensure that negotiations proceed with correct representatives who have a common point of view and are capable of guaranteeing the terms of an agreement among their membership...Internal divisions which may be a normal part of indigenous life are often exacerbated by expectations of material benefits or disquiet over trading in rights.”³⁶⁹

- 10.7 Mr David Martin has argued in *Regional Agreements in Cape York* that as any definition of a region and its boundaries is likely to be artificial there will be significant impediments to regionalism - the most important of which is an Aboriginal cultural resistance to regionalism.

“Success is highly unlikely for any strategies which are directed towards an all-encompassing ‘regional agreement’ over a wide range of issues such as Aboriginal government, control of land and resources, service delivery and so forth.

[There is] strong emphasis on localism in the Aboriginal domain. It poses significant problems for strategically and collectively addressing the issues, developing responses and conducting negotiations across a region.

³⁶⁸ C O’Faircheallaigh, Op Cit, 18.

³⁶⁹ P Sullivan, “Regional Agreements in Australia: An Overview Paper” AITSIS, NTRU Issues Paper no 17, April 1997.

Developing regional agreements involves interests at certain levels and abstracting broad principles upon which agreement can be reached, and usually involves delegating the right to conduct the negotiations to certain identified individuals. The imperative within the Aboriginal domain however tends to lie at the opposing pole; there is usually strong resistance to the perceived loss of autonomy, identity, and individual and local group rights inherent in such collectivising process.”³⁷⁰

This “crisis of unity” has been evident in a number of negotiations already conducted in Australia, particularly in relation to Century Zinc and Murrin Murrin where there were a number of Aboriginal claimants and overlapping claims (see 11.2 and 11.3 of this Chapter).

- 10.8 Factored against the preference for smaller, more local agreements is the point made by Professor Bartlett in 2.3 of this chapter, that the smaller the region of negotiation, the smaller the number of issues which can be compromised. In addition, the creation of large numbers of small agreements have the potential to create a patchwork of conditions and terms which create uncertainty and variation across the State. Therefore, a number of commentators have advocated the concept of “nested” or “inter-connected” agreements. For example in the Kimberley, Mr Patrick Sullivan has argued that a series of local agreements could occur against the setting of larger broader agreements which establish consistency in land-use planning and service delivery across the region.

“Claims are not usually made by a discrete group with uncomplicated relationships among its members. The claimant parties are generally coalitions of cultural groups brought together largely by their interests in the same land. The boundaries of the claims are also to some extent produced by the circumstances rather than describing an enduring cultural reality...The problem is not one of whether the region is to be defined at the small scale or the larger, it is how to integrate small scale agreements into a larger regional settlement. It is common to retreat from the problems of small scale society by looking for a larger administrative region that can oversee the variety of local areas, then, when larger groupings appear inappropriate and beset with their own problems retreat to advocacy of small area solutions. In truth human cultural dynamics have some fractal properties - the problems found at the broader levels are reproduced precisely in miniature at the local levels. The concept of nested regions and nested agreements may make it easier to view segments of this continuum and zoom in and out on the various sections of it in order to better understand them, bearing in mind that the identity of the larger region is no more falsely constructed than the smaller.”³⁷¹

370 D Martin, “Regional Agreements in Cape York”, AITSIS Regional Agreements Project, August 1997, 1 & 21.

371 P. Sullivan, “Claims, Regions, Agreements: The Kimberley”, AITSIS Regional Agreements Project, August 1997, 4.

11 Issues arising from ILUAs so far

11.1 Yandi Land Use Agreement

11.1.1 Dr Clive Senior, the facilitator and the mediator in the negotiations for the Yandi Land Use Agreement, wrote soon after the agreement was finalised of the key factors in the success of the project³⁷². These included:

- **lengthy broad-based pre-negotiation consultation with Aboriginal people in the Pilbara.** The aim of this process was to identify the people with whom negotiation should proceed and to develop a relationship of trust and respect between the company and these people. Those who believed they should be involved, were included to help pre-empt later challenges by Aboriginal people claiming they had not been consulted;
- **an open process of negotiation** in which people concerned were kept fully informed at all times;
- **empowering Aboriginal people to conduct their own meetings and to make their own decisions** as how to proceed - to this end the company provided funding for the Aboriginal people to have their own legal and commercial advisers. A process that one company executive likened to “letting the tiger out of the bag and hanging onto the tail”;
- **ensuring a reasonable equality of bargaining power;**
- establishing a process of reporting back to the wider Aboriginal community and ensuring the elders were kept fully informed; and
- **safeguarding privacy and controlling access to the media**

11.1.2 Dr Senior stressed the importance of broad-based consultations in building trust and personal relationships not only with those likely to be supportive of the project but also with those who could oppose it.

“It seems likely that the contact established at this stage of the process, and in particular the personal recognition accorded to particular individuals by some of the company's top executives, was instrumental in minimising opposition to the project at a later stage, especially from those members of the Aboriginal community who might have been expected to oppose it. For example, the company made a point of establishing personal relations with Aboriginal leaders who had a history of opposition to previous projects and who had most reason to mistrust Hamersley. Once contact had been established, the company kept these individuals informed about the progress of the project and sought their views about how best to proceed. In this way potential opponents of the project were already in possession of considerable information about both the project and the process before stage three commenced. Having had personal contact with the company executives

372

C Senior, “The Yandicoogina Process: a model for negotiating land use agreements”, AITSIS, Regional Agreements Paper no 6, 1998.

involved, these leaders were less inclined to adopt entrenched or extreme positions when the next stage began.”³⁷³

11.1.3 Dr Senior wrote that these consultations helped company representatives gain “...an understanding of their attachments to land, of personal motivating factors and of family relationships and disputes”³⁷⁴.

11.2 Century Zinc Agreement

11.2.1 Dr David Trigger, a consultant anthropologist for Aboriginal groups involved in the negotiations relating to the establishment of the Century Zinc mine in North-West Queensland, gave evidence to the Committee in relation to regional agreements and the negotiations over Century Zinc. Dr Trigger made a number of points to the Committee concerning regional agreements:

- **The right to negotiate under the old NTA provided a structured and effective process for the negotiation of regional agreements.**

“The Century Mine case was a worst case scenario in many ways. It had run for many years before a structured process came into operation under the Native Title Act and it involved a region full of different, contesting Aboriginal groups. The roles of Government and industry were also very complex. There was chaos before that negotiation process began. However, once the Government issued the notices and the right to negotiate process started, it ran for the six months and at the end of that period not all of the parties signed; half the Aboriginal parties or claimants signed on behalf of a whole region of native title holders. The process then went to arbitration, as is provided for under the Native Title Act. Two months after that arbitration began everybody signed the original agreement because it could not be changed after the completion of the right to negotiate process.”³⁷⁵

- **Negotiations should not be rushed.** The shortening of the right to negotiate would be counter-productive in reaching agreements.

“In my view the six months that is in the Native Title Act is the minimum we should expect for the most skilled advisers and representatives, whoever they might be, to get a region of disparate native title holding groups together in agreement on something like that. Decreasing the time pressure can be counterproductive in the sense that things will explode; the more activists in the region who are most negative or sceptical or most apprehensive about coming into an agreement with Government; the more the industry may go off

373 Ibid, 5.

374 Ibid, 5.

375 Dr David Trigger, Transcript of Evidence., 27/11/97, 2.

on a tangent. The aim in forging these agreements is to try to bring the difficult Aboriginal parties together into an agreement, through the process of agreement with government and industry.”³⁷⁶

- **The definition of region will vary from case to case** depending on the physical and social geography of an area and whether a specific project is proposed for the region.
- **It should not be assumed that there will be agreement among Aboriginal people** regarding the giving of commitments about land use and mining. Aboriginal politics play a big part in negotiations. Government and industry should not seek to deal exclusively or predominantly (in a potentially divisive fashion) with only those indigenous groups appearing to be the most positive about proposed developments. All efforts should be made to ensure that the range of “voices” among the indigenous population are heard.

“People held different views about the priorities to be given to economic benefits, environmental risks and whether the right to mine was inconsistent with “Aboriginal culture”. Tensions and competition for resources between various individuals, groups and incorporated organisations affected the extent to which people were able to take “principled decisions” on issues in the negotiations...Allowing different groups to have their own legal representation was important. By the time of the right to negotiate process, distrust and divisions between the differing Aboriginal groups was too serious for people to work through the same legal representatives.”³⁷⁷

- **Government and industry should seek to facilitate a sense of joint ownership of the negotiation process from an early stage.** The Aboriginal parties should be well identified and resourced sufficiently to obtain high quality independent representation and advice.

11.3 Murrin Murrin Agreement

- 11.3.1 The Committee heard from Annaconda Nickel General Manager, Mr Malcolm James, in relation to the Murrin Murrin Nickel mine negotiations. Mr James stressed the importance of dealing directly with Aboriginal people rather than through lawyers.

“We have made a general rule that we will only negotiate with claimants themselves face to face. This is not about making lawyers rich, it is not about putting negotiators in, it is about a mining company that is going to be in the region for 30 years plus and we need to develop a relationship with the individual people rather than their legal representatives.”³⁷⁸

³⁷⁶ Ibid, 10.

³⁷⁷ Ibid.

³⁷⁸ Mr Malcolm James, Transcript of Evidence, Op Cit, 8.

11.3.2 In this respect, Mr James argued that strong and effective Native Title Representative Bodies were an important part of the negotiation process in representing the Aboriginal parties directly. NTRBs also needed to be able act as “gatekeepers” for Aboriginal parties seeking to take part in negotiations. Therefore, Annaconda had assisted in and funded the establishment of the North-East Independent Body through the Murrin Murrin Foundation to assist in future negotiations in the region.

“The representative bodies need to act as the gatekeeper, but if the representative bodies are structured properly you are still dealing essentially with the people and let me give you some examples. The North East Independent Body which we believe hopefully will become a body corporate will be a recognised aboriginal corporation and will represent the region. They will have representatives from each of the claimant groups sitting on their committee and on their executive. That is who you will deal with face up. So you are dealing with the claimants and whilst you may not be dealing with a specific claimant that has a claim out here you will be dealing with one member of that family or people that they have agreed will represent them but they still are the aboriginal people. You are not sitting there dealing with a white-collar lawyer in Perth who cannot articulate what their concerns are; that is a big issue, particularly to us. White-collar lawyers can only really articulate the legal and the financial aspects of concerns. They cannot sit there and tell us about the spiritual impact about the sacred sites, you need to do that face to face, and having had experience in other countries - Africa, Asia and that - I think the only way you can deal in an emotive situation like this is face to face.”³⁷⁹

12 Committee discussion

12.1 As a result of amendments to the NTA restricting the areas of land on which native title may be claimed and the scope of the right to negotiate, it is likely that Aboriginal bargaining power has been significantly decreased.

“While rights are a subject of debate, each side has an interest in shortening the process by sitting down to discuss settlement of the things they can agree on, even where they do not agree upon the circumstances that have brought them to the table.”³⁸⁰

12.2 However, while uncertainty in relation to native title may have some extent been resolved, there are still good reasons for such agreements. They are:

- the real possibility of common law native title claims by Aboriginal peoples, which have the potential to cause disruption, delay and further uncertainty. It

379 Ibid, 10.

380 P Sullivan, Op Cit, 3.

may be the case that future court cases may broaden the scope of common law native title;

- the length and complexity of the amended *NTA*;
- potential for uncertainty arising from the new procedures;
- the existence of Aboriginal cultural heritage legislation and its potential to be used by Aboriginal groups in relation to future development and mining;
- the need to rationalise and improve service and program delivery to Aboriginal peoples and communities and deliver self-reliance and responsibility to these communities; and
- the expressed desire of mining projects to establish good and harmonious relations with nearby Aboriginal communities.

12.3 Regional agreements allow a range of aspirations of Aboriginal communities to be addressed; they can facilitate greater economic self-reliance and responsibility and provide a more lasting and certain solution rather than ongoing litigation and dispute over specific proposals.

12.4 All Aboriginal representatives stressed the point that where solutions proposed were not acceptable to Aboriginal people then uncertainty would continue. More than ever before, Aboriginal people are equipped with the skills, legal representation and determination to continue their fight through political and legal avenues. Both Mr David Lavery of the KLC and Mr Darryl Pearce made the point extremely clearly when they told the Committee that Aboriginal people now had a much clearer understanding and awareness of their legal rights and the way in which they could use the court system to assert them and would do so if their rights and interests were not properly satisfied.

12.5 Regional agreements should be useful in Western Australia in facilitating access to resource development, employment opportunities, and the viability of remote communities. They could deal with matters including:

- mining including provision of employment opportunities, protection of culturally significant sites and access to land, access to and security for resources;
- pastoral leases in relation to Aboriginal living areas, access to land for hunting and gathering, cultural and religious practice, security of lease tenure and providing unobstructed enjoyment of rights under pastoral lease;
- national parks including joint management arrangements;
- tourism including establishment and operation of joint ventures; and
- local government in relation to regional and local planning.

12.6 An aim of these agreements should be to provide for a sustainable economic base for remote communities through provision of essential services and employment. Regional agreements should be a tool for access to resources, employment opportunities and viability of resources.

- 12.7 As suggested above, a factor militating strongly in support of regional agreements, is the extremely complex legislative framework established by the amended *NTA*. With the amendments the *NTA* extended from around 125 pages to 480 pages, with additional State legislation there may be over 600 pages of state and federal legislation in relation to Native Title. And, where once there were processes, the right to negotiate and the freehold test, for dealing with certain Future Acts there will now be many more. Mr John Clarke made no attempt to disguise the complex nature of the new legislation when meeting with the Committee.

*“The amendments have in no way simplified the Act. As you can see from this very thick preliminary copy, it has become considerably thicker and is extremely complex. Please bear with me as we work our way through; it is complex but there is not much I can do about that. Essentially, a number of different responses become possible under the amended Act through various arrangements.”*³⁸¹

- 12.8 With such a complex legislative framework, it is almost inevitable that it will be the subject of litigation to clarify its provisions. Even before the legislation was passed Aboriginal representatives indicated that they would engage in a course of court challenges against State and Federal legislation. Unfortunately, such litigation is likely to create further uncertainty and delays in the processing of titles.
- 12.9 Despite this uncertainty, it is unlikely that there will be an incentive to negotiate agreements where claimants are unregistered and are not entitled to the procedural protections of either the *NTA* or the new State legislation. At a forum hosted by the Chamber of Minerals and Energy in Perth on 7 August 1998, Mr John Clarke told attendees that he doubted whether there would be much “enthusiasm” on the part of government or industry for negotiating agreements with unregistered claimants.
- 12.10 It is hoped that as parties gain more experience in negotiating agreements, that the rate of agreements being reached will increase. This is certainly the prediction of the NNTT, which has reported that each new agreement provides templates for future agreements³⁸².

*“It is clear from the data that the number of agreements reached has risen significantly each year as parties have developed an understanding of the process, built relationships of trust and appreciated the importance of progressing in mediation as opposed to litigating an outcome.”*³⁸³

- 12.11 For regional agreements to be successfully negotiated a number of key elements are necessary:

381 Mr John Clarke, Transcript of Evidence, 6/8/98,1.

382 National Native Title Tribunal, Draft Report, 31/8/98, 27.

383 Ibid.

- broad-based and extensive consultation before negotiations begin to identify all parties with an interest in the negotiations. Such consultation should not be restricted with those likely to be positively-disposed to an agreement being reached;
- an ungrudging commitment by all parties to the negotiation process and a willingness of all parties to compromise;
- that all parties are properly resourced and advised to enable them to participate fully and effectively in the negotiations;
- unity among negotiating parties;
- supportive public attitudes;
- sufficient time and patience to allow an agreement to be properly negotiated;
- that the negotiations be open and fair to parties involved so that all parties are fully informed of all matters impacting on a negotiated settlement; and
- that all parties be required to negotiate in good faith.

12.12 Finally, the Committee observes that while the subject matter of native title agreements may seem unique and new, industry, once provided with clear ground rules, has in the past shown itself to be adept at finding ways of adapting to new circumstances and accommodating new ideas. As Aboriginal negotiator Mr Darryl Pearce, bluntly made clear to the Committee: *“It is just business”*.

“The Native Title Act can work if people approach it in a different way - with creativity and throw the political strategy that many of the mining companies are offering out of the window and do business. It is just business. Unfortunately, whether or not people like it, it is something that must be dealt with. People must get on with it and identify a way of doing business with Aboriginal people that sustains their operation and gives them long term access to country.”³⁸⁴

Conclusions and recommendations

36. The Committee supports the negotiation and implementation of regional agreements as provided for in amendments to the NTA.

37. The Government give in-principle support for negotiated settlements of claims and issues of dispute. It also commits itself to actively seeking negotiated regional agreements throughout the State to incorporate Aboriginal interests into the Western Australian land administration system.

384

Mr Darryl Pearce, Oral Submission, Kalgoorlie, 23/5/1998.

38. Parties to those regional agreements be State, Federal and Aboriginal parties. Prior to and during negotiations, the State should have extensive and ongoing consultations with local government, industry and representative groups.

39. Agreements include:

- **formal recognition of Aboriginal peoples' prior occupation of Western Australia;**
- **accepted identification of traditional owners;**
- **a complete and exclusive code for the exercise of those rights and interests, as defined in the agreement, including where, when and how it can be exercised;**
- **dispute resolution mechanisms;**
- **alternative Future Act mechanisms;**
- **provision for environmental management;**
- **heritage protection;**
- **management arrangements of crown land; and**
- **confirmation of existing non-indigenous interests.**

40. The State provide administrative and mediation support for agreement negotiation and to advise and assist parties in mediation.

41. While agreements should be confidential, the public should be kept regularly informed of the progress and nature of negotiations.

42. The State encourage involvement between the Department of Conservation and Land Management and Aboriginal peoples in relation to National Parks and conservation lands or enter agreements in relation to hunting, gathering, cultural and ceremonial activities in those areas. These may range from joint management arrangements to advisory positions, depending on specific circumstances.

CHAPTER 15

ABORIGINAL TITLE IN CANADA

SOCIAL INDICATORS - ABORIGINAL PEOPLES³⁸⁵ IN CANADA³⁸⁶

- 4.4% of all Canadians have aboriginal ancestry.
- There are 608 aboriginal groups.
- The median age of an aboriginal person is 25, compared to 35 for all other Canadians
- Between 1997 and 2005 the aboriginal population will grow by 1.7% annually, compared to a rate of 1.1% for the general population. The birth rate for registered Indians is twice the national average. The infant mortality rate is 11 per 1,000, compared to a national average of 6 per 1,000.
- 43% of aboriginal communities have fewer than 500 residents; only 11% have more than 2000 residents.
- In 1991, 40% of Status Indians lived outside reserves.
- From 1981 to 1991, the urban aboriginal population grew by 62%, compared to 11% for other urban Canadians.
- The total federal aboriginal program spending in 1997-98 was \$179 million per annum.
- 39% of aboriginal people report that family violence is a problem.
- The incarceration rate of aboriginal peoples is 5-6 times the national average.
- The life expectancy of Aborigines is seven years less than other Canadians.

1 Background

- 1.1 As previously explained in this report, the Committee's attention was drawn on numerous occasions to the Canadian experience with aboriginal (native) title, particularly in the province of British Columbia, the North-West Territory and the Prairie Provinces of Alberta, Manitoba and Saskatchewan. As detailed in the last Chapter, the Western Australian Government's approach to regional agreements is based upon the Canadian approach to regional agreements. It was suggested that there were a number of similarities between the Canadian and Australian jurisdictions and

³⁸⁵ The term "aboriginal peoples" is used in this chapter to refer to the indigenous peoples of Canada. In Canada, the terms "First Nation peoples" and "Indians" are also interchangeably used to refer to indigenous peoples, although the terms "Indians" and "registered Indians" are now used to refer to "status Indians" - indigenous persons covered by the Canadian Indian Act, which establishes a system of reserve administration. The "First Nation" is used to refer to the aboriginal negotiating unit in the BC treaty process.

³⁸⁶ Figures provided by Department of Indian and Northern Affairs.

the Committee would be well served in visiting Canada to familiarise themselves with the approach taken there. As a result, the Committee visited British Columbia, the North West Territories, and Alberta from 9-24 July 1998. The itinerary from the visit can be found at Appendix 4 of the report, a list of persons met during the visit at Appendix 12, and a list of materials collected during the visit at Appendix 2.

2 Introduction

- 2.1 Modern Canadian agreements are referred to as Comprehensive Claims Settlements (CCS). The term “comprehensive” refers to the fact that the agreements seek not only to deal with land administration issues but also seek to provide a *comprehensive long-term settlement* of native title and provide an ongoing framework for management of land administration, economic, environmental and governmental matters for aboriginal peoples.
- 2.2 Professor Richard Bartlett argues that agreements (settlements) provide (a) certainty and clarity for land and resource use and management and existing third party interests; and (b) a “bridge” between traditional and contemporary approaches to development for aboriginal peoples³⁸⁷. Craig and Jull, on the other hand, nominate environmental management as the key plank of the agreements.

“The regional nature of the settlement is important to indigenous people because proper environmental management and protection of environmental rights (for example, hunting and fishing rights) can only succeed where decision-making is organised over a sufficiently large area to enable the various ecological and social interactions to be dealt with adequately by the responsible public agencies. Environment management is an essential component of the regional agreements strategy, not only because of the central role of land care in indigenous culture and the indigenous value system, but also because indigenous peoples cannot expect to determine their economic and social development without the control over the forces which govern, and which can otherwise undermine, their natural resource base.”³⁸⁸

- 2.3 Most treaties involve an exchange, surrender or cession of common law native title rights across the traditional area of use and occupation for a more definite form of title, usually fee simple, to a smaller area of land and usufructuary rights, such as hunting, gathering and ceremonial rights over the remaining area of settlement. All settlements provide that the majority of existing third party interests are protected and confirmed. Common elements of CCS include three major components - land, resources and cash. More particularly they include:

³⁸⁷ R Bartlett, “Indian Reserves and Aboriginal Lands in Canada”, 1990, Native Law Centre, University of Saskatchewan.

³⁸⁸ Op Cit. 6.

- fee simple to portions of land traditionally used and occupied (with some areas including surface and subsurface mineral rights);
- confirmation of existing non-indigenous interests in the region;
- provision for Future Acts in the region;
- extinguishment, cession or surrender of traditional title;
- traditional rights throughout traditional lands such as the rights to hunt, fish and trap wildlife;
- environmental management such as the right to advise government agencies, or share in decision-making;
- offshore area and ocean management;
- social and economic development aid and funding (there is some debate whether this is financial compensation for past unauthorised use of land or rather direct financial transfer of funds for service and programme delivery).
- provision for resource royalty sharing;
- participation and employment in resource development;
- self-government;
- delivery of government programs and services to indigenous communities; and
- dispute resolution.

2.4 In general, Federal and provincial governments have, through the treaty system, sought to reconcile non-aboriginal and aboriginal legal interests through the incorporation of aboriginal traditional title into the Canadian land administration system.

*“Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgements of this Court, that we will achieve...the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”*³⁸⁹

2.5 In seeking to achieve this reconciliation, some members of Canadian society have alleged that the Canadian Government is in the process of creating a system of apartheid/race-based homelands³⁹⁰. In the North-West Territories, where there are 4 settled agreements and a further three being negotiated, Mr John Todd MLA expressed concern that the process not lead to a “balkanisation” of the Territory. The apartheid analogy was strenuously rejected by provincial and federal government parties. British Columbia Provincial Government negotiator Mr Jack Ebbels said the aim of the treaty process was to bring aboriginal people into the “social fabric” of Canadian society through the phasing out of Indian tax exempt status³⁹¹ and the reserve system and integrating traditional title into BC land administration. One witness likened the process of “plugging native title” into the land administration system: *“There are a*

389 *Delgamuukw*, Op Cit, Lamer CJ, 51.

390 “Apartheid inevitable under Nisga’a deal: MP”, *Globe and Mail*, 17/7/98.

391 Under the Canadian *Income Tax Act* and the *Indian Act*, status Indians enjoy tax exempt status while on reserve lands. However, this exemption does not extend to companies nor does it extend to status Indians off-reserve.

whole variety of levels of land title, it is just a matter of plugging native title into one of those levels”.

3 A brief history

3.1 Before 1973

- 3.1.1 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 in the 18th Century. In 1763, King George III issued *The Royal Proclamation Act of 1763* recognising the ownership rights of Indians to unceded lands in their possession. It further stated that Indians could only cede their land to the Crown and only then by consent of the Indians and decreed that Indian peoples should not be disturbed in their use and enjoyment of the land. Exclusive jurisdiction with respect to “Indians and lands reserved for Indians” was assigned to the Federal Parliament and provincial governments had no power to extinguish native title. In 1868, the *Indian Act* provided for a system of Indian reserves with Band Councils³⁹² functioning as agents of the federal government exercising a range of delegated powers on reserve land.
- 3.1.2 Professor Bartlett argues that the conferment of exclusive jurisdiction on the Federal Government resulted in a national policy in Canada of requiring settlement of native title by treaty or agreement³⁹³.
- 3.1.3 The earliest treaties between government and aboriginal people were to formalise military alliances and establish “peace and friendship” with Indian nations. As time went on and the colonial governments sought to expand their control and settlement over North America, further treaties were made. In order to clear the way for settlers in a region, treaty negotiators were sent out in advance of settlers to reach treaties with the aboriginal peoples in that region to obtain surrender of their “claims, rights and interests” in their traditional lands in return for the reservation of “homelands”, traditional hunting and trapping rights on unoccupied lands and promises of social and economic development.

“Treaties involving land became more important and commonplace when the Europeans’ desire for private ownership and exclusive use of the land conflicted with Indian hunting, trapping, and other traditional uses of it.”³⁹⁴

392 A band is a name given to a group of aboriginal people for administrative purposes under the *Indian Act*. In some cases, it represents a traditional family, clan or tribal grouping, and in other cases was an artificial and imposed grouping. The band council functions as an administrative and political organisation on a band’s reserve lands.

393 R Bartlett, *The Reconciliation of Resource Development and Aboriginal Land Rights at Common Law in North America; Implications for Australia*, 1995, 6.

394 “Living Treaties: Lasting Agreements”, *Report of the Task Force to Review Comprehensive Claims Policy*, 1985, 1.

The treaties sought to encourage the Indians to settle and cultivate the reserved lands while maintaining traditional practices. The United States Court of Appeal for the 9th Circuit commented in *Colville Confederated Tribes v Walton*³⁹⁵ that the “*general purpose for the creation of an Indian reservation...[was to provide] a homeland for the survival and growth of the Indians and their way of life*”.

3.1.4 By the 1850s, there were 66 major treaties signed.

3.1.5 The exception in Canada was British Columbia (BC) which from the date of European settlement, other than during early settlement on Vancouver Island, refused to recognise aboriginal peoples’ aboriginal title. Instead, the Governor of the province offered Indian peoples an opportunity to participate in the affairs of the colony similar to that offered to new settlers. This included the right to acquire Crown land and become farmers. The Report of the British Columbia Claims Task Force in 1991 gave an account of British Columbia at the time which has many parallels with white settlement of Western Australia:

“The colonial society was an immigrant society whose values were very different from those of the aboriginal peoples. The new society distrusted communal values, exalted the enterprising individual, favoured progress over tradition, and believed that the betterment of humankind lay not in harmony with nature but in its conquest and transformation. The British Columbian society saw itself as the successor of European explorers, who believed they had “discovered” an unknown, even empty, land that was free for their taking.”

3.1.6 There were a few notable exceptions to this non-recognition policy. The province’s first Governor, James Douglas, drawing on his experience with the Hudson Bay Company, signed 14 small, local agreements with aboriginal groups on Vancouver Island. Small reserves were also created for aboriginal peoples to protect them from encroaching settlement but the provincial government refused to acknowledge any form of indigenous title to the reserves. (One such notable reserve, now located within Vancouver City, was created for the Musqueam Band and now provides income for the Band through a shopping centre and office buildings located on the reserve). In the north, a section of the early treaties, referred to in 2.1.3, extended into the Province. (The Committee heard from Mr Andrew Schuck who is now acting for an aboriginal group which is seeking to become part of that treaty area).

3.1.7 In 1871, BC joined Canada but the Terms of the Union made no reference of indigenous title, despite the Federal Government’s assumption of responsibility of “*Indians and lands reserved for Indians*” under the Canadian Constitution.

3.1.8 From the beginning of white settlement in BC there were complaints, protests and resistance from the aboriginal people and, as settlement expanded, opposition became

395

647, F. 2d 42, 49 (1981).

more organised. As early as the 1870s, there was organised political action among neighbouring aboriginal groups. During the 1880s, aboriginal leaders, including leaders from the Nisga'a³⁹⁶, demanded treaties in their meetings with provincial and federal officials. The Federal Government were sympathetic to their concerns but refused to press the issue with the BC government.

3.1.9 From 1927 until 1951, the *Indian Act* made it effectively illegal to raise funds or hire a lawyer to pursue land claims.

3.1.10 It was not until 1973 that common law native title rights were established in BC, and more generally across Canada. In *Calder v Attorney-General of British Columbia*, six of the seven judges of the Supreme Court of Canada 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. The Court followed the Supreme Court of the United States, which had established Indian common law title some 150 years previously.

3.2 After the 1973 Calder decision

3.2.1 Outside British Columbia

3.2.1.1 Outside British Columbia, it was the Calder decision, along with the disruption of the construction of the massive James Bay hydro-electric power project, which drove the Canadian government’s “Comprehensive Claims Policy”. Like a number of other major projects the James Bay project had been suspended by injunction granted to an Indian Nation. Faced with the prospect of projects being held up for years on end in costly court proceedings, the Canadian Government chose to enter agreements on a regional basis in respect of indigenous title. This process was known as the Modern Comprehensive Claims Policy. The then Minister of Indian and Northern Affairs, Mr Jean Chretien, announced that his government was prepared to recognise and accept its responsibilities under the *British North America Act 1867* for Indian people, and was willing to negotiate regarding claims of native title where rights of traditional use and occupancy had not been extinguished. Existence of aboriginal rights was a fundamental basis for the agreements and the Canadian Government refused to negotiate with groups who could not demonstrate a continuing association with their traditional land or where there had been extinguishment of title. Further, the Government specified that it would only negotiate one treaty per province or territory at one time.

3.2.1.2 The Federal claims process begins when the Federal Government accepts an aboriginal group's statement of claim and supporting materials. The statement must confirm that:

396

A group of aboriginal people from the far North-West of British Columbia.

- the aboriginal group is, and was, an organized society;
- the organized society has occupied the specific territory over which it asserts aboriginal title since time immemorial. The traditional use and occupancy of the territory must have been sufficient to be an established fact at the time of assertion of sovereignty by European nations;
- the occupation of the territory by the aboriginal group was largely to the exclusion of other organized societies;
- the aboriginal group can demonstrate some continuing current use and occupancy of the land for traditional purposes;
- the group's aboriginal title and rights to resource use have not been dealt with by treaty; and
- aboriginal title has not been eliminated by other lawful means.

When the terms of the final agreement have been approved by all parties, the agreement is ratified by the aboriginal party through referendum and implemented by federal settlement legislation.

3.2.1.3 The Federal Government also commenced a Specific Treaty process to deal with obligations and breaches arising out of late 19th century and early 20th century treaties. It was alleged that in a number of cases treaty land was surrendered by aboriginal groups in improper circumstances and in others, that a number of aboriginal groups had not yet received their land entitlement under treaty.

3.2.1.4 In 1974, the Federal Government appointed Justice Thomas Berger to conduct social and environmental impact assessment on proposed oil and gas pipelines that would cut across the Mackenzie Valley in the North-West Territories. The appointment of the Commission followed the discovery of significant deposits of oil and natural gas in the region and growing direct action by local aboriginal groups in response to attempts to exploit these deposits. In 1977, Mr Berger recommended against the immediate building of the pipeline and that a ten-year moratorium be placed on its construction to permit the settlement of land claims.

“The native people want to entrench their rights to the land, not only to preserve the native economy, but also to enable them to achieve a measure of control over the alternative use of land, particularly the development of non-renewable resources.”³⁹⁷

The report commented that the non-renewable resources were the foundation upon which the native people believed their economic future could be established.

397

Report of Mackenzie Valley Pipeline Inquiry, 1977, 178.

“Royalties from the development of non-renewable resources could be used to modernise the native economy and to promote development of renewable resources”³⁹⁸.

- 3.2.1.5 The recommendations of this report were adopted and the pipeline was not built. The Federal Government also pushed to finalise a claim for the entire Western Arctic/Mackenzie Valley region (but not including the Inuvialuit, who reached their own agreement in 1984). However, when the agreement was completed in 1990 the aboriginal parties refused to ratify the agreement as a result of concerns about the agreement’s extinguishment provisions. Since that time, three separate agreements have been reached with a number of individual aboriginal groups and three further agreements are being negotiated. The 1990 draft agreement has formed a template for these agreements.
- 3.2.1.6 In 1982, existing and future aboriginal title and treaty rights were constitutionally entrenched in s. 35 of the Canadian *Constitution Act*. The effect of the provision was not to create aboriginal rights but rather to provide protection for those rights. Aboriginal rights and title cannot now be altered without constitutional amendment. The provision is silent on the nature, scope and extent of these rights. (Professor Andrew Thompson told the Committee that the effect of the “constitutionalisation” of aboriginal title was to prevent either the Parliament of Canada or a provincial legislature from attempting a legislative solution, such as the Australian Native Title Act 1993, without going through the formalities of constitutional change).
- 3.2.1.7 The policy of the Federal Government in relation to Modern Comprehensive Agreements was refined in 1986 following criticism of the requirement that common law native title be extinguished as part of any agreement. In 1981, this approach was expressed in terms of exchanging “undefined aboriginal land rights for concrete rights and benefits”. Under the new policy, a claimant group could retain any aboriginal rights that it could have with respect to any reserved areas it held following settlement, so long as those rights were not inconsistent with the final agreement. The Report of the Task Force to Review Comprehensive Claims Policy noted the problems had resulted in the comprehensive claims policy being “...almost totally ineffective”:

“The status quo is clearly unacceptable...It has cost the Canadian government and aboriginal communities millions of dollars, yet has produced few settlements and much frustration. If this policy were continued aboriginal groups would likely give up negotiating and would have to use the courts and political demonstrations to assert their rights.”

398

Ibid, 179.

“Aboriginal groups want comprehensive claims agreements to affirm their rights. Under earlier policies the federal government sought to clear title to the land, and insisted that aboriginal rights be extinguished. The conflict in the objectives of the two parties has impeded successful negotiations. A new policy should not require aboriginal people to surrender totally rights that our Constitution has so recently recognised and affirmed. We therefore recommend that blanket extinguishment of aboriginal rights no longer be a precondition for settlement.”³⁹⁹

The new policy sought to ensure that those aboriginal rights which were not related to land and resources or to other subjects under negotiation were not affected by the exchange of rights in a negotiated settlement. It also widened the scope of comprehensive claims negotiations to include offshore areas, wildlife harvesting rights, sharing of resource revenues, environmental management, and self-government.

3.2.1.8 Since 1975, six CCSs have been settled:

- **The James Bay and Northern Quebec Agreement (JBNQA) (1975)** - the first comprehensive claim to be settled. This was followed by the Northeastern Quebec Agreement (NEQA) in 1978. Together the agreements gave the 19 000 Cree, Inuit and Naskapi of northern Quebec over \$230 million in compensation, ownership of 14 000 square kilometres of territory (1.3% of traditional lands), excluding mineral rights, and exclusive hunting and trapping rights over another 150,000 square kilometres.
- **The Inuvialuit Final Agreement (1984)** - provided 2 500 Inuvialuit in the western Arctic with 91 000 square kilometres of land (35% of traditional area - 5% including mineral rights), \$45 million to be paid over 13 years, guaranteed hunting and trapping rights, and equal participation in the management of wildlife, conservation and the environment, a \$10 million Economic Enhancement Fund and a \$7.5 million Social Development Fund.
- **The Gwich'in Agreement (1992)** - provided the Gwich'in with approximately 24 000 square kilometres of land in the northwestern portion of the Northwest Territories and 1554 square kilometres of land in the Yukon (45% of traditional land - 12% including mineral rights). In addition to these lands they will receive a non-taxable payment of \$75 million over 15 years, a share of resource royalties from the Mackenzie Valley, subsurface rights, hunting rights, and a role in the management of wildlife, land and the environment.

399

Op Cit, iii.

- **The Nunavut Land Claims Agreement** (1993) - provides some 17 500 Inuit of the eastern Arctic with 350 000 square kilometres of land (17% of traditional lands - 2% including mineral rights), financial compensation of \$1.17 billion over 14 years, the right to share in resource royalties, hunting rights, and a role in the management of land and the environment. The final agreement committed the Federal Government to a process which divides the Northwest Territories and creates the new territory of Nunavut by 1999. This is the largest comprehensive claim settlement in Canada
- **Yukon Umbrella Final Agreement** (1993) - 14 Yukon aboriginal groups signed the agreement with the Government of Canada and the Yukon Territorial Government. The agreement set out the terms for the final land claim settlements in the territory. Since then, final land claim agreements have been reached with four of the aboriginal groups: the Vuntut Gwitchin, the Champagne and, the Teslin Tlingit Council and Na-cho Ny'a'k Dun. These agreements provide the four Yukon aboriginal groups with financial benefits of \$79 895 515, a land settlement of 17 235 square kilometres (8% of traditional lands - 5% including mineral rights) and participation in wildlife and other management boards. In addition to their land claim, the four aboriginal groups have also negotiated self-government agreements which give them more control over land use on settlement lands and greater authority in areas such as language, health care, social services and education.
- **The Sahtu Dene and Metis Agreement** (1994) - the settlement provided the Sahtu Dene and Metis with 41 437 square kilometres of land (42% of traditional lands - 2% including minerals), a share of resource royalties from the Mackenzie Valley, guaranteed wildlife harvesting rights, participation in decision-making bodies dealing with renewable resources, land-use planning, environmental impact assessment and review, land and water use regulations, and \$75 million over 15 years.

3.2.2 British Columbia

- 3.2.2.1 In British Columbia, there was a great deal of uncertainty arising from the 1973 Calder decision as the Canadian Supreme Court split 3-3 on whether indigenous title had been extinguished across the board in the Province. Up until 1990, the BC Government took the view that it had been extinguished and refused to take part in any negotiations with aboriginal peoples.
- 3.2.2.2 About 93 percent of the Province is federal or provincial Crown land. Much of this land is used by private interests holding Crown land leases or licences.

- 3.2.2.3 It was not until 1990 that the BC government decided to pursue agreements. Witnesses in BC described to the Committee the circumstances in the 1980s leading up to this decision. They included organised political activism by aboriginal peoples and their supporters in the form of road blockades (although it did not go as far as armed confrontation as occurred at Oka in the east of Canada). In the courts, activism took the form of applications by aboriginal groups for injunctions to halt government and private enterprise activities on claimed lands. The most notable case involved the Nuu-chah-nulth people who obtained an injunction preventing further logging on Meares Island by logging giant MacMillan Bloedel. The BC Court of Appeal, which did not normally hear appeals on injunctions, took the unusual step of indicating to parties that aboriginal claims should be resolved by “...negotiations and by settlement...in a reasonable exchange between governments and the Indian nations”. To this date the injunction on logging is still in effect and none of the parties has requested the trial resume.
- 3.2.2.4 The Committee spoke to the Native Affairs Minister in the Social Credit⁴⁰⁰ Government of the time Mr Jack Weinberger. Mr Weinberger said initially the Government had taken the attitude that if they could deal with the social and economic disparities between aboriginal and non-aboriginal Canada then the land claims would go away. “*There was a huge fear of what would happen if we opened this Pandora’s box,*” Mr Weinberger said. After a year, the Government reluctantly came to the conclusion that they would have to settle the land claims. Mr Weinberger told the Committee that given the court decisions of the last 10 years, if his government had not acted as they did then BC would have been mired down and the economy would have ground to a halt. The views of Mr Weinberger were echoed by provincial negotiator Jack Ebbels who said: “*If the treaty process had not started then we would have had injunction after injunction based on aboriginal rights and the resources industry would have frozen. Canada [the Federal Government] would have given away the farm and we [the Government of BC] wouldn’t have had a say in it. It would have been a nightmare.*”
- 3.2.2.5 In 1990, a Price Waterhouse study estimated that over \$1 billion and 1,500 jobs had been lost in the forestry and mining sectors as a result of disputes over land claims in the Province.
- 3.2.2.6 In 1990, the Social Credit Government established the BC Claims Task Force (BCCTF) to make proposals relating to the scope of negotiations, the organisation and process for negotiations, interim measures and public measures. The Task Force included two representatives appointed by Canada,

400

The Social Credit Party is a conservative right-of-centre party which had its origins in the monetarist theories of the 1930s. It was particularly strong in British Columbia, where it held Government for lengthy periods between 1950 and 1990 and subsequently formed a coalition with and was largely subsumed by the other right-of-centre party, the Liberal Party.

two by the BC Government, and three representatives of aboriginal peoples in the Province. The BCCTF made recommendations which included the creation of an independent treaty commission to facilitate the process of negotiations with representation from both provincial and Federal Governments and aboriginal groups on the Commission's Board. It recommended a six-stage process to be followed in negotiations (as referred to in 4.2 of this Chapter).

3.2.2.7 On 11 December 1997, the Supreme Court of Canada in *Delgamuukw*⁴⁰¹ stated in passing that aboriginal title to land could survive post-colonisation⁴⁰². It stated that aboriginal title was a right to exclusive use and occupation and not limited to practices which were historically customary or traditional or integral to the distinctive culture of the aboriginal society. As mentioned in Chapter 1 of the report, this was the first time the Court had ruled directly on the existence of aboriginal title to land (as distinct from specific aboriginal rights). Aboriginal title, the Court ruled, was *sui generis* - inalienable to anyone other than the Crown; communal; and not encompassing usage of land "...irreconcilable with the nature of the group's attachment to that land". However, the Court did not make a finding that aboriginal title existed in any specific place. Further, while protected by s. 35 of the Canadian *Constitution Act*, aboriginal rights and title were not absolute and could be infringed in furtherance of a "valid" legislative objective in a manner "...consistent with the special fiduciary relationship between the Crown and aboriginal people". The case came on appeal from the BC Supreme Court which had, at first instance, found that the Crown had extinguished aboriginal title at the time of Confederation, and on appeal, that there was no blanket extinguishment and the claimants had "unextinguished non-exclusive aboriginal rights, **other** than a right of ownership" to much of their traditional territory.

3.2.2.8 On 15 February 1996 the Nisga'a Agreement-in-Principal was signed and on 4 August 1998, immediately following the Committee's visit, the Final Agreement was signed. It was hailed as the first "modern day treaty". The agreement had its origins in the Calder case of 1973, which was brought by the Nisga'a people. The Nisga'a had been seeking recognition of their traditional title for nearly 100 years. Treaty negotiations began in 1976 between the Nisga'a people and the Federal Government, who had sole jurisdiction in relation to fishing and Indian reserve land. The provincial government came late to negotiations in 1990 bringing land and resources, for which they had jurisdiction, into the equation.

401 Op Cit.

402 A full summary of this case can be found at Appendix 6.

The final agreement includes:

- **the grant of 1,930 square kilometres of freehold land** (formerly crown land) (approximately 0.07% of traditionally-occupied land);
- **about \$190 million in cash** - payable over 15 years, as well as a further \$21.5 million in other financial benefits (The Nisga'a government will also continue to receive fiscal transfers from Canada and British Columbia to enable them to provide government services);
- **mineral, fishery and forestry rights in the freehold area;**
- **self-government** - powers to make laws governing Nisga'a citizenship, language and culture, property, public order, peace and safety, taxation on Nisga'a land in respect of Nisga'a people (not non-Nisga'a people), employment, traffic and transport, child and family, social and health services, adoption and education. The Charter of Rights and Freedoms and all federal and provincial laws, including the Criminal Code, will continue to apply to the Nisga'a people. However, a Nisga'a Court can be established with jurisdiction over Nisga'a laws on Nisga'a lands. The Nisga'a government will provide non-Nisga'a residents with participation in Nisga'a public institutions that affect them and full consultation and rights of review respecting decisions which directly and significantly affect them. The agreement prescribes eligibility and enrolment criteria;
- **recognition of most existing private interests** - except timber licences in the freehold area, and provides public unimpeded access to private property or other interests in Nisga'a boundaries but allows the Nisga'a to set the terms and conditions for any new interests which they chose to grant;
- **money to purchase existing fishing licences and vessels;** and
- **an annual allocation of salmon.**

The agreement is expressed to be a “full and final settlement” of aboriginal rights, and to the extent that any rights subsequently found to exist are different from those rights in the agreement, then the Nisga'a agree to release those rights (this contrasts with earlier treaties which required aboriginal people to “cede and surrender” their title). It has been estimated that the total cash value of the package is around \$480 million⁴⁰³. In return, the Indian Act will no longer apply to Nisga'a people, including their tax exempt status⁴⁰⁴.

In the weeks leading up to and following the final agreement, there was media coverage of challenges by other aboriginal groups to the right of the Nisga'a people to exclusive occupation of the treaty area and also of the public debate on whether it was appropriate for the BC parliament to ratify the treaty.

403 Tom Molloy, “Inside the Nisga'a treaty”, *The Globe and Mail*, July 28, 1998.

404 Under the Indian Act, status Indians enjoy tax exempt status while on reserve.

4 Reasons for pursuing agreements

4.1 Resolution of uncertainty surrounding the definition of legal rights and resource development.

4.1.1 Entry into treaty negotiations has often been precipitated by the need to develop, settle, mine or log land being claimed by aboriginal groups, for example the McKenzie River Delta in the North-West Territories and James Bay in Quebec. Uncertainty with respect to the legal status of the lands and resources required for those projects has required the resolution of legal ambiguities associated with the common law aboriginal rights and title. As previously mentioned, in some areas, unresolved land claims have prevented or hindered investment as evidenced in the 1990 Price Waterhouse study referred to in 2.2.2.5.

4.1.2 Article 2.1.1 of the Federal Land Claims Policy noted:

“Prospects for the development of both the renewable and non-renewable resources on so much of the land in question currently are clouded in uncertainty and blocked by conflict. The successful negotiation of claims settlements should remove those obstacles to development. A clear definition of legal rights and mutually agreed-upon decision-making instruments will release the energies of both aboriginals and non-aboriginals for more constructive tasks.”

The 1993 final report of the Whitehorse Mining Initiative, a “multi-stakeholder” review of the Canadian mining industry proposed by the Mining Association of Canada, made considerable reference to the need to settle ground rules for mining on claimed land. At page 9 of the report it noted:

“While these lands are not necessarily closed permanently or in a formal sense, the slow progress being made in settling land claims, and the uncertainty surrounding their eventual settlement discourage the industry from committing exploration capital without knowing whether development will be allowed.”

The report considered that this would be offset, in part, “...through the resolution of outstanding aboriginal land claims and the possibility that these aboriginal communities will open their territories to mineral exploitation and development”.

4.1.3 In its travels throughout Canada, the Committee saw considerable evidence that industry was indeed willing to invest in projects on land which was the subject of a treaty settlement. This was most evident in Calgary, where the Committee met with a number of companies doing business on aboriginal-owned land. Said one Calgary witness: “*Business just needs to know the rules - to have them laid out - and business will get on with doing business. Disputes about land and ethnic identity are just a distraction for business*”.

4.1.4 Where land claims were not settled, industry representatives expressed considerable disquiet. In Yellowknife, BHP representative Mr Graham Nicolls echoed statements by witnesses in Calgary that industry's basic requirement was that ground rules be settled and not subject to change. (BHP is constructing a \$700-million diamond mine near Lac de Gras in the Northwest Territories. The mine is expected to be the largest and richest diamond mine in the world when operating. In 1996, following the publication of an Environmental Assessment Panel report on the proposed project, which recommended that BHP enter directly into negotiations with the aboriginal groups with respect to concluding Impact and Benefit Agreements (IBAs) prior to Government approval, BHP was given 60 days by the Federal Government to finalise an IBA with the aboriginal groups in the region. This demand by the Federal Government was not based upon any legal or policy requirement and was described at the time as an "arbitrary requirement" and one without "logic"⁴⁰⁵). Mr Nicolls said the requirement to finalise IBAs with aboriginal groups had created a great deal of problems for BHP and made the project more costly than any other in the world. "We were concerned that there were moving targets and changing rules for investors who were putting in money...You need a more robust project to operate and deep pockets in face of this kind of uncertainty", Mr Nicolls said.

4.2 Has legislation and litigation worked?

4.2.1 While recognising that in the short-term negotiated agreements would be expensive, time-consuming and would not deliver immediate results, the Canadian government was critical of the legislative option, citing human rights concerns, the need to develop a more inclusive society and a basis for economic self-sufficiency of indigenous peoples⁴⁰⁶. The Report of the Task Force to Review Comprehensive Claims Policy commented:

*"We do not think that litigation or extra-legal action can produce settlements that are in the best interests of either non-aboriginal or aboriginal Canadians. One radical alternative would be to abandon the effort towards negotiated settlements and to impose a legislated solution on aboriginal societies with unextinguished aboriginal rights. We did not consider this alternative because it is unacceptable both to the Government of Canada and to the aboriginal peoples...we think that such a non-consensual approach should be repudiated as being incompatible with what is best in the Canadian tradition."*⁴⁰⁷

4.2.2 Similarly the British Columbia Claims Task Force (1991) noted at page 29 of its report:

405 A Thompson and C Lemon, "The BHP Environmental Agreement - a Way for the Future", 1998, 7.

406 *Living Treaties: Lasting Agreements*, Report of the Task Force to Review Comprehensive Claims Policy, 1985, at 102-103.

407 *Ibid*, 101.

“First Nations should not be required to abandon fundamental constitutional rights simply to achieve certainty for others. Certainty can be achieved without extinguishment. The parties must strive to achieve certainty through treaties which state precisely each party’s rights, duties, and jurisdiction.”

- 4.2.3 While the above claims may or may not be true, the principal reason now for the Canadian and BC governments pursuing an agreement approach to aboriginal title in preference to legislation is that it is nearly impossible to pass legislation dealing with aboriginal title without amending the Canadian constitution. Said Professor Andrew Thompson:

“Neither the Parliament of Canada nor a provincial legislature can change aboriginal title without going through the formalities of constitutional change - a daunting task that no politician would be likely or willing to undertake. For example, statutes like the Native Title Act 1993 or its amending statute of 1998 could not be enacted in Canada without going through the formalities of constitutional change.”⁴⁰⁸

- 4.2.4 The inability of parliaments to legislate in relation to aboriginal title was a source of frustration to a number of people with whom the Committee spoke. Members of the Treaty Negotiation Advisory Council (TNAC) and the Fishing Council of British Columbia argued it was a rash move by the Federal Government to entrench aboriginal title and rights without knowing what the content of that title and rights were. This entrenchment had permitted Canadian Courts to continually expand that title and rights while effectively leaving Canadian governments’ hands tied in relation to title.
- 4.2.5 Canadian courts have also put significant pressure upon parties to reach negotiated settlements. In the course of judgements over the last 25 years, courts have repeatedly impressed upon litigants that they preferred negotiated over litigated outcomes and have provided the parties with a framework within which to reach those outcomes. This message was most clearly made by two of the judges in the recent *Delgamuukw* decision.

“This litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their disputes through the courts...Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgements of this Court, that we will achieve what I stated in Van der Peet, at para. 31, to be a basic purpose of s. 35(1) - “the reconciliation of the pre-existence of

408

Professor A Thompson, “Notes on Aboriginal Title in Canada” (Paper prepared for the Committee).

aboriginal societies with the sovereignty of the Crown...Let us face it, we are all here to stay."⁴⁰⁹

*"So, in the end, the legal rights of the Indian people will have to be accommodated within our total society by political compromises and accommodations based in the first instance on negotiations and agreement and ultimately in accordance with the sovereign will of the community as a whole."*⁴¹⁰

4.2.6 These sentiments were echoed in the report of the Task Force to review Comprehensive Claims Policy.

"[Negotiation is] far more likely to produce solutions that accommodate the interests of both aboriginals and government. In dealing with comprehensive claims, there is no room for absolute winners and absolute losers. Litigation promotes zero-sum, winner-take-all outcomes. The accommodation of interests and consensus, which are crucial ingredients of satisfactory claims settlements, will not likely be obtained through litigation.

Secondly, negotiation can be truly comprehensive, whereas litigation cannot be. Many of the issues that should be addressed in settling claims go far beyond the legal issues that can be decided in court. Claims agreements can be forward-looking, whereas litigation focuses on compensation for damage done in the past. The future economic needs of the aboriginal community and the design of appropriate management and political institutions can be addressed carefully by the participants in claims negotiations. Litigation provides a poor forum in which to work out good solutions to these problems.

*Thirdly, litigation fosters adversarial attitudes that undermine the prospects of developing a true "social contract between Canada's aboriginal and non-aboriginal communities."*⁴¹¹

4.3 To provide for aboriginal self-sufficiency

4.3.1 The need to build self-sufficiency of Canadian aboriginal people through the treaty process was a theme re-iterated to the Committee in most places they went in Canada.

4.3.2 The report of the Task Force to Review Comprehensive Claims Policy stated that agreements would enable Indian Nations to develop self-government and self-sufficiency. The report said that to insist that aboriginal peoples rely solely on

409 *Delgamuukw*, Op Cit, Lamer CJ, 51.

410 *Delgamuukw*, Op Cit, La Forest J, 56.

411 *Living Treaties: Lasting Agreements*, Op Cit, 75.

traditional activities would be to compound the errors of the past and condemn them to a marginal economic existence.

“Canada’s wealth has been generated from the land and resources that aboriginal groups agreed to share with the growing nation, yet aboriginal peoples have had little opportunity to share in the benefits and have been caught in a legal and policy framework that has perpetuated a relationship of debilitating dependency”⁴¹²

“...a central objective of the proposed comprehensive claims policy is to build better relationships between aboriginal societies and Canada. One of the major building blocks will be economic development to enable aboriginal societies to cast off their dependency on government welfare and hand-outs.”⁴¹³

The report said the agreement would have to be flexible enough to accommodate and manage changes.

“Land without the power to manage what happens on it, or the right to fish without a say in the management of fish stocks, will only perpetuate the dependency of aboriginal peoples. The new policy also should enable aboriginal groups to share in the financial rewards of development on their traditional territories.”⁴¹⁴

- 4.3.3 A 1996 study by accounting firm KPMG entitled *Benefits and Costs of Treaty Settlements in British Columbia* gave support to the argument that increased control over land and resources by aboriginal peoples would increase self-sufficiency and independence. It found that claim settlement would be likely to result in strong investment in resource industries, for example fisheries and forestry, and improvements in the skills and abilities associated with resource management. The report found that while this could result in some displacement of non-aboriginal employees, over time aboriginal peoples control over land and resources would allow them to invest and develop successful business,. This would have spin-off benefits for British Columbia through increased investment and less reliance on government support. The report noted that the net financial benefit to British Columbia, after taking into account BC’s share of cash, pre-treaty and negotiation costs, would be about \$3.9 billion and \$5.3 billion, when totalled over 40 years. Further, significant employment gains would be had from the settlement of treaties - between 7,000 to 17,000 jobs.

412 Ibid, 16.

413 Ibid, iii.

414 Ibid.

“When all of the financial impacts in BC are considered, British Columbia can expect about three dollars worth of total financial benefit for every dollar of provincial financial cost...At the same time, the certainty that treaties will bring to the province’s land and resources will encourage increased investment as people with new financial confidence spend money. First Nations, too, will invest settlement money in the province, which will result in modest economic boom for business people in communities near First Nations.”⁴¹⁵

- 4.3.4 The findings of the KPMG report were replicated by a study of aboriginal land claim settlements in northern Canada and New Zealand by the ARA Consulting Group. The ARA Consulting Group determined that, generally, the climate for investment in resource development improved or stayed the same following settlements, due to increased certainty.
- 4.3.5 In Calgary, a number of witnesses told the Committee that settled claims gave aboriginal people the economic capacity to become involved in the Canadian economy. These witnesses included representatives from Shell, Syncrude (the largest miner of oil sand in the world), Norterra (an Inuit-owned transport company), and members of the Calgary Chamber of Commerce Aboriginal Economic Opportunities Committee. Witnesses at the latter said there were now very few companies formed in Canada without Aboriginal representation. Mr Murray Loader from Syncrude claimed that he had observed that another effect of increased economic prosperity in aboriginal communities was a trend towards migration away from aboriginal reserves and integration into the general community.
- 4.3.6 In many cases, aboriginal peoples have chosen to invest the principal of the financial component of treaties in long-term securities and accounts and access only the interest from that investment. One witness referred to a sense of *“This is our money and we are not going to see it fiddled away”*.
- 4.3.7 Witnesses described the emergence of a thriving aboriginal economy from settled land claims. Investments included investments in large airlines and transport companies.
- 4.3.8 Most witnesses agreed that without a land and resources base it was difficult to build economic structures that were sustainable. Said one witness: *“Money is not just the answer but some form of ownership with the means of wealth creation”*.
- 4.3.9 Witnesses also described a sense of responsibility and self-worth that came from land ownership and developing private enterprises. Many referred to the Inuit of Nunavut who apparently were now pushing ahead in the creation of private enterprises. Murrie Hurley from Norterra, a transport company which was purchased by the Inuit from the

415

KPMG, “Benefits and Costs of Treaty Settlements in British Columbia - A Financial and Economic Perspective”, 1996, 14.

Federal Government, said there had been a visible change in the Inuit of Nunavut following the settlement of their claim. Said Mr Hurley:

“In Nunavut, when people used to talk about employment, a veil came over their face and they just said “where is my cheque”, now there is a perceived sense of changed control. Aboriginal companies have begun to be established and they now say “where’s my bigger cheque” and ask what you have to offer. There is a complete rejection of the safety net and a down to business attitude...I have noticed a dramatic change in education levels and enrolments. From a socially depressed society it has felt empowered to going forward...They now have a personal stake in the operation.”

- 4.3.10 In the North-West Territories, Grand Chief Joe Rabesca of the Dogrib described the notable increase in children remaining at school and expressing an interest in the mining industry following the announcement of the construction of BHP’s Ekati Diamond mine in the region. He said the Dogrib were working with BHP to structure the syllabus in Dogrib schools to provide work opportunities in the mining industry: *“Hardly anyone is trapping now and so it is important that we get people educated”*. Grand Chief Rabesca also said the community was planning to construct a hydro-dam to enable the Dogrib to sell power to mining companies. Details of this agreement are included in section 5.8.6 of this Chapter.
- 4.3.11 The trend for increased participation rates in education appears to be generally occurring throughout Canada. Dr Rick Ponting in Canada quoted figures which showed that aboriginal education rates had jumped from 30% completion rates to 70% in recent years.
- 4.3.12 Representatives from industry who the Committee met in Vancouver expressed the view that providing aboriginal people with areas of resource - rich land would not provide self-sufficiency but rather lock them into forms of wealth-creation - such as forestry, fisheries and small-scale mining - that were becoming obsolete in the late 20th Century. At the Business Council of British Columbia, one witness suggested that aboriginal people should be given cash so that they could purchase land, if they so wished, or Microsoft shares, so that they could be locked into the economic development of the Province. Said one witness: *“The fundamental premise of treaties of giving them land and trees is fundamentally wrong - the economic benefits we can derive from the resource sector are dwindling by the day”*. He said that in some of the remote areas in which treaties were being negotiated, economies were already facing difficulties being sustainable and creating work opportunities. Mr Michael Hunter from the BC Fisheries Council expressed concern that with fish stocks becoming depleted it was foreseeable that aboriginal people would be given extensive means to fish but would have nothing to fish. *“The Government is locking people into economic circumstances which doesn’t necessarily reflect the future...What we are giving them by giving them trees, rocks and fish is giving them something which is not part of our economic future.”* Mr Hunter said.

- 4.3.13 The cash approach was rejected outright by aboriginal witnesses: *“We can’t take cash - it would be like selling our very being. Our culture is attached to the land in every way.”*
- 4.3.14 Aboriginal witnesses also made the point that governments needed to be careful that they were not replacing another form of dependency through the imposition of programmes and services and solutions which were not appropriate to the circumstances. They said that aboriginal people needed to be intimately involved in the process of finding solutions, even if this involved the making of mistakes. Said one witness: *“My concern is that we will not be allowed to make mistakes and learn from those mistakes”*.
- 4.3.15 Another concern expressed to the Committee was that while the participation rate of many aboriginal communities in education and white-collar professions was increasing, this was only in certain areas - such as law - and not in areas of greatest need, but lesser financial recompense - such as teaching and nursing. As a result, many aboriginal communities were still relying on imported non-aboriginal professionals in many areas. One representative of the mining industry pointed out that it was hard to get 25% of the non-aboriginal population interested in the mining industry so it would be equally hard to get an equal number of the aboriginal population interested.

4.4 To build a new partnership with aboriginal peoples

- 4.4.1 The Canadian and BC Governments have both referred to the need to build a new relationship or partnerships with aboriginal peoples. This proposal builds on conclusions of the Royal Commission on Aboriginal Peoples that fundamental change was needed in the relationship. It called for a partnership based on the four principles of mutual respect, recognition, responsibility and sharing. Through the “Gathering Strength” policy, Canadian government has committed itself to creating that partnership. The policy commences with a *Statement of Reconciliation* acknowledging *“mistakes and injustices of the past”* and then a *Statement of Renewal* that *“...expresses a vision of a shared future for aboriginal and non-aboriginal people...”*⁴¹⁶.

“The Government of Canada agrees with the Commission’s conclusion that aboriginal and non-aboriginal people must work together, using a non-adversarial approach, to shape a new vision of their relationship and to make that vision a reality. In that spirit, Canada is undertaking to build a renewed partnership with aboriginal people and governments.

Canada’s vision of partnership means celebrating our diversity while sharing common goals. It means developing effective working relationships with aboriginal organisations and communities. Above all, it means all levels of government, the private sector, and individuals working together with

416

“Gathering Strength”, Minister of Indian Affairs and Northern Development, 1997, 2.

aboriginal people on practical solutions to address their needs. Our common aim should be to strengthen aboriginal communities, and to overcome the obstacles that have slowed progress in the past.”⁴¹⁷

4.4.2 Federal government witnesses stressed to the Committee that this was a forward-looking process rather than redress for past injustices. Said one witness at the Department of Indian and Northern Affairs in Yellowknife: “*We take the attitude of ‘We know there have been problems in the past, let’s not concentrate on that and get on with the future’*”.

4.4.3 The Report of the BC Claims Task Force also recommended the creation of new relationships and the reconciliation of conflicting interests through treaties.

“As history shows, the relationship between First Nations and the Crown has been a troubled one. This relationship must be cast aside. In its place, a new relationship which recognises the unique place of aboriginal people and First Nations in Canada must be developed and nurtured. Recognition and respect for First Nations as self-determining and distinct nations with their own spiritual values, histories, languages, territories, political institutions and ways of life must be the hallmark of this new relationship.

To the First Nations, their traditional territories are their homelands. British Columbia is also home to many others who have acquired a variety of interests from the Crown. In developing the new relationship these conflicting interests must be reconciled...Whatever the issues may be, it is crystal clear that any new relationship must be achieved through voluntary negotiations, fairly conducted, in which the First Nations, Canada, and British Columbia are equal participants...The status quo has been costly. Energies and resources have been spent in legal battles and other strategies. It is time to put these resources and energies into the negotiation of a constructive relationship.”⁴¹⁸

4.4.4 The Report of the Task Force to Review Comprehensive Claims Policy called this process a creation of a new “social contract” based upon the sharing and transfer of power to aboriginal peoples.

“To survive, relationships must be flexible, to allow for growth and to meet the changing needs of aboriginal communities and Canadian societies. The policy also should be flexible enough to be responsive to dramatic differences from one region of Canada to another in aboriginal economies and lifestyles,

417 Ibid, 6.

418 Op Cit.16 - 18.

in the economic potential of the land and its resources, and in the policies of provincial or territorial governments.”⁴¹⁹

5 The claims process

5.1 Participants

5.1.1 Parties to the negotiation are normally the claimant group, the Federal Government and the Provincial Government. Third-party interests are not directly involved.

5.1.2 Government

5.1.2.1 While it is not essential that the Provincial Government be involved in negotiations, their involvement is encouraged as it is the Provincial Government which provides title to land, has responsibility for land administration and stands to benefit from the certainty of title they receive through agreements⁴²⁰.

5.1.3 First Nation group

5.1.3.1 In BC, the self-defining First Nation unit is a basic unit of the process. Proof of title is not a requirement: an aboriginal group must only demonstrate that they have a traditional territory, that they have a recognised governing body and a mandate to negotiate before being accepted into the process. However, they must have some exclusive, uncontested territory and any overlaps with other First Nation groups must be resolved by the First Nation parties themselves before the finalisation of an Agreement in Principle. If the matter is litigated then negotiations will be suspended.

5.1.3.2 A requirement of the negotiation procedure is that the aboriginal group have established eligibility criteria for membership of the group and beneficiary of a treaty. However, eligibility criteria may vary between aboriginal groups. For example, the Sechelt band have a membership clerk who deals with membership applications, which should include evidence of heritage. If the applicant does not agree with the clerk’s determination then an appeal may be made to an elders’ committee. If the applicant is still dissatisfied they may submit themselves to a referendum of band members on band land, which requires a vote of 75% or over to be passed. On the other hand, the Ts’kw’aylaxw Band allows citizenship if a person : a) is of Stl’atl’imx or Secwepemc ancestry; b) is on the Ts’kw’aylaxw Indian band list at the date of the final agreement; c) has a significant cultural attachment to Ts’kw’aylaxw and has been accepted at a community meeting as a citizen; or d) has married a person who is a citizen and has requested citizenship.

419 Op Cit, iii.

420 R Bartlett, “The Need for Long Term Settlement Process”, 1993, 277.

5.1.3.3 At present, there are 51 First Nations in the BC Treaty Process. Of these First Nations, 36 are in Stage 4, 12 are in Stage 3, and 3 are in Stage 2 (These stages are more fully described in section 5.2 of this Chapter). About 70% of all First Nations are in the process. Other First Nation Groups have either withdrawn from the process following *Delgamuukw* in the belief that more can be achieved through the Courts or have refused to enter the process in the belief that all negotiations should be on a direct “sovereign nation to sovereign nation” basis between the Federal Government of Canada and the First Nation Group.

5.1.4 Third-party interests

5.1.4.1 In the negotiation process the government has responsibility for representing and safeguarding the interests of third parties as the Crown has the responsibility to present an unencumbered and secure title.

5.1.4.2 In BC, the Treaty Negotiation Advisory Committee (TNAC) has been established to represent third-party interests and advise Government on broad province-wide treaty issues. Additionally, regional consultation groups for individual treaty negotiations have been established, which in some instances has representation in formal negotiations. All negotiations are open to the public. The closed negotiations leading up to the Nisga’a agreement (which were outside the BCTC treaty process) were the source of some public criticism.

5.1.4.3 The Report of the Task Force to Review Comprehensive Claims Policy said it was incumbent upon Government to minimise economic dislocation of third parties and to minimise acrimony between the aboriginal group and third parties. However, because direct representation of third-parties would result in more complex and lengthier negotiations it should not be encouraged.

“The establishment and existence of conflicting interests over portions of the same area has largely resulted from circumstances beyond the immediate control of the aboriginal group and the third-party. Generally, it has resulted from the activities of government and permitting third-party rights without having previously dealt with the aboriginal interest in the area...”

In deciding whether or not the third-party interest should be pre-empted, it will be necessary to determine the balance of interests. No party should have an automatic right of pre-emption. Rather, consideration must be given to matters such as the extent of economic dislocation, the cost of compensating the third-party interest, the achievement of the aims and objectives of the claims policy, and so.”⁴²¹

421

Op Cit, 61-62.

5.1.5 British Columbia Treaty Commission

5.1.5.1 In British Columbia, negotiations are overseen by the BC Treaty Commission, which was established in 1993. Unlike the Australian National Native Title Tribunal, the Commission does not arbitrate disputes nor have the power to make any judicial-type of order or decision nor take part in negotiations. As part of its neutral role as “keeper of the treaty process” it:

- accepts First Nations into the treaty making process and assesses when parties are ready to start negotiations.
- monitors progress of negotiations, identifies problems and offers advice to parties.
- assists parties to resolve disputes through facilitation or dispute-resolution. In relation to matters of boundary overlap among aboriginal groups the Commission may be asked to assist, advise and make recommendations as to resolution but it cannot make binding decisions; and
- allocates funding to First Nations in the form of loans, which is repaid from compensation provided in any final agreement (this is referred to in section 6.6.3 of this Chapter).

5.1.5.2 The three negotiating parties - First Nations, the Provincial Government and the Federal Government - have equal representation on the BCTC Board of Commissioners and all decisions of the BCTC must be agreed by all parties (the BCTC claims that this aspect of the Commission’s operation ensures its neutrality).

5.1.5.3 Funding for the process is split 80-20 between the Federal and Provincial Governments. Over five years since May 1993, the BCTC has allocated \$93 million to First Nations, \$75 million of which was in loans.

5.2 The process

5.2.1 The Negotiation process has six stages.

1) Claimant Groups prepare a **Statement of Claim/Intent to Negotiate**, which is submitted to the Canadian Government. The statement must:

- identify the First Nation’s governing body and the people it represents and show that it has a mandate from those people to enter the process; and
- describe the geographic area of the First Nation’s distinct traditional territory and identify any overlaps with other First Nations.

2) **Preparation for Negotiations** - parties prepare for negotiations by establishing negotiating teams, preparing background research and identifying issues to be negotiated.

3) If the Statement is accepted, a **Framework Agreement** is developed that includes the scope of negotiations, time lines and procedures. It is an attempt by the parties to

lay some groundwork for a future substantive agreement and formalise the parties' common principles and understandings. The agreement is in effect a "table of contents" for negotiations. It identifies the substantive subjects to be negotiated, goals, procedural arrangements, funding for negotiations and a timetable for negotiation, including any negotiation milestones.

4) An **Agreement-in-Principle** (AIP) is then negotiated and ratified by both the claimant group and federal cabinet. The AIP identifies and defines a range of rights and obligations, including existing and future interests in land, sea and resources, structures and authorities of government, regulatory processes, and dispute resolution.

5) A **Final Agreement** is then negotiated and implementation plans prepared.

6) The agreement is then **implemented** by Federal and Provincial Government legislation and by referendum of the First Nation people concerned.

6 Issues arising out of Canadian experience

6.1 The Committee identified a number of important issues arising out of their meetings in Canada. These were:

- **overlaps;**
- **mandate of negotiators;**
- **length and cost of negotiations;**
- **finality;**
- **resource development and interim measures;**
- **self-government;**
- **public education and openness;**
- **capacity of aboriginal people to negotiate; and**
- **ratification of agreements.**

6.2 Overlaps

6.2.1 Federal and Provincial Governments have taken the firm position that it is for aboriginal groups to resolve overlaps amongst themselves before negotiations begin. However, the Federal Commissioner for Aboriginal Land Claims Agreements and the BC Treaty Commission are available at the request of parties to assist in mediation and advising.

"Clarity and certainty of First Nation territorial boundaries and rights within a territory are required to bring finality to the issues on the treaty table. So, First Nations must have a means to address such conflicts as arise out of overlapping territories and rights. Insofar as overlaps affect negotiations, it is the responsibility of First Nations to resolve them. Overlaps can become a

matter of urgency. Without resolution of overlap disputes the parties are unlikely to complete a treaty."⁴²²

*"When a First Nation commences treaty negotiations with Canada and British Columbia over land and resources, it must have the authority to speak for the traditional territory and resources that it claims. If the First Nation is to make progress in treaty negotiations, overlaps must be resolved so that the parties can make arrangements without fear of a competing claim to the territory or resources."*⁴²³

- 6.2.2 Despite this policy, overlapping claims are a continuing issue for all parties concerned. Chief Provincial Negotiator in the Nisga'a treaty Mr Jack Ebbels expressed the view: *"We have that problem in spades"*. Many of the people the Committee met with from industry also expressed a concern about the ability to achieve binding agreements in light of overlapping claims.
- 6.2.3 The BCTC estimated that up to one and a half to two times the area of BC had been claimed by aboriginal people.
- 6.2.4 The Committee witnessed first-hand the problems experienced in relation to overlaps when attending a ceremony at Campbell River, BC for the signing of a framework agreement and an overlap resolution agreement, which was intended to resolve the boundaries between two First Nations to the framework agreement. During the ceremony a third aboriginal group joined proceedings and claimed they would break away from negotiations as the two signing First Nations had taken over their traditional territory. In discussions with the BCTC, members of the BCTC expressed an opinion that this was an abnormal situation as the people concerned had, more than other groups, been displaced from their traditional territory.
- 6.2.5 The Nisga'a negotiations were also bedevilled by conflicting claims during the Committee's stay in Canada with two groups seeking injunctions to prevent the signing of the agreement. Both groups were unsuccessful (Professor Hamar Foster, from the University of Victoria, told the Committee that, in general, Courts were not particularly sympathetic to renegade groups). Nisga'a negotiators sought to allay the concerns of these groups by inserting provisions into the treaty stating that the agreement was not to effect any other groups' aboriginal right or title. Further, if a Court found that there was some adverse impact on an aboriginal neighbour then the offending provision was to be renegotiated.
- 6.2.6 Mr Ebbels said there were a number of ways of dealing with overlaps in treaty negotiations. First, governments could refuse to negotiate with groups until they had worked out their overlaps. This approach had proven to be not particularly successful:

422 BC Treaty Commission Annual Report, 1997,15.

423 BC Treaty Commission Annual Report, 1998, 20.

“Some groups have been at each others throats for a hundred years. They are no different from the constantly-changing boundaries in Europe”. Secondly, a government could delve into a lengthy and expensive process of determining which group had a better anthropological and historical claim. This approach would ultimately be inconclusive and there could potentially never be a settlement. Thirdly, the government could recognise non-exclusive interests of the groups in the treaty area. Fourthly, government could take the attitude that at least one aboriginal group owned the area and put the land and the cash in trust and let the groups fight it out amongst themselves.

6.2.7 It was apparent that a large part of the agreement process was the rebuilding of self-identity and of internal structures of governance, social order and unity. This was a process that could not be externally imposed, as has been done for over 100 years, but must occur on the initiative of aboriginal people themselves.

6.3 Mandate of negotiators

6.3.1 In order to negotiate effectively, negotiators need to have sufficient authority and a flexible mandate. If a negotiator does not have the support of their constituency it is unlikely that any agreement reached by them will be acceptable to that constituency. Therefore, development and maintenance of a mandate is pivotal for an agreement to be effective and long lasting.

6.3.2 On occasions, there have been complaints that negotiators have demonstrated limited authority and worked with mandates that are rigid and often unchangeable. One aboriginal witness described it as hitting a brick wall: *“Negotiators have no mandate to negotiate - they only have a mandate to come and talk to you about what you are interested in.”*

6.3.3 A representative of the Sechelt Band told the Committee that his people had withdrawn from negotiations and returned to litigation because the negotiators had refused to change their offer from day one, a large cash payment: *“Public servants just come to the table with policy seeking to force it upon us. We had to agree to so many bottom lines before entering negotiations. The only way to get a level playing field was to go to Court.”* Since the Committee’s visit to Canada the Sechelt have recommenced negotiations with Governments.

6.3.4 Another aboriginal witness complained that it was impossible to reach agreements as the negotiators could never agree to anything on the spot and had to go back to Cabinet for further instructions. They said that the Provincial negotiators had rejected the proposed land selections of the First Nation and had proposed land selections, around 0.001% of traditional territory, only after Government ministries and private companies had nominated areas of land of interest.

6.3.5 Witnesses from both industry and aboriginal groups agreed that the negotiation positions of government parties were influenced by politics. In particular, it was

- claimed that the rush to finalise the Nisga'a treaty had been influenced by the BC government's desire to win back support from conservationists in the Province.
- 6.3.6 These criticisms were rejected by Provincial negotiators at the Aboriginal Affairs Department in Victoria. They said that while they had initially started with a system whereby all policy mandates had to be approved by cabinet, this had proven to be inefficient, and they were now given a global figure by cabinet within which different mixes of land, resources and cash could be developed. Therefore, in urban areas the cash component of an agreement would be greater as there was less Crown land available than in remote areas. They were also developing template agreements through specific negotiations. For example, it was likely that elements of the Nisga'a agreement would be used again in negotiations with groups in remote areas.
- 6.3.7 Aboriginal leaders also have problems maintaining their mandates. One witness at the University of Victoria claimed: "*First Nation communities are incredibly fragile. Leaders never know when their mandate will disappear and communities are still very much grass-roots driven*". A witness from the Department of Indian and Northern Affairs said it was evident that some leaders were not properly communicating the content of negotiations to their constituencies: "*You need to make sure that people are getting the right message and that expectations are not out of this world*".
- 6.3.8 It was made clear to the Committee that in many cases, the political leadership of aboriginal groups was a product of the *Indian Act* and non-aboriginal governments and did not reflect the cultural and historical leadership structures, as is also often the case in Australia. Often the two were in conflict. Said one witness in BC: "*First Nation leadership is not real leadership. It was set up by us and is really only a liaison committee*".
- 6.4 Participation of third-party interests**
- 6.4.1 The inability of third parties to be directly involved is a source of considerable tension between governments and third parties. The Committee spoke to members of the Business Council of British Columbia in Vancouver who expressed frustration at not being represented at the main negotiating table and said that often they did not know what was going on in negotiations. They also were upset that often the Government did not take notice of their advice. One member claimed that, in the Nisga'a agreement negotiations, it was hard to "get a handle" on what was going on a lot of the time and when they were informed they were given little time to "come to grips" with complex and extensive material. Said another member: "*There is a lot of frustration and the landscape keeps getting more and more frustrating,*".
- 6.4.2 Mr Ebbels curtly responded to criticisms by third-party groups. He said that the Government had responsibility for negotiating treaties and they did not take instructions from TNAC. "*TNAC was under the impression that they had a veto and were there to give us instructions. That's not the case - we get our instructions from*

the Cabinet”, Mr Ebbels said. However, TNAC was kept fully briefed at every stage during the Nisga’a negotiations, he said.

6.5 Capacity of aboriginal groups to negotiate

- 6.5.1 The absence of any requirement of population size has been the source of considerable discontent among the Provincial Government and some members of Industry. Some witnesses expressed dissatisfaction that groups as small as 165 could become involved with treaty negotiations.
- 6.5.2 Witnesses from the Department of Aboriginal Affairs (DAA) in Vancouver expressed the opinion that only a handful of claims would be substantially progressed in the next five years. In many cases First Nation groups did not have the capacity to be negotiating treaties or needed to be amalgamated with other groups - “*We could throw as many resources at the process as we liked but it would not see it go any faster*”, said one DAA witness. Another said that the Nisga’a negotiations were successful because there was a good critical mass with good political structure, leadership and a long history of land rights activism.
- 6.5.3 The BCTC recognised that this was a problem but said it did not have the resources to do any substantial vetting of claims.

*“The Treaty Commission has few tools for establishing whether the governing body and aboriginal group it represents are appropriate to the task of negotiating a comprehensive, government-to-government treaty. This implies a size and degree of organisation that justifies the resolution of all treaty issues...The Treaty Commission acknowledges that a broader concept of nationhood must be balanced by geographical and current political realities. Some First Nations have functioned as independent units for a long time. However, the Treaty Commission also believes that nationhood should, where possible, encompass past, present and future considerations.”*⁴²⁴

- 6.5.4 In response to concerns about the capacity of First Nations to participate in negotiations and assume a form of self-government, Federal and Provincial Governments have committed themselves to delivering programmes and services aimed at strengthening capacity. These programmes and services aim to address health, education, employment and governance issues.

“As the Royal Commission noted, many aboriginal groups and nations require support in order to assume the full range of responsibilities associated with governance, including legislative, executive, judicial and administrative functions. The federal government acknowledges that the existing federal policy and negotiation process, particularly in the area of capacity-building, can be improved. To address this, the Government of Canada intends to focus

424

BC Treaty Commission Annual Report, 1998, 22.

on capacity-building in the negotiating and implementing of self-government.”⁴²⁵

6.5.5 Proposed government assistance included a “Healing Fund” to assist aboriginal people who had been forced to attend “residential schools” (a policy which has been likened to former government policy in Australia of placing Aboriginal children in white families). This fund is said to be a “needs-based” fund rather than “compensation-based” (however, there are a number of common law compensation claims by aboriginal people presently on foot).

6.6 Length and cost of negotiations

6.6.1 Some agreements have taken up to 18 years to negotiate and are extremely resource intensive. For example, the Nisga’a treaty took around 20 years from start to finish to negotiate. In many cases, the funds for aboriginal negotiators are provided in the Federal Government and deducted from any compensation provided by a final agreement.

6.6.2 A KPMG report⁴²⁶ estimated that the dollar cost to British Columbia to range between \$1.4 billion and \$2.1 billion over the next 40 years - around \$50 million a year over the period or \$35 a year for each household in the Province. The report also estimated that when treaties were finalised aboriginal peoples would receive between 24,000 and 29,000 square kilometres of rural land, about 3% of provincial Crown land.

6.6.3 In 1997, funding available to First Nations in the BC treaty process by way of loan was \$30 million. One group of aboriginal representatives expressed considerable disquiet about the extent to which they had to go into debt to achieve agreements. They feared that substantial negotiation costs over a long period could seriously deplete any cash component they stood to gain under a final agreement. As a result of this concern, some groups have chosen to provide their own finance to enter into negotiations rather than be dependent upon government funding for negotiations. Lawyer Andrew Schuck argued that such dependency could be used by a Government to slow down the speed of negotiations in order to extract further concessions in negotiations.

6.6.4 Witnesses from both the BCTC and the BC DAA said that the expense of negotiation arose not so much from actual negotiations but from the work done by First Nation groups in developing their mandate and cohesion within their own community. One witness at BCTC said:

“Currently groups are going through a sorting out process...This is a necessary process and they need time to unravel. The ability of self-

⁴²⁵ “Gathering Strength”, Minister of Indian Affairs and Northern Development, 1997,15.

⁴²⁶ KPMG, “The Benefits and Costs of Treaty Settlements in British Columbia”, 1996.

governance has been destroyed. And part of re-establishing that is sorting these things out.”

- 6.6.5 Witnesses at the Department of Indian and Northern Development in Yellowknife warned against trying to rush negotiations: *“Don’t rush negotiations, don’t cram it, do it right. Consult as widely as possible, learn from past failures and don’t set unrealistic deadlines”*. This point was also made by witnesses at the BC Chamber of Commerce, who claimed that the final stages of the Nisga’a agreement had been rushed by the BC Government in order to have a political win: *“There has been a ridiculous rush to get the treaty finished at the last minute. Don’t rush through something at the last minute which has taken 20 years to negotiate because once it is in the Constitution it cannot be changed and especially given that elements of Nisga’a could be used as a template”*.
- 6.6.6 As a result of the high costs of negotiations, the effectiveness and speed of negotiations is dependent upon the willingness of governments to make funding available. At the time of the Committee’s visit to BC all parties appeared to agree that negotiations, other than Nisga’a, had ground to a halt. In part, this was due to the time taken by the BC Government’s slowness to respond to the *Delgamuukw* decision the previous year. However, another important factor was outlined by the BCTC. BCTC witnesses claimed that the negotiations were deadlocked in part due to continued under-funding.

“In November 1997 the Treaty Commission advised Canada, British Columbia and the First Nations Summit of the need for more treaty negotiation funding. When no increase was forthcoming, the Treaty Commission again advised the Principals of the serious consequences for First Nations. It noted that, although most First Nations have now advanced to Stage 4, they are receiving less funding. Allocation for the 1998/99 fiscal year were capped by the Treaty Commission at 30 per cent. Given current funding from Canada and BC, the situation will be worse next year. There will be less money available while almost all First Nations will be in Stage 4.”⁴²⁷

- 6.6.7 The cost of negotiations has given rise to a concern in other sections of the community that a small percentage of the population is benefitting from such large amounts of money. This was a concern which found voice in the media at the time of the signing of the Nisga’a agreement.

“It’s the benchmark for future agreements. If it involves that much money, everyone should be concerned...I think every city, every town, every person should really take a look at this.”⁴²⁸

⁴²⁷ BCTC Annual Report 1997, Op Cit, 26.

⁴²⁸ *The Globe and Mail*, 23/7/98, A5. See also “Deal entrenches inequality, BC Liberals charge”, 23/7/98, A5.

- 6.6.8 The BC Government has responded to these criticisms by saying that the cost of treaties will be far outweighed by the economic benefits that will flow from increased investment as a result of increased certainty of title and self-sufficiency of aboriginal peoples. Said Aboriginal Affairs Minister Dale Lovick:

“All of the calculations we have carried out thus far tell us that there is still roughly a ratio of 3-to-1 net benefit accruing to the province.”⁴²⁹

- 6.6.9 As outlined earlier in this Chapter, Provincial negotiators held little hope that more than a handful of negotiations would be substantially progressed in the next 5 years. However, they did hope that with the Nisga’a agreement now finalised more resources and energy could be focussed on other negotiations. In addition, sections of the Nisga’a agreement could be used as templates in other negotiations to speed up negotiations. They would also be attempting to develop template agreements for different areas - such as urban areas - in the course of other negotiations.

6.7 Finality

- 6.7.1 The aim of Canadian agreements has been to provide long-term certainty and finalise outstanding legal ambiguities. Article 2.1.1 of the Federal Land Claims Policy notes:

“Final settlements must...result in certainty and predictability with respect to the use and disposition of lands affected by the settlements when the agreement comes into effect, certainty will be established as to ownership rights and the application of laws.”

- 6.7.2 Unfortunately, this has not always occurred. In some cases, aboriginal groups dissatisfied with the agreement negotiated have subsequently become involved in legal proceedings on questions of interpretation of an agreement. In the case of the James Bay Agreement, following a decision of the Quebec Provincial Government to enlarge the hydro-power scheme, the Cree sought to reopen negotiations on the agreement and subsequently applied to the Quebec Superior Court for an injunction to permanently restrain work on the project and a declaration that the original agreement is null and void. Their application was rejected.

- 6.7.3 One way in which Governments have attempted to ensure finality and certainty is by exchanging and extinguishing native title for a different, more defined title which is protected by legislation. These provisions have been a major sticking point for aboriginal groups who are concerned that they require them to give up their heritage. They have also argued that their traditional rights did not only include land, but also cultural, religious, linguistic, and political matters.

“The sweeping extinguishment clause found in modern agreements is perceived as an expression of the Federal government’s wish to abolish their

429

Hansard, Legislative Assembly, 16/7/98.

unique identity and to destroy all aboriginal rights...To many aboriginals, aboriginal rights are intimately tied to culture and lifestyle and are integral to their self-identity. The blanket surrender and extinguishment of these rights suggests assimilation and cultural destruction."⁴³⁰

In relation to the James Bay and Northern Quebec Agreement it was stated:

*"It [the agreement] appears to have merely stripped the Cree and Inuit of their native title land and associated rights in order to make way for expanded resource development."*⁴³¹

6.7.4 As detailed previously in this Chapter, the Canadian Government sought to move away from explicit extinguishment of aboriginal title after 1986. Nevertheless, the issue of how to achieve certainty through other means while ensuring that a treaty cannot be undermined through future common law claims has been an ongoing live issue. The 1990 Dene-Metis Comprehensive Agreement for the NWT faltered principally for the reason that the aboriginal groups refused the certainty provisions. Mr Jack Ebbels said the old approach was to completely truncate what was originally held and grant a new form of title: *"This was abhorrent to First Nations as it was effectively saying 'You need to bring to an end who you were and then, by the grace of the Crown, we will tell you who you are'".*

6.7.5 In an effort to deal with these concerns, the Nisga'a treaty provides that the treaty is a "full and final settlement" of aboriginal rights. All common law aboriginal rights are deemed to be modified and to continue but only in so far as set out in the treaty. The Nisga'a have further indemnified the Provincial and Federal Governments against any claims or losses for past infringements by the Crown of aboriginal rights and interests prior to the treaty and they release any claims based on rights or attributes of rights which are not in the treaty. Mr Ebbels told the Committee that while the terms "surrender and release" had the same legal effect as ceding and extinguishment, it did not have the same connotations for aboriginal people.

Mr Ebbels said if the Nisga'a were not satisfied that a matter had been dealt with by the treaty then it was either something that they did not care about or the Federal and Provincial Governments would not agree to its inclusion.

6.7.6 Some critics of the Nisga'a agreement have argued that the provisions have not gone far enough. Shadow Attorney-General in BC Geoff Plant MLA said only the ceding of title, as occurred in the older treaties, in return for defined rights would achieve acceptable certainty.

430 Living Treaties: Lasting Agreements, Op Cit, 40.

431 B Richardson et Al, "Indigenous Peoples and Environmental Management: a Review of Canadian Regional Agreements and their Potential Application in Australia - Part 2", *Environmental and Planning Law Journal*, October 1994, 357.

6.7.7 Even the older treaties have not been immune to litigation. The Canadian and provincial governments are presently dealing with claims by aboriginal groups arising out of alleged breaches of treaty obligations, such as provision of free health care, and have established the Specific Treaty Claim process to deal with those claims. Some witnesses even suggested that the extinguishment provisions of the older treaties may not be enforceable as the original aboriginal signatories to the agreement did not know the agreement they were signing would extinguish their title. Rather, an agreement which guaranteed traditional hunting and ceremonial rights over their traditional territories would have been interpreted at the time as protecting rather than extinguishing traditional title.

6.7.8 There was some suggestion from a number of academic and government witnesses that the liberal interpretation of aboriginal rights and title in the *Delgamuukw* decision would also affect the interpretation of older treaties. Shadow Aboriginal Affairs spokesman Mr Mike De Jong expressed a fear that the older treaties would begin to unravel - *"They will want more than a block of 5 square kilometres"* - while Mr Tom Flanagan, a political scientist from the University of Calgary, claimed *"The shadow of Delgamuukw will creep over the country and will affect interpretation of other treaties"*: In this respect he painted a bleak picture:

"This will be a chapter that will never be closed - litigation feeds on itself. Whenever one case is settled it will have a flow on effect for others and it may be too late to draw back as Indian bands now have ways of funding their claims. Each settlement will ratchet up expectations and each decision by the Court will provide a new platform for litigation."

6.7.9 It was clear that the *Delgamuukw* decision had, far from providing certainty, initially provoked confusion. It had changed the playing field considerably and forced a period of re-evaluation and change upon parties; whereas government parties may have negotiated because of more moral or political imperatives it now had to do so because of legal imperatives. One government witness commented that the decision had the effect of *"levelling the playing field"*. A witness from the Federal Negotiation Office in Vancouver commented that there was now an *"...incredible pressure to accelerate the negotiation process and for interim measures and consultation..."*.

6.7.10 There also appeared to be an element of over-reaction in the respective parties' response to the *Delgamuukw* decision in BC. Some First Nations initially believed that the decision had delivered them everything and headed straight back to the courts to establish their claims. However, it was becoming increasingly clear that the *Delgamuukw* decision also meant that there was wide scope for legislative infringement of aboriginal title and that the process of proving that title exists, would be both lengthy and expensive. On the other hand, governments appeared immobilised by the decision, with one witness likening the government response to the Kuebler-Ross grieving process: *"At first, government and industry went through a denial phase while First Nation people were euphoric. Most parties were most surprised as there was no expectation that it would go as far as it did"*. This government inaction in turn

has had the effect of fuelling the strength of aboriginal peoples' response to the decision.

- 6.7.11 One reason suggested for the failure of agreements was the failure to resolve all matters in the final agreement and the shifting of matters which could not be agreed upon into the Implementation Phase. It was suggested to the Committee that this had occurred in the Yukon Umbrella Agreement which had established a broad framework for smaller agreements to be struck but left many issues to be resolved in the finalising of individual agreements with the 16 groups involved the Umbrella Agreement.
- 6.7.12 In conceding that a final agreement would never achieve an end to conflict, a witness from the Department of Indian and Northern Development in Yellowknife argued that as treaties dealt with ongoing and evolving relationships, the aim of a final agreement should be an attempt to establish a framework to manage the dynamics of that change.

6.8 Interim measures

- 6.8.1 Given the time taken to achieve final agreements, the importance of having interim measures for aboriginal people was acknowledged by all sides. Of greatest concern to aboriginal people was a perception that there would be little in the way of land and resources left for them by the time they finalised an agreement due to the continuing exploitation of the land and resources during negotiations. Mr Colin Braker of the First Nation Summit summed up the frustration when he said "*What will we have left when we get that land*". Another aboriginal witness likened it to "*...buying a house and when it comes to taking possession of it there is nothing left in it. We may get the land back but with a great big hole in the ground with all the resources taken out*".
- 6.8.2 In a bid to stop exploitation of lands subject to negotiation, some aboriginal groups have sought injunctions. On some occasions, they have been successful. Following the decision of *Delgamuukw*, which found that governments owed aboriginal people a duty to consult when seeking to infringe aboriginal title, a number of legal commentators have argued that the case for injunctions may now be stronger. (It is interesting to compare this point with the factors that led to the right to negotiate in the *NTA*.)
- 6.8.3 Provincial and Federal governments have been looking at a number of options in relation to interim measures. These include the early release of some treaty entitlements prior to final agreement. However, this release would be subject to ensuring that by providing such a release there was still an incentive to reach a final agreement. One witness at the Federal Negotiation Office in Vancouver said the early release of treaty entitlements would also have the effect of improving trust within negotiations: "*We need early deliverables as a way to get peace on the waterfront*".
- 6.8.4 Industry witnesses agreed that there was some merit in achieving interim measures with aboriginal peoples and it was good business to do business with aboriginal people. Said one witness: "*Regardless of where you are operating, you are operating*

in someone's back yard and you have to have a business relationship with them". This included tapping into local sources of labour and achieving certainty in land title. However, balanced against this had to be the need to ensure that there were certain common rules for all people, whether aboriginal or non-aboriginal people. Mr Bob Loader from Syncrude Oil and Gas warned against business adopting approaches which sought to segregate or "draw a circle" around aboriginal people.

- 6.8.5 Industry representatives identified the challenge for industry and aboriginal communities of creating *sustainable* economic development for remote communities without destroying communities or forcing them to leave the community. Said BHP representative Mr Graham Nicolls:

"It always makes good sense that people in the region who are impacted by the project should also benefit from the project. We want to avoid the fly-over phenomenon and even though it may be cheaper to get employees from down south it would create a lot of angst among local governments."

- 6.8.6 An example of a successful Interim Benefit Agreement (IBA) was the agreement achieved between aboriginal communities in the NWT and BHP in relation to their Ekati Diamond Mine, about which the Committee heard evidence from Grand Chief Joe Rabesca as detailed in 4.3.10. The agreement entitlements include a portion of royalties, periodic fixed payments and target employment quotas of around 33% which are to be met from local aboriginal communities (who were to be flown in and out of this remote mine site from their North West Territory reserve communities). While Mr Nicolls expressed the opinion that maybe the package was overly generous in relation to what could have otherwise been achieved he was still satisfied with the agreement. He said the mine was on track to achieve gross revenue of \$4500 million a year and had already achieved an aboriginal participation rate of 50% among mining operators, the figure with which he was very satisfied: *"We are very pleased with the way things have come together. There are whole new opportunities for communities for job creation and for people to remain in the community as well...It has not been the challenge that some people might expect."*

- 6.8.7 Mr Jack Ebbels conceded that government often got in the way of direct relationships between industry and aboriginal groups. This, he said, in part stemmed from a treaty process which separated the two parties: *"It would be a hell of a lot quicker if governments just got out of the way and they dealt directly"*.

- 6.8.8 Industry witnesses also identified a lack of capacity among aboriginal negotiators and inflated expectations about what was possible. Said one member of the Business Council of British Columbia:

"They don't understand that we are not governments and we have to explain to them some pretty fundamental issues about making a profit and it's not going to work unless everyone makes some money."

And said another:

“We need to impress on them the ordinary ways of doing business. They can’t just put in the highest bid and expect it to be accepted because they have preferential status...We want to have a social conscience but we are not here to carry the whole world.”

- 6.8.9 A number of industry witnesses also complained that Government was quick to cave into and over-react to direct action and protest by aboriginal groups and the pressure industry to comply with aboriginal requests. Mr Michael Hunter of the Fisheries Council of BC said the business of protest was big business, especially when it came to a major BC industry such as the fisheries. He said:

“If you pressure Governments by threatening a resource or economic interest you will get your way. Acts of the governments in the last decade have signalled that you can get away with it - if you break the law strong enough and hard enough then government will bend.”

Mr Hunter also accused governments of throwing money at aboriginal people to get in business without providing sufficient support. Said Mr Hunter:

“If you teach a person to fish they can feed themselves, but it will not teach a person to sell fish in Japan.”

- 6.8.10 Aboriginal witnesses conceded that; indeed, they relied on direct action and protest to maximise their negotiating position. Government witnesses too admitted that they tended to reward “bad behaviour”. However, Aboriginal people claimed that, in reality, they had very few other options to achieve fair results. Said one witness:

“We have to jeopardise the economy to get anywhere. We shouldn’t have to but that is the only way we get a response from government. They say ‘we won’t talk to you if you take direct action’ but as soon as we do they’ll be right there.”

6.9 Self-government

- 6.9.1 Some Canadian agreements provide for a form of self-government. Self-government ranges from: the transfer of control of certain areas of service delivery, as is occurring in the Prairie Provinces, to the equivalent of local government, like the Sechelt Band; a new level of government which possesses certain powers transferred from Local, Province and Federal governments, such as the proposed Nisga’a Government; or public, territorial government, such as in the process of formation in the new territory of Nunavut, in the far North-West of Canada, pursuant to the Nunavut Agreement.
- 6.9.2 The Committee was told by Mr Roger Gibbins of the Canada West Foundation in Calgary that the force behind the aboriginal push for self-government had arisen in the

context of a crisis of national unity caused by a push for an independent Quebec. The aboriginal cause had attached their agenda onto a national debate and had been pulled along in a broader constitutional debate, like a surfer on a wave.

- 6.9.3 The Canadian Government has opted to provide for the creation of First Nation governments on the basis that they recognise the “*inherent right of self-government*” of aboriginal people. This inherent right, they say, may be enforceable through the Court.

*“Recognition of the inherent right is based on the view that the aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their land and resources.”*⁴³²

Despite recognising this right, the Canadian Constitution does not recognise any indigenous right to self-government. A referendum to amend the Canadian Constitution to provide for an “*...inherent right of self-government...*” for indigenous peoples was defeated in 26 October 1992.

- 6.9.4 Views as to what self-government actually meant varied from witness to witness from municipal to “municipal-plus” to third-order government (behind provincial and Federal) to a new hybrid government. For example, the local BC media described the Nisga’a government as having “*...most of the powers of a municipality, but will also have authority under provincial and federal jurisdiction, most notably health, education and social services*”⁴³³. Mr Jack Ebbels described it as an eighth-order government:

“I don’t refer to it as a third order of government ...I’ll call it a different form of government. It has aspects of existing Indian band powers, it has many aspects of local government powers and some provincial and federal powers.”

- 6.9.5 The Federal Government has staunchly maintained that the inherent right does not include the right to sovereignty in the international law sense and extends only to matters that are internal to the group, integral to its distinct aboriginal culture, and essential to its operation as a government or institution⁴³⁴. Further, the inherent right is to operate within the framework of the Canadian Constitution, subject to the *Canadian Charter of Rights and Freedoms* and the primary law-making powers of the Federal and Provincial Governments, in particular certain nation-wide laws and standards (such as education and the Criminal Code). Aboriginal laws cannot violate

432 Aboriginal Self-Government, *Federal Policy Guide*, 1995, 3.

433 “Nisga’a treaty empowers band”, *The Vancouver Sun*, 27/7/98, 8.

434 Ibid, 4-5.

Canada's constitution and the government must meet or exceed standards in all areas from forest practices to social services.

*"The Government will take the position that negotiated rules of priority may provide for the paramountcy of aboriginal laws, but may not deviate from the basic principles that those federal and provincial laws of overriding national or provincial importance will prevail over conflicting aboriginal laws."*⁴³⁵

Mr Ebbels said in the case of the Nisga'a agreement no federal or provincial laws would be depleted.

6.9.6 The matters which can be taken over by an aboriginal government include⁴³⁶:

- establishment of governing structures, internal constitutions, elections, leadership selection process;
- membership;
- marriage;
- adoption and child welfare;
- aboriginal language, culture and religion;
- education;
- health;
- social services;
- administration/enforcement of aboriginal laws, including the establishment of aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments;
- policing;
- property rights, including succession and estates;
- land management, including: zoning, service fees, land tenure and access, and expropriation of aboriginal land by aboriginal governments for their own public purposes;
- natural resources management;
- agriculture;
- hunting, fishing and trapping on aboriginal lands;
- taxation in respect of direct taxes and property taxes for members;
- transfer and management of monies and group assets;
- housing;
- local transportation; and
- licensing, regulation and operation of businesses located on aboriginal lands.

The above matters can be taken on if and when the aboriginal group is ready and willing.

435 Ibid, 11.

436 As detailed in *Aboriginal Self Government: The Government of Canada's Approach to the Implementation of the Inherent Right and to the Negotiation of Aboriginal Self-Government*, 1995.

- 6.9.7 Part of the requirements for a self-government agreement include that the agreement include mechanisms to ensure political and financial accountability comparable to those in place for other governments and institutions of similar size⁴³⁷ and that those mechanisms be open and transparent. Mr Jack Ebbels explained that aboriginal groups had to develop detailed constitutions detailing such things as elections, financial accountability, other specific powers.
- 6.9.8 The Federal Government has strenuously argued against claims that the establishment of aboriginal governments was a form of apartheid through the creation of race-based “nations within a nation”. This was a claim that was heard by the Committee during its research. Supporters of self-government said the aim of the policy was to encourage unity through diversity.

*“Implementation of self-government should enhance the participation of aboriginal peoples in the Canadian federation, and ensure that aboriginal peoples and their governments do not exist in isolation, separate and apart from the rest of Canadian society.”*⁴³⁸

Supporters of self-government argued that it also affords an opportunity to rationalise and harmonise the operation of federal, provincial and aboriginal laws and services of which there was often considerable overlap and duplication⁴³⁹. It was also evident to the Committee that an additional motive of the Federal Government in encouraging this rationalisation was the Federal Government’s expressed preference to shift financial responsibility for services to aboriginal people to provincial and aboriginal governments.

- 6.9.9 Another argument for self-government heard by the Committee was that it would encourage self-reliance and responsibility in aboriginal communities by restoring decision-making powers and remove past paternalism. Said one government witness in the North West Territories (NWT): *“If we want people to remain dependent then we are doing the right thing by not giving them responsibility.”* Similarly, Mr Ken Coates wrote:

“The symbolism of self-government is highly significant. It signals that aboriginal communities are again running their own affairs, gives them direct managerial responsibility, and reduces community dependence on outsiders. Because individual self-government agreements allow local autonomy, they can substantially reduce the false belief that outsiders know what is best for

437 *Aboriginal Self-Government*, Op Cit, 13.

438 *Ibid*, 4.

439 “Inside the Nisga’a Treaty”, *Vancouver Sun*, 28/7/98, 11.

*First Nation communities, which has governed First Nations for over a century.”*⁴⁴⁰

6.9.10 Self-government was perhaps the most contentious aspect of treaty negotiations encountered by the Committee on its travels. Objections to it ranged from concerns about the degree of duplication of services and the cost of that duplication to the status of non-aboriginal people on aboriginal lands to fears that it would lead to “balkanisation”.

6.9.11 The issue of duplication of services and the cost of delivering self-government was most alive in the North-West Territories (NWT), where a process of restructuring the Territorial Government in preparation for the imminent departure of the eastern-Nunavut portion, was coming up against claims by aboriginal groups in the region for self-government. Aboriginal groups in the region aspire to exclusive aboriginal governments as primary governments holding provincial-type powers and paramount law-making powers. They rejected a municipal model of government. The Federal and Territorial Government aspired to a public model of government representing all citizens in the territory. Government witnesses argued that under the aboriginal model there was potential for duplication of powers, whereas through public government, as was being created in Nunavut, there would be created an effective, efficient and affordable government.

*“All participants in self-government negotiations must recognise that self-government arrangements will have to be affordable and consistent with the overall social and economic policies and priorities of governments, while at the same time taking into account the specific needs of aboriginal peoples.”*⁴⁴¹

6.9.12 The importance of economies of scale, especially among the smaller aboriginal communities in the North, was stressed by witnesses from the Department of Indian and Northern Development.

“You can’t keep creating new levels of government. There need to be economies of scale and there needs to be resources and an economy to support government. It is expensive to start up governments and large numbers of boards. You can’t have 3 schools, 3 school buses and 3 sewer systems.”

6.9.13 The financial constraints of setting up new governments was expanded upon by NWT parliamentarian John Todd MLA. Mr Todd highlighted that the NWT was already heavily subsidised by the Federal Government and royalties of the much-vaunted mining industry were not providing a self-supporting territory. Therefore, there was a danger that the creation of multiple government administrations in the NWT would further divide an already small financial cake. He argued that aboriginal people were

⁴⁴⁰ K Coates, “Degrees of Separation: First Nations Self-Government in British Columbia”, *Prospering Together*, 1998, 249.

⁴⁴¹ *Aboriginal Self-Government*, Op Cit, 14.

- already over-governed and the money which actually reached aboriginal communities was a small portion of what was originally granted. He said governments needed to ensure that the money which was being spent on aboriginal people actually reached the communities.
- 6.9.14 Supporters of the self-government component of the Nisga'a Treaty say the cost of establishing and running self-government would be offset by significant financial responsibilities taken on by a Nisga'a Government, including the phasing out of tax exemption status, and the revenue raising capabilities of the new government⁴⁴².
- 6.9.15 In British Columbia, the most serious concern of non-aboriginal people in relation to self-government was the position of the non-aboriginal people on aboriginal land. Critics of self-government said these people could find themselves having to pay taxes to aboriginal governments and abide by laws made by aboriginal governments but have no representation in those governments. This was a violation of the fundamental principle of "*no taxation without representation*".
- "The Nisga'a can move to any municipality in BC and they are subject to the [municipal] government and they get to vote for it... but only Nisga'a citizens will have the right to vote for the government in the Nass [Valley]."*⁴⁴³
- 6.9.16 Not all aboriginal communities have supported self-government proposals. Some have expressed a fear that self-government will result in Federal and Provincial governments seeking to avoid the fiduciary and treaty obligations.

6.10 Public education and openness

- 6.10.1 A clear message coming from all Canadian witnesses was the need to retain the support of the community in the negotiation of agreements and the outcomes it produces. "*The community must be brought along in the process...*", said one witness. The retention of such support depended on developing an awareness, knowledge and understanding of the issues involved and the need for agreements.

"The negotiation of treaties in British Columbia will be one of the most significant initiatives in the provinces in the 1990s. It is essential to the success of this initiative that the negotiations be conducted in an atmosphere which will contribute to the development of a new relationship between the aboriginal and non-aboriginal people of British Columbia. In large measures the atmosphere will depend on the public awareness and the understanding of the history of British Columbia, and the dissemination of accurate information about the negotiations.

442 "Inside the Nisga'a Treaty", Op Cit.

443 "Landmark treaty raises inequality concerns", *The Globe and Mail*, 15/7/98.

History is important to the First Nations' approach to treaty negotiations...Unfortunately, most people in the province have little knowledge of this history; without it, they will have difficulty understanding the First Nations' perspective and the underlying need for a new relationship.

First Nations have cultures based on beliefs and values that are fundamentally different from those of most Canadians. This results in different patterns of communication. Often what is intended in one culture is misunderstood in the other. Throughout the province, both aboriginal and non-aboriginal groups have undertaken initiatives to increase public awareness and knowledge of aboriginal people, their culture, and their history.”⁴⁴⁴

- 6.10.2 The need to dispel the myth that land claim agreements were not about giving country back to the natives was identified in *Living Treaties: Lasting Agreements*.

“Land claims are not well understood by most Canadians. Some may support them as simply another way of delivering social services to aboriginal communities; others see them as ridiculous attempts to “give the country back to natives”. We suspect that few Canadians are aware of the historical or the constitutional basis for land claims or appreciate the contributions that lasting agreements can make to the development of this country.”⁴⁴⁵

The flipside of this point was that there is a need to ensure that the expectations and beliefs of aboriginal people are not unrealistic.

- 6.10.3 Whether retaining public confidence in the negotiation process required an open and transparent negotiation process in which members of the public were free to attend, as is the case in most negotiations in BC, was not agreed upon by witnesses.
- 6.10.4 Witnesses from the BC DAA said the danger of having negotiations in public was that there was very little room for parties to negotiate and compromise their initial positions: *“It is very difficult to negotiate in traditional terms and change your original offer without having problems with the rest of the community. There is very little room to move but people expect us to bargain.”*
- 6.10.5 However, “Living Treaties: Lasting Agreements” highlighted the dangers of closed negotiations.

“Non-aboriginals in areas where claims are filed and negotiations begin sometimes fear the effects that agreements may have upon their lives and their ability to earn a livelihood. Some of these fears are understandable. Aboriginal groups lay claim to large areas of land or resources that are also

444 *The Report of the BCCTF*, Op Cit, 68.

445 Op Cit, 93.

*important to local non-aboriginal communities. Negotiations proceed behind closed doors, and the information made available to the public often paints a distorted picture of what is under consideration. Individuals, companies, municipal governments, and other local organisations do not feel that they are well represented during the negotiations. Often they fear the worst and mount opposition to the process before agreements are reached. Both the aboriginal and the non-aboriginal communities in their region are there to stay. If an objective of the claims policy is to build lasting relationships between aboriginal and non-aboriginal Canadians, the process should begin now to assist in building understanding between them.*⁴⁴⁶

6.10.6 The danger of holding confidential negotiations were evident following the finalisation of the Nisga'a agreement. Unlike other negotiations in BC, the Nisga'a negotiations were held privately (although the basic format of the agreement was clear from the 1996 Agreement-in-Principle which was the subject of an inquiry by a Select Committee of the BC Parliament). On finalisation of the agreement a great deal of the criticism centred on the fact that it was concluded in privacy. In an article entitled "How About letting the public in on the Nisga'a deal", Mr Gordon Gibson of the national newspaper *The Globe and Mail* wrote:

*"The Nisga'a deal is tainted by exactly the same kind of process defects. The public was not let in on the important debates, and even a sworn-to-secrecy Treaty Negotiations Advisory Committee was frozen out at the end, in a clear betrayal of explicit commitments."*⁴⁴⁷

6.11 Ratification

6.11.1 From the publicity surrounding the Nisga'a agreement it was obvious to the Committee that the matter of how a final agreement should be approved by members of the negotiating parties before it is signed was a vexed issue. On the one hand, it was argued⁴⁴⁸ that the issue of aboriginal people, which entailed providing constitutional protection to a final agreement, was far too important to be decided by a small number of representatives of the government, and the whole country needed to be involved in determining a fair settlement. Further, given that the Nisga'a people were ratifying the agreement by means of referendum, it was said that non-Nisga'a should be able to do so as well. On the other hand, it was argued that the agreement was about rights and not about voter preferences nor was a referendum an appropriate instrument with which to judge a complex and lengthy treaty.

446 Op Cit, 94.

447 21/7/98, A21.

448 Select Standing Committee on Aboriginal Affairs, *Towards Reconciliation; Nisga'a Agreement-in-Principle and British Columbia Treaty Process*, 1997, 51.

“Because a treaty contains so many distinct provisions, an overwhelming No vote may simply mean that each voter takes exception to only one of hundreds of provisions. Even so, it would be read as rejection of the entire agreement.”⁴⁴⁹

- 6.11.2 Leading the charge against the agreement was the BC Liberal Opposition, which called for a provincial referendum on the agreement to gauge community support for the agreement. This call was rejected by the BC Provincial Government, which said public support for the agreement could be gauged through a free vote on the floor of parliament.
- 6.11.3 In general, most witnesses observed that opinion polls consistently showed that there was broad public support for the resolution of common law aboriginal title claims through agreement. However, it was not a high-profile issue and, on the whole, the agreement agenda had been progressed by a political and legal elite. Dr Rick Ponting from the University of Calgary remarked that there was no evidence to suggest that if more Canadian people were drawn into the issue that aboriginal people would make more progress: *“Public support for agreements is as much a way of avoiding any burden of guilt, liability or responsibility”*.

6.12 Other issues

- 6.12.1 Witnesses at the University of Victoria stressed that agreements needed to provide benefits tangible to ordinary aboriginal people in communities as well as benefits like self-government the value of which, while important in the long-term, were not immediately apparent: *“You need to provide for healthy communities. They want to know about money, about having toilets that flush - they need immediate benefits. You can’t eat self-government”*.
- 6.12.2 Many witnesses who had been involved in agreement negotiations made clear the personal toll that those negotiations took on individuals and that the negotiation process was all-consuming and draining of energy and emotion. Mr Jack Ebbels said Nisga’a negotiations were a *“brutal and unbelievable grind”*. Land claim negotiations were also like no other and a number of witnesses made reference to the difficulty in closing deals. Said one witness: *“The problem, was that there was no bad guy. In commerce, you can say ‘Get lost, I am going to deal with your competitor’”*. They also stressed that most important in any land claim negotiation, like any negotiation, was the development of trust amongst parties to the negotiation. Said one witness: *“What is critical is that you ask the other side what they want and be prepared to listen to what they say is critical to them. In any negotiation compromise is critical.”*

449

Kathleen Keating, Acting Chief Commissioner as quoted in press release of BC Treaty Commission, 30/7/98.

7 Committee discussion

7.1 Ms Michele Ivanitz has noted that Canada and Australia have had different post-contact history with their indigenous populations. Canada had a long history of nation-to-nation dealings between Indigenous people and Europeans and this is reflected in the Constitutional entrenchment of Indian rights and treaties.

*“While Canada and Australia are very similar on the surface in fact the two countries operate on constitutional systems, and legislative/policy processes associated with those systems, that are different in many important aspects. Outcomes in terms of comprehensive claims and treaty land entitlements are possible in Canada owing to a long history of treaty-making, constitutional entrenchment, political activism, legislative change, and political will. Australia does not have a history of treaties and native title is not protected in the Australian Constitution.”*⁴⁵⁰

7.2 While Ivanatiz is correct in highlighting the obvious historical and constitutional differences between Australia and Canada the similarities run a lot deeper. These are:

- **a common jurisprudence on common law aboriginal title** - Canadian and Australian courts have long drawn on each others judgments to form and justify their decisions. While the Australian High Court in *Mabo No 2* drew heavily on the Canadian Supreme Court’s *Calder* decision, the BC Court of Appeal returned the compliment by drawing on the *Mabo* judgment in its decision in *Delgamuukw*;
- **ambiguity as to the scope, content and location of aboriginal title;**
- **wide-spread confusion among industry and loss of investor confidence** - this occurs where uncertainty as to the parameters and content of common law native title exists, for example in BC;
- **a federal system of government in which the provincial/state governments; have responsibility for land administration** - this gives rise to the need to reconcile aboriginal title with non-aboriginal title in the land administration system;
- **overlapping aboriginal claims;**
- **a society struggling to come to terms with its past treatment of aboriginal peoples** and, looking for ways to build more equal and fair partnerships;
- **aboriginal poverty and dependency and poor standards in health, education and employment;**
- **aboriginal leadership, communities and social structures are fragile and susceptible to rapid change** as aboriginal people look to re-establish internal community structures, identity and governance; and
- **the need to ensure sufficient community education and awareness of the issues associated with aboriginal people and aboriginal title** - this important

450

M Ivanitz, “The Emperor Has No Clothes: Canadian Comprehensive Claims and Their Relevance to Australia” AITSIS, Native Titles Research Unit, RA paper No 4 August 1997.

in ensuring that aboriginal and non-aboriginal expectations are not allowed to be distorted.

- 7.3 In addition, it appeared to the Committee that the confusion among stakeholders in BC following the Canadian Supreme Court in *Delgamuukw* was almost identical to that experienced in Australia following *Mabo No 2*. There were common questions: what is aboriginal title to land? where does it exist? how does this affect our dealings with aboriginal people? and is this a racially-based kind of title?
- 7.4 Therefore, Australian governments would be remiss in failing to learn from the experiences and lessons of Canada, along with the United States of America and New Zealand. These countries have shown that there are alternatives to litigation and legislation which seek to engage all stakeholders in finding mutually-acceptable solutions. Without doubt, other governments have a head start in negotiating treaties and a paradigm shift in approach to Aboriginal issues is required by Australian governments. However, it is becoming increasingly apparent that they have very little option if they wish to achieve long-term certainty and cost-effective outcomes.
- 7.5 Nevertheless, it was also apparent to the Committee that the approach being taken in Canada will not provide an immediate solution. Along the way, court decisions and political events will put up obstacles to progress. Such appears to be the case with *Delgamuukw*. It was clear that *Delgamuukw* had, far from providing certainty, provoked confusion. Certainly, the *Delgamuukw* decision has had the initial effect of confusing rather than clarifying the landscape. Said one witness at Vancouver law firm Fergusson Gifford: “*We are walking in strange times - time seems to be standing still.*” It led one industry witness to comment: “*I wouldn’t advise you to buy our model - it’s a mess*”.
- 7.6 Similarly, the solution being offered by Canada is not one that will provide immediate dividends and results. The shift from a system of dependency and imposed solutions to one of self-reliance and responsibility is one which is inevitably going to yield errors and pitfalls along the way.
- 7.7 On the down-side, it would appear that the flow-through of benefits from settled land claims has not been uniform in Canada and, as the figures provided at the beginning of this chapter show, aboriginal peoples, including those in areas where treaties have been settled, still lag behind the rest of Canada on most social indicators. The article *The Last Immigrants* by Mr Tom Flanagan provides the example of the Stoney Nation west of Calgary as a case where a reserve which benefits from oil and gas royalties, derived from deposits on the reserve, has not benefitted on-reserve residents. Flanagan estimated that the deposits provide \$13 million annually to the Stoney Nation and around \$300 million in total. Yet this money has not assisted Stoney, Mr Flanagan claimed.

“1997 saw 12 unnatural deaths by suicide, accident, violent crime, or drug overdose. Two-thirds of the residents are said to be on welfare (although,

given the lax administration, some welfare recipients may also hold jobs with the band). A sympathetic doctor in nearby Cochrane, who treats many Stoney in her practice, has tried to set up a food bank to alleviate what she considers serious malnutrition...In 1997, because the band - despite its revenues - had somehow run up a deficit of \$5.6 million in the previous year, the federal government appointed one accounting firm as the financial trustee for the band and hired another to carry out a forensic audit.”⁴⁵¹

Mr Flanagan alleged a pervasiveness of nepotism in reserve communities and argued that aboriginal people needed to be fully integrated into, or as he phrased it - to “immigrate” to, the broader Canadian society.

- 7.8 However, on a more positive note the Committee heard and saw evidence that settled land claims, in the long run, provided an opportunity to develop self-reliance and economic self-sufficiency in terms acceptable to aboriginal people once certainty of title was no longer an issue.
- 7.9 An observation which the Committee has about the Canadian approach to land claim settlements was the resource and labour intensive nature of it. It would appear that negotiations have produced a multi-million dollar industry cutting across legal, government and aboriginal communities. However, when put in context, it would appear that a similar industry is in the process of formation in Australia.

Conclusions and recommendations

43. Although the issues are still being vigorously debated in Canada, the Committee notes that there is much to learn from the Canadian experience, particularly in pursuing resolutions that involve all stakeholders and seek mutually acceptable solutions.

44. Due to the comparable nature of both government structure and indigenous post-settlement history, that an exchange of information and experiences between Canada and Australia be encouraged and enhanced in all areas, most especially in the area of resolving native title issues.

451

T Flanagan, “The Last Immigrants”, 1998, 27.

Chapter 16

CONCLUSION

- 1 The debate surrounding native title, since the High Court's *Mabo* decision in 1993, and more particularly since the *Wik* decision in 1996, has been both bitter and divisive. Legislation has produced tremendous frustration as a perception has developed that it has provided satisfactory outcomes for neither non-Aboriginal nor Aboriginal peoples.
- 2 At the heart of the debate is the issue of how Aboriginal people can take their full place within Australian society. All parties concerned perceive that their property rights are under threat. Aboriginal peoples' experience is that non-Aboriginal people have taken their land from them. Pastoralists appear to believe Aboriginal people want to take their land from them. Miners and developers are frustrated at delays in gaining access to resource and other development opportunities. This is not a new conflict and it finds its origins in white settlement. Over the last 200 years, greatly differing social, religious and cultural backgrounds have driven endeavours to find a place for Aboriginal peoples in the broader Australian society. Successive policies of segregation, assimilation, integration, self-determination and self-management, can all be seen, at least at some level, as expressions of a society still searching for ways to reconcile two vastly different cultures. In the end we must find a way to unite these two cultures.
- 3 Despite the division among parties, there emerged from all witnesses a consensus - that there needed to be a resolution of uncertainty and division surrounding native title which provided a fair and equitable outcome for all concerned parties so that all parties could get on with building a just Australian society. This would be an outcome that would seek to heal the fractures in Australian society, revealed and exacerbated over the last five years. The term "reconciliation" in this context already runs the risk of becoming a trite, jargon word. The term does usefully refer to a "coming together"; it captures what is meant to describe the process of acknowledging our past, the good and the bad, and moving forward together in a way which recognises our common values and history while respecting each others' traditions and beliefs.
- 4 The experience of native title in Western Australia is that it has not provided an opportunity to do these things. Rather, the native title regime has had the following characteristics:
 - focussed on individual grants of land resulting in a piecemeal and patchwork reconciliation of native title and non-indigenous title over small areas of land;
 - costly and time consuming; and
 - inflexible.

This approach to native title has resulted in the burden of negotiations falling on to grantee parties and the native title claimants. Until court decisions directed it to do otherwise, the State chose not to take a lead role in negotiations, despite having the responsibility for land administration across the State. In some cases, negotiations have taken the form of unseemly haggling over what often is no more than a small piece of land.

5 On top of this, court decisions progressively reduced the capacity of the NNTT to screen applications and have afforded claimants a right to negotiate at the date of lodgement and before the claim has passed the registration test. This has caused the following problems:

- multiple overlapping claims with some groups of claims being made by members of the same family. This has caused division and acrimony not only in the wider community but also within Aboriginal communities; and
- delays in the granting of tenements (although the granting of tenements has been complicated by provisions of the Mining Act which require prospecting and exploration licencees to upgrade to a mining lease without regard to whether they have a definite intention to mine on the tenements).

The Committee's inquiry has confirmed that these problems are real and serious.

6 There has also been misunderstanding and confusion as to the nature, content and location of native title. This has been combined with a political debate which has, at times, fuelled the confusion. The Committee's inquiry has confirmed that this confusion has resulted in:

- unrealistic native title claims and demands for payments of compensation; and
- an unwillingness of parties to consider mediated solutions (for example, regimes of co-existence).

7 There is divided opinion whether these problems have caused a drop in potential mining and exploration activities in the State, with both sides of the debate citing anecdotal and statistical evidence to support their claims. However, whichever is true, it is fair to say that the exact impact of native title on these activities may not be fully known for another 5-10 years.

8 The present situation is clearly unacceptable. Nevertheless, whether people like it or not, native title is a legal reality and the political and legal clock cannot be wound back to before 1993. Nor should government attempt to do so. However imperfect, native title represents an attempt to recognise Aboriginal peoples' prior occupation of Australia. Native title is a right recognised in common law. It attempts to recognise Aboriginal peoples' special relationship with land, which provides a foundation for

- Aboriginal peoples' culture, identity and beliefs. A workable solution in these cases must be one that preserves, where possible, this special relationship. On the other hand, another irreversible fact is that in some cases this connection with the land has been broken and cannot be restored. In these cases, the Community has the challenge of finding ways of addressing the social and economic disadvantage which may have occurred.
- 9 At the end of what has been a long and extensive process of hearings and detailed research both within and outside the State, the Committee has come to the unanimous conclusion that the essence of any workable solution to the above challenge is goodwill. Without goodwill on all sides, any proposed solution will inevitably fail and result in a never-ending cycle of litigation and acrimony. The only way forward is through one which has the commitment and goodwill of all parties concerned. Therefore, the Committee is of the opinion, that, without the goodwill, on the part of government, industry, the wider community and native title parties, any new state legislation will not provide the much sought after certainty. Further, in the absence of goodwill, any new legislation which attempts to settle present ambiguity runs the risk of opening up new areas of contention which, almost inevitably, will be exploited in litigation. It also retains the former legislative regime's piecemeal, tenure-specific, time-consuming and resource-intensive characteristics.
- 10 Therefore, the Committee is of the view that the answer does not lie solely in a legislative response. Rather, resolution of native title will, in the long-term, be through flexible and regionally-based arrangements which reflect the needs, interests and relationships of all parties in the region and which can manage the dynamics of change. These arrangements cannot be imposed or pre-determined but must occur after all parties are fully consulted in relation to all aspects of the proposed arrangement.
- 11 An important part of the agreements will be to provide resolution of the legal ambiguity associated with the common law recognition of traditional title to land. Agreements should seek to provide a clear and certain definition of rights and a framework for the exercise of those rights, not only native title rights but rights under State and Commonwealth heritage protection legislation. It should also establish alternative processes to the *NTA* for Future Acts affecting native title and confirm existing rights of property holders. The resolution of ambiguities associated with recognition and exercise of native title rights are key to facilitating economic development through the removal of legal and political ambiguity which has occurred in the last five years. It should release parties' energies to concentrate on more productive endeavours.
- 12 Agreements should accommodate Aboriginal rights and interests within the Australian legal and political system. Agreements should seek to recognise Aboriginal peoples' special connection to land by providing them with a role in decisions and activities impacting on their traditional land and provide them with opportunities to develop

- self-sufficiency. However, agreements must also recognise, given that Western Australia is a resource-rich State, that access to land is important not only for miners and developers, but for the State and also for Aboriginal peoples.
- 13 Agreements should be flexible enough to accommodate changing ideas and needs in a region over a period of years. Like the rest of society, Aboriginal peoples have changing needs and circumstances which require that agreements ensure that changing times do not undermine the agreement and promote new uncertainty.
- 14 The amendments to the 1993 *NTA* seek to accommodate the likelihood of change in the political and legal landscape, such as occurred post-1993, by endeavouring to provide a comprehensive code for present and future dealings with native title. As a result, the Federal legislation is extensive, detailed and complex. It prescribes a number of procedures and regimes for different tenure types and attempts to deal with foreseen and unforeseen circumstances. The State Government seeks to complement this legislation with its own legislation.
- 15 However, 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 *Miriuwong-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 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 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. As noted in Chapter 5, 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.
- 18 In the bush, this may be the pastoralist and the local Aboriginal community sitting down together to work out arrangements for the community to access the pastoral lease and realising that both share a common interest in the pastoral industry which has been forged through their common history. This can develop into arrangements for the community to attend to bores or fences during their passage across a lease or the pastoralist relying on the community for local and experienced pastoral labour.
- 19 In towns and cities, it may be the local council sitting down with the local Aboriginal communities to work out ways of incorporating Aboriginal concerns and views into the town planning scheme and protecting cultural heritage and realising that both have a common interest in protecting the town's natural and cultural heritage. This can develop into joint management arrangements for crown reserves and participation in council decision making. A promising beginning is evident in Broome, where the Rubibi Working Group and the Broome Shire Council have worked out mutually beneficial arrangements.
- 20 On mine sites, the miner may sit down with the local Aboriginal community and come to an understanding that both are committed to providing economic benefits for their own communities. From this understanding can grow a realisation on the part of the miner that they can utilise the community as a source of local labour. On the part of the Aboriginal community can grow a realisation that by facilitating exploration they can facilitate economic activity in their region from which they can benefit. In return, mining companies can obtain secure titles and provide investor confidence.
- 21 These types of mutually-beneficial arrangements are already occurring across Western Australia, although with much less publicity than the problems in the current system attract. It is too easy to focus on the problems without seeing that positive work is also occurring. More particularly, the Committee sees the framework agreements signed with the Spinifex Desert people and the Balanggarra people as important precedents for future agreements. The Committee recommends that the State continue to seek similar consensual solutions with other Aboriginal groups.
- 22 It goes without saying that it will be impossible to ensure universal support in a region for any prototype arrangements. Already there has been a strongly expressed viewpoint to indicate that the new Federal and proposed State legislative frameworks will not satisfy the aspirations of all Aboriginal people.
- 23 The State stands to benefit from agreements through the facilitation of economic development, avoiding the high cost to the taxpayer of litigation and through being

relieved of the financial burden that a state of dependency for Aboriginal people has imposed.

24 Depending on the circumstances of each case, agreements between the State and Aboriginal groups may provide for:

- recognition of traditional title and culturally significant sites;
- areas of freehold title;
- joint management of national parks;
- participation in town planning schemes;
- participation in environmental monitoring regimes;
- alternative Future Act regimes;
- confirmation of non-indigenous title;
- dispute resolution;
- responsibility for delivery of government programmes and services; and
- access to and exercise of “traditional usage rights” such as hunting, camping and ceremonial activities on “Crown land”.

25 For these arrangements to be successful, it is important that they provide benefits to all parties involved thereby ensuring that all parties have an incentive to ensure the long-term success of the arrangement.

26 However, there are unlikely to be quick-fix solutions. The essence of the agreement process is time, and a willingness to give solutions time to work. It is very often slow and painstaking in progress. Changes will not occur immediately and mistakes will inevitably be made. What is important is not that the mistakes occur, but that they are not repeated. Parties should be under no illusion that even if they opt for more co-operative methods of resolving native title matters, there will not be a considerable period of uncertainty during which parties readjust expectations, attitudes and ideas. This fact is evident from criticisms of the NNTT, detailed in Chapter 5. These criticisms included claims that the Tribunal was not producing enough outcomes. This criticism in part stems from the incorrect belief that the Tribunal can make determinations as to the existence of native title. Other criticisms centre on the Tribunal’s inexperience in handling new and novel concepts and procedures.

27 The solution to the above problems does not lie in abandoning entirely the present system and establishing a new system, with all the expense to the State’s taxpayers that that entails. Many of the problems lie not with the NNTT itself but rather with the parties themselves. No amount of coercion can succeed in achieving successful agreement between parties if there is no willingness by parties to compromise. The NNTT is fundamentally a mediation body which relies on the willingness of parties to reach compromises and consensual outcomes and not one which can impose or determine outcomes. The need to shift from a mind set of litigation and winner-takes-all to one of mediation and compromise is not something which is unique to native title. However, when new legal concepts and processes are also being worked out, the paradigm shift is all the more difficult.

- 28 There is no doubt there are problems in pursuing agreements, not least those of intra-indigenous disputes and conflicting claims, but these are broader systemic problems which will dog whatever option is pursued. Unless they can be addressed at a structural level with the co-operation and full commitment and agreement of all parties, they cannot be remedied. The only other alternative is a never-ending cycle of legislation, litigation and division.
- 29 What is required is a reassessment of ways of going about doing business; seeking partnerships rather than victories. This process is already underway in many areas of the State as companies, governments and individuals realise that the alternatives to agreements of litigation and legislation are just not productive. It is evident to the Committee that a pool of goodwill and expertise is developing in relation to finding alternative ways of doing business with Aboriginal communities. This development will only increase in pace as more people begin to see that agreements are possible and fruitful.
- 30 Government can assist this process by taking a proactive stance and leading by example. In many cases, individuals and private companies take their lead from Government in the way they go about dealing with Aboriginal peoples. The Western Australian Government has showed by its *Land (Titles and Traditional Usages) Act 1993* and then by its advocacy of amendments to the *NTA* that it is prepared to be at the forefront of attempts to find a legislated resolution of native title issues. As the Australian State which has been most affected by native title, the Western Australian Government was among the first to draw attention to the perceived problems of the *NTA*. It now has the challenge of again taking a leadership role and directing its energies to finding mutually acceptable solutions.
- 31 As discussed in Chapter 10, a large portion of the State's budget in relation to native title has been devoted to litigation-related matters. However, it is becoming clear that negotiated agreements cost nowhere near the amount of litigated outcomes. As noted, the Government seems aware of the savings that may be made and is actively seeking consensual outcomes. However, they are occurring without a great deal of publicity and have not changed the public perception that native title and the legislation has been unworkable.
- 32 As noted in Chapter 10, the State has an important role in native title matters given its responsibility for land management and the issuing of titles. It is important that the State ensure uniformity in land administration and the issuing of titles. The State Government is also uniquely placed to represent the public interest in negotiations, to lead by example and to provide structure and directions to negotiations - often parties should not be left to their own devices.
- 33 The State Government is also uniquely placed to dispel community confusion and misunderstanding about native title. The successful resolution of mediation has been

impeded by parties' incorrect understanding of native title and the implications of reaching an agreement; for example, that a determination of native title can override validly-granted rights and interests. This point was noted recently in the 1998 Interim Report of the National Native Title Tribunal:

“The national political debate on native title has also influenced the approach to mediation of some stakeholders and consequently the Tribunal’s capacity to elicit support for negotiated settlements. Much of what has passed for debate can more accurately be described as an ill-informed speculation and misinformation - often by people in positions of authority who might be expected to be fully aware of the implications of their actions...The profound lack of community understanding of the nature of common law rights and interests and their relationship to other valid rights and interests has directly impeded the progress of native title mediation practices. The absence of a concerted effort by Commonwealth and State and Territory governments to direct public information and education programs and the need for informed participation in mediation, has required the Tribunal to commit significant resources to community information and mediation practice training.”⁴⁵²

- 34 The Government could make abundantly clear, for example, that the recognition of native title is not about giving away large areas of land or providing handouts but rather is: a) recognising existing legal rights and Aboriginal peoples' traditional connection to land; b) seeking to enhance Aboriginal peoples' participation in society; and c) providing for the State's economic stability. The retention of public confidence in the process and achievement of public awareness of the reasons for and benefits of recognising native title is crucial to successful outcomes.
- 35 While the focus of the agreements should be primarily land-related, agreements should also be used as a vehicle for addressing the social and economic needs of Aboriginal peoples. While endorsing the need for land-based agreements, the Committee is of the view that parties must guard against the belief that simply providing land will solve deeply-entrenched social problems. Recognition of common law title to land will not of itself provide a substantial improvement in the circumstances of Aboriginal peoples' lives. In the Northern Territory and Canada, land ownership has not been a sufficient condition for economic improvement and advancement; the flow-through benefits of land ownership have not been enjoyed by all. Nevertheless, it is fair to say that in most cases land ownership has been a necessary pre-condition where economic self-sufficiency is developing. Therefore, regional agreements must also endeavour to provide Aboriginal people with the means to obtain an economic stake in a region and, above all, an opportunity for self-reliance.
- 36 Government should also encourage industry to accept the challenge of finding ways to incorporate Aboriginal people within their activities and decision-making structures

⁴⁵² National Native Title Tribunal, Submission to the Committee, 3 & 44.

through the provision of financial and political incentives. The unregulated payment of large amounts of cash by industry is not the appropriate manner in which to deal with native title. This often sets unrealistic precedents and serves to appease individuals, rather than benefitting the entire Aboriginal community. It is also inconsistent with the notion, frequently repeated by Aboriginal people, that land is central to Aboriginal culture and traditions.

- 37 Through regional agreements there is also an opportunity to rationalise the current inefficient and often immensely confusing funding systems for Aboriginal communities established by state and federal governments, operated by both levels of government and supplemented by ATSIC and local governments. A number of inquiries have highlighted the confusion, inefficiencies and overlaps which occur in funding arrangements. Said the Royal Commission into Aboriginal Deaths in Custody:

“The multiplicity of funding agencies, the obvious overlap between many programs from one department to another, the apparent competition for programs to be adopted by Aboriginal communities all present a grossly complex and unwieldy environment which is hardly conducive to effective self-determination and self-management. So far as I can see no individual or organisation, anywhere, has asked for this complex, multi-layered, bureaucratic and organisational picture to be the reality of Aboriginal self-determination and self-management. All of these arrangements are the product of non-Aboriginal bureaucratic notions of the organisational needs and program needs of Aboriginal communities. There is a quite tragic waste of time and money involved in the maintenance of such a ludicrously complicated funding superstructure.”⁴⁵³

Similarly, the 1995 Report of the Chief Executive Working Party on Essential Services to Aboriginal Communities (WA) noted that there was:

“On-going policy confusion between the State and Commonwealth Governments over the establishment of new communities and the responsibility for the maintenance of essential service infrastructure. This confusion stems from the practice of ATSIC of funding the provision of infrastructure to small emerging remote communities without consulting State agencies or local governments. These communities then put demands upon the State Government to provide services such as housing, schools and maintenance of infrastructure.”⁴⁵⁴

453 Royal Commission into Aboriginal Deaths in Custody, Volume 4, 1991, 15.

454 Report of the Chief Executive Working Party on Essential Services to Aboriginal Communities, 1995, 8.

- 38 The new legislative environment anticipates the establishment of a State Native Title Commission with responsibility to administer native title claims and register Indigenous Land Use Agreements (ILUAs). Eventually, these will be extensively used by Aboriginal people and supported by government and industry because such agreements will more effectively deliver certainty and comprehensive benefits to all parties.
- 39 The State Government will need to look seriously at the resource implications of what appears to be a new relationship between the State and indigenous people. It calls into question the resourcing of Aboriginal organisations to ensure successful negotiated outcomes. ATSIC is clearly not able to respond because of its already stretched capacity.
- 40 From the Government's side it will need substantial resources to negotiate these agreements. The State has allocated \$300,000 just for the Balangarra Framework Agreement. It would appear that the proposed Native Title Commission will need to be substantially resourced to perform its role of negotiating ILUA's and having them registered.
- 41 Inevitably the Committee has to ask : Are there to be two or three State Aboriginal departments? Is there to be an ongoing role for the Native Title Unit in the Ministry of Premier and Cabinet? What is the continued role of the AAD in this scenario? The AAD and the new structures that relate to the native title process have to be merged so that public resources can be directed at regional negotiated outcomes that involve land and social and economic development. At the moment, funding for Aboriginal peoples is being dispersed through numerous departments, agencies and organisations. There is a need for a re-appraisal and rationalisation of these funding arrangements.
- 42 The consequence of these overlaps and complex funding arrangements have been two-fold:
- some levels of Governments have taken the view that they are absolved of responsibility for service and program delivery to Aboriginal communities⁴⁵⁵; and
 - the establishment of expansive and expensive bureaucracies to manage funding and ensure accountability. This has resulted in a diminished portion of funding actually reaching the intended target of the funding.
- 43 For these reasons, regional agreements which seek to rationalise funding and provide some form of local autonomy to Aboriginal communities to administer funding are strongly encouraged. The aim of this rationalisation should be to foster self-responsibility. The inclusion in agreements of provisions which are firmly grounded in the circumstances of Aboriginal people's daily lives and priorities also provide a

455 Ibid, 14.

- strong incentive for Aboriginal people to enter into such agreements. For most Aboriginal people, title to land will mean little if provided in a vacuum and not accompanied by measures which seek to address the fundamental social, health, educational, and employment problems experienced in many communities.
- 44 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.
- 45 A process which is regional in focus should also assist in:
- achieving regional standards in land administration and environmental management; and
 - Aboriginal groups taking a more regional approach to land matters and would assist in preventing the divisiveness of the splintering of families and communities.
- 46 In relation to the latter, the present micro, grant-by-grant focus of the current native title process has encouraged arguments between Aboriginal people over ownership of particular pieces of land. This is not to say that overlapping and conflicting claims will cease under a regional agreement process. It was evident to the Committee in Canada, that overlapping claims are still a major ongoing problem. However, a regional agreement process which focuses on more macro regional levels will hopefully stem the splintering of Aboriginal groups and encourage regional groupings and provide a regional structure within which competing Aboriginal interests to land can be reconciled. In many areas, there is as much a need to reconcile these competing Aboriginal interests as there is to reconcile Aboriginal and non-Aboriginal interests in land. The regional agreements process is as much about the reconciliation between competing Aboriginal interests, as it is about reconciliation between Aboriginal and non-Aboriginal interests and the rebuilding of self-identity and of internal structures of governance, social order and unity.
- 47 Problems of conflicting claims and internal division within Aboriginal communities will not be resolved through imposed solutions and must occur on the initiative of Aboriginal people themselves. They are rooted in traditional and historical antecedents, as detailed in Chapter 7. However, as noted in that Chapter, the State can encourage this process by setting the resolution of these issues as a precondition to entering into negotiations.
- 48 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 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.
- 50 Any proposed solution which seeks to replace one form of dependency with another will not succeed. It would be costly not only for Aboriginal people in terms of their own self-esteem and communities but also in financial terms for the rest of Australia. Any solution must provide Aboriginal peoples with a stake in Australian society. A stake which provides them with a share of the responsibility for the outcomes, and all that that entails; rewards and failures. Importantly, it must provide an opportunity for Aboriginal people to control their own futures. Until Aboriginal people sense that they have ownership in a solution, they will have no sense of ownership of the rewards and failures which arise from it.
- 51 Past policies and legislative responses, however well intentioned, have not seen Aboriginal people become full partners in Australian society. Rather, on the whole, these policies have created a state of dependency and poverty. This fact is acknowledged by all sides of the political spectrum. Where there is disagreement it is in how we, as a society, address this. We, as a community, must seek to settle these disagreements through consensual solution for the reason simply put by Lamer CJ of the Canadian Supreme Court in the Delgamuukw decision: "...we are all here to stay". In a similar vein, Mr Anthony Watson from Mount Anderson told the Committee:

*"The challenge for all of us as Australians is coming up with a solution as to how do we coexist"*⁴⁵⁶

The Committee whole-heartedly endorses this sentiment - let's work together to find the common ground on which all Australians can live in a united society.

Conclusions and recommendations

45. 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.

⁴⁵⁶

Mr Anthony Watson, Oral Submission, Kimberley, 18/2/98.

46. 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. 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.

48. The State Government examine ways of providing remote and urban aboriginal communities with more autonomy in the delivery of services and programs to their members and better coordination of Federal, State and local funding and services to those communities.

Hon Tom Stephens MLC
Chairman

Hon Barry House MLC

Hon Murray Nixon MLC

Hon Giz Watson MLC

APPENDICES

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Appendix 2: Materials collected by Committee in Canada

- 1 File of articles from Ferguson & Gifford:
 - (a) Thompson, Andrew - "Notes on Aboriginal Title in Canada";
 - (b) Palleson, Martin - Summary of the Supreme Court Decision of *Delgamuukw v British Columbia* [1998] 1 CNLR 14;
 - (c) Lemon, Christopher and Thompson R - "The BHP Environmental Agreement - A Way for the Future";
 - (d) Palleson, Martin - "Aboriginal Rights and Commercial Opportunity";
 - (e) Palleson, Martin - "The Native Investment Trade Association Aboriginal Law in Canada, 1998".
- 2 File provided by Legislative Assembly of North-West Territories.
- 3 Information package of the First Nations Summit including - "Treaty Making - The First Nations Summit Perspective".
- 4 Information package provided by the Federal Negotiation Office in British Columbia:
 - (a) Presentation on Supreme Court of Canada decision in *Delgamuukw*;
 - (b) The Treaty Negotiation Process;
 - (c) British Columbia Treaty Commission Agreement.
- 5 Information package from the Legislative Assembly of British Columbia.
- 6 File of agreements reached in the North-West Territories provided by the Department of Indian and Northern Development.
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- 8 Basic Departmental Data, Indian and Northern Affairs, Canada.
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- 10 *Aboriginal Review 1997*, Syncrude Canada Ltd.
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- 13 *Towards Reconciliation: NISGA'A Agreement-in-Principle and British Columbia Treaty Process* - report by the Select Standing Committee on Aboriginal Affairs in the Province of British Columbia -.
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- 33 The Western Arctic Claim - The Inuvialuit Final Agreement - Indian and Northern Affairs Canada.
- 34 Implementation of the Inuvialuit Final Agreement - Annual Review 1994-95 - Indian and Northern Affairs Canada.
- 35 Gwich'in Comprehensive - Land Claim Agreement Volume 1 - Indian and Northern Affairs Canada.
36. First Nations Comprehensive Claims in British Columbia and Implications for the Forestry Industry.
- 37 Various newspaper articles.
- 38 File of material collected by the Advisory/Research Officer.

Appendix 3: Committee meetings

Wednesday	17 September 1997	from 11.25am to 11.30am
Thursday	16 October 1997	from 9.35am to 10.50am
Wednesday	22 October 1997	from 6.00pm to 6.05pm
Thursday	23 October 1997	from 8.40am to 10.35am
Friday	31 October 1997	from 8.30am to 1.20pm
Thursday	6 November 1997	from 8.00am to 10.05am
Thursday	13 November 1997	from 8.20am to 10.41am
Thursday	20 November 1997	from 1.04pm to 3pm
Thursday	27 November 1997	from 9.00am to 10.31am
Thursday	4 December 1997	from 9.08am to 10.50am
Thursday	10 February 1998	from 10.15am to 10.55am
Thursday	12 March 1998	from 9.07am to 10.55am
Thursday	2 April 1998	from 1.05pm to 1.35pm
Tuesday	7 April 1998	from 10.30pm to 10.45pm
Thursday	9 April 1998	from 8.30am to 10.50am
Thursday	30 April 1998	from 8.44am to 10.30am
Thursday	21 May 1998	from 8.37am to 10.03am
Thursday	11 June 1998	from 8.40am to 10.50am
Thursday	18 June 1998	from 9.00am to 10.00am
Wednesday	5 August 1998	from 1.20pm to 4.02pm
Thursday	20 August 1998	from 9.05am to 10.50am
Thursday	27 August 1998	from 9.40am to 11.45am
Thursday	10 September 1998	from 9.10am to 10.32am
Friday	11 September 1998	from 9.10am to 4.32pm
Thursday	17 September 1998	from 9.05am to 10.45am
Thursday	15 October 1998	from 9.13am to 10.40am
Friday	16 October 1998	from 9.10am to 10.40am
Monday	19 October 1998	from 12.10pm to 3.15pm
Tuesday	20 October 1998	from 6.15pm to 7.25pm
Wednesday	21 October 1998	from 9.35am to 11.00am
Thursday	22 October 1998	from 9.15am to 10.30am
Tuesday	27 October 1998	from 6.10pm to 7.25pm
Wednesday	28 October 1998	from 9.10am to 10.50am
Thursday	29 October 1998	from 9.10am to 10.30am
Friday	30 October 1998	from 12.15pm to 2.35pm
Tuesday	3 November 1998	from 9.05am to 11.25am

Appendix 4:**Select Committee on Native Title Rights in Western Australia****CANADA****9 JULY TO 24 JULY 1998****ITINERARY****SATURDAY 11 JULY 1998 - CAMPBELL RIVER**

09:30: Framework Agreement Signing Ceremony at Campbell River, British Columbia.

SUNDAY 12 JULY 1998 - VANCOUVER

20:00: Mr Patrick Kelly: Consultant for First Nation Liaison

MONDAY 13 JULY 1998

09:00: Peter Lusztig, Acting Chief Commissioner
Dave Kennedy, Executive Director
BC Treaty Commission

11:30: Colin Braker
First Nations Summit Co-ordinator

15:00: Ms Doreen Mullins
Executive Director
Indian and Northern Affairs Canada
Federal Treaty Negotiation Office

TUESDAY 14 JULY 1998

09:00: Mr Jerry Lampert
Business Council of British Columbia

- 11:30: Mr Andre Schuck
Barrister & Solicitor and
- Mr Tom Berger
Barrister & Solicitor
- 15:00: William Ferguson
Ferguson Gifford
Barristers & Solicitors
- 17:00: Ms Susan Anderson Behn
First Nation Legal Consultant
- Mr David Knoll
Barrister & Solicitor

WEDNESDAY 15 JULY 1998

- 09:00: Keith Lowes
Barrister & Solicitor and
- Mr Michael Hunter
Fisheries Council of BC
- 11:30: Ms Fiona Anderson (with Chief Garry Feschuk of Sechelt Indian Band and
Chief Fred Alec of Ts'kw'aylaxw First Nation)
Snarch & Allen
Barristers & Solicitors

THURSDAY 16 JULY 1998 - VICTORIA

- 08:30 -1800: Meetings with Legislative Assembly members
Parliament Buildings

FRIDAY 17 JULY 1998

- 08:45: Ministry of Aboriginal Affairs
- 15:00: Professor Hamar Foster
Faculty of Law - University of Victoria
- 19:00: Mr Jack Woodward
Barrister & Solicitor

SUNDAY 19 JULY 1998 - YELLOWKNIFE

10:00: Meeting with members of Dogrib First Nation (including Grand Chief Joe Rabesca)

MONDAY 20 JULY 1998

10:00: Jim Antoine (and Fred Koe, Deputy Minister)
Minister For Aboriginal Affairs

12:00: Regional Director General
Department of Indian and Northern Affairs

15:00: Legislative Assembly
Parliament House
Yellowknife

TUESDAY 21 JULY 1998

09:00: Graham Nicolls
Manager - External Affairs
Ekati Diamond Mine

10:30: Mr James Rabesca
Mr John Todd
Members of the NWT Legislative Assembly
Parliament House

WEDNESDAY 22 JULY 1998

09:00: Robin Wortman

Mr Bob Loader
Manager
Syncrude Canada

Mr Murray Hurley
Executive Vice-President
Norterra

12:00: Roger Gibbins
Canada West Foundation

Mr Tom Flanagan

Professor Jim Frideres

Professor Rick Ponting

15:00: Barry Robb
Regional Director
Department of Indian and Northern Affairs

THURSDAY 23 JULY 1998

09:00: Mr Cliff Supernault
Assistant Deputy Minister
Aboriginal Self Government Initiatives
Department of Intergovernmental and Aboriginal Affairs

Mr Neil Reddekopp
Research Director
Aboriginal Land Claims
Department of Intergovernmental and Aboriginal Affairs

12:00: Aboriginal Economic Opportunities Committee
Calgary Chamber of Commerce

14:30: Mr Harry Supernault
Metis Settlements Appeal Tribunal

Appendix 5: Criteria to indicate an ongoing traditional connection with land

**NATIVE TITLE:
CRITERIA TO INDICATE AN ONGOING TRADITIONAL CONNECTION WITH LAND**

CRITERIA	SPECIFIC INDICATIONS	EVIDENCE
1. Specific Identification of Claimants	Each individual to be identified and listed and description of how descendants will qualify as claimants OR Group to be identified in a manner which enables determination of whether a particular person is a member (genealogy, customs of membership and descent and rules of social organisation and kinship)	
2. An established cohesive social group with common identity which constitute an organised and identifiable community since sovereignty	Mutual acceptance and recognition of native title holders (within and between groups) Distinction between those with a traditional and historical association and those with rights to use the land and those who are traditional owners Describe social, political and cultural elements which constitute and govern the group Nature of the group described and proven to indicate whether it constitutes an appropriate group Composition and structure of land owning groups	
3. Proof of a continuous connection between inhabitants at sovereignty and people now making claim	Use of genealogy (biological descent) to prove descent and interconnectedness of claimants Claimants must be descended from Aboriginal inhabitants at time of sovereignty	
4. Continuous traditional association with land claimed	Evidence of traditional lands before sovereignty (documented, anthropological or historical details) Evidences of continuing contact with traditional land since that time, including contemporary contact	
5. Common Language	Language spoken by community members Recognition of language as their own	

<p>6. Clearly identify specific rights claimed</p>	<p>Details of specific rights Description of whether rights are exclusive Description of how rights affect or are affected by other forms of land tenure</p>	
<p>7. Evidence of rights claimed (a right may exist but it would have to be exercised to be proven; if it is not exercised, it is still retained as a right)</p>	<p>Anthropological documentation Evidence of continued enjoyment of rights</p>	
<p>8. Existence and continuous exercise and observance of traditional laws and customs (including cultural practices) since immediately prior to sovereignty</p>	<p>Documentation of traditional laws and customs prior to/and sovereignty Recognition, knowledge and practice of these customs by some/all of claimants Clear understanding of how and why changes to laws and customs since sovereignty have occurred Claimants living on traditional land</p>	
<p>9. All aspects of native title, particularly connection with land, should be in accordance with traditional law and customs as they applied at time of sovereignty</p>	<p>Community members able to demonstrate that specific aspects of native title are an exercise of traditional law and customs Practices supporting rights are integral to claimants' distinctive society and culture</p>	
<p>10. Recognition of ownership of land - communal, group or individual</p>	<p>No other claims over land Accepted recognition by wider community Involves use and occupancy Conforms to anthropological description</p>	
<p>11. Existence of sites of significance within traditional land and recognition of their use</p>	<p>Existence, knowledge and use of sites Registered sites (by claimants)</p>	

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Appendix 6: The *Delgamuukw* decisions

Summary of the decisions by the Supreme Courts of British Columbia and Canada

In the British Columbia Supreme Court, 35 Gitksan and 13 Wet'suwet'en hereditary chiefs, both individually and on behalf of their 71 "houses", claimed 133 separate portions of 58,000 square kilometres in the north-west region of British Columbia. The claim was for "ownership" of the territory and "jurisdiction over it". Delgamuukw was one of the chiefs and the name was also the name of the house of which he was chief.

Trial

The case was initially heard by Chief Justice McEachern in the Supreme Court of British Columbia. It began on 11 May 1987, took 318 days of evidence and 56 days of legal argument, and finished on 30 June 1990. Judgment was delivered on 8 March 1991.

McEachern CJ dismissed the claims to ownership and jurisdiction. He found that the Plaintiffs had not established the internal boundaries of the territory, the boundaries separating the lands of the chiefs and their houses. He also stated that the Plaintiffs had failed to satisfy him that individual chiefs or houses had discrete or exclusive Aboriginal rights or interests in the separate areas claimed. Whilst he was satisfied that a claim for an Aboriginal interest is a communal claim, he found that the law could not conveniently recognise discrete claims by small or sub-groups within an Aboriginal community.

He found that to the extent that Aboriginal customs could have been described as laws prior to the creation of the colony of British Columbia in 1858, they ceased from that time to have any force, as laws, within the colony. That is, they were extinguished.

He found that Aboriginal interests were not proprietary, but rather personal and usufructuary and did not amount to "ownership".

McEachern CJ did however find that the Plaintiffs had established certain limited Aboriginal rights - the right to continued residence in their villages and non-exclusive Aboriginal sustenance (but not commercial) rights - within those parts of the territory which were vacant Crown land. These rights were not based on proof of long term occupancy but on a fiduciary obligation of the Crown which he said precluded the Crown from arbitrarily limiting Aboriginal use of vacant Crown land.

First appeal

The decision by McEachern CJ was appealed by the Plaintiffs. Despite achieving a result which was largely favourable to the Province of British Columbia, the BC Government - which had since the time of trial changed from being one led by the right of centre Social Credit Party to one led by the left-of-centre New Democratic Party - replaced its legal team, and made a number of concessions.

The appeal was dismissed by a majority of 3-2. The Court overturned the finding of extinguishment, but refused to disturb the lower court's conclusions as to the existence of ownerships rights, or the content of aboriginal title. The majority found that while the appellants could have certain traditional non-exclusive rights - such as the right to fish and hunt - these did not extend to exclusive occupation or ownership.

Second appeal

On appeal to the Supreme Court of Canada, all 6 justices agreed that the appeal by the Plaintiffs should be allowed and returned the matter to the Supreme Court of British Columbia for a new trial. The main judgment was delivered by Lamer CJ (with whom Cory and Major JJ concurred).

The central reason for allowing the appeal was the Court's view that the trial judge had failed to take account of the evidentiary difficulties inherent in Aboriginal claims, by refusing to give adequate weight to the oral histories of the plaintiffs. Said Lamer CJ:

"In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that their activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law case."

Lamer CJ also determined that the trial judge was wrong to exclude affidavits because they related to a claimed area which was disputed, as this failed to acknowledge that claims to aboriginal rights and aboriginal title were almost always disputed and contested.

The Court declared that aboriginal title is a right to land itself and is more than the right to engage in specific activities, which may themselves be aboriginal rights, and extends to exclusive use and occupation of land. Aboriginal title was part of a broader-based concept of aboriginal rights, which on the one end of the spectrum included specific aboriginal rights and on the other included title. Title derived from the occupation and possession of lands before the assertion of British sovereignty. However, title is not limited to traditional practices and *'encompasses the right to use the land for a variety of purposes, which need not be aspects of those aboriginal practices, cultures and traditions which are integral to distinctive aboriginal cultures'*. Based on this definition of aboriginal title, the Court included mineral rights and their exploitation within the ambit of aboriginal title. The only limitations on title are that it is communally held, inalienable, and *'cannot be used in a manner that is irreconcilable with the nature of the attachment to the land'*. As a result, Lamer CJ rejected the assertion that aboriginal title is equivalent to a fee simple interest in land.

Court members also discussed the matters that needed to be established to make out a claim for aboriginal title. These were:

- (a) the land must have been occupied prior to European sovereignty;
- (b) if present occupation is relied upon as proof of occupation pre-sovereignty, then there must be a continuity between present and pre-sovereignty occupation; and
- (c) at sovereignty, that occupation must have been exclusive.

In relation to these matters, the Court ruled that both common-law **and** the aboriginal perspective regarding the land in question are relevant in determining questions of occupation and exclusivity. Therefore, it is necessary to consider the group's size, manner of life, material resources, technological abilities and the character of the land. Occupation may include use of territories remote from villages or permanently settled areas in pursuit of a traditional mode of life. It is also possible to have joint title arising from shared exclusivity

While it was necessary to show "an unbroken chain" of continuity of occupation, the Court acknowledged that in some cases aboriginal groups may have been moved from the land, either by force or due to natural events. In those cases, there needed to be a "substantial maintenance of the connection".

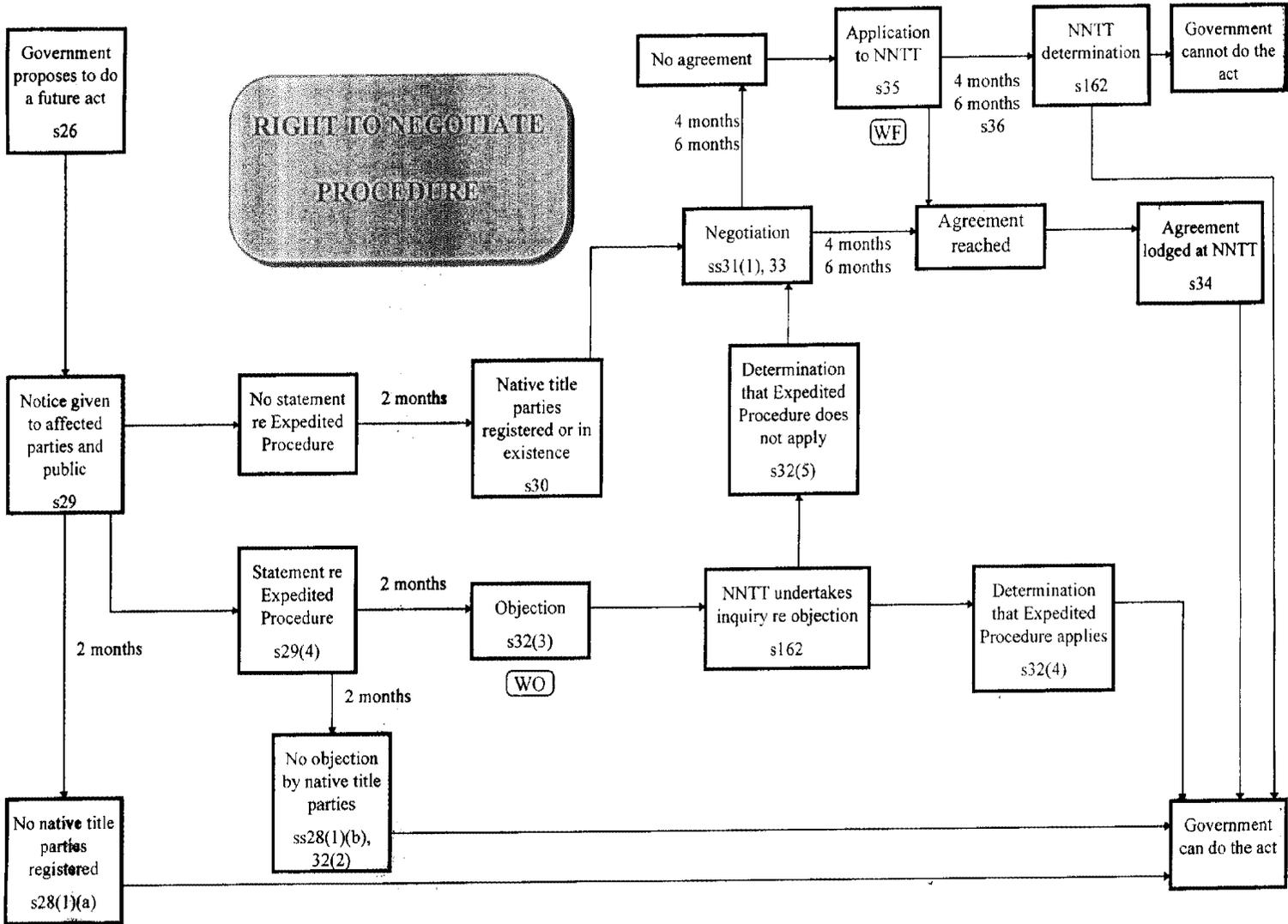
Aboriginal title is protected by s. 35 of the Canadian *Constitution Act*. However, the Court ruled that this protection was not absolute and title could be infringed. However, this infringement must:

- be in furtherance of a compelling and substantial objective;
- consistent with the special fiduciary relationship between the Crown and First Nations;
- be preceded by consultation; and
- be compensated.

In relation to consultation, the Court ruled that the degree of consultation depended on the nature of the infringement. The greater the infringement the more extensive consultation would have to be. Some cases could even require the full consent of an aboriginal nation. Negotiations would have to be in good faith. The requirement of consultation arose from the fiduciary relationship between the Crown and aboriginal peoples.

"[T]he fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified... The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title.... the minimum acceptable standard is consultation [which] must be in good faith, and with the intention of

substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.”



Appendix 8: A brief history of Aboriginal Affairs in Western Australia

The following chronology lists the major historical events, government legislative, administrative and policy changes affecting Aboriginal people in Western Australia since colonisation. The list refers primarily to State Government matters except when major Commonwealth initiatives have impacted on Aboriginal affairs administration in Western Australia.

- 1829** Colonisation of Western Australia by the British. Governor Stirling establishes the Swan River Colony. The welfare of Aborigines comes under the direct responsibility of the Colonial Secretary.
- 1830** Aboriginal Protectors appointed.
- 1832** A Superintendent of Tribes was appointed to assist the Colonial Secretary. The first Superintendent was Captain Ellis who died in 1834 from injuries received during his involvement in the massacre of Aboriginal people at Pinjarra.
- 1838** Rottnest Island Aboriginal prison established.
- 1840** Colonial Government issues direction that Aboriginal people should not be admitted to towns.
- 1854** Role of Protectors temporarily abolished.
- 1883** Royal Commission established to inquire into the treatment of Aboriginal prisoners - the *Forrest Report*.
- 1886** Aborigines Protection Board established under the *Aborigines Protection Act*. The Board was constituted to provide Aborigines with food and clothing when destitute, provide for the education of Aboriginal children and assist in the preservation and well-being of Aborigines. The Board reported directly to the Colonial Secretary. The new Act enabled regulation and control over the entire Aboriginal population in WA.
- 1889** Section 70 introduced into the Constitution providing for 1% of gross revenue to be “appropriated to the welfare of the Aboriginal natives”.
- 1890** Western Australia attains self-government. British government continues to maintain control over Aboriginal affairs.
- 1898** Abolition of the Aborigines Protection Board and establishment of the Aborigines Department under a Chief Protector of Aborigines who was responsible to the Premier.

- 1903** Rottneest Island Aboriginal prison officially closed.
- 1904** Royal Commission into Aboriginal matters headed by Dr W E Roth, inquired into the administration of the Aborigines Department, the employment of Aborigines, the Aboriginal police system (Police Protectors), the treatment of Aboriginal prisoners and the distribution of relief. The report found many abuses of Aborigines and their rights and recommended the protection of Aborigines by strict controls.
- 1905** *Aborigines Act (1905)* enacted. This gave the Chief Protector the statutory power to institute measures for the relief, protection and control of Aborigines as recommended by the Royal Commission. The Act legalised the removal of Aboriginal children from their natural families; encouraged establishment of reserves and missions, and introduced many restrictive measures.
- 1908** Royal Commission to inquire into the treatment of Natives by the Canning Exploration Party. Commission headed by C.F. Gale.
- 1909** Aborigines Department's name changed to Aborigines and Fisheries.
- 1915** Appointment of Mr Auber Octavius Neville as Chief Protector of Aborigines. Neville was in charge of the various departments responsible for Aboriginal Affairs until his retirement in 1940.
- Carrolup Native Settlement opened.
- 1918** Moore River Native Settlement opened.
- 1920** The Department for the North West was responsible for Aborigines living above the 25th parallel and the Department of Aborigines and Fisheries for those below the 25th parallel.
- 1926** The Aborigines Department was re-established and became responsible for Aboriginal matters throughout the State.
- 1927** The Royal Commission into the Killings and Burning of Bodies of Aborigines in East Kimberley, conducted by Mr G T Wood, resulted from public outcry over the 1926 Forrest River Massacre.
- 1934** Royal Commission into Aboriginal Affairs under Mr M D Mosely SM established. The Commission inquired into the social and economic conditions of Aborigines; the law relating to Aborigines; the administration of the Aborigines Department; and the specific allegations of ill-treatment of Aborigines.
- 1936** As a result of the recommendations of the Royal Commission, the Aborigines Act was amended and became the *Native Administration Act (1936)*. The Aborigines

Department became the Department of Native Affairs headed by a Commissioner for Native Affairs.

The amendment incorporated the recommendations of the Royal Commission which resulted in greater control of the Aboriginal population, including the imposition of penalties for actions which were not an offence for non-Aborigines; the placement of children of Aborigines under the guardianship of the Commissioner; and the imposition of a permit system for entry into certain towns and for employment.

- 1941** Commonwealth Child Endowment payment extended to children of ‘detrified’ parents.
- 1943** Commonwealth invalid and old age pensions and maternity allowance extended to Aboriginal people holding ‘Exemption Certificates’.
- 1944** *Natives (Citizenship Rights) Act* gave limited rights to Aboriginal people who could prove, among other things that they have adopted a “civilised life” and did not associate with Aboriginal people who did not have citizenship rights. Such ‘citizenship’, however, could be withdrawn at any time.

Commonwealth Unemployment and Sickness Benefits extended to “detrified natives” living in European conditions.

- 1946** First Aboriginal pastoral workers strike in the Pilbara.
- 1947** Mr F Bateman SM was appointed to survey Aboriginal conditions in Western Australia. The Bateman report showed the deplorable conditions in which the Aboriginal population was living and advocated the abandonment of past protective measures in favour of a long term policy of positive welfare and supported the assimilation of Aboriginal people into the general community.

The report resulted in the decentralisation of the Aborigines Department, and the appointment of field officers to deal directly with Aborigines and concomitantly to reduce the Department’s dependence on Police Protectors.

- 1954** Native Administration Act replaced by the *Native Welfare Act*, which attempted to overcome the previous policy of strict controls and handouts. Many of the restrictions imposed by the previous Act were repealed. The Department’s name changed to the Department of Native Welfare.
- 1962** Aboriginal people became eligible to vote. Voting not compulsory.
- 1963** Slow but progressive liberalisation of the regulations affecting Aborigines culminated in the amendment of the Native Welfare Act in which the last restrictive provisions were removed. Some places in the North West, however, were still entitled to restrict

the Governments of Aborigines and refuse to supply liquor. (These clauses were repealed in 1972).

- 1967** Commonwealth Referendum. Aboriginal people first granted citizenship rights. Commonwealth Government given the power to legislate in relation to Aboriginal matters.
- 1968** Federal Pastoral Industry Award amendment sanctioned, theoretically allowing for equal wages for equal work.

Australian Aboriginal Affairs Council (AAAC), comprising Commonwealth, State and Territory Ministers with responsibility for Aboriginal Affairs, formed.

- 1972** Repeal of the Native Welfare Act and the enactment of the *Aboriginal Affairs Planning Authority (AAPA) Act*. The Department of Native Welfare was abolished and replaced by the Aboriginal Affairs Planning Authority, with some of its functions taken over by the newly created Department of Community Welfare. Rather than having a single department with over-riding responsibilities, housing, health, education, employment and welfare programs were channelled to departments such as the State Housing Commission and the Public Health Department.

The Authority was established to retain the policy planning, co-ordination, Ministerial advice and land management roles of the defunct Native Welfare Department. In addition, it provided administrative support to three statutory bodies: The Aboriginal Lands Trust, the Aboriginal Advisory Council and the Aboriginal Affairs Co-ordinating Committee. For the first time a Statutory mechanism was in place for Aboriginal people to be involved in the government decision making process.

The *Aboriginal Heritage Act* was also enacted giving the WA Museum, through the Department of Aboriginal Sites, the responsibility to protect places and objects of significance to Aboriginal people.

- 1973** A Royal Commission headed by Mr L C Furnell QC enquired into all matters affecting the well-being of Aboriginal people in Western Australia. Because the AAPA Act and the Authority had only been in existence for 12 months, the report did not consider that any major changes were justified. The report recommended that the most desirable policy towards Aborigines would be to preserve as much as possible tribal Aboriginal identity along with assisting the integration of non-tribal Aborigines.

The report affirmed the existing policy of consultation and Aboriginal involvement in decision making and that Aboriginal communities should be self managing and able to choose their own manner of living.

National Aboriginal Consultative Committee (NACC) established.

- 1974** The Federal Labor Government announced its intention of taking on greater responsibility in Aboriginal affairs throughout Australia.

As a consequence, following discussions with the Western Australian Government, the AAPA Act was amended and a merger took place between the Authority and the Federal Department of Aboriginal Affairs (DAA). The Commonwealth became responsible for the administration of the AAPA Act.

- 1976** Laverton Royal Commission inquired into the ‘Skull Creek Incident’ between Aboriginal people and police. The Commission concluded that no-one involved acted improperly despite allegations of assault made by Aboriginal people and “unsatisfactory evidence” from police.

- 1977** National Aboriginal Conference (NAC) established as a result of a restructure of the NACC. This established the first Aboriginal elected body with direct access to government.

- 1979** *Aboriginal Communities Act* was proclaimed, allowing certain Aboriginal communities to manage and control community affairs.

- 1980** The Noonkanbah dispute highlighted the administrative difficulties of the State/Commonwealth merger since officers were required to implement the policies of both the State and Commonwealth Governments which at times differed.

In addition, an expectation was developing within the Commonwealth that the States should resume more responsibility in Aboriginal affairs.

The Aboriginal Heritage Act was amended in 1980 in response to uncertainty and disputes (particularly at Noonkanbah) which had occurred in recent years over Aboriginal sites. The amendments tightened the definition of an Aboriginal site, removed a penalty provision and gave the responsible Minister the power to give approval to disturb an Aboriginal site.

- 1983** Newly elected State Labour Government instituted the Aboriginal Land Inquiry, headed by Mr Paul Seaman, QC. The inquiry was established to make recommendations to the Government “for a scheme of legislation for land related measures for the benefit of Aboriginal people” in Western Australia.

- 1984** In July 1984 the formal arrangements by which the Commonwealth Government had responsibility for administering the AAPA Act were repealed. The AAPA became independent of the Commonwealth Department of Aboriginal Affairs. The AAPA also became responsible for administering the *Aboriginal Communities Act*, 1979.

The *Report of the Aboriginal Land Inquiry* was submitted to the Government in September, 1984.

- 1985** The *Aboriginal Land Bill* was presented to State Parliament and defeated in the Legislative Council.

National Aboriginal Conference disbanded.

- 1986** For the first time since 1972 a separate Aboriginal Affairs portfolio was created in Western Australia. The Hon Ernie Bridge, MLA became the first Aboriginal member of Parliament to be appointed to Cabinet when he became Minister for Aboriginal Affairs.

In December 1986 Ms Sue Lundberg was appointed Commissioner for Aboriginal Planning, thereby becoming the first Aboriginal person to head a State Department in Western Australia.

Following the failure of the Aboriginal Land Bill and the Commonwealth Government's decision not to introduce uniform land rights legislation, the State and Commonwealth Governments entered into an agreement in support of land initiatives within the terms of existing legislation. \$100m was allocated over 5 years (\$10m per year per government) for the Aboriginal Communities Development Program (ACDP).

- 1987** On 16 October the Royal Commission into Aboriginal Deaths in Custody was established jointly by the Commonwealth, State and Territory Governments. The Commission investigated the deaths of 99 Aboriginal and Torres Strait Islander people in the custody of police, in prison or in juvenile detention institutions between 1 January 1980 and 31 May 1989.

In November 1987, the State Ministers for Aboriginal Affairs, Police and Corrective services established an Interim Inquiry into Aboriginal Deaths in Custody in Western Australia. The inquiry was chaired by Mr Phillip Vincent and was required to present an interim report by January 1988.

Commonwealth Government launched the Aboriginal Employment Development Policy to assist Aboriginal people to achieve equity with other Australians in terms of employment and economic status. The policy was established as a result of the Miller Report (*Review of Aboriginal Employment and Training Programs*) and aimed to promote Aboriginal economic independence from Government and to reduce Aboriginal dependency on welfare in accordance with their traditions, chosen way of life and cultural identity.

In December, the Ministers for Aboriginal Affairs and Health co-chaired the first national meeting of a joint Ministerial Forum on Aboriginal Health. This forum agreed to establish a working party to develop a National Aboriginal Health Strategy.

- 1988** On 21 January 1988, 32 recommendations from the WA Interim Inquiry or 'Vincent Report' were submitted to Government. This report led to the introduction of the Aboriginal Visitors Scheme.

The Royal Commission into Aboriginal deaths in Custody produced an interim report, also known as the ‘Muirhead Report’.

On 1 March 1988, the Aboriginal Lands Trust, a statutory body under the Aboriginal Affairs Planning Authority Act, became a sub-department of the AAPA.

The Bill to establish the Aboriginal and Torres Strait Islander Commission (ATSIC) was introduced into Federal Parliament.

- 1989** Royal Commission appoints Patrick Dodson as Commissioner for Western Australia to consider “underlying issues” for Aboriginal deaths in custody.

The National Aboriginal Health Strategy was finalised in March 1989.

In May 1989, State Cabinet approved the establishment of a Cabinet Sub-Committee on Aboriginal affairs.

The Aboriginal Lands Trust was reabsorbed into the AAPA.

Mr Cedric Wyatt appointed Commissioner for Aboriginal Planning.

- 1990** The Aboriginal and Torres Strait Islander Commissioner commenced official operation on 6 March 1990.

Aboriginal Visitors Scheme established on a permanent basis.

Inquiry into Service and Resource Provision to Remote Communities conducted by Mr Peter Alexander examined the delivery of services in remote areas.

- 1991** Final ‘Alexander Report’ presented to State Government. The report highlighted the need to improve communication systems for remote communities and made a number of recommendations aimed at improving planning and co-ordination for better safety in remote and emergency situations.

On 9 May 1991, the final *Report of The Royal Commission into Aboriginal Deaths in Custody* was tabled in State and Federal Parliaments. The Royal Commission made 339 recommendations aimed largely at addressing the disadvantaged position of Aboriginal people in society which the Commission found to be the most significant factor contributing to the over-representation of Aboriginal people in the criminal justice system and the principle reason for the large number of Aboriginal deaths in custody. The Royal Commission stressed the need to empower Aboriginal society and Aboriginal people’s right to self-determination. A special Royal Commission Cabinet Sub-Committee was announced by the State Government.

The Statutory Aboriginal Advisory Council was restructured to establish formal links with the Aboriginal and Torres Strait Islander Commission and to represent a wide range of Aboriginal special interest groups.

In August 1991, both houses of Federal Parliament unanimously passed the *Council for Aboriginal Reconciliation Act* establishing a Council of 25 members.

The State Tripartite Forum on Aboriginal Health was formed to bring together the Key agencies and health providers in government and community health care.

1992 On 31 March 1992, Commonwealth and State Governments tabled a cooperative *National Response* and individual State responses to the recommendations of the Royal Commission into Aboriginal Deaths in Custody. The State Government indicated its full, qualified or in principle support to all 339 recommendations.

The Aboriginal Advisory Council established a special Royal Commission Reference Group chaired by ex-Royal Commissioner Mr Pat Dodson.

An Aboriginal Women's Task force was formed as a reference group to the Aboriginal Advisory Council to provide advice to the Authority and to the Minister on matters affecting Aboriginal women and families.

The Commissioner for Aboriginal Planning was appointed Chairperson of the State Tripartite Forum. A State Aboriginal Health Strategic Plan was developed.

The Commissioner for Aboriginal Planning appointed Chairperson of an Aboriginal Education Strategic Planning Group. The Group was formed under the auspices of the National Aboriginal Education Policy.

State Government gave approval for the reorganisation and regionalisation of the Department of Aboriginal Sites in line with the recommendations of a Public Service review of the Department.

On 3 June 1992 the High Court handed down its decision in the *Mabo v. Queensland* case. The decision rejected the doctrine that Australia was 'terra nullius' (land belonging to no-one) at the time of settlement with its implication that absolute ownership of land at that time vested in the Crown. Instead, the Court held that the common law of Australia recognises a form of traditional native title.

In December 1992, the State Government tabled a progress report on the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

Also in December 1992, the Council of Australian Governments endorsed a *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders*. The major purpose of the National

Commitment was to provide a framework for co-ordinated intergovernmental action to redress Aboriginal inequality and disadvantage, confirm the national commitment established common objectives and that the planning and provision of government programs and services is a shared responsibility across all levels of government. Bilateral agreements are to be entered into between governments for the delivery of specific programs and services. The development of agreements in the areas of housing and health commenced in 1993.

1993 In April the *Aboriginal Plan 1993* was published by the AAPA and released by the Coalition Government under Premier Richard Court and Minister for Aboriginal Affairs the Hon Kevin Minson. This was the first time that a plan had been produced which provides a clear statement of State Government programs in Aboriginal affairs, listed the departments responsible for them, and the financial resources provided for their implementation.

ATSIC legislation was amended in June and provided for a reduction in the number of Regional Councils from 60 to 36 and for Council chairpersons to be appointed on a full-time basis. Regional Council boundaries were altered at the same time and there are now nine Regional Councils operating in Western Australia.

The Social Justice Task Force (SJTF) was established in August to review activities of Government in relation to social conditions and the advancement of Aboriginal people. The AAPA provided information resources, support and assistance in co-ordinating consultation with Aboriginal communities across the State.

The *Land (Titles and Traditional Usage) Act* came into force on 2 December. The Act replace native title with rights of traditional usage of Crown land and provided for a system of objection, appeal and/or compensation if those traditional usage rights were extinguished or interfered with through the granting of other forms of title to land.

In December the *Implementation report of the Royal Commission into Aboriginal Deaths in Custody* was tabled in State Parliament. Western Australia is the only government to date that has tabled a formal and detailed progress report on the implementation of the Royal Commission's recommendations.

1994 In April the *Report of the Task Force on Aboriginal Social Justice* was presented to the Government. The Task Force report made 296 recommendations. The major issues considered and recommendations developed by the Task Force can be categorised into three themes:

- better management;
- better lives; and
- better community support.

On 1 November the Aboriginal Affairs Department was created in response to the recommendations of the Premiers' Task Force on Aboriginal Social Justice. It

incorporates the roles of the former Aboriginal Affairs Planning Authority, the Department of Aboriginal Sites and Office of Traditional Land Use. The Department's role in planning, coordination, target setting and monitoring outcomes in Aboriginal affairs across Government was strengthened.

Mr Cedric Wyatt was appointed the first Chief Executive Officer of the Aboriginal Affairs Department.

In November State Cabinet confirmed the transition from interim status to full recognition of the role and functions of the Aboriginal Justice Council.

In December three reports were released on the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody *Government of Western Australia Implementation Report 1994 vol 1; Aboriginal Contact with the Criminal Justice in Western Australia vol 2; and Getting Strong on Justice.*

1995 On March 16, the High Court of Australia handed down its decision on Native Title. As a result of this decision the provisions of the *WA Land (Titles and Traditional Usage) Act* and sections of the *Mining and Land Acts* relating to the rights of traditional usage became inoperative. Land and mining titles over most of WA are now processed through the Federal Tribunal system.

In June the WA Government's Chief Executive Working Party on Essential Services to Aboriginal Communities under the Chairmanship of Dr Kim Hames MLA published its report. The recommendations in the report have been used as a basis for a review of services and proposals for new legislation.

At the end of June, the Human Rights and Equal Opportunity Commission (HREOC) launched its Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families.

The Aboriginal Affairs Department's seven regional offices were opened in July.

The Commission of Elders was established with representatives drawn from each of the seven regions. The AAD gives secretariat support and assistance to the Elders.

The process of setting up regional Aboriginal Justice Councils commenced. The first ones were established in the Pilbara, the Metropolitan region, the Goldfields and the Murchison/Gascoyne.

1996 In March the State presented its submission to the HREOC Inquiry. The AAD was responsible for preparing responses to the Terms of Reference A and B which included a history of Aboriginal Affairs Administration in WA.

In April the Aboriginal Lands Trust Review Team which was chaired by Mr Neville Bonner released its report *Review of the Aboriginal Lands Trust*.

To improve coordination and planning of essential services to discrete Aboriginal communities, the AAD was closely involved in a joint project with ATSIC to ensure remote Aboriginal communities develop town plans.

To foster better across-government planning and coordination in remote Aboriginal communities, demonstration projects totalling \$3 million were launched in Ombulgurri in the East Kimberley and Jigalong in the Pilbara.

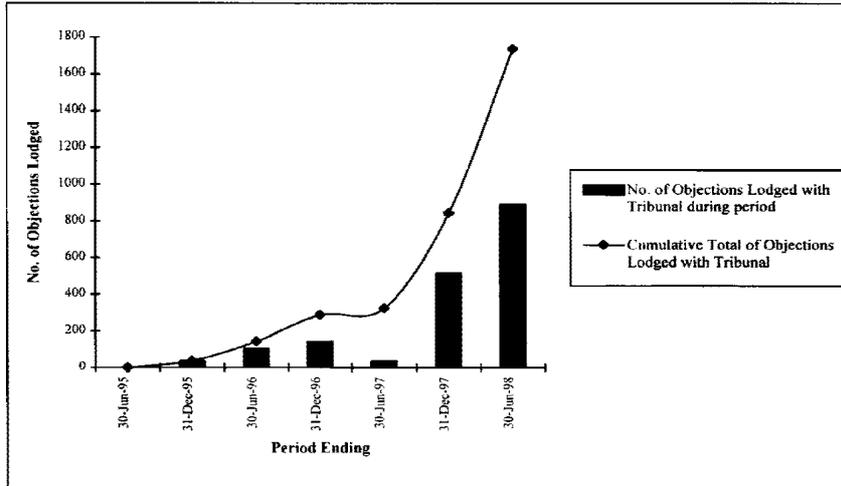
1997 The Legislative Review Reference Group report *Provision of services to Aboriginal people in Western Australia an action plan and proposed legislation* was released in January 1997.

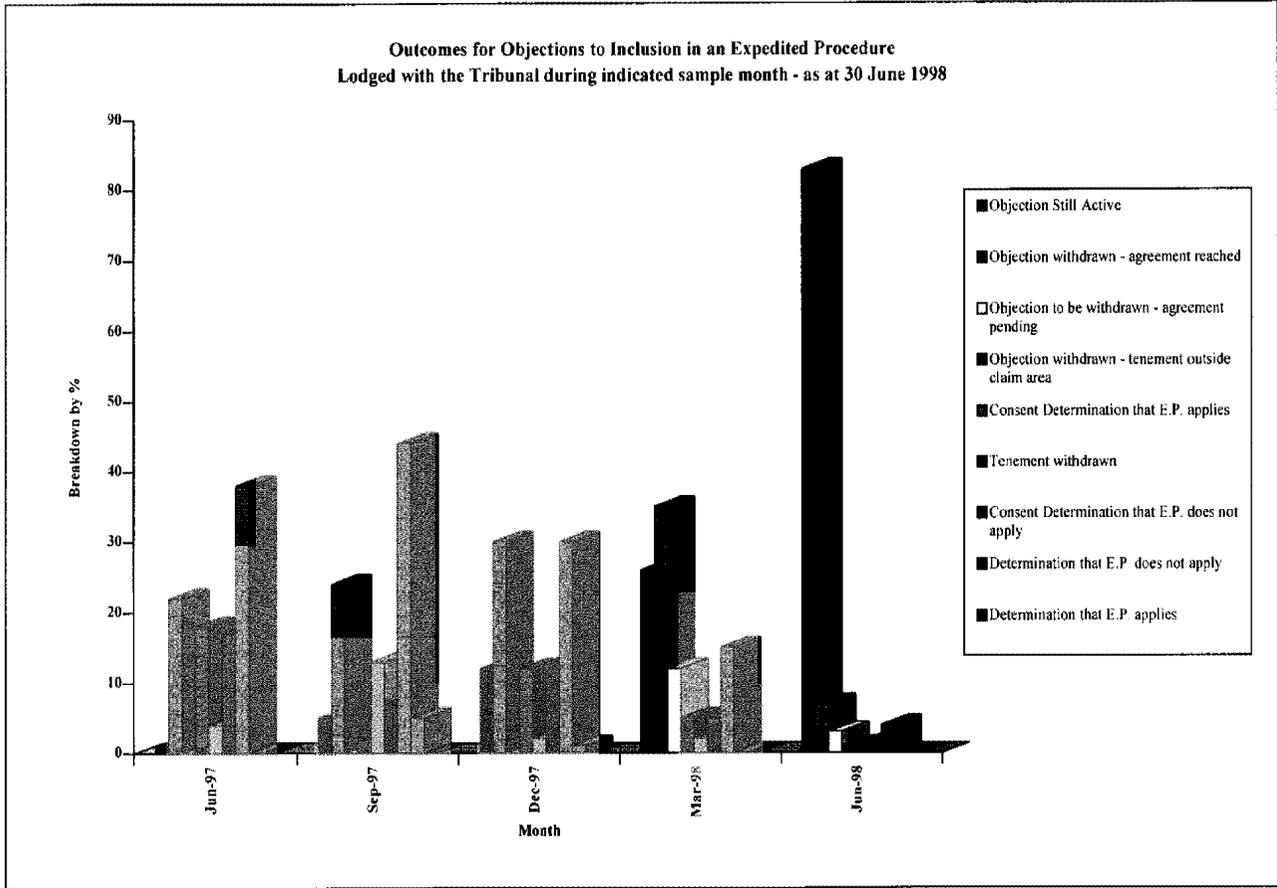
In May the HREOC Inquiry brought down its findings in its report *Bringing them home: a guide to the findings and recommendations of the National Inquiry into the separation of Aboriginal and Torres Strait Islander children from their families*.

In July the AAD completed a restructure to reflect more closely its functions and responsibilities.

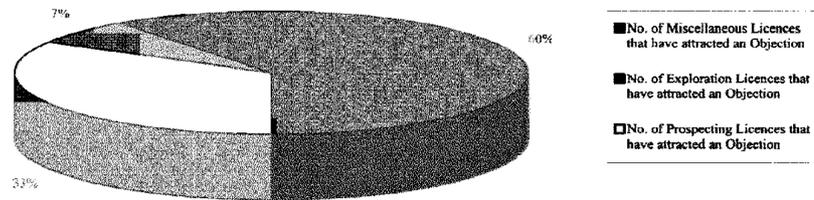
Appendix 9: Data from the National Native Title Tribunal

Rate of Lodgement of Objections to Expedited Procedure Applications Since Commencement of Future Act Process in Western Australia - As at 30 June 1998

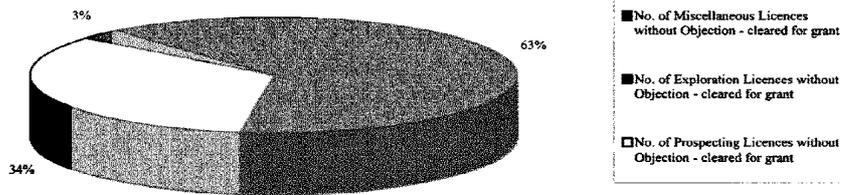




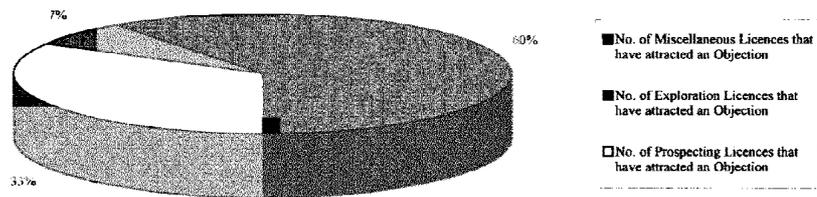
Percentage Breakdown of Miscellaneous, Exploration & Prospecting Licences that have been Notified Post Wik under Section 29 of the Native Title Act 1993



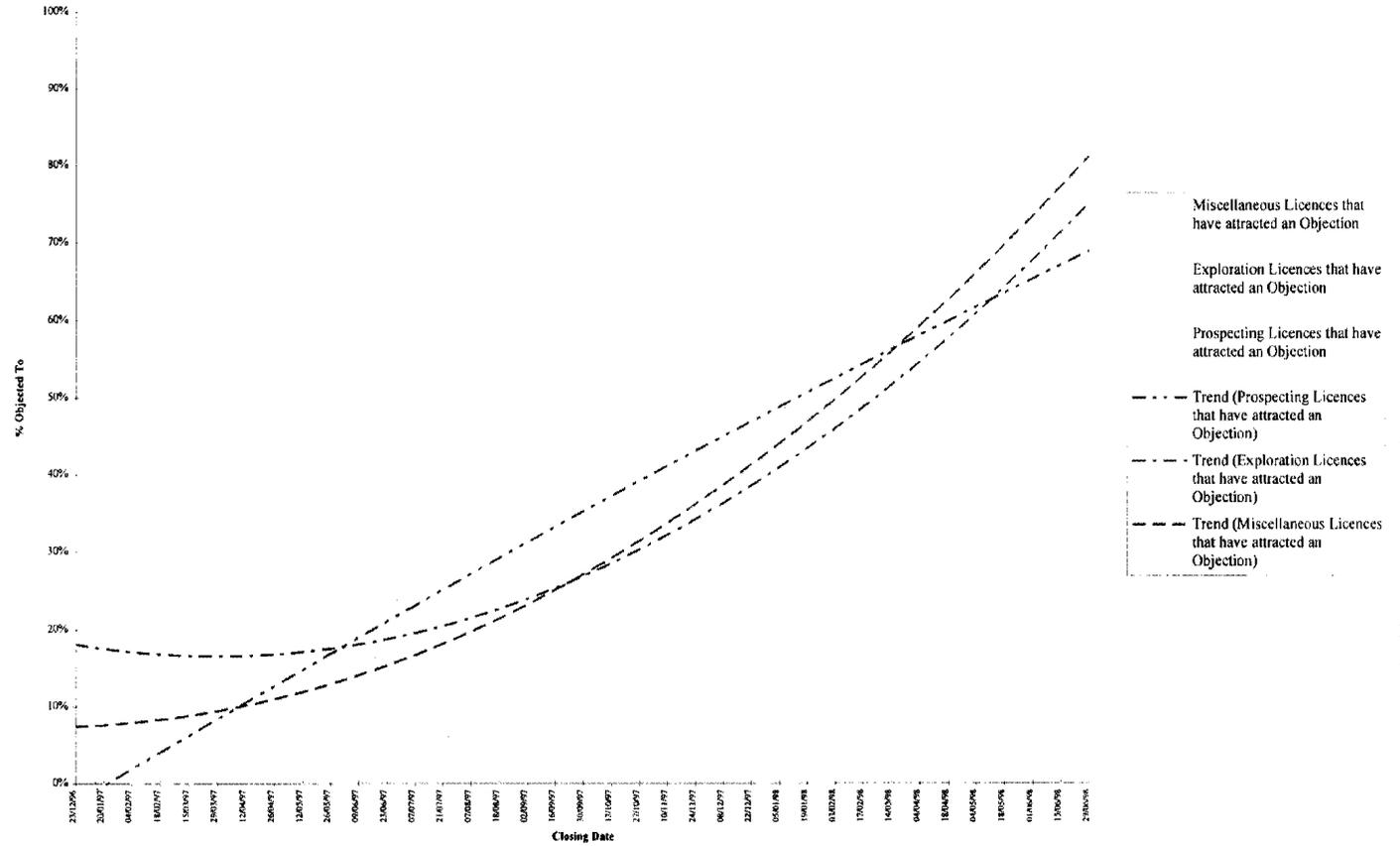
Percentage Breakdown of Miscellaneous, Exploration & Prospecting Licences Lodged Post Wik that have been Cleared for Grant at the end of the Notification Period without an Objection Application being Lodged



Percentage Breakdown of Miscellaneous, Exploration & Prospecting Licences Lodged Post Wik that Received an Objection to an Expedited Procedure Application



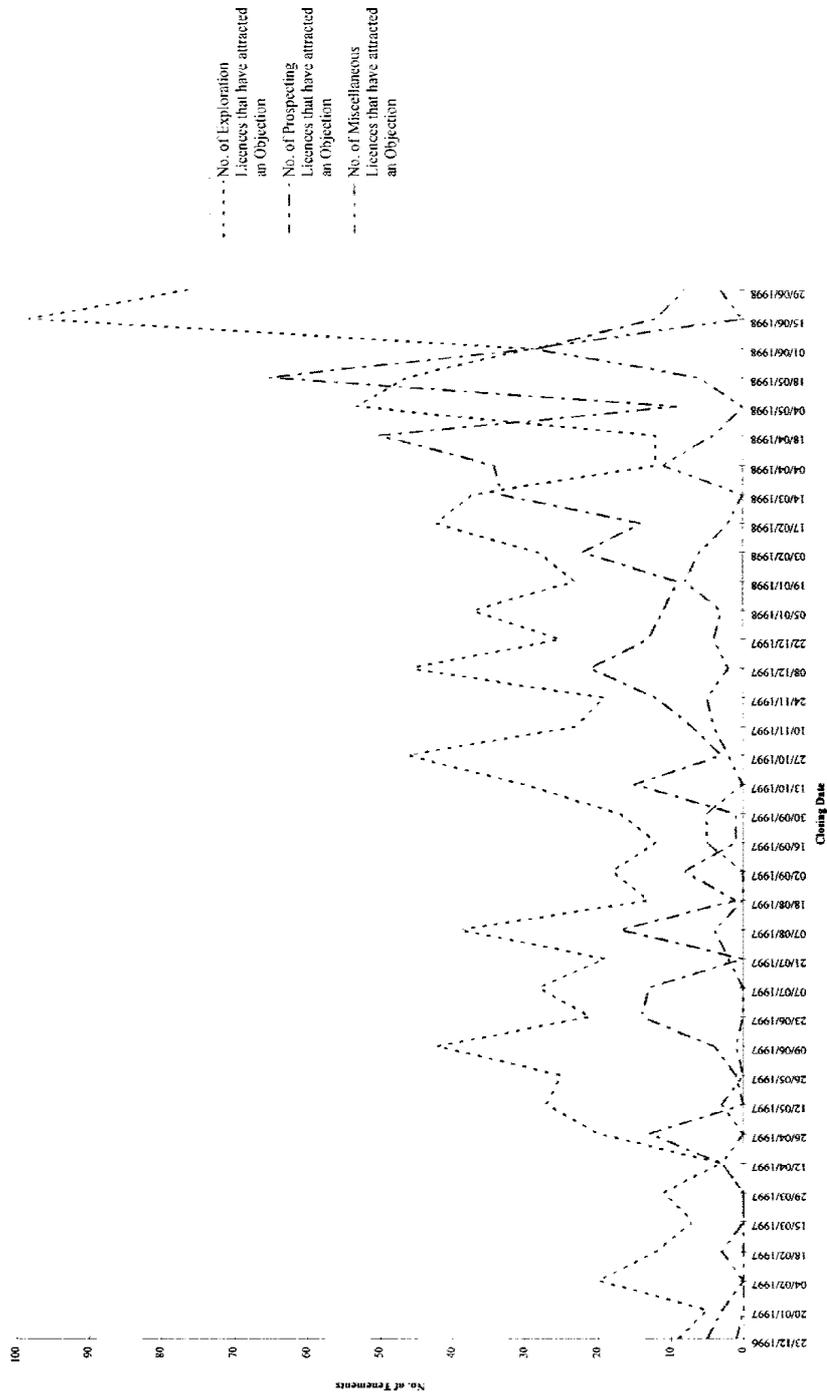
Percentage Breakdown by Closing Date of Miscellaneous, Exploration and Prospecting Licences Lodged post Wik that have Attracted an Objection to Inclusion in an Expedited Procedure

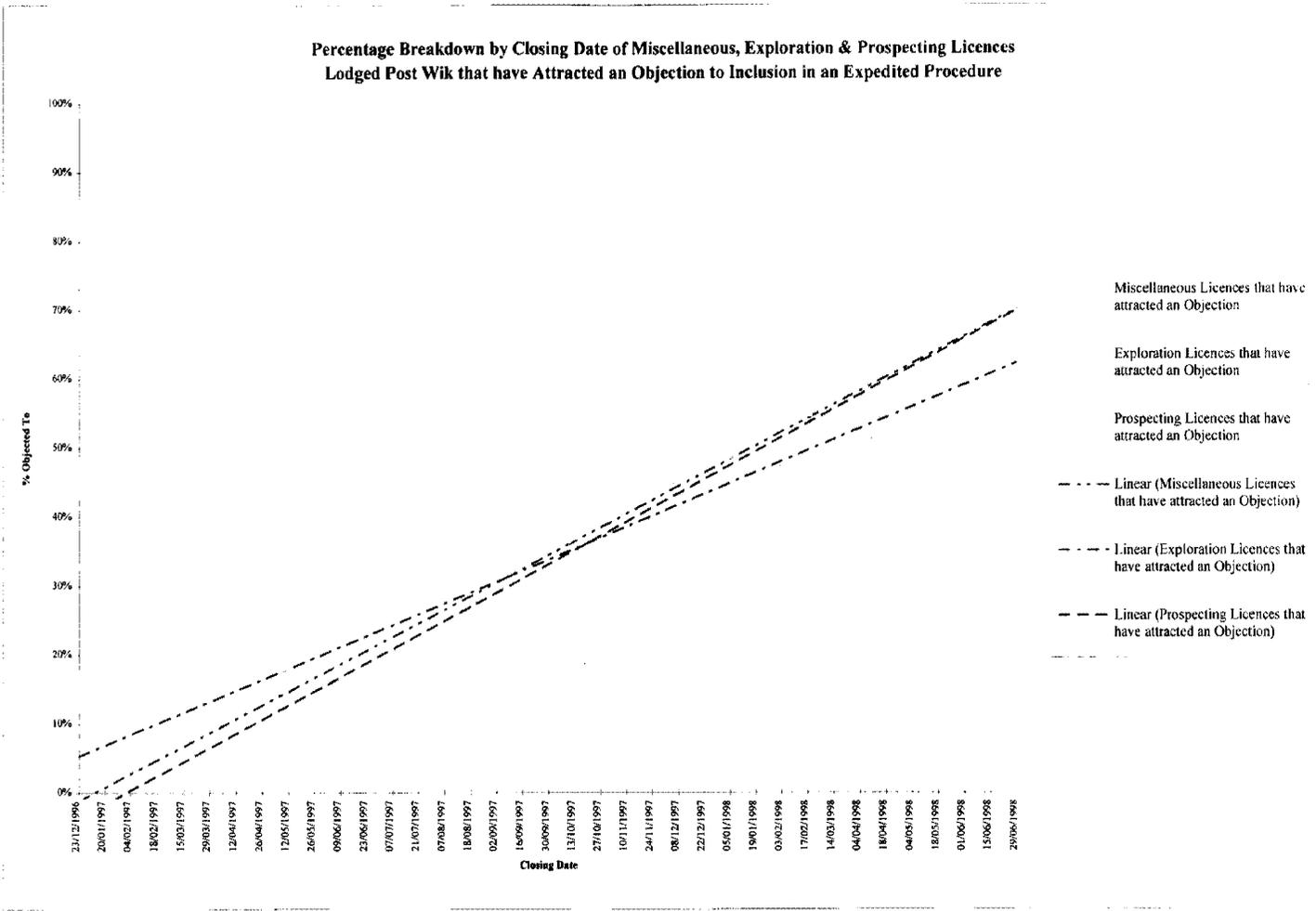


% Trend by CD (Polynomial)

National Native Title Tribunal - Future Act Unit 23/9/98

**Breakdown by Closing Date of Miscellaneous, Exploration and Prospecting Licences
Lodged Post Wik that received an Objection to Inclusion in an Expedited Procedure Application**

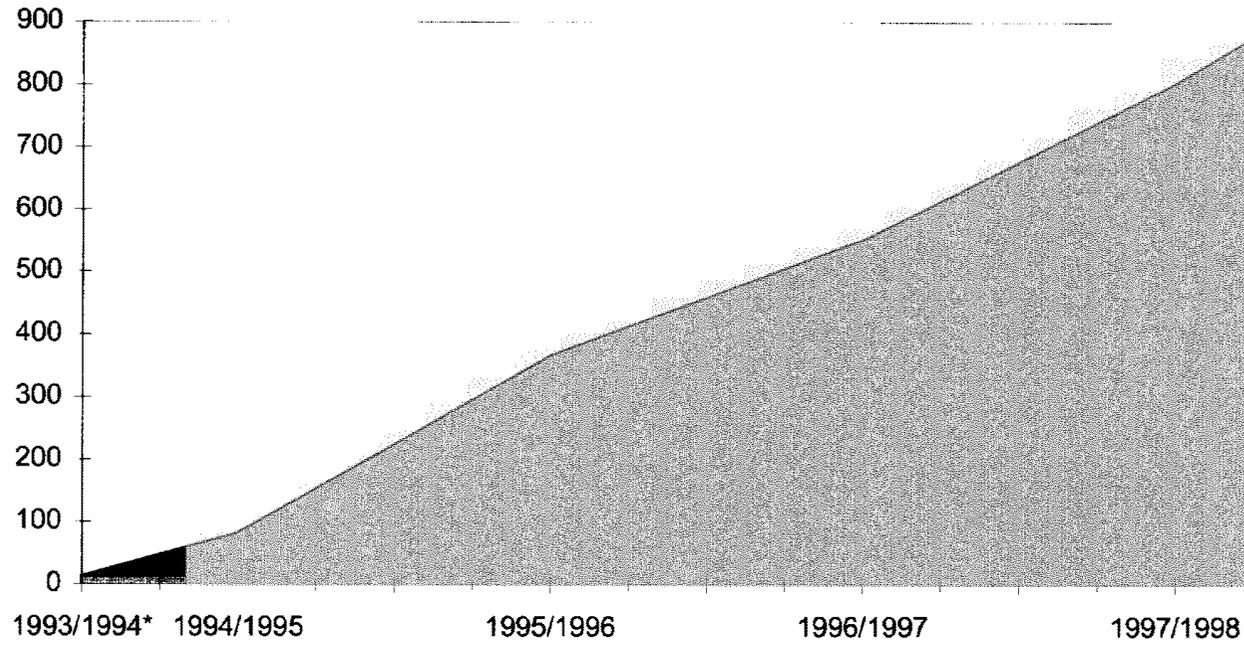




% of L, E & P's Obj by CD

National Native Title Tribunal - Future Act Unit 23/9/98

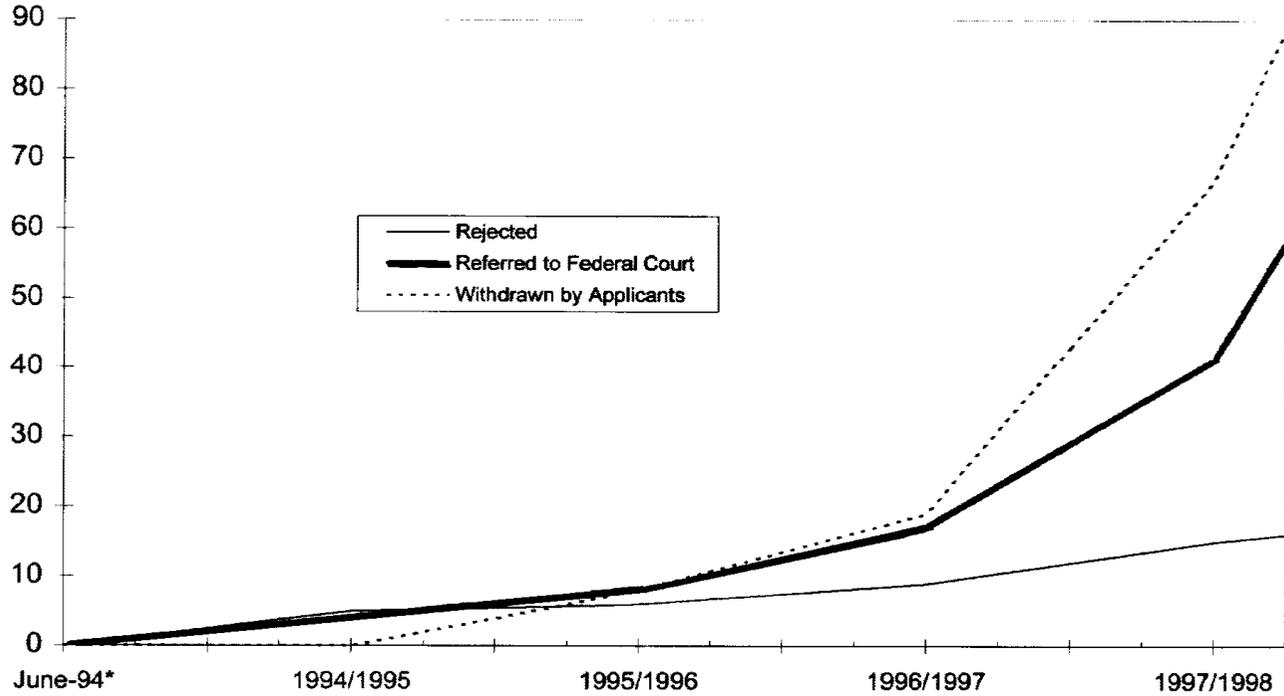
**Total Claimant Applications lodged with the National Native Title Tribunal
for each Financial Year**



NOTE: Cumulative until 29th September 1998, commencement of amended *Native Title Act*

*Tribunal commenced operations on 1 Jan 1994, therefore 93/94 is only a 6 month period.

Claimant Applications that have been Rejected, Referred and Withdrawn for each Financial Year



NOTE: Cumulative until 29th September 1998, commencement of amended Native Title Act
 *Tribunal commenced operations on 1 Jan 1994, therefore 93/94 is only a 6 month period.

Appendix 10: List of persons who made submissions to the Committee

Aboriginal and Torres Strait Islander Commission

National Indigenous Working Group on Native Title

Human Rights and Equal Opportunity Commission

National Native Title Tribunal

The Chamber of Minerals and Energy

Department of Land Administration

Aboriginal Legal Service of WA (Inc)

Amalgamated Prospectors and Leaseholders Association of WA Inc

The Western Australian Farmers Federation (Inc)

Manjimup Aboriginal Corporation

Western Mining Corporation Resources Ltd

Australian Conservation Foundation

National Native Title Tribunal

Mallee Aboriginal Corporation

Strelley Community School

Shire of Albany

Aboriginal International Friendship Foundation Inc

Shire of West Arthur

Family and Children's Services

Mingenew Shire Council

The Shire of Wiluna

City of Kalgoorlie-Boulder

Noel Olive

Shire of Leonara

Alcoa of Australia Limited

Shire of Murchison

Councillor Keith Schekkerman, York Shire Council

Shire of Roebourne

Kimberley Land Council

Association of Mining and Exploration Companies (Inc)

Uniya Jesuit Social Justice Centre

Native Title Unit, Ministry of the Premier and Cabinet

Athol Farrant

Franklin Gaffney

Australian Law Reform Commission

Mindi Mindi Aboriginal Corporation

Australian Petroleum Production & Exploration Association Ltd

Department of Minerals and Energy

Stanley F Davey

West Kimberley Commission of Elders

Edith Cowan University

Western Australian Aboriginal Native Title Working Group

George and Terry Hackett

Tourism Council Australia

Western Australian Fishing Industry Council

Professor Richard Bartlett

Shire of Laverton

Croesus Mines

Goldfields Land Council

Rubibi Working Group

Goldfields Chamber of Commerce

Appendix 11: List of persons spoken to by the Committee in Western Australia

Mr JOHN CLARKE Consultant Department of Premier & Cabinet	23 October 1997
Ms VERA NOVAK Manager, Native Title Unit Department of Premier & Cabinet	23 October 1997
Mr JOHN CLARKE Consultant Department of Premier & Cabinet	31 October 1997
Ms VERA NOVAK Manager, Native Title Unit Department of Premier & Cabinet	31 October 1997
Mr GREGORY BENN Manager, Land and Heritage Unit Aboriginal Legal Service of WA	31 October 1997
Mr WILLIAM de MARS Legal Officer, Land and Heritage Unit Aboriginal Legal Service of WA	31 October 1997
Mr PATRICK SPINNER Manager, Resource Titles GGO Office, WMC Resources Ltd	31 October 1997
Ms JAN MacPHERSON Manager, Legal in GGO Office WMC Resources Ltd	31 October 1997
Mr FRANKLIN GAFFNEY	31 October 1997
Mr GEORGE KAILIS Vice Chairman of WA Fishing Industry Council Chairman of the Fishing Industry Native Title Group Managing Director of the MG Kailis Group	31 October 1997
Mr GUY LEYLAND Executive Officer, WA Fishing Industry Council	31 October 1997

Mr MICHAEL BUCKLEY Executive Officer, Pearl Producers Association	31 October 1997
Mr RON YURYEVICH Mayor, City of Kalgoorlie-Boulder	6 November 1997
Mr ATHOL FARRANT Retired Farmer	6 November 1997
Mr WAYNE WARNER Member, WA Aboriginal Native Title Working Group	6 November 1997
Mr DARRYL KICKETT Coordinator, WA Aboriginal Native Title Working Group	6 November 1997
Mr GLENN SHAW Coordinator, WA Aboriginal Native Title Working Group	6 November 1997
Mr ROY BURTON Manager, Special Projects (Mineral Titles) Department of Minerals and Energy	6 November 1997
Mr PHIL MIRABELLA Senior Case Manager Department of Minerals and Energy	6 November 1997
Mr JUSTICE ROBERT FRENCH President, National Native Title Tribunal	13 November 1997
Mr CHRISTOPHER DOEPEL Registrar, National Native Title Tribunal	13 November 1997
Mr ALLAN PADGETT Coordinator, Future Act Unit, National Native Title Tribunal	13 November 1997
Mr PETER YU Executive Director, Kimberley Land Council	13 November 1997
Mr KENNY OOBAGOOMA Deputy Chair, Kimberley Land Council	13 November 1997
Mr MICHAEL O'DONNELL Lawyer, Kimberley Land Council	13 November 1997
Dr DAVID TRIGGER Senior Lecturer, University of WA	27 November 1997

Mr CHRISTOPHER WILLIAMS 4 December 1997
Director Land Operations
Department of Land Administration

Mr RON PUMPHREY 4 December 1997
Manager, Native Title Unit
Department of Land Administration

**Persons spoken to by the Committee 16 - 21 February 1998
during its visit to the Kimberley**

Mr DAVID LAVERY
Lawyer, Kimberley Land Council

Mr MICHAEL TORRES
Rubibi Project Officer, Kimberley Land Council

Mr TERRY McVEIGH
Shire of Broome

Mr ROSS MacCULLOCH
Shire of Broome

Mr GREG POWELL
Executive Officer, Shire of Broome

Mr ANGUS MURRAY
President, Shire of Broome

Mr RICKY ROE
Community Consultant, Rubibi/Kimberley Land Council

Mr GREG FINLEY
Fisheries Department

Mr GRAHAM MACARTHUR
Kimberley Tourism Association

Mrs RUTH WEBB-SMITH
Mr DANIEL WEBB-SMITH
Pastoralists and Graziers Association
Beefwood Park Station

Mr BILLIE KING
Councillor and Manager

Mr PHILLIP DUCKHOLE
Chairman

Mr PETER THOMPSON
Mt Barnett

Mr PETER and Mrs PAT LACEY
Mt Elizabeth
Mr STUART GUNNING
Aboriginal Pastoralists Association

Ms JODIE BELL
Mr ROBERT IMBER
Mr RICHARD WEBB
Maraworraworra Resources Agency

Mr JOHNNY WATSON
Mr ANTHONY WATSON
Mr ROBERT WATSON
Mr ERNIE HUNTER
Mr BILLY WRIGHT
Mt Anderson

Mr RICHARD JORDINSON
Mr PETER JOHN TAYLOR
Mr DAVID JOHN BELL
Mr JOHN MITCHELL
Western Metals Ltd
Lennard Shelf Operations

Mr MICHAEL FRANCIS RYNNE 30 April 1998
Legal Practitioner

Professor RICHARD BARTLETT 21 May 1998
Professor, Law School, University of WA

Mr HAYDN LOWE 11 June 1998
Chief Executive Officer, Aboriginal Affairs Department

Mr MICHAEL GOODA 11 June 1998
Chairman, Aboriginal Lands Trust
Director of Operations, Aboriginal Affairs Department

Mr JOHN LINKOVICH 11 June 1998
Legal Officer, Aboriginal Affairs Department

Mr MALCOLM RAYMOND SCOTT JAMES General Manager, Corporate and Company Secretary Anaconda Nickel Ltd	11 June 1998
Mr JOHN CLARKE Consultant, Ministry of Premier and Cabinet	5 August 1998
Ms VERA NOVAK A/Assistant Director General, Ministry of Premier and Cabinet	5 August 1998
Mr GLENN SHAW Executive Officer, Land and Heritage Unit Aboriginal Legal service of WA	5 August 1998
Mr GREGORY McINTYRE Barrister	5 August 1998

Persons spoken to by the Committee 22 - 23 May 1998 during its visit to Kalgoorlie

Mr SCOTT WILSON
Branch President
Kalgoorlie Amalgamated Prospectors and Leaseholders Association

Mr BILL O'DONNELL
Kalgoorlie Amalgamated Prospectors and Leaseholders Association

Mr FRED ANDREI
Kalgoorlie Amalgamated Prospectors and Leaseholders Association

Mr ANDREW JAGGERS
Native Title Mediation Service

Ms CHRISTINA LANGE
Native Title Mediation Service

Mr RAY CIANTA
Goldfields Development Commission

Mr LLOYD JONES
Land Manager for Croesus

Mr DOUGLAS DAWS

Mr ROBERT MONEY
Money Mining NL

Mr CYRIL BARNES
Aboriginal Claimant and Prospector

Mr BRIAN WYATT

Mr GLEN BAKER
President, Shire of Leonora

Mr MURRAY THOMAS
Shire President, Shire of Laverton
Member of the Goldfields Mediation Council

Mr DION MEREDITH
Chairman of the Goldfields Land Council

Mr ADRIAN MEREDITH
Chief Executive Officer, North-East Independent Body

Mr DARRYL PEARCE
Private Consultant

Mr GERARD ANDERSON
Kalgoorlie Consolidated Goldmines

Ms YVONNE BROWNLEY
Goldfields Aboriginal Land Council

Mr AUBREY LYNCH
North-Eastern Working Group

Appendix 12: List of persons spoken to by the Committee in Canada

Full Name	Title	Organisation
Mr Bob Loader	Manager, Aboriginal Affairs	Syncrude Canada Limited
Mr Murray Hurley	Vice President, Human Resources	Norterra
Mr Roger Gibbins	Canada West Foundation	
Mr Barry Robb	Regional Director	Department of Indian and Northern Affairs
Mr Max Chickite		
Mr Alvin Scow		Kla-Lee-La-Week Charters
Mr Robin Wortman		R.A.W Communications
Mr Neil Reddekopp	Director of Claims Research	Department of Intergovernmental & Aboriginal Affairs
Ms Lee Anne Cameron	Special Assistant (British Columbia Region)	Office of the Minister of Indian Affairs & Northern Development
Mr Colin Braker	Communications Coordinator (Media)	First Nations Summit
Ms Angela C Olsen	Manager of Operations	Tsa-Kwa-Luten Lodge
J.Guy Rose		Quilchena Cattle Co
Mr Joe Migwi		
Moise & Joyce Rabesca		Sah Naji Kwe Camp & Wilderness Spa
Mr James Rabesca	North Slave Member of the Legislative Assembly	
Grand Chief Joe Rabesca		Dogrib Treaty 11 Council
Ms Heather Jo McCarley-Tomlin	Duty Manager	Vancouver International Airport Authority

Full Name	Title	Organisation
Mr Cliff Supernault	Assistant Deputy Minister	Department of Intergovernmental and Aboriginal Affairs
Mr Kevin Lamb	Manager	Austrade
Mr Michael Hunter	President	Fisheries Council of British Columbia
Mr William Ferguson		Ferguson Gifford Barristers & Solicitors
Ms Janet Harper	Senior Advisor	Federal Treaty Negotiation Office
Ms Lynne Gregor	Director of Treaties, Vancouver Island	Federal Treaty Negotiation Office
Ms Eve C. Munro		Ferguson Gifford Barristers & Solicitors
Chief Garry Feschuk		Sechelt Indian Band
Ms Jeannie Kanakos		Federal Treaty Negotiation Office
Mr Patrick Kelly		Patrick Kelly Consulting
Ms Nancy A Morgan		Ferguson Gifford Barristers & Solicitors
Chief Fred Alec		Ts'kw'aylaxw First Nation
Mr Jerry Lampert		Business Council of British Columbia
Mr Christopher Lemon		Ferguson Gifford Barristers & Solicitors
Mr Allan Lester		Ferguson Gifford Barristers & Solicitors
Mr Andre Schuck	Barrister & Solicitor	
Mr Bill Lomax	Treaty Process Analyst	British Columbia Treaty Commission
Mr Keith Lowes		Barrister & Solicitor
Mr Peter Lusztig	Acting Chief Commissioner	BC Treaty Commission

Full Name	Title	Organisation
Mr Denis de Keruzec	General Consul	Department of Justice
Ms Fiona Anderson		Snarch & Allen Barristers & Solicitors
Ms Doreen Mullins	Executive Director	Federal Treaty Negotiation Office
Mr John Watson		Federal Treaty Negotiation Office
Ms Wendy Porteous	Chief Federal Negotiator	Federal Treaty Negotiation Office
Dr Andrew Thompson	Associate Counsel	Ferguson Gifford Barristers & Solicitors
Mr Martin Palleson		Ferguson Gifford Barristers & Solicitors
Mr Tony Penikett		
Hon Andrew Petter MLA	Minister of Intergovernmental Relations	
Mr Geoff Plant MLA		
Ms Thelma Oliver	Ministerial Assistant	Ministry of Aboriginal Affairs
Mr Craig James	Clerk of the Parliaments	Parliament Buildings
Mr Helmut Giesbrecht MLA		
Hon Gretchen Mann Brewin MLA	Speaker of the Legislative Assembly of British Columbia	
Mr Murray Coell MLA		
Mr Mike de Jong MLA	Opposition Aboriginal Affairs Critic	
Mr Jack Weisgerber MLA		
Mr Phil Steenkamp	Deputy Minister	Ministry of Aboriginal Affairs

Full Name	Title	Organisation
Mr Tim Stevenson MLA		
Professor Hamar Foster		Faculty of Law
Ms Nichola Wade	Consultation Manager	Ministry of Aboriginal Affairs
Mr Lyle Viereck	Treaty Negotiator	Ministry of Aboriginal Affairs
Hon Ian Waddell MLA	Ministry of Small Business, Tourism and Culture	
Mr Robert Overvald	Regional Director	Department of Indian & Northern Affairs
Mr Mark Warren	Director, Calims Negotiation & Implementation	Ministry of Aboriginal Affairs
Mr Graham Nicolls	Manager - External Affairs	Ekati Diamond Mine
Mr Fred Koe	Deputy Minister	Ministry of Aboriginal Affairs
Mr Dave Kennedy	Executive Director	BC Treaty Commission
Mr Stephan Van Dine	Senior Advisor	Department of Indian and Northern Affairs (NWT)
Mr Clint Westman	Specific Claims Research Analysis	Department of Indian and Northern Affairs (Alberta)
Mr Harry Supernault	Chairman	Metis Settlements Appeal Tribunal
Mr Jack Ebbels	Assistant Deputy Minister	Ministry of Aboriginal Affairs (British Columbia)
Mr Bill Lomax	Treaty Process Analyst	BC Treaty Commission
Ms Carol Crowe	Market Development Specialist, Health, Education & Aboriginal Services	Telus Communications
Neil Reimer	Committee Clerk	Legislative Assembly of British Columbia

Full Name	Title	Organisation
Dr Jim Frideres	Professor	University of Calgary
Dr Rick Ponting		University of Calgary
Mr Tom Flanagan		University of Calgary
Mr Jim Antoine		Ministry of Aboriginal Affairs (NWT)
Mr Roland Bellerose		

Appendix 13: Data from the NNTT regarding agreements reached

Agreement type	Totals	WA	QLD	VIC/TAS	NT	NSW/ACT	SA
Native title agreement or agreement leading to same	208	156	18	1	3	15	15
Non-native title agreement	38	18	2	0	1	3	14
TOTAL NATIVE TITLE RELATED AGREEMENTS	246	174	20	1	4	18	29
1. Future Act agreements: non mining	18	8	0	7	1	1	1
2.(a) Future Act agreements: mining (S34 State deeds)	320	291	3	0	1	3	22*
2. (b) Future Act agreements: mining (consent determinations regarding expedited procedure)	439	437	0	0	0	0	2
2 (c) Future Act agreements: mining (withdrawal of objection to expedited procedure)	221	221	0	0	0	0	0
TOTAL FUTURE ACT AGREEMENTS	998	957	3	7	2	4	25
GRAND TOTAL OF BOTH GROUPS	1244	1131	23	8	6	22	54

* Part 9B SA Mining Act agreements

Appendix 14: The Howard Government's Ten Point Plan**NATIVE TITLE 10 POINT PLAN**

(*designates points that were amended before enactment)

- 1 **Validation:** Validates acts or grants on non-vacant Crown land between passage of *Native Title Act* on 1 January 1994 and *Wik* decision on 29 December 1996.
- 2 **Extinguishment:** Confirmation of extinguishment of native title on “exclusive tenures” - States can confirm no native title on freehold, residential, commercial and some agricultural leases.
- 3 **Government services:** Impediments to the provision of government services in relation to land on which native title may exist to be removed.
- 4 **Native title and pastoral lease:** Native title permanently extinguished to the extent that it is inconsistent with pastoralists rights.
- 5 **Statutory access rights:** Registered claimants who can prove current physical access to pastoral leases will have rights confirmed; access rights to pastoral lease land while a claim is being assessed.
- 6 **Future mining activity:** Higher registration test for native title claimants seeking the right to negotiate over mining on vacant crown land; Aboriginal rights to negotiate restricted - no negotiations on exploration and only one right to negotiate per project*; right to negotiate continues on other non-exclusive leases.
- 7 **Future government and commercial development:** Higher registration test to negotiate over vacant Crown land outside towns and cities; no right to negotiate over land in cities and towns. Native title holders will have to prove one claimant had a physical connection to the land*.
- 8 **Management of water and airspace:** No native title claims on water and airspace.
- 9 **Management of claims:** Higher registration test for native claims - one living claimant must have a physical connection to land to be able to negotiate; amendments to speed up claims. Six year sunset clause for native title to be formally lodged*.
- 10 **Agreements:** Measures to encourage voluntary but binding agreements between stakeholders on native title.

Appendix 15: Draft Pastoral Lease Grant Agreement

National Native Title Tribunal Common Templates
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Title : Pastoral Lease Grant Agreement

Agreement Category : Pastoral Agreements

Editor's Note: The South Australian Government has kindly agreed to the following draft agreement being entered onto the database. Please refer to the attached "word" document to view the draft agreement in its original form.

Draft 1 / 12 June 1998

**WITHOUT PREJUDICE
DRAFT AREA AGREEMENT**

This document is currently the subject of discussions with key stakeholders and is likely to be substantially modified as a result. It was circulated in the following form in June 1997. Note that the definitions require further work.

Note: This draft has been prepared for discussion purposes only. It does not represent the final views of the SA government. Those final views will only be determined following upon broad consultation by the government on what might be included in such an agreement if one were to be entered into.

AGREEMENT

BETWEEN:

MINISTER FOR THE ENVIRONMENT AND NATURAL RESOURCES (the "Minister") for and on behalf of the Crown in right of the State of South Australia (the "State") in its own right and as agent;

AND

The person named and described in item 1 of Schedule Two, both as principal in its own right and as agent for and on behalf of each of the Aboriginal Communities specified in item 2 of Schedule Two (the "Representative" and the "Aboriginal Communities")

respectively);

RECITALS

A. The Minister has granted, pursuant to the Pastoral Land Management and Conservation Act, 1989 (the "Pastoral Act"), the pastoral leases (the "Pastoral Leases") specified in item 3 of Schedule Two in respect of the land specified in item 4 of Schedule Two (the "Land").

B. The Representative represents the Aboriginal Communities who assert that their ancestors used and occupied the Land or various portions of the Land in accordance with their law, tradition and custom and that subsequent generations of their people have continued to maintain a relationship with the Land. Based on this claimed traditional connection with the Land, the members of the Aboriginal Communities assert that they hold native title or native title rights and interests in respect of the Land or various portions of the Land or that they have a traditional relationship with the Land or various portions of the Land.

C. Whether native title or native title rights exist in respect of the Land or not, the Aboriginal Communities have rights conferred by section 47 of the Pastoral Act which they intend to exercise in the future. Further, the Aboriginal Communities are recognised by the law and custom of Aboriginal peoples as those people who are entitled by tradition to speak for the Land.

D. The Aboriginal Communities claim to represent all persons who are entitled by tradition to speak for the Land or who assert a traditional connection with the Land.

E. The State does not concede or admit that any common law native title or common law native title rights and interests exist in respect of the Land, whether of any of the Aboriginal Communities or any other persons or communities.

F. The parties agree that it is not necessary to determine the existence or otherwise of any common law native title or common law native title rights and interests in or to the Land for the purposes of this Agreement. The parties also agree that it is not necessary for them to reach any concluded position as to their respective entitlements at common law or pursuant to the Native Title Act, 1993 (Commonwealth), including any entitlements to compensation. The parties agree that their respective needs for certainty in respect of the various co-existing rights over Pastoral Leases, together with the delays and prohibitive costs involved in the resolution of that uncertainty by any other processes, make it essential in the interests of both parties that they reach this Agreement.

G. If any of the Aboriginal Communities holds any native title or native title rights and interests in respect of the Land, then it is intended that this agreement operate as an agreement pursuant to section [] of the Native Title Act, 1993 (Commonwealth), so as to authorise the various acts required or agreed to be done pursuant to the Agreement. If any Aboriginal Community does not hold any native title or native title rights and interests in the Land, then it is intended that this Agreement operate as an agreement by the parties to

take the acts required or agreed to be done pursuant to the Agreement.

H. Section 47 of the Pastoral Act confers on Aborigines a statutory right to enter, travel across or stay on pastoral lands within South Australia for the purpose of carrying on the traditional pursuits of Aboriginal people. Members of the Aboriginal Communities intend to exercise the statutory rights over the Land or portions of the Land in the future.

I. The parties have discussed the provisions of this Agreement with the South Australian Farmers Federation, with the Pastoralists and with other interested persons and bodies.

J. The parties have decided to enter into this Agreement in order to clarify and regulate the rights of the State, the Aboriginal Community, the Pastoralists and others having or who may have interests in respect of the Land and to establish a regime by which those rights and interests will be exercised in the future.

THE PARTIES AGREE AS FOLLOWS.

1. ACCURACY OF RECITALS

The parties agree both that the matters referred to in the recitals of this Agreement are true and correct in every material particular and that the recitals shall form part of this Agreement.

2. DEFINITIONS & INTERPRETATION

2.1 Definitions

Note: The State considers that the following definitions require substantial rewording to give effect to the objects of this agreement. In particular, the definitions of "traditional rights" and "traditional rights holder" require clarification

Subject to any contrary intention indicated by subject or context, in the interpretation of this Agreement the following terms and expressions are stipulated as having the following meanings.

2.1.1 "**Aboriginal Communities**" means the members of the Aboriginal communities specified in item 2 of Schedule Two and the members of any Aboriginal communities who may, after the date of this Agreement, be entitled to be or become members of the Prescribed Body Corporate, all denoted collectively.

2.1.2 "**Aboriginal Object**" means the Aboriginal objects or remains specified in item 5 of Schedule Two or any other Aboriginal object or remains for the purpose of the Aboriginal Heritage Act, 1988.

2.1.3 "**Aboriginal Site**" means the Aboriginal Sites on the Land specified in item 6 of Schedule Two or any other such Aboriginal site for the purpose of the Aboriginal Heritage Act, 1988.

2.1.4 "**Claim**" means any amount, claim, demand, action, cause of action, proceedings, judgment, order, relief, remedy, right, entitlement, damages, liquidated damages, arbitration award, loss, compensation, reimbursement, penalty, cost, expense or liability payable, incurred, suffered, brought, made or recovered of any nature, however arising and whether presently ascertained, immediate, future or contingent, whether arising under

statute, at law or in equity or whether of a contractual, proprietary or tortious nature (whether in negligence, for breach of statutory duty, other breach of duty, of a strict liability or otherwise) or any other civil cause of action or civil liability whatsoever.

2.1.5 "**Commonwealth NTA**" means the Native Title Act, 1993 (Commonwealth) as amended from time to time.

2.1.6 "**Community Living Area**" means an area on the Land where members of an Aboriginal Community have chosen to live and have erected houses, shelters and essential services for that purpose as envisaged by clause 28 of Schedule One.

2.1.7 "**Contract Manager**" means a person appointed as a contract manager pursuant to this Agreement by the State, the Prescribed Body Corporate or by a Pastoralist.

2.1.8 "**Land**" means the land comprised in the Pastoral Leases specified in item 4 of Schedule Two or any portion of that Land but expressly excluding, for the removal of doubt, any land comprised in a Public Access Route or a stock route established pursuant to section 45 of the Pastoral Act.

2.1.9 "**Legislation**" means any statute, regulation, by-law, proclamation, ordinance or any notice or order made or given pursuant to any of the foregoing.

2.1.10 "**Management Committee**" means the management committee established pursuant to this Agreement.

2.1.11 "**Mining Act**" means as follows:

- (a) the Mining Act, 1971; and
- (b) the Opal Mining Act, 1995.

2.1.12 "**Minister**" means the Minister for the Environment and Natural Resources, a body corporate pursuant to the Administrative Arrangements Act, 1994.

2.1.13 "**New Mining Operations**" means carrying on of mining production pursuant to a production tenement issued pursuant to the Mining Act or the Petroleum Act where such a tenement had not been in existence prior to 24 December, 1996 and was not a renewal, substitute or replacement for a tenement issued prior to that date.

2.1.14 "**Pastoral Act**" means the Pastoral Land Management and Conservation Act, 1989 as amended from time to time.

2.1.15 "**Pastoralist**" means the lessee pursuant to a Pastoral Lease.

2.1.16 "**Pastoral Business**" means the business of primary production as defined in the Income Tax Assessment Act, 1936 (Cth) and includes business activities related to tourism, subject always to the terms of the Pastoral Lease and the rights and obligations specified herein.

2.1.17 "**Pastoral Lease**" means the pastoral leases specified in item 3 of Schedule Two or a pastoral lease granted in respect of the Land or a portion of the Land pursuant to the Pastoral Act and any extension or renewal of any such pastoral lease, whether granted, extended or renewed as at the date of this Agreement or at any time during the Term.

2.1.18 "**Petroleum Act**" means as follows:

- (a) the Petroleum Act, 1940; and
- (b) the Petroleum (Submerged Lands) Act, 1982.

2.1.19 "**Prescribed Body Corporate**" means the body corporate to be created pursuant to clause 11.

2.1.20 "**Public Access Route**" means any public access route established pursuant to section 45 of the Pastoral Act.

2.1.21 "**Public Infrastructure**" means as follows:

(a) the infrastructure, equipment, structures, works and other facilities used in or in connection with the supply of water or electricity, gas, telephony, telegraphy or other forms of energy, public services or public utilities or the drainage or treatment of waste water or sewerage;

(b) roads and their supporting structures or works; or

(c) ports, wharfs, jetties, railways, tramways, conveyers, pipelines and busways, whether constructed, maintained or operated by a State agency (for the purpose of section 49 of the Development Act, 1993) or not.

2.1.22 "**Relevant Traditional Rights**" means the Traditional Rights, if any, of the Aboriginal Community to cross over, to hunt and to camp in respect of the Land.

2.1.23 "**Representative**" means [] Inc.

2.1.24 "**State**" means the Crown in right of the State of South Australia and any of its Ministers, agencies, instrumentalities, employees, agents or statutory corporations formed by or pursuant to legislation enacted by the Parliament of South Australia.

2.1.25 "**State NTA**" means the Native Title (South Australia) Act, 1994 as amended from time to time.

2.1.26 "**Term**" means, subject to an earlier termination pursuant to this Agreement or otherwise at or by the operation of law, the expiration of seventy five (75) years commencing on the date of this Agreement.

2.1.27 "**Traditional Rights**" has the same meaning as stipulated for the expression "native title" in section 4 of the State NTA.

2.1.28 "**Traditional Rights Holder**" in respect of any portion of the Land means a member of an Aboriginal Community who:

(a) has physically exercised any of the Relevant Traditional Rights on the relevant portion of the Land during the period of thirty five (35) years immediately prior to the making of this Agreement; and

(b) is recognised in accordance with Aboriginal custom and tradition as having the right to speak for the relevant portion of the Land, and includes a person who, in accordance with Aboriginal custom and tradition, is a member of an Aboriginal Community where other members of that Aboriginal Community are Traditional Rights Holders.

2.2 **Interpretation**

Subject to any contrary intention indicated by subject or context, the following rules of construction shall be used in the interpretation of this Agreement.

2.2.1 Words denoting the singular number or plural number include the plural number and singular number respectively.

2.2.2 Words denoting any gender shall include all genders.

2.2.3 Headings are for convenience only and shall not affect interpretation.

2.2.4 Words denoting individuals shall include corporations and vice versa.

2.2.5 A reference to a recital, party, clause, schedule, appendix or annexure is a reference to a recital, party, clause, schedule, appendix or annexure of this Agreement.

2.2.6 A reference to any item of Legislation shall be deemed to include any amendments made to that item and all statutory provisions substituted for that item after the date of this Agreement.

2.2.7 The use of "or" shall be that of the inclusive "or", *ie.*, meaning one, some or all of a number of possibilities or alternatives.

2.2.8 All references to "dollars" or to "\$" are to Australian dollars.

2.2.9 A reference to a corporation, organisation or other body (whether or not incorporated) is:

- (a) if that corporation, organisation or other body is replaced by another corporation, organisation or other body, deemed to refer to that other corporation, organisation or other body; and
- (b) if that corporation, organisation or other body ceases to exist, deemed to refer to the corporation, organisation or other body which most nearly or substantially fulfils the same purposes or objects as the first mentioned corporation, organisation or other body.

3. AIMS OF THIS AGREEMENT

The parties acknowledge and agree that the aims of this Agreement are as follows:

- 3.1 not to extinguish any Traditional Rights in or to the Land as a consequence of the granting of a Pastoral Lease or any act, omission, matter or thing performed or not performed pursuant to or in accordance with a Pastoral Lease (as the case may be) upon the Land;
- 3.2 if any Traditional Rights exist in or to the Land, then to enter into an agreement, for the purpose of section 21 of the Commonwealth NTA, to authorise, to the extent necessary, the exercise or enjoyment of co-existing estates, interests, rights or entitlements in or to the Land together with any Traditional Rights pursuant to this Agreement;
- 3.3 to provide an agreed basis for the introduction into the South Australian Parliament of legislation to authorise, ratify and give effect to the terms of this Agreement;
- 3.4 to establish a consensual regime whereby the State, the Pastoralists, the Aboriginal Communities and other persons can all use and enjoy the Land harmoniously and consistently in exercise of their respective rights, powers or interests in or to the Land; and
- 3.5 to foster and develop a mutually beneficial relationship between all such persons having any such estates, interests or rights in relation to the use and enjoyment of the Land.

4. ACKNOWLEDGMENTS

- 4.1 The Representative acknowledges and declares to the State that the Aboriginal Communities are the sole and exclusive Traditional Rights Holders and are the holders of any Relevant Traditional Rights or any other Traditional Rights in respect of the Land for the purpose of and in accordance with the Commonwealth NTA and the State NTA and, further, or in the alternative, that together they have the sole and exclusive continuing traditional Aboriginal connection with the Land or are comprised of the people who, according to Aboriginal law and custom, traditionally are entitled to speak for the Land.
- 4.2 The Representative acknowledges and declares to the State that the Representative is either the prescribed body corporate registered on the Native Title Register maintained pursuant to the Commonwealth NTA as the Traditional Holder of any Relevant Traditional Rights on trust for the Aboriginal Community or, if not, then that the Representative is the duly authorised agent, delegate or representative of each of the Aboriginal Communities.
- 4.3 Each Aboriginal Community and the Representative, jointly and severally, warrant and represent to the State that the Representative is expressly authorised in writing to enter into this Agreement for and on behalf of each of the Aboriginal Communities as its trustee, agent, delegate or representative (as the case may be) and consequently to legally bind the Aboriginal Community either on the basis that the Representative is the Traditional Rights Holder or on the same basis as if each person, who is a Traditional Rights Holder or who

otherwise held any Traditional Rights in respect of the Land, were a party to this Agreement.

4.4 The Representative warrants and represents to the State that the Representative has consulted with and distributed or made available to members of each Aboriginal Community this Agreement as well as previous drafts of this Agreement for their consideration and comment.

5. NO ADMISSION OF EXISTENCE OF TRADITIONAL RIGHTS

The State acknowledges and declares that it does not admit or concede the existence, in or to the Land, of any Relevant Traditional Rights or any other Traditional Rights and that it does not concede that there are any Traditional Rights Holders in respect of the Land.

6. CONSIDERATION

If any Traditional Rights exist in or to the Land, then the entering into this Agreement by the State and the State's obligations pursuant to this Agreement constitute the State's consideration for the purpose of the making of this Agreement pursuant to section [] of the Commonwealth NTA.

7. SECTION [] AUTHORISATION

If any Traditional Rights exist in or to the Land, then the following provisions shall apply:

7.1 The parties acknowledge that the enactment of any State legislation to give effect to the terms of this Agreement may be a future act in relation to the Land for the purpose of the Commonwealth NTA.

7.2 The parties acknowledge that the granting of a Pastoral Lease or any act, omission, matter or thing performed or not performed pursuant to or in accordance with a Pastoral Lease or otherwise pursuant to or envisaged by this Agreement (as the case may be) may each be future acts in relation to the Land for the purpose of the Commonwealth NTA.

7.3 Notwithstanding subclause 4, the parties acknowledge that the enactment of such legislation, the granting of a Pastoral Lease, the making of this Agreement or any act, omission, matter or thing (save only for any act involving a compulsory acquisition) performed or not performed pursuant to or in accordance with a Pastoral Lease or this Agreement (as the case may be) on or after the date of this Agreement shall not extinguish and shall not be construed as extinguishing, in any way, any Traditional Rights, whether under statute or at common law.

7.4 The parties acknowledge that the granting of a Pastoral Lease or any act, omission, matter or thing performed or not performed pursuant to or in accordance with a Pastoral Lease or this Agreement (as the case may be) may be wholly or partially inconsistent with the continued existence, enjoyment or exercise of any Relevant Traditional Rights and may thereby affect, for the purposes of the Commonwealth NTA or any Traditional Rights.

7.5 This Agreement constitutes an agreement between the State and the Representative, for the purposes of section [] of the Commonwealth NTA, the effect of which agreement is to authorise the enactment of relevant State legislation, the granting of a Pastoral Lease and any act, omission, matter or thing performed or not performed pursuant to a Pastoral Lease or this Agreement (as the case may be) as each being a future act affecting any Relevant Traditional Rights.

7.6 As a consequence of this Agreement constituting an agreement for the purpose of

section [] of the Commonwealth NTA, the enactment of such legislation, the granting of a Pastoral Lease or any act, omission, matter or thing performed or not performed pursuant to a Pastoral Lease or this Agreement (as the case may be) shall each be and be construed to be a permissible future act for the purposes of the Commonwealth NTA.

8. STATE TO ENACT LEGISLATION

8.1 The Minister (or such other Minister as may be authorised by the Government of the State for this purpose) shall cause the Government of the State as soon as practicable after the execution of this Agreement to introduce and sponsor in the Parliament of the State a Bill to approve and ratify this Agreement and, in particular, to provide that the rights, obligations and duties specified in Schedule One hereof shall apply and be enforceable notwithstanding any other agreements or statutes to the contrary.

8.2 This Agreement shall terminate if the Parliament of the State fails to enact such a Bill within eighteen (18) months of the date of this Agreement.

8.3 This Agreement shall terminate if the Parliament of the State amends any Act enacted for the purpose of this clause without having first obtained the written consent of the Prescribed Body Corporate to any such amendment.

8.4 In addition, the State may, by Legislation, and without any requirement for further negotiation with the Prescribed Body Corporate or the Aboriginal Communities or their respective representatives and without creating any liability for compensation, damages or any other liability to the Aboriginal Communities or their members, vary the term of a Pastoral Lease so that any such Pastoral Lease has a perpetual term provided that any such variation in the term of a Pastoral Lease shall not otherwise derogate from or affect the rights and obligations between the State, the Representative, the Prescribed Body Corporate, the Aboriginal Communities and the relevant Pastoralist pursuant to or under this Agreement.

8.5 The Representative and each Aboriginal Community shall support and not oppose, in any way, whether publicly or otherwise, any Bill or any amending Bill introduced and sponsored by the Government of the State pursuant to subclauses 1 or 3 respectively.

9. RELEASE

9.1 The Representative, both for itself and for and on behalf of each Aboriginal Community and their respective members, hereby releases, to the extent permitted by law, the State and any Pastoralist or other person having an interest in the Land from any Claim, whether for damages, compensation or otherwise under statute or at common law, that the Aboriginal Community or any member of the Aboriginal Community may have or be entitled to bring, exercise or enforce in relation or incidental to the granting of the Pastoral Leases or any act, omission, matter or thing performed or not performed pursuant to and in accordance with the Pastoral Leases and this Agreement.

9.2 The parties acknowledge that the granting of Pastoral Leases or any act, omission, matter or thing performed or not performed pursuant to and in accordance with a Pastoral Lease and this Agreement does not create any obligation on or liability of the State or a Pastoralist to pay to the Representative, any Aboriginal Community, any member of an Aboriginal Community or any other person any compensation, damages or other amount in respect of either the granting of the Pastoral Leases or the performing or not performing of any act, omission, matter or thing pursuant to the Pastoral Leases (as the case may be).

9.3 The parties hereby agree, to the extent permitted by law, to exclude and negate the operation of any applicable legislation or common law principle creating or imposing any such obligation or liability.

10. SUSPENSION OF COMMON LAW TRADITIONAL RIGHTS

The Representative, both for itself and for and on behalf of each Aboriginal Community and their respective members agree that the Traditional Rights, if any, or any other native title rights of any Aboriginal Community shall be suspended for the duration of the Term such that they may not be exercised or enjoyed and, that for the duration of the Term, they shall have and enjoy the rights granted and agreed in and pursuant to this Agreement.

11. CREATION OF THE PRESCRIBED BODY CORPORATE

11.1 The Representative shall establish or cause to be established a Prescribed Body Corporate in accordance with this clause within [] months of the date of this Agreement or otherwise as soon as reasonably practicable thereafter.

11.2 If any Traditional Rights exist in or to the Land, then the Representative shall ensure that the Prescribed Body Corporate shall be a prescribed body corporate in accordance with the Native Title (Prescribed Bodies Corporate) Regulations, 1994 promulgated under the Commonwealth NTA and that it shall comply with those regulations in all respects.

11.3 In any event, but subject to the following stipulations being consistent with the Native Title (Prescribed Bodies Corporate) Regulations, 1994, the constitution, rules or other relevant constitutive document of the Prescribed Body Corporate shall contain the following provisions:

11.3.1 that the Prescribed Body Corporate's members shall be exclusively restricted to members of the Aboriginal Communities;

11.3.2 that the Prescribed Body Corporate's constitution, rules or others constitutive document prescribes that any person who is a member of an Aboriginal Community is entitled to be or become a member of the Prescribed Body Corporate;

11.3.3 that the Prescribed Body Corporate's constitution, rules or other constitutive documents prescribes that any person who is a member of an Aboriginal community (not being an Aboriginal Community for the purpose of this Agreement), either which makes a claim for the determination of the existence of any Traditional Rights in or to the Land, after the date of this Agreement or which is found to have any such Traditional Rights pursuant to any such claim, is entitled to be or become a member of the Prescribed Body Corporate;

11.3.4 that a person may seek an appropriate order of a court of competent jurisdiction to declare that person to be entitled to be a member of the Prescribed Body Corporate;

11.3.5 that upon such an order being made, that person shall be a member of the Prescribed Body Corporate;

11.3.6 that the Prescribed Body Corporate may, in its own right and on behalf of its members, seek an appropriate order of a court of competent jurisdiction to declare that a person is not entitled to be a member of the Prescribed Body Corporate;

11.3.7 subject always to an amendment which is consistent with paragraph 9, that the constitution, rules or other relevant constitutive document shall prescribe that it may only be amended pursuant to either a process satisfying paragraph 5(2) (a) of the Native Title (Prescribed Bodies Corporate) Regulations, 1994 or, if no such customary or traditional

decision making process exists, then by a two thirds majority of a duly convened meeting of the Prescribed Body Corporate's members at which at least ninety per cent (90%) of the persons who are entitled to be members are present;

11.3.8 that the Prescribed Body Corporate shall give at least twenty eight (28) days' prior written notice of the proposal to call a meeting of its members at which an amendment to the constitution, rules or other constitutive document is to be considered together with the terms of the proposed amendment;

11.3.9 if there is more than one Aboriginal Community which has Relevant Traditional Rights in relation to the Land or any portion of the Land, then that the constitution, rules or other relevant constitutive document of the Prescribed Body Corporate appropriately provides that only those particular Aboriginal Communities have any voting or other rights pursuant to the constitution, rules or other document in relation to the Relevant Traditional Rights in respect of the Land or the relevant portion (as the case may be);

11.3.10 that the constitution, rules or other relevant constitutive document shall only be amended in accordance with the rule or article described in paragraph 7; and

11.3.11 the constitution, rules or other constitutive document of the Prescribed Body Corporate shall entrench the provisions required to be included pursuant to this clause (including the entrenching provision) such that those provisions cannot be amended by the procedure described in paragraph 7.

12. TERM

This Agreement shall continue to exist and operate between the parties for the Term.

13. CONSEQUENCES OF BREACH

13.1 Subject to clause 8, the State and the Representative acknowledge and agree that this Agreement may not, in any circumstances, be terminated by either of them by reason of a breach of this Agreement of any nature, whether of a fundamental term, a fundamental breach or otherwise, by the other of them.

13.2 The State and the Representative each hereby agree to waive and to release and discharge the other of them from any right, power or remedy, whether pursuant to this Agreement or otherwise at law, to terminate this Agreement for breach.

13.3 The State or the Representative (as the case may be) may make or pursue claims for damages sustained which were caused by or were a consequence of a breach of this Agreement by the other of them.

13.4 The parties acknowledge that an award of damages for a breach of this Agreement may be an inadequate remedy and that, subject to observing the dispute resolution procedure specified in this Agreement, a party may enforce compliance with this Agreement by seeking appropriate injunctions or any other available or appropriate form of legal or equitable remedy or relief in any appropriate court or jurisdiction.

14. SUCCESSORS & ASSIGNEES BOUND

This Agreement shall bind any of the Representative's and each Aboriginal Community's successors, successors to the estate or interest of an Aboriginal Community in or to the Land and their respective permitted assignees.

15. ABILITY TO ASSIGN OR ENCUMBER THIS AGREEMENT

The rights, powers, entitlements, remedies or obligations of the Aboriginal Community pursuant to this Agreement are personal to them. Consequently, the Aboriginal Community shall not assign, convey, transfer, charge, otherwise encumber or otherwise deal with or agree to assign, convey, transfer, charge, otherwise encumber or otherwise deal with the benefit of this Agreement without the State's prior written consent, which may be given or withheld in the State's absolute and unfettered discretion, and, if given, then may be given on such conditions as the State considers appropriate.

16. PUBLIC ANNOUNCEMENTS

A party shall not make, issue, commit or suffer or permit to be made any public statement, public announcement or media release concerning any matter or thing relating or incidental to either the granting of this Agreement or the provisions of this Agreement either unless any such statement, announcement or media release is required by law (including the obligations of the State and its Ministers to the Parliament and to the Executive Council of the State) and the content of any such statement, announcement or media release has been approved by the State or unless the making and content of any such statement, announcement or media release is otherwise approved by the State.

17. EMPLOYEES & AGENTS

Any act, matter or thing which either is required to be performed or done by a party or is permitted to be performed or done by a party may be performed or done by a party's duly authorised employees, agents, delegates or contractors.

18. FURTHER ASSURANCES

The parties shall do all acts, matters and things and sign all documents and shall cause to be done all acts necessary to give full effect to the terms of this Agreement.

19. ENTIRE AGREEMENT

This Agreement contains the entire agreement between the parties in respect of the subject matter of this Agreement and the parties agree that this Agreement supersedes and extinguishes any prior agreement or understanding (if any) between the parties in respect of this subject matter. Further, no other agreement, whether collateral or otherwise, shall be taken to have been formed between the parties by reason of any promise, representation, inducement or undertaking (if any) given or made by one party to another prior to the date of this Agreement.

20. WAIVER

20.1 No waiver by a party of a breach of a provision of this Agreement shall operate as a waiver of another breach of the same or of any other provision of this Agreement.

20.2 No forbearance, delay, indulgence or partial exercise by a party in enforcing the provisions of this Agreement shall be a waiver of or prejudice or restrict the rights of that party in any way.

21. AMENDMENT

21.1 This Agreement shall not be amended or varied other than by a written instrument expressed both to be a deed and to be supplemental to or in substitution for the whole or a

part of this Agreement. Further, any such instrument shall be signed by each party or by a person duly authorised to execute such an instrument on behalf of a party.

21.2 The parties agree and accept that, once the Prescribed Body Corporate has been established, an instrument executed by the Prescribed Body Corporate but otherwise conforming to the requirements in subclause 1 hereof, shall be as effective to amend or vary this Agreement as if it were executed by the Representative Body.

22. READING DOWN & SEVERANCE

22.1 If a sentence, subparagraph, paragraph, subclause, clause or other provision of this Agreement is reasonably capable of an interpretation which would render that provision not to be unenforceable, illegal, invalid or void and an alternative interpretation which would have one or more of those consequences, then that provision shall be interpreted or construed, so far as is possible, to be limited and read down such that its meaning is that which does not render it unenforceable, illegal, invalid or void.

22.2 Subject to subclause 1, if a provision of this Agreement is for any reason, illegal, void, invalid or unenforceable, then that provision shall be severed from this Agreement without affecting the legality, validity or enforceability of the remainder of this Agreement.

23. RELATIONSHIP BETWEEN THE PARTIES

23.1 The parties acknowledge and agree that their relationship pursuant to this Agreement shall be exclusively that of, independent contractors with the several rights, liabilities, duties and obligations set out in this Agreement or, subject to this Agreement, at law. Nothing contained in this Agreement shall be deemed or construed to constitute a party to be a partner, joint venturer, principal, agent, trustee (whether express, implied or constructive), beneficiary, or fiduciary of any other party.

23.2 No party has the authority to act for or to incur any liability or obligation pursuant to this Agreement as agent for and on behalf of any other party except as expressly provided in or contemplated by this Agreement.

23.3 Each party shall indemnify and keep indemnified the other from and against any obligations or liabilities arising as a consequence of one party incurring any obligations or liabilities for and on behalf of the other party in the manner proscribed by subclause 2 and otherwise than pursuant to this Agreement or with the express written consent of the other party.

24. COSTS

Each party shall bear their own costs incurred in and incidental to the negotiation, preparation and execution of this Agreement.

25. STAMP DUTY

The State shall be responsible for and pay any stamp duty assessed or charged in respect of this Agreement. The parties shall agree on the liability to pay stamp duty assessed in respect of any other instrument to be executed pursuant to this Agreement or to give effect to its provisions.

26. PROPER LAW

26.1 The proper law of this Agreement shall be the law of South Australia and accordingly

this Agreement shall be governed by and construed in accordance with the laws of this State.

26.2 The parties irrevocably covenant for the benefit of each other that the courts of the State of South Australia shall have jurisdiction to hear and determine any suit, action or proceeding and to settle any disputes which may arise out of or in connection with this Agreement and for such purposes the parties irrevocably submit to the non-exclusive jurisdiction of such courts. Further, the parties mutually covenant that they shall each not institute or attempt to institute any litigious proceedings in respect of any matter or thing arising out of or in connection with this Agreement other than either in a court of the State of South Australia or in the Adelaide Registry of any Federal court. Each party acknowledges that the courts of or sitting in South Australia constitute the most convenient forum to hear and determine any such suits, actions, proceedings or disputes. Furthermore, each party waives any right it has to object to an action being brought in these courts, to claim that the action has been brought in an inconvenient forum or to claim that these courts do not have jurisdiction. The parties further agree that any suits, actions, disputes or other litigious proceedings brought in a Federal court shall be instituted in the Adelaide Registry of any such Federal court and should be heard by any such Federal court while sitting in Adelaide.

UNCONDITIONALLY
EXECUTED AS AN AGREEMENT on the day of 1997.
THE COMMON SEAL of MINISTER FOR THE)
ENVIRONMENT AND NATURAL RESOURCES)
was hereunto affixed in the presence of:)

.....
Witness

THE COMMON SEAL of [THE)
REPRESENTATIVE] INC. was hereunto affixed)
in accordance with its Rules of Association)
For and on behalf of the members of the)
[ABORIGINAL COMMUNITIES])
In the presence of:)

.....
Chairman

.....
Director

SCHEDULE ONE

PART A: PASTORALISTS

1. REGULATION OF RIGHTS

The provisions of the Pastoral Act, any Pastoral Lease and this Schedule shall govern and regulate the exercise, during the term of any relevant Pastoral Lease, of any Traditional Rights of the Aboriginal Community and the relevant Pastoralist's rights, powers, entitlements or remedies, whether pursuant to the Pastoral Lease or otherwise at law.

2. EXERCISE OF RIGHTS BY THE ABORIGINAL COMMUNITY AND THE PASTORALIST

26.1 A Pastoralist shall occupy and use the Land and permit members of the Prescribed Body Corporate to exercise and enjoy any Relevant Traditional Rights in accordance and consistently with the Pastoral Act, the relevant Pastoral Lease and this Agreement and Schedule.

2.2 A Pastoralist may occupy and use the Land in accordance and consistently with the Pastoral Lease and this Schedule.

26.3 Member of the Prescribed Body Corporate may exercise and enjoy any Relevant Traditional Rights in accordance and consistently with the Pastoral Act, the relevant Pastoral Lease and this Agreement and Schedule.

3. CONDUCT OF PASTORAL BUSINESS

Subject to and in accordance with this Schedule, a Pastoralist may conduct a pastoral business on the Land pursuant to and in accordance with the relevant Pastoral Lease provided that any act, matter, thing or omission by the Pastoralist in the conduct of the pastoral business is not a breach of the rights conferred upon the Prescribed Body Corporate or its members by this Schedule.

4. PASTORALIST'S EXCLUSIVE OCCUPATION

4.1 A Pastoralist may exclude all persons, including members of the Prescribed Body Corporate, from any part of the Land within a one kilometre radius of any house, shed, outbuilding or other building erected on the Land. Members of an Aboriginal Community may not exercise any right held by them or granted to them, including any Relevant Traditional Right, within any such part of the Land.

4.2 Subject to Pastoral Act, the relevant Pastoral Lease and this Agreement and Schedule, and in particular, the rights held by the Prescribed Body Corporate and its members, a Pastoralist has a right of exclusive occupation of that part of the Land comprised within the relevant pastoral lease.

4.3 Nothing within this clause or otherwise within this Agreement and Schedule shall be construed as limiting any statutory right of entry onto land for official purposes, or as limiting an otherwise lawful entry onto the Land by a police officer acting in the course of carrying out his official duties, or of any other officer appointed pursuant to statute acting in the course of carrying out his official duties or of limiting an otherwise lawful entry upon the land in the case of emergency.

5. SECTION 47 OF THE PASTORAL ACT

Subject to this Schedule, the members of the Prescribed Body Corporate may exercise their rights contained in section 47 of the Pastoral Act for the purpose of following their traditional pursuits. A Pastoralist shall not interfere with, obstruct or otherwise impede the exercise or enjoyment of those rights in accordance with this Schedule.

6. EXERCISE OF ANY RELEVANT TRADITIONAL RIGHTS

Subject to and in accordance with this Schedule, members of the Prescribed Body Corporate may exercise any Relevant Traditional Rights in accordance with the provisions of this Schedule. Consequently, members of the Prescribed Body Corporate may perform any act, matter or thing reasonably necessary for or incidental to the exercise of any Relevant Traditional Rights on the basis that each of the following conditions is, at all times, satisfied:

6.1 any such act, matter, thing or omission is not a breach of this Schedule or the Pastoral Act; and

6.2 any such act, matter, thing or omission does not unreasonably interfere with the conduct of a Pastoralist's business or cause any damage to a Pastoralist's business or any of its livestock or property.

7. COMPLIANCE WITH AGREEMENT BY THIRD PARTIES

A Pastoralist and the Prescribed Body Corporate shall each ensure that their respective employees, agents, contractors, members, officers, invitees, visitors, persons living on the Land or any other persons on the Land under the control of a Pastoralist or the Prescribed Body Corporate (as the case may be) observe and comply with the provisions of this Agreement.

8. TRADITIONAL RIGHTS APPLICATIONS

8.1 A Pastoralist shall not, for the duration of the Term of the Agreement, make or pursue a "non-claimant" application for a determination as to the existence or otherwise of any Traditional Rights in the Land under any State or Commonwealth legislation.

8.2 The Representative, the Prescribed Body Corporate, any Aboriginal Community, any member of an Aboriginal Community or any other traditional owners of the Land shall not, for the duration of the Term of the Agreement, make or pursue a native title claim or application in respect of the Land, whether at common law or under State or Commonwealth legislation.

9. CULTURAL CEREMONIES & PRACTICES

A Pastoralist shall respect the need for privacy of an Aboriginal Community when its members are conducting cultural ceremonies or practices on the Land and shall not, to the extent reasonably possible given the use of the Land by the Pastoralist for pastoral purposes, interfere with the conduct of any such ceremonies or practices.

10. ABORIGINAL SITES & OBJECTS

10.1 A Pastoralist shall not damage, disturb or interfere with any Aboriginal Site, Aboriginal Object or any other Aboriginal site, object or remains which has been identified to the Pastoralist as such or which the Pastoralist should have reasonably known as being

such. Further, the Pastoralist shall use its best endeavours to preserve and protect any such Aboriginal Site or Aboriginal Object.

10.2 Nothing in subclause 1 shall limit or be construed as limiting the obligations of any person pursuant to the Aboriginal Heritage Act, 1988.

10.3 The Prescribed Body Corporate may, after consultation with the relevant Pastoralist, repair any Aboriginal Site or Aboriginal Object damaged, disturbed or interfered with, whether as at the date of this Agreement or subsequently.

10.4 The Prescribed Body Corporate may, after consultation with the State and the relevant Pastoralist and at its cost, fence any Aboriginal Site or Aboriginal Object for its protection from damage or interference by livestock.

11. USE OF THE LAND

Members of the Prescribed Body Corporate shall have access to and may use the Land, always in accordance with this Schedule, for any of the following purposes:

11.1 hunting and gathering for private or domestic purposes but not for any commercial or business purpose;

11.2 cultural ceremonies and practices;

11.3 meetings of the Aboriginal Community;

11.4 traversing the Land;

11.5 camping;

11.6 access to water;

11.7 access to a Community Living Area established in accordance with clause 28 of this Schedule;

11.8 collecting medicines;

11.9 collecting or extracting materials for artistic, ceremonial or other cultural purposes;

11.10 fishing for private or domestic purposes but not for any commercial or business purpose;

11.11 burial grounds;

11.12 teaching; or

11.13 other purposes consistent with and incidental to the foregoing purposes.

12. ACCESS TO THE LAND

12.1 Access for persons not members of the Aboriginal Community

Members of the Prescribed Body Corporate may only bring on to the Land persons who are not members of the Prescribed Body Corporate with the prior consent of the relevant Pastoralist, which consent shall not be unreasonably withheld.

12.2 No limitation on operation of sections 46 & 48 of the Pastoral Act

Subclause 1 does not and shall not be construed as limiting, in any way, a person's right to travel or camp temporarily on a Public Access Route pursuant to section 48 of the Pastoral Act or to use a stock route pursuant to section 46 of the Pastoral Act.

12.3 Means of access

Members of the Prescribed Body Corporate may have access to the Land on foot, in motor vehicles or on horseback, always along or using Public Access Routes or other existing roads, tracks or access routes, for any purpose permitted pursuant to this Agreement.

12.4 Notification

12.4.1 The Prescribed Body Corporate or its members of the Aboriginal Community shall

give the Pastoralist at least one (1) day's prior notice before entering on the Land for the following purposes:

- (a) any purpose permitted pursuant to this Schedule which is not a purpose for the following of the traditional pursuits of the Aboriginal community where it is intended to travel across the Land in a group of more than two (2) vehicles; or
- (b) for any purpose where it is intended that non-members of the Aboriginal Community will travel across or be on land not comprised in a Public Access Route or stock route.

12.4.2 Notification pursuant to paragraph 1 shall include the following details:

- (a) the number of people in total who will travel across or be on the Land;
- (b) the purpose of the particular journey or use of the Land;
- (c) when the particular journey is to occur;
- (d) the journey's route and the areas of the Land which it is intended to travel across, stay on or otherwise use;
- (e) the intended method of transport; and
- (f) the expected duration of the journey across or company on the Land.

12.5 Public Access Routes & Tracks

12.5.1 Members of the Prescribed Body Corporate shall, where possible, use Public Access Routes or other existing roads, tracks or access routes on the Land but may deviate or create new tracks or access routes with the consent of a Pastoralist, which consent shall not be unreasonably withheld if reasonably necessary for a purpose permitted pursuant to this Agreement. A Pastoralist may use any such road, track or access route on the same basis as members of the Prescribed Body Corporate may use existing roads, tracks or access routes or those constructed by the Pastoralist.

12.5.2 Road, tracks or access routes (other than any created by the Prescribed Body Corporate) shall not be used by members of the Prescribed Body Corporate if affected by heavy rains and such use would result in damage to the road, track or access route. A Pastoralist may notify the Prescribed Body Corporate if there is any restriction on access or passage for this reason.

12.5.3 Maintenance of roads, tracks or access routes (other than Public Access Routes) is the responsibility of the Pastoralist, other than those tracks created by the Prescribed Body Corporate or any of its members, maintenance of which shall be the responsibility of the Prescribed Body Corporate.

12.5.4 Neither the Prescribed Body Corporate nor a Pastoralist shall be liable for any failure to maintain any road, track or access route created by the other.

12.5.5 The party who or any of whose employees, agents, contractors or invitees has damaged any road, track or access route shall repair the relevant road, track or access route within a reasonable period.

12.5.6 A Pastoralist or the Prescribed Body Corporate shall reimburse the Prescribed Body Corporate or the Pastoralist (as the case may be) for any costs or expenses reasonably incurred by the second party to independent third party contractors engaged to repair or remedy any damage to a road, track or access route constructed by the second party which was caused by the former party or its employees, agents, contractors, invitees or members (as the case may be).

13. USE OF WATER

13.1 Members of the Prescribed Body Corporate may take water from any natural water

source on the Land.

13.2 Further, members of the Prescribed Body Corporate may take water from any dam, bore or other constructed stock watering point on the Land for private or domestic purposes.

13.3 The Prescribed Body Corporate may sink bores or construct watering points on the Land for their own use, provided they consult with and obtain the written consent of the Pastoralist. If the parties are unable to agree, then the dispute may be referred to the dispute resolution procedure. If the parties are unable to reach agreement as a result of the mediation process, then the Pastoral Board shall make a decision binding on both parties.

14. DOGS & OTHER ANIMALS

14.1 Members of the Prescribed Body Corporate may take dogs on the Land provided that they do not harass or injure livestock or otherwise interfere with the conduct of a Pastoralist's pastoral business.

14.2 Any such dog shall be appropriately restrained or otherwise controlled at all times.

14.3 Members of the Prescribed Body Corporate shall not take dogs into paddocks or portions of the Land in respect of which the Pastoralist has, by notice, specified that dogs are prohibited.

14.4 The members of the Prescribed Body Corporate shall not bring onto or keep on the Land any other animal or bird without the prior written consent of the relevant Pastoralist.

15. HUNTING & FIREARMS

15.1 Members of the Prescribed Body Corporate may hunt on the Land exclusively for private or domestic purposes but in a manner which does not harm or injure any of the Pastoralist's livestock and which does not involve any risk to any other persons on the Land.

15.2 Any firearms brought on to the Land by members of the Prescribed Body Corporate shall be registered and otherwise kept and maintained in accordance with the law. Any such firearm shall be used safely and not in a manner which endangers or causes any harm or damage to any person or livestock or which is reckless thereto.

15.3 If a Pastoralist reasonably considers there is a material probability that the use of a firearm in a specified portion of the Land may endanger life or property, then the Pastoralist may designate, by written notice served on the Prescribed Body Corporate, specified areas of the land to be one of the following:

15.3.1 an area in which the use of a firearm is absolutely prohibited; or

15.3.2 an area in respect of which a member of the Prescribed Body Corporate must notify and obtain the consent of the relevant Pastoralist prior to using a firearm in that area.

15.4 The Prescribed Body Corporate may dispute any such designation of an area by the relevant Pastoralist. If the Pastoralist and the Prescribed Body Corporate cannot resolve any such dispute by agreement, then the dispute resolution procedure will apply.

16. FISHING

Members of the Prescribed Body Corporate may fish exclusively for private or domestic purposes from any river, stream or natural watercourse on the Land.

17. FIRES

17.1 Subject to the Country Fires Act, 1989 and any other applicable laws, members of the

Prescribed Body Corporate may light fires for private or domestic and cultural purposes provided that all reasonable and prudent precautions are taken in relation to fire safety.

17.2 Members of the Prescribed Body Corporate shall comply with all reasonable requirements as may be notified from time to time to them by a Pastoralist in relation to fire or bushfire safety or precautions on the Land. The Prescribed Body Corporate shall assist a Pastoralist in undertaking such reasonable precautions to minimise the risk of or damage caused by bushfires on the Land and to combat any such bushfire should one occur.

18. CUTTING OF TIMBER

18.1 Members of the Prescribed Body Corporate may collect any firewood, brush or other dead timber exclusively for private or domestic purposes.

18.2 Subject to the Native Vegetation Act, 1991, members of the Prescribed Body Corporate shall not cut down, top, lop or destroy any living tree except with the prior consent of the relevant Pastoralist, which consent shall not be unreasonably withheld if the purpose in respect of which the request is made is for the conduct of a genuine cultural or ceremonial practice of an Aboriginal Community.

19. TAKING OF PLANTS

19.1 Subject to the Native Vegetation Act, 1991, members of the Prescribed Body Corporate may take and use such plants, animals or other materials or substances from the Land for the following purposes:

19.1.1 the conduct of traditional ceremonies and practices;

19.1.2 medicinal purposes;

19.1.3 food and nourishment;

19.1.4 artistic or cultural purposes; or

19.1.5 any purpose incidental to a purpose specified in this clause.

19.2 The Prescribed Body Corporate shall not take or use any plants, animals or any other materials or substances from the Land for any commercial or business purpose without the prior consent of the State and the relevant Pastoralist.

20. BURIALS

Subject to any applicable law, a member of the Prescribed Body Corporate may be buried on the Land after consultation with the relevant Pastoralist and provided that the proposed burial site does not unreasonably interfere with the conduct of the relevant Pastoralist's pastoral business.

21. PROTECTION OF NATURAL FEATURES

The Prescribed Body Corporate may, after consultation with and the agreement of the relevant Pastoralist, protect and take such reasonable measures as may be necessary to protect native fruits, plants or seeds of significance in or used for the traditional pursuits of the relevant Aboriginal Community.

22. COMMERCIAL ENTERPRISES

22.1 The Prescribed Body Corporate or any of its members may, after consultation with and the consent of the relevant Pastoralist, conduct small scale commercial enterprises or

activities in relation to or associated with the historical, cultural or contemporary use of the Land by the relevant Aboriginal Community, the interpretation of sites of historical or cultural significance to the relevant Aboriginal Community, the production and sale of Aboriginal art, artefacts and tourist material, the conduct of tours of the Land for the purpose of visiting sites or objects relating to Aboriginal culture or history.

22.2 The relevant Pastoralist's consent in relation to any such commercial enterprise or activity shall not be unreasonably withheld if the proposed enterprise or activity does not unreasonably interfere with the conduct of the Pastoralist's pastoral business.

23. GATES

23.1 A Pastoralist may fence all or any part of the Land. If fences have been or are to be erected, then sufficient gates, grids or stiles shall be provided to permit reasonable access to all parts of the Land by members of the Prescribed Body Corporate.

23.2 Gates shall be unlocked unless a Pastoralist considers it reasonably necessary to lock particular gates for the following reasons:

23.2.1 to prevent different herds of cattle being mixed;

23.2.2 to isolate stud bulls or rams;

23.2.3 to prevent the stealing of stock; or

23.2.4 to prevent cattle straying on to public roads or Public Access Routes; or

23.2.5 such other reasons as are essential for the carrying on of a pastoral business.

23.3 If a Pastoralist proposes to lock a particular gate, then the Pastoralist shall give written notice to the Prescribed Body Corporate, setting out the reasons for locking the gate and whether the Pastoralist intends to exclude all persons or whether the members of the Prescribed Body Corporate may continue to have access to the relevant portion of the Land by some specified means.

23.4 The Prescribed Body Corporate shall have 30 days in which to advise the relevant Pastoralist whether it objects to the locking of the gate or to the proposed means of securing continued access by members of the Prescribed Body Corporate (as the case may be).

23.5 If the Prescribed Body Corporate objects to any aspect of the relevant Pastoralist's proposal and the parties cannot resolve the matter by agreement, then either party may refer the matter to the dispute resolution procedure.

23.6 The relevant Pastoralist may lock any such gate after it has given written notice to the Prescribed Body Corporate pursuant to this clause and during the period in which the Prescribed Body Corporate is considering whether to object to the particular locking or in which a dispute is being resolved.

23.7 The Prescribed Body Corporate may, by a written notice to this effect, advise the relevant Pastoralist that it considers it desirable that a gate or gates be installed in a specified fence on the land at the Prescribed Body Corporate's cost. The relevant Pastoralist shall have 30 days to advise the Prescribed Body Corporate of whether it objects to the installation of the specified gate or gates. Any dispute in relation to the installation of any such gate may be referred to the dispute resolution procedure. The Prescribed Body Corporate shall provide the relevant Pastoralist with a key to any gate installed by the Prescribed Body Corporate pursuant to this clause.

23.8 Gates are to be left as they are found, *ie.*, any gate that is found closed, locked or open shall be closed, locked or left open respectively.

24. CONTROL OF PESTS & WEEDS

The Prescribed Body Corporate shall take every reasonable precaution to ensure that any feral animals, pests, vermin, weeds, or other undesirable plants are not introduced on the Land or that any such thing spreads as a consequence of the activities of the Prescribed Body Corporate.

25. WASTE & POLLUTION

Members of the Prescribed Body Corporate shall properly dispose of any waste or litter generated by their activities on the Land and shall not pollute, in any way, the Land, or cause any damage to the environment including, in particular, by dumping or depositing any substance or refuse in any dam, bore, stock watering point, river, stream or other watercourse on the Land.

26. CAMPING

No member of the Prescribed Body Corporate shall camp within 500 metres of any dam or other constructed stock watering point.

27. INTERFERENCE WITH PASTORALIST'S BUSINESS

Notwithstanding the other provisions of this Schedule, the Prescribed Body Corporate and its members shall not interfere with the conduct of a Pastoralist's business or cause any damage to a Pastoralist's business or any of its livestock or property.

28. EXCISION OF COMMUNITY LIVING AREAS

28.1 Subject to subclauses 4 and 5, the Prescribed Body Corporate may apply to the State for the excision from land comprised in the Pastoral Lease of an area of land specified in the application for the purpose of the establishment and maintenance of a Community Living Area and the grant of a perpetual lease for residential purposes in that land to and for the benefit either of the Prescribed Body Corporate or of specified members of the Prescribed Body Corporate identified by the Prescribed Body Corporate. *[Amendments to Pastoral Act required to allow for this - see for example Part 8 of the Northern Territory Pastoral Land Act, 1992]*

28.2 Prior to making any such application, the Prescribed Body Corporate shall give written notice to the relevant Pastoralist of its intention to make such an application. The Prescribed Body Corporate shall confer with the State and the relevant Pastoralist with a view to reaching agreement on the size, location and other features of the land that the Community will apply to have excised and the amount of any compensation to be paid to the Pastoralist as a consequence of any such excision.

28.3 If parties cannot agree, then the dispute may be referred to the dispute resolution procedure.

28.4 The Prescribed Body Corporate shall not make any such excision application unless the Prescribed Body Corporate can reasonably satisfy the State that sufficient funds are available to establish and develop the relevant Community Living Area and development and all other necessary approvals, consents or permission have been obtained or will be obtained.

28.5 Subject to the operation of any supervening legislation, no such excision shall be

effected without the prior consent of the Pastoralist, which consent shall not be unreasonably withheld.

29. FUTURE DEVELOPMENT

29.1 A Pastoralist shall notify and consult with the Prescribed Body Corporate in relation to the following matters:

29.1.1 if the Pastoralist proposes to conduct any business on the land other than a pastoral business; or

29.1.2 if the Pastoralist proposes to undertake any proposed development, for the purpose of the Development Act, 1993, of the Land.

29.2 If the Prescribed Body Corporate reasonably considers that any such proposed activity will affect an Aboriginal Site, Aboriginal Object or any other Aboriginal site or object, then the Prescribed Body Corporate shall notify the relevant Pastoralist of this view within one (1) month of the Prescribed Body Corporate receiving the relevant Pastoralist's notification.

29.3 A relevant Pastoralist shall not undertake any such business activity or development on or of the Land which may affect an Aboriginal Object or Aboriginal Site or any other Aboriginal site or object without the prior consent of the Prescribed Body Corporate.

29.4 If the relevant Pastoralist has not received notification from the Prescribed Body Corporate pursuant to subclause 2 in relation to a proposed business or development within the period specified in subclause 2, then, subject to the provisions of this Schedule, the relevant Pastoralist may undertake the proposed business or development on the basis that such business or development will not affect an Aboriginal Site, Aboriginal Object or any other Aboriginal site or object.

29.5 Notwithstanding subclause 4 hereof, a Pastoralist shall not damage, disturb or interfere with any Aboriginal Object or Aboriginal Site in contravention of the Aboriginal Heritage Act, 1988.

29.6 Notwithstanding subclause 4 hereof, a Pastoralist shall obtain any requisite consent, approval, authority, permission, licence or other thing pursuant to the Pastoral Act, the Aboriginal Heritage Act, 1988, the Development Act, 1993 or any other applicable legislation or requirement of a governmental agency or instrumentality.

29.7 The dispute resolution procedure shall apply to any dispute arising between a Pastoralist or the Prescribed Body Corporate in relation to the proposed undertaking of either any such use or development of or any such construction works on the Land.

30. CONFIDENTIALITY

30.1 A Pastoralist shall treat as strictly confidential all information (other than information in the public domain or information that is trivial or obvious) which that Pastoralist knows to be confidential when acquired by the Pastoralist or which the Pastoralist should have reasonably known to be confidential relating to Aboriginal Objects, Aboriginal Sites or other objects, sites of cultural significance to or the cultural practices, ceremonies and beliefs of an Aboriginal Community. A Pastoralist shall not disclose any such confidential information to any person without the prior written consent of the Prescribed Body Corporate.

30.2 The Prescribed Body Corporate and its members shall treat as strictly confidential all information (other than information in the public domain or information that is trivial or

obvious) which the Prescribed Body Corporate or a member knows to be confidential when acquired by the Prescribed Body Corporate or that member or which the Prescribed Body Corporate or that member should have reasonably known to be confidential relating to a Pastoralist's pastoral business or other business ventures or enterprises. A member shall not disclose any such confidential information to any person without the relevant Pastoralist's prior written consent.

30.3 The Prescribed Body Corporate and each Pastoralist shall ensure that its respective agents, employees, officers, members, shareholders, any persons residing on the Land or any persons in its control (as the case may be) observe and comply with these confidentiality obligations.

30.4 The obligations as to confidentiality pursuant to this Schedule shall survive the termination of the Agreement.

31. INDEMNITIES

31.1 Each Pastoralist shall indemnify and keep indemnified the Prescribed Body Corporate and its members, employees, agents or contractors from and against any claim which the Prescribed Body Corporate or its members, employees, agents or contractors may suffer or incur themselves or to any person caused by or as a consequence of any misfeasant (but not non-feasant) act or omission of the relevant Pastoralist or its employees, agents, contractors, invitees, visitors or other persons using or upon the Land with the relevant Pastoralist's permission or of which the relevant Pastoralist has knowledge including, without limiting the generality of the foregoing, any damages in respect of any loss of or damage to property or for the death of or injury to any person.

31.2 The Prescribed Body Corporate shall indemnify and keep indemnified each Pastoralist and their officers, employees, agents, contractors or persons residing on the Land from and against any Claim which a Pastoralist or its officers, employees, agents, contractors or persons residing on the Land may suffer or incur themselves or to any person caused by or as a consequence of any misfeasant (but not non-feasant) act or omission of the Prescribed Body Corporate or its members, employees, agents, contractors, invitees, visitors or other persons using or upon the Land with the Prescribed Body Corporate's permission or of which a member of the Prescribed Body Corporate has knowledge including, without limiting the generality of the foregoing, any damages in respect of any loss of or damage to property or for the death of or injury to any person.

32. INSURANCE

32.1 Each Pastoralist and the Prescribed Body Corporate shall, at its cost and expense in all things, effect and maintain, throughout the Term, the following insurance policies:

32.1.1 public risk and products liability insurance;

32.1.2 insurance in respect of any indemnity given by a party in this Agreement or any other liability arising pursuant to or as a consequence of this Agreement or its breach;

32.1.3 such further insurance against or in respect of such risks which the State reasonably considers appropriate to be taken out to fully insure the interests of a Pastoralist or the Prescribed Body Corporate (and any other relevant person).

32.2 Each Pastoralist and the Prescribed Body Corporate shall each do the following matters or things in respect of each policy of insurance which is to be effected pursuant to this Agreement:

32.2.1 place any such policy with an insurer approved by the State for the purposes of this clause, which approval shall not be unreasonably withheld;

32.2.2 the policy shall be for the amount of cover, in respect of the risks and with only those conditions, endorsements or exclusions reasonable required or acceptable to the State from time to time; and

32.2.3 effect the policy in the names of any relevant person reasonably required to be included by the State for the relevant insurable.

32.3 Each Pastoralist and the Prescribed Body Corporate shall each do the following matters or things:

32.3.1 punctually pay the premiums in respect of any such insurance policy at least fourteen (14) days before such premiums become due;

32.3.2 deliver to the State, a copy of the insurance policy, any renewal certificates or endorsement slips; and

32.3.3 not less than seven (7) days prior to a premium becoming due and payable under an insurance policy, deliver to the State, without demand, a copy of the receipt in respect of the payment of the relevant premium or other sufficient proof of the payment of any such premium.

32.4 Each Pastoralist and the Prescribed Body Corporate shall not do or omit to do or permit to be done or omitted, any act, matter or thing as a result of which any insurance policy effected in accordance with this clause may be vitiated or rendered unenforceable, void or voidable.

33. MANAGEMENT COMMITTEE

33.1 The State, the Prescribed Body Corporate and the Pastoralists shall establish a management committee which is to be known as () for the purpose of managing and monitoring the use of the Land pursuant to this Agreement and the general operation of this Agreement.

33.2 Each of the State, the Pastoralists and the Prescribed Body Corporate may, at any time and from time to time, by written notice, appoint two (2) persons to the Management Committee. An appointed party may, from time to time, remove an appointee appointed by that party. If an appointing party has appointed a Contract Manager, then that Contract Manager shall be an ex officio member of the Management Committee and be deemed to be appointed by the appointing party.

33.3 Each appointing party may, from time to time, by notice in writing to the chairperson, appoint a person to act as an alternate of a person appointed by that appointing party to the Management Committee. If an appointee of a party is absent from a meeting of the Management Committee and his or her alternate is present, then the alternate shall be deemed to be a member of the Management Committee as the appointee of the party who has appointed the absent appointee.

33.4 The maximum number of voting members of the Management Committee shall be six (6), unless the parties agree otherwise.

33.5 The quorum necessary for the proper transaction of any business of the Management Committee shall be three (3), comprised of one appointee of each of the State, the Pastoralists and the Prescribed Body Corporate.

33.6 A member shall be regarded as present at a meeting of the Management Committee if the meeting is so conducted by telephone or other electronic means of conferring that any

such member is able to hear the proceedings of the entire meeting and, for himself or herself, to be heard by all others present at the meeting. A meeting held at which some members are present by such telephonic or other electronic means shall be deemed to be held at such place as shall be agreed upon by the members present at the meeting provided that at least one (1) of the members present is at such agreed place for the duration of that meeting.

33.7 Any questions arising at a meeting of the Management Committee shall be decided by an unanimous vote of the members present and voting. Each member shall have one (1) vote only. The chairperson shall not have a casting vote.

33.8 If a casual vacancy should occur in the membership of the Management Committee, then that casual vacancy shall be filled by the appointing party who appointed the member whose vacation of office has given rise to the vacancy.

33.9 The Management Committee may, in its absolute and unfettered discretion, make recommendations and suggestions to the parties with respect to the following matters:

33.9.1 any dispute between the parties arising pursuant to or as a consequence of this Agreement;

33.9.2 any matter which may arise in the ordinary course of the use of the Land; or

33.9.3 any matter reasonably incidental to any of the foregoing matters.

33.10 The Management Committee shall meet, adjourn and regulate its meetings as it thinks fit and, unless otherwise resolved, shall meet at least [eg. monthly]. The first meeting of the Management Committee shall occur on or before the expiration of ninety days of the date of the Agreement or of the date of the Commencement of the Act (whichever first occurs) and take place at [] or on such other date or at such other place as the parties may agree.

33.11 The Minister shall appoint one of his appointees to the Management Committee as the chairperson for such duration and on such other terms and conditions as he may see fit. If the chairperson is not present at a meeting of the Management Committee, then the Management Committee members present at that meeting may elect one of their number as the chairperson of that meeting.

33.12 Any member of the Management Committee may, at any time, by not less than fourteen (14) days' notice in writing to the chairperson, require the chairperson to summon a meeting of the Management Committee. A meeting of the Management Committee may be held by giving less than fourteen (14) days' notice to the chairperson provided that all members of the Management Committee consent in writing to the meeting being held with the notice actually given or proposed to be given.

33.13 Other than a meeting convened with short notice pursuant to subclause 12, a notice of each meeting of the Management Committee specifying the time and place of the meeting and the business to be considered shall be given by the chairperson to each member of the Management Committee at least seven (7) days prior to the proposed date of the meeting.

33.14 The Management Committee shall cause minutes to be made of the matters arising, the discussions ensuing and the resolutions passed at any meeting. Copies of such minutes shall be circulated to each of the Management Committee members for consideration as to the accuracy of the minutes. If a Management Committee member considers that the minutes as circulated are not accurate in any respect, then the minutes shall be reconsidered at the next meeting of the Management Committee. If, after reconsideration,

the Management Committee members cannot agree on the form of the minutes, then the minutes shall accurately record the matters of disagreement. The minutes as agreed shall be signed and dated by the chairperson or, if the chairperson was not present at that meeting to which the minutes relate, then by the person appointed as the chairperson of the meeting in accordance with this clause.

33.15 A resolution in writing signed by all of the members of the Management Committee, or by their respective alternates, shall be valid and effectual resolution as if it had been duly passed at a meeting of the Management Committee duly convened and held on the day and at the time at which the said written resolution was signed by the last member or his or her alternate to sign. Any such written resolution may be constituted by several documents in like form each signed by any number of members or their alternates but so that each member, or his or her alternate, has signed one of the several documents.

33.16 Any appointing party may raise any matter of concern at the meeting, but where possible, each party will give advance notice to the other parties of issues it wants discussed.

33.17 Any matters discussed at a meeting will be without prejudice to an appointing party's legal or equitable rights.

33.18 Each appointing party shall treat and maintain as confidential, in accordance with this Agreement, any information disclosed by another appointing party at a meeting which the disclosing party specifies as confidential.

33.19 The appointing parties agree that they shall each use their best endeavours to implement effectively any resolutions and determinations of the Management Committee and also that they shall procure their nominees, employees, or agents to act in a like manner.

34. DISPUTE RESOLUTION PROCEDURE

34.1 Subject to subclauses 16 and 17, this clause shall apply to any dispute arising between a Pastoralist and the Prescribed Body Corporate or its members pursuant to or as a consequence of this Schedule or otherwise relating to their co-existence upon the Land irrespective of whether this Schedule expressly provides that a dispute may be referred to the dispute resolution procedure contained in this clause.

34.2 Subject to subclauses 16 and 17, if any such dispute arises between a Pastoralist, the Prescribed Body Corporate or any of its members then the Management Committee shall meet as soon as possible, at a mutually convenient location, to attempt to resolve the dispute in good faith. The Management Committee shall use its reasonable endeavours to attempt to resolve a dispute.

34.3 If the Management Committee is unable to resolve a dispute within thirty (30) days of their meeting, then any of the State, a Pastoralist or the Prescribed Body Corporate may immediately refer the dispute to a meeting of the Contract Managers.

34.4 Each Contract Manager shall be empowered to make decisions on behalf of, and to bind contractually, the party who appointed that Contract Manager in all matters raised for resolution at a meeting of the Contract Managers.

34.5 The quorum for a meeting of the Contract Managers shall be the presence of the three Contract Managers.

34.6 If a quorum is not present within 45 minutes after the time appointed for commencement of a meeting of the Contract Managers, then that meeting shall be

adjourned to the same time two (2) business days later at the same place or at such other time, day or place as the three Contract Managers may agree.

34.7 Resolution of any dispute shall require the unanimous agreement of the three Contract Managers acting within the ambit of each Contract Manager's actual authority conferred by his or her principal - appointor.

34.8 A notice convening a meeting of the Contract Managers may be given by any Contract Manager and shall specify the nature of business to be transacted. Unless otherwise agreed by the other Contract Managers, no business other than that specified in the notice shall be transacted at the meeting the subject of the notice.

34.9 Meetings of the Contract Managers shall be held at the venue and time and on the date agreed between the Contract Managers.

34.10 The Contract Managers shall meet to hear and attempt to resolve a dispute within five (5) business days of any such dispute being referred to them pursuant to subclause 3 or of a Contract Manager summoning a meeting of the Contract Managers by giving not less than 15 business days' notice in writing to the other Contract Managers.

34.11 A meeting of the Contract Managers may be held on less notice if agreed between Contract Managers.

34.12 One Contract Manager shall agree to be the secretary who shall perform such duties as are specified by the Contract Managers and who shall arrange for minutes of each meeting to be kept.

34.13 A copy of the minutes of each meeting of the Contract Managers shall be given to each of the Contract Managers within 10 business days of a meeting. Each Contract Manager shall, as soon as possible, either ratify the minutes as a true and correct record of the meeting or state in writing the matters in respect of which the minutes are not a true and correct record.

34.14 If a dispute has not be resolved within thirty (30) days of the Contract Managers meeting to attempt to resolve the dispute, then a party to the dispute may, by written notice, require the other parties (to avoid doubt, being two of the State, a Pastoralist or the Prescribed Body Representative) to attend a meeting and to there attempt to agree whether the dispute should be referred to mediation, arbitration, the Pastoral Board, an independent expert, the Environment, Resources and Development Court, another court or some other forum for dispute resolution and the terms on which any such referral should occur. The State, the Pastoralists and the Prescribed Body Corporate shall appoint a person to represent it at any such meeting. The representative of each such party may, at the relevant party's discretion, be that party's Contract Manager.

34.15 If the parties fail to agree on the appropriate forum for or the terms of any such referral or any forum for dispute resolution agreed pursuant to subclause 14 fails to resolve a dispute, then, subject to subclauses 16 and 17, any of the State, the Pastoralists or the Prescribed Body Corporate may refer the dispute for determination by the Pastoral Board.

34.16 This clause does not apply to and shall not be construed as applying to any dispute concerning the interpretation or construction of a provision of this Agreement or any other question of law or question of mixed law and fact arising pursuant to or as a consequence of this Agreement or its operation. Any such dispute shall be resolved either by agreement between the parties or by referral to an appropriate court.

34.17 Nothing in this Agreement shall prevent a party from seeking such urgent relief from a court as a party may consider to be appropriate in the circumstances in order adequately

to protect its interests.

35. APPOINTMENT OF CONTRACT MANAGERS

35.1 Each of the State, each Pastoralist and the Prescribed Body Corporate may in respect of each pastoral lease within the Land, from time to time for the purposes of this Agreement, appoint a person as that party's Contract Manager and may, from time to time, revoke any such appointment.

35.2 Any such appointment or revocation shall be made by a written notice served by the appointing party on the other party.

35.3 A Contract Manager shall be a delegate of the appointing party duly authorised either to exercise any of that party's rights, powers, entitlements or remedies pursuant to this Agreement or to do any act, matter or thing which is required to be performed or done or is permitted to be performed or done by the appointing party pursuant to this Schedule, including, without limitation, any of the following:

35.3.1 the signing or execution of any notice, deed, agreement, instrument or other document which is required to be or may be made or given pursuant to this Agreement;

35.3.2 the giving of any consent or approval;

35.3.3 the resolving, settling or agreeing to resolve or settle any dispute in relation to any matter arising pursuant to or as a consequence of this Agreement.

36. JOINT & SEVERAL LIABILITY

36.1 The obligations and liabilities of each Pastoralist pursuant to this Schedule shall be several only.

36.2 The obligations and liabilities of the Prescribed Body Corporate and its members shall be joint and several.

37. DEFAULTS AND BREACHES OF OBLIGATIONS

37.1 The Prescribed Body Corporate may make or pursue claims for compensation in relation to a breach of this Agreement by a Pastoralist which affects any rights conferred on a Prescribed Body Corporate or its members pursuant to this Schedule. The amount of such compensation shall be determined pursuant to the principles applicable to claims for compensation in relation to acts affecting Traditional Rights made pursuant to the Commonwealth NTA.

37.2 The Prescribed Body Corporate may institute legal proceedings for injunctive or any other appropriate form of remedy or relief to enforce the performance by the Pastoralist of the provisions of this Schedule.

37.3 If the following events occur or state of affairs subsists:

37.3.1 The Prescribed Body Corporate or a member of the Aboriginal Community (as the case may be) is in breach of a provision of this Agreement;

37.3.2 the Pastoralist has served a written notice on the Prescribed Body Corporate (as the case may be) requiring the relevant breach to be remedied within the period specified in the notice, which period must be reasonable given the nature of the breach and all relevant surrounding circumstances; and

37.3.3 the relevant breach has not been remedied within the period specified in the notice or, if that period is not reasonable then within such longer period as may be reasonable in accordance with paragraph 2,

then the following provisions shall apply until the relevant breach is remedied:

37.3.4 the benefit and operation of this Schedule shall be suspended in respect of the Prescribed Body Corporate and its members such that they may not exercise or have the benefit of any right, power or entitlement granted pursuant to this Schedule but without relieving the Prescribed Body Corporate of any obligation to perform that party's obligations;

37.3.5 the Pastoralist may, but is not obliged to, remedy any such breach and recover any costs and expenses incurred in doing so from the Prescribed Body Corporate as a debt;

37.3.6 the Pastoralist may institute legal proceedings for injunctive or any other appropriate form of remedy or relief to enforce the performance by the Prescribed Body Corporate of the provisions of this Schedule; or

37.3.7 the Pastoralist may sue the Prescribed Body Corporate for any damages the non-defaulting party has sustained or incurred.

PART B: COMPULSORY ACQUISITION

38. COMPULSORY ACQUISITION OF TRADITIONAL RIGHTS

38.1 The State may compulsorily acquire Traditional Rights, if any, pursuant to the Land Acquisition Act, 1969 for any purpose which the Minister considers appropriate, including, without limitation, either for the doing of any act for the purpose of the Commonwealth NTA or for the purpose of conferring any proprietary estates, rights or interests on a person other than the State or an instrumentality or agency of the State.

38.2 Prior to commencing the compulsory acquisition of any Traditional Rights, the State shall consult with the Prescribed Body Corporate as to whether any such compulsory acquisition is necessary or desirable in order for the State to achieve its stated policy objectives.

38.3 Without affecting the operation of section 79 of the Commonwealth NTA or section 23 of the State NTA, the maximum value of any compensation payable to the Prescribed Body Corporate (including, for this purpose, any amount payable to any other Aboriginal person or group claiming to have Traditional Rights in or to the Land) in relation to any such acquisition of Traditional Rights, if any, shall be that compensation payable if the Minister acquired the estate in fee simple to the relevant land.

38.4 Notwithstanding the other terms of this Schedule, or the provisions of the Land Acquisition Act, 1969, no compensation shall be payable unless there is a holder of Traditional Rights in respect of the portion of the Land which is or is to be compulsorily acquired.

38.5 Any such acquisition shall extinguish any Traditional Rights in respect of the portion of the Land that is compulsorily acquired to the extent that any such acquisition or the exercise of any rights obtained by any such acquisition is inconsistent with the continued existence or enjoyment of the Relevant Traditional Rights.

PART C: MINING

39. MINING ON THE LAND

39.1 Subject to subclauses 5 and 6, a person authorised pursuant to a Mining Act or a Petroleum Act may undertake any exploratory (as authorised in the relevant Mining Act or Petroleum Act) operations on the Land without being obliged to first consult with the Prescribed Body Corporate or any holder of Traditional Rights and without creating any liability to the Prescribed Body Corporate for any compensation as a consequence of the undertaking of any such exploratory operations.

39.2 A person (including a Minister or agency, instrumentality or statutory corporation of the State), specifically authorised to do any of the following, may do the following acts on the relevant portion of the Land:

39.2.1 undertake fossicking or prospecting (as defined in the Opal Mining Act, 1995) operations for precious stones (as defined in the Opal Mining Act, 1995);

39.2.2 fossicking (as defined in the Mining Act, 1971) or other minor mining operations which do not involve a significant disturbance of any land by machinery or explosives;

39.2.3 the exercise of any rights, the performance of any obligations or the doing of any act, matter or thing pursuant to or in performance of the Indentures contained as schedules to the Roxby Downs (Indenture Ratification) Act, 1982, the Cooper Basin (Ratification) Act, 1975, the Stony Point (Liquids Project) Ratification Act, 1981, the Broken Hill Proprietary Company's Indenture Act, 1937; or the Broken Hill Proprietary Company's Steel Works Indenture Act, 1958;

39.2.4 the provision of any Public Infrastructure described in clause 40 of this Schedule, without being obliged to first consult with the Prescribed Body Corporate and without creating any liability to the Prescribed Body Corporate or any native title holder of Relevant Traditional Rights for any compensation as a consequence of the undertaking of any such acts.

39.3 Prior to the undertaking of any other new mining operations (for the purpose of a Mining Act or Petroleum Act) on the Land, the person or persons proposing to undertake such operations shall consult with representatives of the Prescribed Body Corporate concerning the nature and scale of the proposed mining operations and any other relevant matters or things, but is not required to enter into the right to negotiate procedure.

39.4 Where new mining operations that are not subject to subclauses 1 and 2 are carried out on the Land then the person or persons undertaking such operations shall pay compensation to the Prescribed Body Corporate. Such compensation shall only be payable for the disturbance suffered by the Prescribed Body Corporate and its members to their Relevant Traditional Rights. Unless such compensation is agreed between the Prescribed Body Corporate and the person or persons undertaking such operations (which agreement may include provision for the provision of "non-cash" compensation), the compensation shall be determined by the Wardens Court. The maximum rate of compensation for any act of any person affecting the Traditional Rights, if any, as a consequence of the undertaking of any such mining operations in respect of any particular mining production tenement (including, without limitation, petroleum production) the subject of this subclause, shall be an annual compensation payment equal to one half of one percent (0.5%) of:

(a) in the case of a mining production tenement granted under the Mining Act, the value of the minerals, such value to be calculated in the same manner as royalty is calculated under

the Mining Act ;

(b) in the case of a production tenement granted under the Petroleum Act, the value at the well head of all petroleum recovered from the land comprised in the tenement, such value to be calculated in the same manner as royalty is calculated under the Petroleum Act.

Any amounts paid or payable to the Prescribed Body Corporate or any members or to any Aboriginal Community by the person or persons undertaking any such mining operations on account of, or in respect of, any Traditional Rights they or any of them may have in respect of that portion of the Land, or in respect of any action or approval given by them or any of them in respect of the Aboriginal Heritage Act, 1988 or in respect of sacred sites or sacred objects relating to that portion of the Land (hereinafter called "Heritage Payments") shall be deemed to be compensation payable pursuant to this clause such that no further compensation is payable unless and until and to the extent that the total amount of maximum annual payments payable under this subclause exceeds the amount of the total Heritage Payments.

39.5 Notwithstanding the other terms of this Schedule or the provisions of any other Act, no compensation shall be payable in respect of mining activity or operations on a Pastoral Lease unless there is a Traditional Rights Holder in respect of that portion of the Land which is affected by the mining activity or operations.

39.6 Notwithstanding the other terms of this Schedule, or the provisions of any other Act, there is no obligation to consult or to pay compensation pursuant to this Schedule in respect of any mining activity or operations that was lawfully in existence at the date of the Agreement.

39.7 The right to compensation contained in and payment in accordance with subclause 5 shall be in substitution of and shall absolutely release and discharge the State and any other person from any Claim to the Prescribed Body Corporate or any native title holder of any Traditional Rights either for any requisite acquisition of the Relevant Traditional Rights, if any, or for any acts of any person affecting (whether by extinguishment or inconsistency) the Relevant Traditional Rights, if any, as a consequence of any mining operations including, without limitation, any Claim for the payment of any compensation to the Aboriginal Community in relation or incidental to the undertaking of the relevant mining operations, any consequent acquisition of the Relevant Traditional Rights, whether pursuant to any relevant Mining Act or Petroleum Act, the Commonwealth NTA, the State NTA, the Land Acquisition Act, 1969 or any such Claim at common law.

39.8 Nothing in this clause shall authorise or be construed as authorising the doing of any act, matter or thing contrary to the Aboriginal Heritage Act, 1988.

39.9 The doing of any act, matter or thing by any person pursuant to or in exercise of the rights created by this clause shall be subject to the obtaining of any approval necessary pursuant to the Aboriginal Heritage Act, 1988.

PART D: PUBLIC INFRASTRUCTURE

40. PUBLIC INFRASTRUCTURE ON THE LAND

40.1 Subject to subclause 2, the construction, operation, maintenance, repair or replacement of any Public Infrastructure does not and shall not be construed as affecting, in any way, any Relevant Traditional Rights.

40.2 Subclause 1 does not apply to any such item of Public Infrastructure which is or is to be fenced unless any such fencing has sufficient gates to enable the Prescribed Body Corporate or its members to use or enjoy the relevant Land and arrangements for access to the relevant fenced portion of the Land by those gates have been agreed between the State and Prescribed Body Corporate.

40.3 Nothing in this clause shall authorise or be construed as authorising the doing of any act, matter or thing contrary to the Aboriginal Heritage Act, 1988.

40.4 The doing of any act, matter or thing by any person pursuant to or in exercise of the rights created by this clause shall be subject to the obtaining of any approval necessary pursuant to the Aboriginal Heritage Act, 1988.

PART E: WAIVER OF RIGHTS

41. PRIVATE RIGHTS

41.1 The rights or entitlements granted or created in this Schedule are for the respective benefit and protection of the Pastoralists, miners, developers, the Prescribed Body Corporate and its members or other persons (as the case may be) in their respective private capacities.

41.2 Any Pastoralist, miner, developer or other person may enter into a contract with the Prescribed Body Corporate pursuant to which any such person or the Prescribed Body Corporate may agree to vary, waive, suspend, extinguish, terminate or dispense with any rights or entitlements granted to any such person or the Prescribed Body Corporate pursuant to this Schedule for such consideration and on such terms and conditions as that person or the Prescribed Body Corporate may consider sufficient or appropriate and agree to in his, her or its absolute and unfettered discretion without infringing any public right or public policy.

41.3 For the avoidance of doubt, an agreement or promise to vary, waive, suspend, extinguish, terminate or dispense with any rights or entitlements granted to any such person or the Prescribed Body Corporate shall be and be construed as being good and sufficient consideration for the purpose of entering into a legally binding and enforceable contract.

41.4 Unless the State has consented to any such contract, no such contract shall bind or apply to the successors in title of any Pastoralist, miner, developer or other person.

Appendix 16: Letter from Hon Murray Criddle MLC, dated 3 November 1998

MINISTER FOR TRANSPORT
WESTERN AUSTRALIA

- 3 NOV 1998

Hon Tom Stephens MLC
Chairman
Select Committee on Native Title Rights
in Western Australia
Parliament House
PERTH WA 6000

Dear Tom

Further to our telephone discussion today, I wish to confirm that it is my intention to exclude myself from the final report of the Select Committee on Native Title Rights in Western Australia.

Due to Ministerial and other commitments I have not had the opportunity to fully and properly apprise myself of the draft report at this time. I understand it is the intention of the Committee to finalise the Report today and I therefore believe it would be inappropriate to associate myself with the final report.

Yours sincerely

Murray Criddle MLC
**MINISTER FOR TRANSPORT
MEMBER FOR THE AGRICULTURAL REGION**

cc Hon Barry House MLC
Hon Murray Nixon MLC
Hon Giz Watson MLC
Mr Laurie Marquet, Clerk of the Council